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ARTICLES

FORCE MAJEURE, FAILURE OF CAUSE AND THEORIE DE L'IMPRÉVISION: LOUISIANA LAW AND BEYOND

Saul Litvinoff*

I. FORCE MAJEURE

Absolute vs. Relative Impossibility

After a contract is made, a party bound under that contract may run into obstacles that make his performance impossible. When such is the case, that party is not liable for any damages that may result from his failure to perform. That is the doctrine of force majeure which, with only slight departure from its French ancestor, article 1147 of the Code Napoleon, was received in article 1933(2) of the Louisiana Civil Code of 1870.¹ For that doctrine to prevail, however, performance by the obligor must be truly impossible. In the traditional approach of French and Louisiana courts, there is force majeure only when the performance of an obligation becomes absolutely impossible because of obstacles that the obligor could neither foresee nor resist.² An obligor, in that conception, must honor his signature or his word at any price. He is bound to employ all his efforts and resources, and even face the collapse of his business if necessary, in order to perform his obligation. His diligence, in other words, must be absolute and perfect, regardless of the magnitude of the increase in physical or financial effort that unforeseen events or changes in circumstances may require of him in order to perform, and also regardless of the collapse of his expectations when such events or changes, without making impossible the performance

¹ La. Civ. Code art. 1933(2) (1870): "Where, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do or is from the same causes compelled to do what the contract bound him not to do, no damages can be recovered for the inexecution of the contract." French Civil Code art. 1147: "A debtor is liable for damages arising either from nonperformance or from delay in the performance of the obligation unless he can show that his failure to perform was caused by events beyond his control, and further that there was no bad faith on his part."

he promised, deprive him from obtaining the reasonable advantage in contemplation of which he bound himself to perform.3

Thus, in a Louisiana case where a construction company which undertook to do excavating work ran into a peculiarly hard subsoil formation, the court concluded that, under article 1901 of the Louisiana Civil Code of 1870, agreements legally entered into have the effects of law for the parties and must be performed in good faith, from where it follows that a party is obliged to perform a contract if performance is possible at all, regardless of any difficulty he might experience in performing it.4 In another case, an owner who had contracted for additions to his home attempted to dissolve the contract on grounds that a hurricane had severely damaged the property for which the additions were intended. Upon finding that the hurricane had not totally destroyed the home, the Louisiana court concluded that the planned additions were still possible, though payment by the owner under the contract was made more difficult and burdensome because the money he had saved or borrowed for that payment will be needed now to repair the home. The court expressed sympathy for the home-owner's predicament, but asserted that the settled jurisprudence of Louisiana is that the obligor is not released from his duty to perform by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event or an irresistible force.5 In still another case, a party who had agreed to cut and remove timber within a certain time alleged that, because of world-wide financial panic and economic depression, market-values went down in such a way that he was unable to cut, remove, and market the timber without suffering an unreasonably great financial loss. The Louisiana court concluded that the alleged reason did not make the performance impossible but merely rendered it more difficult, burdensome, and unprofitable, for which causes the party could not be excused.6

It must be recognized that such an approach still prevails in the mind of common law courts also, in spite of the efforts to the contrary reflected in the doctrines of frustration of contract and commercial impracticability.7

Unless the traditional doctrine of *force majeure* or impossibility of performance is reformulated in response to modern economic and commercial realities, the result of applying the strict letter of the law may be that, in order to perform a contractual obligation, one or more parties will be required to bear a devastating burden whenever unforeseen events drastically alter the degree of onerousness the parties contemplated for the performance at the time the contract was made. That is the case when situations of vast generality, such as war, international crisis, inflation, or unprecedented fluctuation of markets, cause an extraordinary increase in prices or extreme scarcity of raw materials.8

Revised article 1873 of the Louisiana Civil Code, providing in its first paragraph that an obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible, seems to preserve the traditional approach. That article, however, is inserted in a special section now devoted to impossibility of performance.9 When read together, the articles in that section disclose that there exists between impossibility of performance and the theory of cause a connection that was less explicit in the Louisiana Civil Code of 1870.10 When properly understood, that connection may serve as a foundation for a more flexible approach to *force majeure*.

**Rebus Sic Stantibus vs. Pacta Sunt Servanda**

In Louisiana, absent absolute impossibility, an obligor is bound to render performance. Some legal systems, however, grant a remedy to an obligor when, as a consequence of unforeseen events, the performance he is bound to render becomes excessively onerous. In general terms, there is no consensus among writers as to whether the grounds for such a remedy are just an expansion of the doctrine of *force majeure* or are instead to be found in a new doctrine. Be that as it may, such grounds are expounded throughout the civilian world under the French label of *théorie de l'imprévision*, or theory of unexpected circumstances.

That theory is certainly not novel. Its roots can be traced to Roman writers for whom every contract contained *rebus sic stantibus*—which can be freely translated as “provided the circumstances remain unchanged”—as an implied term. Thus, in entering a contract the parties

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10. Thus, La. Civ. Code art. 1876 provides: 'When the entire performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved. The other party may then recover any performance he has already rendered.' That is so because the impossibility of one party's performance determines the failure of the cause of the obligation of the other party, thereby prompting the dissolution of the contract; see I S. Litvinoff, Obligations 399, in 6 Louisiana Civil Law Treatise (1969).
bound themselves to perform, provided the circumstances existing at that moment remained the same. A change in circumstances was regarded as an alteration of the contractual foundation which resulted in the contract either coming to an end or becoming susceptible to judicial revision, ad aequitatem reduci. It is noteworthy that the words "rebus sic stantibus" are just the core of a maxim the full text of which is, Contractus qui habent tractum succesivum et dependentiam de futurum, rebus sic stantibus intelligentur—which may be freely translated as, "Contracts providing for successive acts of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same." The full text of the maxim clearly shows the importance to be given to changes in circumstance when parties enter into contracts of long duration calling for a series of acts of performance. Contracts of that kind, such as lease or requirement or output contracts, differ greatly in purpose and structure from contracts calling for instantaneous, immediate, or simultaneous performance by the parties, such as the cash sale of a movable thing.

That approach was relied upon also by the Romanist school of glossators, and later by Canonist writers, but started its decline towards the end of the eighteenth century, owing to the prevalence of the economic and political theories of capitalism and liberalism. Since then, and for over a century, rebus sic stantibus has been replaced by pacta sunt servanda, that is, "contracts must be honored," with the implication that it must be so regardless of any change in circumstances and regardless of cost, effort, or sacrifice to the obligor.

Dramatic changes brought about by World War I in the social and political spheres and the upsetting impact of both World War I and II upon the world economy, as reflected in recession, depression, and rampant and destructive inflation, among other consequences, brought théorie de l'imprévision back into focus.

Though that theory has many followers, it also has a good number of opponents. The arguments advanced against the theory can be

11. See 3 J. Bonnecase, Supplément à Baudry-Lacantinerie, Traité théorique et pratique de droit civil 595-96 (1926); A. Bruzin, Essai sur la notion d'imprévision et sur son rôle en matière contractuelle 87-123 (1922); 1 J. Puig Brutau, supra note 8, at 363-68.
12. This formulation of the maxim was made by the Romanist school of post-glossators. Some writers trace the origin of the maxim to Cicero in De Officiis—Of Duties; others, to Seneca in De Beneficiis—Of Benefits or Gifts. It appears in a passage by Neratius in the Digest, Book VII, Title 4, Law 8, and also in a passage by Marcellus, also in the Digest. See L. Rezzónico, La fuerza obligatoria del contrato y la teoría de la imprevisión 21 (2d ed. 1954).
summarized in a few points. First, a contract is, primarily, an instrument of prévision, or foresight. A party who enters a contract of long duration or a contract to be performed through a long series of successive performances, intends, precisely, to protect himself against changing circumstances, an intention that is defeated by a theory allowing relief to an obligor if such changes place him in a harsh situation. Secondly, contracts are made to be fulfilled. A theory that allows departure from such a basic principle introduces an element of insecurity and instability in the legal relations of the parties to a contract. Thirdly, strict performance of contracts is material not only for the law but also for morals, since respect for the pledged word is a matter of honor. Fourthly, théorie de l'imprévision allows the courts a discretion as excessive as it is dangerous, since that theory opens the door to increasing intervention by the state, thereby resulting in progressive reduction of the autonomy of the will of private parties.¹⁵

Such objections, though consistent with a liberal philosophy of law, exhibit a rigidity incompatible with basic ideas that shape the spirit of modern law.¹⁶ It is one thing to expound respect for binding agreements, a principle whose merits are beyond dispute, and quite another to turn contracts into instruments of oppressive unfairness. No doubt, a contract is an admirable instrument for exercising foresight, and it is not denied that parties do quite often enter a contract for the purpose of sheltering themselves against the risk involved in changing circumstances. Provided the operation of those principles is kept within reasonable limitations, the obligations arising out of contract must indeed be honored, even though performance becomes more burdensome than anticipated by one or all parties at the moment of contracting. Nevertheless, when the change in circumstances is reasonably unforeseen and is such that the obligor can perform only at the cost of an excessive sacrifice, then the letter of a contract cannot be upheld without substantial alteration of its spirit, which is the true intent of the parties. That is so because the intent of the parties is to make a contract that, even if more advantageous to one of them, is equitable in terms for both. That underlying equity is destroyed by the assertion that strict compliance with the contract must obtain always.¹⁷ It is not denied that performance in compliance with a contract is a matter that also affects morals, but that moral principle can be applied only to whatever is foreseeable. Something that the parties could not have foreseen cannot be comprised by the duty to fulfill a contractual promise. Lastly, judicial intervention as a means to achieve greater equity and more fairness in the legal relations of private parties, rather than being feared, must be welcomed as one of

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¹⁷. Id.
the most significant accomplishments of modern law, enhancing the
importance of substance over form.18

At common law, the problems arising from the interference of
unexpected circumstances are dealt with by the doctrines of “frustra-
tion of contract,” or “frustration of purpose,” and the doctrine of “im-
practicability.” The following discussion will show that such doctrines,
and the théorie de l'imprédvision as well, are actually founded on that
fatal kind of contract-disease known at civil law as “failure of cause.”
Indeed, because of caution or fear of far-reaching implication, a court
may choose to disregard frustration, impracticability, or imprédvision,
but even so, a court simply cannot disregard failure of cause when it
is clearly shown.

Impracticability of Performance

As grounds for granting relief to an obligor, impracticability of the
performance is a doctrine that received its first legislative formulation
in Article 2, Section 615 of the Uniform Commercial Code. Because of
the place where this article is inserted and because of the general pro-
visions set forth in Article 1 of the same code, the operation of that
doctrine was confined to contracts for the sale of goods. That limitation
has been eliminated, however, in the final draft of the Restatement of
The Restatement Second incorporates the doctrine of impracticability of
performance without limiting it to a particular kind of contract and
gives the doctrine a formulation more concise than the one in the
Uniform Commercial Code. Thus, according to Section 261 of the
Restatement Second, “Where, after a contract is made, a party’s per-
formance is made impracticable without his fault by the occurrence of
an event the non-occurrence of which was a basic assumption on which
the contract was made, his duty to render that performance is discharged,
unless the language or the circumstances indicate the contrary.”

Under this doctrine, even though a party, in assuming a duty, has
not qualified the language of his undertaking, a court may relieve him
of that duty if performance has unexpectedly become impracticable as
a result of a supervening event. Like the Uniform Commercial Code,
the Restatement Second states a principle broadly applicable to all types
of impracticability and deliberately refrains from any attempt at an
exhaustive expression of contingencies.19

The determination of whether the non-occurrence of a particular
event was or was not a basic assumption of the parties involves a
judgment as to which party assumed the risk of such occurrence. For

19. See Restatement (Second) of Contracts § 261 comment a (1981). See also E.
Farnsworth, Contracts 677-79 (1982).
example, in contracting for the manufacture and delivery of goods at a price fixed in the contract, the seller assumes the risk of increased costs within the normal range. Nevertheless, if a disaster, or a general crisis, causes an abrupt and extraordinary increase in the cost to the seller, a court might determine the seller did not assume that risk, by concluding that the non-occurrence of a general crisis or disaster was a ‘basic assumption’ on which the contract was made. To make such a determination, a court will look at all circumstances, including the terms of the contract. A finding that the event was unforeseeable carries much weight in suggesting that its non-occurrence was indeed a basic assumption. Nevertheless, the fact that it was foreseeable, or even foreseen, does not, of itself, suggest a contrary conclusion, since the parties may not have thought it a sufficiently important risk to have made it a subject of their bargaining. Another circumstance to be looked into by the court is the effectiveness of the market in spreading such risks. For example, if the obligor is a middleman, he has an opportunity to adjust his prices to cover certain risks. If the obligor is a producer of goods, he may not have such an opportunity.20

The rationale of section 261 in the Restatement of Contracts, Second is that the obligor is relieved of his duty because the contract, having been made on a different ‘basic assumption,’ is regarded as not covering the factual situation that has arisen. It is a risk omitted from the parties' assumptions that falls within a ‘gap’ in the contract.21 Ordinarily, the just way to deal with the omitted or unanticipated situation is to hold that the obligor's duty is discharged in the case of changed circumstances and thus to shift the risk to the obligee.

By appropriate contractual language a party may, nevertheless, agree to perform in spite of impracticability that would otherwise justify his nonperformance. In the absence of an express agreement, a court may, of course, decide that a party assumed a greater obligation. For such a purpose the court will, again, look at the circumstances. Thus, the fact that a supplier has not taken advantage of the opportunity to shift the risk of a shortage in supply to the other party at the time the contract was negotiated will be regarded as being more significant when the supplier is a middleman with a variety of sources of supply and an opportunity to spread the risk among many customers, than when the obligor is a producer with a limited source of supply and no comparable opportunity.

If the supervening event was not reasonably foreseeable when the contract was made, the party claiming discharge can hardly be expected to have stipulated against its occurrence. If it was reasonably foreseeable, or even foreseen, the opposite conclusion does not necessarily follow.

21. Id. See also E. Farnsworth, supra note 19, at 686-87.
A court may consider that the practical difficulty of reaching agreement on the endless number of conceivable terms in a complex contract may excuse a failure to deal with contingencies that, from the negotiating table, seem at least improbable.

As expressed in the transcribed Restatement section, the doctrine of impracticability is sometimes phrased in terms of "impossibility." Nevertheless, as it is unquestionably recognized, the doctrine of impracticability operates to discharge a party's duty even though the event has not made performance absolutely impossible. In the mind of the drafters, "This Section, therefore, uses 'impracticable,' the term employed by Uniform Commercial Code § 2-615(a), to describe the required extent of the impediment to performance. Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section. . . . However, 'impracticability' means more than 'impracticality.' A mere change in the degree of difficulty or expense due to such causes as increased wages, prices of raw materials, or costs of construction, unless well beyond the normal range, does not amount to impracticability since it is this sort of risk that a fixed-price contract is intended to cover."22

It is noteworthy that the new Restatement takes a step beyond the prior conceptual boundaries of that doctrine and not only contemplates impracticability that results from supervening events, but also addresses itself to impracticability "existing" at the moment of contracting. Thus, section 266 provides in its first paragraph, "Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary."

As stated by the drafters, situations that would fall under the doctrine of existing impracticability are also susceptible to being adjudged through application of the rules of mistake. The party entitled to relief in such a case may, of course, choose the grounds on which to rely.23

It is noteworthy that one of the illustrations offered by the drafters is the case of a party who has contracted to sell a particular machine though, unbeknownst to him, the machine had been destroyed by fire without any fault on his part. That illustration strikingly resembles the situation contemplated in article 2455 of the Louisiana Civil Code, "If,

23. Id. § 266 comment a, at 339.
at the moment of the sale, the thing sold is totally destroyed, the sale is null; if there is only a part of the thing destroyed, the purchaser has the choice, either to abandon the sale, or to retain the preserved part, by having the price thereof determined by appraisement."

The wisdom of the doctrine of impracticability of performance has been praised in many scholarly articles. American courts, however, have been less than enthusiastic in their reception of that doctrine and, for practical purposes, have concluded that relief on grounds of impracticability will be granted only in situations that meet the strict requirements for impossibility. That reluctance of the courts can be taken to mean that the future of the doctrine of impracticability is not very bright. Nevertheless, there was an important step toward change in the decision rendered in Aluminum Company of America v. Essex Group, Inc. Although, so far, that decision cannot be said to have started a new trend, its persuasive force may very well be discovered in a time to come.

Frustration of Contract; Frustration of Purpose

Upon its triumph over rebus sic stantibus, pacta sunt servanda became such a strong principle that, at least in the common law legal world, courts were prepared to consider the obligations created by a contract as still standing despite the fact that their performance was physically impossible. It is clear that such a perception of a contract is


too narrow and, since the decision in *Taylor v. Caldwell*, with varying results, English courts began recognizing the need to broaden that perception for the sake of fairness.

