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Denis Philippe ■

1 THE DOCTRINE OF IMPRÉVISION

1.1 Definition

In French and Belgian discourse, the doctrine of *imprévision* is the most important concept dealing with the effects of unexpected circumstances on contractual obligations. This idea generally refers to cases in which unforeseen economic circumstances become apparent after a contract has been concluded and which make its performance extremely difficult or much more costly, but do not render it impossible.¹ The doctrine of *imprévision* can be based on the

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- 1 J. Ghestin, *Les obligations, Effets*, Paris: LGDJ 2001; P. Voirin, *De l'imprévision dans les rapports de droit privé* (thesis), Nancy: 1922; E. Gaudin de la Grance, *La crise du contrat et le rôle du juge* (thesis), Montpellier: 1935; P. Azard, 'L'instabilité monétaire et la notion d'équivalence dans les contrats', *Jurisclasseur Périodique*, 1953.I.1092; M. El Gammal, *L'adaptation du contrat aux circonstances économiques*, Paris: 1967; Le Rôle du juge en présence de problèmes problématiques, *Travaux Association R. Capitant*, t. XXII 1970, avec notamment le rapport sur le rôle du juge en présence de problèmes économiques en droit civil français par B. Oppetit, 185n et le rapport général par R. Perrot, 260; P. Catala, 'Les effets de la dépréciation monétaire sur les rapports juridiques contractuels en droit civil français', *Travaux Ass. H. Capitant*, t. XXIII, 1971, 439, Ghestin et Billiau, *Le prix dans les contrats de longue durée* (1990); J. L. Devolve, 'L'imprévision dans les contrats internationaux', *Travaux comité fr. DIP*, 1988-1990, p. 147; L. Grynbaum, *Le contrat contingent* (thesis), Paris: 1998; C. Jamin, 'Révision et intangibilité ou la double philosophie de l'article 1134 du code civil', *Droit et Patrimoine*, 1998, n° 58, p. 46 et seq.; H. Lecuyer, 'Le contrat, acte de prévision', *Mélanges Terré*, 1999, p. 643; R. David, 'L'imprévision dans les droits européens', *Mélanges Jauffret*, 1974, p. 211; D. Tallon, 'La révision du contrat pour imprévision au regard des enseignements récents du droit comparé', *Mélanges Sayag*, 1997, p. 403 et seq., sp. 406, P. Stoffel Munck, *L'abus dans le contrat* (thesis), Aix Marseille, 1999, LGDJ, 2000.
- In Belgium Cass., 30 October 1924, *Pas.*, 1924, I, p. 565; H. De Page, *Traité élémentaire de droit civil belge* (Brussels: Bruylant, 3rd ed. 1964), p. 560. See for criticism of these definitions D. Philippe obs. comm. Brussels, 16 January 1979, *J.T.*, 1980, p. 459 et seq.; L. Vael, 'Beschouwingen over het imprevisieleerstuk: omtrent de eventuele ontsluiting van de overeenkomst in geval van een gewijzigd contractueel verhoudingskader', in: *Liber Amicorum Tijdschrift voor Privaatrecht en Marcel Storme*, Story Scientia, 2004, p. 703 et seq.; P. Wéry, 'L'imprévision et ses succédanés', *J.L.M.B.* 1996, p. 105. D. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle* (Bruylant, 1986). J.F. Germain & Y. Ninane, *Droit des Obligations*, CUP, 2010, p. 81 et seq.

assumption that there is an economic imbalance between the contractual obligations at the time of performance. The doctrine of *imprévision* is not applied to speculative contracts like stock exchange transactions, as this 'speculative' nature is part and parcel of such contracts.² From a theoretical point of view the concept of *imprévision* is directed at resolving a conflict between commutative justice demanding a balanced exchange on the one hand and, on the other, the principle of *pacta sunt servanda* which corresponds to the more general objective of legal certainty.

