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Interpreting the Conditions for Imprévision: The Goals of the Reform Projects as a Decisive Tool for French and Belgian Courts

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**INTERPRETING THE CONDITIONS FOR *IMPRÉVISION*: THE
GOALS OF THE REFORM PROJECTS AS A DECISIVE TOOL
FOR FRENCH AND BELGIAN COURTS**

Luigi Montefusco*

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ABSTRACT

The codification of the doctrine of imprévision in France and its codification attempt in Belgium is a significant turning point given the historical resistance in both countries towards it. Nevertheless, the fact that the French and Belgian civil codes had remained silent on the issue for more than 200 years poses problems of interpretation, in particular, with the regard to requirements to be met in order to trigger imprévision as set forth by new Article 1195 of the French Civil Code and Draft Article 5.77 of Belgian legislative proposal No. 3709/1 of April 3, 2019. In the absence of a well-established line of cases on the doctrine of imprévision, French and Belgian courts might, however, endeavour to interpret the requirements for imprévision by analysing it in light of the goals shared by the French and Belgian reform projects, namely modernisation, legal certainty and contractual justice. The purpose of this research is to assess the requirements for imprévision in light of the objectives set by the legislators, in order to recommend a possible interpretation of those requirements by French and Belgian courts.

Keywords: France, Belgium, *imprévision*, hardship, art. 1195, draft article 5.77, modernisation, legal certainty, contractual justice

I. INTRODUCTION

In order to become more appealing to foreign companies, more and more often national legislators aim to create a “business-friendly” legal environment¹ by making significant changes to their civil or commercial codes. In this respect, comparative law plays a key role. It is a source of inspiration for legislators, who are pushed by globalised and interconnected markets to introduce juridical values into their national legal systems to which they do not traditionally belong.²

Along the same lines, France and Belgium perceived the need to update their law of obligations,³ including the introduction of the long-awaited doctrine of *imprévision*⁴ within their respective civil

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1. However, a “business-friendly” legal environment is an essential but insufficient condition. See CCI Paris Ile de France, *Droit des affaires : enjeux d’attractivité internationale et de souveraineté* (2015), <https://perma.cc/EDM6-U5MH>.

2. E. Ciongaru, *Influence of globalisation on the law systems*, 8 AGORA INT’L J. JURID. SCI. 24 (2014).

3. The need for modernisation of French contract law was perceived especially after the publication of the *Doing Business* reports by the World Bank between 2004 and 2006. These documents highlighted the drawbacks of French contract law with regards to its effects on business. France was only ranked forty-fourth for ease of doing business, since French law was considered economically inefficient, complex, unpredictable, and not being very attractive as opposed to common law systems. These reports had the effect of “electroshocks” to the French legal community. The initial reaction from French scholars was highly critical, in particular for what concerns the methodology employed by the World Bank in ranking the different legal systems. Nevertheless, these reports were also constructive, as they sparked a public debate in France about the economic efficiency of law and, as proved by their direct reference within the Report to the President of the Republic accompanying the reform project, played a role in the modernisation of the French Civil Code. For the reaction of the French legal community, see ASSOCIATION HENRI CAPITANT DES AMIS DE LA CULTURE JURIDIQUE FRANÇAISE, 1 LES DROITS DE TRADITION CIVILISTE EN QUESTION : À PROPOS DES RAPPORTS DOING BUSINESS DE LA BANQUE MONDIALE (SLC 2006); B. Fauvarque-Cosson & A. J. Kerhuel, *Is Law an Economic Contest? French Reactions to the Doing Business World Bank Reports and Economic Analysis of the Law*, 57 AM. J. COMP. L. 811 (2009).

4. According to the French doctrinal literature, the theory of *imprévision* (often defined as “hardship” in common law jurisdictions) is the theory of

codes. In France, this desire for reform resulted in Ordinance no. 2016-131 of February 10, 2016,⁵ which enshrined the doctrine of *imprévision* in the new article 1195 of the Civil Code. In Belgium, it resulted in legislative proposal no. 3709/1 of 3 April 2019⁶ (which is yet to be approved by the Parliament) to insert Book 5 “Obligations” into the new Civil Code, including draft article 5.77 on *imprévision*.

On the one hand, the introduction of articles expressly regulating changed circumstances in the French and—if the reform project is approved—the Belgian civil codes is to be welcomed, as these two bodies of laws had remained silent on the issue for more than 200 years. On the other hand, the absence of a well-established line of cases on this legal issue calls for a hermeneutic effort from French and Belgian courts, especially in the interpretation of the several conditions triggering *imprévision* under article 1195 and draft article 5.77. French and Belgian judges might, however, endeavour to

changed circumstances: it refers to situations where performance of the contract becomes extremely difficult or much more onerous, without being impossible, as a result of unforeseeable circumstances subsequent to the conclusion of the contract, which disrupt the balance of the contract. *See*, on this point, J. GHESTIN ET AL., TRAITÉ DE DROIT CIVIL : LES EFFETS DU CONTRAT 310-311 (L.G.D.J. 1994); P. Ancel, *Imprévision*, 1 RÉP. DE DR. CIV. 1 (2017). In such scenarios, judges are granted the power to intervene in the contractual sphere in order to provide the aggrieved party with a contractual remedy to cope with the unforeseeable circumstance. This intervention may take the form of renegotiations imposed upon the parties, revision of the contract, or termination.

Common law jurisdictions deal with changed circumstances under the doctrine of “frustration of purpose”: frustration occurs when, due to an unforeseen event, performance of the contract produces a radically different result from what the parties anticipated when the contract was signed; however, unlike the doctrine of *imprévision*, this doctrine does not allow for renegotiation and judicial revision of the contract. It only allows for its termination.

5. *Ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no. 0035, Feb. 11, 2016. The ordinance came into force on Oct. 1, 2016. As required, it was ratified by the parliament through Act no. 2018-287, Apr. 20, 2018, JORF no. 0093, Apr. 21, 2018, which entered into force on Oct. 1, 2018 [hereinafter, the French Revision of 2016].

6. *Proposition de loi portant insertion du livre 5 “Les obligations” dans le nouveau Code civil*, no. 3709/001, Chambre, 6e session de la 54e législature (*Proposition de loi, no. 3709/001*) [hereinafter, the Belgian Draft of 2019], <https://perma.cc/FD9Q-83JZ>.

interpret the requirements for *imprévision* by analysing it in light of the goals of the reform projects. Indeed, the French and Belgian reforms are driven by the same goals of modernisation, legal certainty, and contractual justice.⁷

Both countries intended to modernise their civil codes through a comparative look at foreign law and international and European projects for the harmonisation of the law of contract, particularly the Principles of European Contract Law,⁸ the Draft European Common Frame of Reference⁹ and the UNIDROIT Principles of International Commercial Contracts.¹⁰ With regard to *imprévision*, the internal resistance to this doctrine caused France and Belgium to be the main exceptions to a well-established trend in Europe towards the recognition of the duty to renegotiate and the possibility for the courts to adapt the contract in the event of changed circumstances.¹¹ The legislators of both countries acknowledged this isolation from the rest of Europe and presented it as one of the reasons to modernise their civil codes by welcoming the theory of *imprévision*. Indeed, in the Report to the President of the Republic, it is stated that “France is one of the last countries in Europe not to recognize the theory of *imprévision* as a moderating cause of the binding force of the contract.”¹² Similarly, the Belgian Draft of 2019 highlights that this

7. For France, see *Rapport au Président de la République relatif à l'ordonnance no. 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no. 0035, Feb. 11, 2016 [hereinafter *Rapport au Président*]; for Belgium, see Belgian Draft of 2019, *supra* note 6.

8. PRINCIPLES OF EUROPEAN CONTRACT LAW (2010) [hereinafter, PECL].

9. DRAFT EUROPEAN COMMON FRAME OF REFERENCE (Sellier 2009) [hereinafter, DCFR].

10. UNIDROIT Principles of International Commercial Contracts [hereinafter, PICC].

11. R. M. URIBE, THE EFFECT OF A CHANGE OF CIRCUMSTANCES ON THE BINDING FORCE OF CONTRACTS 191 (Intersentia 2011).

12. *Rapport au Président*, *supra* note 7: “La France est l’un des derniers pays d’Europe à ne pas reconnaître la théorie de l’imprévision comme cause modératrice de la force obligatoire du contrat.”

juridical concept is present in all modern legislations and the above-mentioned harmonisation projects.¹³

Updating the Civil Code was also necessary to provide legal certainty, the main issue being the development of French and Belgian civil law outside their respective civil codes. As for France, the legislator acknowledged that “the current texts do not allow for an understanding of positive law, as the courts have had to interpret them, by analogy, *a contrario*, or even *contra legem*.”¹⁴ However, “jurisprudence is inherently fluid, and does not provide the legal certainty which only a written law can offer.”¹⁵ The Belgian Draft of 2019 is also aimed at “improving legal certainty,”¹⁶ considering that it is no longer possible to claim that “positive law, as it is applied in practice, is found within the Code.”¹⁷ This is particularly visible in the above-mentioned draft article 5.77, where the inclusion of a provision on *imprévision* is justified by the need to establish *sécurité juridique* with regard to the jurisprudence of the *Cour de cassation*, which tends to accept it gradually.¹⁸ It is evident that the French and Belgian legislators feared the confusion created by the numerous judgements interpreting, and sometimes contradicting, the wording of their civil codes, and therefore decided to enact clear rules to prevent the creation of law outside of them.¹⁹

13. See Belgian Draft of 2019, *supra* note 6, Commentaire des articles, art. 5.77.

14. *Rapport au Président*, *supra* note 7: “les textes actuels ne permettent pas d’appréhender le droit positif, tant la jurisprudence a dû les interpréter, par analogie, *a contrario*, voire *contra legem*.”

15. See *id.*: “la jurisprudence est par essence fluctuante, et ne permet pas d’assurer la sécurité juridique que seul peut offrir un droit écrit.”

16. See Belgian Draft of 2019, *supra* note 6, Résumé.

17. See *id.*, Introduction: “on ne peut plus prétendre que le droit positif, tel qu’il est appliqué dans la pratique actuelle, se trouve dans le Code.”

18. Belgian Draft of 2019, *supra* note 6, Commentaire des articles, art. 5.77.

19. For France, see S. Rowan, *The New French Law of Contract*, 66 INT’L & COMP. L.Q. 807-808 (2017): “To read the Civil Code therefore did not give a clear or precise picture of the French law of contract”; for Belgium, see P. Wéry, *Mutations et défis du nouveau droit belge des obligations*, 60 REVUE DE LA FACULTÉ DE DROIT DE L’UNIVERSITÉ DE LIÈGE 223 (2015), where the author refers to the Belgian Civil Code in these terms: “La façade de l’édifice n’est toutefois plus qu’un trompe-l’œil. Les pièces intérieures et le mobilier ont été rénovés en profondeur par la doctrine et la jurisprudence.”

Regarding contractual justice, this is an overall goal of the reforms on the law of obligations, which can also be identified, among others, in the provisions on *imprévision*.²⁰ The introduction of the theory of *imprévision* is intended to promote contractual fairness,²¹ by allowing courts to correct serious contractual imbalances that arise during its execution. The proliferation of long-term contracts has posed problems in this respect. These contracts are more likely to be affected by the instability of economic conditions over time.²² In the absence of code provisions allowing for contract termination and/or adaptation, commercial parties who did not include specific clauses regulating the case of supervening circumstances into their contract bear the risk “to be stuck with 300-year-old contract terms stipulating prices in a currency that had long ceased to exist.”²³

The purpose of this research is to provide a critical analysis of the requirements triggering *imprévision* under the new article 1195 of the French Civil Code and draft article 5.77 of the Belgian Draft of 2019, in light of the objectives set by the legislators. The following section will introduce the juridical context preceding the French and Belgian reform of the law of contract, a context of resistance and sometimes outright rejection of the doctrine of *imprévision* (Section II). Then, the article will look into the conditions for

20. For France, see the *Rapport au Président*, *supra* note 7, which refers to the *justice contractuelle* as an explicit objective of the French Revision of 2016. The Belgian Draft of 2019, *supra* note 6, although not specifically, does the same by stating the goal of modernising “the balance between party autonomy and the role of the judge as guardian of the interests of the weaker party. . . .” (author’s translation). The latter goal is pursued, among others, by allowing courts to adapt the contract in the event of changed circumstances (Draft art. 5.77). Moreover, Draft art. 5.77 is inspired by French law, where the inclusion of the power of courts to adapt the contract is justified on grounds of contractual fairness.

21. See *Rapport au Président*, *supra* note 7; see also D. Philippe, *L’introduction de l’imprévision en droit belge*, in HET BURGERLIJK RECHT IN BEWEGING / LE DROIT CIVIL EN MOUVEMENT : JAARBOEK DAG VAN DE BEDRIJFSJURIST 2018 - ANNUAIRE JOURNÉE DU JURISTE D’ENTREPRISE 2018 (M. Beyens ed., Uitgeverij Larcier 2018).

22. Rowan, *supra* note 19, at 820.

23. T. Lutz, *Introducing Imprévision into French Contract Law: A Paradigm Shift in Comparative Perspective*, in THE FRENCH CONTRACT LAW REFORM: A SOURCE OF INSPIRATION? 98 (S. Stijns & S. Jansen eds., Intersentia 2016).

imprévision, which will be assessed in relation to the above-mentioned goals of modernisation (Section III), legal certainty (Section IV) and contractual justice (Section V), respectively. This analysis will be then followed by a conclusion on the recommended interpretation of those requirements by French and Belgian courts.

II. THE EVOLUTION OF THE DOCTRINE OF *IMPRÉVISION* FROM THE *CODE NAPOLÉON* TO THE REFORM PROJECTS OF THE FRENCH AND BELGIAN CIVIL CODES

A. *The Historical Resistance to Imprévision in France and Belgium*

After the publication of the *Code Napoléon* in 1804, French courts adopted different approaches towards *imprévision*. On the one hand, administrative courts have been more open, as they have recognised the possibility to grant relief to parties affected by changed circumstances.²⁴ On the other hand, the openness of administrative courts has been countered with the rejection of this doctrine by civil courts. Furthermore, within the latter, the more lenient approach of lower courts has been strongly opposed and overturned by the *Cour de cassation*.²⁵

Administrative courts started to consider changed circumstances as of the famous judgement rendered by the *Conseil d'Etat* in the *Gaz de Bordeaux* case of 1916.²⁶ The court considered the price increase affecting a concession contract to be exceptional and therefore granted partial indemnity to the aggrieved party, in order to ensure the continuity of public services.²⁷ Even though the remedy was not the adaptation of the contract, this judgement laid the foundation

24. E. HONDIUS & C. GRIGOLEIT, UNEXPECTED CIRCUMSTANCES IN EUROPEAN CONTRACT LAW 147 (Cambridge U. Press 2011); Ancel, *supra* note 4, at para. 18.