As defined by Lord Radcliffe in *Davis Contractors Ltd. v. Fareham Urban District Council*, "frustration occurs whenever the law recognizes that without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract." The idea is that when a performance is still physically possible but, because of changed circumstances, it becomes dramatically more burdensome, the rendering of that performance is no longer a discharge of the obligation originally contracted but rather the discharge of a different one. The language in some decisions strongly suggests that a change in circumstances may turn a performance into a "commercially different one which would suffice to make it fundamentally different." In spite of the broad formulation given to the doctrine, the same English judge, whose definition in *Davis Contractors* is transcribed above, added that, "Frustration is not lightly to be reached as the dissolvent of a contract." In one view, that is so because the majority of contracts in connection with which important problems of frustration will arise are made between businessmen who constantly deal with one another and who may well be more concerned with maintaining their amicable relations than in abiding by the strict rules of law. For that reason, it is said, the majority of such cases are settled peacefully and in accordance with business practice or by private arbitration, and it is only the exceptional case which comes before the courts.

Frustration of contract thus concerns the effect that supervening circumstances, unforeseen at the time of contracting, have upon rights and duties arising from a contractual arrangement. Frustration arises when unforeseen events, occurring after the time of contracting, render performance either legally or physically impossible, excessively difficult, impracticable, expensive, or when they destroy the known utility which the stipulated performance had to either party. In the latter instance, that is, when unforeseen events do not so much make the performance impossible as they make it impossible for the parties to acquire or enjoy the advantage for whose acquisition or enjoyment they entered the contract, the expression "frustration of contract" becomes synonymous

29. 3 B. & S. 826 (1863).
30. 1956 A.C. 696.
32. 1956 A.C. at 727.
with "frustration of purpose." Though it has been stated that frustration of purpose can be present only if the purpose of both parties, or the common purpose, is destroyed, in most, if not all situations in which frustration of purpose has been found, clearly the purpose of only one party to the contract was frustrated. Thus, if war prevents a seller from delivering machinery for which the buyer paid the price in advance, it is clear that frustration of the contractual purpose visits only the buyer.34

It is noteworthy that, in the United States, a distinction has been made between frustration of performance and frustration of purpose. The former involves situations where performance has become either impossible or excessively difficult or expensive, while the latter involves situations where the known purpose for which either party entered into the contract has been destroyed.35

Through that distinction it is then possible to speak of frustration as a contractual pitfall not identical with impossibility. Indeed, frustration of one party's purpose is hardly ever caused by the impossibility of his own performance, but his purpose may very well be frustrated by the impossibility of the other party's performance. Further, a party's purpose is frustrated when the other party's performance, though technically and physically possible, has become either totally worthless or of insignificant value owing to a collateral event that could not be foreseen at the time of the contract. A question might be raised as to whether there is true frustration of a party's purpose because of collateral events when the agreed-upon equivalent promised him in return for his performance can be given to him, or has perhaps been already given. It can be said that in such a case the party gets that for which he bargained, his immediate object of desire. To that question it has been said, "The answer to this is that a contractor has indirect and ultimate objects of desire; he bargains for the immediate object in order to attain more remote ends and in the confident belief that the attainment of the first will bring home the second one also. Thus a lessee promises to pay rent in order to induce the lessor to convey a limited estate in the land—the leasehold interest. He desires to be owner of this leasehold, with the manifold legal relations of which it is composed, in order to enjoy the physical use and occupation and to realize the profits therefrom by operating it as a farm, a dwelling place, a movie theater, or a liquor saloon. The conveyance is made; and the lessee is in possession and owner of the leasehold interest. He has attained his immediate object. Yet he may be wholly ousted from possession by an invading army; the dwelling house may be burned down; a city ordinance may forbid the use of inflammable films; the legislature may prohibit the sale of

35. See The Claveresek, 264 F. 276 (2d Cir. 1920); Patterson, Constructive Conditions in Contracts, 42 Colum. L. Rev. 903, 943 (1942).
liquor. In these cases, the ultimate purpose of the lessee is frustrated. It is what he now regards as his chief purpose; without it, he would not have promised to pay rent or, at least, so much rent. In a great number of cases, this kind of frustration has caused the lessee to refuse to pay rent. . . . One who asserts frustration of purpose as a discharge from duty is seldom, if ever, asserting impossibility of performance of his own promise as a defense. The principal performance promised by the lessee, in the cases stated above, is the payment of rent. Nothing has made that performance impossible. In setting up frustration of purpose, he is asserting a different sort of defense. Some kind of contemplated performance may have become impossible; but it is not that promised performance from which he asks to be excused."36

Where a balcony was leased for the convenience of watching a coronation parade but the ceremonies were called off because of the illness of the king who was to be crowned, a question was raised as to the effect of the king's illness upon the contract for the balcony. One answer is, "That it should have no effect whatever unless the holding of the ceremonies as planned formed what is sometimes called the 'basis of the contract,' but is more accurately described as the basis on which one of the parties assented to the bargain. It is not such a 'basis' unless it creates a major part—an essential part—of the value of one of the performances that the parties agree to exchange, inducing one of the parties and enabling the other to reach the agreement."37 The similarity, or practical identity, between the views expressed in the emphasized language, and in the preceding quotation as well, and the basic ideas that constitute the civil law theory of cause is simply striking.

In a recent case, owing to a change in circumstances consisting of a cost increase beyond foreseeable limitations, a seller and processor of aluminum under a long-term contract was reduced to obtaining an exceedingly low compensation for its deliveries to the buyer and, as a result, it sought reformation, or adjustment on an equitable basis, of the contract. The court stated that the main question was whether earning money, or making a profit, is the kind of purpose that is subject to frustration so as to allow the granting of relief. The court conceded that most traditional illustrations of the problem of frustration, such as those offered in the Restatement of Contracts, seem to involve a purpose other than making a profit. Nevertheless, with citation of eminent authority and scattered precedent, the court concluded that earning money is an ultimate end in commercial life and it therefore constitutes the kind of purpose which is severely disappointed or frustrated when an unforeseen change of circumstances converts expected profit into a serious loss.38

37. Id. at 465 (emphasis added).
38. See ALCOA, 499 F. Supp. at 76-78.
In the United States, the latest Restatement of Contracts, in section 265, reformulates the doctrine of frustration thusly, "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." In a comment, however, it is clearly stated that the section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other party, thereby frustrating his purpose in making the contract, and is therefore distinct from the problem of impracticability, because there is no impediment to performance by either party.

Though the decision in the Aluminum Company of America case may herald a change towards a more reasonable approach, the fact is that, heretofore, American courts have shown considerable diffidence vis-à-vis allegations of frustration of contract or frustration of purpose.39

II. FRUSTRATION OF PURPOSE AT CIVIL LAW: FAILURE OF CAUSE

A. Failure of Cause in French Civil Law

Force Majeure; Impossibility of Performance

Under articles 1147 and 1148 of the Code Napoleon, an obligor who fails to perform is liable for damages unless his performance has been prevented by an "event not reasonably foreseeable by the parties at the time the contract was entered into." As expounded by traditional doctrine and applied by cautious jurisprudence, under the Code Civil notion of force majeure, for a contract to be discharged, performance must be rendered absolutely impossible, not merely more onerous. Impossibility may be physical, as in the case of an act of God or loss of the contractual object without the obligor's fault, or it may be legal, as in the case of a fait du prince—act of the prince—that, for instance, prohibits exportation of the goods constituting the contractual object.40

At first blush, the French notion of force majeure appears as being narrower than the different common law renditions of impossibility. That, however, is not so.

Force Majeure and Failure of Cause

While never arriving at a broader formulation of the principle, French courts have managed to temper the originally stringent approach

40. See generally, 2 H. Mazeaud, supra note 3, at 593-97.
to impossibility. Thus, in one case, the contract was discharged because the physical incapacity of one of the parties prevented his personal performance although the contract did not require that party to perform in person, that is, performance was not rendered absolutely impossible by the fortuitous event that befell the obligor.41 In another case, the contract was discharged because rendering the performance would have endangered the life of the obligor, even though such performance was not absolutely impossible.42

In other cases, French courts have placed themselves in a position quite similar to that of those common law courts which have taken a flexible approach to frustration. Thus, in still another case, a tract of land had been leased for hunting purposes, but the authorities forbade hunting in that area. The court held that the lessee was entitled to a reduction of the rent. It is clear in such a case that the prohibition did not make impossible the performance of the contract of lease, since it interfered neither with occupation of the leased premises nor with payment of the rent, but rather destroyed the expectation of one of the parties.43 The French court adopted a liberal view quite similar to, if not identical with, that of the English courts which decided the coronation cases; such view being that the disappearance of the common end of the parties puts an end to the contract.

A French court reached an even more interesting conclusion. Plaintiff was a tailor who, under a long-term contract, had been employed for the purpose of making fine clothes for defendant’s establishment. World War I, however, caused a dispersion of most of defendant’s customers thereby making plaintiff’s services superfluous. Though it is clear that performance was still physically and legally possible under the traditional approach, the tribunal de commerce declared the contract dissolved. It is clear that the underlying reason for the court’s reaction was the fact that unpredictable circumstances prevented the parties from attaining the purpose for which the contract was entered.44

Decisions of that kind may surprise no one. Indeed, in French doctrine, force majeure is referred to, and explained under, the theory of cause. In the civilian tradition no “consideration” is needed to make a promise enforceable, but a cause must be found at the root of every obligation in order to make it binding. That cause is the motive, or end, or reason, or purpose for which a party binds himself. If that cause fails, the obligation fails also.45 From that vantage point, force majeure prevents parties from attaining realization of the end for which

42. Letellier v. Carvalho, 1869 D. Jur. IV 211 (Trib. Seine 1869).
45. See H. Capitant, De la cause des obligations 23, 25, 275 (1923); 1 S. Litvinoff, supra note 10, at 435-40.
they entered the contract. Connection between *cause* and *force majeure* is, thus, direct. Such a direct connection amply justifies a broadening of the basis of *force majeure*, especially in view of the fact that a strict approach to impossibility is the result of interpretation rather than a clearly formulated rule.\(^4^6\)

*Théorie de l'Imprévision*

In *Compagnie Générale d'Éclairage de Bordeaux v. Ville de Bordeaux*, plaintiff, a supplier of gas, had contracted for deliveries to the city of Bordeaux at fixed rates over a period of years. The great increase in the price of coal, owing to the outbreak of World War I, prompted the company to demand an increase in the contractual rate, but that demand was rejected by the departmental authorities. On appeal to the *Conseil d'État*, the highest French court for administrative matters, the decision was reversed. The *Conseil* recognized that, as a matter of principle, it was in the nature of such fixed-rate contracts that fluctuation in costs should be anticipated, but said that, as the increased cost "certainly exceeds the outer limits of the increases that could have been contemplated by the parties when the contract of concession was concluded," the case should be remanded to adjust the terms of the contract if the parties could not agree between themselves.

The *théorie de l'imprévision*—theory of unexpected circumstances—thus received judicial sanction. At its roots lies a combination of the overriding principle of good faith, as expressed in article 1134 of the Code Napoleon, and the reading of a sort of implicit condition *rebus sic stantibus* into the contract.\(^4^8\)

The theory of unexpected circumstances, however, cannot be regarded as a creation of the *Conseil d'État*. The impact of an abrupt change of circumstances upon contracts of long duration preoccupied very early civilian writers such as André Alciat, who propounded a solution quite similar to *théorie de l'imprévision*. French doctrine deems the fact unfortunate that those writers whose work furnished the guidelines for the redactors of the Code Napoleon, such as Domat and Pothier, did not give special treatment to such a problem, even though their work did not expressly bar a comparable solution.\(^4^9\)

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\(^4^8\) See Aubrey, supra note 33, at 1175; 3 J. Bonnecase, supra note 11, at 575-76; 6 R. Demogue, supra note 2, at 689-92.

\(^4^9\) See 3 J. Bonnecase, supra note 11, at 594; A. Bruzin, supra note 11, at 87-123.
*Imprévision* was applied many other times by the *Conseil d'État*.[50] In all cases the contract involved is one governed by public law, such as a contract of concession entered into between a public entity and a private company for services of a public nature to be rendered by the latter, that is, a contract strictly governed by administrative law under the French system.[51] Under *imprévision*, the party whose performance became exceedingly more onerous because of unforeseen circumstances is awarded compensation—*indemnité*—aimed at restoring the altered equilibrium of the contract.[52] Confronted with adverse circumstances that increase its contractual burden the party bound to perform must nevertheless render performance and then seek compensation.[53] The right to redress under *imprévision* is forfeited if a party fails to perform when an unforeseen change of circumstances increases the burden of performing.[54] To award compensation under *imprévision*, the administrative court actually effects a revision of the contract.[55] As of late, decisions of that kind are rare because, in the first place, an enactment of 1974 specifically regulates the indemnity owed a party to a public contract in case its performance becomes more onerous due to unexpected circumstances.[56] In the second place, conventional *imprévision* clauses are now *de rigueur* in contracts of that kind.[57]

For contracts not involving a public entity, or a public service, that is, for contracts governed by the civil law proper, rather than by administrative law, the highest French civil and commercial tribunal, the *Cour de cassation*, has refused application of *imprévision* and remained faithful to a strict notion of impossibility. That attitude of the *Cour de cassation* has been strongly supported by some French writers.[58] Others contend, instead, that the scope of *imprévision* and contract revision

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55. P. Voirin, de l'imprévision dans les rapports de droit privé 195-200 (1922).


58. See G. Ripert, supra note 15, at 160-67; Niboyet, La revision des contrats par le juge, Travaux de la semaine internationale de droit 1-13 (1937).
should be expanded to make those remedies applicable also to contracts between private parties since the Code Civil, which does not expressly contemplate such remedies, certainly does not prohibit them.  

That split in the jurisprudence of different French courts has led some commentators to express, in the case of public contracts, that it is not the unfair situation of the obligor that imprévision attempts to remedy, but rather it is the public interest that is so protected, since such interest, and the community at large, would be greatly affected by the interruption or discontinuance of a public service.  

Be that as it may, the close connection between théorie de l'imprévision and theory of cause is firmly established in French doctrine. That is why in many decisions escaping the control of the Cour de cassation—a tribunal that can address itself only to questions of law—courts of a lower level, availing themselves of the prerogative that makes them sovereign evaluators of facts, often conclude that a fact constitutes force majeure, and therefore determines the impossibility of performance, even though such impossibility is not absolute but merely amounts to an excessive burden on the obligor.  

B. Failure of Cause in German Civil Law  

Cause German Style  

The German Civil Code does not make express reference to “cause” as an element necessary to make an obligation binding. That code, thus, contains no article equivalent to article 1131 of the French or article 1893 of the Louisiana civil codes, which clearly proclaim that an obligation without a cause can have no effect.  

Nevertheless, from that silence in the German Civil Code the conclusion should not be derived that the German civilian system has excluded the notion of cause as an element of contract-formation. Quite the contrary, all German writers agree that there is no obligation without a cause. Moreover, German law makes a broader use of cause than does French law. Thus, the doctrine elaborated on the basis of article  

59. See P. Voirin, supra note 55, at 195-223. It has been asserted that contract revision, as a consequence of imprévision, is allowed by article 4 of the Code Napoleon: "The judge who refuses to render judgment on pretext of silence, obscurity or insufficiency of the law, may be prosecuted for denial of justice." See P. Voirin, supra note 55, at 204. Cf. La. Civ. Code art. 21: "In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."  

