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# No Act of God Necessary: Expanding Beyond Louisiana's Force Majeure Doctrine to Imprévision

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# No Act of God Necessary: Expanding Beyond Louisiana’s *Force Majeure* Doctrine to *Imprévision*

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## INTRODUCTION

In 1965, the Schencks saved enough money to construct an addition to their home in St. Bernard Parish.<sup>1</sup> For a price of \$2,260, the Schencks were set to expand their vision of the American Dream.<sup>2</sup> That dream, however, would never be realized. One month after signing the contract, nearly six feet of water poured into the home.<sup>3</sup> Construction had barely begun on the addition, but no one could have foreseen the wrath of Hurricane Betsy.<sup>4</sup> The Schencks lost most of their belongings and needed to renovate their home.<sup>5</sup> Consequently, the family could no longer afford the addition as contemplated in the contract and refused both to pay and to allow future work on the home.<sup>6</sup> The construction company sued the Schencks for payment for work done along with liquidated damages.<sup>7</sup> Although the Louisiana court expressed sympathy for the family, it held that Louisiana's *force majeure* doctrine was too strict to provide any relief to the Schencks.<sup>8</sup>

Like the Schencks, Louisiana families and businesses continue to experience unprecedented disasters.<sup>9</sup> The August 2016 floods and Hurricane Katrina in 2005 wreaked havoc on Louisiana.<sup>10</sup> In 2017, Louisiana narrowly missed massive destruction from Hurricane Harvey amidst rebuilding from the devastating 2016 floods.<sup>11</sup> If the Schencks or other families recovering

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1. *See* Schenck v. Capri Constr. Co., 194 So. 2d 378 (La. Ct. App. 1967).

2. *See id.*

3. *Id.* at 379.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* at 379–80.

9. In 2005, Hurricane Katrina resulted in one of the worst natural disasters in U.S. history when it made landfall near New Orleans, and, in 2016, Baton Rouge experienced a “1000-year” flood that destroyed many homes and businesses. *See generally* Amy Wold, *NOAA: Climate change played significant role in Louisiana’s torrential August rainfall*, *ADVOCATE* (Sept. 7, 2016), [https://www.theadvocate.com/baton\\_rouge/news/environment/article\\_dc458f5e-750b-11e6-a0dd-93b70f9bfa04.html](https://www.theadvocate.com/baton_rouge/news/environment/article_dc458f5e-750b-11e6-a0dd-93b70f9bfa04.html) [<https://perma.cc/4YXL-ANF8>].

10. Campbell Robertson & Alan Blinder, *After Baton Rouge Flooding, Learning Lessons from New Orleans*, *N.Y. TIMES* (Aug. 22, 2016), [https://www.nytimes.com/2016/08/23/us/baton-rouge-flooding-lessons-katrina.html?\\_r=0](https://www.nytimes.com/2016/08/23/us/baton-rouge-flooding-lessons-katrina.html?_r=0) [<https://perma.cc/WE7D-TMMP>].

11. *See* Mark Schleifstein, *Louisiana Flood of 2016 resulted from ‘1,000-year’ rain in 2 days*, *TIMES PICAYUNE* (Aug. 17, 2016), <https://www.nola.com/weather>

from destruction lived in France—Louisiana’s original source for its contract law—the law would have required that the parties, with the court’s help, find a way to adjust the contract so that no party was ruined financially.<sup>12</sup> If the Schencks or similarly situated families lived elsewhere in the United States, the law would have provided for a more equitable result than enforcing the contract against a family on the verge of financial ruin.<sup>13</sup>

Although much of the world allows for contractual flexibility when unexpected circumstances arise, Louisiana has stubbornly resisted changes such as impracticability or hardship, ignoring national and international trends and continuing to apply its strict *force majeure* doctrine.<sup>14</sup> Presently, Louisiana requires performance to be physically impossible for a party to obtain relief when disaster strikes.<sup>15</sup> In contrast, France recently added a new civil code article to increase flexibility beyond traditional *force majeure* after over 200 years of mirroring Louisiana.<sup>16</sup> Although lawmakers have attempted to relax Louisiana’s law of impossibility, these attempts have had little to no impact.<sup>17</sup> Louisiana law continues to serve as an inequitable roadblock to people the state’s frequent natural disasters affect.

The most realistic solution to Louisiana’s inflexible approach to *force majeure* is a legislative revision of the Louisiana Civil Code because the leading solution—requiring an extensive interpretation of the Civil Code—failed.<sup>18</sup> A revision to the Code should take into account the realities of Louisiana’s mixed jurisdictional status.<sup>19</sup> A survey of three general approaches other jurisdictions use to move beyond outright impossibility illuminates potential solutions for Louisiana to expand its law beyond the *force majeure* doctrine into cases of impracticability, *imprévision*, and hardship: (1) the Uniform Commercial Code (“U.C.C.”) and American

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/index.ssf/2016/08/louisiana\_flood\_of\_2016\_result.html [https://perma.cc/6Q5J-YX5J].

12. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

13. See, e.g., U.C.C. § 2-615(a) (AM. LAW. INST. & UNIF. LAW COMM’N 1977).

14. See generally Charles Tabor, Comment, *Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law*, 68 LA. L. REV. 549, 560 (2008).

15. See generally Saul Litvinoff, *Force Majeure, Failure of Cause and Theorie de l’Imprévision: Louisiana Law and Beyond*, 46 LA. L. REV. 1 (1985).

16. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

17. See Litvinoff, *supra* note 15; see also Tabor, *supra* note 14.

18. Tabor, *supra* note 14, at 565; see also Litvinoff, *supra* note 15.

19. See generally Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 8–9 (1994) (explaining generally how Louisiana is a mixed jurisdiction).

common law; (2) the United Nations Convention on the International Sale of Goods (“CISG”) and Unidroit Principles; and (3) the French Civil Code.<sup>20</sup> These approaches are most relevant because French civil law and American common law legal principles frequently are, and historically have been, used in the development of Louisiana law;<sup>21</sup> and the CISG, along with its contemporary, Unidroit,<sup>22</sup> are rare attempts to reconcile and modernize both common law and civil law legal systems.<sup>23</sup> Based on a careful weighing of these three approaches, Louisiana should add a provision to the Civil Code’s section on obligations to reflect the French model because the French model overcomes the weaknesses of the other solutions, such as narrow remedies and imprecision, but retains strengths, such as flexibility and binding force of contract.

Part I of this Comment explains Louisiana’s *force majeure* doctrine, distinguishes it from similar doctrines in other jurisdictions, and demonstrates the inequitable development of Louisiana’s law regarding *force majeure*. Part II discusses the two major failed attempts to introduce more flexibility into Louisiana’s *force majeure* doctrine. Part III surveys and analyzes three relevant sources of law that Louisiana should look to in constructing a workable application of hardship or *imprévision*: (1) the common law—doctrines and U.C.C.; (2) international law—the CISG and Unidroit; and (3) French law. Part IV argues that the French solution is best because it incorporates important concepts from the other solutions also providing an equitable approach and resolution to disputes and concludes that because the French solution is simple and compatible with Louisiana law, it would reduce inequities created by the current regime.

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20. See generally U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM’N 1977); United Nations Convention on Contracts for the International Sale of Goods art. 79, Apr. 11, 1981, 52 Fed. Reg. 6262, 6264–80 (1987), 1489 U.N.T.S. 3 [hereinafter CISG]; Art. 6.2.2 UNIDROIT Principles 2010; CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

21. See generally Tabor, *supra* note 14, at 565 (discussing common sources the legislature has used to develop Louisiana law).

22. The Unidroit Principles serve as an international restatement of contracts and the CISG inspired them. See Joseph M. Perillo, *Unidroit Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281, 283 (1994).

23. See Brandon Nagy, Comment, *Unreliable Excuses: How Do Differing Persuasive Interpretations of CISG Article 79 Affect its Goal of Harmony?*, 26 N.Y. INT’L L. REV. 61 (2013).

I. LOUISIANA'S STRICT APPLICATION OF *FORCE MAJEURE* AND THE HARSH CONSEQUENCES

*Force majeure* is a doctrine in the law of obligations that provides an obligor relief from damages when any obstacle renders the obligor's performance impossible.<sup>24</sup> A court may discharge an obligor from his obligation when a supervening event occurs through a "foreign cause," and the event is insurmountable rather than merely onerous or expensive.<sup>25</sup> The most straightforward application of the doctrine is to natural disasters that make performance impossible.<sup>26</sup> Nevertheless, Louisiana courts have so restrictively applied *force majeure* that various individuals have been left with no remedy even when natural disasters impede performance of contracts.<sup>27</sup>

A. Force Majeure as a Louisiana Civil Law Doctrine

The doctrine of *force majeure* dates back to Roman law, which described it as *impossibilium nulla obligatio*.<sup>28</sup> French civil law adopted *force majeure* in the Code Napoléon in 1804, and the idea is also present in the common law doctrines of "frustration" and "impossibility of performance."<sup>29</sup> *Force majeure* is likewise related to the well-known common law "act of God" defense.<sup>30</sup> The act of God defense typically involves a supervening event an extraordinary act of nature causes.<sup>31</sup> Compared to *force majeure*, the act of God defense embodies a much narrower spectrum of events because *force majeure* can apply beyond

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24. Litvinoff, *supra* note 15, at 1.

25. PLANIOL, OBLIGATIONS § 231, in 2 TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL 139 (11th ed. 1959).

26. *Id.* at 140.

27. *See, e.g.*, *Losecco v. Gregory*, 32 So. 985 (La. 1901); *Schenck v. Capri Constr. Co.*, 194 So. 2d 378 (La. Ct. App. 1967). Although natural disasters are overwhelmingly cited as the supervening event causing *force majeure* in Louisiana jurisprudence, acts of the government can also trigger the doctrine. *See, e.g.*, *MIE Properties-LA, L.L.C. v. Huff*, No. 2011 CA 0258, 2012 WL 1203373 (La. Ct. App. Apr. 9, 2012).

28. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 759 (1990). *Impossibilium nulla obligatio* means "there is no obligation to do the impossible." E. ALLAN FARNSWORTH, CONTRACTS § 9.5 (4th ed. 2004).

29. *See* EWAN MCKENDRICK, FORCE MAJEURE AND FRUSTRATION OF CONTRACT 6 (1991); Litvinoff, *supra* note 15, at 6.

30. *See* 1 AM. JUR. 2d *Act of God* § 1 (2017).

31. *Id.*

natural disasters to labor strikes, war, and acts of third parties, such as a carrier's non-delivery of goods.<sup>32</sup>

Under Louisiana law, *force majeure* is directly connected to the civil law theory of cause.<sup>33</sup> Cause is a necessary element of all contracts in Louisiana law.<sup>34</sup> According to the Civil Code, “[c]ause is the reason why a party obligates himself.”<sup>35</sup> Thus, if the cause for the contract fails, then the entire obligation never existed.<sup>36</sup> Impossibility of performance involves a circumstance that upsets the cause or reason for the obligation.<sup>37</sup> Although cause is a leading rationale behind Louisiana's *force majeure* doctrine, other civil law jurisdictions, like France, rely on the parties' opportunity to resist the event and the parties' fault to explain *force majeure*.<sup>38</sup> Under the French approach, *force majeure* occurs when resisting the supervening event is impossible, provided the parties take reasonable precautions to avoid the event.<sup>39</sup> The French approach, therefore, is similar to a tort analysis—including concepts of foreseeability and fault—rather than an analysis of the elements of contract like the Louisiana approach.<sup>40</sup> In Louisiana, performance must be “truly impossible” to satisfy the requirements for *force majeure*.<sup>41</sup> True impossibility exists when performance is physically impossible, unless the obligor's fault triggers the impossibility, in which case the obligor remains bound.<sup>42</sup>

*Force majeure* is distinguishable from both the French *theorie l'imprévision*, or hardship doctrine, and the common law doctrine of

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32. See PLANIOL, *supra* note 25, § 232, at 140.

33. Litvinoff, *supra* note 15, at 14–15.

34. *Id.* at 14.