25. HONDIUS & GRIGOLEIT, *supra* note 24, at 147-48.

26. CE 30 Mar. 1916, *Cie générale d'éclairage de Bordeaux c/ Ville de Bordeaux*, Rec. Lebon 59928.

27. HONDIUS & GRIGOLEIT, *supra* note 24, at 147.

for the power of administrative judges to remedy unforeseen circumstances.²⁸

On the civil side, the silence of the *Code Napoléon* (and of its preparatory works) on the impact of changed circumstances on the contract urged civil courts to clarify the question.²⁹ Despite the attempts of some lower courts to revise contracts whose balance had been disrupted,³⁰ the *Cour de cassation* repeatedly denied this possibility.³¹ The rejection of the theory of *imprévision* was explicit in the *Canal de Craponne* case of 1876, where the *Cour de cassation* stated that “under no circumstances is it for the courts, however fair their decision may appear to them to be, to take into account the time and the circumstances in order to substitute new terms for those which have been freely accepted by the contracting parties.”³² The decision was grounded in the principle of the binding force of the contract enshrined in the then article 1134 of the French Civil Code (now article 1103³³). This article embodies the principle of *pacta*

28. Ancel, *supra* note 4, at para. 18. The *Conseil d'État* confirmed this position in its future jurisprudence, where it also specified the conditions of application: CE 8 Feb. 1918, *Sté d'éclairage de Poissy*, RD publ. 1918.244, concl. Corneille; CE 27 June 1919, *Sté du gaz et de l'électricité de Nice c/ Ville de Nice*, S. 1920.3.25, note M. Hauriou; CE 3 Dec. 1920, *Fromassol*, RD publ. 1921.80, concl. Corneille; CE 25 Nov. 1921, *Cie générale des automobiles postales c/ État*, S. 1923.3.33, note M. Hauriou; CE 25 Nov. 1921; 2 Mar. 1923; Feb. 29, Mar. 28, Jun. 18 and Aug. 8, 1924; Jan. 23, 1925, DP 1925.3.17, note Closset; CE May 8, 1925, *Compagnies réunies de gaz et d'électricité c/ Ville de Bordeaux*; CE Mar. 27, 1926, *Ville de Montfort-l'Amaury*, DP 1927.3.17, note Closset; CE Dec. 9, 1932, *Cie des tramways de Cherbourg*, DP 1933.3.17, note Pelloux; CE 22 June 1934, *Cie continentale du gaz*, DH 1934.448.

29. *Id.*

30. Rouen, 9 Feb. 1844, DP 1845. 2. 4; Douai, 3 May 1851, DP 1854. 2. 130; Grenoble, 18 Aug. 1854, PD 1855. 2. 78; Paris, 26 May 1854, three judgements, DP 1854. 2. 129; Rouen, 3 June 1854, DP 1854. 2. 131.

31. Cass. Civ., 9 Jan. 1856, PD 1856.1.33, seven judgments; Cass. Civ., 14 May 1872, S. 1873.1.224; Cass. Civ., 24 Mar. 1874, S. 1874.1.429. Although these judgements do not reject in principle the theory of *imprévision*, they do it implicitly by refusing to revise the contract due to events making performance more onerous, on the assumption that these events fall short of constituting a situation of *force majeure*, and therefore cannot be taken into account.

32. Cass. Civ., Mar. 6, 1876, *Canal de Craponne*, D. 1876.1.193, available in English at H. G. BEALE ET AL., CASES, MATERIALS AND TEXT ON CONTRACT LAW 1131 (Hart Publ'g 2010).

33. “Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits.”

sunt servanda, according to which legally formed agreements have the force of law between the parties, who must respect them and abide by whatever has been promised in them.³⁴ It is believed that the drafters of the Civil Code, given the historical precedents, could not have disregarded the issue, and deliberately refrained from allowing any exception to article 1134.³⁵ The *Cour de cassation* has been uncompromising in rejecting *imprévision* at least until the early 1990s.³⁶ French scholars, in turn, had not yet analysed the question of hardship at the time of this judgement, as the term *imprévision* is not found in the works of any commentator.³⁷ This is evidenced by the fact that the *Canal de Craponne* case did not arouse attention among scholars, until the aftermath of World War I.³⁸

In Belgium, the history of the judicial and doctrinal developments of the theory of *imprévision* is very similar to the French one.³⁹ Unlike France, in Belgium there is no recognition of this theory in administrative cases, as the *Conseil d'État* is not competent to deal with public contracts.⁴⁰ However, the *Cour de cassation* has recognised that some form of the theory of *imprévision* applies to public procurement contracts.⁴¹ On the other hand, just like in

34. Rowan, *supra* note 19, at 813; H. van Houtte, *Changed Circumstances and Pacta Sunt Servanda*, in TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION 107-109 (E. Gaillard ed., ICC Publ. 1993).

35. J. CARBONNIER, DROIT CIVIL. LES BIENS. LES OBLIGATIONS 1075 (PUF 2004).

36. Ancel, *supra* note 4, at paras. 24-25. Cass. Civ., 15 Nov. 1933, Gaz. Pal. 1934.1.68; Cass. Com., 18 Jan. 1950, D. 1950.227; Cass. Soc., 8 March 1972, no. 71-40.429, D. 1972.340; Cass. Com., 18 Dec. 1979, no. 78-10.763, Bull. civ. IV, no. 339; Cass. Civ. 3, 14 Oct. 1987, no. 85-18.132, Bull. civ. III, no. 169.

37. Ancel, *supra* note 4, at paras. 14 and 16. Changed circumstances are analysed, yet without mentioning the term *imprévision*, only by Larombière. See L. LAROMBIÈRE, 4 THÉORIE ET PRATIQUE DES OBLIGATIONS, OU COMMENTAIRE DES TITRES III ET IV, LIVRE III DU CODE CIVIL, ART. 1101 À 1386 (Pedone-Lauriel 1885).

38. *Id.* at para. 16.

39. HONDIUS & C. GRIGOLEIT, *supra* note 24, at 156.

40. *Id.* at 157.

41. P. VAN OMMESLAGHE & H. DE PAGE, 2 TRAITÉ DE DROIT CIVIL BELGE : LES OBLIGATIONS 824 (Bruylant 2013). However, while in France the doctrine has been recognised autonomously by administrative courts, in Belgium the decision of the *Cour de cassation* was based on the general terms on public works; J. HERBOTS, CONTRACT LAW IN BELGIUM 185 (Kluwer 1995).

France, the absence of civil code provisions taking into account changed circumstances led the Belgian *Cour de cassation* to reject the possibility for courts to revise the contract in the event of hardship, based on the principle of the binding force of the contract enshrined in article 1134⁴² of the Belgian Civil Code.⁴³ The majority of Belgian doctrine has traditionally supported the *Cour de cassation* in the rejection of the doctrine of *imprévision*.⁴⁴ However, a movement in favour of its acceptance was formed around the 1980s.⁴⁵ Despite the development of this doctrinal trend, the *Cour de cassation* has maintained, in principle, its position.⁴⁶

B. The Slow Erosion of the Principle of the Binding Force of the Contract: The Attempts of the Legislator, Scholars, and Courts

While the French and the Belgian courts of cassation insisted on the binding force of the contract to oppose the judicial revision in case of unforeseen changed circumstances, some exceptions to this

42. “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.”

43. Cass., 19 May 1921, Pas. 1921, I, 380; Cass., 30 Oct. 1924, Pas. 1924, I, 565. In these two judgements the *Cour de cassation* made clear that the revision of the contract was possible only when envisaged by the law (in that case, Law of Oct. 11, 1919). The rejection in principle of the theory of *imprévision* is found in Cass., 14 Apr. 1994, Pas. 1994, I, 365; Cass., 20 Apr. 2006, Pas., 2006, 884. See VAN OMMESLAGHE & DE PAGE, *supra* note 41, at 818; C. Biquet-Mathieu, *Propos sur l'imprévision : l'arrêt Scafom international et son contexte belge, européen et international*, in MÉLANGES JEAN-LOUIS BAUDOUIN 212-213 (B. Moore ed., Editions Yvon Blais 2012).

44. VAN OMMESLAGHE & DE PAGE, *supra* note 41, at 823-824; P. DE HARVEN, MOUVEMENTS GÉNÉRAUX DU DROIT CIVIL BELGE CONTEMPORAIN: ÉTUDE CRITIQUE 231 (Bruylant 1928); C. Renard, *La théorie de l'imprévision dans les contrats*, 2 REV. DR. INT. COMP. 17 (1950); Y. Hannequart, *La portée du contrat*, in 4 LES NOUVELLES, DROIT CIVIL 52 (Larcier 1958); X. Dieux, *Réflexions sur la force obligatoire des contrats et sur la théorie de l'imprévision en droit privé*, REV. CRIT. JUR. BELGE 386 (1983); J. Perilleux, *La bonne foi dans l'exécution du contrat. Rapport belge*, in ASSOCIATION HENRI CAPITANT, LA BONNE FOI 237 (Littéc 1994); C. Delforge, *La modification unilatérale du contrat*, in LA VOLONTÉ UNILATÉRALE DANS LE CONTRAT 139 (P. Van Ommeslaghe & J. F. Germain eds., Larcier 2008).

45. VAN OMMESLAGHE & DE PAGE, *supra* note 41.

46. Ancel, *supra* note 4, at para. 36.

principle were established first in special legislation, then in scholarly writings, and finally in court decisions.

The French and the Belgian legislators intervened with a series of temporary measures in order to cope with the economic upheavals caused primarily by the world wars. Courts could terminate specific contracts concluded before or during the war, provided that the performance had become too onerous for one of the parties.⁴⁷ In the same context, the legislators of both countries went so far as to grant courts the power to revise contracts in specific situations.⁴⁸ Together with these temporary measures, permanent legislation was enacted to allow for the judicial revision of contracts in various sectors, among others, lease contracts,⁴⁹ divorce,⁵⁰ copyright,⁵¹ and public works.⁵² These provisions demonstrate the lawmakers' will to create exceptions to the principle of the sanctity of contracts, in order to assist certain categories of contractors whose situation is seriously unbalanced as a result of major changes in society.⁵³

47. For France, see Act of Jan. 21, 1918, *Loi Faillot*, (DP 1918.4.261). Similarly, after World War II, Act no. 49-547 of Apr. 22, 1949, D.1949.241, allowed for the termination of successive delivery contracts concluded before Sept. 2, 1939, the execution of which would have generated new expenses for the debtor, due to the war or the new economic circumstances, exceeding by far what could have been expected at the time of the conclusion of the contract. For Belgium, see Act of Oct. 11, 1919, *Moniteur belge*, Oct. 20, 1919.

48. Particularly, in France judges could delay payment terms (Law of June 29, 1935, DP 1935.4.313) or review the capital and interest terms of the purchaser's debt (Law of July 17, 1937, DP 1938.4.113). For the temporary measures taken, since the 1960s, in favour of repatriated French nationals, see Ancel, *supra* note 4, at para. 28. For Belgium, Act of Oct. 11, 1919, unlike the *Loi Faillot*, empowered courts not only to terminate, but also to revise contracts concluded before WWI.

49. For Belgium, see art. 7 of the Law of Feb. 16, 1991 on residential leases; art. 6 of the Law of Apr. 30, 1951 on commercial leases; arts. 17 *et seq.* of the Law of Nov. 4, 1969 on leases and leased property. For France see decree no. 53-960 of Sept. 30, 1953 on commercial leases; art. 17 *et seq.* Act no. 89-462 of July 6, 1989 on residential leases.

50. For Belgium see art. 1288 Judicial Code; for France see art. 276 Civil Code.

51. For France see art. 37 of the Act of Mar. 11, 1957 on Copyright (L.131-5 Code of Intellectual Property).

52. For Belgium see art. 16 *Cahier général des charges des marchés publics de travaux*.

53. Ancel, *supra* note 4, at para. 28; E. HONDIUS & C. GRIGOLEIT, *supra* note 24, at 146-147.

The economic upheavals caused by World War I (shortage of raw materials, increased prices, and the scarcity of male labour) also had the effect of sparking the doctrinal debate among civilian scholars with regard to the question of *imprévision*.⁵⁴ They started questioning the destiny of those contracts whose performance had been made more difficult as a result of the events mentioned. In France, there was an initial trend⁵⁵ in favour of the contractual revision by courts and against the rigidity of the contract, based on different legal grounds.⁵⁶ Later, a doctrinal movement, in line with the solutions offered by the above-mentioned cases, strongly rejected the theory on grounds of inviolability of the principle *pacta sunt servanda*.⁵⁷ However, as of the late 1980s, there is a re-emergence of post-WWI ideas in the French civil doctrine. The reappraisal of the theory of *imprévision* is due to considerations of solidarity and contractual justice⁵⁸: the key is the third paragraph of (the then) article 1134 of the French Civil Code, which imposes on the parties a duty to perform agreements in good faith and which would justify the judicial

54. Ancel, *supra* note 4, at para. 17.

55. A. LOUVEAU, THÉORIE DE L'IMPRÉVISION EN DROIT CIVIL ET EN DROIT ADMINISTRATIF (Impr. de F. Simon 1920); L. FYOT, ESSAI D'UNE JUSTIFICATION NOUVELLE DE LA THÉORIE DE L'IMPRÉVISION À L'ÉGARD DES CONTRATS PORTANT SUR DES OBJETS AUTRES QU'UNE SOMME D'ARGENT (Impr. veuve Paul Berthier 1921); P. VOIRIN, DE L'IMPRÉVISION DANS LES RAPPORTS DE DROIT PRIVÉ (Ancienne impr. Vagner 1922); A. BRUZIN, ESSAI SUR LA NOTION D'IMPRÉVISION ET SUR SON RÔLE EN MATIÈRE CONTRACTUELLE (Impr. J. Prély 1922); J. E. GUELLETTE, DES EFFETS JURIDIQUES DE LA GUERRE SUR LES CONTRATS (Jouve 1918); J. RADOUANT, DU CAS FORTUIT ET DE LA FORCE MAJEURE (Rousseau 1920); S. Serbesco, *Effets de la guerre sur l'exécution des contrats*, RTD CIV. 329 (1917); L. JOSSERAND, DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ (Daloz 1927).