1.2 Historical developments

In Roman law *force majeure* was a well-accepted concept. Meanwhile, in the medieval period, the importance of commutative justice was stressed. Saint Thomas of Aquinas asserted that one who makes a promise and does not keep it because of changing conditions cannot be blamed for any unfaithfulness.³ This view implied the notion of *clausula rebus sic stantibus*. According to this concept contracts providing for successive acts of performance over a future period of time must be understood as being subject to the condition that the circumstances will remain the same.⁴ Post-glossators adopted this doctrine of *imprévision*, while Cujas and Pothier did not even mention it.⁵ In the French Civil Code the idea of *imprévision* was not recognised, which may be seen as the result of the influence of the historical school of Roman law, the Natural law school and the liberal economy.⁶ Article 1134 of the Code Civil (Cciv) lays down the principle of the immutability or sanctity of contracts. The same idea underlies Article 1793 Cciv. This confirms that the French position is inspired by the notion of the autonomy of will.⁷ Historically, Article 1134 Cciv is construed as a demarcation between the power of the courts and legislation

2 Art. 7 par. 2, loi 'Faillot' 21 January 1918 in France.

3 Saint Thomas of Aquinas in his *Somme théologique*, IIa-IIae p. 110, arts. 3 to 5.

4 The Latin adage is: '*Contractus qui habent tractum successivum et dependentiam de futuro rebus sic stantibus intelleguntur*'.

5 Voirin, De l'imprévision, pp. 46-47; 'La genèse de la '*clausula rebus sic stantibus* – *Contractus qui habent tractum successivum et dependentiam de futuro rebus sic stantibus intelleguntur*' (droit romain, Moyen Age, ancien droit)', in: A. Ruelle & M. Berlingin, *Le Droit Romain d'hier à aujourd'hui. Collationes et oblationes. Liber Amicorum en l'honneur du professeur Gilbert Hanard*, Facultés Universitaires St Louis, 2009.

6 Liberalism, as the predominant philosophical movement in the eighteenth century, gave rise to some ideas which were incompatible with a restrictive application of the *rebus sic stantibus* as provided by the canonists. *Pacta sunt servanda*, on the contrary, was perfectly coherent with the concept of laissez-faire. Therefore the code enacted during this period did not adopt *rebus sic stantibus*.

7 '*Le contrat est une emprise sur l'avenir*': Ripert, *La règle morale dans les obligations civiles*, n° 84, p. 151.

forbidding judges from interfering with contracts and, therefore, reserving contractual justice for legislative regulation.

1.3 Legislative exceptions

One will first notice an increasing number of legislative or judicial exceptions to the principle of the sanctity of contracts. Temporary legislation dealing specifically with hardship was enacted as a reaction to the world wars and economic crises. After the outbreak of World War I the legal literature looked for theoretical justifications to exculpate the debtor who could not perform his contractual obligations because it had become extremely burdensome. The concept of *rebus sic stantibus* attracted new interest and obtained legal acceptance in specific statutes.⁸ Furthermore, a growing number of statutes generally protecting the ‘weaker parties’ in contracts were enacted. Many of these statutes are directly related to the *imprévision* doctrine as is particularly the case with the Act of 30 July 1930 (Arts. 17 and 20) on insurance contracts. This is also the case with Art. 37 of the Act of 11 March 1957 on Copyright (L.131-5 Code of Intellectual Property).⁹ One may also refer to the Act of 3 July 1971 (Art. 833-1 Cciv),¹⁰ the Act of 11 July 1975 on divorce reform (Art. 276 Cciv),¹¹ the Act of 4 July 1984 (Art. 900-2 Cciv) and, finally, the Act of 25 January 1985, in its Art. 98 par. 2.¹² All these examples demonstrate how far the principle of the sanctity of contracts is subject to exceptions when major changes occur in society.