35. LA. CIV. CODE art. 1967 (2018).

36. Litvinoff, *supra* note 15. A mere failure of cause is different from an absolutely null cause. See, e.g., SAUL LITVINOFF, OBLIGATIONS § 17.3, in 5 LOUISIANA CIVIL LAW TREATISE LAW OF OBLIGATIONS 17.3 (2d ed. 2017). Failure of cause results in an obligation that does not exist anymore whereas an unlawful cause results in absolute nullity for a cause that does exist but the law does not permit. *Id.*

37. See Litvinoff, *supra* note 15, at 14–15.

38. See HUGH BEALE, ARTHUR HARTKAMP, HEIN KÖTZ & DENIS TALLON, CASES, MATERIALS AND TEXT ON CONTRACT LAW 595 (2002).

39. See Cour de cassation [Cass.][supreme court for judicial matters] Ire, Mar. 9, 1994, Bull. civ. I, No. 91 (Fr.); BEALE, *supra* note 38, at 595.

40. See *supra* note 39.

41. Litvinoff, *supra* note 15, at 1.

42. AUBRY & RAU, OBLIGATIONS § 331, in 4 DROIT CIVIL FRANÇAIS 260 (A.N. Yiannopoulos trans., 6th ed. 1965).

commercial impracticability.<sup>43</sup> Modern French doctrine defines *imprévision* as a situation in which an unpredictable change in circumstances renders a contract *unbalanced*, making performance of the contract exceptionally difficult.<sup>44</sup> Similarly, the American doctrine of impracticability relieves an obligor from performance when a change in circumstances makes an obligor's performance excessively burdensome or costly.<sup>45</sup> Louisiana's law differs from both of these doctrines because Louisiana does not provide a remedy for "exceptionally difficult" or "excessively burdensome" contracts—instead, the obligation must meet the much higher standard of "truly impossible."<sup>46</sup>

*B. Louisiana's Force Majeure Doctrine: A Tale of Inflexibility*

The drafters of the Louisiana Civil Code of 1870 borrowed *force majeure* from the Code Napoléon, enshrining the principle forever in Louisiana law.<sup>47</sup> Although the placement of the *force majeure* provision has varied in the Code over the years, the present article preserves the same legal principle as in its debut.<sup>48</sup> The present *force majeure* doctrine originated in canon law.<sup>49</sup> Canon lawyers saw breach of contract as a sin, which led to the strict philosophy of *pacta sunt servanda*, or "contracts must be honored."<sup>50</sup> As natural law philosophers in the 17th century began advocating the idea of *rebus sic stantibus*, meaning "provided circumstances remain unchanged," one exception to the strict canon law was recognized: *force majeure*.<sup>51</sup> The Code Napoléon, the source of Louisiana's law, adopted the *pacta sunt servanda* philosophy combined with the *force majeure* exception.<sup>52</sup>

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43. See Litvinoff, *supra* note 15, at 3; G.H. TREITEL, FRUSTRATION AND FORCE MAJEURE 238 (1994).

44. *Fiches d'orientation: Imprévision*, DALLOZ-AVOCATS (Apr. 2017), <http://www.dalloz-avocats.fr/documentation/Document?id=DZ/OASIS/001520> [https://perma.cc/V5NC-ZZPJ].

45. K. ZWEIGERT & H. KÖTZ, AN INTRODUCTION TO COMPARATIVE LAW 531 (Tony Weir trans., 3d ed. 1998).

46. See Litvinoff, *supra* note 15, at 1.

47. *Id.*

48. LA. CIV. CODE art. 1873 (2018); see also LA. CIV. CODE ANN. art. 1873 cmt. a (2018) (emphasizing that the article does not change the law).

49. Tabor, *supra* note 14, at 553–54. Canon law is the body of legal doctrine the Catholic Church developed. See generally *id.* at 553, n.21.

50. *Id.* at 553.

51. *Id.* at 554–56.

52. *Id.* at 554–55.



The Louisiana Supreme Court applied *force majeure* narrowly from the beginning in three illustrative cases.<sup>53</sup> The earliest case regarding *force majeure* presented the court with tremendous difficulty, resulting in two rehearings.<sup>54</sup> In *Losecco v. Gregory*, the plaintiff, a speculator in orange crops, contracted \$8,000 to buy “all oranges [the] trees may produce” between 1899 and 1900.<sup>55</sup> Unfortunately, a freeze in 1899 destroyed the entire grove of trees.<sup>56</sup> The court struggled to reconcile the scope of an assumption of risk clause in the contract with the object of the aleatory<sup>57</sup> contract, a *chance* of getting orange crops.<sup>58</sup> The court initially excused the plaintiff from paying all \$8,000 and justified the decision based on failure of cause.<sup>59</sup> On first rehearing, the court reversed its original decision, reasoning that a major freeze was somewhat foreseeable, thus placing the freeze within the scope of the assumption of risk clause of the contract, despite finding that the freeze was *not* foreseeable in its original decision.<sup>60</sup> Additionally, the court held that the plaintiff owed \$4,000 for the 1899 crop but was still excused from paying the \$4,000 for the 1900 crop.<sup>61</sup> Finally, on second rehearing, the court backtracked further by requiring the plaintiff to pay the entire \$8,000.<sup>62</sup> Citing numerous French

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53. The latter two cases are summed up nicely in two recent Louisiana Bar Journal articles. See Jonathan Riley, *The Civilian Lawyer: The Doctrine of Fortuitous Event*, 56 LA. B.J. 36, 36–37 (2008); Christopher T. Chocheles, *No Excuses: Hurricanes and the “Act of God” Defense to Breach of Contract Claims*, 57 LA. B.J. 380, 381–84 (2010).

54. *Losecco v. Gregory*, 32 So. 985 (La. 1901).

55. *Id.* at 986.

56. *Id.*

57. The language of the contract seemed to make it an aleatory contract—a contract for which performance depends on a future uncertain event. LA. CIV. CODE art. 1912 (2018); *Losecco*, 32 So. at 986. See also *Contrat Aléatoire*, DICTIONARY OF THE CIVIL CODE (1st ed. 2014):

A contract the object of which is to cause the performances of the parties to depend on an uncertain event, the occurrence or the result of which will be that one will realize a gain and the other will experience a loss, whether the contract has for its purpose the pursuit of a chance of gain to start with (gamble, wager, lottery) or the search for a guaranty against a risk of loss (insurance) (each party accepting for itself a chance of gain or loss as per an uncertain event).

58. *Losecco*, 32 So. at 986–87.

59. The court reasoned that the assumption of risk clause was too broad and that the parties had contemplated that the trees would at least exist. *Id.* at 988.

60. See *id.* at 991.

61. *Id.* at 992.

62. *Id.* at 996.

sources and the Louisiana Civil Code,<sup>63</sup> the court concluded that the contract was a specific type of aleatory contract for a sale of a hope to get crops<sup>64</sup> and that a sale of a hope inherently comes with an assumption that the purchaser may get nothing.<sup>65</sup>

Two decades later, the Louisiana Supreme Court decided *Sickinger v. Board of Directors of Public Schools for the Parish of Orleans*, in which the plaintiff contracted to sell his lot in exchange for the defendant moving the plaintiff's house to the adjacent lot.<sup>66</sup> When a hurricane partially destroyed the house, the defendant asserted *force majeure*; however, the court ruled that the defendant had assumed the risk of the storm and therefore should rebuild the house.<sup>67</sup> Shortly thereafter, the court decided *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, in which the defendant promised to deliver coiled elm hoops to the plaintiff.<sup>68</sup> Even though excessive rainfall prevented the defendant from securing the goods, the court found that it would still be possible to perform through a third party.<sup>69</sup> These early decisions reflect a narrow view of *force majeure* and set the stage for a literal interpretation of impossibility.<sup>70</sup>

Several decades later, the Louisiana Fourth Circuit Court of Appeal applied *force majeure* in the *Schenck* case described in the introduction.<sup>71</sup>

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63. *Id.* at 993–95. The court cited treatises from civil law scholars Pothier, Duranton, Troplong, Baudry-Lacantinerie, and Laurent. *Id.*

64. LA. CIV. CODE art. 2451 (2018) provides a definition for a sale of hope:

A hope may be the object of a contract of sale. Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties' expectations, and even if nothing is caught the sale is valid.

65. *Losecco*, 32 So. at 996.

66. *Sickinger v. Bd. of Dirs. of Pub. Sch. for the Parish of Orleans*, 85 So. 212, 212–13 (La. 1920).

67. *Id.* at 215. Ironically, the court suggested that there was no way to know that the storm would imperil the contract. Indeed, the court said that hurricanes do not occur annually, but the mere fact that there is general awareness of hurricanes is enough for assuming the risk of the storm. For more discussion, see Chocheles, *supra* note 53, at 381–82.

68. *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, 109 So. 844, 844 (La. 1926). Coiled elm hoops are common in the trade of barrel making. They are used in the construction and sealing of barrels. See JOSEPH WAGNER, COOPERAGE: A TREATISE ON MODERN SHOP PRACTICE AND METHODS; FROM THE TREE TO THE FINISHED ARTICLE 304 (1910).

69. *Dallas Cooperage*, 109 So. 844 at 844; Riley, *supra* note 53, at 36–37.

70. See Riley, *supra* note 53, at 36; Chocheles, *supra* note 53, at 381.

71. *Schenck v. Capri Constr. Co.*, 194 So. 2d 378 (La. Ct. App. 1967). See also discussion *supra* Introduction.

In dicta, the court expressed sympathy for the plaintiff's position.<sup>72</sup> Nevertheless, the *Schenck* court relied on the rule in *Dallas Cooperage* and held that former Civil Code article 1933 on *force majeure* applied only when performance was impossible rather than merely burdensome.<sup>73</sup> Although the court remained inflexible in applying *force majeure*, the sympathy in dicta suggested that more flexibility was appropriate.<sup>74</sup> Louisiana courts' overreliance on strict *force majeure* jurisprudence illustrates the necessity for a legislative solution to the inflexibility.<sup>75</sup>

In the wake of Hurricane Katrina, *force majeure* litigation returned to the stage.<sup>76</sup> Although commentary regarding more flexibility had begun to surface,<sup>77</sup> Louisiana's Fourth Circuit continued the strict *force majeure* tradition in *Associated Acquisitions, L.L.C. v. Carbone Properties*.<sup>78</sup> In *Associated Acquisitions*, the plaintiff owned an interest in Carbone, a company building a Hilton Inn in New Orleans.<sup>79</sup> After Hurricane Katrina damaged the property, Carbone argued that the increased cost of construction associated with the storm made interest payments on a promissory note to Associated Acquisitions impossible.<sup>80</sup> Carbone premised its impossibility argument on the fact that the bank had terminated its construction loan and that the hotel franchise agreement ended.<sup>81</sup> Nevertheless, the court ruled for Associated Acquisitions, once again relying on *Dallas Cooperage* and now on *Schenck*, holding that Carbone must pay the interest on the promissory note in full because payment was possible despite the means becoming more difficult.<sup>82</sup>

The Louisiana First Circuit Court of Appeal subsequently endorsed the *Dallas Cooperage*, *Schenck*, and *Associated Acquisitions* holdings in 2008, when a seller refused to honor a pre-hurricane purchase agreement on his home because he could not complete repairs Hurricane Katrina

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72. *Schenck*, 194 So. 2d at 380.

73. *Id.* at 379–80.

74. *See id.* at 380.

75. The court was explicit when it reasoned jurisprudence bound it. *See id.* at 379–80.

76. *See generally* Chocheles, *supra* note 53, at 382.

77. *See generally* Litvinoff, *supra* note 15; *but see* LA. CIV. CODE ANN. art. 1873 cmt. a (2018) (emphasizing that the article does not change the law).

78. *See* Riley, *supra* note 53, at 37.

79. *Associated Acquisitions, L.L.C. v. Carbone Props. of Audubon, L.L.C.*, 962 So. 2d 1102, 1103 (La. Ct. App. 2007).

80. *Id.* at 1104–05.