56. Fyot assimilates the situation in which a party cannot perform as a result of unforeseeable circumstances to the position of the non-performing debtor in good faith under art. 1150 Civ. Code, which can be ordered to compensate the creditor, only up to the limit of the foreseeable damages; Josserrand refers instead to implicit will of the parties not to bear the negative consequences of changed circumstances.

57. Ancel, *supra* note 4, at para. 30. This trend begins in the 1930s.

58. C. Jamin, *Révision ou intangibilité du contrat ou la double philosophie de l'article 1134 du Code civil*, DR. ET PATR. 46 (1998); See also M. Cédras, *Le solidarisme contractuel en doctrine et devant la Cour de cassation*, in RAPPORT COUR DE CASSATION 2003 (La documentation française 2004), <https://perma.cc/98TZ-95TV>.

revisions of contracts.⁵⁹ This solution is further encouraged by the fact that provisions allowing for the judicial revision of the contract were part of both the legislation of other European jurisdictions and the harmonisation projects of contract law at the European level.⁶⁰ Like France, and despite its traditional resistance, the Belgian doctrine has taken, in the last decades, a favourable approach to *imprévision*, based on arguments of good faith, abuse of rights, and equity.⁶¹

Finally, a mitigation of the principle of the sanctity of contracts is visible in some relatively recent court decisions. While in France the traditional approach was attenuated through the concepts of good faith and cause,⁶² in Belgium the theory of the abuse of right has been adopted. Moreover, the courts of both countries have recognised the theory of *imprévision* when faced with international

59. Jamin, *supra* note 58, at 49, 54-57. See also H. Bouthinon-Dumas, *Les contrats relationnels et la théorie de l'imprévision*, 15 REV. INT. DR. ÉCON. 361-362 (2001).

60. B. Fauvarque-Cosson, *Le changement de circonstances*, 1 RDC 67 (2004); B. Fauvarque-Cosson, *La réforme du droit français des contrats, perspective comparative*, 1 RDC 147 (2006); V. Witz, *Force obligatoire et durée du contrat*, in LES CONCEPTS CONTRACTUELS FRANÇAIS À L'HEURE DES PRINCIPES DU DROIT EUROPÉEN DES CONTRATS 175 (P. Rémy-Corlay & D. Fenouillet eds., Dalloz 2003). However, among those in favour of the doctrine of changed circumstances, many oppose the judicial revision of the contract and prefer termination as a remedy: see *ex multis* P. Mauraie, *Petite note sur le projet de réforme du droit des contrats*, 1 JCP G 204 (2008); Y. Lequette, *Bilan des solidarismes contractuels*, in ÉTUDES DE DROIT PRIVÉ : MÉLANGES OFFERTS À PAUL DIDIER 273 (J. Azéma et al. eds., Economica 2008); E. Savaux, *L'introduction de la révision ou de la résiliation pour imprévision - Rapport français*, 1 RDC 1057 (2010).

61. VAN OMMESLAGHE & DE PAGE, *supra* note 41, at 823; D. PHILIPPE, CHANGEMENT DE CIRCONSTANCES ET BOULEVERSEMENT DE L'ÉCONOMIE CONTRACTUELLE (Bruylant 1986); D. Philippe, *Le point sur... l'imprévision*, 126 JOURNAL DES TRIBUNAUX 738 (2007); M. Fontaine, *Portée et limites du principe de la convention-loi*, in LES OBLIGATIONS CONTRACTUELLES 190 (X. Dieux ed., Édition du jeune barreau 1984).

62. However, after the reform of the French Civil Code in 2016, the concept of cause is no longer mentioned among the essential conditions for the validity of a contract. As explained in the *Rapport au Président*, *supra* note 7, this decision followed the criticism by both scholars and practitioners, according to which the cause represented a factor of legal uncertainty due to the difficulty of giving it a precise definition.

sales contracts governed by the CISG.⁶³ The notion of good faith has been employed by the commercial chamber of the French *Cour de cassation* in order to find an obligation for commercial parties to renegotiate the contract in case of hardship.⁶⁴ The refusal to renegotiate would constitute a breach of the duty to perform the contract in good faith, which can be sanctioned with a compensation payment to the other party.⁶⁵ Although the remedy granted is not the typical relief associated to the theory of *imprévision*, namely the revision of the contract,⁶⁶ these judgements show the efforts of the *Cour de cassation* to consider unforeseeable supervening events disrupting the contractual balance. However praiseworthy this approach may be, it did not create a general obligation to renegotiate the contract in those instances.⁶⁷ These decisions, according to some scholars, “can be explained by the particular circumstances of the two cases and do not testify to a larger change of paradigm.”⁶⁸ Moreover, a later judgement denies the possibility of a shift in the *Cour de cassation*’s orientation, by refusing to acknowledge the existence of a duty to renegotiate in case of hardship, as the aggrieved party accepts the risk of the transaction.⁶⁹ In order to create an exception to the principle of the binding force of the contract, the French *Cour de cassation* also resorted to the concept

63. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980.

64. Cass. Com., 3 Nov. 1992, *Huard*, pourvoi no. 90-18.547; Cass. Com., 24 Nov. 1998, pourvoi no. 96-18.357.

65. Lutzi, *supra* note 23, at 97; Ancel, *supra* note 4, at para. 25.

66. On this point, the Court of Appeal of Bordeaux clarified that even if an obligation to renegotiate the contract in the event of changed circumstances were to exist, the failure to renegotiate could not lead to imposing on a party the revision of the contract, “this principle of review for unforeseen circumstances being constantly rejected by the courts since Mar. 6, 1876”; see Bordeaux, 28 Oct. 2015, RG no. 14/00668, Gaz. Pal. 26 Apr. 2016, no. 16. Against the use of good faith to overturn the terms of a contract, see Cass. Civ., 9 Dec. 2009, no. 04-19.923, Bull. civ. III, no. 275; Cass. Com., 10 Jul. 2007, JCP 2007.II.10154.

67. Ancel, *supra* note 4, at para. 25.

68. Lutzi, *supra* note 23, at 97. Particularly, the fact the both decisions related to the distribution industry; see C. Pédamon, *The Paradoxes of the Theory of Imprévision in the New French Law of Contract: A Judicial Deterrent?*, 112 AMICUS CURIAE 12 (2019).

69. Cass. Civ., 10 Dec. 2003, no. 02-14.990, unreported.

of cause. It overturned a decision of the court of appeal to impose a penalty payment on the company Soffimat for not having performed its obligation, because the court of appeal had failed to investigate “whether the evolution of economic circumstances ... did not have the effect ... of disequilibrating the general economy of the contract ... and of depriving the obligation [of the defendant] of every counterpart. . . .”⁷⁰ In doing so, the court admitted that the contractual imbalance brought by changed circumstances could eventually leave the contract without a valid cause.⁷¹ Again, this ruling did not pave the way for a jurisprudential recognition of the theory of *imprévision*. Not only was the judgement not published in the official bulletin, but the solution proposed was also overturned by a later decision of the *Cour de cassation*.⁷² Moreover, after the reform of 2016 the same solution could not be applied anyway because the concept of cause was removed as an essential element for the validity of the contract.⁷³ Turning to Belgium, while, on the one hand, the *Cour de cassation* rejected the use of good faith to overturn the terms of a contract,⁷⁴ on the other hand, it employed the concept of abuse of right in order to interfere with a pre-divorce agreement, in spite of the *pacta sunt servanda* principle. The *Cour de cassation* considered that the wife had committed abuse of rights by continuing to demand the performance of the agreement, as it had become disproportionate to the evolved economic situation of the parties, and thus released the husband from the payment of alimony.⁷⁵ It is noteworthy that in abolishing the alimony, the *Cour*

70. Luzzi, *supra* note 23, at 97; Cass. Com., 29 June 2010, *Soffimat*, pourvoi no. 09-67.369, D. 2010, 2481.

71. Luzzi, *supra* note 23; Ancel, *supra* note 4, at para. 26.

72. Ancel, *supra* note 4; Cass. Com., 18 Mar. 2014, no. 12-29.453, D. 2014, 1915, where the *Cour de cassation* held that the existence of the cause must be assessed at the moment of contract formation and therefore changing economic circumstances disrupting the balance of the contract do not make its cause disappear.

73. Luzzi, *supra* note 23, at 97; *Ordonnance no. 2016-131 du 10 février 2016*, art. 1128.

74. Cass., 20 Apr. 2006, Pas., 2006, 884.

75. Cass., 14 Oct. 2010, no. C.09.0608.F/1.

de cassation contradicted its previous jurisprudence on abuse of rights,⁷⁶ where the remedy had been the reduction of the right, rather than its suppression.⁷⁷ While some⁷⁸ believe that the absence of judicial revision undermines the relevance of this judgement, as it sets an important distinction between the mechanisms of abuse of rights and *imprévision*, others⁷⁹ argue that this decision might have accepted some kind of modification of the contract as a sanction for the abuse of rights. Lastly, in addition to the developments regarding internal contracts, the French and Belgian courts of cassation were openly receptive of *imprévision* when faced with international sales contracts governed by the CISG.⁸⁰ The CISG does not expressly regulate hardship, and it is debated whether a party affected by changed circumstances may find relief under the Convention.⁸¹ It is even more debated whether the regulation of the remedies to be granted in case of hardship constitutes an internal gap in the Convention, which, under article 7.2 CISG, can be filled through the general principles on which the CISG is based.⁸² Nevertheless, the courts did not hesitate to answer positively to both questions and to resort to the hardship provisions of the PICC⁸³ in order to fill the alleged gap and find, at least, a duty to renegotiate in the event of changed circumstances.

76. Cass., 11 June 1992, Pas., 1992, I, 898.

77. Biquet-Mathieu, *supra* note 43, at 216.

78. Ancel, *supra* note 4, at para. 36.

79. Biquet-Mathieu, *supra* note 43, at 218. In this regard, the author highlights that the *Cour de cassation*, differently from its previous jurisprudence, does not mention the prohibition for the judge to amend the content of an agreement. *See also* Philippe, *supra* note 21.

80. For France, *see* Cass. Com., 17 Feb. 2015, *Dupiré Invicta v. Gabo*, nos. 12-29550, 13-18956, and 13-20230; for Belgium, *see* Cass, 19 June 2009, *Scafom International BV v. Lorraine Tubes SAS*, no. C.07.0289.N.

81. *See*, on this point, L. Di Matteo, *Contractual Excuse under CISG: Impediment, Hardship and the Excuse Doctrines*, 27 PACE INT. LAW REV. (2015).

82. *See* Dewez et al., *The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of the UNIDROIT Principles*, 19 EUR. REV. PRIV. LAW 101-154 (2001); S. Slater, *Overcome by Hardship: The Inapplicability of the Unidroit Principles' Hardship Provisions to CISG*, 12 FLA. J. INT'L L. 231 (1998).

83. Arts. 6.2.2, 6.2.3 PICC.

C. The Regulation of Imprévision Under the New Article 1195 and Draft Article 5.77

Eventually, the legislative openness towards *imprévision* resulted in the French Revision of 2016,⁸⁴ introducing the new article 1195 in the French Civil Code, and in the Belgian Draft of 2019, proposing to insert Book 5 “Obligations” in the Belgian Civil Code and in particular draft article 5.77. Both of these provisions allow contractual parties to request the judicial revision of the contract in case of changed circumstances, should the attempts to renegotiate the contractual terms fail.

Article 1195 of the French Civil Code⁸⁵ reads as follows:

If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall

84. This revision was preceded by the *Avant-projet de réforme du droit des obligations*, 2005, (*Projet Catala*), the *Projet de réforme du droit des contrats*, 2008, Ministère de la Justice (*Avant-projet de la Chancellerie*) and by the *Projet Terré*, 2013. While the first two envisaged only the power of the aggrieved party to terminate the contract in the event of hardship, the latter provided for judicial revision.

85. Art. 1195 C. civ. :

Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.

En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.

determine.⁸⁶

The French provision revolves around three conditions: (1) there must be a change of circumstances which was unforeseeable at the moment of the conclusion of the contract; (2) it must render the performance excessively onerous for one party; (3) this party must have not agreed to bear that risk.⁸⁷ As for the effects of *imprévision*, the new article 1195 confers upon the aggrieved party the right to request the renegotiation of the agreement. Judicial intervention is an option of last resort, which can be triggered only if the renegotiations fail or do not take place at all, and if the parties do not reach an agreement to terminate the contract. Under such circumstances, parties may either ask the court to adapt the contract by agreement or individually request the court to terminate or adapt the contract.

On the other hand, the Belgian provision on *imprévision*, which is allegedly based on French law, diverges from the latter in some aspects. Draft article 5.77⁸⁸ provides that:

86. J. Cartwright et al., *The New Provisions of the Code civil Created by Ordonnance no. 2016-131 of 10 February 2016, translated into English*, available at <https://perma.cc/D3GN-26QZ>; see also M. SÉJEAN, FRENCH CIVIL CODE, ENGLISH - FRENCH - ARABIC (LexisNexis 2020).

87. C. Pédamon, *The New French Contract Law and Its Impact on Commercial Law: Good Faith, Unfair Contract Terms and Hardship*, in *THE FUTURE OF THE COMMERCIAL CONTRACT IN SCHOLARSHIP AND LAW REFORM 120* (M. Heide-mann & J. Lee eds., Springer 2018).

88. Belgian Draft of 2019, *supra* note 6, art. 5.77:

Chaque partie doit exécuter ses obligations quand bien même l'exécution en serait devenue plus onéreuse, soit que le coût de l'exécution ait augmenté, soit que la valeur de la contre-prestation ait diminué.