Also in Belgium, in specific sectors statutes were later enacted on a non-temporary basis in order to deal with unexpected circumstances concerning

8 The Act of 21st January 1918, the ‘Loi Faillot’, allowed for the *résolution* (but not the *révision*) of contracts concluded before 1914 if one of the contractors had been the victim of a reasonable assumption when concluding the contract; see also the Act of March 1918 (regarding the modification of a lease for real property), as well as the Acts of 6 July 1925, 8 April 1933, 1 January 1924, 11 November 1932, 12 July 1933, and 22 April 1949, concerning contracts entered into before 2 September 1939 (relating to delivery, construction contracts, performance, and successive or postponed contracts). See in Belgium, Act of 11 October 1919, *Moniteur belge*, 29 October 1919; see D. Philippe, *Le changement*, p. 156.

9 Article 37 of the Act of 11 March 1957 provides that, having sold his exploitation rights, an author of intellectual work who has suffered a loss of more than 7/12 due to a *lésion*, or an insufficient prediction, is entitled to claim a revision of the contract price.

10 In succession law or gratuitous contracts or unilateral contracts, A. 855-1 of the Civil Code (based on the Act of 3 July 1971) provides for an adaptation of the contract under certain circumstances when the value of the contracted goods has increased or decreased by more than a quarter since the division.

11 Amending maintenance payments for a spouse.

12 In the case of a lease including commitments by the lessee to acquire commercial establishments, when the lessee is not able to acquire the establishment due to a reason which is beyond his control. See Fin-Langer, pp. 367-375.

especially long-term contracts,¹³ like leases (Art. 7 of the Law of 16 February 1991 on residential leases, Art. 6 of the Law of 30 April 1951 on commercial leases,¹⁴ Art. 17 *et seq.* of the Law of 4 November 1969 on tenancies and leasehold property),¹⁵ divorce by mutual consent (Art. 1288 of the Belgian Civil Code [Ccivil]) or public works (Art. 16 of the general terms on public works). According to Art.710 Ccivil the judge can also order the expiry of a servitude when it has lost its purpose for the beneficiary.

1.4 Case law

a) *Administrative law*

The principle of sanctity also became subject to a large number of judicial exceptions. In France, in administrative law, the *imprévision* doctrine has been generally recognised since the famous decision in *Gaz de Bordeaux*¹⁶ where the *Conseil d'Etat*, the highest Administrative Court, allowed a contract to be renegotiated when there were unexpected circumstances. In the absence of an agreement, administrative law grants an indemnification to a contracting party based on the principle of continuity of public services.¹⁷ This applies in particular to transport, public works and distribution markets.¹⁸ However, the contractual imbalance must have been caused by an event that is external and unforeseeable to the contracting parties and that event must result in an excessive burden for the contracting party. If the imbalance is definite, the contract can be cancelled.¹⁹

Unlike in France, the *Conseil d'Etat* is not competent to deal with public contracts; therefore the restrictive approach of the Belgian Cour de cassation concerning unforeseen circumstances would, in principle, also apply to public contracts.

13 S. Heremans, 'Le bouleversement', *R.G.D.C.*, 2000, p. 473 *et seq.*; D. Philippe, *Le changement*, p. 156. E. De Bock, 'Stijgende metaalprijzen, is er tegemoetkoming', *NJW*, 2005, p. 477.

14 See my comment, D. Philippe, *Le changement*, p. 162.

15 Law of 15 June 1955 modified by the law of 2 July 1974.

16 In the case '*Gaz de Bordeaux*', the *Conseil d'Etat* established the *imprévision* doctrine. An unpredictable increase in coal prices had disrupted the balance of a concession contract. The Administrative High Court granted damages to the concessionaire. CE. 30 March 1916, *D.P.* 1916.3.25, S. 1916.3.17, *Les grands arrêts de la jurisprudence administrative*, 11th ed., n° 50: "Cf.: Annexes XXX.; J. Antoine, 'La mutabilité contractuelle née des faits nouveaux extérieurs aux parties', *R.F.D.A.*, 2004, p. 80.

