Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law

Charles Tabor

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"Law is something pertaining to reason."¹

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I. INTRODUCTION

Louisiana faces a dilemma. On one hand, it can continue following its current impossibility doctrine and thereby stay true to two hundred years of French influence. On the other hand, it can broaden its basis of excuse for non-performance, thereby bringing itself in line with many other legal systems. In either event, Louisiana will have to step back and evaluate how it approaches legal development, either through strict adherence to historical ideas or through progressive applications attempting to balance law and contemporary issues.

For hundreds of years, two separate ideals have battled to control the policy behind this area of the law; *pacta sunt servanda,* which calls for the absolute adherence to terms in a contract, and *rebus sic stantibus,* which holds that when things change, those terms collapse. At various times throughout history, each of these ideals has ridden at the forefront of popular legal thought. While one was in the spotlight, the other would be cast aside. Thus, the two have been trapped in a proverbial tug of war, fighting for dominance as centuries slowly pass.

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3. "Provided the circumstances remain unchanged." *Id.* at 3.
The purpose of this Comment is to inject a sense of equity into Louisiana law.\(^4\) That is not to say that Louisiana law does not currently contain equitable notions—it does; however, certain aspects of the law seem to be stuck in an archaic world that has long since passed. Imposing harsh laws on the public may make for easy legal analysis, but it does not always provide a fair result for the common citizen. The time has come for Louisiana to overlay its current articles on impossibility with a renewed sense of equity and good faith.

This Comment proposes a set of articles that would broaden Louisiana's basis of excuse for non-performance of a contractual obligation. First, it is necessary to evaluate how Louisiana's current law of impossibility came to be, as well as the alternative method utilized by numerous legal systems. Second, this Comment analyzes why the current Louisiana law is inadequate in dealing with contemporary problems and how recent events call for a new approach. Next, the proposed articles are introduced, with their application being compared to approaches taken in other legal systems. Finally, after a short discussion of economic implications, this Comment addresses a common argument against the proposed "more lenient" approach.

II. BACKGROUND

The following lays the foundation necessary to understand both the conflicts and purposes of the strict and relaxed views of excuse for contractual non-performance. Before seeing where we need to go, it is necessary to first see where we have been. The past is of no use if we do not learn from it.

\(^4\) Professor Alain Levasseur informed me that I should be careful when using the term "equity." Interview with Professor Alain Levasseur, Hermann Moyse, Sr. Professor of Law, Paul M. Hebert Law Center, in Baton Rouge, La. (Oct. 31, 2006). Equity in the Louisiana Civil Code governs only when there is an absence of either legislation or custom. \textsc{La. Civ. Code Ann.} art. 4 (2007). Therefore, I use the word "equity" as being analogous to "fairness"—perhaps more in a natural law sense.
A. The Origins of Louisiana's Impossibility Excuse (Pacta Sunt Servanda)

Currently in Louisiana, impossibility of performance is contained in its own section of the Louisiana Civil Code in the chapter on "Extinction of Obligations." Pursuant to these articles, an obligor's failure to perform an obligation is excused only when: (1) performance is absolutely impossible; (2) the impossibility is preceded by a fortuitous event; (3) the risk of this fortuitous event has not been assumed by the obligor; (4) the obligor is not in default when the fortuitous event occurs; and finally, (5) the obligor is free from fault. Thus, it is only when all of these requirements are met that an obligor may be excused for failing to perform an obligation.

Although impossibility covers all obligations in Louisiana, both scholars and lawyers have argued that courts should recognize an expanded view of excuse when dealing with contractual obligations. Despite these attempts, Louisiana courts have refused to expand impossibility, even in situations where the obligor's performance has become exceedingly difficult after the contract's execution. In effect, Louisiana has stayed true to the strict adherence to contractual terms inherited from its French ancestors.

6. LA. CIV. CODE ANN. art. 1873 (2007); Litvinoff, supra note 2, at 1.
7. Art. 1873.
8. Id.
9. Id.
10. Id.
11. See, e.g., Martin Forest Prods. v. Grantadams, 616 So. 2d 251, 254–55 (La. App. 2d Cir. 1993) (rejecting appellant's argument that performance of a consent decree should be excused for commercial impracticability); Hannover Petroleum Corp. v. Tenneco, Inc., 521 So. 2d 1234, 1240 (La. App. 3d Cir. 1988) (holding that impracticability and imprevision are not recognized in Louisiana); Litvinoff, supra note 2, at 58–59.
12. See, e.g., Martin Forest, 616 So. 2d at 254–55; Hannover, 521 So. 2d at 1240.
13. Louisiana adopted its strict notion of impossibility from article 1147 of the Code Napoléon. Litvinoff, supra note 2, at 1. The French Code Napoléon was adopted at a time when the classical period of contract had a strong hold on Europe. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN
This strict adherence to contractual terms is the product of centuries of legal development and is also called *pacta sunt servanda* ("contracts must be honored"). Its origins can be traced to the Roman praetors’ promise of *pacta conventa servabo* ("I will respect the agreement"). It was the medieval canon lawyers (*jus canonicus*), however, who spurred the creation of the doctrine known today. Oddly enough, the development of this doctrine is not as clear cut as the rule it embodies.

The Church’s involvement with the doctrine was mainly concerned with sin. According to the Church, a promise was binding before God regardless of its formalities. Therefore, a breach of an oral promise was no less sinful than a breach of an oath or contract. In order to harmonize the law with this view, it became necessary to give all informal promises the binding effect of a formal oath. This idea was subsequently included in both the *Decretum Gratiani* (Gratian’s Decretum) and the Decretals of Gregory IX.

FOUNDATIONS OF THE CIVILIAN TRADITION 579 (1990). This “classical” view maintained the supremacy of a party’s contractual freedom. *Id.*

16. *Id.* at 576.
17. *Id.* at 542.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.* Decretals are the written decisions of popes about points or questions of canon law. Peter Stein, Roman Law in European History 49 (1999). Although not a pope but only a mere monk, Gratian’s explanations of his work *Concordantia discordantium canonum*, which was an authoritative collection of canon law, became known as his *Decretum*. *Id.* Gregory IX, who was a pope, later published extracts of papal decretals outside of what was covered under Gratian’s *Dectretum*; therefore, it was known as the *Liber extra*. *Id.* at 50–51. These texts, combined with other scholarly works, were combined to form the *Corpus iuris canonici* (Body of the canon law). *Id.* This body of canon law was considered on equal footing with Justinian’s *Corpus iuris civilis*. *Id.* Interestingly, Gratian’s *Decretum* was considered so authoritative that it became the subject of its own glossaes. *Id.* at 49. It was one of these glossaes which provided kindling for the more lenient and equitable solution of *rebus sic stantibus*, which has continuously been at battle with *pacta sunt servanda* ever since. Zimmermann, *supra* note 13, at 579–80; Hernany Veytia, *The
Expounding on this Church-based idea, the natural lawyers provided the analytical leap necessary to form the current view of *pacta sunt servanda*. They took the canonist view one step farther by finding that since *fides* (faith) is the foundation of justice, all promises must be binding "under all circumstances." Thus, it was this mutation that formed the foundation for the "classical" theory of contract.

Nevertheless, this strict adherence to contractual terms has never been an absolute rule. Even in the Roman law, *pacta sunt servanda* was not without exceptions. As the law developed, the excuse of impossibility was seen as one of those exceptions. This excuse became recognized in France and was included in the Code Napoléon, where it was then transferred to Louisiana.

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23. *Id.* at 544, 576–77 (emphasis added).
24. *Id.* at 576–77; see also Litvinoff, *supra* note 2, at 4.
25. ZIMMERMANN, *supra* note 13, at 578. Roman law allowed *locatio conduction rei* contracts to be unilaterally terminated for failure to perform; *mandatum* (mandate) could be terminated through revocation or renunciation; *societas* (partnership) was also subject to renunciation; and a sale could be rescinded under an *actio redhibitoria* (action in redhibition). *Id.*
27. See LA. CIV. CODE ANN. art. 1933 (1947) (historical note) (explaining that the introduction of impossibility in Louisiana came from articles 1146–48 of the Code Napoléon); Litvinoff, *supra* note 2, at 1 (explaining that Louisiana adopted impossibility as an excuse in article 1933(2) of the Code of 1870 based on the French article 1147 in the Code Napoléon). This author realizes that Louisiana substantive law was provided by the *Siete Partidas* and supposedly only used the French form. J.-R. Trahan, *The Continuing Influence of Le Droit Civil and El Derecho Civil in the Private Law of Louisiana*, 63 LA. L. REV. 1019, 1026 (2003). But see Shael Herman, *Under My Wings Every Thing*
Thus, Louisiana's current law of impossibility is the culmination of a long history of legal development, the origins of which predate Justinian's Digest.

B. The Foundation for Expanding Louisiana's Excuse (Rebus Sic Stantibus)

Like Louisiana's impossibility excuse, the expansion argument can also boast of a rich legal pedigree. Known today as rebus sic stantibus ("provided circumstances remain unchanged"), the foundations of this idea can be traced to Plato during the time of the Roman Republic.\(^28\) It was the Moral Philosophers, however, who prompted its legal use.

St. Augustine took up Cicero's example of "a sword which does not have to be returned to a depositor who has become insane" and included it in his teachings.\(^29\) This idea of a changed circumstance was then included in Gratian's Decretum, a gloss of which provided the spark for the modern rebus sic stantibus doctrine.\(^30\) After affirmation by St. Thomas Aquinas, the natural

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*Prospers: Reflections upon Vernon Palmer's The Louisiana Civilian Experience—Critiques of Codification in a Mixed Jurisdiction*, 80 Tul. L. Rev. 1491, 1500 (2006). Here, the wording of the French article was used in the Digest of 1808; therefore, an analysis of the French law is more appropriate.

28. PLATO, *Republic* 7–8 (Allan Bloom trans., 1991) (360 B.C.). Some contemporary writers have stated that "the example of a sword which does not have to be returned to a depositor who has become insane," which was an influential basis for the current idea of rebus sic stantibus, can only be traced back to Cicero in the first century B.C. ZIMMERMANN, *supra* note 13, at 579. That same example, however, is found in the much earlier work of Plato's Republic. See PLATO, *supra*. Thus, the foundations for rebus sic stantibus can be found as far back as the fourth century B.C.