Toutefois, le débiteur peut demander au créancier de renégocier le contrat en vue de l'adapter ou d'y mettre fin lorsque les conditions suivantes sont réunies:

- 1° un changement de circonstances rend excessivement onéreuse l'exécution du contrat de sorte qu'on ne puisse raisonnablement l'exiger;
- 2° ce changement était imprévisible lors de la conclusion du contrat;
- 3° ce changement n'est pas imputable au débiteur;
- 4° le débiteur n'a pas assumé ce risque; et
- 5° la loi ou le contrat n'exclut pas cette possibilité.

Les parties continuent à exécuter leurs obligations pendant la durée des renégociations.

En cas de refus ou d'échec des renégociations dans un délai raisonnable, le juge peut, à la demande de l'une ou l'autre des parties, adapter le contrat afin de le mettre en conformité avec ce que les parties auraient raisonnablement convenu au moment de la conclusion du contrat si elles

Each party must fulfil his or her obligations even when the execution has become more onerous, either because the cost of the execution has increased, or because the value of the counter-performance has decreased.

However, the debtor may request the creditor to renegotiate the contract in order to adapt or terminate it when the following conditions are met:

- (1) a change of circumstances makes the performance of the contract excessively onerous so that no one may reasonably demand it;
- (2) the change was unforeseeable at the time of the conclusion of the contract;
- (3) the change is not attributable to the debtor;
- (4) the debtor has not assumed that risk; and
- (5) the law or the contract does not exclude this possibility.

The parties continue to perform their obligations during the renegotiations. In the event of refusal or failure of the renegotiations after a reasonable time, the judge may, at the request of either party, adapt the contract in order to bring it in line with what the parties would have reasonably agreed at the time of conclusion of the contract if they had taken into account the change of circumstances, or terminate the contract in whole or in part from a date that cannot be prior to the change of circumstances and according to conditions fixed by the judge. The action is formed and instructed according to the forms of summary proceedings.⁸⁹

As for the requirements to be met in order to trigger the Belgian provision, it is also required, unlike in article 1195, that the change of circumstances not be attributable to the aggrieved party. The commentary to draft article 5.77 explains that this requirement must be read together with draft article 5.299,⁹⁰ which defines attributability by linking it to the concept of fault.⁹¹ Moreover, the condition that “the law or the contract does not exclude this possibility” introduced by draft article 5.77, although not expressly specified in

avaient tenu compte du changement de circonstances, ou mettre fin au contrat en tout en partie à une date qui ne peut être antérieure au changement de circonstances et selon des modalités fixées par le juge. L'action est formée et instruite selon les formes du référé.

89. Translated by the author.

90. Belgian Draft of 2019, *supra* note 6, Commentaire des articles, art. 5.77.

91. *Id.* at art. 5.299.

article 1195, is also a feature of the latter provision. In particular, the reference to the “law” excluding the possibility to apply draft article 5.77 simply refers to those special legal provisions, such as article 1474/1 of the Belgian Civil Code on equitable judicial review, which shall prevail over it.⁹² By the same token, article 1773 of the French Civil Code excludes in principle any revision of fixed-price contracts.⁹³ As for the possibility that “the contract” excludes the applicability of draft article 5.77, it refers to the non-mandatory nature of the provision on *imprévision*, which is also a feature of the new article 1195. In fact, the comment on article 1195 enshrined in the Report to the President of the Republic states that parties may derogate from it.

As to the effects of *imprévision*, similarly to article 1195, draft article 5.77 allows the aggrieved party to request renegotiations, and only as a last resort grants both parties the possibility to ask the judge either to adapt or terminate the contract.

III. THE INTRODUCTION OF *IMPRÉVISION* IN LIGHT OF THE GOAL OF MODERNISATION

The reform projects of the French and Belgian Civil Codes feature a repeated imperative: to modernise. This expression is found several times both in the Report to the President of the Republic on the French Revision of 2016 and in the Belgian Draft of 2019. Modernisation is sometimes stated as an independent and overriding goal,⁹⁴ whereas in other passages of those instruments it is described as the means to achieve other objectives, in particular the protection

92. *Id.* at art. 5.77.

93. Ancel, *supra* note 4, at paras. 107-108.

94. *See Rapport au Président, supra* note 7: “La présente ordonnance est prise en application de l’article 8 de la loi no. 2015-177 du 16 février 2015 relative à la modernisation et à la simplification du droit et des procédures dans les domaines de la justice et des affaires intérieures.” *See also* Belgian Draft of 2019, *supra* note 6, Résumé: “Cette proposition vise à moderniser le droit des obligations.”

of the weaker party.⁹⁵ However, this raises the question regarding the meaning of the modernization of the law of obligations. Both proposals emphasise the fact that large parts of the Civil Code have not been modified in more than two centuries and that this triggered the intervention of courts, which distanced themselves from the wording of the code in order to adapt it to the changing reality. Hence, there is the need to codify the solutions developed by the courts.⁹⁶ Consequently, it seems that modernisation, at least in part, has been perceived by the French and Belgian legislators as keeping up with the evolution of jurisprudence. This is visible in the incorporation of many jurisprudential rules regarding, for instance, framework contracts, lapse, unjustified enrichment (articles 1111, 1186, and 1303 of the French Civil Code, respectively),⁹⁷ partial

95. See *Rapport au Président*, *supra* note 7: “Il est donc apparu nécessaire . . . de le moderniser, pour faciliter son accessibilité et sa lisibilité, tout en conservant l’esprit du code civil, à la fois favorable à un consensualisme propice aux échanges économiques et protecteur des plus faibles.” See also Belgian Draft of 2019, *supra* note 6, Resumé: “La proposition a pour objectif . . . de moderniser l’équilibre entre l’autonomie des parties et le rôle du juge en tant que gardien des intérêts de la partie faible et de l’intérêt général.”

96. For France, see *Rapport au Président*, *supra* note 7:

Force est de constater que les textes actuels ne permettent pas d’appréhender le droit positif, tant la jurisprudence a dû les interpréter, par analogie, *a contrario*, voire *contra legem*. La compréhension de nombreuses dispositions passe ainsi nécessairement par la consultation des décisions rendues par les tribunaux, voire par l’interprétation qu’en fait la doctrine. Par ailleurs, la jurisprudence est par essence fluctuante, et ne permet pas d’assurer la sécurité juridique que seul peut offrir un droit écrit. C’est la raison pour laquelle l’ordonnance prévoit, pour sa majeure partie, une codification à droit constant de la jurisprudence, reprenant des solutions bien ancrées dans le paysage juridique français bien que non écrites.

For Belgium, see Belgian Draft of 2019, *supra* note 6, Introduction Générale:

La jurisprudence a, bien entendu, pu assurer une certaine modernisation du droit des obligations. . . . L’influence de la jurisprudence est à ce point considérable que le droit belge des obligations s’apparente de plus en plus au système de Common law. . . . C’est pour ces mêmes raisons que le ministre de la Justice décida, conformément à l’Accord de gouvernement du 10 octobre 2014, de créer plusieurs Commissions chargées de réformer le droit civil.

97. B. MERCADAL, *RÉFORME DU DROIT DES CONTRATS : ORDONNANCE DU 10 FÉVRIER 2016* 26 (Éditions Francis Lefebvre 2016).

invalidity, defence of non-performance (draft articles 5.66 and 5.313 of the Belgian draft of 2019, respectively).⁹⁸

However, even assuming that the codification of the novelties brought by the jurisprudence fits a definition of “modernisation,” the reforms at issue do not simply codify the solutions found in judicial decisions,⁹⁹ but go so far as to introduce legal concepts such as the doctrine of *imprévision*, which not only had never been codified but had also never been recognised by the jurisprudence of the *Cour de cassation*. Therefore, it is fair to wonder whether this innovation actually modernises the Civil Code. Does a revision of the rules governing the law of contracts necessarily account for a modernisation? Certainly, a new code is not *per se* a modern code.

Whether the new article 1195 of the French Civil Code and draft article 5.77 of the Belgian Draft of 2019 are in line with the overall goal of modernisation, again, depends on how one defines the latter. The reform projects stress the importance to align the French and Belgian Civil Codes with the law of foreign countries and with the European and international projects for the harmonisation of contract law.¹⁰⁰ Therefore, the introduction of rules governing changed circumstances could be deemed to modernise the Civil Code simply because it follows the footsteps of other domestic jurisdictions and transnational legal principles. The French Revision of 2016, on the other hand, also emphasises the need to strengthen the attractiveness of its law by adapting it to the developments in the globalised

98. Belgian Draft of 2019, *supra* note 6, Introduction Générale.

99. *See id.*: “Les textes proposés ne sont pas une simple codification de la jurisprudence. . . .”

100. This is particularly remarked when commenting the introduction of *imprévision*. For Belgium, *see* Belgian Draft of 2019, *supra* note 6, Commentaire des articles, art. 5.77, “Le changement de circonstances est pris en compte par toutes les législations modernes (voy. p. ex. art. 89 CESL; art. 1196 C. civ. fr.; art. 313 BGB; art. 6:258 NBW; art. III.1:110 DCFR; art. 6.2 des PICC. . . .)” For France, *see Rapport au Président*, *supra* note 7: “La France est l’un des derniers pays d’Europe à ne pas reconnaître la théorie de l’imprévision comme cause modératrice de la force obligatoire du contrat. Cette consécration, inspirée du droit comparé comme des projets d’harmonisation européens. . . .”

economy.¹⁰¹ Hence, although this is a general goal of the reform, which is not expressly stated in the comment to article 1195, one may wonder whether the introduction of *imprévision* modernises the Civil Code in the sense that it reflects the financial and societal needs of commercial parties. Ultimately, it is unclear if the new provisions on *imprévision* are meant to update French and Belgian law in light of national and transnational legal developments or if they constitute a concrete response to the commercial needs of businesses.¹⁰² In the following paragraphs, the question of the modernisation of the French and Belgian Civil Codes through the introduction of the doctrine of *imprévision* will be analysed from both points of view.

A. Modernisation Through Harmonisation

In the first sense in which modernisation can be understood, the French Report to the President of the Republic makes a vague reference to “comparative law” and to “European harmonisation projects” as the sources of inspiration of the new solution.¹⁰³ Along the same lines, the commentary to draft article 5.77 in the Belgian Draft of 2019, after having highlighted that all modern legislations take into account *imprévision*, lists by way of example several domestic jurisdictions (France, Germany, the Netherlands) as well as international and European harmonisation projects (Common European Sales Law,¹⁰⁴ DCFR, PICC). However, it is stated that the Belgian provision is based particularly on the CESL and French law.¹⁰⁵ If modernisation is intended to keep up with the legal developments of other jurisdictions, it is necessary to compare the French and Belgian solutions with those adopted by the national, international, and European instruments mentioned in the respective reform projects.

101. See *Rapport au Président*, *supra* note 7.

102. Pédamon, *supra* note 68, at 10.

103. See *Rapport au Président*, *supra* note 7; Ancel, *supra* note 4, at para. 41.

104. Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law [hereinafter, CESL].

105. Belgian Draft of 2019, *supra* note 6, Commentaire des articles, art. 5.77.

Overall, the idea of judicial intervention to correct a contractual imbalance, caused by unforeseeable changed circumstances, by means of revision or termination of the contract reflects a common trend both in domestic jurisdictions¹⁰⁶ and in international and European instruments.¹⁰⁷ France was, and Belgium still is, one of the last countries to refuse to apply the theory of *imprévision*, together with a number of other legal systems based on the *Code Napoléon* (such as Luxemburg and Quebec) and common law jurisdictions.¹⁰⁸ Moreover, when it comes to renegotiation, France and Belgium proved to be one step ahead of other domestic jurisdictions, such as Germany, Italy, and The Netherlands (among others), that do not contain such a requirement.¹⁰⁹ Although they are not imposed upon the parties (as in the CESL, DCFR, and PECL), the French and Belgian provisions attach great importance to renegotiations, as they are a necessary condition to then be able to request judicial intervention. For what specifically concerns the conditions for *imprévision*, if we exclude the requirement that the change not be attributable to the aggrieved party (draft article 5.77),¹¹⁰ the other conditions shared by the French and Belgian provisions (excessive onerousness of the

106. See these civil codes: The Netherlands (art. 6:258), Germany (§313), Greece (art. 388), Egypt (art. 147), Turkey (art. 138), Portugal (art. 437), Argentina (old Civil Code) (art. 1198(2)), Bolivia (art. 581–583), Brazil (art. 478–480), Paraguay (art. 672), Peru (art. 1440–1444), Colombia (art. 868), El Salvador (art. 994), and Guatemala (art. 688). Art. 1467 of the Italian Civil Code deserves a particular mention: although the provision only allows the aggrieved party to request judicial termination, the other party may avoid termination by offering an equitable modification of the contractual terms. However, the Italian Supreme Court has interpreted this provision as to allow “the judge’s intervention in the adaptation process by stating that if the offer is inadequate, the judge may determine an equitable revision of the contract,” see M. Kovac & C. Poncibò, *Towards a Theory of Imprévision in the EU?*, 14 EUR. REV. CONTRACT L. 357 (2018).

107. See art. 6:111 PECL; art. 6.2.3 PICC; art. III.-1:110 DCFR; art. 89 CESL; art. 157 European Contract Code (Code Gandolfi); art. 7:101 Principes contractuels communs de l’Association Capitant (PCC).

108. Ancel, *supra* note 4, at para. 34.

109. Lutz, *supra* note 23, at 112; Pédamon, *supra* note 87, at 122.

110. It is noteworthy that this requirement is absent not only in the CESL and in the French Civil Code, which are described as a direct source of inspiration of the Belgian provision, but also in any of the provisions listed in the commentary to the Belgian Draft of 2019, *supra* note 6, art. 5.77.

performance, unforeseeability of the event, and non-acceptance of the risk) are in line with those found in many of the above-mentioned instruments.¹¹¹ Therefore, in this sense, the introduction of *imprévision* can be deemed as an element of modernisation of French and Belgian law.