17 CE. 5 November 1982, soc. Propétrol, *Rec.*, p. 380, *A.J.D.A.*, 1983, p. 259, conc. Labetouille.

18 The interpretation of a contract where a public body is involved is not governed by the rules of droit civil in France, but is a matter of droit administratif. So the reasoning of the *Conseil d'Etat* is different from that of the civil and commercial courts.

19 CE. 9 December 1932, Tramways de Cherbourg, *D.P.* 1933.3.17, *Les grands arrêts de la jurisprudence administrative*, 11th ed., n° 50.

b) *The principle of inviolability established by the Cour de cassation*

Contrary to the administrative courts, the civil courts have consistently refused in the past to recognise a revision on the basis of *imprévision*. However, a tendency can be observed that civil judges will also intervene even though the scope of their intervention is quite limited. In any case, this opposing view between civil and administrative courts shows how difficult the implementation of *imprévision* is in French law.

After coming close to recognising the *imprévision* doctrine at the beginning of the 19th century,²⁰ the Cour de cassation, the highest civil court, rejected the concept in 1856²¹ and established the principle of the sanctity of contracts on 6 March 1876²² in the famous case of ‘Canal de Craponne’.²³ The contracts in question, dating from 1560 and 1567, referred to the water supply for an irrigation canal in the plains of Arles at a fixed price. Much later, in the 19th century, confronted with inflation and an increase in labour costs, those in charge of canal maintenance requested that the price be increased. The Aix Court of Appeal confirmed the tribunal’s judgment in which the price had been increased. However, this decision was overruled by the Cour de cassation arguing that time and equity could not allow a judge to modify the agreement between the parties according to Article 1134 Cciv.

c) *Exceptions*

The principle of the sanctity of contracts has been consistently adhered to by the highest civil courts. Yet, in a growing number of cases, judges have been allowed to revise contracts.

The civil courts generally take into consideration changed circumstances that render the performance of a contract more difficult and give the parties an incentive to renegotiate the terms of their contract.²⁴ The obligation to renegotiate is justified by the principle of good faith between the parties in

20 Req., 20 August 1838, S. 1838, 1, p. 973; D.P. 1838, 1, p. 380.

21 Cass. civ., 9 January 1856 (7 cases) D.P. 1856, 1, p. 33, report Nicias-Gaillard, which considered that an unpredictable increase in a contingent fee did not constitute *force majeure* since it would not make the performance of an insurance contract against the risks of military recruitment impossible. Despite changing circumstances, the contract should be declared valid: Cass., 11 March 1856, D.P. 1856, 1, p. 100. 2 April 1856, D.P. 1856, 1, p. 101. 7 March 1859, 1, p. 118. Adde. Cass. civ., 24 March 1874 (2nd case), S. 1874, 1, p. 428.

22 D.P. 1876, 1, p. 193, note A. Giboulot; S. 1876, 1, 161.

23 Cass. civ., 6 March 1876, (De Galliffet c/. Commune de Pélissanne) D.P. 76.1.195.S. Giboulot, 76.1.161, *Grands arrêts* n° 94.

24 Cf.: Cass. com., 3 November 1992, ‘arrêt Huard’, Bull. 1992 IV n° 338 p. 241, J.C.P., 1993-11-24, n° 46-47, p. 469. See also, Cass. com., 24 November 1998, Bull. 1998 IV n° 277 p. 232, J.C.P.E., 1999-07-22, n° 29, p. 1242, obs. C. Jamin; Cass., 29 June 2010, D. 2010, 2481 and obs. Mazeaud; see, however, for a confirmation of the *pacta sunt servanda* principle Civ. 3, 18 March 2009, no 07-21260, *Bulletin*, RTD civ. 2009.528, obs. B. Fages.

the execution of a contract as laid down in Article 1134 Cciv. The instability of the contract must be due to an exterior event after its conclusion and must not have been caused by either of the parties.