29. ZIMMERMANN, *supra* note 13, at 579. Evidence of this use can be found in the *Enarrationes in Psalmos*, V, 7, which is a collection of St. Augustine's sermons. Id. at 579 & n.240; see *Enarrationes in Psalmos*, http://www.augnet.org/default.asp?ipageid=1343 (last visited Oct. 1, 2007). It should be mentioned once again that attributing this example to Cicero is not totally accurate since the example was included in Plato's Republic roughly three centuries earlier. PLATO, *supra* note 28, at 7–8.

lawyers picked up the idea and began to expand it.\textsuperscript{31} This expansion resulted in the Romanist writers seeing \textit{rebus sic stantibus} as an implied condition in every contract.\textsuperscript{32}

From the Roman Empire to present, public opinion, and therefore popularity, of the doctrine has been subject to a rollercoaster effect. The doctrine's highpoint for popular opinion occurred during the seventeenth century.\textsuperscript{33} It was during this period that \textit{rebus sic stantibus} made its furthest inroads into the private law, becoming "part and parcel of the \textit{usus modernus}" (modern use).\textsuperscript{34} This popularity was short lived; however, due to

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\textbf{31. Zimmermann, supra note 13, at 580.} It was Bartolus who introduced \textit{rebus sic stantibus} into the civil law as an implied condition, limited to only the act of \textit{renuntiatio}. \textit{Id.} Baldus took this idea and enlarged it to cover all obligations. \textit{Id.} St. Thomas Aquinas gives a very clear explanation of the Church's view in his Summa Theologica, stating:

\begin{quote}
A man does not lie, so long as he has a mind to do what he promises, because he does not speak contrary to what he has in mind: but if he does not act to keep his promise, he seems to act without faith in changing his mind. He may, however, be excused . . . if circumstances have changed with regard to persons or the business at hand. For, as Seneca states, for a man to be bound to keep a promise it is necessary for everything to remain unchanged: otherwise neither did he lie in promising—since he promised what he had in his mind, due to circumstances being taken for granted—nor was he faithless in not keeping his promise, because circumstances are no longer the same. Hence, the apostle, though he did not go to Corinth, whither he had promised to go . . . did not lie, because obstacles had arisen which prevented him.
\end{quote}

\textbf{2 Aquinas, supra note 1, pt. 2, Q. 110, art. 3, reply to obj. 5, at 1667.}

\textbf{32. Litvinoff, supra note 2, at 3; see also Saul Litvinoff, Obligations § 16.72, in 5 Louisiana Civil Law Treatise 560 (1st ed. 1992); Zimmermann, supra note 13, at 580.} The full text of the clause is "\textit{Contractus qui habent tractum successivum et dependentiam de futurum, rebus sic stantibus intelligitur}," which may be freely translated as, "Contracts providing for successive acts of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same." Litvinoff, \textit{supra} note 2, at 4.

\textbf{33. Zimmermann, supra note 13, at 581.} Zimmerman muses that perhaps the reason for the popularity of the doctrine during the seventeenth century was in part due to the horrendous wars taking place at the time. \textit{Id.}

\textbf{34. Id.} An Italian friend, Andrea Borroni, informed me that the \textit{usus modernus} is founded on deeper roots. It actually stands for the \textit{usus modernus pandectarum}, which is a method of thinking established in Germany. Between
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the rise of the theories of capitalism and liberalism during the eighteenth century, both of which were particularly hostile to this equitable notion.\textsuperscript{35} Eventually, the changing legal scene led to the disappearance of the doctrine altogether.\textsuperscript{36}

With the rise of the World Wars in the early part of the twentieth century, \textit{rebus sic stantibus} re-emerged as a workable theory in many jurisdictions. The Italians have codified the idea in their civil code.\textsuperscript{37} Both Germany's BGB and Greece's Civil Code contain a provision based on the doctrine.\textsuperscript{38} Russia, Uzbekistan, and Turkmenistan have followed the trend by codifying the doctrine.\textsuperscript{39} Spain and Poland have allowed the theory jurisprudentially.\textsuperscript{40} Puerto Rico found that the doctrine was embodied under its existing code article on good faith.\textsuperscript{41} France has accepted the idea in its public law.\textsuperscript{42} Perhaps most profoundly,
large projects such as the Unidroit Principles of International Commercial Contracts, the Principles of European Contract Law (PECL), the Restatement (Second) of Contracts, and the Uniform Commercial Code all contain express provisions based on an underlying *rebus sic stantibus* theory.\(^{43}\)

This sudden re-emergence of the doctrine may indicate a coup against the strictness of *pacta sunt servanda*. Interwoven with the notions of good faith and failure of cause,\(^{44}\) *rebus sic stantibus* has been an active player in contract law for many centuries. Despite attempts to wipe it out, the doctrine still has a strong presence in the law. Its popularity seems to always increase after catastrophic events that alter contractual-based assumptions.\(^{45}\) The ebb and flow of the doctrine’s popularity has best been summarized by the German Jurist Bernhard Windscheid, who stated: “Thrown out by the door . . . it will always re-enter through the window.”\(^{46}\)

### III. WHY DOES LOUISIANA NEED TO CHANGE?

After tracing the foundations of Louisiana’s current law, it is necessary to evaluate why that law is not able to effectively handle

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\(^{44}\) Litvinoff, * supra* note 2, at 6, 16.

\(^{45}\) Veytia, * supra* note 21, at 1203.

\(^{46}\) ZIMMERMANN, * supra* note 13, at 581 (citing Windscheid “Die Voraussetzung” (1892) 78 Archiv fur die civilistische Praxis 197). Windscheid was a member of the commission who drafted the BGB. Borroni Interview, * supra* note 34.
contemporary problems. Louisiana’s current excuse of impossibility is inadequate for the following reasons: (1) Louisiana has experienced a catastrophic event similar to those that have spurred other jurisdictions to move away from the “classical” contract doctrine; (2) Louisiana is legally isolating itself from many of its commercial partners by refusing to acknowledge a broader basis of excuse; and (3) it is more economically efficient to allow a broader basis of excuse.

A. Catastrophic Events

Applying a strict, bright-line rule is easy in times of economic stability and predictability. However, when events occur that shatter that presupposed stability, the gap between the strict letter of the law and a fair result can become a chasm. That is why the more equitable notion of *rebus sic stantibus* gains support immediately after drastic events; circumstances change so that it does not make sense to hold people to certain obligations. This can be seen time and time again throughout history. 47

Germany faced this problem immediately following World War I. The value of German currency plummeted after the war and crippled the economy. 48 Their code contained a strict view of impossibility, which embodied a *pacta sunt servanda* foundation similar to the French tradition; therefore, the code provided no express method of reaching an equitable solution for debtors affected by only an economic crisis. 49 In order to reach an equitable solution, the courts expanded good faith (*Treu und Glauben*) and created the doctrine of *Wegfall der Geschäftsgrundlage* (collapse of the underlying basis of the transaction). This jurisprudential doctrine is similar to the idea of

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47. *See Veytia, supra* note 21, at 1203 (asserting that the doctrines of *rebus sic stantibus* and *pacta sunt servanda* reach greater conflict following events that collapse basic contractual assumptions).


49. Litvinoff, *supra* note 2, at 20–21.
failure of cause, allowing for judicial revision of a contract. In 2002, Germany codified this doctrine in article 313 of the BGB. Thus, following a catastrophic event, the Germans looked to the notion of *rebus sic stantibus* to counteract the effects of its *pacta sunt servanda*-based law.

France also felt the effects of World War I and leaned on its courts to find a solution to the problems that arose. Due to an eighty percent devaluation in the franc and a drastic increase in the price of coal, the French courts created the *théorie de l’imprévision* (theory of unexpected circumstances), which also allows for judicial revision of a contract. The courts limited the *théorie de l’imprévision*’s scope to public law. Nevertheless, the need to find equitable solutions for unfair laws was apparent. Thus, France, like Germany, faced a catastrophic event and sought relief from *pacta sunt servanda* through application of *rebus sic stantibus*.

Although not at war, Louisiana is presently in the wake of its own catastrophic event. The 2005 hurricane season left much of South Louisiana devastated, causing both economic and emotional ripples throughout the country. The catastrophes of Hurricanes Katrina and Rita affected obligors throughout the state, destroying the basic assumptions on which they agreed to contract. The effect is that performance under the contractual terms has become excessively onerous.

For instance, what is a contractor to do who had his bid for a construction job accepted shortly before the danger of the

50. *Id.* at 20; *Zimmermann*, *supra* note 13, at 581–82; Gerhard Dannemann, *An Introduction to German Civil and Commercial Law* 31–32 (British Inst. of Int’l and Comp. Law 1993).


54. *Id.*
hurricanes materialized? In the hurricanes’ wake, it may have been extremely difficult to find skilled employees. In addition, the lack of transportation and communication may have made it onerous to get materials to the job site. These problems result in the contractor not being able to perform at the price contained in his bid, yet he is still bound to perform. Louisiana’s impossibility excuse does not apply because his performance is not absolutely impossible. He can import in workers and materials from other states and still perform. The fact that the cost may be exorbitant makes no difference.

This is just one of many situations that may have occurred in the wake of the 2005 hurricanes, and it is in these situations where Louisiana law falls short. It is no surprise that many of the other jurisdictions that now recognize a broader basis of excuse were prompted to do so in similar circumstances. Therefore, looking back at its own disaster, Louisiana must take a second look at the interplay between pacta sunt servanda and rebus sic stantibus.55

B. Legal Isolation

As the world becomes a more global economy, having laws that are easier to align with other legal systems becomes increasingly important. This movement is best evinced by the use of international conventions, treaties, uniform codes, and restatements to provide a written snapshot of the lex mercatoria (law of the merchant), making it easier to complete business agreements between different legal systems.56 This idea is not new.

55. This would not be the first time that Louisiana has been forced to evaluate its stance on impossibility. During the gas price fluctuations in the 1980s, attorneys attempted to introduce the French imprévision and the common law commercial impracticability doctrines into Louisiana because of the adverse effects of “take or pay” clauses; the courts denied it. See Hannover Petroleum Corp. v. Tenneco, Inc., 521 So. 2d 1234, 1240 (La. App. 3d Cir. 1988). The difference in the current situation is that many more obligors have been affected. In addition, many of the contracts that have become excessively onerous may have been entered into by laymen and not merchants.