81. *Id.* at 1107. In the wake of the storm, Hilton and Carbone mutually agreed to terminate the franchise agreement, thus any hotel built would not be branded as a Hilton. *Id.* at n.6.

82. *Id.* at 1107–08.

caused by the date of closing.<sup>83</sup> In *Payne v. Hurwitz*, the court found that the seller's bad faith in failing to renegotiate caused the impossibility rather than Hurricane Katrina.<sup>84</sup> The court ruled for the buyers, relying on jurisprudence, Professor Litvinoff's treatise on Louisiana civil law, and good faith.<sup>85</sup> The court's use of good faith illustrated an ability and willingness to use good faith in conjunction with *force majeure*;<sup>86</sup> however, the good faith analysis reinforced the strict jurisprudence rather than expanding *force majeure*.<sup>87</sup> Thus, over a century of jurisprudence has led courts to refuse an expansion of *force majeure* to circumstances of excessively difficult performance.

## II. FAILED ATTEMPTS TO REVISE *FORCE MAJEURE*

Although jurisprudence remained inflexible with regard to *force majeure*, Professor Litvinoff, a chief architect of the 1984 revision to the Civil Code's section on obligations, wrote an extensive law review article detailing how application of the *force majeure* provision in Civil Code article 1873 could be more flexible.<sup>88</sup> Litvinoff was concerned with the harsh consequences of strict impossibility when disasters make performance excessively burdensome.<sup>89</sup> In 2008, Charles Tabor's student comment echoed Professor Litvinoff's concerns.<sup>90</sup> The commentary suggested two primary solutions.<sup>91</sup> Professor Litvinoff's suggestion involved using general principles of the law and other code articles to modify the meaning of impossibility *without* amending the code.<sup>92</sup> Tabor's suggestion proposed a legislative amendment to the Code to make it more flexible.<sup>93</sup>

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83. *Payne v. Hurwitz*, 978 So. 2d 1000, 1002 (La. Ct. App. 2008); Chocheles, *supra* note 53, at 382.

84. *Payne*, 978 So. 2d at 1006–07.

85. *Id.* at 1005–07. The author does not necessarily disagree with the result in this case. Indeed, the specific facts in the case suggest foul play; however, the court's endorsement of the inflexible approach to *force majeure* continues.

86. LA. CIV. CODE art. 1759 (2018) (“Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.”); *see* Litvinoff, *supra* note 15, at 19–20.

87. *Payne*, 978 So. 2d at 1005–07.

88. Litvinoff, *supra* note 15, at 3.

89. *See id.*

90. *See generally* Tabor, *supra* note 14.

91. *See generally* Litvinoff, *supra* note 15; Tabor, *supra* note 14.

92. *See generally* Litvinoff, *supra* note 15.

93. *See generally* Tabor, *supra* note 14.

*A. An Expansion Through Cause*

Professor Litvinoff demonstrated that courts could expand *force majeure* through civil law cause.<sup>94</sup> He found two early French cases that dissolved contracts for cause after a change in circumstances made performance of an obligation much more difficult.<sup>95</sup> In one case, a party became physically incapacitated, but performance did not actually require the incapacitated party himself to perform.<sup>96</sup> In the other case, performance of the contract threatened the life of the obligor.<sup>97</sup> In neither case was performance absolutely impossible, but the French courts nevertheless excused performance.<sup>98</sup>

Professor Litvinoff also found that French courts have occasionally avoided harsh results by treating cause like the common law doctrine of frustration.<sup>99</sup> In one case involving a hunting lease, authorities banned hunting in the area, and a French court used cause to reduce the rent.<sup>100</sup> In another case, World War I physically displaced a tailor's clients under long-term contracts, and the court dissolved the contract for lack of cause.<sup>101</sup> Professor Litvinoff argued that the events that upset performance of the contracts prevented the parties from realizing the reason they entered the contract in the context of *force majeure*.<sup>102</sup> In each of the French cases, an event destroyed the reason the parties entered into a contract, but the obligors' performances in the form of payment remained possible.<sup>103</sup> Accordingly, Litvinoff contended that a direct connection between cause and *force majeure* exists that can provide an avenue for broadening *force majeure* beyond strict impossibility.<sup>104</sup>

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94. See Litvinoff, *supra* note 15, at 14.

95. *Id.* at 13–14.

96. See Bertrand v. Junot, 1905 Gaz. Trib. II 2 (Trib. Seine 1905).

97. See Letellier v. Carvalho, 1869 D. Jur. IV 211 (Trib. Seine 1869).

98. In the case in which the party lacked capacity, that party was not required to perform in person. In the case in which the obligor's life was endangered, performance was still physically possible, just more dangerous. See Litvinoff, *supra* note 15, at 14.

99. *Id.* Frustration will be analyzed thoroughly in Part III, but generally, frustration in the common law has developed into a more flexible version of civil law cause. See *infra* Part III.

100. Aguado v. DeBearn, 1875 D. Jur. II 204 (Ct. App. Paris 1875).

101. Esteve v. Dubois, 1916 D. 112 (Ct. App. Toulouse 1915).

102. See Litvinoff, *supra* note 15, at 15.

103. See *id.* at 14.

104. *Id.* at 15.

A rare and modern example of the cause theory in Louisiana appeared in *MIE Properties-LA, L.L.C. v. Huff*.<sup>105</sup> In *Huff*, a woman leased space for a coffee shop but soon struggled for business when road construction closed off easy access to the shop.<sup>106</sup> So few customers came that the woman could not pay her rent.<sup>107</sup> When she was sued for breach of contract, the woman made a *force majeure* argument under article 1873.<sup>108</sup> The court held that the lease dissolved because of a failure of cause from *force majeure*.<sup>109</sup> Notwithstanding *Huff*, recognition of cause in *force majeure* cases has been inconsistent, illustrating that Professor Litvinoff's solution has been largely ignored.<sup>110</sup> In fact, the cause solution is rare in Louisiana legal thought, as the French doctrine deemphasized cause to the point that lawmakers removed it as an element of conventional obligations in the 2016 revision of the French Civil Code.<sup>111</sup> Because the natural remedy for an obligor seeking relief from a contract in which cause no longer exists is dissolution, relying on cause in *force majeure* cases results in an inversely inflexible approach as compared to the current one.<sup>112</sup> Instead of no remedy under the current inflexible *force majeure* law, the cause remedy would dissolve every impracticable contract even if renegotiation or revision were possible.<sup>113</sup>

#### B. Using Good Faith to Adopt Imprévision

Although cause is one method of expanding *force majeure*, flexibility would be better achieved by emphasizing Professor Litvinoff's second component—reading *force majeure* in conjunction with the rule that

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105. *MIE Properties-LA, L.L.C. v. Huff*, No. 2011 CA 0258, 2012 WL 1203373 (La. Ct. App. Apr. 9, 2012).

106. *Id.* at \*1.

107. *Id.*

108. *Id.* at \*3.

109. *Id.* at \*4.

110. *See id.* (citing only one other case, along with the Civil Code, to support its decision).

111. *See* Mustapha Mekki, *The French Reform of Contract Law: The Art of Redoing without Undoing*, 10 J. CIV. L. STUDIES 223, 241 (2018) (noting the removal of cause). *See also* PLANIOL, *supra* note 25, § 1039, at 596 (discussing uselessness of cause).

112. *See MIE Properties*, 2012 WL 1203373 at \*4 (the remedy proscribed was dissolution of the contract); *see also* LA. CIV. CODE art. 1966 (2018) (“[A]n obligation cannot exist without a lawful cause.”). In other words, there exists no obligation that can be revised.

113. *See* Litvinoff, *supra* note 15, at 13–19 (discussing the classic effect of failure of cause in French and German civil law doctrines).

parties must act in good faith.<sup>114</sup> The roots of the French *theorie l'imprévision* rely on good faith to reach remedies, such as judicial adjustment of the contract, when performance becomes excessively onerous or difficult.<sup>115</sup> To achieve the new remedies, the court must read an implicit condition into the parties' contract that the obligation exists "provided circumstances remain unchanged."<sup>116</sup> The implied condition, coupled with the good faith that parties owe each other, encourages parties to cooperate and pursue remedies, such as revision, to keep the obligation intact when circumstances change.<sup>117</sup>

In addition to increasing the number of remedies available to the parties, injecting a good faith analysis into *force majeure* cases would expand the doctrine beyond strict physical impossibility.<sup>118</sup> Good faith is performance "in conformity with the intention of the parties and in the light of the purpose for which [agreements] have been formed."<sup>119</sup> German judges recognized that good faith was such an overarching principle of law that it superseded physical and legal impossibility in extreme circumstances.<sup>120</sup> According to Professor Litvinoff, good faith as an overarching principle, as the Civil Code's mandate that obligors perform in good faith illustrates, could yield the concept of "financial impossibility" in Louisiana.<sup>121</sup> Indeed, German judges used this good faith reasoning to say that courts must deem a circumstance appearing "impossible to ordinary business common sense" *force majeure*.<sup>122</sup>

Louisiana jurisprudence recognized an overriding principle of good faith long prior to the 1984 revision that emphasized good faith by establishing it as a general principle of all obligations.<sup>123</sup> Prior to the

114. *See id.* at 15.

115. *Id.*

116. The implicit condition is *rebus sic stantibus*. *Id.*

117. *See* BEALE, *supra* note 38, at 637.

118. *See* Litvinoff, *supra* note 15, at 19–20 (discussing how German doctrine and jurisprudence used good faith to yield "financial impossibility" or "impossible to ordinary business common sense").

119. AUBRY & RAU, *supra* note 42, § 346 at 343.

120. *See* Bundesgerichtshof [BGH][Federal Court of Justice] Oct. 14, 1992, BGHZ 120.10 (Ger.) (holding that good faith in § 242 of the German Civil Code required a remedy with economic impossibility).

121. *See* Litvinoff, *supra* note 15, at 19–20.

122. *Id.* at 20.

123. *See generally* Campbell v. Lambert, 36 La. Ann. 35 (La. 1884); Litvinoff, *supra* note 15, at 38–39 (interpreting *Campbell*); *see also* LA. CIV. CODE art. 1759 (2018) (under Title III: Obligations in General and Chapter 1: General Principles the article states: "Good faith shall govern the conduct of the obligor and the oblige

revision, courts found good faith as a principle under conventional obligations.<sup>124</sup> In modern decisions, courts have recognized the revised general principle of good faith.<sup>125</sup> Therefore, Louisiana law is compatible with using good faith to increase flexibility in the application of remedy and scope of *force majeure*.<sup>126</sup> Nevertheless, Louisiana courts have not adopted Professor Litvinoff's ideas using cause, implicit conditions, and good faith in *force majeure* cases,<sup>127</sup> possibly because the scheme requires a judge to make too many inferences or address the uncertainty and lack of clarity surrounding the definition of good faith.<sup>128</sup>

### C. Revising the Civil Code

In his 2008 student comment, Tabor proposed the addition of 11 new articles to the Civil Code.<sup>129</sup> The inspiration for the revision came from Unidroit Principles, Principles of European Contract Law ("PECL"), and eastern civil codes such as Uzbekistan's.<sup>130</sup> In the proposed articles, Tabor suggested codifying the general rule that contracts must be honored as written along with an exception to the rule when a "substantial change of circumstances" occurs.<sup>131</sup> The subsequent proposed articles defined many of the terms in the exception.<sup>132</sup> The final group of suggested articles reiterated what is already a rule—that good faith governs the parties'

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in whatever pertains to the obligation."); LA. CIV. CODE ANN. art. 1759 cmt. (2018) (noting that the new article extends good faith to obligations in general).

124. See LA. CIV. CODE art. 1901 (1870).

125. See *Payne v. Hurwitz*, 978 So. 2d 1000, 1005–07 (La. Ct. App. 2008).

126. See Litvinoff, *supra* note 15, at 37.

127. Part I discusses long standing application of *force majeure*. See *supra* Part I; but see *Payne*, 978 So. 2d at 1005–07 (recognizing good faith but endorsing the strict *force majeure* approach) and *MIE Properties-LA, L.L.C. v. Huff*, No. 2011 CA 0258, 2012 WL 1203373, at \*4 (La. Ct. App. Apr. 9, 2012) (analyzing cause but using the classic remedy of dissolution of the contract).