B. Modernisation as the Reflection of the Interests of Commercial Parties

Alternatively, the modernisation of the law can be conceived as the operation aimed at accommodating new economic and social needs. The logic behind the modernisation of the French Civil Code, as stated in the Report to the President of the Republic, was to increase the attractiveness of French law to international business. In order to do this, the new provisions need to constitute a concrete response to the commercial needs of international companies. In light of the strong criticism that has followed the introduction of *imprévision*,¹¹² one may wonder whether the new provisions pay heed to the actual needs of companies and investors. Not only scholars, but also practitioners warned about the impact of such a reform. The working group set up by DLA Piper France on the reform of the Civil Code gathered many practitioners who discussed the proposed innovations. The doctrine of *imprévision*, in particular, was criticised for allowing courts to rewrite contracts, as this clashes with the normal tasks envisioned for a civil law judge and threatens legal

111. This is the structure followed by art. 1467 Italian Civil Code, art. 6:111 PECL; art. III.-1:110 DCFR; art. 89 CESL. Art. 6.2.2 PICC and art. 313 BGB feature the requirements on foreseeability and risk-taking, however they diverge when it comes to the impact of changed circumstances on the situation of the parties. Art. 6.2.2 PICC refers to a fundamental alteration of the contractual equilibrium as a result of the event, while art. 313 BGB mentions a performance which cannot reasonably be expected to be upheld without alteration, rather than a performance rendered excessively onerous.

112. Kovac & Poncibò, *supra* note 106, at 353; P. Stoffel-Munck, *Les clauses abusives: on attendait Grouchy*, 240 DROIT ET PATRIMOINE 56 (2014); Y. M. Laitier, *Les règles relatives à l'inexécution des obligations contractuelles*, 21 JCP G SUPPL 52 (2015).

certainty.¹¹³ Other risks brought by the doctrine of *imprévision* would be the “possible exploitation by dishonest contracting parties, attempting evasion from unfavourable contracts, the subsequent contamination effect of the termination or revision of contracts, and the destabilisation of contracting parties’ anticipations.”¹¹⁴ The fear of businesses towards the uncertainty brought by the doctrine of *imprévision* makes the assumption that this innovation answers the commercial needs of companies less plausible. However, some additional considerations are necessary. The desire of the French legislator to increase the attractiveness of French law was aimed at facilitating its application in international law contracts.¹¹⁵ Thus, it seems that the target of the reform is primarily companies operating cross-border, which are aware of the risk of unforeseen changes of circumstances in international trade.¹¹⁶ Especially in long-term contractual relationships, international commercial parties prefer to safeguard their lasting and productive relationship, in order to preserve their mutual interests.¹¹⁷ Therefore, the commercial need to remedy a contractual imbalance (and have the contract revised) is perceived at the international level. That being said, it is also true that large companies operating internationally have a preference for regulating themselves the consequences of unforeseen circumstances by including the so-called hardship clauses within their

113. DLA Piper & Cercle Montesquieu, *Groupe de travail sur le projet d’ordonnance et la réforme du Code civil, Travaux depuis février 2015*, 204 (2016).

114. A. Pietrancosta, *Introduction of the Hardship Doctrine (“théorie de l’imprévision”) into French Contract Law: A Mere Revolution on the Books?*, 3 RTDF 1 (2016).

115. See *Rapport au Président*, *supra* note 7.

116. E. Zaccaria, *The Effects of Changed Circumstances in International Commercial Trade*, 9 INT’L TRADE & BUS. L. REV. 136 (2005):

The risk of hardship is virtually inevitable in the field of international trade, as the economic and political context is subject to continual flux and rapid change. A great number of factors may intervene, such as an alteration in the political situation of a nation, an unexpected price rise in raw materials or a sudden depreciation of currency. Naturally, the longer the contract lasts, the greater the risk that circumstances may change. As international contracts generally last a long time this risk is ever present.

117. *Id.*

agreements, in order to avoid any judicial interference.¹¹⁸ However, small and medium-sized enterprises usually lack the know-how to address in detail hardship situations through sophisticated contractual clauses. Consequently, it is fair to say that new article 1195 is a response to the interests of the latter enterprises, which in the absence of a default provision on unforeseen circumstances would bear the financial consequences of the contractual imbalance.¹¹⁹ At the same time, as highlighted during the parliamentary debate,¹²⁰ the non-mandatory nature of new article 1195 does not affect the commercial needs of large corporations, which may continue to regulate *imprévision* in the contract, therefore ruling out the application of the provision. At least in theory, the introduction of *imprévision* pays heed to the needs of small corporations, without impairing those of large companies, and therefore, in this limited sense, modernises the Civil Code. However, in practice much will depend on the bargaining power of small and medium-sized enterprises. Indeed, when they trade with large corporations, the latter may impose their contractual power to opt-out from the rules on *imprévision*. Hence, to cope with possible contractual abuse, the legislators could have followed the example of article 7:102 of the “Common Contractual Principles” by the Henri Capitant Association, according to which “[a] clause which would apportion to one of the parties the essential risks of a change of circumstances is valid only if it does not entail unreasonable consequences for that party.”¹²¹

118. Pédamon, *supra* note 68, at 11, 13, 17.

119. *Id.* at 11.

120. As remarked by the member of the Senate François Pillet, judicial intervention will be limited due to the fact that commercial parties who benefit from legal advice will systematically exclude the provision from the contract.

121. See PROJET DE CADRE COUUMUN DE RÉFÉRENCE : PRINCIPES CONTRACTUAL COMMUN (SLC 2008); see also B. Fauvarque-Cosson, *Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?*, in *THE CODE NAPOLÉON REWRITTEN: FRENCH CONTRACT LAW AFTER THE 2016 REFORMS 200* (J. Cartwright & S. Whittaker eds., Hart Publ'g 2017). The author notes that in France, art. 1171 of the Civil Code on unfair terms applies exclusively to standard-form contracts, only the control on contract terms prescribed by art. L 442-6 I 2 of the Commercial Code might be able to exclude these opt-out clauses.

IV. THE INTRODUCTION OF *IMPRÉVISION* IN LIGHT OF THE GOAL OF LEGAL CERTAINTY

The second goal of the French and Belgian reforms of contract law was to attain more legal certainty (*sécurité juridique*). This term can assume different connotations depending on the various legal systems.

A. The Disputed Meaning of “Legal Certainty”

European countries tend to believe that there is legal certainty when the law is codified, as opposed to English contract law, where ensuring legal certainty means giving effect to the contract and to honest parties’ reasonable expectations.¹²²

The European approach to legal certainty is visible within the French Revision of 2016 and the Belgian Draft of 2019: both stressed that the main threat to legal certainty is the development of rules by courts, interpreting or even contradicting the wording of their civil codes.¹²³ Therefore, codifying the judicial innovations and enacting clear rules was considered the solution to prevent the judicial creation of law and to ensure legal certainty.

The commentary to draft article 5.77 in the Belgian draft of 2019 states that the inclusion of *imprévision* also contributes to legal certainty, as it is in line with the jurisprudence of the *Cour de cassation* which tends to accept it gradually. However, as it has been shown,¹²⁴ the Belgian *Cour de cassation* has never accepted in principle the theory of *imprévision*, but simply mitigated the principle of the binding force of contracts on grounds of abuse of rights. Moreover, the commentary to draft article 5.77 makes reference to two judgements rendered by the *Cour de cassation*, where the law applicable was the CISG and it was supplemented by the PICC’s provisions on

122. H. G. BEALE ET AL., CASES, MATERIALS AND TEXT ON CONTRACT LAW 8-11 (Hart Publ’g 2019).

123. See *supra* Introduction, at p.5.

124. See *supra* Section II(B).

hardship.¹²⁵ While, on the one hand, these judgements show a modern approach by Belgian judges towards *imprévision* and the transnational instruments on international contracts, on the other hand, they do not prove an internal openness on the same issue. The same applies to France, where the *Cour de cassation* occasionally employed various legal arguments to loosen the principle of *pacta sunt servanda*. Therefore, the introduction of *imprévision* cannot be considered a codification of jurisprudence. Nevertheless, its codification might promote legal certainty, according to the European connotation, as it eliminates the uncertainty of commercial parties, also in light of the fluctuating and uncertain jurisprudence, related to the possibility to obtain relief in the event of hardship.

By contrast, following the approach of English contract law, the French and Belgian provisions might well be a threat to legal certainty, both for the possibility of the judge to adapt the contract and for the broad and vague drafting of the provisions. According to English contract law, the interplay between the principles of freedom of contract and *pacta sunt servanda* favours the parties' decision-making over the judicial one.¹²⁶ It is precisely the power of the courts to interfere with the contractual relationship that mostly worries businesses, since it represents a significant source of uncertainty as opposed to holding parties to the agreed terms.¹²⁷ Moreover, the common law also links legal certainty to the precise and detailed regulation of the situations in which a law can be applied.¹²⁸ For an English lawyer, the French and Belgian provisions might pose problems of legal certainty with regard to the conditions necessary to trigger their application. The broad way in which the legal propositions have been drafted raises concerns in relation to the possible

125. Cass, 19 June 2009, Scafom International BV v Lorraine Tubes SAS, no. C.07.0289.N.; Cass., 12 Apr. 2013, *Pas.*, 2013, 863.

126. S. Whittaker, *Contracts, Contract Law and Contractual Principle*, in THE CODE NAPOLÉON REWRITTEN: FRENCH CONTRACT LAW AFTER THE 2016 REFORMS, *supra* note 121, at 31.

127. Rowan, *supra* note 19, at 809.

128. Whittaker, *supra* note 126, at 32.

interpretation by French and Belgian courts, in the absence of a well-established line of cases on the issue.¹²⁹

Since studies have shown that the judicial revision of contracts does not impact legal certainty,¹³⁰ the focus of this section will be on the possible uncertainties related to the requirements for *imprévision* under new article 1195 and draft article 5.77.

B. Time of the Change of Circumstances

The first doubt concerns the fact that, unlike provisions which clarify that the event causing hardship must occur after the conclusion of the contract,¹³¹ the French and Belgian ones are silent on the issue. Sometimes, an event may occur before the contract is concluded but the parties are not aware of its existence when they sign the agreement. The absence of this requirement would, *prima facie*, lead to the conclusion that article 1195 and draft article 5.77 cover these situations. Such interpretation would be confirmed by the 2003 ICC-Hardship Clause, which does not feature the above-mentioned requirement and explains that:

[T]his Clause is not limited to situations where the events rendering performance excessively onerous occurred after the time the contract was concluded . . . on the ground that a party might wish to invoke the Clause in circumstances where it simply did not know – and could not have known – of the existence of the event at the time of the conclusion of the contract.¹³²

Therefore, the French and Belgian legislators could have perhaps been more precise. In order to rule out the existing doubts, they could have either stated that the event must occur after the conclusion of the contract, or, following the example of the PICC, specified

129. Lutz, *supra* note 23, at 109.

130. M. Mekki, *Hardship and Modification (or 'Revision') of the Contract*, in *TOWARDS A EUROPEAN CIVIL CODE 7* (A. S. Hartkamp ed., Kluwer 2011).

131. See art. 6:111 PECL; art. III.-1:110 DCFR; art. 89 CESL; art. 313 BGB.

132. See International Chamber of Commerce, *ICC Force Majeure Clause 2003/ICC Hardship Clause 2003* 11, 17, available at <https://perma.cc/UU6G-76N4>.

that there is hardship when “the events occur or become known to the disadvantaged party after the conclusion of the contract.”¹³³

C. Manifestations of Imprévision

The second dilemma concerns the situations which in principle can amount to *imprévision*.¹³⁴ While draft article 5.77 makes clear that performance can become excessively onerous due to either an increase in the cost of performance or a decrease in the value of the counter-performance, article 1195 merely refers to events rendering performance excessively onerous for a party. On the surface, it seems that article 1195 takes into account solely events making performance more costly, excluding the second set of events. It has been suggested that onerousness should be deemed as a benefit-cost ratio which negatively affects one party, and therefore should be viewed in terms of the difference between the value of the performance rendered and the value of the counter-performance.¹³⁵ In doing so, article 1195 would also cover situations where, even though the cost of executing the contract is unaltered for one party, this cost can no longer be absorbed to the same extent due to the drop in the value of the compensation received.¹³⁶ Moreover, the international and European instruments from which the French legislator has drawn inspiration,¹³⁷ make clear that both situations fall within their scope. It is ultimately unclear whether the French legislator intended to reduce the ambit of new article 1195 or whether it considered the clarification unnecessary. However, according to the maxim of interpretation *ubi lex non distinguit, nec nos distinguere debemus* (i.e., “where the law does not distinguish, nor the interpreter must

133. Art. 6.2.2 PICC.

134. For a discussion on the possibility for art. 1195 to cover situations of loss of interest in the contract, see Ancel, *supra* note 4, at para. 77.

135. P. Stoffel-Munck, *L'imprévision et la réforme des effets du contrat*, RDC 30 (2016).

136. O. DESHAYES ET AL., RÉFORME DU DROIT DES CONTRATS, DU RÉGIME GÉNÉRAL ET DE LA PREUVE DES OBLIGATIONS 396 (LexisNexis 2016).

137. See art. 6:111 PECL; art. III.-1:110 DCFR; art. 89 CESL; art. 6.2.2 PICC.

distinguish”), the general formulation of a legal text leads to its general application. Therefore, it seems fair to conclude that the French formula, vast as it is, includes the two Belgian hypotheses.

D. Excessive Onerousness of the Performance

Another problem in the interpretation of new article 1195 and draft article 5.77 concerns the meaning of “excessively” onerous. The wording adopted shows that not any difficulty in performing the contract will trigger the application of the provisions on *imprévision*. The Belgian provision, emulating international and European harmonisation projects,¹³⁸ is more precise than the French one in this respect, as it prescribes that “[e]ach party must fulfil its obligations even when the execution has become more onerous.”¹³⁹ Even if Article 1195 does not contain such clarification, it is evident from its wording that it will cover only exceptional situations, as *imprévision* is conceived as an exception to the binding force of the contract.¹⁴⁰ Nevertheless, neither article 1195 nor draft article 5.77 contain any indication as to how to determine the excess. Surely, there must be a significant gap between the benefit received and the cost incurred. However, the excessive onerousness might be defined in different ways. One option could be to distinguish mere onerousness from excessive onerousness in the following manner: a performance would be merely more onerous when “the costs of performance exceed the contract price but not yet the value of performance to the promisee”¹⁴¹; excessively onerous would be when the “costs of performance increase to a level where those costs exceed the initial net value of performance.”¹⁴² Alternatively, the excessiveness might be

138. *Id.*

139. Translated by the author.

140. See *Rapport au Président*, *supra* note 7, this is clear from the report, where *imprévision* is defined as a moderating cause of the binding force of the contract.