56. See KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 3–4, 144 (2d ed. 1999) (revealing that Unidroit’s main goal in creating its principles was to “harmonize[] and coordinate[] the private law of states and groups of states and to prepare for the progressive application of
to Louisiana; on numerous occasions the legislature has adopted laws from other bodies of law, including both the Uniform Commercial Code (U.C.C.) and the United Nations Convention on Contracts for the International Sale of Goods (CISG).\textsuperscript{57}

Having laws that are incompatible with those of other jurisdictions has an even larger impact on Louisiana because of its geographic position. Not only must Louisiana contend with conflicting international laws, but it is also boxed in by, yet inextricably tied to the legal systems of its sister states.\textsuperscript{58} Because Louisiana is the proverbial "odd man out," it is only further alienating itself from the legal systems with which it shares the largest commercial interest.\textsuperscript{59} Thus, expanding Louisiana's strict uniform private law"); see also Flambouras, supra note 26, at 262–63 (asserting that implementing the CISG provided a "uniform sales law for countries that account[s] for two-thirds of all world trade") (alteration in original); Guido Alpa, The "Principles of European Contract Law" and the Italian Civil Code: Some Preliminary Remarks, 15 TUL. EUR. & CIV. L.F. 81, 81 (2001) (arguing that the drafting of the PECL is a step forward along with the drafting of a European Civil Code).

57. Trahan, supra note 27, at 1019, 1059–60 & nn.99–100. Compare LA. CIV. CODE ANN. art. 2601 (2006), with United Nations Convention on Contracts for the International Sale of Goods art. 19, Apr. 11, 1980, S. TREATY Doc. No. 98–9, 1489 U.N.T.S. 3; U.C.C. §§ 2-206–207 (2004). The comments to article 2601 state that it changes the law, but they fail to provide a reference to the article's source. However, upon comparing article 2601 with article 19 of the CISG and articles 2-206 and 2-207 of the U.C.C., the sources should become fairly obvious. It should be noted that even though Louisiana used the CISG as a source for one of its code articles, the CISG is a treaty and is already the law in Louisiana when dealing with another country that has adopted the convention. Once again, these are just illustrative examples and should not be construed as an exhaustive list of laws from other jurisdictions enacted in Louisiana.

58. This author is in no way advocating that Louisiana should adopt a common law principle. On the other hand, when the civil law supports a doctrine that is also accepted by the common law, fewer difficulties arise in interactions between the two legal systems.

view on impossibility will remove one more obstacle to attracting trade and investment in the state.

C. Economic Inefficiency

Louisiana’s current rules on impossibility are not the most economically efficient option available. As deftly stated by Professor Paul Joskow, “[A] strict interpretation of the rule of discharge . . . would only create an incentive . . . to write a more detailed and complicated contract,” which would create “additional negotiation costs.”60 By requiring absolute impossibility before an obligor is excused for non-performance, Louisiana places a strict requirement on its excuse from liability. Thus, while perhaps easy for the judiciary to apply, Louisiana’s current impossibility rules only increase the transactional costs of the parties.

It bears noting, however, that the other extreme is just as problematic. Transaction costs are also increased if the law is too lenient in sheltering an obligor from his liability for non-performance.61 This is because the “risk-diversifying” aspect of contracts would, in effect, become moot.62

Risk diversification requires a little more explanation. Working from the basic understanding that risk is “[t]he uncertainty of a result, happening, or loss,”63 contracts function to distribute that risk between the contracting parties. If a legal system provides a harsh, bright-line rule that assigns almost all risk to a certain party, then those parties will have to spend money

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Louisiana’s top foreign exporting countries in addition to the United States have adopted the CISG. Trade Stats, supra. Therefore it could be argued that the laws of these jurisdictions have already been harmonized. This is not the case. The CISG only deals with impossibility; it makes no mention of hardship or changed circumstances. It has been argued that this creates a gap that should be filled with either the Unidroit Principles, which would harmonize the law, or domestic law through stipulated clauses, which would not harmonize the legal systems. Flambouras, supra note 26, at 279–81.

60. Paul L. Joskow, Commercial Impossibility, the Uranium Market and the Westinghouse Case, 6 J. LEGAL STUD. 119, 154 (1977).
61. Id.
62. Id.
63. BLACK’S LAW DICTIONARY 1353 (8th ed. 2004).
inserting additional provisions to allocate risks in a different manner. This is what Professor Joskow is talking about when he mentions the problems of an overly strict law of discharge.\footnote{Joskow, \textit{supra} note 60, at 154.}

In contrast, if a legal system provides an overly lenient rule of discharge, parties have to make the same overcorrection; namely, writing in more detailed provisions in order to ensure a certain allocation of risk.\footnote{\textit{Id.}} Once again, transactional costs are increased because of the added expense of these provisions. In addition, an overly lenient rule of discharge may discourage certain parties from entering into contracts at all, negating this very important risk-diversifying aspect of contracts.\footnote{\textit{Id.}}

In order to provide a more efficient rule of law to its citizens, it is necessary for Louisiana to move away from its strict notion of impossibility. However, it is also important not to overcompensate by establishing an overly lenient basis for excusing non-performance; to do so would only create the same transaction costs already present in the current regime. As will be shown, through a controlled application of \textit{rebus sic stantibus}, a happy medium between these two extremes can be implemented.

\section*{IV. Why Must the Change Be Employed Through Legislation?}

Besides invoking the legislature, perhaps the easiest method would be to allow the courts to expand Louisiana's impossibility excuse through jurisprudence. Unfortunately, that method has already been attempted, and the courts have refused to move away from \textit{pacta sunt servanda}. The following section explores what has been attempted in the past to blunt the edge of Louisiana's view on impossibility, as well as how the courts have emasculated those efforts by failing to take a very basic step in civilian methodology: reading the Code.

Although the courts have failed to explore the idea, it is arguable that Louisiana law is currently able to recognize a broader excuse for non-performance based solely on the 1985 revision of
the law of obligations. Professor Sául Litvinoff drafted the revised articles on obligations that went into effect as part of the ongoing revision of the Civil Code. In his revision, Professor Litvinoff did two things that could have impacted Louisiana's adherence to a strict impossibility excuse. First, he moved the excuse of impossibility of performance to its own section in the Code and used the term "fortuitous event" while leaving out the term "irresistible force." Second, he added Louisiana Civil Code article 1759 (good faith) under the general rules of obligations. In making these changes, Professor Litvinoff implied on more than one occasion that he formulated the code articles so as to give Louisiana courts the necessary tools to broaden Louisiana's impossibility doctrine.

In applying these revised code articles, courts have not taken advantage of the tools Professor Litvinoff provided. The Louisiana Second Circuit Court of Appeal denied considering a commercial impracticability argument, stating that Louisiana does not recognize the doctrine. Oddly enough, in support of its position, the court did not cite the revised code articles on impossibility. Instead, it cited jurisprudence that applied the law predating the revision of the obligations. The Third Circuit Court of Appeal also held that a fortuitous event that made performance more burdensome, but not impossible, does not excuse non-performance. The court, in the same manner as the second

68. LA. CIV. CODE ANN. art. 1759 (2007).
69. See Litvinoff, supra note 2, at 58–59; see also Litvinoff, supra note 32, at 577.
70. Martin Forest Products v. Grantadams, 616 So. 2d 251, 254–55 (La. App. 2d Cir. 1993). In Martin Forest, the plaintiff, who ran a wood chip mill, entered into a settlement with home owners dealing with noise restrictions. Id. at 253. The court held that it did not matter that he had spent more than he anticipated because commercial impracticability was not grounds for relief in Louisiana. Id. at 254–55. Although argued as commercial impracticability, the French doctrine of imprévision is similar in application.
71. Id. at 254 (citing Hanover Petroleum Corp. v. Tenneco, Inc., 521 So. 2d 1234, 1240 (La. App. 3d Cir. 1988)).
72. West v. Cent. La. Limousine Serv., Inc., 856 So. 2d 203, 205 (La. App. 3d Cir. 2003). In West, a limousine company was unable to perform services on the defendants wedding day because of mechanical problems. Id. at 204–05.
circuit, cited prior jurisprudence and failed to discuss the revised articles.  

Although Professor Litvinoff insinuated that the courts could expand impossibility with his code articles, these decisions are arguably still correct in their application. Regardless of Professor Litvinoff’s implications, the comments to most of the impossibility articles state that the new articles do not change the law. Therefore, citations to prior case law instead of the current impossibility articles, although odd in a civil law jurisdiction, may not have really affected the courts’ decisions.

Nevertheless, the court’s application may have been affected by the failure to make any reference to good faith under article 1759. When article 1759 was added, it expanded the notion of good faith to obligations in general (versus its prior application under only contractual performance). This is almost identical to the German approach, which puts forth a more expanded notion of good faith when compared to the traditional view. In writing

The court stated that CLLS had a duty to secure the defendant another suitable vehicle. Id. at 206. It should be noted that this author does not disagree with the holding of this case. What is troublesome is the court’s statement that it is settled law that a more burdensome performance is not grounds for excuse. See id. at 205. However, upon making that statement the court references old jurisprudence and not the new code articles. Id. All the court had to say was that since there was not fortuitous event, it did not have to address the question of impracticability.

73. Id. (citing Dallas Cooperage & Woodenware Co. v. Creston Hoop Co., 109 So. 844, 844 (La. 1926); Schneck v. Capri Const. Co., 194 So. 2d 378 (La. App. 4th Cir. 1967)).

74. LA. CIV. CODE ANN. art. 1873 cmt. a (2007); LA. CIV. CODE ANN. art. 1874 cmt. a (2007); LA. CIV. CODE ANN. art. 1875 cmt. a (2007); LA. CIV. CODE ANN. art. 1876 cmt. a (2007); LA. CIV. CODE ANN. art. 1878 cmt. a (2007).

75. It bears noting, however, that regardless of what the comments say, they are not the law. Succession of Gonzales, 868 So. 2d 987, 990 (La. App. 4th Cir. 2004). Therefore, when they are in conflict with the Code articles, the articles prevail.


about the role of this new article, Professor Litvinoff stated that good faith has been "liberated from its confinement within the law of performance of contracts and prompted . . . upon other contractual stages."\textsuperscript{78} In particular, the professor sees good faith as "the root of the solution . . . to the problem of supervening excessive onerousness of performance caused by a change in circumstances."\textsuperscript{79} Thus, it seems likely that article 1759 was intentionally introduced in the Code to provide courts with a way to expand the excuse of impossibility without having to introduce new articles into the Code.\textsuperscript{80}

Unfortunately, courts have not taken the opportunity provided to them. As the above-mentioned cases show, Louisiana courts have adamantly adhered to the strict view of impossibility inherited from France. Therefore, in order to invoke the more equitable notion of \textit{rebus sic stantibus}, Louisiana’s current articles on impossibility are inadequate, and it is necessary to look to an alternative solution. It is necessary to act through the legislature to effect a change in this area of the law.