128. See LITVINOFF, *supra* note 36, § 1.8 (explaining that good faith rests on the "assumption that everybody understands what [good faith] means," but that the concept is exceptionally difficult to define).

129. Tabor, *supra* note 14, at 568–70.

130. See *id.* at 572–73. The Unidroit Principles serve as an international restatement of contracts and are heavily inspired by the CISG. See Perillo, *supra* note 22, at 283. The PECL regulates commercial trade within the European Union similar to the U.C.C. in the United States. See María del Pilar Perales Viscasillas, *The Formation of Contracts & The Principles of European Contract Law*, 13 PACE INT'L L. REV. 371, 373 (2001).

131. Tabor, *supra* note 14, at 570–72.

132. *Id.* at 575–78.



conduct—and gave the court explicit rules on how to resolve disputes arising from a “substantial change of circumstances” after contract formation.<sup>133</sup>

Today, *force majeure* remains unrevised in the Louisiana Civil Code.<sup>134</sup> Perhaps Tabor’s proposed revision was ignored because the complicated 11 article scheme is contrary to principles of the Code.<sup>135</sup> The suggested scheme reads like a revised statute and departs substantially from the ease, flexibility, and generality that a civil code is designed to provide.<sup>136</sup> Another reason the legislature may have ignored Tabor’s proposal could be that some of the sources used to inspire his scheme go beyond Louisiana’s traditional sources of legal inspiration, most of which have never been discussed in other Louisiana doctrine.<sup>137</sup> Regardless, because the courts overlooked Litvinoff’s suggestions, and the legislature overlooked Tabor’s, the law remains rigid and unchanged.

### III. PLAUSIBLE SOLUTIONS IN RELATED JURISDICTIONS

To find a more attractive solution than the previous suggestions, the remedy to the harsh outcomes of Louisiana’s *force majeure* doctrine should derive from United States sources, United States-influenced international sources, and French sources.<sup>138</sup> Surveying the different sources reveals the aspects of each that Louisiana should adopt and the aspects that Louisiana should avoid in modernizing its law. Although some solutions may appear to deviate more from *pacta sunt servanda* than others, all move beyond Louisiana’s *force majeure* doctrine in a meaningful way.

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133. *Id.* at 580–86.

134. *See generally* LA. CIV. CODE art. 1873 (2018).

135. *See* ROBERT PASCAL, THE CIVIL CODE AND US 2 (1998).

136. *Id.* Professor Pascal explains, “A civil code is an attempt to express the general scheme of this civil law in a reasonably brief . . . and integrated fashion.” *Id.* Professor Pascal further argues that civil code provisions should be applicable in “readily recognizable [situations].” *Id.*

137. *See generally* Tabor, *supra* note 14, at 562 (Tabor admits that the Louisiana Legislature takes inspiration from American sources and American-International sources like the CISG, but uses neither for most of the inspiration of his revision); Litvinoff, *supra* note 15, at 1 (1985) (discussing how the Code Napoléon was received to the Louisiana Civil Code—French law from the beginning has inspired Louisiana law).

138. *See infra* note 141.

*A. The Common Law and Uniform Commercial Code*

The strict doctrine of impossibility in the early English common law amounted to a rule similar to Louisiana's *force majeure* doctrine. Impossibility essentially required true impossibility where the only excuses for performance were: illegal contracts; death of the promisor; and total, physical destruction of the thing required for performance.<sup>139</sup> The doctrine of frustration in England sparked the common law's expansion of impossibility.<sup>140</sup> Although American courts have retained England's frustration principles,<sup>141</sup> the doctrine of frustration evolved in the United States into the doctrine of commercial impracticability.<sup>142</sup> The commercial impracticability doctrine was then codified into U.C.C. § 2-615.<sup>143</sup> Although § 2-615 codified the spirit of the common law, hints of a more expansive application, perhaps inspired by Germany, appear in the comments.<sup>144</sup> Frustration, impracticability, and § 2-615 all reflect a more flexible approach to *force majeure* than that of Louisiana.

*1. Frustration*

Before the birth of the commercial impracticability doctrine, the doctrine of frustration appeared more accommodating than Louisiana's law. The doctrine of frustration provides an excuse for failure to perform a contract when a party cannot fulfill an obligation because the circumstances produced a situation radically different from what the parties originally intended.<sup>145</sup> In essence, frustration occurs when the basis for the contract is destroyed.<sup>146</sup> The relation between frustration and the basis of the contract is nearly identical to civil law cause.<sup>147</sup> The classic

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139. FARNSWORTH, *supra* note 28, § 9.5.

140. *See generally* MCKENDRICK, *supra* note 29, at 52–53.

141. *See e.g.*, 20th Century Lites, Inc. v. Goodman, 149 P. 2d 88 (1944); RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. LAW INST., June 2017 update).

142. *See generally* Mineral Park Land Co. v. Howard, 156 P. 458 (Cal. 1916); *see also* TREITEL, *supra* note 43, at 239.

143. U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM'N 1977); *see* FARNSWORTH, *supra* note 28, § 9.6.

144. *See* U.C.C. § 2-615 cmt. 6 (AM. LAW. INST. & UNIF. LAW COMM'N 1977) (“In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of ‘excuse’ or ‘no excuse,’ adjustment under the various provisions of this Article is necessary, especially the sections on good faith.”).

145. MCKENDRICK, *supra* note 29, at 5.

146. *See id.* at 53.

147. *See* Litvinoff, *supra* note 15, at 6.

example of frustration arose in English “coronation cases” involving the lease of rooms to watch King Edward VII’s coronation.<sup>148</sup>

In *Krell v. Henry*,<sup>149</sup> a frequently cited coronation case, the English Court of King’s Bench ruled frustration of contract existed between a lessor and lessee for a room to watch King Edward VII’s coronation.<sup>150</sup> Frustration occurred because the basis for the contract, to watch the King’s coronation, was destroyed when the King became ill and cancelled the coronation.<sup>151</sup> The court held that payment for the room was excused despite the fact that leasing the room was still possible.<sup>152</sup>

The modern English frustration doctrine has five governing principles: (1) frustration reduces injustice for “literal performance of absolute promises”; (2) courts should rarely invoke frustration because it discharges the entire contract; (3) frustration ends the contract immediately; (4) frustration cannot be self-induced; and (5) frustration cannot be the fault of a party.<sup>153</sup> In the United States, frustration has been distilled even further into three elements: (1) the principal purpose of the contract must be destroyed; (2) the frustration must be substantial; and (3) the assumption during contract formation must have been that the frustrating event would not occur.<sup>154</sup> Destruction of the principal purpose contemplates an object of the contract so fundamental that in its absence the transaction makes no sense.<sup>155</sup> The substantiality requirement contemplates more than mere loss of profit, and the basic assumption requirement contemplates the parties’ belief that certain means of performance will continue to exist.<sup>156</sup> Both England and the United States apply frustration retroactively to the contract, extinguishing the entire agreement if the standards are met.<sup>157</sup>

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148. See MCKENDRICK, *supra* note 29, at 53.

149. *Krell v. Henry* [1903] 2 K.B. 740.

150. MCKENDRICK, *supra* note 29, at 53.

151. *See id.*

152. *See Krell*, [1903] 2 K.B. 740.

153. MCKENDRICK, *supra* note 29, at 32 (listing the modern principles of frustration as articulated by Lord Justice Bingham).

154. RESTATEMENT (SECOND) OF CONTRACTS § 265 (AM. LAW INST., June 2017 update).

155. *Id.*

156. *Id.*; *see also id.* § 261.

157. “Where, after a contract is made, a party’s principal purpose is substantially frustrated . . . his remaining duties to render performance are discharged.” RESTATEMENT (SECOND) OF CONTRACTS § 265; *see also* the first illustration in the Restatement which articulates facts similar to the coronation cases but says that the lessor is not liable to pay. For a more in-depth discussion on modern English frustration doctrine, *see* MCKENDRICK, *supra* note 29.

Although frustration has developed more than Louisiana's *force majeure*, the consequences of frustration are still inflexible.<sup>158</sup> Modern frustration functions similarly to failure of cause in Louisiana and also results in dissolution of the contract.<sup>159</sup> Unlike other solutions found in the doctrine of *imprévision*, the doctrine of commercial impracticability, the U.C.C., and the CISG, frustration can *only* result in immediate dissolution of the contract.<sup>160</sup>

## 2. American Commercial Impracticability

Frustration's more refined contemporary is the doctrine of impracticability, a doctrine that is best described as such: "In matters of business, a thing is said to be impossible when it is not practicable; and a thing is impracticable when it can only be done at an excessive or unreasonable cost."<sup>161</sup> The doctrine finds its roots in a 1916 California Supreme Court case, *Mineral Park Land Co. v. Howard*.<sup>162</sup> In *Mineral Park*, the contract required the defendants to remove gravel from the plaintiff's land.<sup>163</sup> The defendants removed half of the gravel but refused to remove the other half because it was underwater.<sup>164</sup> The court ruled in favor of the defendants, reasoning that the gravel underwater could only be removed at "prohibitive cost."<sup>165</sup> Even though *Mineral Park* represented the birth of impracticability doctrine in the United States, it should not have.<sup>166</sup> The event that made performance impracticable—the gravel being underwater—existed *before* the contract was made.<sup>167</sup> Consequently, the case could have been decided based on common law "mistake" in contract.<sup>168</sup> It is possible that *Mineral Park* coined impracticability to evade the difficult standards of mistake that would require proof of knowledge of

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158. See generally MCKENDRICK, *supra* note 29, at 38.

159. Part II discusses the rarity of failure of cause in Louisiana case law as well as the single remedy. See *supra* Part II.

160. See MCKENDRICK, *supra* note 29, at 38.

161. *Mineral Park Land Co. v. Howard*, 156 P. 458, 460 (Cal. 1916).

162. *Mineral Park*, 156 P. 458.

163. *Id.* at 458.

164. *Id.* at 459.

165. *Id.* at 460. The court said that "prohibitive cost" was 10 to 12 times greater than the usual cost per yard to dredge. *Id.* at 459.

166. See Andrew Kull, *Mistake, Frustration, and the Windfall Principle of Contract Remedies*, 43 HASTINGS L.J. 1 n.74 (1991) (describing how the case is often cited is the birth of impracticability but is easily an example of mistake).

167. See *Mineral Park*, 156 P. at 459.

168. See Kull, *supra* note 166, at 458 n.74.

the underwater gravel rather than simply an error in predicting that all gravel would be recoverable.<sup>169</sup>

The most controversial case applying impracticability with a supervening obstacle is *Aluminum Corp. of America v. Essex Group Inc.* (“ALCOA”).<sup>170</sup> In *ALCOA*, Essex and ALCOA agreed to a price-fixing formula for the delivery and smelting of aluminum.<sup>171</sup> The price-fixing formula eventually failed when electricity costs skyrocketed several years into the contract.<sup>172</sup> ALCOA estimated that it would lose \$75 million if it did not obtain judicial relief.<sup>173</sup> The court ruled in favor of ALCOA on grounds of impracticability and granted relief by setting the contract price itself.<sup>174</sup> In *ALCOA*, the American doctrine of impracticability came strikingly close to *imprévision* because the remedy granted for the excessive increase in cost was judicial adjustment of the contract.<sup>175</sup> In justifying its novel remedy, the *ALCOA* court appeared to suggest that the holding was very narrow.<sup>176</sup> The court noted the effort the parties made to avoid risks with a price-fixing mechanism and reasoned that modern commercial law should accommodate parties who are diligent.<sup>177</sup> Unfortunately, *ALCOA* did not have a major precedential impact, and courts have generally continued to apply impracticability strictly.<sup>178</sup> Without further development of the *ALCOA* principle, the scenarios and procedures for application of the *imprévision*-like remedy are unclear.<sup>179</sup> Furthermore, *ALCOA* may fall outside of impracticability and into mistake of fact—similar to *Mineral Park*—or exceed the scope of impracticability, leaving judges with a large discretionary task absent legislative authorization.<sup>180</sup>

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169. See FARNSWORTH, *supra* note 28, § 9.8.