60. See A. Weill & F. Terré, supra note 57, at 428; 6 R. Demogue, Traite des obligations en général 688 (1931).  


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1131 of the Code Napoleon has focused its preoccupation upon conventional obligations alone, while in German doctrine the notion of cause underlies every juridical act susceptible of having patrimonial consequences, irrespective of whether such an act is so intended. In other words, a cause must be found, in German law, behind every declaration of will.63

**Presupposition or Foundation of Contract**

No discussion can be had of cause in German law without a reference to the doctrine of presupposition—*Voraussetzung*. Under this doctrine, just as the parties are free to qualify their transactions by express conditions, charges, and time limitations, so may the law itself qualify transactions of private parties by way of implied or constructive conditions or presuppositions. Such conditions may be implied in fact, that is, ascertained by genuine interpretation of the express terms of a transaction, or implied in law, that is, not really involved in the actual transaction or found by genuine interpretation, but imposed by law. In a like manner, the law may qualify transactions with reference to their presuppositions in order to attain results that are in accord with the reasonable expectations of the parties.64

Circumstances of social intercourse, or business-life, afford full justification to the distinction between condition and presupposition. When at the time of entering a contract the parties are doubtful as to events that may affect its terms, they usually introduce a condition. When they are not doubtful as to future developments, however, unforeseen or not reasonably foreseeable events may nevertheless thwart the reasonable purposes on which the contract was framed. In that case, the presupposition—a sort of undeveloped condition—allows a defense based on the collapse of those reasonable expectations. The presupposition, the contractual foundation, is like an assumption that the contract would produce its effect, or operate, under circumstances that, either because they were reasonably known or because they were supposedly known, were not made an express condition of the contract.65

**Failure of Cause—German Style: The Enhancement of Good Faith**

The connection between "reasonable expectations of the parties"—based on presupposition—and the idea of cause, which is always put in terms of motive, end, or purpose, is inescapable. In fact, it is possible

63. See I S. Litvinoff, supra note 10, at 442-45.
64. See 1 B. Winscheid, Lehrbuch des Pandektenrechts 507-19 (Kipp 9th ed. 1963).
to say that in German law *presupposition* is identical with *cause* in other civilian systems.

It follows then that, in German law, a collapse of the *presupposition*, that is, a destruction of the contractual basis, namely, a frustration of the reasonable expectations of the parties, brings the contract to an end, exactly as a failure of cause effects the same result under French law.

In one case, thus, a lessor claimed that because circumstances had drastically changed since the time the contract of lease was entered into, he could no longer furnish steam for industrial purposes to the lessee, as the contract provided, and sought to be discharged from that obligation unless the lessee paid a reasonable price for the steam. The court held that the performance of a contract can no longer be owed or demanded when, as a result of a complete change in conditions, the performance has become completely different from the performance originally contemplated and desired by both parties.66

A distinguished German scholar explained that decision in light of what he called the contractual basis or foundation—*Geschäftsgrundlage*—and said, "‘Basis of the transaction,’ is an assumption made by one party that has become obvious to the other during the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence of circumstances forming the basis of the contractual intention. Alternatively, ‘contractual basis’ is the common assumption on the part of the respective parties of such circumstances."67

Thus, even when the parties have not introduced as an express condition that certain circumstances must persist in order for the contract to be effective, dissolution is allowed when the circumstances are altered in such a manner as to leave the contract without a reasonable basis, thereby frustrating the parties' expectations.68

That doctrine was formulated through a flexible interpretation of the philosophy underlying article 242 of the German Civil Code which provides, "The obligor is bound to render his performance in the manner required by *good faith* with due regard to prevailing usages."69 During the serious economic crisis that destroyed the value of the German currency in the aftermath of World War I, that doctrine became the preferred instrument with which German courts handled the crippling effects of unprecedented, and therefore unforeseen, changes of circumstances upon contracts.70 In that way, the traditional approach to

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68. See L. Enneccerus & H. Lehmann, *Recht der Schuldverhältnisse* 174-84 (1958); see also 108 RGZ 109 (1924); 106 RGZ 9 (1923); 103 RGZ 329 (1922).
impossibility of performance yielded to the new concept of financial impossibility, so that something that appears as impossible to ordinary business common sense must be considered as impossible in the legal sense also.\(^7\) That is so not only when the unforeseen circumstances greatly increase the burden of the obligor, but also when the unforeseen circumstances, without affecting the material aspects of the obligor’s performance, have turned that performance into something worthless to the obligee. Thus, performance of the obligation of repaying a loan is physically, and even legally, possible when the currency in which the loan was made has lost all its value, but holding that the lender must be satisfied with such a performance by the borrower violates the elementary and overriding principle of good faith.\(^8\) The importance of good faith was enhanced by German judges even beyond the realm of contract, in such a way that good faith became a conceptual ground to explain not only the frustration of contracts, but also the “frustration” of statutes. Thus, in a difficult situation where focus had to be made on statutes under which worthless currency was still legal tender, a committee of judges of the Reichsgericht, then the German Supreme Court, addressed to the government a sort of manifesto expressing that, “The idea of good faith stands outside any particular statute or provision of positive law. No legal order that deserves the name can exist without this fundamental idea. Therefore the legislature may not through its peremptory order defeat a result that good faith irresistibly commands.”\(^9\)

Nevertheless, in the case that prompted the doctrine of destruction of the contractual foundation—Wegfall Der Geschäftsgrundlage—the court was not asked to dissolve the contract but to adjust a particular part of it. It was argued that if the court had the power to dissolve the contract it was also empowered, logically, to change one of its terms. The court accepted that challenge explaining that a full adjustment must be made so that the loss would not fall exclusively on one party.\(^10\)

Thus the German stream of the civil law reacted against the notion that force majeure can be alleged only when unforeseen events made a

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71. The foundations for that approach had been established in some German decisions rendered even before World War I; see Cohn, supra note 70, at 16.
73. 1924 NJW 90; Dawson, supra note 70, at 1049. See also 107 RGZ 129 (1923).
74. That solution, of course, did not go uncriticized; see Cohn, supra note 70, at 23-25. The revision of contracts by the court received statutory formulation in the Decree on Judicial Assistance for Contracts—Vertragshilfe Verordnung—in 1939 RGBI I 2329, whereby far-reaching powers are granted to district courts for the purpose of amending certain types of contracts, through a predominantly administrative kind of procedure adapted to the needs of a noncontentious jurisdiction. It is noteworthy that the controversial decision rendered in 1951 in the celebrated Volkswagen case, 52 Juristenzeitung 154 (note by Kegel), has prompted distinguished authorities to express skeptic views on the judicial revision of contracts; see Dawson, supra note 70, at 1086-98. See also K. Larenz, Geschäftsgrundlage und Vertragserfüllung 120-21 (3d ed. 1963).
performance absolutely impossible. As in other jurisdictions, the traditional, strict approach, arrived at through a literal interpretation of the provisions of the German Civil Code on impossibility had prevailed in Germany prior to the advent of the new doctrine.  

Equivalence of Values

Before the consolidation of the doctrine of frustration or collapse of the contractual basis, German courts achieved comparable results through a doctrine known as "equivalence of values." That doctrine asserts that it is of the nature of a reciprocal contract that each party considers his performance as an equivalent for the counter-performance of the other. Though there need not be equality of values between the performances, there must be at least some relationship of adequacy. When that relationship is destroyed, a performance not reciprocated with an adequate counter-performance is treated as impossible.

The doctrine of equivalence of values was thus a fatal blow to the traditional view that required absolute impossibility in order to exonerate an obligor. Indeed, from the vantage point of equivalence, the economic motives of the parties, the nature and purpose of the transaction, and the relation of such elements to the change of circumstances began to matter far more.

Strikingly enough, the doctrine of equivalence, as a general principle of fairness that has its source in Pothier, underlies the Louisiana doctrine of lesion beyond moiety.

Coincidence or Ancestry?

The German doctrine of frustration of the contractual basis, the Anglo-American doctrine of frustration of contract or purpose, and the American doctrine of impracticability of performance are strikingly similar. The three doctrines address themselves to the consequences of an event the non-occurrence of which was a basic assumption of the parties at the time of contracting. The doctrine of impracticability and that of frustration Anglo-American style focus on different kinds of disappointment suffered by a contracting party. Impracticability places its focus on occurrences that greatly increase the cost, difficulty, or risk

75. See German Civ. Code arts. 275(2) and 306; see also E. Schuster, Principles of German Civil Law 167 (1907).
76. See 107 RGZ 140; 1920 NJW 961.
77. See Cohn, supra note 70, at 19.
78. See I M. Pothier, A Treatise on the Law of Obligations, or Contracts 21 (W. Evans trans. 1806). Article 1860 of the Louisiana Civil Code of 1870 expressed that, in commutative contracts the parties are supposed to give, and receive, equivalents. Though that article has been eliminated by the revision of the law of obligations enacted in 1984, the institution of lesion, provided for in former article 1860, has been preserved in La. Civ. Code arts. 1965 and 2589-2600.
of the performance owed by one party. The Anglo-American doctrine of frustration, on the other hand, places its focus on a severe disappointment caused to a party by circumstances that frustrate his principal purpose for entering the contract. It often applies to relieve a party of a contract which could be performed without impediment but whose performance would be of little value to the frustrated party. The German doctrine covers both kinds of disappointment.

So striking a similarity warrants the question whether it is just a coincidence or whether the ancestry of common law frustration and impracticability can be traced to German law. At first blush, such a derivation appears strange, since the German doctrine is based on an equivalent of cause, while the common law never listed cause as an element of contract-formation. Nevertheless, as clearly put by eminent common law authority, "A 'contract' never has a purpose or object. Only the contracting persons have purposes; and the purpose of any one of these persons is different from the purpose of any other." Now, if "frustration of contract" is the same as "frustration of purpose," though not the purpose of the contract itself but the purpose of one or more parties, then "frustration of purpose," thus understood, becomes perfectly synonymous with "failure of cause." Indeed, as clearly explained in article 1967 of the Louisiana Civil Code, cause is the reason that induces a party to contract an obligation.

At a second glance, the evolution of modern common law towards convergence with the civil law where obligations or contracts are concerned is no longer perplexing.

Concerning the doctrine of commercial impracticability as formulated in the Uniform Commercial Code Section 2-615(a), its German civil law overtones may, perhaps, be explained by Karl Llewellyn's familiarity with and fondness for the German version of the civil law.

C. Failure of Cause in Louisiana Civil Law

Unexpected Circumstances, Contract Dissolution, and Failure of Cause

The Louisiana Civil Code contains several examples of situations where a contract may be dissolved because of a sudden change of

79. See Restatement (Second) of Contracts §§ 261, 265 (1981); U.C.C. § 2-615(a) (1978); ALCOA, 499 F. Supp. at 73.
81. 6 A. Corbin on Contracts 455 (1962).
82. For the conceptual proximity between "reason" and "purpose," see I S. Litvinoff, supra note 10, at 381-82, 388-96. See also La. Civ. Code art. 1967 comment b; articles 1779 and 1896 of the Louisiana Civil Code of 1870.
83. See I S. Litvinoff, supra note 10, at 500; see also R. David, Cause et considération, in Mêlanges offerts à Jacques Maury 111, 121 (1960).
84. See W. Twining, Karl Llewellyn and the Realist Movement 107 (1973). Llewellyn even wrote scholarly work in German, occasionally under the pseudonym "Teufelsdröckh." Translated into English some of that work was published in this country. See The Karl Llewellyn Papers: A Guide to the Collection 93 (Ellingwood & Twining ed. 1970); see also Herman, Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code, 56 Tul. L. Rev. 1125, 1129-31, 1138 (1982).
circumstances. Thus, in the case of loan for use, article 2906 explains that the borrower must return the thing after expiration of the term agreed upon, but article 2907 adds, "Nevertheless, if during the interval, or before the borrower has done with the thing, the lender be in an urgent and unforeseen need of this thing, the judge may, according to circumstances, compel the borrower to return it to him." 85

Concerning the contract of deposit, article 2955 provides, "The deposit must be restored to the depositer as soon as he demands it, even though the contract may have specified the time for its being restored . . . ." 86

For similar reasons, under article 1705, a testament is revoked by the subsequent birth of a legitimate child to the testator or by his adoption of a child. Quite significantly, according to article 953 of the French Civil Code, even a donation inter vivos is revoked for the same reason. 87

According to article 2455, if the thing sold is partially destroyed at the moment of the sale, the purchaser has the choice of either receding from the contract or taking delivery of what remains of the thing and having the price thereof determined by appraisement. Louisiana courts have made that article applicable also to situations where the partial destruction of the thing occurs after an agreement to purchase has been made, but before a transfer of ownership has taken place. 88

In all those situations the civil code insinuates a foundation for théorie de l'imprévision. 89 In all of them the common feature is the frustration of the purpose, or the disappearance of the reason, for which the transaction was made—the failure of its cause, a failure brought about by a change in circumstances that frustrates the parties' motives or expectations. 90 Indeed, at civil law, an obligation is closely dependent upon the existence, the possibility, and the nature of the contemplated end. Moreover, after its birth, the life of an obligation is subjected to the materialization of the pursued end because, if the end is not attained, the binding force of the obligation is not recognized. An obligation is valid only insofar as the end contemplated by the parties is susceptible of being attained. 91 A promise has no binding force when it is no longer

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85. Emphasis added.
86. Emphasis added.
87. For the legislative history of the Louisiana provision, see 3 Louisiana Legal Archives Pt. I 856 (1940).
88. See Daum v. Lehde, 239 La. 607, 119 So. 2d 481 (1960); see also Bornemann v. Richards, 245 La. 851, 161 So. 2d 741 (1964).
89. See 3 J. Bonnecase, supra note 11, at 477-80, 574-75; Cf. 6 R. Demogue, supra note 2, at 691-93.
90. See 6 R. Demogue, supra note 2, at 691.
91. See H. Capitant, supra note 45, at 18.
conducive to the end contemplated by the promisor. As a matter of necessity, the obligation disappears together with its cause.92

The close connection between cause and obligation has been recognized by the Louisiana jurisprudence on numerous occasions, though never with greater clarity than in one case, where the Louisiana Supreme Court asserted that the realization of the principal cause or motive is understood to be the basis upon which consent is given and it therefore becomes a tacit condition of the contract, because the final and principal motive for assuming an obligation lies in the obvious end being sought.93 If that cause fails, the will is vitiated and the contract falls.94 In the same decision, a dissenting opinion expressed, “Some reliance might also be placed upon the modern civilian théorie de l'imprévision—the power of the courts to hold negated an obligation when a change of circumstance or impossibility voids the presuppositions or reasonable expectations of the parties, although not expressed, which formed an underlying basis for the agreement.”95

Cas Fortuit and Failure of Cause

The leading Louisiana case involving the connection between fortuitous event, irresistible force, impossibility of performance, and failure of cause was decided by the United States Supreme Court.96 In that case, the lessee of a sugar plantation sought cancellation of the lease because the plantation was flooded by the Mississippi River and a large part of the crop and plants were destroyed and the land itself damaged. It was quite clear, however, that the lease could continue, since it was not absolutely or physically impossible for either party to perform the obligations arising under it. With utmost clarity the Supreme Court addressed itself to two questions. First, whether the overflowing of the river was truly a fortuitous event, since, because of its recurrence, flooding could have been foreseen. Secondly, whether a force could be regarded as irresistible to the effect of releasing an obligor even though such a force did not make performance absolutely impossible. In both instances the United States Supreme Court undertook an admirable exegesis of the Louisiana Civil Code, deeply delving into its direct ancestor the Code Napoleon and into its more remote ancestor, the Roman law as reflected in the opinions of Ulpian.

To the first question the Supreme Court answered, “In Louisiana the breaking of the Mississippi through the levees occurs so often that

92. See I S. Litvinoff, supra note 10, at 396-99. La. Civ. Code art. 1876 provides accordingly: “When the entire performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved...”
94. Id. at 822.
95. Id. at 830.
96. See Viterbo v. Friedlander, 120 U.S. 707, 7 S.Ct. 962, 30 L. Ed. 776 (1887).
it is held not to be an extraordinary accident; but that does not take it out of the general class of accidents or unforeseen events, \textit{cas fortuits}. The breaking of a crevasse in the Louisiana levees by the waters of the Mississippi River, causing a plantation to be overflowed, must therefore be considered as a \textit{cas fortuit}, a fortuitous or unforeseen event . . . entitling the lessee, if the plantation is . . . rendered unfit for the purpose for which it was leased, to have the lease annulled; although it is not a \textit{cas fortuit extrordinaire}, an extraordinary as well as an unforeseen accident . . . ."^{97}

To the second question the Court stated, "In short, the inundation left the thing leased in such a condition, that it was unfit for the purpose of a sugar plantation, for which it had been leased, and could not be made fit for that purpose without spending large sums of money to restore it to a condition for the cultivation of sugar cane, and to obtain seed cane elsewhere to start to afresh."^{98}

On the strength of both answers, reinforced by abundant citations of French authorities such as Domat, Pothier, and Tropling, the Court granted cancellation of the lease, since a fortuitous event, though foreseeable, made impossible—perhaps, frustrated?—the purpose for which plaintiff had entered the contract, even though such an event did not make performance physically or absolutely impossible.