\textbf{V. THE PROJET}

"\textit{Justice [is] a certain rectitude of mind, whereby a man does what he ought . . . }.\textsuperscript{81}

After reviewing why Louisiana’s current excuse of impossibility is inadequate, and why legislative action is needed to find equity, the next inquiry becomes, "What should the legislature do?" Fortunately, Louisiana has the ability to walk in the long shadow of legal development cast by numerous other jurisdictions and organizations. Other legal systems have faced the same problems now present in Louisiana and have created their own solutions. Taking full account of these systems' proposed solutions, I offer a set of proposed articles that will expand

\textsuperscript{78} Litvinoff, \textit{supra} note 76, at 1658.

\textsuperscript{79} \textit{Id.} at 1661–62.

\textsuperscript{80} Professor Litvinoff has confirmed his intent for article 1759. Interview with Saúl Litvinoff, Boyd Professor of Law and Oliver P. Stockwell Professor, Paul M. Hebert Law Center, in Baton Rouge, La. (Oct. 17, 2006) (on file with author).

\textsuperscript{81} \textit{1 AQUINAS, supra} note 1, pt. 1 of 2d pt., Q. 61, art. 4, at 848.
Louisiana's current excuse of non-performance under contractual obligations. These articles are written so as to be placed in Chapter Eight of Title IV under "Conventional Obligations."

A. Proposed Articles

Section 6—Substantial Change of Circumstance

Article (a)
Subject to the following modifications, an obligor is still bound to perform a contractual obligation, even though performance of that obligation has become more burdensome than that obligor, at the time of contracting, had expected that performance would be.

Article (b)
When an obligor's performance under a contractual obligation has become more burdensome, or the performance received by an obligee has become less valuable, because of a substantial change of circumstances, the disadvantaged party may unilaterally request renegotiation of the contract. Negotiations must take place within a reasonable time according to the circumstances. A request for renegotiation does not entitle a disadvantaged party to withhold performance. Performance may be withheld only if allowed by the court.

Article (c)
A substantial change of circumstances occurs where a fortuitous event causes a fundamental alteration of either the obligor's or obligee's equilibrium, such that had the circumstances been present at the time the contract was formed either the obligor or obligee would not have consented to the agreement.

Article (d)
A fortuitous event is one that at the time the contract was made could not be reasonably foreseen.
Article (e)
A fundamental alteration of equilibrium occurs in the following situations: The value of the performance received from another obligor has disproportionately decreased, or The cost of one obligor's performance has disproportionately increased.
Where performance is capable of a precise measurement, a change by more than half in the value or cost of performance from the time the contract was made will be presumed disproportionate.

Article (f)
All parties shall be governed by the duty of good faith in both the request for and the execution of renegotiations.

Article (g)
Upon failure to reach an agreement within a reasonable time, either party may resort to the court.

Article (h)
If the court finds that a substantial change of circumstance has occurred, it may leave the contract unmodified, dissolve the contract in whole or in part, or modify the contract to restore the parties' equilibrium.

Article (i)
The court shall dissolve the contract only when: taking into account all of the surrounding circumstances and the principle of good faith, adaptation to restore the parties' equilibrium is impossible; or the obligor, obligee, or both refuse to continue with the contract once it has been modified;
The court shall not dissolve the contract when: both parties intend that the contract be preserved.

Article (j)
When dissolution of the contract is not required, the court may modify the contract in any manner necessary to restore the parties' equilibrium. Such modification may include but is not limited to: postponing the term for performance; allowing the obligor to make payments in installments when the object of an obligor's performance is the payment of money; increasing or
decreasing the required performance of the obligor; or extending or shortening the term of the obligation.

Article (k)
The preceding articles do not apply when: the disadvantaged obligor assumed the risk of the fortuitous event; the obligor had been put into default before the fortuitous event occurred; or the fortuitous event was preceded by the obligor’s fault, without which the substantial change of circumstances would not have occurred.

B. Explanation and Application

1. Article (a)

Subject to the following modifications, an obligor is still bound to perform a contractual obligation even though performance of that obligation has become more burdensome than that obligor, at the time of contracting, had expected that performance would be.

Article (a) states the general rule of *pacta sunt servanda*. That is to say that the parties are bound to perform their contractual obligations regardless of any subsequent onerousness of performance. The statement of this general rule is necessary because Louisiana contract law is based on this notion. In addition, the articles that follow will provide the only exception, save impossibility, allowed. This article is specifically worded so as not to effect the application of Louisiana’s current articles on impossibility. Thus, the *general* rule is that a party is bound to perform when a contract has become more onerous; however, that party is not bound to perform when performance becomes impossible.

The sources of this article are both the Unidroit Principles and the PECL. Both of these compilations begin their articles on hardship (here called substantial change of circumstances) with the

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82. All of the existing foreign code articles, uniform code articles, and restatement articles mentioned in this section are reprinted *infra* appendix.

The wording of article (a), however, more closely follows the PECL approach taken in article 6.111. This is because the general rule that the obligation must be performed covers not only circumstances where the obligor's performance becomes onerous, but also where the performance received by the obligee decreases in value. The Unidroit principles, as written in article 6.2.1, only cover the former situation. Therefore, even though the general rule stated in article (a) is broader in application, similar to the PECL, it embodies the same idea that is covered by both compilations of principles.

Article (a)'s use of this general principle distinguishes it from the approaches taken in other jurisdictions. Although reaching the same result, the German and Italian codes, the American U.C.C., and the Restatement (Second) of Contracts do not expressly provide for a general rule in their articles. The articles in these jurisdictions only mention the situations in which performance will be excused, thus merely implying that a general rule is in force. This same "exclusion only" approach can be found in other civil law jurisdictions such as Russia, Turkmenistan, and Uzbekistan. Therefore, while the approach taken in article (a) expressly provides for a general rule, other jurisdictions reach the same rule through deduction. Although worded differently, article (a) has the same substantive basis as all of the codes and common law compilations mentioned.

The first words contained in article (a) are: "Subject to the following modifications." This word usage sets the stage for an

84. UNIDROIT PRINCIPLES, supra note 43, art. 6.2.1; PECL, supra note 43, art. 6.111; Flambouras, supra note 26, at 286; F. Macario, Interaction Between the PECL and Italian Law, in PRINCIPLES OF EUROPEAN CONTRACT LAW AND ITALIAN LAW: A COMMENTARY 310, 310 (Luisa Antoniolli & Anna Veneziano eds., 2005).

85. PECL, art. 6.111 ("A party is bound to fulfill its obligations even if performance has become more onerous, whether because the costs of performance has increased or because the value of the performance it receives has diminished.") (emphasis added).

86. BGB § 275 ¶¶ 2–3, ¶ 313 ¶¶ 1–2 (F.R.G.); C.C. art. 1467 (Italy); RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 265, 272 (1981); U.C.C. § 2-615 (2004).

87. See GK art. 451 (Russ.); TCC art. 409 (Turkm.); RUCC art. 383 (Uzb.).
exception to article (a)'s general *pacta sunt servanda* rule. Nevertheless, article (a), although allowing for an exception, at the same time limits the scope of that exception to the articles that immediately follow the general rule.

2. *Article (b)*

When an obligor's performance under a contractual obligation has become more burdensome, or the performance received by an obligee has become less valuable, because of a substantial change of circumstances, the disadvantaged party may unilaterally request renegotiation of the contract. Negotiations must take place within a reasonable time according to the circumstances. A request for renegotiation does not entitle a disadvantaged party to withhold performance. Performance may be withheld only if allowed by the court.

In its first paragraph, article (b) provides the exception alluded to in article (a). That exception is recognized only where a substantial change of circumstances has either increased the burden of performance on the obligor, or decreased the value of the performance received by the obligee. When this happens, the affected party has the right to unilaterally request renegotiation of the contract; however, that party does not unilaterally have the right to withhold performance.

The sources of the first paragraph are once again both the Unidroit Principles and the PECL. However, in contrast to article (a), article (b) follows the method advocated in the Unidroit Principles. Unidroit, and the proposed article (b), allow the party who has been disadvantaged to request renegotiation of the contract, but expressly prohibit refusing to perform. The PECL, on the other hand, binds both parties with the obligation of entering into renegotiations when performance has become more onerous, yet makes no mention of a prohibition on refusing performance.

88. *Unidroit Principles*, *supra* note 43, art. 6.2.3.

89. *PECL*, *supra* note 43, art. 6.111. Although refusing performance is not expressly forbidden, by forcing upon the parties a duty to renegotiate, it is implied that the disadvantaged party does not have the right to refuse performance and seek dissolution. *Macario, supra* note 84, at 311.
Therefore, under the PECL, either party to a contract could force renegotiation, even if they have not been adversely affected. Article (b) purposefully follows Unidroit.

Allowing the affected party to refuse performance also garners support from other civil codes. Article 383 of the Uzbekistan Civil Code is written in such a way that it can be inferred that a party cannot refuse to perform but must seek renegotiation with the other party, or if that fails, petition the court. Russian Civil Code article 451 is drafted in a similar manner, thereby forcing the parties to renegotiate before the contract may be rescinded. This wording in the Uzbekistan and Russian codes also gives rise to an inference that onerousness alone does not give the right to refuse performance—there needs to be onerousness in conjunction with both parties’ inability to come to an agreement.

In allowing a right to force renegotiation but banning a refusal to perform, article (b)’s application differs from certain other jurisdictions that recognize a rebus sic stantibus-based excuse. Pursuant to BGB sections 275, 313, and 314, German law allows a disadvantaged party to refuse performance, petition the court for alteration of the contract, or terminate the agreement. No mention is made of renegotiation. Therefore, forcing renegotiations on the other party is not allowed. The Italian Civil Code takes a different approach in that it allows a disadvantaged party to seek dissolution of the contract; however, it does not create a right to either request renegotiation or refuse performance. The U.C.C. allows a seller to refuse performance (or delay that performance) when it becomes impracticable, but does not require renegotiation. Also, the Restatement (Second) of Contracts allows for dissolution and refusal to perform pursuant to

90. RUCC art. 383 (Uzb.).
91. GK art. 451 (Russ.).
92. GK art. 451 (Russ.); RUCC art. 383 (Uzb.).
94. C.C. art. 1467 (Italy). Nevertheless, the idea of renegotiation is not unknown in Italian law. A more specific rule dealing with hardship in construction contracts allows a request for price revision, when there has been an increase or decrease in cost that is more than one-tenth of the total price agreed upon. C.C. art. 1664.
impracticability and frustration of purpose, but it does not require renegotiation. 96

Article (b), however, does not impose an absolute ban on refusing to perform. The last provision in the article allows a disadvantaged party (whether they are an obligor or obligee) to withhold performance if allowed by the court. The purpose of this article is found in the general pacta sunt servanda rule embodied in article (a). All contracts should be upheld. As a result, an obligor must perform and may not unilaterally walk away from a contract. However, this provision allows the court to step in and evaluate both the obligor’s and obligee’s relative positions. A party may only withhold performance for which he is bound when the court finds it reasonable. Presumably, the court would allow a party to withhold performance by granting an injunction barring the obligee from requesting performance until after negotiations have taken place. 97

In addition to ensuring contractual performance, article (b) also imposes a reasonableness requirement on the timeframe in which the renegotiation must take place. The purpose behind this requirement is the need to address different situations individually. Under some situations, it may be necessary for the parties to begin negotiations within a short period of time following the request, such as when an obligor is required to supply a certain amount of perishable goods at a certain price in two days and a fortuitous event causes a large increase in that obligor’s cost of performance. If the increase is such that fulfilling the obligation would put the obligor out of business, the obligor faces the choice of performing the obligation and going out of business, or breaching the contract and being liable for damages in addition to losing the product. Other situations, however, may not require such a quick initiation of negotiations—where an obligor is bound to provide a certain amount of goods for a certain price and performance is due in sixty days. In this case, the parties have more time with which to work, and the disadvantaged party may not be able to require the other

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97. There may be an added benefit to allowing a party to refuse performance when it is reasonable; it will motivate the other party to work toward a speedy resolution of the issue.
party to enter negotiations as quickly. Overall, the reasonableness requirement is included to ensure practical considerations are taken into account when acting pursuant to these articles.