170. *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F. Supp. 53 (W.D. Pa. 1980) [hereinafter *ALCOA*]; see also TREITEL, *supra* note 43, at 252 (illustrating its controversial nature).

171. *ALCOA*, 499 F. Supp. at 57–58.

172. *Id.* at 59.

173. *Id.*

174. See *id.* at 89.

175. See *supra* Part II.B; *infra* Part III.C.1.

176. *Id.*

177. *Id.*

178. See JOHN MURRAY, JR. & HARRY FLECHTNER, SALES, LEASES AND ELECTRONIC COMMERCE PROBLEMS AND MATERIALS ON NATIONAL AND INTERNATIONAL TRANSACTIONS 406, n.9 (4th ed. 2013).

179. *Id.* § 9.9 (noting overall rejection of equitable adjustment of contracts in wake of *ALCOA*).

180. See FARNSWORTH, *supra* note 28, § 9.2. Farnsworth argues that the court principally decided *ALCOA* on mistake of fact or “actuarial error” in the effectiveness of the price fixing mechanism. *Id.* For a European perspective, see

### 3. U.C.C. § 2-615

Other cases have used impracticability as embodied in U.C.C. § 2-615 for disputes involving goods.<sup>181</sup> Although only applicable to contracts of sale involving goods, the spirit of § 2-615 has found its way into the Restatement on Contracts,<sup>182</sup> leading it to affect the law of contract as a whole.<sup>183</sup> Section 2-615 applies only to sellers, and provides:

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

- (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made *impracticable* by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
- (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
- (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under

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TREITEL, *supra* note 43, at 253 (highlighting several reasons that the *ALCOA* decision was objectionable but noting that there could be support for the decision in the U.C.C. even though the U.C.C. could not apply for ALCOA's sale of services).

181. See FARNSWORTH, *supra* note 28, § 9.6.

182. RESTATEMENT (SECOND) OF CONTRACTS § 261 (AM. LAW INST., June 2017 update) (“Where, after a contract is made, a party’s performance 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.”).

183. *Id.*

paragraph (b), of the estimated quota thus made available for the buyer.<sup>184</sup>

In other words, no breach of contract occurs when an occurrence that was not assumed at the formation of the contract makes performance impracticable.<sup>185</sup> Foreseeability of a supervening event is given more weight in § 2-615 to temper some of the rigidity in earlier American frustration cases where risk not foreseen was deemed risk assumed.<sup>186</sup> Finally, a comment to § 2-615 supports the proposition that a court can make equitable adjustments to a contract when performance has become impracticable.<sup>187</sup> The adjustment idea is unsurprising because of the U.C.C.'s German influence.<sup>188</sup> The comment likely acknowledges *Geschäftsgrundlage*, or "contractual basis or foundation,"<sup>189</sup> which German courts have used to adapt contracts.<sup>190</sup>

Despite the fact that § 2-615 expressly authorizes relief when circumstances become impracticable and impliedly recommends in its comments more flexibility in the analysis, obtaining relief in court under § 2-615 is incredibly difficult.<sup>191</sup> In *Iowa Electric Power Co. v. Atlas Corp.*, a seller argued for contract modification after the cost of yellowcake<sup>192</sup> reached 50–58% of the original contract price.<sup>193</sup> The court ruled against the

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184. U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM'N 1977) (emphasis added).

185. *Id.* § 2-615(a).

186. See E. Allan Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 888 n.127 (1968).

187. U.C.C. § 2-615 cmt. 6 ("In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or 'no excuse,' adjustment under various provisions of this Article is necessary."); see also TREITEL, *supra* note 43, at 246.

188. TREITEL, *supra* note 43, at 246; see also Litvinoff, *supra* note 15, at 22 (1985) (discussing Karl Llewelyn, the architect of the U.C.C., and his fondness for the German civil law).

189. Litvinoff, *supra* note 15, at 19.

190. TREITEL, *supra* note 43, at 246.

191. See FARNSWORTH, *supra* note 28, § 9.6 (explaining that increase in expense has rarely been allowed and citing only one case where the remedy was simply discharge); see also TREITEL, *supra* note 43, at 246 (explaining mechanisms within § 2-615 to reach flexible remedies but illustrating lack of success of § 2-615 arguments).

192. Yellowcake is a uranium concentrate used in nuclear power production. *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129, 131 (N.D. Iowa 1978).

193. *Id.* at 138, 140.

seller, denying requests for adjustment or discharge of the contract.<sup>194</sup> Similarly, in *Louisiana Power & Light Co. v. Allegheny Ludlum Industries, Inc.*, the court refused to excuse the defendant under § 2-615 when costs of condenser tubing for a nuclear plant reached 38% of the contract price.<sup>195</sup> The Louisiana federal court applied the U.C.C. because the parties' contract contained a New York choice of law provision.<sup>196</sup> The court reasoned that commercial impracticability was not met because it required an "extreme and unreasonable" expense.<sup>197</sup> *Louisiana Power* does reveal, however, two tendencies of Louisiana courts: (1) conflation of § 2-615 with common law impracticability and frustration; and (2) overemphasis of comment 4,<sup>198</sup> explaining that increased costs do not excuse performance, in the official comments of § 2-615.<sup>199</sup>

The practices illustrated in *Louisiana Power* are unsurprising since § 2-615 is, indeed, an exception to the general rule of enforcement of contracts.<sup>200</sup> As such, courts still apply the law narrowly to traditional categories such as war, embargo, and crop failure.<sup>201</sup> When a court departs from the old categories and into situations of increased economic expense, the remedy remains discharge of the obligation.<sup>202</sup> Nevertheless, in

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194. *Id.* at 140.

195. *La. Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1324 (E.D. La. 1981).

196. *Id.* at 1322 n.2.

197. *Id.* (quoting *Am. Trading & Prod. Corp. v. Shell Int'l Martine, Ltd.*, 459 F.2d 939, 942 (2d Cir. 1972)).

198. U.C.C. § 2-615 cmt. 4 (AM. LAW. INST. & UNIF. LAW COMM'N 1977).

199. *Louisiana Power & Light* contains an excellent history lesson of § 2-615 interpretation across the United States as well as frustration in England. Specifically, *Louisiana Power & Light* observes the conflation in *Eastern Airlines Inc. v. Gulf Oil Corp.* and *Transatlantic Financing Corp. v. United States*. See *La. Power & Light*, 517 F. Supp. at 1324 (quoting *E. Airlines Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 438 (S.D. Fla. 1975) and *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966)).

200. See FARNSWORTH, *supra* note 28, § 9.6 ("The new synthesis candidly recognizes that the judicial function is to determine whether, in light of exceptional circumstances, justice requires a departure from the general rule that a promisor bears the risk of increased difficulty in performance.").

201. See, e.g., *D.S. Simmons, Inc. v. Steel Group, L.L.C.*, No. 5:06-CV-363-BR, 2008 WL 488845, at \*2-3 (E.D. N.C. Feb. 19, 2008) (discussing acceptable conditions to trigger § 2-615 as "war, embargo, crop failure" and ruling against the seller); see also Litvinoff, *supra* note 15, at 22 (noting the drafter of the U.C.C.'s influence of German civil law).

202. See *Fla. Power & Light Co. v. Westinghouse Elec. Corp.*, 826 F.2d 239, 278-79 (4th Cir. 1987). In a contract to reprocess spent nuclear fuel,



extraordinary circumstances, some commentators suggest that courts should consider the more equitable remedies beyond dissolution that § 2-615 and, by implication of the Restatement, commercial impracticability may allow.<sup>203</sup> Section 2-615's use of the term "impracticable" appears to influence courts to remain attached to the historically stricter common law conception.<sup>204</sup> Comment 4 to § 2-615, which states, in pertinent part, that "[i]ncreased cost alone does not excuse performance," seems to overshadow other comments.<sup>205</sup> The suggestion of remedies mirroring *imprévision*, such as renegotiation and adjustment under good faith, are in comment 6, and the comment appears not to include the majority of sellers' arguments in court.<sup>206</sup> Conceivably, § 2-615's comment scheme is not conducive to increased flexibility because the comments are not the law.<sup>207</sup> Judges therefore have discretion to incorporate comments into case law, and the jurisprudence illustrates that courts thus far have neglected comment 6.<sup>208</sup> As it stands, use of § 2-615 is best described by *Louisiana Power*, which aptly noted that there is "little encouragement to those who . . . wield the sword of commercial impracticability."<sup>209</sup> Louisiana should also look at international contemporaries to § 2-615 in order to observe potentially better constructed and more effective law on impracticability.

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Westinghouse was unable to perform because the U.S. government banned reprocessing. The court found that increased costs of dealing with the fuel would overshadow profits by up to five times and discharged Westinghouse of its performance. *Id.*

203. See Farnsworth, *supra* note 186, at 884 (noting that a flexibility similar to German doctrine is achievable through comment 6 of § 2-615).

204. U.C.C. § 2-615(a) (AM. LAW. INST. & UNIF. LAW COMM'N 1977) (using the term impracticable); see also *id.* § 2-615 cmt. 3 (describing how "impracticability" was chosen to direct courts to think about the commercial nature the article contemplates); *E. Airlines Inc. v. Gulf Oil Corp.*, 415 F. Supp. 429, 438 (S.D. Fla. 1975).

205. See *e.g.*, *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 319 (D.C. Cir. 1966).

206. See U.C.C. § 2-615 cmt. 6; see also TREITEL, *supra* note 43, at 239 (suggesting a seller in illustrative case did not rely on comment 6); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978) (many comments were cited in the case but not § 2-615 comment 6 which arguably would have addressed the court's concern about modifying the contract on its own).

207. See MURRAY & FLECHTNER, *supra* note 178, at 6.

208. *Iowa Elec. Light and Power*, 467 F. Supp. at 129 (many comments were cited in the case but not § 2-615 comment 6 which arguably would have addressed the court's concern about modifying the contract on its own).

209. *La. Power & Light Co. v. Allegheny Ludlum Indus.*, 517 F. Supp. 1319, 1325 (E.D. La. 1981).

*B. CISG and Unidroit*

The CISG is an international treaty ratified by 88 nations.<sup>210</sup> The treaty is an important source of law because it represents one of the best attempts to bridge common and civil law legal principles.<sup>211</sup> The United States ratified the CISG and made it the law in all 50 states in litigation involving international transactions of goods.<sup>212</sup>

Article 79 of the CISG addresses *force majeure* situations.<sup>213</sup> Although article 79 was likely designed to deal with cases of impossibility, contemporary decisions and scholarship point to article 79 as a law also addressing hardship.<sup>214</sup> The article provides, in pertinent part, that “a party is not liable for a failure to perform . . . if he proves that the failure was due to an impediment beyond his control and that he could not reasonably [have accounted for the impediment].”<sup>215</sup> The article applies only during the period in which the impediment exists and only protects a party from damages.<sup>216</sup> An aggrieved party may rely on the article solely to prevent damages for non-performance.<sup>217</sup> Therefore, non-performance can still be grounds for dissolution and even revision of the contract.<sup>218</sup> In contrast to U.C.C. § 2-615, the frustration doctrine, and the doctrine of impracticability, the text of article 79 of the CISG suggests that dissolution is not the only remedy.<sup>219</sup> For example, the law suspends performance if the impediment is temporary and preserves all judicial remedies, such as revision or dissolution, excluding damages.<sup>220</sup>

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210. UNCITRAL, *Status: United Nations Convention on Contracts for the International Sale of Goods*, [http://www.uncitral.org/uncitral/uncitral\\_texts/sale\\_goods/1980CISG\\_status.html](http://www.uncitral.org/uncitral/uncitral_texts/sale_goods/1980CISG_status.html) [<https://perma.cc/A45A-4FXJ>] (last visited Dec. 14, 2017).

211. See Nagy, *supra* note 23, at 61.

212. See MURRAY & FLECHTNER, *supra* note 178, at 6–7.

213. See generally Nagy, *supra* note 23, at 63–64 (explaining that domestic terms like *force majeure* were avoided in the drafting but that article 79 reflects the concept).