141. M. Kovac, *Frustration of Purpose and the French Contract Law Reform: The Challenge to the International Commercial Attractiveness of English Law?*, 25 MAASTRICHT J. EUR. & COMP. L. 301 (2018).

142. *Id.* at 300.

defined by indicating a threshold percentage that must be met. This concept is not new either to the French and Belgian legislators¹⁴³ or to the French administrative jurisprudence.¹⁴⁴ A threshold for hardship featured also the PICC, from which France and Belgium drew inspiration: the Official Comment on the 1994 edition of the PICC stated that “an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a ‘fundamental’ alteration.”¹⁴⁵ However, as of the PICC’s 2004 edition, the 50% minimum threshold was removed because, as shown in the preparatory works, it was criticized in scholarly writings as being too low and arbitrary.¹⁴⁶ The absence of any directive or threshold to determine the excessive onerousness leads towards a factual evaluation by the judge on a case-by-case basis.¹⁴⁷ This raises the question whether the excessive onerousness will be measured, objectively, against the counter-performance or, subjectively, against the parties’ conditions. In the first case, courts will assess the balance between

143. For France, see art. L. 411-13, French Rural Code:

Le preneur ou le bailleur qui, lors de la conclusion du bail, a contracté à un prix supérieur ou inférieur d’au moins un dixième à la valeur locative de la catégorie du bien particulier donné à bail, peut, au cours de la troisième année de jouissance, et une seule fois pour chaque bail, saisir le tribunal paritaire qui fixe, pour la période du bail restant à courir à partir de la demande, le prix normal du fermage selon les modalités ci-dessus.

For Belgium, see art. 6, Law of Apr. 30, 1951 on Commercial Leases:

A l’expiration de chaque triennat, les parties ont le droit de demander au juge de paix la révision du loyer, à charge d’établir que, par le fait de circonstances nouvelles, la valeur locative normale de l’immeuble loué est supérieure ou inférieure d’au moins 15 p.c. au loyer stipulé dans le bail ou fixé lors de la dernière révision.

144. See Direction des Affaires Économiques et Internationales du Ministère de l’équipement (France), note du 18 mai 2004 de la DAEI relative à la hausse du cours de l’acier, 3, available at <https://perma.cc/RS8N-23C8>. The note stated that judgements rendered since 1974 accept a disruption of the general economy of the contract when there is a 10% increase of the initial amount of the contract.

145. UNIDROIT Principles of International Commercial Contracts with Official Commentary, 1994, art. 6.2.2 [hereinafter, PICC Official Commentary].

146. International Institute for the Unification of Private Law, Working Group for the Preparation of Principles of International Commercial Contracts, *Consolidated Edition of Part I and Part II of the Principles of International Commercial Contracts: Decided Amendments & Open Questions Memorandum* (Rome, Apr. 2013), available at <https://perma.cc/K7AS-SA9G>.

147. P. Stoffel-Munck, *La révision du contrat par l’arbitre à la lumière de l’article 1195 du Code civil*, 1 REV. ARB. 58 (2017).

the performances or the obligations arising from the contract, while in the second case courts will consider the impact of the changed circumstances on the financial situation of the party, even though there is no disproportion with the counter-performance received.¹⁴⁸ While the French provision is completely silent on the issue, draft article 5.77 suggests that the aggrieved party's personal situation might be taken into account. Indeed, the Belgian provision refers to a change of circumstances which makes the execution of the contract excessively onerous in a way that "no one may reasonably demand it." This wording recalls the subjective approach taken by article 313 BGB and article 6:258 of the Dutch Civil Code. The German provision refers to a change of circumstances so burdensome that "one of the parties cannot reasonably be expected to uphold the contract without alteration," while the Dutch one speaks of "unforeseen circumstances of such a nature that the opposite party, according to standards of reasonableness and fairness, may not expect an unchanged continuation of the agreement." As it has been noted,¹⁴⁹ these broader formulations go beyond the mere imbalance between the performances and could allow courts to take into consideration whether maintaining the contract would lead to the financial ruin of the party.

E. Unforeseeability of the Event

Moreover, the French and Belgian provisions raise further concerns regarding the condition of unforeseeability. Both article 1195 and draft article 5.77 require that the change of circumstances was "unforeseeable at the time of the conclusion of the contract." On the other hand, many of the above-mentioned harmonisation projects link the unforeseeability to a standard of reasonableness, by requiring that the event could not have been reasonably foreseeable at the

148. Ancel, *supra* note 4, at para. 76.

149. *See id.* at para. 78.

moment the contract was concluded.¹⁵⁰ This departure from the standard of reasonableness is even more remarkable with respect to new article 1195. Indeed, the new article 1218 of the French Civil Code on force majeure defines an unforeseeable event as one which “could not reasonably be foreseen.” This difference in the drafting of the provisions poses problems of interpretation both with regard to the object of foreseeability and the modality of its assessment.¹⁵¹ The first problem concerns what has to be unforeseeable: whether the nature of the event only or also its extent. If the wording of the French and Belgian provisions was to be interpreted in the first sense, it could lead to an assessment of the object of foreseeability in absolute terms, reducing the scope of application of the rules.¹⁵² Indeed, since everything can be foreseeable *in abstracto*, the rise in the costs of performance can in principle always be anticipated by the parties.¹⁵³ A different question is whether, *in concreto*, costs increases of a certain magnitude can reasonably be anticipated at the moment of conclusion of the contract. A relativization is necessary because even if an event is in principle foreseeable (e.g., the rise in the cost of raw materials) its extent can well be reasonably unforeseeable (e.g., an extraordinary and unprecedented rise in those costs).¹⁵⁴ Otherwise, as it has been noted,¹⁵⁵ parties would have to bear the consequences of an event which could in principle have been foreseen, even if the worst-case scenario was considered.

150. See art. 6:111 PECL; art. III.-1:110 DCFR; art. 6.2.2 PICC.

151. Ancel, *supra* note 4, at para. 81.

152. *Id.*

153. J. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles*, 5 TUL. J. INT'L. & COMP. L. 16-17 (1997):

Anyone who has read a bit of history or who has lived for three or more decades of the twentieth century can foresee, in a general way, the possibility of war, revolution, embargo, plague, terrorism, hyper-inflation and economic depression, among the other horrors that have afflicted the human race. If one reads science fiction, one learns of the possibility of new terrors that have not yet afflicted us, but involve possibilities that are not pure fantasy.

154. G. CHANTEPIE & M. LATINA, *LE NOUVEAU DROIT DES OBLIGATIONS, COMMENTAIRE THÉORIQUE ET PRATIQUE DANS L'ORDRE DU CODE CIVIL* 473 (Daloz 2018).

155. *Id.* at 474.

Secondly, this requirement raises the question of how to conduct the assessment of unforeseeability, whether objectively or subjectively. In other words, whether the change of circumstances should be objectively unforeseeable for any reasonable person under the same conditions or whether it is enough that the parties did not consider the occurrence of the event.¹⁵⁶ A definition of unforeseeability along with the standard of reasonableness would surely point towards an objective assessment,¹⁵⁷ but the present formulation might have courts consider to what extent the parties actually foresaw the occurrence of the changed circumstances.¹⁵⁸ In any case, the absence of the adverb “reasonably” does not automatically entail a subjective assessment of unforeseeability, as ample discretion is left to courts in conducting this test.¹⁵⁹

On a more general note, it is not surprising that the new article 1195, even more than draft article 5.77, does not provide definitions or a detailed regulation of its conditions of application. The French legislator usually leaves this task to courts and scholars, as its primary concern is to adopt clear and general legal propositions, devoid of any technicality, which are comprehensible to ordinary citizens.¹⁶⁰ This is where the contrast between France and common law jurisdictions in respect to legal certainty becomes more evident: while a French lawyer would deem such clear and accessible rules to promote *sécurité juridique*, an English lawyer would consider them to be against it because of their uncertain content which gives courts wide margins of appreciation.¹⁶¹

156. *Id.*

157. Stoffel-Munck, *supra* note 147, at 60-61; Ancel, *supra* note 4, at para. 81; CHANTEPIE & LATINA, *supra* note 154, at 474.

158. Pédamon, *supra* note 87, at 120.

159. Fauvarque-Cosson, *supra* note 121, at 197.

160. BEALE ET AL., *supra* note 122, at 10.

161. *Id.*

V. THE INTRODUCTION OF *IMPRÉVISION* IN LIGHT OF THE GOAL OF CONTRACTUAL JUSTICE

The above-mentioned objectives of the French and Belgian reforms coexist with the goal of contractual justice, which needs to be affirmed.

A. The Meaning of Contractual Justice

In France, the idea of contractual justice has been developed by way of two grand legal theories: autonomy of the will and contractual solidarity.¹⁶² The school of autonomy of the will believes that since parties freely determine the content of the contract, there can be no exceptions to its binding force. The doctrine of contractual solidarity, which was a response to the first, holds that the idea of autonomy as a general principle is curtailed by a set of exceptions based on contractual solidarity, among which is the doctrine of *imprévision*.¹⁶³ Through the lenses of solidarity, contractual relationships are not perceived anymore as bargains to make as much profit as possible, but rather as “a kind of microcosm, a small society where everyone must work towards a common goal.”¹⁶⁴ Hence, a duty of cooperation is imposed upon the parties in order to achieve said common goal.¹⁶⁵ Moreover, unlike the school of autonomy of the will, which believes that only the contractual parties can judge the content of the contract, the person responsible for ensuring solidarity against the letter of the contract, in the silence of the legislator, is the judge, who in the event of hardship may step in to correct the contractual imbalance by terminating or adapting the agreement.¹⁶⁶

162. Cédras, *supra* note 58.

163. *Id.*

164. R. DEMOGUE, 6 TRAITÉ DES OBLIGATIONS EN GÉNÉRAL 9 (Rousseau 1931).

165. Y. BUFFELAN-LANORE ET AL., DROIT CIVIL : LES OBLIGATIONS 290 (Sirey 2018).

166. Cédras, *supra* note 58.

It is believed that considerations of contractual justice might clash with the goal of legal certainty pursued by the reforms.¹⁶⁷ Legal certainty, at least for common law lawyers, aims not only at the precise and detailed regulation of the situations in which the law can be applied, but also at allowing parties to clearly establish their duties and performances.¹⁶⁸ Consequently, the judicial interference with contractual terms, based on grounds of contractual justice, is deemed to sacrifice pragmatism and transactional certainty.¹⁶⁹ However, the French and Belgian legislators consider the two goals compatible. In France, this is visible in the new chapter of the Civil Code entitled “Introductory Provisions,” where freedom of contract (article 1102), binding force of the contract (article 1103) and good faith (article 1104) are stated as three fundamental principles. As explained by the Report to the President of the Republic, this choice expresses one of the essential objectives pursued by the French Revision of 2016: to find a balance between contractual justice and autonomy of the will.¹⁷⁰ The Belgian Draft of 2019 also aims at finding a harmony between these principles, as one paramount objective of the proposal is to “modernize the balance between the autonomy of the parties and the role of the judge as guardian of the interests of the weaker party.”¹⁷¹

The idea behind contractual justice is to maintain the contractual equilibrium within the transaction, by allowing the judge to balance or rebalance the contract.¹⁷² In addition to the provisions on

167. F. CHÉNÉDÉ, *LE NOUVEAU DROIT DES OBLIGATIONS ET DES CONTRATS : CONSOLIDATIONS, INNOVATIONS, PERSPECTIVES* 9 (Dalloz 2018).

168. Whittaker, *supra* note 126, at 32.

169. Rowan, *supra* note 19, at 809. These considerations of contractual justice to the detriment of legal certainty are traditionally indicated as one of the main reasons why French law is less attractive to foreign companies and investors as compared to common law systems.

170. *See Rapport au Président*, *supra* note 7.

171. Belgian Draft of 2019, *supra* note 6, Resumé.

172. BUFFELAN-LANORE ET AL., *supra* note 165, at 414; P. Stoffel-Munck, *Les enjeux majeurs de la réforme “Attractivité, Sécurité, Justice”*, in *RÉFORME DU DROIT DES CONTRATS ET PRATIQUE DES AFFAIRES* 22 (P. Stoffel-Munck ed., Dalloz 2015); Whittaker, *supra* note 126, at 50.

imprévision, the Belgian proposal also achieves this result by regulating abuse of circumstances (draft article 5.41),¹⁷³ while in France, after the 2016 reform, contractual justice is pursued, among others, through the articles on violence in the case of the abuse of a state of dependence (article 1143) and unfair terms in standard contracts (article 1171).¹⁷⁴

For what specifically concerns the French and Belgian provisions on *imprévision*, the relation with the goal of contractual justice can be found in the *ratio juris* of the former. Namely, that “to insist on the binding force of contract in such extreme situations, which may cause several difficulties on the disadvantaged party is judged as obviously unfair.”¹⁷⁵ Therefore, when a supervening change of circumstances making performance excessively onerous for one party occurs, courts step in to correct the serious contractual imbalance that arises during the execution of the contract. However, as analysed above, the broad wording adopted by the French and Belgian legislators when drafting the requirements for *imprévision* may trigger different judicial interpretations. Therefore, these requirements will be analysed in the following sections with a view to finding the interpretation that better suits the goal of contractual justice.

173. Belgian Draft of 2019, *supra* note 6, Introduction Générale : [L]e juge se verra investi de pouvoirs lui permettant de corriger des situations de déséquilibre contractuel (par exemple, lorsque l'économie du contrat est bouleversée à la suite de circonstances nouvelles imprévisibles – la théorie de l'imprévision – ou lorsque les prestations sont, dès le départ, affectées d'un déséquilibre manifeste par suite d'un abus par une partie de la position de faiblesse de l'autre partie – l'abus de circonstances).

174. For an analysis of the provisions of the French Civil Code pursuing contractual justice, *see* Whittaker, *supra* note 126, at 50-54.

175. B. BAŞOĞLU, THE EFFECTS OF FINANCIAL CRISES ON THE BINDING FORCE OF CONTRACTS - RENEGOTIATION, RESCISSION OR REVISION 9 (Springer 2016). Although the author is referring to financial crisis, the *ratio juris* can be extended to all the events causing hardship.