The reasonableness requirement in article (b) does not have a counterpart in the PECL, but a similar provision is found in the Unidroit Principles. Article 6.2.3 of the principles states that “the request [for renegotiation] shall be made without undue delay.” If the party waits too long, it will lose the right to renegotiate and find itself without a remedy.

Another underlying foundation of this provision is the good faith requirement found in article (f), as well as the general good faith rules embodied in Louisiana Civil Code articles 1759 and 1983. Thus, refusing to enter negotiations within a reasonable timeframe under the circumstances will breach the duty of good faith, thereby making that party liable for all direct damages pursuant to Louisiana Civil Code article 1997.

3. Article (c)

A substantial change of circumstances occurs where a fortuitous event causes a fundamental alteration of either the obligor’s or obligee’s equilibrium, such that had the circumstances been present at the time the contract was formed, either the obligor or obligee would not have consented to the agreement.

Article (c) supplements article (b) by providing the definition of “substantial change of circumstances.” The foundations of this article are taken from a portion of the “hardship” definition found in the Unidroit principles article 6.2.2., and the change of circumstance definitions found in the German, Russian, Uzbekistan, and Turkmenistan Civil Codes.

98. UNIDROIT PRINCIPLES, supra note 43, art. 6.2.3.
100. Louisiana Civil Code article 1997 provides that: “an obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.”
101. UNIDROIT PRINCIPLES, supra note 43, art. 6.2.2; BGB § 313 ¶ 1 (F.R.G.); GK art. 451 (Russ.); TCC art. 409 (Turkm.); RUCC art. 383 (Uzb.). Pursuant to Unidroit, hardship is: “where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a
The Unidroit-like wording was used in the first portion of the definition, because it defines hardship from the perspective of both the obligor and the obligee. The Restatement also takes this bilateral approach, yet its common law language does not fit well in these proposed articles.\textsuperscript{102} Under the proposed articles, a “substantial change of circumstances” can occur even if the party can perform with no problem, but the counter-performance received would be of little or no value. This inevitably ties substantial change of circumstances to failure of cause.

The contributions of the German, Russian, Uzbekistan, and Turkmenistan codes come in the retroactivity of the analysis. Article (b) follows those legal systems’ approach by requiring hindsight to the time the contract was formed to see if a substantial change of circumstances has occurred.\textsuperscript{103} Under article (c), even if the party’s equilibrium in the contract has been shattered, there is no remedy if they would have still entered into the agreement.

In contrast, the other legal systems and compilations approach the issue only from the perspective of the obligor. The PECL defines “hardship” only in terms of performance becoming excessively onerous—allowing an excuse only where the obligor is concerned.\textsuperscript{104} The Italian Civil Code does not actually use the terms “hardship” or “substantial change of circumstances.” However, the Italian code takes the “obligor only” approach in

\textsuperscript{102} See \textit{Restatement (Second) of Contracts} § 265 (1981).

\textsuperscript{103} See BGB § 313 \textsuperscript{1} (F.R.G.); GK art. 451 (Russ.); TCC art. 409 (Turkm.); RUCC art. 383 (Uzb.).

\textsuperscript{104} PECL, \textit{supra} note 43, art. 6.111.
allowing a request for dissolution when "events make . . . performance . . . excessively onerous."105

Although article (c) provides the general definition of "substantial change of circumstances," it also provides two more terms that must be defined before the group of articles can be applied. These terms are "fortuitous event" and "fundamental alteration," which are defined in articles (d) and (e) respectively.

4. Article (d)

A fortuitous event is one that at the time the contract was made could not be reasonably foreseen.

This definition is identical to the one found in Louisiana Civil Code article 1875. Having the same definition for the same word occur twice in the Code is intentional. The Louisiana Legislature has a tendency of giving the same word different meanings throughout the Code. For instance, when assessing whether a possessor is entitled to ten or thirty year acquisitive prescription, good faith is defined in Louisiana Civil Code article 3480 as "reasonably believ[ing], in light of objective considerations, that [you] [are] owner of the thing [you] possess[]."106 Article 3480 provides an objective definition of good faith. In contrast, good faith has been given an entirely different meaning when dealing with accession issues. Louisiana Civil Code article 487 defines good faith for purposes of accession as "possess[ing] by virtue of an act translative of ownership and . . . not know[ing] of any defects in . . . ownership."107 Thus, for purposes of accession, good faith contains a subjective element. Therefore, the repetitive definitions of fortuitous event are necessary to provide consistency in the Code.

Unforeseeability is not a requirement that is unique to either the Louisiana Civil Code or these proposed articles. With the exception of Turkmenistan's code, all of the civil codes mentioned in this Comment contain express unforeseeability requirements.108

105. C.C. art. 1467 (Italy).
106. LA. CIV. CODE ANN. art. 3480 (2007).
108. BGB § 313 ¶ 1 (F.R.G.); C.C. art. 1467 (Italy); GK art. 451 (Russ.); RUCC 383 (Uzb.).
Furthermore, Unidroit and the PECL also require that the possibility of the change of circumstances could not have been taken into account.109

5. Article (e)

A fundamental alteration of equilibrium occurs in the following situations: The value of the performance received from another obligor has disproportionately decreased, or the cost of one obligor's performance has disproportionately increased. Where performance is capable of a precise measurement, a change by more than half in the value or cost of performance from the time the contract was made will be presumed disproportionate.

Article (e) provides both a definition of a "fundamental alteration of equilibrium," as well as an example. The definition takes the same bilateral approach used when defining a "substantial change of circumstances." In other words, it addresses the issue from both the obligor's and obligee's perspective. In effect, a fundamental alteration of equilibrium occurs where either the cost or value of performance has disproportionately changed from the time the contract was perfected.

The source of this definition leans more heavily on the wording contained in Unidroit and the PECL; however, this idea is embodied, to various extents, in all of the codes and compilations that have previously been discussed.110 The German, Russian, Turkmenistan, and Uzbekistan codes contain this notion in their definition of changed circumstances.111 These codes look to whether the parties would not have entered into the agreement if

109. UNIDROIT PRINCIPLES, supra note 43, art. 6.2.2; PECL, supra note 43, art. 6.111. Interestingly, the Russian code also requires that the change in circumstances be caused by a force the parties could not have overcome. GK art. 451. It may be of interest to the reader that Louisiana (and now the proposed articles) has the same requirement. In Louisiana, the term fortuitous event encompasses both of the terms cas fortuit (fortuitous event) and force majeure (irresistible force). LA. CIV CODE ANN. art. 1873 cmt. c (2007).

110. See UNIDROIT PRINCIPLES, supra note 43, art. 6.2.2; PECL, supra note 43, art. 6.111.

111. See BGB § 313 ¶ 1 (F.R.G.); GK art. 451 (Russ.); TCC art. 409 (Turkm.); RUCC art. 383 (Uzb.).
the changed circumstances would have been present from the outset. If they would not have entered into the agreement, it is implied that the reason is either that the cost or value of performance would no longer be advantageous. The Italian Civil Code covers performance that has become excessively onerous, implying that the cost of performance has increased. Finally, the U.C.C. and the Restatement (Second) of Contracts express this idea when mentioning performance that has become impracticable.\footnote{112. See Restatement (Second) of Contracts § 261 (1981); U.C.C. § 2-615 (2004).}

The presumption created in article (e) helps clarify how much of a value or cost change is needed before that change will be considered disproportionate. In essence, this article allows the party who has been disadvantaged the benefit of a rebuttable presumption, while at the same time giving the unaffected party the ability to rebut that presumption if circumstances dictate.

This provision in article (e) does not have a corresponding provision under any other code articles on changed circumstances or hardship. The sources of this provision are, instead, found in two places: (1) Louisiana Civil Code article 2589 dealing with lesion; and (2) an official comment to article 6.2.2 in the Unidroit Principles.\footnote{113. La. Civ. Code Ann. art. 2589 (2007); Unidroit Principles, supra note 43, art. 6.2.2 cmt. 2.}

Under lesion, a sale of an immovable may be rescinded if the price is less than one half of the value, or beyond moiety.\footnote{114. Art. 2589.} The same standard was incorporated into article (e) in an effort to both maintain consistency in the Code and emphasize the high requirement necessary for a fundamental alteration of equilibrium.

Although article (e)’s example is similar to one of Unidroit’s official comments, the application in the proposed article differs in one aspect—Unidroit makes no reference to a rebuttable presumption.\footnote{115. Id. (emphasis added).} Instead, the comment states that a fifty percent alteration in either cost or value of the performance “is likely to amount to a ‘fundamental’ alteration.”\footnote{116. Id. (emphasis added).} Thus, the Unidroit...
comment only provides a general guideline for the court whereas proposed article (e) creates a procedural shift in the burden of proof.

6. Article (f)

All parties shall be governed by the duty of good faith in both the request for and the execution of renegotiations.

Article (f) provides, perhaps, the most fundamental addition to the law. At first glance this article does not seem remarkable. The plain wording simply seems to bind parties to act in good faith when requesting and carrying out renegotiation of their contract. However, the impact of this article goes far beyond its wording.

As mentioned earlier, Professor Litvinoff added article 1759 (good faith) during the most recent revision on the law of obligations. Article 1759 expanded good faith in Louisiana to cover everything pertaining to an obligation. This inclusion moved Louisiana away from French good faith and moved the state closer to the position taken by Germany and Switzerland.