Albeit the United States Supreme Court used other words in keeping with the legal terminology prevailing at the time the decision was rendered, transposed into modern terminology the rule of \textit{Viterbo v. Friedlander} stands for the proposition that the remedy of cancellation must be granted when the occurrence of an event, the non-occurrence of which was a basic assumption of the parties at the time of contracting, destroys the contractual foundation or purpose for which a party entered the contract, even though such event does not make the performance absolutely impossible but renders it only commercially impracticable. Reference by the Court to the large amount of money necessary to restore the plantation to a fit condition leaves no room for doubt. \textit{Viterbo v. Friedlander} has been often times cited, or distinguished, in later decisions.^{99}

III. \textbf{FORCE MAJEURE AND THE DEGREE OF CARE OF A PRUDENT ADMINISTRATOR}

\textbf{A. The Standard of Diligence}

\textit{Degree of Care in the Traditional Approach to Force Majeure}

The traditional approach to \textit{force majeure} in both civil law and common law has developed a very high standard of impossibility of

\begin{itemize}
\item \textit{Id. at 733, 7 S. Ct. at 976, 30 L. Ed. at 785.}
\item \textit{Id. at 736, 7 S. Ct. at 977, 30 L. Ed. at 786 (emphasis added).}
\item See Losecco v. Gregory, 108 La. 648, 32 So. 985 (1901).
\end{itemize}
performance, according to which an obligor is expected to make all efforts and employ all his resources in order to overcome whatever adverse circumstances may interfere with his performance, and he is relieved only when outside forces, primarily physical, actually prevent him from performing. That approach, in other words, subjects obligors to a standard of absolute and perfect diligence.\textsuperscript{100}

Contemporary French doctrine criticizes such a rigorous conception for its disregard of practical needs and social reality. Indeed, it is said, to demand from an obligor every possible precaution against all foreseeable dangers is unrealistic.\textsuperscript{101} It is beyond dispute that a person who borrows a thing or who receives it to do some work upon it must keep that thing safe. Nevertheless, if the thing is stolen or destroyed, it does not follow that he should be held responsible for the simple reason that theft or destruction is foreseeable or not insurmountable. For all practical purposes it can be readily said that everything is foreseeable and, especially because of present-day technology, nothing is impossible. Nevertheless, a party cannot be blamed for not having deposited a borrowed thing in a vault, or for not having requested special police protection, merely because a break-in by robbers was possible and therefore foreseeable. He should be blamed only if he took no precautions when he had good reasons to believe that such a break-in would occur.\textsuperscript{102} In other words, it is not the possible occurrence of an event that makes it foreseeable, and therefore not susceptible of being regarded as force majeure, but rather its probable occurrence.\textsuperscript{103} In this perspective, the foreseeability of an event, and thus the effort an obligor is bound to make in order to prevent its destructive effects, is a matter of the obligor’s prudence, diligence, or degree of care in the performance of his obligation.

That vantage point casts a different light, not only upon elementary situations as the one exemplified by the borrower of a thing, but also upon situations of greater economic and even social importance, as in the case of contracts of long duration, such as contracts for requirements, output, or supplies needed by the obligee for the rendering of services or redistribution to others. Such contracts create between the parties a relation of interdependence whose equilibrium or imbalance will have repercussions for other parties and even the community at large. In such a light, further inquiry is warranted into the truth of the assertion that, to constitute force majeure, an event must always be unforeseeable and irresistible in an absolute sense.\textsuperscript{104}

\textsuperscript{100} See I H. Mazeaud, Mazeaud & Tunc, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle 733-39 (5th ed. 1957).


\textsuperscript{102} See 2 H. Mazeaud, supra note 3, at 567-70.

\textsuperscript{103} See 6 R. Demogue, supra note 2, at 576.

The Degree of Care of a Prudent Administrator

The Louisiana Civil Code establishes a standard for the diligence that should be expected, or may be demanded, from an obligor in the performance of his obligation. Thus, under article 2468, until the moment of delivery, the obligor who is bound to give a thing is under a duty to keep it safe, a duty that binds him to take all care that can be expected from a faithful administrator. The same idea is expressed also in article 2710 which binds the lessee to enjoy the thing leased as a good administrator. That language originates in article 1137 of the Code Napoleon whose redactors followed Pothier in adopting the model of a bon père de famille—a prudent administrator. In Pothier's formulation, what should be expected from an obligor who owes delivery of a thing to another is "that ordinary diligence which persons of prudence apply to their own affairs." In another work, the eminent French writer asserted that, in the preservation of the thing sold, the vendor must exercise common and ordinary diligence and not that of the most rigorous kind, adding that the vendor incurs no liability if the thing is destroyed without his fault, conclusions that are incorporated into articles 2468 and 2470 of the Louisiana Civil Code. Still in another work, after setting forth the general contention that a lessee must use the thing leased as a prudent administrator, Pothier asserts that a lessee is relieved from his obligation of returning the thing if it has been destroyed without his fault. These conclusions are incorporated into articles 1728 and 1733 of the Code Napoleon and articles 2710 and 2723 of the Louisiana Civil Code. The same basic idea is reflected in other articles of the Code Napoleon and the Louisiana Civil Code, such as article 1882 of the former and 2900 of the latter.

Pothier makes a clear distinction between ordinary diligence and a more rigorous diligence that implies "all possible care." As a matter of
of principle, only the first one, that is, ordinary diligence, should be expected from an obligor, though Pothier says quite clearly that, "The degree of diligence which the debtor is bound to apply differs according to the varying nature of the engagements upon which the obligation depends." The travaux préparatoires offer sufficient elements to support the conclusion that the redactors of the Code Napoleon did not intend to depart from Pothier's formula in drafting French article 1137, which is the ancestor of article 1908 of the Louisiana Civil Code of 1870. It is significant that post-classical French doctrine has reverted to Pothier's traditional ideas on the standard of care of a prudent administrator in its search for a standard of diligence to be applied to the performance of an obligation.

**Degree of Care and Force Majeure**

There can be little doubt that a prudent administrator—a bon père de famille—would not be so foolish as to ruin himself for the purpose of protecting his possessions against all possible danger or for the purpose of completing a performance he has engaged himself to render. On the contrary, consistent views assert that a prudent administrator is a person of normal or fair diligence. He is expected to exercise, "The diligence that an individual as diligent as men ordinarily are exercises in the preservation of his possessions." Likewise, a prudent administrator has been described as a person who shows ordinary diligence in managing his patrimony, a person who exercises current solicitude in caring for the things in his custody.

If the performance of an obligation calls only for the ordinary diligence of a prudent administrator, and if it suffices for an obligor to exercise normal care in fulfilling his contractual duty, then it is inconsistent to assert that only an unforeseeable and irresistible obstacle will relieve that obligor from liability if he fails to perform. In other words, because both extreme foresight and unusually strenuous efforts to resist adversity are beyond an ordinary degree of care, the traditional approach to force majeure gives rise to a contradiction between articles 2468 and 1873 of the Louisiana Civil Code. The former expresses the

111. See 3 Oeuvres de Pothier, Traité du contrat de nantissement 402 (Bugnet ed. 1861).
112. See Bigot-Preameneu, Exposé de motifs, in 12 J. Locré, La législation civile, commerciale et criminelle de la France 327, 388 (1828).
113. See especially Tunc, supra note 101, at 249-54; 1 H. Mazeaud, supra note 100, at 733-39.
114. See 1 H. Mazeaud, supra note 100, at 735.
116. See 8 C. Beudant, Cours de droit civil français 289 (1936); see also 1 L. Laronbire, Théorie et pratique des obligations 420 (1885).
117. See Tunc, supra note 101, at 246.
standard of diligence, the latter contains the doctrine of fortuitous event or irresistible force as an excuse for nonperformance.

In spite of its place in the civil code, article 2468 is not confined to the regulation of not yet fulfilled obligations the performance of which consists of giving a thing. Almost unanimously, French doctrine asserts that the article in the Code Napoleon that served as inspiration for the Louisiana article is the carrier of a general principle that establishes the degree of care or diligence expected from an obligor whatever the kind of obligation he must perform. That is, an obligor must exercise the ordinary care and diligence of a prudent administrator whether the obligation is to keep safe the thing he must deliver, which is an obligation to achieve a certain result, or whether the obligation is to make all reasonable efforts to achieve a certain result.

On the other hand, article 1873 of the Louisiana Civil Code provides in part that an obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. That language seems to suggest that an obligor will not be excused unless performance has been rendered impossible by a fortuitous event. Such a result, however, appears to be in direct contradiction with the standard of care established in article 2468. Elimination of the contradiction between articles 2468 and 1873 calls either for an increase in the standard of diligence expected from a prudent administrator or for a decrease in the strictness with which force majeure is conceptualized under the traditional approach. Since the standard of care of a prudent administrator is well defined, and unquestionably accepted as a duty to exercise normal or ordinary diligence, the only alternative left is to attempt a new conception of force majeure under which the required unforeseeability and irresistibility need not be of an absolute character but can be reduced to reasonable proportions. In this regard, it is noteworthy that the standard of a prudent administrator has been introduced in the Louisiana Mineral Code, though qualified in order to enhance its flexibility. Article 122 of that code states that a mineral lessee is bound to operate the property leased as a reasonably prudent operator.

**Degree of Care and Nature of the Obligation**

Through his consent, an obligor may assume the obligation to build a house, or to transport a thing, or to deliver a thing he has sold, or to supply large quantities of gas over a long period of time. Unless an obligor is so powerful that his will alone suffices to make things ma-

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118. The French Civil Code does not contain an equivalent to La. Civ. Code art. 2468 in its title on sale; see 3 Louisiana Legal Archives Pt. II 1360 (1942).
119. See 2 A. Colin & H. Capitant, Cours élémentaire de droit civil français 87-88 (de la Morandière 10th ed. 1953); 7 M. Planiol & G. Ripert, Traité pratique de droit civil français 161-63 (2d ed. 1954); see also Tunc, supra note 101, at 247-49.
terialize, the performance of his obligation will boil down to his exercising a certain diligence in producing or bringing about the object of that performance. For that purpose he will make arrangements for materials, give instructions to his personnel, and take precautions. He will fight, in other words, against his own inertia, against the inertia of things, and against the ill will or the unfavorable disposition of other men. It can be readily understood that, in such an endeavor, an obligor may run into unforeseen obstacles, namely, increase in prices, unavailability of raw materials, threat of expropriation, or unexpected depletion of supplies. When such obstacles are encountered the obligor's diligence is challenged by adverse forces. If he overcomes such forces he will be able to perform and extinguish his obligation by discharge. If he does not, his failure to perform then gives rise to the problem of his liability.

Under article 1994 of the Louisiana Civil Code, an obligor may not be held liable for damages unless he has incurred fault. That fault, however, cannot be established without a prior determination of the kind of diligence that the obligor should have exercised in order to perform his obligation. Thus, in case of a failure to perform, the question of the obligor's liability cannot be covered from an inquiry into the sufficiency, or reasonableness, of the diligence that he exercised in attempting to perform. Put in other words, the true question is whether the obligor was under a duty to overcome a particular adverse force.

The degree of care, or diligence, owed by an obligor depends on the content and scope of the particular obligation that binds him. A person who receives in deposit, or borrows, a thing of mediocre value cannot be placed under the same duty of care as a bank which shelters a unique and precious thing in its vault. It is clear that an obligor's duty of care may be heavier or lighter according to the kind of contract he has made. Thus, under article 2898 the borrower of a thing is bound to keep it in the best possible order. Under article 2900, if destruction of the thing borrowed would have been avoided had the borrower used a thing of his own, he is liable for the loss of the former. According to article 2937, in preserving the thing deposited with him, a depository is bound to use the same diligence that he uses in preserving his own property. And, with utmost clarity, article 3003 explains that the liability

120. See Tunc, supra note 101, at 237.
123. See Tunc, supra note 101, at 237.
a mandatory incurs for his fault is less rigorous when his services are gratuitous than when he receives a compensation.\footnote{124}{See also French Civ. Code arts. 1880, 1882, and 1927.}

The Louisiana jurisprudence exhibits an awareness that the degree of diligence expected from an obligor is a matter that concerns the content of the obligation which a particular contract imposes upon him. Thus, where public transportation is involved Louisiana courts have said that, "It is well established that common carriers are charged with the highest degree of care to their passengers and that the slightest negligence causing injury to a passenger will result in liability."\footnote{125}{Galland v. New Orleans Public Service, Inc., 377 So. 2d 84, 85 (La. 1979); Wise v. Prescott, 244 La. 157, 151 So. 2d 356 (1963).} Though very high, such a standard does not, however, turn a carrier into an insurer of its passengers, which means that no liability arises unless the carrier is shown to have been derelict in meeting his heavy duty to exercise diligence.\footnote{126}{Davis v. Owen, 368 So. 2d 1052, 1055 (La. 1979); Comeaux v. Greyhound Lines, Inc., 381 So. 2d 910 (La. App. 3d Cir. 1980), writ denied, 383 So. 2d 782 (La. 1980).} An injured party under a duty to mitigate damages is bound to take only \textit{reasonable} steps to minimize the consequences of the injury and the standard by which those steps are measured is that of a reasonable man under like circumstances.\footnote{127}{See Easterling v. Halter Marine, Inc., 470 So. 2d 221 (La. App. 4th Cir. 1985). See also La. Civ. Code art. 2002.}

Thus, the imposition of a very high degree of diligence still does not mean that an obligor must defy the impossible in order to perform. Even when exceptional skill and responsibility are expected from an obligor, as in the case of one rendering professional services, he must be exonerated from liability if it is shown that, using his best judgment, he did all he could under the circumstances, that is, he employed the degree of skill \textit{ordinarily employed} under similar circumstances by other renderers of the same kind of services.\footnote{128}{See Tunc, supra note 101, at 247.}

Since, as shown, the degree of diligence or care that must be exercised in the performance of obligations is neither fixed nor immutable, but instead varies in accordance with the content of each obligation, it is then inescapable that the test of unforeseeability and irresistibility which an event must meet in order to be regarded as a \textit{force majeure} cannot be maintained with inflexible or indiscriminate rigor. The test of absolute impossibility cannot be supported as a matter of policy designed to induce obligors into maintaining high standards of performance. If the lawmaker's objective is that the highest possible diligence be exercised \textit{always}, such an objective would be clearly set forth but, so far, the lawmaker has not so done. On the contrary, the lawmaker has chosen the prudent administrator as the preferred standard. Under the articles of the Louisiana Civil Code discussed earlier, that standard is at odds
with absolute impossibility as a measure for *force majeure*. In applying that test of absolute impossibility, courts neglect the prudent administrator as a standard of diligence in an attempt to achieve particular results through indirect methods. Such attempts lead to undesirable social results.