B. The Contrast Between a Narrow Interpretation of the Requirements and the Goal of Contractual Justice

To begin with, an interpretation of the requirements for *imprévision* under the new article 1195 and draft article 5.77 that conforms to the goal of contractual justice is one which avoids that situations of contractual imbalance evade the scope of the rules at issue. In other words, interpretations which excessively narrow down the scope of the provisions on *imprévision*, to the detriment of the party affected by the supervening event, run counter to the realisation of contractual fairness.

1. Time of the Change of Circumstances: The Relationship Between the Doctrine of Imprévision and the Doctrine of Mistake

As it has been pointed out above, the first uncertainty concerns the possibility for the French and Belgian provisions to cover not only events which occur after the conclusion of the contract, but also those occurring before the contract is concluded when the parties are not aware of their existence as they sign the agreement. If the absence of an express requirement in the first sense points towards the inclusion of the latter situations within article 1195 and draft article 5.77, the same conclusion must be reached on grounds of contractual fairness. These provisions require a change of circumstances that was unforeseeable at the time of contract conclusion. This change does not necessarily need to be factual but can also concern the intellectual considerations of the parties.¹⁷⁶ Therefore, when the parties could not know of the existence of the event causing hardship at the moment of contract conclusion, and learn about it only later in time, there is a change of circumstances under article 1195 and draft article 5.77. Since such changes create a contractual imbalance just like any other hardship situation occurring after the conclusion of

176. DESHAYES ET AL., *supra* note 136, at 391.

the contract, it would be against contractual justice to exclude them from the scope of the provisions. However, such solution might clash with the fact that the unawareness of existing circumstances at the time of contract conclusion has traditionally been dealt with under the doctrine of “mistake” or “error” (a more civilian term) as a vice of consent.¹⁷⁷ This doctrine, which is enshrined in article 1130 and following articles of the French Civil Code¹⁷⁸ and article 1110 of the Belgian Civil Code,¹⁷⁹ refers to situations where a party has given its consent due to misrepresentation of either the obligations arising out of the contract or of the identity of the other contracting party.¹⁸⁰ The mistaken party is entitled to obtain the relative nullity of the contract provided that the misrepresentation was decisive for its consent.¹⁸¹ Consequently, when a party signs an agreement just because that party ignores the real circumstances, the doctrine of

177. Ancel, *supra* note 4, at para. 69. The author argues that art. 1195 should be interpreted as not covering events already existing at the moment of the conclusion of the contract but ignored by the party, as these situations are covered by the doctrine of “mistake.”

178. In particular, *see* Cartwright et al., *supra* note 86, which provides the following translation of art. 1132: “Mistake of law or of fact, as long as it is not inexcusable, is a ground of nullity of the contract where it bears on the essential qualities of the act of performance owed or of the other contracting party.”

179. Art. 1110, Belgian Civil Code:

L’erreur n’est une cause de nullité de la convention que lorsqu’elle tombe sur la substance même de la chose qui en est l’objet.
Elle n’est point une cause de nullité, lorsqu’elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention.

180. F. TERRÉ ET AL., *DROIT CIVIL, LES OBLIGATIONS* 309 (Daloz 2018); Y. BUFFELAN-LANORE ET AL., *supra* note 165, at 299; C. Goux, *L’erreur, le dol et la lésion qualifiée : analyse et comparaisons*, in *LA THÉORIE GÉNÉRALE DES OBLIGATIONS* 24-25 (P. Wery ed., Formation permanente CUP 1998).

181. For France, *see* J. Cartwright et al., *supra* note 86, which provides the following translation of art. 1130: “Mistake, fraud and duress vitiate consent where they are of such a nature that, without them, one of the parties would not have contracted or would have contracted on substantially different terms.” For Belgium, *see* P. Van Ommeslaghe, *Examen de jurisprudence (1974 à 1982) - Les obligations*, 6 R.C.J.B. 33 (1986), where the author explains that this is the interpretation of art. 1110 provided by the Belgian *Cour de cassation*. *See also* Belgian Draft of 2019, *supra* note 6, art. 5.38, which codifies the latter interpretation by providing that: “L’erreur n’est une cause de nullité que lorsqu’une partie a, de manière excusable, une représentation erronée d’un élément qui l’a déterminée à conclure le contrat, alors que l’autre partie connaissait ou devait connaître ce caractère déterminant.”

mistake appears more appropriate than the doctrine of *imprévision*, as it allows the mistaken party to deprive its contractual commitment of legal effect. However, a better understanding of the relationship between the doctrine of mistake and that of *imprévision* requires further considerations. Firstly, there are situations in which the doctrine of mistake cannot be applied to the unawareness of hardship situations already existing when the contract was concluded, and therefore no conflict with the doctrine of *imprévision* arises. Indeed, in order to preserve commercial transactions, not every mistake, even if decisive, can make the contract null.¹⁸² In particular, a mistake as to the mere value of performance is irrelevant, unless it bears on the “essential qualities of the act of performance”¹⁸³ (article 1136, French Civil Code) or on “a decisive characteristic of the subject matter of the contract”¹⁸⁴ (draft article 5.38, Belgian draft of 2019). A mistake as to the value is based on the incorrect monetary valuation of the performance, in the sense that the purchase price was either too high or too low compared to the value of the service offered.¹⁸⁵ An example of such mistake can be found in a manufacturing contract where the manufacturer sets the price without knowing that the cost of raw materials has recently increased.¹⁸⁶ Had the manufacturer known about the increased cost, the final price would have been commensurate with the economic value of its performance.

182. TERRÉ ET AL., *supra* note 180, at 310.

183. Cartwright et al., *supra* note 86, art. 1136.

184. Belgian Draft of 2019, *supra* note 6, art. 5.38: “N’est pas davantage une cause de nullité l’erreur qui concerne exclusivement la valeur d’une chose ou d’une prestation ou le prix, à moins qu’elle résulte d’une erreur concernant une caractéristique déterminante de l’objet du contrat.”

185. See TERRÉ ET AL., *supra* note 180, at 324: “Par suite d’une appréciation économique erronée, le vendeur a vendu trop bon marché ou l’acheteur a acheté trop cher.” See also B. MERCADAL, *supra* note 97, at para. 338: “L’erreur sur la valeur . . . repose sur la mauvaise évaluation monétaire de la prestation de la chose qui a conduit à lui donner une valeur minorée ou excessive.”

186. This example is adopted by the commentary on art. 89 CESL to argue that these situations cannot constitute a change of circumstances under the provision. However, such interpretation is in line with the wording of art. 89(3) CESL which requires the change of circumstances to occur after the conclusion of the contract, unlike art. 1195 and Belgian Draft of 2019, *supra* note 6, art. 5.77 which are silent on the issue.

However, this mistake bears on circumstances (the increased cost of raw materials) which are external to the act of performance of the contract and is therefore irrelevant.¹⁸⁷ Nevertheless, the example shows a typical hardship situation determined by the increase in the cost of the manufacturer's performance. As shown above, situations where the party could not know about the hardship event at the moment of contract conclusion may well constitute a change of circumstances under article 1195 and draft article 5.77. Therefore, considering that in this scenario the doctrine of mistake cannot operate, nothing prevents the manufacturer from claiming the application of the doctrine of *imprévision*, provided that the other requirements envisaged by article 1195 and draft article 5.77 are met. Secondly, the doctrine of mistake and that of *imprévision* may overlap in some cases. This possibility may arise when a mistake which is legally relevant pursuant to article 1136 or draft article 5.38, is triggered by the ignorance of an event which may also constitute hardship, and consequently falls on the value of performance. This situation occurs, for instance, when a buyer believes to have acquired building land while it is not legally possible to build on it. In this case, the mistake as to value of the land assumes relevance as it stems from a different mistake on the "essential qualities" (article 1136)¹⁸⁸ or "decisive characteristic" (draft article 5.38)¹⁸⁹ of performance, namely the possibility to build on it. Moreover, the impossibility to build on the acquired land is not only the source of a mistake but also that of a hardship situation, as it decreases the value of the counter-performance received by the buyer. Considering that the supervening knowledge of this impossibility may constitute a change of circumstances under article 1195 and draft article 5.77, the case at issue may be dealt with under both the doctrine of mistake and that of *imprévision*. It is no doubt true that, as pointed out above, the

187. Ancel, *supra* note 4, at para. 69.

188. TERRÉ ET AL., *supra* note 180, at 321.

189. Belgian Draft of 2019, *supra* note 6, Commentaire des articles, art. 5.38. Belgian courts had already taken this position when interpreting art. 1110, *see* Cour d'appel de Liège, 11 Dec. 1989, Act. dr., 1991, 210.

doctrine of mistake is more adequate when dealing with such situations, as the mistaken party presumably prefers to render the contract null. Nevertheless, considering that a mistake produces a relative nullity¹⁹⁰ (which can only be invoked by the mistaken party), the party is probably in the best position to decide which remedy suits its interests best. Therefore, in the example provided, it is conceivable that if the party decides to keep the land despite the impossibility to build on it, it will claim an adaptation of the price rather than bringing an action for nullity.

2. Manifestations of Imprévision

The risk of a restrictive interpretation concerns, in the second place, the events which may constitute hardship under these provisions. As shown in Section IV, while draft article 5.77 refers to events making performance excessively onerous due to either an increase in the cost of performance or a decrease in the value of the counter-performance, the new article 1195 merely refers to events rendering performance excessively onerous for a party. The plain wording of the French provision might lead courts to consider only the first set of events, namely those rendering performance more costly for one party. However, the ratio of new article 1195 is, in line with the goal of contractual justice, to protect the victim of an unforeseen circumstance from contractual imbalances.¹⁹¹ Therefore, as the decrease in the value of the counter-performance received also determines a contractual imbalance, ruling out these situations from the ambit of the French provision would be against the goal of contractual justice, which the new article 1195 purports to achieve.

190. Art. 1131, French Civil Code: “Les vices du consentement sont une cause de nullité relative du contrat.”

191. *Rapport au Président*, supra note 7. The section of the report commenting the introduction of *imprévision* provides the following: “Cette consécration, inspirée du droit comparé comme des projets d’harmonisation européens, permet de lutter contre les déséquilibres contractuels majeurs qui surviennent en cours d’exécution, conformément à l’objectif de justice contractuelle poursuivi par l’ordonnance.”

3. Unforeseeability of the Event

Furthermore, similar problems may arise if courts adopt a restrictive interpretation of the requirement that the change of circumstances be “unforeseeable at the time of the conclusion of the contract,” which features both the French and the Belgian provisions. For what concerns the object of foreseeability, as shown in the previous section, a narrow interpretation would take into account only the nature of the change of circumstances, disregarding its extent. Consequently, even if the event is extraordinary and unprecedented in its size, it would fall out of the scope of the provisions on *imprévision* just because it is in principle foreseeable.¹⁹² However, this would paralyse the application of article 1195 and draft article 5.77, as the aggrieved party would not be able to benefit from the remedies envisaged in the rules, even if the worst-case scenario occurred and the contractual equilibrium was destroyed.¹⁹³ Therefore, compliance with the goal of contractual justice calls for an extensive judicial interpretation of the requirement at issue, which considers not only the nature of the event but also its extent. The necessity to assess the unforeseeability of the event on the basis of the specific circumstances of each case,¹⁹⁴ rather than *in abstracto*, has been acknowledged by the courts of both civil and common law jurisdictions. As for the common law, in the *Alcoa* case¹⁹⁵ the parties had agreed that the contract price would partially escalate in accordance with changes in the Wholesale Price Index-Industrial Commodities (WPI). The District Court of Pennsylvania noticed that while “over

192. CHANTEPIE & LATINA, *supra* note 154, at 474; Ancel, *supra* note 4, at para. 81; DESHAYES ET AL., *supra* note 136, at 393.

193. CHANTEPIE & LATINA, *supra* note 154.

194. See BGE 104 II 314, 317 (1978). In relation to construction works, the Swiss Federal Tribunal has established that, since every work carried out at fixed flat or unit rates presents a risk, “the question as to what difficulties a contractor should take into account in connection with the construction works depends to a large degree on the particularities of the individual case, in particular the type and term of the work contract.”

195. *Aluminum Co. of America v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980), Civ. A. No. 78-598.

the previous twenty years, the Wholesale Price Index had tracked, within a 5% variation, pertinent costs to ALCOA, a 500% variation of costs to Index [being discussed there] must be deemed to be unforeseeable, within any meaningful sense of the word.”¹⁹⁶ The court considered that there was a limit to the foreseeability of price increases and that in the case at hand the inflation rate had exceeded this limit, being “unforeseeable in a commercial sense.”¹⁹⁷ On the civil law side,¹⁹⁸ the Swiss Federal Tribunal held in the *Jolieville* case¹⁹⁹ that when assessing the foreseeability of a change in the legislation the extent of the change plays a fundamental role. Indeed, while changes of law are generally foreseeable in relation to long-term contracts,²⁰⁰ “the extent (i.e., the type and essential contents) of the change of law may not have been specifically foreseeable.”²⁰¹ The case dealt with a change in the planning and building laws that repealed the possibility to build on a land which had been leased for that purpose.²⁰² This change frustrated the purpose of the contract and therefore decreased the value of the performance received,

196. *Id.* at para. 65.

197. *Id.* at para. 76. See L. S. Conrad, *Bernina Distributors, Inc. v. Bernina Sewing Machine Co.: New Grounds for Commercial Impracticability Based on Currency Exchange Rates under Uniform Commercial Code Section 2-615*, 8 N.C. J. INT’L L. & COM. REG. 125 (2016).

198. There are also arbitral awards based on the hardship provisions of civil law countries which considered the extent of the change of circumstances when determining its foreseeability. See ICC Arbitration Case no. 6281 of 26 Aug. 1989 (*Steel bars case*), available at <https://perma.cc/CA75-GYCY>, decided on the basis of Yugoslavian law, where the tribunal stated that the increase in world market prices was “well within the customary margin” and therefore predictable; see also ICC Arbitration Case no. 2763 of June 25, 1980, Y.B. Com. Arb. 1985, 43, decided on the basis of Libyan law, where the tribunal stated that “while the presence of undetected submerged explosives at the bottom of a harbour which was subjected to numerous bombardments during the war, constituted a foreseeable circumstance, the importance and the quantity of explosives found went far beyond what the parties had foreseen.”