It is this author's position that inclusion of article 1759 was one of the main tools the professor was speaking of when he stated:

[T]he express formulation of rules that before the revision had to be surmised from general principles may have the salutary effect of bringing about a recognition of the need for more flexibility in the interpretation and application of the basic rule that governs impossibility as an excuse for nonperformance, so that reasonable exceptions can be made that, without changing the rule will make it more functionally responsive to the demands of the contemporary business community.

This is where article (f) begins to show its real importance. Reading article (f) together with the other proposed articles, it

118. See Baudouin, supra note 42, at 156–57; see also Jean-Louis Baudouin, Oppressive and Unequal Contracts: The Unconscionability Problem in Louisiana and Comparative Law, 60 TUL. L. REV. 1119, 1132 (1986) [hereinafter Baudouin, Unequal].
119. LITVINOFF, supra note 32, at 577.
becomes apparent that good faith has been expanded. Under the wordings of articles (b) and (f), when a fortuitous event creates a substantial change of circumstances, the party who has benefited from the event now has a duty (upon request) to renegotiate the contract. In essence, good faith is used to keep a contract alive by forcing the parties to attempt to reach an agreement.

This article was not created out of thin air. It is based on the foundations laid in Louisiana Civil Code article 1759. Furthermore, as with other articles in this projet, the PECL provides a basis for this article. PECL article 6.111 does differ, however, from the approach taken in article (f). The PECL states that "the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing." Thus, the PECL article has a negative application, since refusing to renegotiate will violate an implied duty, whereas article (f) takes a positive approach in expressly creating a duty to renegotiate. Nevertheless, both articles should reach the same result.

7. Article (g)

Upon failure to reach an agreement within a reasonable time, either party may resort to the court.

Article (g) is included to reinforce the idea that a party must first attempt to renegotiate the contract before seeking a court remedy. Judicial revision of a contract has traditionally not been favored in Louisiana. Therefore, the policy behind this article is that the law prefers parties to come to an agreement.

This article also imposes a reasonableness requirement before a party may seek judicial intervention. Reasonableness here also ties into the good faith requirement stated in the previous article. Thus, if a party has not attempted to negotiate for at least a reasonable time under the circumstances, the duty of good faith is breached and that party may become liable for direct damages.

120. PECL, supra note 43, art. 6.111.
121. An explanation of Louisiana’s reluctance to give broad discretionary powers to its courts will be discussed later in this Comment.
The source of this article is the Unidroit Principles. Unidroit article 6.2.3 contains identical wording to article (g) in paragraph three, under the general title Effects of [H]ardship. A similar provision is also included in article 6.111 of the PECL; however, its structure provides for a different analysis. Other codes that call for renegotiation, such as the Russian, Turkmenistan, and Uzbekistan codes, take an approach similar to the PECL. There is no express duty to renegotiate for a reasonable time contained in these codes, but if an agreement cannot be reached, certain rights are granted to the disadvantaged party. The language of Unidroit was used because it creates a positive duty as opposed to a negative sanction.

8. Article (h)

If the court finds that a substantial change of circumstances has occurred, it may leave the contract unmodified, dissolve the contract in whole or in part, or modify the contract to restore the parties' equilibrium.

Article (h) provides three actions that the court is allowed to implement which may affect the parties' original contract. However, before the court can take these actions: (1) either the obligor or the obligee must have sought judicial intervention; (2) the court must evaluate the circumstances and find that a substantial change of circumstances has taken place; (3) a substantial change of circumstances must have fundamentally altered the parties' equilibrium; (4) the reasonable timeframe for negotiation must be met; and (5) the party seeking the court's action must have complied with all good faith requirements. Once all five of these elements have been satisfied, the court has limited

123. UNIDROIT PRINCIPLES, supra note 43, art. 6.2.3.
124. PECL, supra note 43, art. 6.111. Article 6.111 does not specifically state that parties must negotiate for a reasonable period; instead, it provides a set of judicial remedies if the parties fail to reach an agreement within a reasonable period. Id. Therefore, as both the PECL and Unidroit have a tendency to do, they create duties through an indirect approach versus creating a positive duty.
125. See GK art. 451 (Russ.); TCC art. 409 (Turkm.); RUCC art. 383 (Uzb.).
discretion to either alter the original agreement or leave it unchanged.\textsuperscript{126}

This article is written with broad terminology with respect to what the court can do to affect the original agreement. This is because it is introductory and will be narrowed in scope by subsequent articles. The court’s outer boundary of power includes the ability to modify the contract to restore the parties’ equilibrium, dissolve the contract in whole or in part, or simply leave the contract untouched.

The sources of this article are harder to identify than the preceding articles. Because each particular system uses its own approach, which often includes at least one, but rarely all three, of these powers, article (h) does not rely specifically on one system. Instead, it is an aggregate of the remedies allowed in all of the previously discussed codes and compilations.\textsuperscript{127}

9. Article (i)

The court shall dissolve the contract only when: taking into account all of the surrounding circumstance and the principle of good faith, adaptation to restore the parties’ equilibrium is impossible; or the obligor, obligee, or both refuse to continue with the contract once it has been modified;

The court shall not dissolve the contract when: both parties intend that the contract be preserved.

Article (i) narrows the discretion the court is allowed. It lays down guidelines dictating when the court is required to dissolve a contract and when it is precluded from doing so. The court is prohibited from modifying a contract when it is not possible to fairly distribute the unanticipated loss between the parties. In making this determination, the court must look at the parties’ duty of good faith as well as the situation surrounding the change of circumstances.

\textsuperscript{126} This limitation of the courts’ discretion will be more apparent when the next proposed article is analyzed.

\textsuperscript{127} See BGB § 313 (F.R.G.); GK art. 451 (Russ.); TCC art. 409 (Turkm.); RUCC art. 383 (Uzb.); UNIDROIT PRINCIPLES, supra note 43, art. 6.2.3; PECL, supra note 43, art. 6.111.
The court is also required to dissolve the contract when either or both parties refuse to continue under the contract after the court has modified its terms. The sources of these provisions in article (i) are the restrictions placed on contract alteration in the law of Switzerland, as well the idea that the extinction of the obligation should be used as a last resort.\textsuperscript{128}

On the other hand, when both parties intend to continue under the contract but are not able by themselves to reach an agreement, article (i) prohibits the court from dissolving the contract. This requirement again supports the idea that where possible, the contract should be preserved. It also prevents the courts from taking “the easy way out” by extinguishing the obligation versus adapting it to the new situation.\textsuperscript{129} Requiring the court to modify a contract if possible can also be supported by the positions taken in Germany, Unidroit, and the PECL; however, it is in direct conflict with the approaches of Russia, Uzbekistan, and Italy.\textsuperscript{130}

10. Article (j)

When dissolution of the contract is not required, the court may modify the contract in any manner necessary to restore the parties’ equilibrium. Such modification may include but is not limited to: postponing the term for performance;


\textsuperscript{129} This author is fully aware of the idea that every contractual modification includes a rescission of the original obligation. However, the idea here is not that the parties have to continue being bound regardless of the circumstances; instead, it is that the parties originally came to an agreement. Therefore when the parties want to continue in that relationship, it is not the courts’ role to disturb that intent.

\textsuperscript{130} See BGB § 313 ¶¶ 1, 3 (F.R.G.). Both Unidroit and the PECL articles are written so that the court has a choice. See UNIDROIT PRINCIPLES, supra note 43, art. 6.2.3; PECL, supra note 43, art. 6.111. When these articles are read together with the general \textit{pacta sunt servanda} principle they contain, it would seem as though the court should attempt to modify the contract when possible. Russia and Uzbekistan only allow the court to alter a contract in exceptional circumstances; those countries prefer dissolution as a remedy. GK art. 451 (Russ.); RUCC art. 383 (Uzb.). Italy also only allows dissolution, yet makes an exception in article 1664 dealing with supervening hardship for contractors. C.C. arts. 1467, 1664 (Italy).
allowing the obligor to make payments in installments when the object of an obligor's performance is the payment of money; increasing or decreasing the required performance of the obligor; or extending or shortening the term of the obligation.

Article (j) provides further guidance for the court by providing examples of modifications the court may make to a contract. The court may postpone the term for performance, such as allowing an obligor to delay rendering his required performance without fear of being placed in default. When the obligation is the payment of money, an obligor may be allowed to render payments in installments where a lump sum was originally required. For example, suppose an obligor has contracted to buy a house by paying a lump sum, but the stock market crashes, wiping out the money that was to be used to pay the price. If feasible, the court may allow the obligor to pay the price in installments. The court may also increase or decrease the required performance, such as raising the sale price to compensate for an unexpected rise in the cost of production. Finally, the court may lengthen or shorten the time the parties will be bound by a contract. For instance, where economic conditions make it so that the obligor will be able to perform at a profit for only a certain amount of time, the court may shorten the term of the obligation to end when the obligor begins showing a loss. As provided in article (j), these examples are merely illustrative.

Article (j) also restates the equilibrium requirement contained in article (h). This is included to provide consistency in the articles. Following this requirement, the court may make any changes necessary to restore the parties' equilibrium. Note, however, that the article in no way implies that the court must alter the contract to make it fair. The purpose of these articles as a whole is to restore the parties to their original agreement, not to save them from a bad bargain.

11. Article (k)

The preceding articles do not apply when: the disadvantaged obligor assumed the risk of the fortuitous event; the obligor had been put into default before the fortuitous event occurred; or the fortuitous event was
preceded by the obligor’s fault, without which the substantial change of circumstances would not have occurred.

The final article in the projet provides for situations where the preceding articles are excluded from application. The simple logic behind this article is based on economic principles. For instance, under the first exclusion provision, these articles have no application when the event that caused the problem could be foreseen because foresight extinguishes the fortuity of the event. Since the articles in this projet require a fortuitous event in order to be applicable, when the obligor assumes the risk that an event will occur, the entire purpose of the articles collapses. Thus, the obligor will not be able to find relief because he held the risk and should bear the loss.

Also tied to the idea of risk is the second exclusion provision. An obligor cannot benefit from these articles when in default. Under Louisiana law, when an obligor is put into default, the obligee’s risk of loss is shifted to the obligor.\textsuperscript{131} In addition, the obligor should not be allowed to benefit from his own delay in performance. Had the obligor performed as required, the loss would have been sustained by the obligee.

Note the difference between the approach taken here and that taken under impossibility in Louisiana Civil Code article 1874. In article 1874, being put in default will not exclude the obligor from benefiting from the impossibility excuse if the object of performance would have been destroyed in the hands of the obligee.\textsuperscript{132} This approach is based on the idea that the object would have been destroyed regardless of who had possession. In article (k), the excuse is based only on changed circumstances. The obligor can still perform; it is just excessively burdensome. Had the obligor performed as was required, the obligee would have had to deal with the burden, and the obligor would face no hardship. Thus, the obligor is not allowed to benefit from his own non-performance.