At any rate, the desirability of imposing a very high standard of diligence on every obligor is questionable. It is not denied that an obligor should not be lulled into carelessness. Yet, to demand from him more than is demanded from a reasonable man who behaves with normal diligence amounts to denying the social nature of law and, further, to asserting that there is legal fault where neither social nor moral fault can be found.¹²⁹

*Force Majeure and Fault*

Articles 2468 and 2710 of the Louisiana Civil Code, which are specifications of the principle that establishes the standard of diligence for the performance of obligations, and article 1873 of the same code, which exonerates from liability an obligor whose performance is prevented by *force majeure*, can be reconciled according to the preceding discussion. All that is needed is to realize that the principles contained in those articles complement rather than contradict each other. Those articles relate to the same problems and to the same obligations. That amounts to saying that the content of the obligation contemplated in article 2468 and *force majeure* contemplated in article 1873 are compatible notions.¹³⁰ Put in other words, fault on the one hand and *force majeure* on the other are alternative bases for decision whenever an obligor fails to achieve the results the parties expected, for such a failure can only be explained either by the obligor's default or by the interference of an event beyond his control and for which he cannot be blamed. More obviously, he is either chargeable or not chargeable for that failure.¹³¹

The event beyond his control that may explain the obligor's failure is that obstacle which, in spite of the obligor's having exercised all the care and diligence he owed under the contract, suddenly appeared to obstruct his performance and is such that it could be avoided or overcome only by means superior to those at his disposal or superior to those the contract required him to employ. Such an event is a *force majeure* that, in this light, appears as marking the limit or borderline of the obligation. The expression "*force majeure*" indicates, by itself, a comparison between the magnitude of the obstacle and the diligence owed,  

¹²⁹. Id.  
¹³¹. See 2 H. Mazeaud, supra note 3, at 732.
and clearly means that situation or event which exceeds the scope of such diligence.\textsuperscript{132}

\textit{Force Majeure and Absence of Fault}

If fault and \textit{force majeure} are alternative notions, then \textit{force majeure} becomes the correlative of absence of fault. That is so because if an obstacle is such as to prevent performance though the obligor exercised all the diligence he owed in attempting to perform, then he committed no fault. If he can avail himself of \textit{force majeure}, it is because of the absence of fault on his part—both support each other reciprocally.\textsuperscript{133}

That relation between \textit{force majeure} and absence of fault was clear to Pothier.\textsuperscript{134} In the words of a later authority, "An appraisement of \textit{force majeure} implies a comparison between the seriousness of an obstacle to the performance of an obligation and the energy the obligor would have to spend to overcome it. If the obstacle appears to be the greater quantity, \textit{vis major}, the obligor, \textit{if he had done as much as he could}, is relieved from all liability."\textsuperscript{135}

It is not that an obligor should be released from liability only upon a showing that he was not at fault. In spite of the lack of fault on his part, the obligor must still prove the nature of the obstacle, force, or event that prevented his performance. The absence of fault has no other effect than reducing to reasonable proportions the unforeseeability and irresistibility of that obstacle. Thus, for example, if during a war a mechanic endeavors to repair a car in his shop and that shop is destroyed when the city is bombed by the enemy, his absence of fault should allow his plea of \textit{force majeure} even if bombardment was foreseeable because of the war.\textsuperscript{136} On the other hand, a person who, in the same city, undertook the custody of a priceless work of art, or a precious manuscript, or valuable securities should not be allowed such a plea if he cannot show that he deposited the thing in a bank vault or otherwise did as much as he could to preserve it.\textsuperscript{137}

\textit{The Jurisprudence}

Though the correlation between \textit{force majeure} and absence of fault has gathered strong support in continental doctrine, the jurisprudence

\begin{footnotes}
\item[132.] See 7 T. Huc, Commentaire théorique et pratique du code civil 202 (1894).
\item[133.] See 3 J. Bonnecase, supra note 11, at 553.
\item[134.] See 4 Oeuvres de Pothier, supra note 109, at 73.
\item[135.] 7 T. Huc, supra note 132, at 202 (emphasis added).
\item[136.] See 1 H. Mazeaud, supra note 100, at 568.
\item[137.] It is noteworthy, however, that some writers attempt to distinguish between absence of fault and \textit{force majeure}, but rather from an evidentiary point of view; see 6 R. Demogue, supra note 2, at 580. Other writers, on the contrary, suggests that absence of fault on the part of an obligor is a finding that may help a court in achieving the same results as under \textit{théorie de l'imprévision}; see, e.g., L. Rezzônico, supra note 12, at 125-51.
\end{footnotes}
of France and Louisiana, and of the common law world as well, still adhere to traditional views on unforeseeability and irresistibility and demand a very high standard of impossibility in order to exonerate an obligor who invokes force majeure. There are indications, however, of some change in that trend. Certain French and Louisiana decisions have granted relief to an obligor who encountered in his performance an obstacle he could not have overcome with the degree of diligence that, according to the nature of the contract, could be expected from him. In one case a Louisiana court said, "Rain is foreseeable, but excessive rain to the extent of twenty-one inches above normal, with abnormal frequency (a rain every three days), does not seem reasonably foreseeable, and in this case, under this contract, falls in the category of fortuitous event." 138 In a case where, because of pronounced fluctuations of the market-price, a supplier of gas failed to perform a contract for the delivery of such commodity, the court found that a five-fold increase in the price of natural gas over a three-year period amounted to a "drastic rise" neither foreseen nor reasonably foreseeable by the parties at the time the contract was entered.139

Beyond that, French writers place great emphasis on a case where the Cour de cassation exonerated the defendant from liability on grounds that its employee had committed no fault, even though the fortuitous event that caused damage to the plaintiff was foreseeable.140

Decisions of that kind, in sharp contrast with earlier Louisiana cases characterized by a strict and inflexible approach to force majeure, are persuasive authority for the reception of a more flexible standard of impossibility in the jurisprudence of France and Louisiana.

B. Diligence in Performance of Contracts of Long Duration

Contracts of Long Duration

Modern law is aware of the distinction between contracts giving rise to obligations that are performed in just one act, whereby the parties

139. See Continental Oil Co. v. Crutcher, 434 F. Supp. 464, 471 (E.D. La. 1977), where plaintiff-purchaser filed a motion for preliminary injunction in order to compel specific performance by defendants-sellers of a contract for the supply of natural gas. But see 465 F. Supp. 118 (E.D. La. 1979), where, upon the parties' joint motion to reopen the proceedings, and because of a joint stipulation entered by the parties, the court withdrew comments and remarks made in the initial decision that were unnecessary for the conclusion reached in the second opinion. Preliminary injunction was again denied though on different grounds. It is clear, however, that the second decision does not reflect a change of mind of the court concerning a five hundred percent increase in price as force majeure, as the parties' stipulation allowed the court to dismiss the motion on the finding of lack of irreparable harm on the part of plaintiff.
bind themselves for a short term, and contracts giving rise to continuous relations between the parties for a long term. In contemporary terminology the expression "transactional ventures" designates contracts of either instantaneous or short term performance, while the expression "relational ventures" has been coined to mean contracts entered in order to govern the parties' relations for a long time. In the former, the parties are in a position to plan their affairs on the assumption that known risks may affect performance in a foreseeable manner. In the latter, the assumption is that preliminary planning may be inadequate since unknown risks may occur during the long life of the contract, a reason for which the continuous relation arising from the contract is not always fully articulated.

That distinction is now reflected in the Louisiana Civil Code. Nevertheless, the traditional law of impossibility, patterned no doubt to befit the model of transactional ventures, does not account for the realities of relational ventures.

Contracts contemplating a continuous performance or a series of acts of performance over a long time are the result of modern business practices and have been recognized by the law as a useful tool to meet the practical needs of commerce. Indeed, demands of a complicated industrial society compel manufacturers and distributors of goods, and purveyors of services for large markets, to secure a steady supply of the raw materials or finished goods required by their normal operation, just as such needs also compel producers of goods to secure steady and reliable outlets for their output. On the Continent, such contracts are called contrats de fourniture. Agreements of that nature are of different kinds, such as contrat de distribution (distribution contract), contrat de collaboration (cooperation contract), contrat d'intégration (integration contract), and contrat d'assistance et fourniture (requirements and financial assistance contract).

Whatever their kind, the distinctive feature of all such contracts is that they do not provide for a single act of performance but for a series of acts that will take place, usually, over the course of a long time.

143. Id.
144. See supra note 13.
145. See Trakman, supra note 142, at 487.
time. In modern law, requirements contracts, *contrats de fourniture*,
and contracts of related kinds are conceived of as agreements establishing
general rules, in the form of a private "constitution" of the parties,
designed to govern a series of specific contracts that the parties intend
to enter either thereupon or in the future. Thus, rather than "contracts" in a traditional sense, they are a framework for future dealings—a *contrat-cadre*, or framework contract.\(^{147}\)

Perhaps the clearest assertion made on the nature of a *contrat de fourniture* or *contrat-cadre* is that it is similar, if not identical, to an agreement to engage in further good faith negotiations.\(^{148}\)

**Good Faith and The Parties’ Objectives**

There is a general tendency to believe that the main purpose the parties have in mind when entering a contract of long duration, is to assure a buyer that he will be able to get the needed supplies at a certain price, either fixed or subject to variation according to an agreed scale. Such view is only partial and therefore not realistic. As recently put from the vantage point of legal and business experience: "The parties to a long-term contract have other objects in mind than one strictly of price. Their principal object is, for the seller, a market, and, for the buyer, a supply of goods. To be sure, price, as an element of concern, is always present, because the seller must obtain a return of his costs, and the buyer must pass on his costs, including the purchase price of what he gets from the seller, to his customers. But for both, price is more of a means to an end, rather than an end itself. The longer the term of the contract, the more the principal object of the contracting parties refers to supply of goods and the manner in which it will be supplied and the less to the highest or lowest price which can be obtained. The seller and buyer on a long-term arrangement are not in the same relationship as there exists between one out of a multitude of sellers who sells on an ad hoc basis to one of a multitude of buyers of that particular product with a single or a few deliveries being made shortly after the date of contracting to fulfill the seller’s obligation to deliver. The buyer and seller in a long-term arrangement are molded into some-

\(^{147}\) See I S. Litvinoff, supra note 10, at 537; J. Mousseron & Seube, supra note 146, at 197. See also Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 823 (1941); Llewellyn, What Price Contract? - An Essay in Perspective, 40 Yale L.J. 704, 727-37 (1931).

thing other than that typically envisaged by the common law as that existing between buyer and seller."

In such a context, it is clear that the preservation of the relationship is a primary interest of the parties and for that reason cannot be ignored; they must be ready to make and receive concessions from time to time. Parties to that kind of contract know that a breakdown of confidence between them may mean more than mere termination of the relationship, as the cost of entering new contractual arrangements with other parties may be very high, and a disruption of performance may have devastating effects for other parties such as producers and suppliers whose business has become interdependent with that of the parties, consumers, and more often than not, the community at large.

The overriding duty of good faith that the parties owe themselves reciprocally is thus enhanced in contracts of long duration. The emphasis is displaced from the individual end pursued by each of the parties to the end pursued in common by all of them, as if the contract were a joint-venture where the idea of opposed interests yields to the idea of a certain union of interests among the parties. Thus, insofar as the expected performance is concerned, the obligee is no longer a creditor without more. He also becomes an obligor under a duty of collaboration, an obligation to cooperate in the attainment of the mutual ends, which need no longer be accomplished solely through the means originally conceived by the parties but may be achieved by other means supplied by their will or by judicial fiat. The door is thus opened for the modification of contracts.

**Long Duration and Standard of Diligence**

The standard of diligence in performance of a contract of long duration has not yet been explored in depth. The lack of any provision

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149. Stroh, supra note 7, at 208-09 (1982). The following reflection is added later on: "The judicial approach has, on the whole, been not to recognize these differences in the relationship and the orientation to market/supply rather than price, and, because of the manner in which the approach of the courts to the problems of impracticability and frustration is made, the contractor for the longer term has suffered more than the short-term seller. This is not to say that a seller on the shorter term cannot be subjected to many of the same burdens on his costs and expectations as the longer term seller. But where a producer under a short-term contract is caught in a cost/price squeeze, he can grit his teeth, perform, and raise his price the next time around." Id. at 209.

150. See Trakman, supra note 142, at 490.


153. See 2 R. Demogue, Traité des obligations en général 525-44 (1923); 2 A. Colin & H. Capitant, supra note 119, at 81; 2 S. Litvinoff, supra note 121, at 7.

154. See 6 R. Demogue, supra note 2, at 9, 59-71; 2 S. Litvinoff, supra note 121, at 6.
to the contrary warrants the conclusion that, in the Louisiana Civil Code, the standard of a prudent administrator prevails regardless of the duration of the contract. Nevertheless, human experience and the regular course of events show that the longer the period covered by a performance, the greater the likelihood that unforeseen risks will occur. When properly weighed, this realization supports the conclusion that, where contracts of long duration are involved, the standard of diligence to which the obligor is to be held must be lowered at a rate inversely proportionate to the length of the duration of the contract. One article of the Louisiana Civil Code lends support to that conclusion. Article 2743, dealing with the contract of lease—a typical example of a contract of long duration—provides that, "The tenant of a predial estate can not claim an abatement of the rent, under the plea that, during the lease, either the whole, or a part of his crop, has been destroyed by accidents, unless those accidents be of such an extraordinary nature, that they could not have been foreseen by either of the parties at the time the contract was made; such as the ravages of war extending over a country then at peace, and where no person entertained any apprehension of being exposed to invasion or the like..."

A tenant, thus, is bound to foresee the occurrence of accidents known to happen in the regular course of events, precisely because such accidents are foreseeable. He may not be charged, however, with the consequences of extraordinary accidents, because such accidents are unforeseeable. Because the lease of a predial estate is a contract of long duration—in relative or absolute terms—it is foreseeable that heavy rain, or hail, or a freeze may occur at least once in the course of several years, but war, as in the example offered in the article, need not necessarily happen and is therefore not foreseeable. In other words, the diligence proper of a prudent administrator does not bind an obligor under a contract of long duration to foresee extraordinary events. The last paragraph of article 2743 corroborates that conclusion in asserting that, "The tenant has no right to an abatement, if it is stipulated in the contract, that the tenant shall run all the chances of all foreseen and unforeseen accidents."

The risk of extraordinary events or obstacles must then be expressly assumed in order to hold an obligor liable for the consequences of such events.

The Louisiana jurisprudence detected long ago that contracts to be performed through a long series of acts over an extended period of time require special treatment, primarily from the vantage point of the overriding obligation of good faith, precisely because a party to such a contract, unless endowed with a foresight beyond human limitations, may find himself unwillingly placed at the mercy of the other party.

155. Emphasis added.
156. Emphasis added.
In a case where, in face of rapidly increasing prices, a buyer of coal under a long-term contract began placing unusually large orders which the supplier could not fill without sustaining great financial loss, the Louisiana court clearly understood the unfairness of such a situation and, perhaps because of an inability to resort to different tools, declared the contract null for the lack of a reasonable cause, which the court called a "sufficient consideration."\(^{157}\)

Also in France, contracts of long duration that call for a series of acts of performance have elicited a certain reaction from courts. Thus, the *théorie de l'imprévision*, or theory of unexpected circumstances, applies only to contracts providing for successive acts of performance during a long period and not to contracts that are discharged through one single act.\(^{158}\) In at least one decision the Louisiana Supreme Court adhered to the view that *théorie de l'imprévision* is related to contracts of long duration.\(^{159}\)

**IV. ERROR, FRUSTRATION, IMPOSSIBILITY, CAUSE, AND THÉORIE DE L'IMPRÉVISION**

*Error, Frustration of Purpose, and Force Majeure*

When a party who undertook to deliver large quantities of goods over a long period of time suddenly realizes that, in spite of rigorous preliminary calculations, its own source of such goods is insufficient to satisfy the needs of the contract, while unforeseen and unprecedented changes in market conditions have made prohibitive the cost of securing goods from another source, or when a party who undertook to buy large quantities of goods for industrial purposes suddenly realizes that unprecedented changes in circumstances have greatly diminished, or destroyed, the market for which the goods were intended, the unexpected changes partake of the nature of a fortuitous event that is extraordinary. The question is whether a party in such a predicament can be blamed for the consequences when, at the time the contract was made, the general belief of the parties, of the experts who advised them, and even of public opinion at large, was that future changes would not exceed certain foreseeable margins.

The compulsion is irresistible to handle such a situation with the conceptual tools of the doctrine of error which performs the same function as, though it reaches deeper than, the common law doctrine of mistake.\(^{160}\)

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157. See Campbell v. Lambert, 36 La. Ann. 35 (1884); see also analysis of the decision in 1 S. Litvinoff, supra note 10, at 536-38.

158. See 3 J. Bonnecase, supra note 11, at 578-79.


As recently expressed, "In broad outline the doctrines of impracticability and of frustration of purpose resemble the doctrine of mistake. All three doctrines discharge an obligor from his duty to perform a contract where a failure of a basic assumption of the parties produces a grave failure of the equivalence of value of the exchange to the parties. And all three are qualified by the same notions of risk assumption and allocation." In a recent work by an influential English authority mistake and frustration are alluded to as sister-doctrines.

That reflection of an American court and an English scholar in light of well-known common law principles is not only compatible with, but has a stronger foundation in, the Louisiana Civil Code. That is so because the code expressly relates the doctrine of mistake to the theory of cause. Thus, according to article 1949 of the Louisiana Civil Code, which has no equivalent in the Code Napoleon, error invalidates consent only when it concerns a cause without which the obligation would not have been incurred. As expressed in the source to which that article can be traced, the reality of the cause is an essential condition of the contract, without which the consent would not have been given, because the will is always determined by a motive and, if there be no such motive, or cause, where one was supposed to exist, or if it is falsely represented, there can be no valid consent. In the same code, impossibility as an excuse for nonperformance, which lies at the foundation of the related notions of frustration and impracticability, is also strongly connected with cause.