199. BGE 127 III 302 (2001).

200. BGE 127 III 300, 305 (2001).

201. C. BRUNNER, 18 FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 165 (Wolters Kluwer 2008).

202. The supermarket chain (Migros) concluded a 100-year building lease agreement with an association of landowners for the purposes of building and operating a shopping mall on their premises.

causing a typical hardship situation for the seller.²⁰³ The court ruled that the specific type and extent of the change of law was not foreseeable, since at the moment of contract conclusion nothing indicated such possibility.²⁰⁴ In France, it appears that the *Cour de cassation* also leans towards this direction.²⁰⁵ In the recent *Dupire Invicta Industrie v. Gabo* case,²⁰⁶ the *Cour de cassation* held that there is hardship when the cost of raw materials considerably increases beyond what the parties could have foreseen.²⁰⁷ In this passage, the *Cour de cassation* implied that there is a limit to the foreseeability of price increases, as not every price increase is *per se* foreseeable but only those within this limit. Furthermore, the court of appeal had previously considered that the aggrieved party assumed the risk that the execution of its performance would become more expensive.²⁰⁸ In the absence of an express risk allocation within the contract, it is indeed presumed that a party assumes the risk of the events which were foreseeable at the moment of contract conclusion.²⁰⁹ However, the *Cour de cassation* criticised the court of appeal, as, in deciding that the aggrieved party assumed such risk, it did not consider if the cost increase of raw materials amounted to abnormal fluctuations in the relevant market.²¹⁰ The *Cour de cassation* rightly implied that it is not possible to assume the risk of those events which, by their extent and impact, cannot be foreseen.

203. See PICC Official Commentary, *supra* note 145, at no. 2.b to art. 6.2.2, according to which the definition of hardship expressly covers such situations.

204. BGE 127 III 302, 306 (2001).

205. Pédamon, *supra* note 68, at 14.

206. Cass. Com., 17 Feb. 2015, nos. 12-29.550, 13-18.956, 13-20.230.

207. See *id.*: “qu’il y a hardship lorsque surviennent des événements qui altèrent fondamentalement l’équilibre des prestations, notamment lorsque le coût des matières premières se trouve considérablement augmenté, au-delà de ce qu’auraient pu prévoir les parties. . . .”

208. Reims, 4 Sep. 2012, no. 11/02698.

209. BRUNNER, *supra* note 201, at 157, 441.

210. Pédamon, *supra* note 68, at 14; Pédamon, *supra* note 87, at 121.

C. The Contrast Between a Broad Interpretation of the Requirements and the Goal of Contractual Justice

If, on the one hand, those interpretations of the requirements of article 1195 and draft article 5.77 which are excessively narrow run counter to goal of contractual justice pursued by the rules, on the other hand, the same can be said if these provisions or their requirements are interpreted too broadly as to cover situations which are caused by the aggrieved party or which are independent of the transaction.

1. Hardship Situations Attributable to the Aggrieved Party

In particular, although the theory of *imprévision* refers to changes of circumstances which are caused by factors external to the contracting party,²¹¹ the new article 1195 neither makes reference to the need for the event to be beyond the party's control,²¹² nor does it prescribe that the event must not be determined by the party's conduct. For what specifically concerns the second point, draft article 5.77, unlike the French provision, requires that the change of circumstances be not attributable to the debtor. As explained above, this means that it must not be caused by the faulty behaviour of the aggrieved party. Despite the silence of article 1195, several authors have suggested that a claim for *imprévision* under the French provision must be denied when the event is attributable to the actions of the debtor.²¹³ The same view has been upheld by

211. Ancel, *supra* note 4, at para. 70.

212. Art. 1195 also differs from art. 1218 of the French Civil Code, on force majeure, which prescribes that the event must be beyond the control of the debtor. As it has been noted, this notion is broader than fault: art. 1218 does not apply if the situation is within the party's sphere of control, even if the event was not caused by the party's fault. Conversely, it seems that Belgian Draft of 2019, *supra* note 6, art. 5.77 would apply even when the event is within the control of the aggrieved party (e.g., acts of employees), as long as it was not caused by its faulty behaviour (e.g., employer negligence).

213. DESHAYES ET AL., *supra* note 136, at 391; TERRÉ ET AL., *supra* note 180, at 716; MERCADAL, *supra* note 97, at para. 615, note that this approach is already followed by the *Conseil d'État* when addressing cases of *imprévision*.

the Italian Supreme Court, even though article 1467 of the Italian Civil Code does not contain such requirement.²¹⁴ However, French courts are highly unlikely to protect self-induced hardship, as this would mean protecting incompetent or careless parties. Indeed, if article 1195 were to be interpreted as to cover situations of self-induced hardship, the goal of contractual justice pursued by the reform would hardly be accomplished. The other party would run the risk to bear further costs resulting from the possible adaptation of the contract, even when the event making the execution excessively onerous occurred due to a delay in the performance of the contract by the aggrieved party.²¹⁵ In doing so, article 1195 would allow dishonest contracting parties to escape the harmful consequences of their own faults, unfairly placing the other parties in a disadvantaged position.²¹⁶

*2. Excessive Onerousness of the Performance Measured
Against the Subjective Conditions of the Aggrieved Party*

Moreover, there is the risk that French and Belgian courts might interpret the excessive onerousness requirement too extensively. It is true that a case-by-case evaluation is to be preferred to a universal and mathematical threshold.²¹⁷ Indeed, assessing the excessive onerousness against a merely numeric benchmark, without taking into account the circumstances surrounding the contract, constitutes a strict application of the principle *pacta sunt servanda*, which clashes with the goal of contractual justice. However, it is debated how deep this evaluation *in concreto* should be.

In determining when the change of circumstances makes performance of the contract excessively onerous, courts will have to decide whether to interpret this condition objectively, measuring the

214. Corte di Cassazione, section II, 23 Feb. 2001, n. 2661.

215. DESHAYES ET AL., *supra* note 136, at 391.

216. *Id.*

217. D. Girsberger & P. Zapolskis, *Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption*, 19 JURISPRUDENCIJA 129 (2012).

performance of the aggrieved party against the counter-performance, or subjectively, against the aggrieved party's conditions.²¹⁸ In particular, it is controversial whether article 1195 and draft article 5.77 allow courts to consider the impact of the change of circumstances on the financial situation of the party, in order to conclude that the event amounts to hardship. If the latter approach were to be adopted, French and Belgian courts might find *imprévision* even when the supervening event creates no significant disproportion between the parties' performances, and yet performing the contract would result in the financial ruin of the party claiming hardship.

As shown in section IV, the wording of draft article 5.77 suggests that courts might take into account the aggrieved party's personal situation, as it refers to a change of circumstances which makes the execution of the contract excessively onerous in a way that "no one may reasonably demand it." As for article 1195, while many authors believe that the objective approach should prevail,²¹⁹ others hold that French courts might well take into account the personal conditions of the aggrieved party²²⁰ or are ultimately unsure about the right approach as it is considered a legal policy decision.²²¹ As seen above, the French and Belgian legislators have made an express legal policy choice with regard to the provisions on *imprévision*, as they consider them an expression of the overall goal of contractual justice pursued by the reforms. Consequently, courts should lean towards the objective approach, disregarding the financial situation of the party. The goal of contractual justice is to avoid contractual imbalances, namely a disproportion between the obligations stemming from the contract. Conversely, the subjective approach considers the imbalance between the parties rather than their performances, and it analyses factors which are external to the

218. TERRÉ ET AL., *supra* note 180, at 717.

219. *Id.*; CHÉNEDÉ, *supra* note 167, at 118; Stoffel-Munck, *supra* note 135, at 33; J. S. Borghetti, *La force obligatoire des contrats*, DR. ET PATR. 68 (2016); P. MALAURIE ET AL., DROIT DES OBLIGATIONS 764 (L.G.D.J./Lextenso 2016).

220. Ancel, *supra* note 4, at para. 78; MERCADAL, *supra* note 97, at para. 613.

221. DESHAYES ET AL., *supra* note 136, at 399.

contract. This has the pathological effect of discriminating between commercial parties based on their financial situation: on the one hand, the application of article 1195 and draft article 5.77 would be prevented to a successful company with high profits, just because it would be able to absorb the exceptional costs generated by the loss of the single transaction; on the other hand, a company close to financial ruin would easily meet the threshold for the excessive onerousness even if, for instance, it makes a loss due to an ordinary price increase.²²² When the excessiveness is examined with regard to the transaction alone, the remedy of adaptation is meant to correct contractual injustice; when it is examined in relation to the aggrieved party's economic situation, adaptation becomes a grace mechanism.²²³ Hardship situations must be exceptional, because they constitute a derogation from the principle of *pacta sunt servanda*. Therefore, they cannot encompass the state of indebtedness of the aggrieved party, as anything could amount to hardship for the debtor with a sensitive financial situation. This conclusion shall not be hindered by the wording of draft article 5.77 which defines contract execution as excessively onerous when "no one may reasonably demand it." The reasonableness test must be conducted with regard to the exceptional increase in the cost of performance or decrease in the value of the counter-performance, rather than the personal conditions of the party. Furthermore, in most cases the sensitive financial situation of the party is the result of bad business management. Consequently, the economic condition of the aggrieved party cannot be taken into account also because, as shown above, the change of circumstances must not be attributable to the debtor.

Nevertheless, by way of derogation from the proposed objective interpretation, the economic condition of the aggrieved party may indirectly assume some relevance in long-term agreements. Parties enter into long-term agreements with the aim of building up and

222. Stoffel-Munck, *supra* note 147, at 58-59.

223. DESHAYES ET AL., *supra* note 136, at 399.

maintaining “for several years (usually around 20-25) a relationship that satisfies the reciprocal interests and expectations.”²²⁴ They invest significant resources in planning a commercial relationship on which they wish to be able to rely for long.²²⁵ Consequently, in determining what makes performance of the parties excessively onerous, courts should first look at what risks the parties have assumed at the moment of contract conclusion,²²⁶ as they might have implicitly ruled out the possibility of financial ruin. Regarding agreements for a particular long term, such as joint ventures or franchising contracts, parties might express the desire to enter into a mutually beneficial relationship and impliedly expect a certain outcome or profit rate from the whole operation. Such contracts might be affected by a change of circumstances, making performance significantly more onerous, which causes the aggrieved party’s financial ruin even though the required threshold for hardship is not met.²²⁷ An example of that situation is a supervening event which is not limited to a short period of time, causing the aggrieved party to bear an annual loss. While the single loss is *per se* sustainable, this prolonged situation might expose the aggrieved party, whose financial situation was sound when parties entered into the agreement, to an impending financial ruin.²²⁸ Moreover, if this loss could have been foreseen, the length of the hardship situation may not have been specifically foreseeable. Although in long-term contracts bad years may be offset by good years,²²⁹ the same loss repeated over the years makes this impossible. Indeed, the impending commercial ruin of the aggrieved party frustrates the purpose of the contract as it prevents the parties

224. P. FERRARIO, *THE ADAPTATION OF LONG-TERM GAS SALE AGREEMENTS BY ARBITRATORS* 72 (Wolters Kluwer 2017).

225. *Id.* at 73.

226. BRUNNER, *supra* note 201, at 240-241, 432.

227. *Id.* at 435. The financial impact on the obligor may become disastrous, especially when the aggrieved party is a relatively small company for which the affected contract represents a significant part of its revenues.

228. It is conceivable that the repeated loss might hinder the aggrieved party from accessing financial credit, the lack of which eventually leads to its bankruptcy.

229. BGE 47 II 440, 458 (1921).

from reversing the consequences of the hardship situation in the future, so as to achieve in the long-term the minimum expected outcome.

VI. CONCLUSION

The codification of *imprévision* in France and its codification attempt in Belgium are part of a larger revitalization of the law of contracts, aimed at attracting foreign investors through the creation of a business-friendly legal environment which is able to adapt to the new social and economic challenges. For this outcome to be achieved, it is paramount that contractual parties know under which circumstances they can successfully claim adaptation or termination of their agreements. However, the approach of the French and Belgian legislators to adopt general legal propositions, without definitions or a detailed regulation of the conditions triggering the application of article 1195 and draft article 5.77, leaves itself open to several questions of interpretation and criticism. In particular, the wide margins of appreciation given to courts might create uncertainty among contractual parties, confronted with the risk of different judicial interpretations of the same requirements for *imprévision*.

It is not unusual in continental legal systems for courts to be given tremendous leeway in interpreting codified provisions. Nevertheless, it appears appropriate, in order not to frustrate the expectations of contractual parties and to give the legal system some sort of stability, that courts carry out their hermeneutical activity in a manner consistent with the three main goals of the French and Belgian reforms: that is, to have a law which is modern, certain and fair.

According to the proposed solution, to strike a balance between said goals, article 1195 and draft article 5.77 should apply: (1) as for the time of the change of circumstances, also to events occurring before the conclusion of the contract, when the parties learn about their existence only after its conclusion; (2) as for the manifestations of *imprévision*, also to situations in which performance becomes

excessively onerous due to a decrease in the value of the counter-performance received; (3) as for the unforeseeability of the event, to changes of circumstances which are unforeseeable in their extent, rather than their nature; (4) as for the excessive onerousness of the performance, to situations where there is an excessive imbalance between the contractual performances and not between the subjective conditions of the parties (which can be considered only by way of exception); (5) as for the attributability of the change of circumstances, only to situations where the hardship event has not been caused by the actions of the aggrieved party. In particular, such interpretation is not against legal certainty (as conceived by European countries), as the inclusion of these situations is not contrary to the wording of the norms. Moreover, it conforms with the goal of modernisation, as these solutions have been adopted by modern projects for the harmonisation of contract law. Finally, these solutions must be preferred also on grounds of contractual justice, as they allow courts to better preserve the contractual balance.

The judicial application of the rules at issue will be paramount in order to end the doctrinal debate surrounding the requirements for *imprévision*. Seeing how the French and Belgian reforms emerged from a context of historical rejection of the doctrine of *imprévision*, it will be interesting to analyse how French and, if ever, Belgian courts will make use for the first time in their history of the power to revise contracts in the event of unforeseeable circumstances. In particular, whether the long-standing judicial tradition to protect the principle of *pacta sunt servanda* will lead to a restrictive interpretation of such requirements or whether courts, taking into account the desire of the legislators to pursue contractual justice, will avoid that situations of contractual imbalance evade the scope of the rules at issue, however, without excessively broadening the boundaries of judicial intervention into contractual affairs.