214. Ingeborg Schwenzer, *Force Majeure and Hardship in International Sales Contracts*, 39 VICT. U. WELLINGTON L. REV. 709, 712–13 (2009).

215. CISG art. 79, Apr. 11, 1981, 52 Fed. Reg. 6262, 6264–80 (1987), 1489 U.N.T.S. 3.

216. *Id.* art. 79(3), (5).

217. *Id.* art. 79(5).

218. The CISG uses the term “avoidance” as dissolution. The procedure for avoidance is quite complex. See *id.* art. 49.

219. *Id.* art. 79(3) (the contract can stay intact while the impediment exists without liability for the invoking party).

220. *Id.* art. 79(3), (5).

In practice however, courts have inconsistently interpreted CISG article 79, particularly in defining “impediment.”<sup>221</sup> For instance, German courts have defined the term as encompassing *force majeure*, economic impossibility, and excessive onerousness.<sup>222</sup> An Italian court defined impediment as absolute impossibility.<sup>223</sup> Controversially, the United States has interpreted article 79 to be equivalent to U.C.C. § 2-615.<sup>224</sup> Criticism of the United States’s interpretation stems from the federal district court’s blatant violation of article 7 of the CISG by superimposing the U.C.C. over the convention and defying the article 7 rule that the CISG is to be interpreted with respect to its international character.<sup>225</sup>

From an American perspective, the most debated case applying CISG article 79 comes from the Belgian Supreme Court.<sup>226</sup> In 2009, the Belgian Supreme Court held that a 70% increase in the market price of steel tubes created a sufficient economic difficulty to qualify as an impediment under article 79.<sup>227</sup> As a result, the court essentially applied *theorie l’imprévision*<sup>228</sup> and ordered the parties to renegotiate the contract.<sup>229</sup> An opinion that the preeminent authority on the treaty, the CISG Advisory Council, issued<sup>230</sup> appeared to provoke the Belgian decision, and both the decision and the council’s opinion elicited an intense negative reaction from American commentators.<sup>231</sup>

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221. See Nagy, *supra* note 23, at 65.

222. See, e.g., Chinese goods case, Schiedsgericht der Handelskammer [Arbitral Tribunal] (Hamburg, Ger. 1996), <http://cisgw3.law.pace.edu/cases/960321g1.html> [<https://perma.cc/WB38-V2A5>].

223. See Nuova Fucinati v. Fondmetall Int’l, Tribunale Civile di Monza (It. 1993), <http://cisgw3.law.pace.edu/cases/930114i3.html> [<https://perma.cc/F774-JUYN>].

224. Raw Materials, Inc. v. Manfred Forberich GmbH & Co., No. 03 C 1154, 2004 WL 1535839, at \*3–4 (N.D. Ill. July 7, 2004).

225. See Joseph Lookofsky & Harry Flechtner, *Nominating Manfred Forberich: The Worst CISG Decision in 25 Years?*, INTERNATIONAL INSTITUTE OF COMMERCIAL LAW, <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky13.html> [<https://perma.cc/9SK2-CA7P>].

226. See Nagy, *supra* note 23, at 83–84.

227. See *id.* at 83.

228. See *supra* Part II.B; *infra* Part III.C.1 (discussing how *imprévision* applies when performance is excessively difficult and can result in judicial adjustment of the contract).

229. See Nagy, *supra* note 23, at 84.

230. See *id.* at 86 (arguing that CISG Advisory Opinion No. 7’s liberal interpretation of art. 79 emboldened Belgium).

231. See *id.* at 84 (asserting that the decision violates precedential norms).

Fears regarding a liberal interpretation of article 79 promoting *imprévision*, and that such an interpretation is unfounded in the law, may be unwarranted. CISG Advisory Opinion No. 7, which allegedly emboldened Belgium, does not promote loose application of article 79 to situations in which performance becomes excessively difficult.<sup>232</sup> The opinion articulates that economic fluctuations creating hardship typically do not create impediments and that a radical, rare case is necessary to trigger article 79.<sup>233</sup> Nevertheless, the opinion states that a rare case of hardship could be an impediment, and a remedy that adjusts the contract can be easily reached through the CISG's provision on good faith and article 79(5).<sup>234</sup> Article 7 instructs courts to observe good faith in trade,<sup>235</sup> and when read together with article 79(5), which only excludes damages as a remedy, adjustment of the contract is an available remedy for the parties.<sup>236</sup>

CISG article 79 broadens the scope of remedies overall but still recognizes the sanctity of the parties' agreement.<sup>237</sup> The law's major weakness, however, is its inconsistent application among the ratifying nations.<sup>238</sup> Although one may view varying application as a feature of international law, inconsistent application of the CISG runs counter to its goal of uniformly and consistently applying the body of law for those engaged in global transactions.<sup>239</sup> The implicit rather than explicit

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232. See CISG-AC Opinion No. 7, Exemption of Liability for Damages Under Article 79 of the CISG, ¶ 39, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html> [<https://perma.cc/5KEJ-A7QD>] [hereinafter CISG-AC Opinion No. 7].

233. *Supra* note 232.

234. CISG-AC Opinion No. 7, *supra* note 232, ¶ 40.

235. CISG art. 7(1), Apr. 11, 1981, 52 Fed. Reg. 6262, 6264–80 (1987), 1489 U.N.T.S. 3.

236. See CISG-AC Opinion No. 7, *supra* note 232, ¶ 40.

237. See MCKENDRICK, *supra* note 29, at 193 (discussing in conclusion (3) narrow scope of art. 79 scenarios, but more remedies); CISG-AC Opinion No. 7, *supra* note 232, ¶ 40 (discussing the possibility of adjusting a contract).

238. See Nagy, *supra* note 23, at 65.

239. CISG Preamble, *supra* note 20 (stating that the ratifying nations are “of the opinion that the adoption of *uniform* rules which govern contracts for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade.”); see also Nagy, *supra* note 23, at 63 (stating that “[d]iverging interpretations of the CISG will create disharmony between legal systems, which could lead to unpredictable results that contradict its goal of harmonizing international commercial law”).

authorization of remedies, such as contract revision, seems to deter many courts from pursuing remedies beyond traditional dissolution of the contract.<sup>240</sup>

Similar to § 2-615's influence on the Restatement of Contracts, the CISG influenced the Unidroit Principles.<sup>241</sup> Although modeled after the CISG, the Unidroit Principles are broader in scope—dealing with all contracts, not just the sale of goods—and progress the law further than the CISG, yielding an international restatement of contracts.<sup>242</sup> Article 7.1.7 of Unidroit mirrors, almost verbatim, article 79 of the CISG, but Unidroit explicitly characterizes its article as a provision for *force majeure*.<sup>243</sup> Unidroit then departs from the CISG by adding article 6.2.2 on hardship.<sup>244</sup> Article 6.2.2 defines hardship as “where the occurrence of events fundamentally alters the equilibrium of the contract either because the *cost* of a party's performance has *increased* or because the *value* of the performance a party receives has *diminished*.”<sup>245</sup> The article goes on to condition hardship on lack of foreseeability and no assumption of risk.<sup>246</sup> If the conditions for hardship are satisfied, article 6.2.3 first gives the aggrieved party the right to request renegotiations, followed by the ability to challenge in court.<sup>247</sup> The court is allowed to either terminate the contract or adapt the contract for the parties.<sup>248</sup> Thus, Chapter 6, Section 2 of the principles places *imprévision* in black ink, and its traces are apparent in the French Revision of 2016.<sup>249</sup>

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240. See generally Nagy, *supra* note 23, at 89 (illustrating how interpretation of the convention can vary by domestic modes of exegesis and disagreeing with the Belgian court's analysis of the convention).

241. See Perillo, *supra* note 22, at 282.

242. *Id.* at 283.

243. Compare Art. 7.1.7 UNIDROIT Principles 2010 with CISG art. 79, Apr. 11, 1981, 52 Fed. Reg. 6262, 6264–80 (1987), 1489 U.N.T.S. 3.

244. Art. 6.2.2 UNIDROIT Principles 2010.

245. *Id.* (emphasis added).

246. *Id.*

247. *Id.* art. 6.2.3.

248. *Id.*

249. See PHILIPPE MALINAUD, DOMINIQUE FENOUILLET & MUSTAPHA MEKKI, DROIT DES OBLIGATIONS 470 (14th ed. 2017).

### C. French Revision of 2016

In 2016, France revised its Civil Code's provisions on contracts to much fanfare.<sup>250</sup> The revision was the first change to the law of obligations since 1804.<sup>251</sup> Among the major changes was the addition of Civil Code article 1195, which explicitly codifies *imprévision*.<sup>252</sup> Article 1195 is the first addition of excuse for performance in French private contract law since the codification of *force majeure* over 200 years ago.<sup>253</sup>

#### 1. *Imprévision: From Isolated Doctrine to Code Article*

Before the reform, *imprévision* was exclusively a doctrinal construct, applied occasionally in French administrative law—law governing disputes between public and private entities.<sup>254</sup> In 1876, the French Supreme Court rejected *imprévision* in private law when it overturned a lower court's decision to adjust a long-term contract involving a canal.<sup>255</sup> French jurists were content with the decision, indulging the legal fiction that parties neither envision a contract revision nor account for the future at the time of contracting.<sup>256</sup> Instead, the Conseil d'Etat sanctioned *imprévision* 40 years later in the administrative law case of *Compagnie Générale d'Éclairage de Bordeaux v. Ville de Bordeaux*.<sup>257</sup> The case involved skyrocketing coal prices after World War I, and the contract at issue was between an electric company and a city.<sup>258</sup> The court held that the increased costs exceeded the amount the parties could have

250. See Peter Rosher, *French Contract Law Reform*, 17 NO. 1 BUS. INT'L 59, 59 (2016); JOHN CARTWRIGHT & SIMON WHITTAKER, *THE CODE NAPOLÉON REWRITTEN: FRENCH CONTRACT LAW AFTER THE 2016 REFORMS* 8 (2017).

251. See CARTWRIGHT & WHITTAKER, *supra* note 250.

252. See Mustapha Mekki, *The General Principles of Contract Law in the "Ordonnance" on the Reform of Contract Law*, 76 LA. L. REV. 1193, 1206, n.100 (2016).

253. Article 1147 of the Code Napoléon previously governed obstacles in performance of a contract; see generally Litvinoff, *supra* note 15.

254. See Rosher, *supra* note 250, at 60.

255. Canal de Craponne, Cour de cassation [Cass.] [supreme court for judicial matters], civ., Mar. 6 1876, D. 1876.I.93.

256. PLANIOL, *supra* note 25, § 1168A, at 663.

257. *Compagnie Générale d'éclairage de Bordeaux v. Ville de Bordeaux*, 1916 D. Jur. III 25, 1916 S. Jur. III 17 (Conseil d'État 1916).

258. *Id.*; see BEALE, *supra* note 38, at 629–30 (explaining that public works contracts such as electric contracts fall within administrative law and noting the rationale of using *imprévision* in such cases).

contemplated when contracting<sup>259</sup> and remanded the case to adjust the contract if the parties failed to renegotiate.<sup>260</sup> The leading explanation for the rationale is that *imprévision* in administrative law seeks ultimately to protect the public interest in having public services, such as electricity, rather than the unfair financial circumstances that may befall a party to a private contract.<sup>261</sup>

In legislatively incorporating *imprévision* into the private law, France draws a sharp distinction between *imprévision* and *force majeure* like the Unidroit Principles.<sup>262</sup> Significantly, the distinction means the French did not expand *force majeure*; *force majeure* continues to govern situations of strict impossibility, whereas *imprévision* exists as a new and separate right.<sup>263</sup> The distinction means also that events making performance truly impossible fall outside of *imprévision* and must be governed by *force majeure* and its remedies.<sup>264</sup> The distinction follows other models including Italy<sup>265</sup> and Unidroit.<sup>266</sup>

## 2. A Law Both Suppletive and Mandatory

Although separate from the *force majeure* provision, French Civil Code article 1195 retains some ability to modify contracts from the default rule, just like for *force majeure*.<sup>267</sup> Article 1195 provides:

Should a change in circumstances that was unforeseeable at the time the contract was concluded make its execution excessively onerous for a party who had not agreed to assume the risk, that party may ask the other party that the contract be re-negotiated. While the contract is being re-negotiated, the former party continues to carry out its obligations.