Error of Fact vs. Erroneous Prediction—"The" Cause that Error Must Concern

With citation to the Restatement of Contracts, Second, it has been asserted in a Louisiana case that, to be operative, a mistake must relate to the facts as they existed at the time of contracting, while a party's prediction or judgment as to events to occur in the future, even if erroneous, is not a mistake as defined in the Restatement. Thus, if parties make a mistake involving the suitability of a certain formula for the escalation of prices, that "suitability" is a "fact" that existed

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161. ALCOA, 499 F. Supp. at 70 (emphasis added).
163. 3 C. Toullier, Le droit civil français 329 (1833). Article 1824 of the Louisiana Civil Code of 1870 provides, "The reality of the cause is a kind of precedent condition to the contract, without which the consent would not have been given, because the motive being that which determines the will, if there be no such cause where one was supposed to exist, or if it be falsely represented, there can be no valid consent." See also La. Civ. Code art. 1949 comment a.
164. See supra text accompanying note 10.
at the time of contracting, while an error on the profit to be made on
the basis of a certain price and escalation formula is an error that
involves a future economic event and, as such, is not operative. 166

That distinction, which rests on unfirm grounds, is not consistent
with the tradition to which the Louisiana law belongs. Thus, according
to Toullier, whose thoughts have greatly influenced the Louisiana doc-
trine of error, if the reason that prompts the parties to make a contract
is the occurrence of an event or the existence of a thing, the resulting
obligations will have no cause if the event does not occur or the thing
does not exist. 167 A promise to give a sum of money to defray the
expenses of a wedding, for example, is invalid if the wedding does not
take place. 168 By the same token, if an inheritance is sold burdened with
a “rent of land,” the obligation to pay such rent is extinguished if the
acquired estate is lost. 169 The inference is thus very clear that, in the
mind of that influential authority, the failure of a basic assumption of
the parties at the time of contracting causes the contract to fail. 170

The objection may be raised that situations of that sort actually
involve absence of cause rather than error, but such objection can be
readily dismissed. It has been said in this context that, “It is unques-
tionable that in Louisiana law, absence of cause, false cause, and error
in the cause have been brought together. Nevertheless, there are cir-
cumstances where the lack of a counterpart for the obligation assumed
by one of the parties can be determined on an objective basis. Even
though lack of cause is the result of the party’s mistake, this mistake
can be recognized as such in some instances without much inquiring
into the party’s state of mind, as when he bought a second insurance
policy for the same risk. Whereas at other times, the mistake cannot
be determined as such without a deep probe into the party’s psychological
processes, as in the case of error on a certain quality deemed substantial.
Both situations are the consequence of a mistake.” 171

That connection between “absence of cause” and “false cause”
sufficiently explains that “fact” and “prediction” cannot be distin-
guished for the purpose of finding that an error is operative in the
Louisiana law.

      1319, 1327 (E.D. La. 1981). See also Restatement (Second) of Contracts § 151 comment
167. See 3 C. Toullier, supra note 163, at 329-31, 381.
168. Id. at 330.
169. Id. at 381.
170. See Bilbe, Mistaken Assumptions and Misunderstandings of Contracting Parties—
171. S. Litvinoff, “Error” in the Civil Law, in Essays on the Civil Law of Obligations
      222, 265-66 (J. Dainow ed. 1969); see also Hoff, supra note 160, at 361-62; J. Ghestin, La
      notion d’erreur dans le droit positif actuel 258-60 (1963).
Both civil law and common law agree that error takes place in the intellectual representations that precede the parties' declaration of will that forms that contract.\textsuperscript{172} Since in order to be operative in the civilian approach an error must affect the cause or principal cause of the obligation, it becomes imperative to define "cause" in the context of the doctrine of error, a matter of great concern in French legal literature.\textsuperscript{173}

In the context of error, "cause" is not reduced to merely the other party's counterperformance, an approach that brings the civilian "cause" very close to the common law "consideration."\textsuperscript{174} Quite on the contrary, for purposes of error, a definition of cause emerges from a deep probe into the intent of the parties. It has been said in that connection that, "Cause is the 'juridical reason,' shared by and determining the will of all parties."\textsuperscript{175} It has also been said that cause is the "end," the "objective," or the intentional element, inherent or implied, in the nature of the contract, an end that, as a consequence, was known, or should have been known, to the two parties and therefore not merely personal to the obligor.\textsuperscript{176} Always in the same context, it has been asserted that the will, or consent, cannot be conceived independently of the intellectual representations that inform it. When such representations are tainted by error there is lack of accord between representations and the objective elements that support the will. The essential rapport of "cause-effect" between the objective elements of the will or consent is thus destroyed thereby prompting the destruction of the cause.\textsuperscript{177}

Where error is concerned the definition of cause reaches deeply into the social utility of contract. In such connection it has been said that "cause" is a "necessity" that surpasses mere respect for the parties' will as it imposes itself upon the parties. "If one admits that a contractual obligation is not a purely arbitrary creation of the will of the parties and that a contract, far from being an end in itself, is just an instrument for the exchange of goods and services, the conclusion is clear that, in contracts, cause constitutes an independent juridical element of great importance. It allows knowledge of the end on the basis of which the parties have contracted. The civil law thereby controls the right utilization of contract and therefore disallows contracts to be entered without a cause."\textsuperscript{178}

\textsuperscript{172} See article 1821 of the Louisiana Civil Code of 1870; Restatement (Second) of Contracts § 151 (1981).
\textsuperscript{173} See J. Ghestin, supra note 171, at 258-60.
\textsuperscript{174} See I S. Litvinoff, supra note 10, at 500-02.
\textsuperscript{175} See I L. Larombière, supra note 116, at 295.
\textsuperscript{176} See C. Bufnoir, Propriété et contrat 529 (2d ed. 1924).
\textsuperscript{177} See B. Célice, L'erreur dans les contrats 116-17 (1922).
\textsuperscript{178} 2 G. Ripert & F. Boulanger, Traité de droit civil d'après le traité de Planiol 110 (1957). See also I R. Demogue, Traité des obligations en général 540 (1923).
It is in the context of error that it becomes clear that cause is not just the other party's counterperformance in a commutative contract. If cause were only that, as the proponents of the "objective theory" of cause contend, then it would be a redundant concept whose function is more efficiently discharged by the concept of contractual object. Indeed, if acquiring the thing sold were the cause of the vendee's obligation to pay the price in every contract of sale, the idea of a "cause" would contribute little or nothing to an analytical approach to the situation.\(^ {179}\) If the usefulness of the function of cause is to be rescued, that essential ingredient of an obligation must be explored in the sphere of the motivation of parties, the reasons that prompt them to bind themselves. Of course, an error may concern a thing that a party is buying for no other reason than to have it and enjoy it. In such a case, the cause on which the error falls can be singled out without probing too deeply into the party's subjectivity.\(^ {180}\) A deeper probing is required other times, however, as when the reason for the purchase is the use of the acquired thing in a subsequent course of action for the attainment of certain ends. The subjectivity of cause must be, thus, accepted for the proper utilization of that important requirement as a useful conceptual tool.\(^ {181}\)

Resorting to a terminology which is traditional in the Louisiana law, the fact that not every motive can be treated as the cause of an obligation should be explained in terms of communication, or presumption, rather than alleged objectivity.\(^ {182}\) That motive which is the cause is the one that has been expressed as such between the parties, or the one that can be presumed to be the cause under certain circumstances. Parties are free to make manifest, or to withhold their reasons for binding themselves through an obligation, their motives to enter into a contract. If those motives are expressed and the other party is made aware of them, then according to the almost proverbial expression, they have entered the contractual field—they become the cause.\(^ {183}\) But if no special motive is expressed, the law shall presume that the motive is that one which can be taken as a stimulation of a person's will under the same circumstances. In other words, if a person is about to purchase something, he may state his requirements in the clearest possible way, thereby making the vendor aware of what is it that he, the vendee, wants the thing for. In this manner his motives are communicated to the other

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180. See S. Litvinoff, supra note 171, at 265.

181. See S. Litvinoff, supra note 10, at 390-94.


183. I S. Litvinoff, supra note 10, at 395.
party who now knows that this cause is why the other is going to obligate himself. However, if the purchaser does not state his concrete motivation he will be deemed to have been motivated by a desire to have the requested thing without more. Thus, the cause of the vendee's obligation will always be his willingness to have the thing, in every contract of sale, provided he did not express a more precise motivation. This means that, confined within these limits, as a general presumption, the basic tenet of the classical theory of cause still holds, but it is clearly understood that the presumption can be overcome by proof of special circumstances.\footnote{184}

A motive that is communicated abandons the realm of strict subjectivity. It would be an exaggeration to think that it becomes something objective. But it should be conceded that, at least, it acquires a certain inter-subjectivity. This inter-subjectivity is the guideline that allows the courts to isolate the motive which is the cause, from the other simple motives that cannot be elevated to that category.\footnote{185}

The importance of this inter-subjectivity of the motive that qualifies as cause can be easily explained. The party who communicates his motives is asking for a certain cooperation from the other in order to attain the motivated result. In this manner, the kind or amount of cooperation requested, or reasonably presumed to have been requested, also serves as an aid in determining which motive shall be considered cause. Thus, whichever motive of one of the parties remains outside the other's ability to cooperate, will not be regarded as a determining motive; that is, as the cause.\footnote{186}

A consumer, for example, normally buys a particular item of merchandise for his personal consumption or that of his family or friends. It is reasonable to assume that his motive, reason, or cause, for purchasing the item is to obtain it for his personal use or for the use of his family or friends; that is, for consumption rather than resale. In such a situation, the seller fulfills his duty of good faith cooperation by delivering a thing of the required quality that contains no hidden defect or vice.\footnote{187} If, on personal grounds, the purchaser does not derive the kind of satisfaction or enjoyment he expected from the thing, there is nothing the seller could have done by way of cooperation to prevent that disappointment. On the other hand, had the consumer bought for the ulterior motive of reselling the thing purchased at a higher price, the law could not regard this motive as the reason for which he bought, unless he manifested this particular motive to the seller.\footnote{188}

\footnote{184}{Id. at 435-37. See also H. Capitant, supra note 45, at 209-10.}
\footnote{185}{1 S. Litvinoff, supra note 10, at 437.}
\footnote{186}{Id.}
\footnote{187}{See La. Civ. Code arts. 2520 and 2531.}
\footnote{188}{See La. Civ. Code art. 1949; 3 C. Toullier, supra note 163, at 329; articles 1825 and 1826 of the Louisiana Civil Code of 1870.}
The situation of a merchant, or professional seller, is of course different. Such a party buys with the intent of reselling in a given market at a profit, rather than consuming the things he buys in the course of his business. His motive, reason, or cause is the profit to be made through reselling at a higher price. A necessary presupposition to the achievement of that goal is the existence of a given market or markets for the goods involved. The existence of markets is an important part of the motivation that prompted him to buy. It is clear that such motivation is known to the other party, even if not expressed, especially if the other party is also a merchant. The same reflection applies to a merchant who contracts to meet the requirements of another party with an expectation of profit to be made out of goods of a certain source of supply. The existence of that source is, in such a case, a necessary presupposition to the attainment of that party's goal.

In either case, an error made on a fact on which the attainment of a party's contractual end depends is an error that concerns the cause of the party's obligation. When cause is viewed in the perspective of the parties' communicated or otherwise understood reasons, the conclusion is clear that a prediction, which is, of course, an intellectual representation, may very well bear an operative error when such prediction has determined the will of the two parties, or of one of them to the knowledge of the other.

The connection of error, force majeure, and impossibility of performance is thus established.

The Louisiana Jurisprudence

Louisiana courts do not hesitate in bestowing the nature of operative error to an event that does not precede, nor is contemporaneous, but is rather subsequent, to the contract and, therefore, is only a "prediction" at the time the contract is entered. Thus, one decision asserts that, "Failure of the parties to a contract to buy and sell to anticipate a lack of governmental approval of the purchaser's planned use of the property has previously been held to constitute error in the principal.

189. See I. Garrigues, Curso de derecho mercantil 22 (1976).
191. To avoid terminological confusion, revised article 1967 of the Louisiana Civil Code defines cause in terms of reason rather than motive. As explained in comment b to that article, that substitution of words was effected in order to make the Louisiana doctrine of cause more consistent with its source, as Toullier spoke of motif (motive) as pourquoi (why an obligation is assumed); see 3 C. Toullier, supra note 163, at 378. In such a context, "motive" and "reason" are practically interchangeable, though it is quite clear that "reason" is closer than "motive" to the approach taken by modern and contemporary French doctrine, which speaks of "cause" in terms of but (end or goal); see H. Capitant, supra note 45, at 5; I S. Litvinoff, supra note 10, at 388-96.
192. See L. Rezzonico, supra note 12, at 125-30; E. Farnsworth, supra note 19, at 697-98.
cause of the contract . . . failure to anticipate an unreasonable and indefinite delay in governmental approval should lead to the same result, as fulfillment of the principal cause is equally impossible. For that reason we find: (1) performance of the contract within a reasonable time was a principal cause of the contract; (2) this cause was apparent both from the inherent nature of an agreement of purchase and sale of real estate and from the circumstances surrounding this particular contract; (3) the cause cannot be fulfilled due to events beyond the control of either party; and (4) the parties' failure to anticipate the unreasonable delay was error of fact sufficient to vitiate their consent and invalidate the contract."

In the preceding quotation, in crystal clear form, the Louisiana court asserts that a "failure to anticipate," hardly distinguishable from a wrong prediction, is an error of fact, thereby rejecting the common law distinction received in the Louisiana Power & Light case. On the other hand, the Louisiana court speaks of "impossibility of fulfillment of the principal cause" in terms that are equally descriptive of impracticability or frustration of purpose.

In another case, plaintiff sued for the specific performance of an agreement to purchase a house. The court found that plaintiff-vendor knew that the reason that prompted defendant to enter the agreement was the fact that defendant’s employer wanted him to move closer to the site of his work, but the order to move was rescinded by the employer after the defendant had entered the agreement. The court dismissed plaintiff’s action, saying in passing that defendant made good faith efforts to fulfill the buy-sell agreement as long as his motive for entering the agreement was intact. Here the distinction between the contractual object, namely the house purported to be sold, and the cause of defendant’s obligation to take delivery of and pay for the house was made glaringly clear by the court.

In one decision, the Louisiana Supreme Court concluded that failure to obtain a liquor license for the operation of a bar and lounge constitutes an error of fact as to the principal cause which effects invalidation of the contract. Another Louisiana court has held that a party's wrong prediction concerning the sufficiency of certain funds for the purpose of paying a mortgage note constitutes an operative error of fact. It is unquestionable, in all such cases, that, in mind of Louisiana courts, a material error of fact may invalidate a contract even if it is

195. Id. at 1317.
uncovered only in the light of a supervening event.

**Error and Théorie de L’Imprévision**

The connection between error and théorie de l’imprévision has, of course, been detected in French legal literature. Thus, a distinguished French authority does not hesitate in defining “imprévision” as an error involving the economic development of the contract.\(^\text{198}\) It has been observed, however, that, as a matter of principle, error concerns the formation of contracts while “imprévision” concerns performance. Nevertheless, it was immediately added that in practical terms, where the mind of the parties is concerned, it is very difficult, if not simply impossible, to distinguish intellectual representations of the future from those of the past or of the present.\(^\text{199}\)

The symmetry between contemporary developments at common law and civil law is thus enhanced.

The wider scope of cause in the context of error, as explained earlier,\(^\text{200}\) clearly shows that to be operative, error need not involve only the other party’s counterperformance. Error does not come to the rescue only of those who are not receiving what they expected from a contract, such as a purchaser who bought the wrong thing. On the contrary, as error must inhere to the parties’ primary motivation—the principal cause—it is operative also when it involves a performance promised on the basis of a wrong assumption.\(^\text{201}\)

From the Louisiana jurisprudence it is clear that a contract may be invalidated when only one of the parties made an error in estimating the performance expected from him under such contract.\(^\text{202}\)

**The Limits of Foreseeability; Damages, Risk, and Sharing of Loss**

In sum, where error is concerned the law has not distinguished between facts which are unknown but presently knowable and facts which presently exist but are unknowable.\(^\text{203}\) Something which presently exists but is at the time unknowable is bound to strike with the same devastating effects as a fortuitous event or irresistible force. Such is the case of a natural gas-reserve base generally believed to be practically inexhaustible at a certain moment, but proved to be insufficient by the supervening effects of changes in government policies, international crisis, and unprecedented market changes.