\textsuperscript{131} LA. CIV. CODE ANN. art. 1992 (2007).
\textsuperscript{132} LA. CIV. CODE ANN. art. 1874 (2007).
C. Economic Inefficiency Revisited

Rebus sic stantibus can provide an efficient happy medium for lowering transaction costs. In analyzing "impracticability" in the Uniform Commercial Code, Professor Paul Joskow found that "[t]he key to . . . a rule of discharge working well is to provide an appropriate and well understood list of occurrences and an appropriate and well-defined standard for calculating what a dramatic increase in cost is."\(^1\) He found that section 2-615 of the U.C.C. met this standard because it contained four elements: (1) a foreseeability test; (2) an assumption of the risk test; (3) a defined standard of "impracticability;" and (4) a good faith requirement.\(^2\) Because the proposed articles meet these elements, it can be presumed that they are also an efficient standard of excuse.\(^3\)

The importance of the "foreseeability test" is that it draws a line between events that are "reasonably part of the decisionmaking process and those that are not."\(^4\) This idea encompasses the theory of "bounded rationality," which is the recognition that it is not possible for humans to evaluate all possible contingencies of a particular situation.\(^5\) When parties contract, they include only a

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\(^1\) Joskow, *supra* note 60, at 154. In addition, it should be noted that Professor Joskow is not the only source for a standard of economic efficiency. Richard Posner and Andrew Rosenfield have also provided a standard for allocating risk between parties in situations they did not foresee. Their method, labeled the "Superior Risk Bearer Model," allocates risk based on which party is the more efficient risk bearer and could have better prevented or insured against a particular risk. Richard A. Posner & Andrew M. Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL STUD. 83, 90 (1977). Scholars have criticized this approach as being unrealistic due to the complexity of its application. See Daniel T. Ostas & Frank P. Darr, *Understanding Commercial Impracticability: Tempering Efficiency with Community Fairness Norms*, 27 RUTGERS L.J. 343, 354 (1996); Aaron J. Wright, Note, *Rendered Impracticable: Behavioral Economics and the Impracticability Doctrine*, 26 CARDOZO L. REV. 2183, 2195 (2005). Therefore, this author feels that Professor Joskow provides a more workable model.


\(^3\) This author is not saying that the proposed articles provide the most efficient method for handling discharge, only that they are more efficient than the current system.


\(^5\) Id.
small subset of possible contingencies in the agreement, thus, courts can enforce a contract only to the extent of the contingencies included in the agreement.\textsuperscript{138}

The proposed articles create a foreseeability test by including the civilian notion of fortuitous event. By its definition, a fortuitous event is something that could not be reasonably foreseen.\textsuperscript{139} If the event that caused a substantial change of circumstances is not fortuitous, it was within the foreseeability of the parties and no remedy will be found under the proposed articles. Thus, element one of Joskow's analysis is met.

The second element of Joskow's analysis is an assumption of the risk test. It is basically "an extension of the foreseeability test" and provides the court with a standard for evaluating the circumstances surrounding the contract.\textsuperscript{140} Therefore, if one of the parties has implicitly assumed the risk of the fortuitous event, there is no remedy found in the proposed articles.

Article (k) expressly supplies an assumption of the risk test. It does so by stating that the entire regime of substantial change of circumstances does not apply if the disadvantaged obligor assumed the risk of the fortuitous event. Thus, element two of Joskow's analysis is met.

The third element in Joskow's analysis is a defined standard of impracticability. Joskow found that U.C.C. § 2-615 met this requirement because it put high limitations on what would be required in order to meet the impracticability definition.\textsuperscript{141} In further defining this standard, Joskow mentions that a tenfold increase in price might be sufficient.\textsuperscript{142} Thus, an increase in price must be "marked" or "extreme and unreasonable" before the standard is met.\textsuperscript{143}

While at civil law, the terms "hardship" and "changed circumstances" are used instead of impracticability, the notions are the same. With this in mind, the defined standards of a substantial change of circumstances are found in proposed articles (c) and (e).

\textsuperscript{138} Id.
\textsuperscript{139} LA. CIV. CODE ANN. art. 1875 (2007).
\textsuperscript{140} This is what civilians might call an \textit{inconcreto} analysis of the facts.
\textsuperscript{141} Joskow, supra note 60, at 159–60.
\textsuperscript{142} Id. at 160.
\textsuperscript{143} Id. at 159–60.
Pursuant to these articles, the fortuitous event must create a fundamental alteration of equilibrium. This fundamental alteration must produce such a disproportionate change in the parties' equilibrium that had it existed at the time of the agreement, they would not have consented to the contract. Furthermore, this standard is aided by a presumption when either the value or cost of performance changes by more than one half.

It is obvious that a fifty percent change is much lower than the ten-fold increase contemplated by Joskow. Nevertheless, it should be sufficient to meet the requirement because under the proposed articles, a fifty percent change only creates a presumption. If the other party can show that such a change is normal, or at least not disproportionate under the circumstances, then the disadvantaged party will be bound to the contractual terms. Thus, the proposed articles create a “defined standard,” and the third element of Joskow’s analysis is met.

Finally, in order to meet all the elements under Joskow’s analysis, the proposed articles must contain a good faith requirement. The professor evaluates this element as requiring that the disadvantaged party: (1) take all reasonable steps to perform as promised; and (2) be without fault. Thus, in essence there must be a requirement that the party seeking a remedy act in good faith.

Articles (f) and (k) embody this requirement in the proposed articles. Article (f) requires that the parties shall be governed by good faith in the request for renegotiations. Therefore, if the party seeking a remedy has failed to do everything possible to perform as originally agreed, that party will be denied a remedy. In addition, article (k) expressly requires that the party be free from any fault that would have prevented the substantial change of circumstances from occurring. Thus, the fourth and final element of Joskow’s analysis is met.

In concluding the efficiency discussion, it warrants mentioning that the proposed articles really make only one efficiency-related change from the current impossibility law. They expand the overly restrictive “absolute impossibility” requirement to allow an excuse even when performance is possible. Parties can now contract without being forced to anticipate every conceivable event through

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144. Id. at 161–63.
force majeure clauses. Joskow stated that "[a] strict interpretation of the rule of discharge which puts too much of the risk on the [obligor]" creates "additional . . . costs." Thus, the proposed articles are more efficient because they take the one flaw in the current approach to impossibility and transform it into that "happy medium."

VI. DEFENSE: LOUISIANA LAW SUPPORTS JUDICIAL MODIFICATION OF CONTRACTS

The purpose of this Comment is not only to propose a new basis for expanding excuse for non-performance in Louisiana, but also to handle certain objections to implementation of the proposed articles. The major "complaint" against implementation comes in the argument that Louisiana law does not support judicial modification of a contract. The following section will address this issue.

The Louisiana Civil Code does not support judicial modification of a contract. At first glance, this is a very reasonable assertion. Louisiana Civil Code article 1983 provides that a contract "[has] the effect of law for the parties." Thus, "[being the] 'law' the parties had freely chosen to give themselves and freely chosen to abide by . . . it [is] enforceable as such and [can] not be changed, altered, or modified except with the consent of [the] parties." Furthermore, it is arguable that "[b]eing an act of free will . . . it [is] by definition just and fair in its results and effects." This is the same approach used in article 11 of the Code Napoléon, which was incorporated into Louisiana law through article 34 of the Digest of 1808.

145. Id. at 154.
147. Baudouin, Unequal, supra note 118, at 1120.
148. Id.
149. Id.; LA. CIV. CODE art. 1901 (1947) (historical note). Interestingly, Baudouin says that article 11 of the Code Napoléon states the same proposition as the current Louisiana Civil Code article 1983. Baudoin, Unequal, supra note 118, at 1120. The historical note to article 1901 of the Code of 1870 (which is the predecessor to the current article 1983) states that article 1134 of the Code Napoléon was the predecessor to the current article 1983.
The harsh French view against judicial revision is thought to have its source in the French Revolution, which created a suspicion of judicial power. Louisiana thereby followed its strict French roots by consistently taking a hard stand against judicial revision of contracts. Thus, it would seem as though Louisiana has stayed true to the ideas it received from France, precluding courts from taking an active role in contract modification; however, this is not the case.

The current Louisiana law does indeed support judicial modification of a contract freely entered into between two consenting parties. In instances such as partial impossibility, stipulated damages, dissolution, and lease, the court is allowed some leeway to modify the parties' agreement. For instance, pursuant to article 1877, when performance has become impossible in part, the court may reduce the amount by which the parties are bound. When stipulated damages are "so manifestly unreasonable as to be contrary to public policy," the court is allowed to modify the agreement by reducing the amount to a reasonable sum. Also, when a party seeks judicial dissolution of a contract, the court has the ability to refuse the request and alter the agreement by providing the obligor with more time to perform. Furthermore, when parties to a lease cannot agree on the re-determination of rent, the court is allowed to unilaterally fix the rent. Thus, not only has Louisiana moved away from the original French hostility toward contract modification, it has gone so far as to legislatively endorse it under certain circumstances.

VII. CONCLUSION

Rebus sic stantibus and pacta sunt servanda have been employed by numerous legal systems in various forms. Each system has implemented these rules and provided various

150. Baudouin, Unequal, supra note 118, at 1123.
151. Id.
152. Litvinoff, supra note 2, at 59–60.
156. LA. CIV. CODE ANN. art. 2676 (2007).
exclusions based on their contemporary needs. It is with this in mind that Louisiana must evaluate where it stands. Law must change with society; else, instead of promoting a structured system for the interaction of free peoples, it becomes a tool for oppression and inequity.

Throughout history, the law has seen an ebb and flow between strict adherence and equity. Whether it is the abolishment of the writ system in England, or the move away from code pleading in federal civil procedure, the balance between these two driving forces is not easy to find. However, the constant theme is the ability of legal systems to adapt their laws to the needs of society.

In making its decision, Louisiana should listen to the lessons that history has provided. Louisiana does not have the burden of writing on a blank slate. Numerous other jurisdictions have wrestled with this problem and attempted to resolve it by what was believed to be in the best interest of the people. Using the past accomplishments and mistakes of these other systems, Louisiana has the opportunity to move its law forward, extricating itself from the bounds of ideology long past. Hopefully, the opportunity will not be squandered.

Charles Tabor*

* Co-recipient of the Association Henri Capitant, Louisiana Chapter Award for best paper on a civil law topic or a comparative law topic with an emphasis in the civil law.