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259. *Compagnie Générale d'éclairage de Bordeaux v. Ville de Bordeaux*, 1916 D. Jur. III 25, 1916 S. Jur. III 17 (Conseil d'État 1916).

260. *Id.*

261. PLANIOL, *supra* note 25, § 1168A, at 664; BEALE, *supra* note 38, at 630.

262. PASCAL ANCEL, *Imprévision [Hardship]* ¶ 3, RÉPERTOIRE DE DROIT CIVIL [ENCYCLOPEDIA OF CIVIL LAW], Dalloz (May 2017) [hereinafter ANCEL] (discussing that the two concepts are separate: article 1195 provides for *imprévision* and article 1218 provides for *force majeure*) (on file with author).

263. *See id.*

264. *See id.*

265. CODICE CIVILE [C.C.] [CIVIL CODE] art. 1467 (It.).

266. *Compare* Art. 7.1.7 UNIDROIT Principles 2010 *with* Art. 6.2.2 UNIDROIT Principles 2010.

267. CARTWRIGHT & WHITTAKER, *supra* note 250, at 199.

In the event of a refusal or the failure to re-negotiate, the parties may agree that the contract will be dissolved on the date and under the conditions they lay down, or they may ask by common agreement that the court proceed with its adaptation. If they fail to reach an agreement within a reasonable time, the court may, at the request of one party, revise the contract or put an end to it, at the time and under the conditions the court will determine.<sup>268</sup>

Although article 1195 is a general, mandatory rule for applying *imprévision*, the law itself is likely suppletive in nature.<sup>269</sup> In other words, the rule is a default provision, but parties can opt out of *imprévision*.<sup>270</sup> Thus, article 1195 provides a course of action only in an agreement that does not exclude the provision.<sup>271</sup> Nevertheless, scholars are split as to the extent to which parties can opt out of the article.<sup>272</sup> The suppletive nature of the article helps mitigate some of the criticism of the revision involving contractual unpredictability—potentially encouraging parties to renege on bad deals.<sup>273</sup> Commentators doubt, however, that parties could completely exclude French Civil Code article 1195 in a contract without providing another mechanism for relief if circumstances become excessively onerous.<sup>274</sup> The majority of scholars seem to favor an ability to opt out of the clause, allowing judicial interference with the contract.<sup>275</sup>

### 3. *The Spirit and Effect of Article 1195*

Many commentators agree that the change in law needed to originate from the legislature rather than the courts.<sup>276</sup> French courts were seen as unfit to develop a structured review mechanism in *imprévision* scenarios to sufficiently address uncertainty issues.<sup>277</sup> In a few recent but isolated decisions before the revision, however, the French Supreme Court ordered parties to renegotiate and adapt contracts under the duty of good faith when

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268. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.) (Alain A. Levasseur, John R. Trahan & David W. Gruning trans.).

269. Reports from the drafters to the President and most commentary recognize a suppletive aspect to the rule. ANCEL, *supra* note 262, ¶¶ 55, 56, 95.

270. See generally Alejandro M. Garro, *Codification Technique and the Problem of Imperative and Suppletive Laws*, 41 LA. L. REV. 1007 (1981).

271. See generally *id.*

272. ANCEL, *supra* note 262, ¶ 95.

273. See Rosher, *supra* note 250, at 61–62.

274. See ANCEL, *supra* note 262, ¶¶ 95, 96.

275. *Id.* ¶ 95.

276. *Id.* ¶ 57.

277. *Id.*



economic conditions made performance more onerous.<sup>278</sup> Ultimately, article 1195 has three essential elements: (1) excessive onerousness; (2) unpredictability; and (3) no assumption of risk.<sup>279</sup> Throughout the article's drafting, the guiding principles were the common will of the parties and the idea that the parties themselves will negotiate the best solution.<sup>280</sup> Unlike the U.C.C., which applies only to the sale of goods, article 1195 was intended to apply to all contracts, with the idea that the code article's language and construction provides adequate restrictions to curb fears of contractual uncertainty.<sup>281</sup> Article 1195 seeks to impose an objective standard that emphasizes the amount of change and the severity of impact on the contract instead of an approach emphasizing the consequences arising from the detrimental effect on one of the parties.<sup>282</sup>

The drafters of article 1195 considered three circumstances to trigger the article: (1) one that fundamentally alters the equilibrium of the contract; (2) one that renders the contract profoundly unbalanced because of a change of reasonably unforeseeable circumstances; or (3) one rendering the contract excessively onerous.<sup>283</sup> In the end, the drafters rejected the first two methods and chose the third, inspired by article 1467 of the Italian Civil Code.<sup>284</sup> French courts must now decide how to interpret "excessively onerous."<sup>285</sup>

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278. See Huard, Cour de cassation [Cass.] [supreme court for judicial matters], civ., Nov. 3, 1992 Bull. civ. IV, No. 338 (Fr.) (ordering parties to renegotiate after service station's long-term fuel contract became too expensive); Cour de cassation [Cass.] [supreme court for judicial matters], Nov. 24, 1998. D. 2008, 1120 (Fr.) (ordering renegotiations due to discoveries about greenhouse gases). See also MALINAUD, FENOUILLET & MEKKI, *supra* note 249, at 468 (noting that the decisions only came from the commercial division of the Court of Cassation).

279. ANCEL, *supra* note 262, ¶¶ 72, 79.

280. *Id.* ¶¶ 58, 59.

281. *Id.* ¶ 62.

282. *Id.* ¶ 67.

283. *Id.* ¶ 74.

284. CODICE CIVILE [C.C.] [CIVIL CODE] art. 1467 (It.):

In contracts with continuous or periodic performance or deferred execution, if the performance of one of the parties has become excessively onerous due to occurrence of extraordinary and unforeseeable events, the party that has such performance may request the termination of the contract, with the effects established by art. 1458 (1). The resolution cannot be asked if the onerousness of the contract falls within the normal contract (2). The party against whom the resolution is sought may avoid it by offering to modify the terms of the contract equally (3).

See also ANCEL, *supra* note 262, ¶ 74.

285. See ANCEL, *supra* note 262, ¶ 74.

One interpretation is that “excessively onerous” means performance has become tremendously expensive, such as the price of materials skyrocketing, or total worthlessness, in a case of rapid inflation.<sup>286</sup> Another interpretation involves a measure of the balance between performance and counter-performance or whether the value of the transaction substantially favors one party over another.<sup>287</sup> The last interpretation, which the text least supports, is that “excessively onerous” includes situations in which a party becomes disinterested in a contract because of a change in circumstances.<sup>288</sup> The most probable interpretation falls within the realm of a fundamental alteration or profound imbalance in the contract.<sup>289</sup>

The final two elements are straightforward. Unpredictability under article 1195 is essentially a strict reasonableness standard.<sup>290</sup> The occurrence should be so exceptional that the parties would not have normally considered it.<sup>291</sup> The standard appears to have a subjective prong, requiring a reasonableness analysis particular to the type of party contracting and the type of business involved in the contract.<sup>292</sup> No assumption of risk requirement means article 1195 will not apply if the parties explicitly or implicitly accepted the chance of the onerous circumstance.<sup>293</sup> As for implicit acceptance of risk, commentators assert that implicit acceptance should not apply when circumstances completely change the original balance between chance of gain and risk of loss.<sup>294</sup> Speculative or aleatory contracts almost always involve an implicit acceptance of risk, and if article 1195 could apply at all, the facts would need to be extraordinary.<sup>295</sup>

The French reform provides more flexibility than other areas of law, both in the circumstances in which the law can apply and in the freedom to mitigate the law’s effects.<sup>296</sup> The variety of options for interpretation of

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286. *See id.* ¶ 75.

287. *See id.* ¶ 76.

288. *See id.* ¶ 77.

289. Discussion with Olivier Moreteau, Director of the Center of Civil Law, Louisiana State University Paul M. Hebert Law Center, in Baton Rouge, La. (Jan. 16, 2018).

290. ANCEL, *supra* note 262, ¶ 81.

291. *Id.*

292. *Id.* ¶ 80.

293. *Id.* ¶ 84.

294. *Id.*

295. *See id.* (recognizing the possibility that art. 1195 could apply to speculative contracts). The author’s discussion with Professor Moreteau on the point of article 1195’s applicability to aleatory contracts yielded the opinion that it would almost always be inapplicable.

296. *See Rosher, supra* note 250, at 64.

the elements gives courts the freedom to develop jurisprudence.<sup>297</sup> At the same time, article 1195 forces courts to consider different remedies to situations beyond traditional *force majeure*.<sup>298</sup> Although article 1873 of the Louisiana Civil Code speaks only to exemption of liability when fortuitous events—*force majeure*—make performance impossible, article 1195 of the French Civil Code promotes a host of remedies for situations of contractual hardship not amounting to *force majeure* within a tidy framework.<sup>299</sup>

#### IV. LOUISIANA'S SOLUTION SHOULD FOLLOW THE FRENCH REVISION

In light of all the potential approaches, Louisiana should follow the French model.<sup>300</sup> The French solution is more comprehensive than the U.C.C. because article 1195 of the French Civil Code applies to all contracts and parties,<sup>301</sup> but § 2-615 applies only to sales of goods and sellers.<sup>302</sup> With applicability to both parties, a buyer is protected when an extreme event makes the buyer's purchase worthless.<sup>303</sup> Section 2-615 does not, on its face, promote the conservation of the contract; the provision addresses only a release of liability from damages.<sup>304</sup> Any conservation must be extrapolated from the comments of § 2-615, but courts have not used the comments to preserve and adjust contracts.<sup>305</sup> Article 1195 eliminates uncertainty with regard to preservation because it promotes contract conservation with revision in the text of the law itself rather than in the comments, which do not have the force of law.<sup>306</sup>

Article 1195 of the French revision, like the Unidroit Principles, includes strengths from article 79 of the CISG but expands beyond the CISG. First, article 1195 uses a distinct legal term of art: “excessively

297. See ANCEL, *supra* note 262, ¶¶ 74–84.

298. There are many options and safeguards within article 1195. CODE CIVIL [C. CIV.] (CIVIL CODE) art. 1195 (Fr.). See also Mekki, *supra* note 111, at 248.

299. Compare LA. CIV. CODE art. 1873 (2018), with CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

300. See *supra* Part III.

301. Compare CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.), with CISG art. 79, *supra* note 19, and U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM'N 1977).

302. Compare CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.), with U.C.C. § 2-615 (AM. LAW. INST. & UNIF. LAW COMM'N 1977) (the preamble only refers to sellers); see also ANCEL, *supra* note 262, ¶ 75.

303. *Id.*

304. See U.C.C. § 2-615.

305. See *id.* cmt. 6; see also TREITEL, *supra* note 43, at 246.

306. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

onerous.”<sup>307</sup> Drafters chose this term, from the Italian Civil Code and mirroring the language in Unidroit, specifically to expand the covered circumstances that could qualify beyond traditional *force majeure*.<sup>308</sup> Similarly, drafters chose the CISG’s use of “impediment” to distinguish article 79 of the CISG from frustration and impossibility.<sup>309</sup> Article 1195’s use of the term “excessively onerous” makes it unlikely that Louisiana courts will completely adopt impracticability or frustration. Also similar to the CISG, article 1195 promotes the continuance of the contract even though there is an obstacle to performance.<sup>310</sup>

Another great strength of article 1195 is that it preserves *force majeure* and creates a separate right.<sup>311</sup> Article 1195 does not need to straddle *force majeure* and *imprévision* like article 79 of the CISG.<sup>312</sup> Although both promote contract conservation, article 1195 encourages performance while the parties renegotiate around the obstacle. Article 1195 operates accordingly because it does not apply to impossibility, whereas article 79 must account for impossibility.<sup>313</sup> Another strength of decoupling *force majeure* and *imprévision* is that Louisiana jurisprudence and tradition are preserved.<sup>314</sup> Leaving the jurisprudence concerning *force majeure* intact ensures consistency in the law by keeping present Louisiana Civil Code article 1873, thus providing the remedy of dissolution for actual impossibility.