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198. B. Célice, supra note 177, at 217.
199. J. Ghestin, supra note 171, at 63, n. 70.
200. See supra text p. 40.
201. See J. Ghestin, supra note 171, at 280-81.
By way of example, although the cause-effect relation in the extraordinary alteration of prices brought about by international crisis or international conflagration should be known to a prudent administrator, there is no reason for him to foresee the occurrence of a crisis or conflagration which upsets domestic or world markets. That kind of foresight escapes the prudence of a standard prudent administrator. The Louisiana jurisprudence is well aware of that conclusion.\textsuperscript{204}

Objections may be voiced against the views just expressed, on grounds that they permit a certain leniency towards defaulting obligors, particularly in light of the fact that failure in the performance of obligations may be prompted, perhaps, by dishonest calculations and, therefore, are to be regarded with distrust. Such an objection, however, can be made only in total disregard for the ideas underlying article 1996 of the Louisiana Civil Code and articles 1150 and 1151 of the Code Napoleon which, in limiting the liability of an obligor in good faith to the reparation of damages that were or should have been foreseen, assert that, to some degree, losses must be shared between the parties rather than overburdening the obligor alone. Whenever force majeure strikes, the business of the parties takes a bad turn. That either party should get all or nothing is not a fair solution. A sharing of loss is more in keeping not only with human limitations, but with social needs as well.\textsuperscript{205}

The need for solutions that allow a fair sharing of loss, or an equitable allocation of risk, between parties to a contract of long duration is advocated not only by modern French doctrine but also by German and Anglo-American decisions and doctrinal opinion. Thus, through a very adept judicial understanding of the obligation of good faith prescribed in article 242 of the German Civil Code, German courts reached the conclusion that several customers of a supplier of goods form a community of risk among themselves and that the supplier's available stock must be apportioned among such customers if unforeseen events prevent the availability of goods in a quantity sufficient to deliver the full amount owed by the supplier to each customer.\textsuperscript{206} At common law, eminent authority has expressed that, "We can not lay down one simple and all-controlling rule. . . . The problem is that of allocating, in the most generally satisfactory way, the risk of harm and disappointment that result from supervening events."\textsuperscript{207} In some instances, American courts have spoken in terms of a judicial duty to apportion risks.\textsuperscript{208}

That is so because in every fully developed legal system the diligence

\begin{footnotes}
\item[204] See McLemore v. Louisiana State Bank, 91 U.S. 27, 23 L. Ed. 196 (1875).
\item[205] See 6 R. Demogue, supra note 2, at 571.
\item[206] See 84 RGZ 125 (1914); 95 RGZ 264 (1919).
\item[207] 6 A. Corbin on Contracts § 1322, at 256 (1962).
\item[208] See Lloyd v. Murphy, 25 Cal. 2d 48, 153 P.2d 47 (1944); see also Patterson, The Apportionment of Business Risks Through Legal Devices, 24 Colum. L. Rev. 335 (1924); Smit, supra note 39.
\end{footnotes}
owed by an obligor in performing his obligation cannot be but a compromise between the absolute expectations of the obligee and the practical difficulties involved in rendering the performance. The social and economic cost of any other solution is unbearably high.209

V. UNEXPECTED CIRCUMSTANCES AND CONTRACT INTERPRETATION

The Approach

When unexpected changes of circumstance greatly affect the performance of contractual obligations, the resulting conflict can be analyzed from the vantage point of the intent of the parties at the time of contracting. For that purpose, clear guidance is contained in the articles of the Louisiana Civil Code pertaining to interpretation of contracts.

Ascertaining Mutual Intent

According to article 2045 of the Louisiana Civil Code, interpretation of a contract is, precisely, the determination of the common intent of the parties.210 Article 2046 provides, "When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent."211 According to article 2054, however, "When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose."212 Article 2051 provides, on the other hand, that, "Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include."213 Louisiana courts have never hesitated in recognizing and enforcing those principles.214 Some Louisiana decisions assert that to determine the mutual intent of parties, a particular provision of a contract must be viewed as a pinpoint of light in a broader spectrum which is the entire document.215

According to those articles, unless the words of a contract concerning a particular situation are quite clear, Louisiana courts must examine all circumstances surrounding the conclusion of the contract in order to
discern the mutual intent of the parties. In an interesting case, thus, an agreement had been made between a seller of oil and a sugar manufacturer whereby the latter, plaintiff, would purchase a large quantity of oil with the privilege of buying an additional large quantity.\textsuperscript{216} Though not expressed, the parties had contemplated the sale to cover only the quantity of oil necessary to run plaintiff's plant. When the price of oil escalated, plaintiff demanded of seller's assignee the full quantity of barrels, though not all was to be used to run the factory. Although the language of the contract seemed clear, the court insisted upon examining the circumstances behind the agreement and found that the terms of the contract should be viewed in light of the conditions that existed at the time of the agreement and should take into account what could be reasonably believed to have been in the minds of the parties at that time. The court held the seller not liable for the alleged failure to furnish the full amount of oil.\textsuperscript{217} Additionally, it has been said in one decision that, "A venerable principle under Louisiana contract law is that a contract must be construed in light of the condition and surrounding circumstances existing at the time of contracting, together with the terms and language used."\textsuperscript{218}

Louisiana courts have held that when the parties fail to contemplate intervening contingencies, the court should not construe the contract so as to work hardship on one of the parties when that can be avoided without defeating the intention of the parties at the time of execution. In one case, a mineral lease between the parties provided a one-eighth royalty free of cost on all the oil, gas, and gasoline produced. After execution of the lease, deep wells rich in gas suitable for gasoline production were discovered. Though extraction of gasoline from that kind of gas is extremely costly, the lessor demanded his one-eighth royalty free of cost. Noting that such a construction of the contract had not been initially contemplated and would work hardship on the lessee, the court allowed that party to deduct the cost of extraction.\textsuperscript{219}

In a case where the contract was unambiguous, but unforeseen contingencies had occurred, the court concluded that usages of the trade in that particular area should substitute for the omitted expression of the parties' intent.\textsuperscript{220} That conclusion is now supported by article 2055 of the Louisiana Civil Code.

\textsuperscript{216} Adeline Sugar Factory v. Evangeline Oil Co., 121 La. 961, 46 So. 935 (1908).
\textsuperscript{217} Id. at 979, 46 So. at 941.
\textsuperscript{218} Continental Oil Co. v. Crutcher, 434 F. Supp. 464, 471 (E.D. La. 1977); Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 1007, 144 So. 737, 742 (1932).
\textsuperscript{219} Coyle v. Louisiana Gas & Fuel Co., 175 La. 990, 144 So. 737 (1932). See also Ascension Red Cypress Co. v. New River Drainage Dist., 149 La. 764, 90 So. 165 (1921).
Omission and Decision

Whether the parties have been silent concerning a certain contingency is a question that cannot be answered without exploring the expectations of the parties. Indeed, the parties form their expectations in relation to a limited number of situations which they deem significant and which they select from a larger number of foreseeable ones. "As to those situations that are excluded by this process of selection, there is an absence of expectation. When they reduce their expectations to contract language, a second process of selection takes place, and they use their language only in connection with a limited number of the significant situations with respect to which they formed their expectations. As to the rest, there is an understatement of expectation. A situation that does not survive these processes of selection is a 'casus omissus.' The process of determining whether there is a 'casus omissus' is that of inference, based either on actual expectations or on general principles of fairness and justice. So where a dispute over omission concerns the qualification of a duty that has been expressed without qualification, a court must first determine by the process of interpretation whether the case at hand was one of the significant situations with respect to which the court should recognize that it is within its power to extend the duty by analogy to the case at hand, to refuse to extend it, or to reach an adjustment that lies between these extremes." 221

Those methods are a part of the process of judicial decision-making under any Western system of law. 222

That approach has a clear importance to the problem of unanticipated circumstances. Inasmuch as, in the typical case of frustration, the supervening events were neither foreseen nor reasonably foreseeable, the terms of the contract cannot be interpreted to continue their applicability in the changed situation, even though, on their face, they might seem to do so. Swiss, German, English, and American courts have reached such a conclusion when faced with contractual situations of that sort. 223

Some Louisiana decisions contain a clear indication that Louisiana courts also believe that situations which the parties did not contemplate escape the purview of a contract. 224

It is clear, thus, that even without altering traditional notions of force majeure or impossibility, or without admitting new doctrines that

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221. Farnsworth, Omission in Contracts, 68 Colum. L. Rev. 860 (1968).
account for the consequences of unexpected circumstances, courts are able to use centuries-old principles of interpretation of contracts as a ground for relief whenever fairness demands a remedy for an obligor whose burden has become exceedingly onerous because of circumstances beyond his control, which amounts, in a way, to a restoration of *rebus sic stantibus*.

VI. UNEXPECTED CIRCUMSTANCES AS AN EXCUSE IN OTHER CIVILIAN JURISDICTIONS

Spain

Article 1105 of the Civil Code of Spain contains a classical version of *force majeure*, that is, an obligor is not liable for a failure to perform caused by an event that could be neither foreseen nor resisted. For half a century after the enactment of that code in 1889, Spanish courts asserted that only absolute impossibility could give rise to *force majeure* as an excuse, thus they adhered to the traditional approach. In 1951, however, in a decision involving a long-term contract of transportation, the *Tribunal Supremo*, the Spanish Supreme Court, took into account both the long duration of the contract and the increase in the cost of freight and read a *rebus sic stantibus* into the contract in order to conclude that a contract must be adjusted when a supervening change of circumstances alters the economic foundation of the contract and upsets the balance originally existing between the parties’ reciprocal performances.\(^\text{225}\) In 1953, the same tribunal held that a party had committed no breach of contract when, because of black-outs and restrictions on the use of electric power, only thirty percent of the wooden boxes promised by that party could be manufactured and delivered.\(^\text{226}\)

Through those decisions, and others, it is clear that the Supreme Court of Spain has departed from the orthodox approach to *force majeure* and has made the notion of impossibility remarkably flexible through a doctrine having some “impracticability” overtones.

Italy

Article 1225 of the Italian Civil Code of 1865, as its model in the Code Napoleon, contained a rule that reflected the traditional approach to *force majeure*. Nevertheless, in a celebrated decision rendered in 1916, the court of the city of Turin concluded that in contracts providing for a series of future acts of performance over a period of time, the clause *rebus sic stantibus* is always implied and, therefore, when a change in circumstances has considerably increased the burden of one party’s per-

\(^\text{225}\) See 17 *Repertorio de la jurisprudencia civil espanola* (J.C. Espana) 453 (1951); 2 J. Puig Brutau, supra note 8, at 378.

\(^\text{226}\) See 18 J.C. Espan. 366-67 (1953); 2 J. Puig Brutau, supra note 8, at 378-79.
formance such contracts may be either dissolved, or modified in order to alleviate the consequences of the change.\textsuperscript{227} That conclusion was reasserted in many other decisions that followed.\textsuperscript{228}

The Revised Italian Civil Code of 1942, sensitive to those jurisprudential developments, provides now in its article 1664, "If as a result of unforeseeable circumstances such increases or reductions occur in the cost of materials or of labor as to cause an increase or reduction of more than one-tenth of the total price agreed upon, either party may request that the price be revised. . . . If in the course of the work, difficulties appear that derive from geological conditions, water, or other similar causes not foreseen by the parties, which make the performance of one party considerably more onerous, that party is entitled to just compensation therefor."\textsuperscript{229}

\textit{Greece}

Before the enactment of a civil code in 1946, nonperformance of a contract was a matter governed in Greece by the Roman law as developed by the Pandectist school in the nineteenth century.\textsuperscript{230} Responding to the influence of German jurisprudence and doctrine, some Greek courts resorted to \textit{pacta sunt servanda} in order to grant relief to obligors when the performance of their contractual obligations had become extremely more difficult by virtue of unforeseen changes of circumstances.\textsuperscript{231}

It is against such a background that article 388 of the Greek Civil Code of 1946 addresses the problem of frustration of contract in a manner that reflects the influence of the French \textit{Imprévision} and also the German doctrine of good faith.\textsuperscript{232} That article provides, "If, according to good faith and business practices, the parties have entered a synallagmatic contract under circumstances that have changed because of extraordinary reasons which could not have been foreseen, and, as a result of such change, the obligor's performance, also with regard to the counter-performance, has become excessively burdensome, the court

\begin{itemize}
\item \textsuperscript{227} See 1921 Foro It. I 737. For a discussion of classical Italian doctrine that gives ample support to the conclusion reached in that decision, see 3 Enciclopedia Giuridica Italiana Pt. III Sec. 2.
\item \textsuperscript{228} See F. Messineo, Dottrina generale del contratto 508-514 (1952); L. Rezzónico, supra note 12, at 54-56.
\item \textsuperscript{229} For interesting commentaries to that article, see 4 F. Stolfi \& G. Stolfi, II nuovo codice civile Pt. II 167-69 (1952).
\item \textsuperscript{230} By Royal Decree of February 23, 1835 the civil law of the Byzantine emperors, as contained in the Hexabiblos of Harmenopoulos was proclaimed in force until the enactment of a civil code; see P. Zepos, Greek Law 80 (1949). See also Weiss, E. Griechisches Privatrecht 219-41 (1965).
\item \textsuperscript{231} See Zepos, Frustration of Contract in Comparative Law and in The New Greek Civil Code of 1946, 11 Mod. L. Rev. 36, 41 (1948).
\item \textsuperscript{232} Id. at 41-45.
\end{itemize}
may, at the obligor's request, reduce such performance to reasonable proportions based on its own evaluation, or even declare the contract dissolved in whole or in that part not yet performed."

**Poland**

The different codes in force in Poland before enactment of the Polish Code of Obligations of 1935 strongly adhered to *pacta sunt servanda*, as that principle was then deemed indispensable for the protection of the security of transactions. As a consequence, increased difficulty of a performance resulting from an unexpected change of circumstances was not operative as an excuse for the obligor, who was entitled to relief only in case of absolute impossibility of performance. Nevertheless, in search of a solution for the pressing problems which originated in the crisis that ensued after World War I, the highest tribunal of Poland developed a jurisprudential doctrine that allowed relief in cases of relative, rather than absolute, impossibility of performance. According to the origin of the law applicable to each case, the court resorted, for that purpose, to different sets of concepts such as good faith, abuse of rights, frustration of the contractual basis or equivalence of the parties' respective performances. That creative work of the Polish Supreme Court received legislative formulation in article 269 of the Polish Code of Obligations of 1934 which provides, "When as a result of extraordinary circumstances such as war, epidemic, total loss of crops, or other natural cataclysm the performance of an obligation has become excessively difficult or would force one of the parties to sustain an exorbitant loss not contemplated when the contract was concluded, the court may, if it deems it necessary, according to the principle of good faith and after taking into consideration the interest of both parties, establish the manner and the extent of the performance, or even pronounce the dissolution of the contract."

**Argentina**

Receptive to views expressed by distinguished writers, Argentine courts developed their version of *Imprévision* according to which relief is granted to an obligor in situations of relative impossibility of performance, that is, when because of unexpected changes of circumstance, performance, though not absolutely impossible, has become extremely impossible.

233. See Niboyet, supra note 58, at 9.
234. See Longchamps de Berier, *La revision des contrats par le juge dans le droit polonais*, Travaux de la semaine internationale de droit 105, 110-17 (1937).
235. A treatise by Przybyłowski on the effect of changed circumstances on the binding force of contracts, published in Lwow in 1926, where all the Polish legal literature on that subject is summarized, became very influential at the time the code of obligations was in the drafting stage; see id. at 112.
onerous for the obligor. That was done on the basis of a civil code article prescribing that contracts bind the parties not only to whatever is expressly provided therein but also to whatever may be regarded as virtually comprised in them. From there, the conclusion was reached that, just as there is no consent when error vitiates it, a party cannot be presumed to have consented to perform in the face of changes of circumstance that increase the burden of the performance. The result is deemed to have been an expansion of the scope of the traditional doctrine of force majeure.

As a consequence of those jurisprudential developments, when revision of the Argentine Civil Code was undertaken, article 1198 was amended in 1968, so that it now reads, "Contracts must be executed, interpreted and performed in good faith and according to that which is likely the parties have or should have understood had they acted with care and foresight. In bilateral commutative contracts, unilateral onerous contracts and commutative contracts of continuous or deferred performance, if the performance of one party becomes excessively onerous because of extraordinary events that could not have been foreseen, the party thus burdened may seek the dissolution of the contract. The same principle shall be applied to aleatory contracts when the excessive onerousness is the result of causes unrelated to the risk involved in such contracts. In contracts of continuous performance their dissolution may not impair those effects which have been already accomplished. Dissolution may not be granted when the overburdened party has been negligent or has fallen into default. The other party may prevent the

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236. See E. Cardini, La teoría de la imprevisión (1937); E. Cardini, La Lesión sobreviniente (1961); L. Rezzónico, supra note 12; Carlomagno, La teoría de la imprevisión en los contratos y en el derecho en general, [1933] 43 J.A. 18; Fornieles, La clausula Rebus Sic Stantibus, 1942 J.A. IV 9; Orgaz, El contrato y la doctrina de la imprevisión, [1950] 60 La Ley 691; see also Dursi v. Teitelbaum, 1964 J.A. V 286 (Ct. App. B.A. 1964); Ferrari v. Santa Rosa Estancias, 1965 J.A. IV 413 (Ct. App. B.A. 1964); Cabal v. Madero, 1975 La Ley 254 (Ct. App. Nat'l 1953). These are just a few of the many decisions receiving the doctrine. It must be said, however, that decisions rejecting the doctrine have also been rendered. It is significant that those decisions where courts have expressed approval on the clearest of terms very often do not grant relief on grounds that the strict requirements for operation of the doctrine have not been met, as in the Ferrari case. It is also noteworthy that, according to a distinguished writer, the basis for a rebus sic stantibus doctrine can be found in the decision of the Argentina Supreme Court in Avico v. De la Pesa, [1934] 48 J.A. 697 where, significantly enough, the court cites Wilson v. New, 243 U.S. 332, 37 S.Ct. 298 (1917) and Ogden v. Saunders, 25 U.S. (12 Wheat.) 213 (1827). The Argentine and American cases deal with the constitutionality of emergency legislation that may impair the obligation of contracts.