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A. Principles of European Contract Law

Article 6.111 (ex art. 2.117)–of Circumstances

(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract,
(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and
(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) terminate the contract at a date and on terms to be determined by the court; or
(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.\textsuperscript{157}

\textsuperscript{157} PECL, supra note 43, art. 6.111.
B. The Unidroit Principles

SECTION 2: HARDSHIP

ARTICLE 6.2.1 (Contract to be Observed)
Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

ARTICLE 6.2.2 (Definition of Hardship)
There is hardship 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, and
(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) the events are beyond the control of the disadvantaged party; and
(d) the risk of the events was not assumed by the disadvantaged party.

ARTICLE 6.2.3 (Effects of Hardship)
(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
(4) If the court finds hardship it may, if reasonable,
(a) terminate the contract at a date and on terms to be fixed, or
(b) adapt the contract with a view to restoring its equilibrium.158

158. UNIDROIT PRINCIPLES, supra note 43, arts. 6.2.1–2.3.
C. The German BGB

Section 1: Subject matter of obligations

Title 1: Obligation to perform

§ 275. Exclusion of the obligation to perform

(1) A claim for performance cannot be made in so far as it is impossible for the obligor or for anyone else to perform.

(2) The obligor may refuse to perform in so far as performance requires expenditure which, having regard to the subject matter of the obligation and the principle of good faith, is manifestly disproportionate to the obligee's interest in performance. When determining what may reasonably be required of the obligor, regard must also be had to whether he is responsible for the impediment.

(3) Moreover, the obligor may refuse to perform if he is to effect the performance in person and, after weighing up the obligee's interest in performance and the impediment to performance, performance cannot be reasonably required of the obligor.

(4) The obligee's rights are determined by §§ 280, 283 to 285, 311a and 326.

Sub-title 3: Adaptation and cessation of contracts

§ 313. Interference with the basis of the contract

(1) If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form.

(2) If material assumptions that have become the basis of the contract subsequently turn out to be incorrect, they are treated in the same way as a change in circumstances.

(3) If adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party may terminate the contract. In the case of a contract for the
performance of a recurring obligation, the right to terminate is replaced by the right to terminate on notice.

§ 314. Termination, or good cause, of contracts for the performance of a recurring obligation

(1) Either party may terminate a contract for the performance of a recurring obligation on notice with immediate effect if there is good cause for doing so. There is good cause if, having regard to all the circumstances of the specific case and balancing the interests of both parties, the terminating party cannot reasonably be expected to continue the contractual relationship until the agreed termination date or until the end of a notice period.

(2) If the good cause consists in the infringement of a duty under the contract, the contract may be terminated on notice only after a specified period for remedial action has expired or notice of default has been given to no avail. § 323 (2) applies mutatis mutandis.

(3) The person entitled may terminate only if he gives notice of termination within a reasonable period after becoming aware of the cause for termination.

(4) The right to claim damages is not precluded by the termination.159

D. The Russian Civil Code

Chapter 29 (Amendment and Rescission of a Contract)

Article 451

1. A significant change in the circumstances from which the parties proceeded in concluding the contract shall constitute grounds for its amendment or rescission, unless otherwise specified by the contract or indicated by its nature.

A change in the circumstances shall be considered significant when they have changes so much that, if the parties could have reasonably foreseen them, the contract would not have been concluded by them, or would have been concluded on significantly different conditions.

2. If the parties have failed to reach agreement on bringing the contract in conformance with the significantly changed

159. BGB §§ 275, 313–14 (F.R.G.).
circumstances or on its rescission, the contract may be rescinded, and on the grounds specified in paragraph 4 of the present article—amended by a court at the petition of an interested party if the following conditions are concurrently present:

1) at the time of concluding the contract, the parties acted on the fact that such change in circumstances would not occur;
2) the change in circumstances was caused by reasons which the interested party could not overcome after their emergence, using the same degree of care and caution which was required of it under the nature of the contract and the conditions of commerce;
3) performance of the contract without amendment of its conditions would so greatly violate the correlation of property interests of the parties under the contract and would entail such loss for the interested party, that it would be deprived to a significant degree of that which it had a right to expect in concluding the contract;
4) business custom or the nature of the agreement does not indicate that the risk of change in circumstances is borne by the interested party.

3. In case of rescission of a contract as a result of significantly changed circumstances, a court, at the petition of either of the parties, shall determine the consequences of rescission of the contract, based upon the necessity of fair distribution between the parties of the expenditures incurred by them in connection with the performance of this contract.
4. Amendment of a contract in connection with significant change of circumstances shall be permitted by the decision of a court in exceptional cases, when rescission of the contract shall operate against the public interest or would entail loss for the parties which significantly exceeds the expenditures necessary for performance of the contract under the court-altered conditions.\(^{160}\)

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160. GK art. 451 (Russ.).
E. The Italian Civil Code

**Article 1467 (Contracts for Mutual Counterperformance)**

In contracts for continuous or periodic performance or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand dissolution of the contract, with the effects set forth in article 1458.

Dissolution cannot be demanded if the supervening onerousness is part of the normal risk of the contract.

A party against whom dissolution is demanded can avoid it by offering to modify equitably the conditions of the contract.

**Article 1468 (Contracts with Obligations of One Party Only)**

In the case contemplated in the preceding article, if the contract is one in which only one of the parties has assumed obligations, he can demand a reduction in his performance or a modification of the manner of performance, sufficient to restore it to an equitable basis.

**Article 1664 (Supervening Hardship or Difficulty in Performance)**

If, as a result of unforeseeable circumstances, there have occurred such increases or reductions in the cost of the materials or of labor as to cause an increase or reduction by more than one-tenth of the total price agreed upon, the independent contractor or the customer can request that the price be revised. The revision can only be granted for that part of the difference which exceeds one-tenth.

If in the course of the work difficulties are revealed deriving from geological conditions, water, or other similar causes not foreseen by the parties, which made the performance of the contractor considerably more onerous, he is entitled to just compensation thereof.\(^{161}\)

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161. C.C. arts. 1467–68, 1664 (Italy).
F. The Turkmenistan Civil Code

Article 409. Bringing Contract into Conformity with Changed Circumstances

1. If circumstances which became the grounds for the conclusion of a contract have clearly changed after the conclusion of the contract and the parties would not have concluded it or would have concluded it with other content, the bringing of the contract into conformity with the changed circumstances may be demanded insofar as taking into account individual instances, in particular, proceeding from the type of norms, strict compliance with the unchanged contract may not be demanded from the parties to the contract.

2. To changes of circumstances shall be equated also instances when conceptions which became the basis of the contract have turned out to be incorrect.

3. The parties in priority must endeavor to bring the contract into conformity with the changed circumstances.

4. If bringing the contract into conformity with changed circumstances is impossible or the other party does not agree with this, the party whose interests have been violated may renounce the contract. 162

G. The Uzbekistan Civil Code

Article 383. Change and Dissolution of Contract in Connection with Material Change of Circumstances

A material change of circumstances from which the parties proceeded when concluding a contract shall be a grounds for the change or dissolution thereof unless provided otherwise by the contract or it follows from the essence thereof.

A change of circumstances shall be deemed to be material when they have changed such that if the parties could reasonably foresee this, the contract would not have been concluded at all by them or it would have been concluded on significantly differing conditions.

162. TCC art. 409 (Turkm.).
If the parties have not reached agreement concerning the bringing of the contract into conformity with the materially changed circumstances or the dissolution thereof, the contract may be dissolved, and on the grounds provide for by paragraph five of the present Article, changed by a court at the demand of the interested party when the following conditions simultaneously exist:

(1) at the moment of concluding the contract the parties proceeded from the fact that such a change of circumstances would not occur;

(2) the change of circumstances has been caused by reasons which the interested party could not overcome after they arose with that degree of good faith and attentiveness which are required of him by the character of the contract and the conditions of turnover;

(3) the performance of the contract without a change of its conditions would so violate correlation of property interests of the parties which correspond to the contract and entail for the interested party such damage that it would be deprived to a significant degree of that which it had the right to count on when concluding the contract;

(4) it does not follow from the customs of business turnover or the essence of the contract that the risk of the change of circumstances is borne by the interested party.

In the event of the dissolution of a contract as a consequence of materially changed circumstances the court at the demand of any of the parties shall determine the consequences of the dissolution of the contract by proceeding from the need for a just distribution between the parties of the expenses incurred by them in connection with the performance of this contract.

The change of a contract in connection with a material change of circumstances shall be permitted by decision of a court in exceptional instances when dissolution of the contract is contrary to social interest or entails damage for the parties which significantly exceeds the costs needed to perform the contract on the conditions changed by the court.
Article 384. Procedure for Change of and Dissolution of Contract.

An agreement concerning a change of or dissolution of a contract shall be concluded in the same form as the contract unless it follows otherwise from legislation, the contract, or the customs of business turnover.

A demand concerning a change of or dissolution of a contract may be made by a party in court only after receipt of a refusal of the other party to the proposal to change or dissolve the contract or of not receiving a reply within the period specified in the proposal or established by law or by contract, and in the absence thereof, within a thirty-day period.

Article 38. Consequences of Dissolution of and Change of Contract

In the event of the change of a contract, the obligations of the parties shall be preserved in the changed form.

In the event of the dissolution of the contract the obligations of the parties shall terminate.

In the event of the change of or the dissolution of a contract, the obligations shall be considered to be changed or terminated from the moment of the conclusion of an agreement of the parties concerning the change of or dissolution of the contract unless it follows otherwise from the agreement or the character of the change of the contract, and in the event of the change of or the dissolution of a contract in a judicial procedure, from the moment of the entry into legal force of the decision of the court on the change of or the dissolution of the contract.

The parties shall not have the right to demand the return of that which was performed by them under the obligation before the moment of change or dissolution of the contract, unless established otherwise by a law or by agreement of the parties.

If a material violation of the contract by one of the parties has served as the grounds for change of or the dissolution of a contract, the other party shall have the right to demand compensation of losses caused by the change of or the dissolution of the contract.\(^{163}\)

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\(^{163}\) RUCC arts. 383–85 (Uzb.).
H. The Uniform Commercial Code

§ 2-615. Excuse by Failure of Presupposed Conditions.
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 paragraph (b), of the estimated quota thus made available for the buyer.\(^\text{164}\)

I. The Restatement (Second) of Contracts

Chapter 1. Impracticability of Performance and Frustration of Purpose

§ 261. Discharge by Supervening Impracticability
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.

\(^{164}\) U.C.C. § 2-615 (2004).
§ 265. Discharge by Supervening Frustration

Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary. 165