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307. *Id.*

308. See ANCEL, *supra* note 262, ¶ 74.

309. Nagy, *supra* note 23, at 68–69.

310. Compare CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.) (performance required during renegotiation), with CISG art. 79(3), Apr. 11, 1981, 52 Fed. Reg. 6262, 6264–80 (1987), 1489 U.N.T.S. 3 (performance resumes when the impediment is removed).

311. Compare CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.), with CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1218 (Fr.); see also ANCEL, *supra* note 262, ¶ 3.

312. Contrast CISG art. 79(3) (performance is excused during the impediment) with CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.) (performance required during negotiations).

313. Compare CISG art. 79, with CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.) (providing for *imprévision*), and CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1218 (Fr.) (providing for *force majeure*). See also Schwenger, *supra* note 214, at 712–13 (noting the likelihood that article 79 was originally the exclusive impossibility excuse).

314. See generally LA. CIV. CODE art. 1 (2018) (“The sources of law are legislation and custom.”); *id.* art. 3 (providing in pertinent part that “[c]ustom may not abrogate legislation”). Legislation trumps custom according to the Civil Code, meaning that a substantial change to the code’s provision on *force majeure* would override the long-standing jurisprudence. *Id.*

Ultimately, article 1195 is legally consistent with Louisiana contract law and the Civil Code.<sup>315</sup> A simple codification of common law frustration or impracticability would be redundant because the doctrines equate to failure of cause.<sup>316</sup> Although rarely invoking it, Louisiana recognizes failure of cause and its limited remedy of dissolution.<sup>317</sup> Article 1195 instead promotes the good faith requirement of the Code and makes explicit the implicit condition that the obligation exists as long as the circumstances remain unchanged.<sup>318</sup> Thus, article 1195 codifies much of Professor Litvinoff's rationale for expanding *force majeure* with the addition of one simple article.<sup>319</sup>

#### A. Reasons to Expand the Law to *Imprévision*

Several general principles support the codification of *imprévision*.<sup>320</sup> First, *imprévision* combats the legal fiction that parties want to maintain their written agreement even in the event of unforeseeable, radical circumstances.<sup>321</sup> Though *imprévision* embodies a different assumption—that parties did not envision a change in circumstances—it forces parties and judges to consider that parties likely want to achieve the goals of the original contract via different means.<sup>322</sup> Second, *imprévision* explicitly promotes good faith and coordination between contracting parties.<sup>323</sup> Third, *imprévision* allows a court to intervene when the failure to do so could jeopardize a contract whose performance is necessary for the public interest.<sup>324</sup> Article 1195 assumes the more realistic premise that parties consent to what they know at the time of contracting—a relative stability in the state of affairs.<sup>325</sup>

The leading criticism to article 1195's approach and *imprévision* is uncertainty in contracts because of a perceived weakness in the binding

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315. See *supra* Part II.C.

316. See MALINAUD, FENOUILLET & MEKKI, *supra* note 249, at 472; see also Litvinoff, *supra* note 15, at 6.

317. See MIE Properties-LA, L.L.C. v. Huff, No. 2011 CA 0258, 2012 WL 1203373 (La. Ct. App. Apr. 9, 2012).

318. See generally Litvinoff, *supra* note 15, at 5.

319. See discussion *supra* Part II (discussing the shortcomings of Professor Litvinoff's scheme and Tabor's 11-article scheme). Article 1195 alleviates both concerns. *Id.*

320. ANCEL, *supra* note 262, ¶ 5.

321. *Id.*

322. *Id.*

323. See *id.*

324. *Id.*

325. See *id.*

force of parties' agreements.<sup>326</sup> Although uncertainty seems to invite a flood of litigation, some studies in comparative law have concluded that jurisdictions with *imprévision* have not seen more litigation.<sup>327</sup> Moreover, other parts of the article's language alleviate the concern of uncertainty despite the fact that at its core, article 1195 is a mandatory rule that the overarching principle of good faith requires.<sup>328</sup>

First, the initial element—that performance become “excessively onerous”—will likely require an analysis of profound imbalance in the contract, leaving only a somewhat more generous interpretation of the code than the present *force majeure* analysis.<sup>329</sup> Second, article 1195 requires that performance of the original obligation continue while renegotiation takes place.<sup>330</sup> As a result, the obligation is still in force and binding, which may serve to deter a party from invoking article 1195 when the circumstances are not truly exceptional.<sup>331</sup> Third, many of the remedies in article 1195 can be suppletive.<sup>332</sup> If parties include their own mechanisms for remedying hardship, those mechanisms can prevail over the article even if the mechanism excludes judicial intervention.<sup>333</sup> In addition, the controversial judicial intervention clause is discretionary, as indicated by the use of the word “may.”<sup>334</sup> Furthermore, judicial intervention involving a juridical act<sup>335</sup> and a disagreement among parties is not completely foreign in Louisiana law.<sup>336</sup> In the law of successions, the Louisiana Civil Code permits a judge to order a partition of donated

326. Rosher, *supra* note 250, at 61.

327. See CARTWRIGHT & WHITTAKER, *supra* note 250, at 188 (citing D Tallon, ‘Réflexions comparatives’ in R Rodière (ed), *La modification du contrat au cours de son exécution en raison de circonstances nouvelles* (Paris, Pedone, 1984)).

328. See ANCEL, *supra* note 262, ¶¶ 55, 56, 95.

329. See generally CARTWRIGHT & WHITTAKER, *supra* note 250, at 197–98. The author doesn't mean to undercut the benefits of *imprévision* by comparing its interpretation to *force majeure*, but is merely observing that one can find judicial restraint in the construction of article 1195.

330. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

331. CYRIL BLOCH ET AL., THE INFLUENCE OF THE NEW FRENCH OF OBLIGATIONS ON BUSINESS LAW 198 (2018) (French-to-English trans. ed.).

332. See ANCEL, *supra* note 262, ¶¶ 55, 56, 95.

333. See *id.* ¶¶ 95, 96.

334. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.) (“[T]he court may, on request of a party, revise the contract.”).

335. A juridical act is a voluntary expression of will intended to create legal consequences. See *Acte*, DICTIONARY OF THE CIVIL CODE (1st ed. 2014). Juridical acts include contracts, wills, testaments, and donations. *Id.* See also *Juridique \*acte juridique*, DICTIONARY OF THE CIVIL CODE (1st ed. 2014).

336. See LA. CIV. CODE art. 1300 (2018).

property after five years if the coheirs cannot agree among themselves how to administer or partition the property.<sup>337</sup> Finally, article 1195 does not apply under circumstances in which parties assumed the risk of a change.<sup>338</sup> Consequently, if a party explicitly accepts a risk in the terms of the contract, the party cannot avail itself of article 1195.<sup>339</sup>

### B. Placement in the Louisiana Civil Code

Having decided to codify *imprévision*, one issue remains: the placement of the new article within the Louisiana Civil Code. Lawmakers should place the article after article 1983 under Book III, Title IV, Chapter 8, Section 1: General Effects of Contracts.<sup>340</sup> This section is analogous to the placement of article 1195 in the French Civil Code.<sup>341</sup> Additionally, article 1983 provides a relevant principle to preface the exception of an article 1195 analog: “Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.”<sup>342</sup> Placement after article 1983 is better than placement after article 1873 on *force majeure* because article 1873 is in Chapter 6 on extinction of obligations and Section 2 on impossibility of performance.<sup>343</sup> Article 1873 is likewise located in Title III on obligations in general, making it applicable beyond conventional contract law, such as tort law.<sup>344</sup> Article 1195, contrarily, promotes the continuance of an obligation, applies when performance is

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337. *Id.* The author notes that split ownership of property and conditional donations are generally disfavored in Louisiana law thus providing a somewhat different rationale for judicial intervention with respect to partitioning of donated property; however, the example serves to merely illustrate that the law does not *per se* reject judicial intervention of a juridical act. *See, e.g., id.* arts. 807 (disfavoring split ownership of property), 1299 (disfavoring perpetual condition against partitioning).

338. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

339. *See* ANCEL, *supra* note 262, ¶ 84.

340. *See* LA. CIV. CODE art. 1983.

341. Article 1195 is placed in Book III, Title III, Sub-title: The Contract, Chapter IV Section 1: The effects of contracts between the parties, subsection: binding force of obligations. CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

342. Article 1983 reiterates that good faith is required between the parties and emphasizes, like article 1195, that the parties' consent is most important. LA. CIV. CODE art. 1983.

343. *Id.* art. 1873.

344. *Id.*

still possible but excessively onerous, and pertains only to conventional obligations.<sup>345</sup>

#### CONCLUSION

Adopting an analog to the French *imprévision* in the Louisiana Civil Code would save Louisiana families like the Schencks from ruin.<sup>346</sup> In a state in which unprecedented disasters are becoming more common,<sup>347</sup> Louisiana needs a solution that encourages the continuation of parties' agreements but also recognizes the commercial reality that unforeseen circumstances can change parties' positions drastically.<sup>348</sup> Ultimately, Louisiana's oldest and original source of legal inspiration, France, provides the most innovative, legally compatible, and comprehensive solution, which should serve as the leading model for a revision to the Louisiana Civil Code.<sup>349</sup> Furthermore, the French solution codifies what the architect of Louisiana's *force majeure* law, Professor Litvinoff, envisioned.<sup>350</sup> Finally, codification would express that Louisianans want flexibility when disaster strikes, and Louisiana courts will not ignore this expression.<sup>351</sup> Louisiana families do not need an act of God to help them

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345. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

346. Compare *id.*, with *Schenck v. Capri Constr. Co.*, 194 So. 2d 378 (La. Ct. App. 1967).

347. See generally Editorial Board, Editorial, *Extreme weather like the Louisiana floods should serve as a warning*, WASH. POST (Aug. 22, 2016), [https://www.washingtonpost.com/opinions/extreme-weather-like-the-louisiana-floods-should-serve-as-a-warning/2016/08/22/6e351564-68ab-11e6-99bf-f0cf3a6449a6\\_story.html?utm\\_term=.d9b38f5f1e8f](https://www.washingtonpost.com/opinions/extreme-weather-like-the-louisiana-floods-should-serve-as-a-warning/2016/08/22/6e351564-68ab-11e6-99bf-f0cf3a6449a6_story.html?utm_term=.d9b38f5f1e8f) [https://perma.cc/TA3C-YK7T].

348. See generally Mark Schleifstein, *Louisiana Flood of 2016 resulted from '1,000-year' rain in 2 days*, TIMES PICAYUNE (Aug. 17, 2016), [https://www.nola.com/weather/index.ssf/2016/08/louisiana\\_flood\\_of\\_2016\\_result.html](https://www.nola.com/weather/index.ssf/2016/08/louisiana_flood_of_2016_result.html) [https://perma.cc/6Q5J-YX5J].

349. See CODE CIVIL [C. CIV.] [CIVIL CODE] art. 1195 (Fr.).

350. See Litvinoff, *supra* note 15.

351. See LA. CIV. CODE art. 2 (2018) ("Legislation is a solemn expression of legislative will."); see also *id.* art. 4 (giving courts freedom when legislation does not speak to the issue).

\* J.D./D.C.L., 2019. Paul M. Hebert Law Center, Louisiana State University and recipient of the Vinson & Elkins Best Student Casenote or Comment Award; The Henri Capitant Association Award for best civil and comparative law topic; and the W. Lee Hargrave Award for outstanding service to the *Louisiana Law Review* as a Junior Associate. The author would like to specially thank Professor Olivier Moréteau for the guidance and sources on the many aspects of comparative contract law. The author would also like to thank Benjamin Devine



in post-disaster contracts; they need a simple, single article revision to the Civil Code.

*Christopher R. Handy\**

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