237. See article 1198 of the Argentine Civil Code of 1869. See also La. Civ. Code art. 2053 and article 1903 of the Louisiana Civil Code of 1825.

238. See Ferrari v. Santa Rosa Estancias, 1965 J.A. IV 413.

239. See Dursi v. Teitelbaum, 1964 J.A. V 286; see also L. Rezzónico, supra note 12, at 100-07.
dissolution of the contract by offering to improve his own performance.\textsuperscript{240}

\textit{Quebec}

It has been said that the \textit{Code civil de la province de Quebec} of 1866 went beyond the Code Napoleon in asserting the sanctity of contract, as, for example, in denying a remedy for lesion to persons who were of legal age at the time of contracting.\textsuperscript{241} Even though, for that reason, the Quebec jurisprudence has not been generally receptive concerning \textit{Théorie de l'imprévision}, Quebec courts have occasionally granted relief in situations where a performance has become extremely more onerous by virtue of unexpected circumstances, as a manner of preserving the \textit{equité} of the contract.\textsuperscript{242}

Against such a background it is especially significant that article 73 of the Draft Quebec Civil Code of 1979 provides, "If unpredictable circumstances render execution of the contract more onerous, the debtor is not freed from his obligation. Exceptionally, the court may, notwithstanding any agreement to the contrary, cancel, resiliate or review any contract the execution of which would entail excessive prejudice to either party, as a result of unforeseeable circumstances not imputable to him."\textsuperscript{243}

\textit{The Special Case of Puerto Rico}

In the Commonwealth of Puerto Rico, as in Louisiana, the basic private law is contained in a civil code of traditional Continental structure which is applied and maintained in the context of powerful common-law influences. That reason makes the law of Puerto Rico of particular relevance to Louisiana, since the Puerto Rican experience, for greater reasons than the experience of other jurisdictions, can serve as guidance in Louisiana when new paths must be found within the law in order to find solutions for pressing problems.

As its Spanish ancestor, the Puerto Rican Civil Code of 1902 contains \textit{force majeure} provisions patterned after the French model.\textsuperscript{244} In the context of such rules, however, the highest court of Puerto Rico found

\footnotesize{\textsuperscript{240} See G. Borda, supra note 14, at 251-52; J. Llambias, Estudio de la reforma del código civil 307-29 (1969).}

\footnotesize{\textsuperscript{241} See J. Baudouin, Le droit civil de la province de Quebec 731-32 (1953). See also article 1012 of the Quebec Civil Code of 1866. In recent times, however, a remedy founded on lesion has been introduced for the protection of consumers; see L. Baudouin, Les obligations 133-37 (1983).}

\footnotesize{\textsuperscript{242} See Madda v. Demers, 29 B.R. 505 (1920); but see J. Baudouin, Les obligations 224 (1983).}

\footnotesize{\textsuperscript{243} See J. Baudouin, Les Obligations 225 (1983).}

\footnotesize{\textsuperscript{244} See article 1058 of the Civil Code of Puerto Rico as re-enacted in 1930; see also P.R. Laws Ann. tit. 31, § 3022 (1962).}
that a doctrine of unexpected circumstances readily arises from the civil code provisions on good faith, contractual fairness, and unjust enrichment.\textsuperscript{245} Thus, in a case where a supplier of goods alleged that extreme and unforeseen scarcity of the goods prevented its performance of the contract, the court opened the door of Puerto Rican law to \textit{Imprévision}.\textsuperscript{246} The court asserted, for that purpose, that the clause \textit{rebus sic stantibus} is unquestionably contained in the overriding obligation of good faith, especially in the case of contracts of long duration. Spanish and German doctrine, extensively analyzed by the court, lend support to that conclusion.\textsuperscript{247} The court made it clear that, for relief to be granted, certain findings are a prerequisite. Thus, unforeseeability of the changes of circumstance, which is a question of fact, is a fundamental condition, independent of the other factors operating in each particular case. An extraordinary difficulty must be shown that renders the conditions of performance more severe and onerous for the obligor, though without attaining that extraordinary degree of severity that constitutes absolute impossibility, which is also a question of fact. Assumption of risk, as the case would be in an aleatory contract, must not have been a primary purpose of the contract involved in the case. There must be an absence of bad faith on the part of either party, since bad faith would constitute either delict or quasi-delict, the effects of which are already regulated by the law. The contract must involve a series of acts of performance, or a performance subject to a term, for there is no room for \textit{Imprévision} in contracts that are performed immediately. Finally, the unforeseen circumstances must have brought about a change of a certain permanence, which seems to follow from the extraordinary nature of the change.\textsuperscript{248}

\textbf{VII. Conclusions}

\textit{Creation vs. Expansion}

The preceding discussion shows different reactions and different possible solutions to the problems that arise when unexpected changes of circumstance increase the burden of performing an obligation in a manner that, exceeding the reasonable contemplation of the parties at the time the contract was made, threatens the financial stability of the

\textsuperscript{247} Id. at 853-57. See also 3 J. Castan, Derecho civil espanol, comun y foral 548 (1947); 2 J. Puig Brutau, supra note 8, at 372-79.
\textsuperscript{248} See 108 P.R. Dec. 856-57 (1979). Because some of those prerequisites were absent in the situation involved in the case, plaintiff was denied relief. See comments to that case in Echevarria Vargas, Revisión contractual por alteración de las circunstancias, 21 Rev. D.P. 202, 215-17 (1981).
obligor and, as in some of the situations explored, may also threaten the continuity of indispensable services.

In many continental legal systems, *Théorie de l'imprévision*, whose affinity with the American impracticability of performance has been discussed, has made deeper inroads than in France, where it originated. For some authorities, *Imprévision*—unforeseen or unexpected circumstances—is another of the manners in which obligations are extinguished, a new defense, an excuse for nonperformance with an entity of its own that has to be distinguished from traditional *force majeure*.²⁴⁹ For others, *Imprévision* alludes to difficult problems that differ from those clustered around *force majeure*, which justifies the search for a solution through other avenues such as failure of cause (so similar to frustration of purpose), error, good faith, contract-interpretation, and even abuse of right or unjust enrichment.²⁵⁰

Be that as it may, and regardless of precision in the legal foundations, the important thing is the recognition given to unexpected changes of circumstance as an excuse to be invoked by an overburdened obligor. It is noteworthy that even staunch supporters of the enforceability of contracts as made by the parties have conceded that when an obligor's burden reaches a certain degree, it is manifestly unjust to uphold the contract as originally made, since it is as unfair to profit from circumstances that were unforeseen at the time of contracting as it is to profit from the other party's ignorance of circumstances that existed at that moment.²⁵¹ For the same reason that the doctrine of vices of consent furnishes a remedy in the latter situation, it has been said, a remedy is also needed in the former.²⁵²

Nevertheless, for the sake of rigor in the conceptual approach, it cannot be denied that, when operative, unexpected circumstances and *force majeure* share the feature of unforeseeability and also share the obstructive effect. The fact that changes of circumstance, for their vast generality, may affect many, or all, obligors within a class, while *force majeure* may affect only one, can justify a difference of species within a certain category but not a difference in the category itself.²⁵³ In other words, an expansion of the scope of the traditional doctrine of *force majeure*, especially on account of an increasingly changing world, should give ample room for unexpected changes of circumstance as an excuse for nonperformance.²⁵⁴

Articles 1873 and 1875 of the Louisiana Civil

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²⁵⁰. See 3 J. Bonnecase, supra note 11, at 572-93; Smit, supra note 39.

²⁵¹. See 6 M. Planiol & G. Ripert, supra note 212, at 535; see also A. Weill & F. Terre, supra note 57, at 420-22.

²⁵². See 6 M. Planiol & G. Ripert, supra note 212, at 535.

²⁵³. See 2 J. Puig Brutau, supra note 8, at 363-72.

²⁵⁴. Cf. J. Radouant, supra note 130, at 92-98; see also 2 A. Colin & H. Capitant, supra note 119, at 94-98.
Code lend support to that conclusion as a result of having chosen "fortuitous event" over "irresistible force" as the cause of impossibility.255

In sum, fairness or the public interest are valid reasons that can still make rebus sic stantibus a viable alternative to pacta sunt servanda, at least in critical situations.

**Dissolution vs. Revision**

If extreme difficulty is equated to impossibility as the result of a more flexible and realistic approach to force majeure, then a contract should be dissolved when the obligation of one party can no longer be performed as originally intended. In many situations that solution is the only one that is reasonable and fair. Dissolution, however, which is the natural consequence of a fortuitous event that strikes a party's performance according to article 1876 of the Louisiana Civil Code, is not always the best outcome of the inevitable conflict of interests. Dissolution may mean the total destruction of the parties' contractual expectations, while, when unexpected circumstances have exceedingly increased the burden of a performance, fairness to one of the parties, or both, may require that the contractual relation be preserved, though not in the original terms.256 Moreover, in some situations, the preservation of the contractual relation may be required by the public interest or the welfare of the community.257

Of course, the parties on their own initiative may modify, revise, or alter their own contract in exercise of their contractual freedom.258 In spite of such an intention they may fail to reach a solution. The question is whether a revision of the contract may be judicially imposed upon them. At first blush, contract-revision as a remedy seems to run counter to the fundamental principle that a contract is the private law of the parties, which would seem to exclude any judicial interference with that law.259 The fact is, however, that the civil code itself provides for a revision of the contract as a solution in some instances. Thus,

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255. La. Civ. Code art. 1873: "An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible." La. Civ. Code art. 1875: "A fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen." Article 1933(2) of the Louisiana Civil Code of 1870 provides: "Where, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do . . . ." See also La. Civ. Code art. 3556(14), (15).

256. See Trakman, supra note 142, at 489-91.


according to article 1877, when a fortuitous event has made a party's performance impossible in part, the court may reduce the other party's counterperformance proportionally, as an alternative to the dissolution of the contract. That is consistent with the solution propounded in article 2455 under the terms of which, if the thing sold is partially destroyed at the time of contracting, the purchaser has the choice of keeping that part of the thing that has been preserved and having a new price determined by appraisement. According to article 2012, a court may modify a stipulation of damages made by the parties, when such damages are manifestly unreasonable and contrary to public order.

In the clear words of article 2543, in an action for rescission on grounds of redhibition, the court may decree a reduction of the price thereby unholding the contract, though not in its original terms. Under certain circumstances, in an action for judicial dissolution, article 2013 allows the court to grant additional time to an obligor who failed to perform thereby modifying the contractual term.

In other instances, modification of the contract is a choice the law gives to a party as an alternative to rescission or dissolution. In the case of lesion, article 2591 prescribes that if it should appear that immovable property has been sold for less than one half of its fair value, the purchaser may either restore the thing and take back the price which he has paid, or improve that price to make it fair and keep the thing. That is now consistent with article 1951 according to which rescission on grounds of error may not be granted if the other party is willing to perform the contract as intended by the party in error. Also, under article 2697, if a leased thing is destroyed in part, the lessee may either demand a diminution of the price or dissolution of the contract.

Written provisions aside, Louisiana courts have asserted on several occasions that, when a fortuitous event has thwarted the parties' expectations, an effort should be made by the court to restructure or re-balance the obligations of the parties, so as to place them as nearly as possible in equal positions.

It is clear, thus, that the idea that a contract may be revised by a court is not alien to the civil code. It appears, in that context, that the
principle that makes of a contract the private law of the parties assumes normality in the life of a contract. When that normality is severely altered because of unexpected changes in circumstance, an adjustment of the contract to the altered circumstances is actually a manner of going back to the original will of the parties whom should always be presumed to have intended to make a contract that will subsist rather than collapse. In the words of a distinguished French writer, a doctrine that allows revision, far from destroying contracts, actually restores them to their real and effective scope.265

Of course, one thing is a contract-modification that consists in determining a new price for a partially destroyed thing or allowing additional time for an obligor to perform, and another is the modification of a contract of long duration the clauses of which may contain extremely complicated technical or economic formulae. Even for such situations, however, it is possible to develop suitable methods.266 On the other hand, knowledge that a court may exercise such a power may be the best stimulation for parties to reach an adjustment by their own means, and to introduce in their future contracts devices that will force them to negotiate solutions in good faith.267

Be that as it may, the judicial revision of contracts other than those governed by administrative law has been rejected in France.268 Besides the alleged encroachment upon the sanctity of contract, another reason for that rejection is the danger of too much judicial discretion.269 To that, a distinguished French authority responded that a judge is more than a mere interpreter of contracts, that in deeply delving into the parties' intent in order to bestow meaning upon their contract a judge becomes a collaborator of the parties, a wise administrator whose discretion should never be feared.270

To conclude, sight should not be lost of the fact that civil law is not only French law. It has been shown earlier that in other ambits of the civilian world, a doctrine of unexpected circumstances that propounds judicial revision of contracts as a remedy has been developed on the basis of centuries-old civilian principles.271

265. M. Morin, La loi et le contrat 49-50 (1927).
269. For an excellent discussion of the objection referred to in the text, see L. Rezzónico, supra note 12, at 112-15.
270. 2 R. Demogué, supra note 153, at 493-94. See also G. Ripert, supra note 15, at 142-43.
271. See supra text pp. 52-57.
Limitations

When not specifically provided by law, the remedy of contract-revision, because of its extraordinary nature, must be used sparingly, prudently, and applied only to extremely serious situations. Certain findings are indispensable for that purpose, to wit:

(1) The facts or events that brought about changes of circumstances and call for application of rebus sic stantibus must be so extraordinary and abnormal as to have escaped the foreseeability of prudent parties. If such events or changes were foreseeable, then the conclusion must be that the obligor assumed the pertinent risk.\(^{272}\)

(2) The consequences of the unexpected changes must be of such an importance as to allow the conclusion that the obligor would not have bound himself if those changes had been foreseeable. The balance between the parties’ respective performances must be drastically altered as the result of the greatly increased onerousness of one.\(^{273}\)

(3) The unexpected changes must have produced consequences of vast generality that affect whole categories of obligors, as it is the case with the economic consequences of war, or inflation, or depletion of the sources of certain supplies.\(^{274}\)

(4) The contract involved must be one providing for a series of acts of performance over a certain period of time, or for a performance deferred in time. In either case, time is the factor that allows a change to occur.\(^{275}\) In contracts of instantaneous or immediate performance, a manifest lack of balance between what the parties give and receive may be cured through other remedies.\(^{276}\)

(5) The contract involved must be commutative, that is, not aleatory, in which case it may be assumed that the obligor assumed the risk of extraordinary contingencies.\(^{277}\)

The General Interest

Technical requirements aside, the most important consideration on which the granting of an extraordinary remedy—either judicially or by legislative fiat—must be based is an awareness of the consequences that may follow if only ordinary remedies are allowed in certain situations. Indeed, if upon an unquestionably clear showing that the difficulties encountered by an obligor truly amount to impossibility dissolution is

\(^{272}\) See L. Rezzónico, supra note 12, at 38-40.

\(^{273}\) The balance may be altered also if the onerousness of one performance is suddenly greatly decreased as when, because of inflation, a purchaser who was granted a term to pay the price pays it in depreciated currency; see A. Morello & Tróccoli, La revision del contrato 101-20 (1977). See also K. Rosenn, Law and Inflation 84-93 (1982).

\(^{274}\) See L. Rezzónico, supra note 12, at 39.

\(^{275}\) See 6 R. Demogue, supra note 2, at 697.

\(^{276}\) See 6 M. Planiol & G. Ripert, supra note 212, at 537-38.

\(^{277}\) Id.
granted of a contract of long duration for the supply of goods indispensable to render a service to the community, interruption of the service may then ensue. Preservation of the continuity of public services is the ultimate justification for Théorie de l'imprévision in French law. On the other hand, if specific performance is granted upon a conclusion that an increase of the burden of performing an obligation, even though excessive, does not amount to absolute impossibility, the obligor may be reduced to a situation of actual or virtual financial ruin with the attending impact on large numbers of workers, the contractual expectations of third parties and, again, the community at large. It has been said, in that context, that rather than a mere source of private rights, contracts are instruments protected by the law for the satisfaction of human needs through the creation and distribution of wealth, and instruments of that kind cannot be viewed as rigid when stricken by extraordinary change.

279. See Trakman, supra note 142, at 485-86.
280. See R. Demogue, supra note 2, at 697.