At this stage, great uncertainty still exists with regard to the conditions for the application of *imprévision*. It is particularly unclear whether or not these circumstances really have to be new and unforeseeable upon the conclusion of the contract and whether they have to be beyond the control of the parties.

A report (by Professor Catala and his team of distinguished legal scholars) recommending that the French Civil Code be reformed was submitted to the French Minister of Justice on September 22, 2005. It is currently still under discussion and the Ministry of Justice is preparing to revise the Civil Code on the basis of this report.²⁵ The report does not expressly recognise the doctrine of *imprévision* because the drafters consider that the parties themselves have to foresee the difficulties in performing their obligations.²⁶ But the draft does introduce a rule that recognises the relevance of unexpected circumstances. Article 1135-1 of the draft Cciv allows the parties to insert a renegotiation clause in case of unexpected circumstances that affect the equilibrium of the contract so that one of the parties loses its interest in performing the contract. Article 1135-2 Cciv provides that, in the absence of such a clause, the parties can request the president of the court of first instance to order a renegotiation. This draft article specifies that the negotiations must be conducted in good faith. If such negotiations are of no avail, the parties can terminate the contract. With reference to the Unidroit Principles, it has been suggested that such negotiations must be conducted on a constructive and timely basis.²⁷ It has been pointed out that the proposals for the adaptation of a contract must be in conformity with the original contractual framework. Damages can be claimed if one party does not negotiate in good faith.²⁸ There are many authors who argue in favour of the renegotiation of a contract by the judge if there are unexpected circumstances.^{29/30}

The draft prepared by the Ministry of Justice goes further; in case of failure of the renegotiation by the parties, the judge can not only terminate the contract (as proposed in the Catala report), but he is also entitled to revise it in agreement with the parties.³¹

25 See the report presented to Parliament by the Ministry of Justice in July 2008, article 136.

26 See *commentary*, p. 35, by A. Ghozi.

27 S. Primont, *L'économie du contrat*, PU Aix-Marseille: 2004, p. 272, n° 414.

28 Primont, *L'économie*, p. 273.

29 See for a revision of the contract by the judge: C. Jamin, 'Révision et intangibilité du contrat ou la double philosophie de l'article 1134 du code civil', *March* 1998, p. 46, p. 55 *et seq.*; C. Thibiergen-Guelfucci, *Libres propos sur la transformation du droit des contrats* (RTD civ., 1997), p. 357, n° 11 s., p. 366; Ripert wrote already 'l'immutabilité du contrat apparaît comme un anachronisme', *La règle morale*, n° 84, p. 151.

30 See also a recent proposal aiming to expressly recognise the 'imprévision' in Article 1134 of the Civil Code dd. 22 June 2011, n° 3563, submitted by M.T. Thoraval and others.

31 See <http://crfpa.unblog.fr/2009/01/19/point-sur-la-reforme-du-droit-des-contrats/>.

In Belgium, in the past, the Cour de cassation did not recognise the doctrine of *imprévision*.³² However, some lower courts have referred to this principle, but have rejected its application due to the fact that the conditions for its application have not been met.³³ In the literature, various authors argue that this principle should be recognised.³⁴

Furthermore, we can underline a recent decision of the Supreme Court of 19 June 2009. In a long-term international contract, the price of raw materials rose sharply. The Court of Appeal proceeded to the adaptation of the contract. This decision was confirmed by the Cour de cassation. The Court considered that on the basis of Article 7 of the Vienna Convention, the international usages apply to the sale of goods. Unidroit principles are international usages. These principles recognise the adaptation of the contract in case of a change of circumstances; consequently the contract could in this case be adapted on this basis. Furthermore, the Supreme Court considered that Article 79 of the Vienna Convention which exonerates the debtor in case of impediment must have a broad interpretation and must also apply in case of a change of circumstances which renders the performance of the contract substantially more burdensome.³⁵

Another interesting case of the Supreme Court dd. 14 November 2010³⁶ entitled the husband to cease the payment of alimony after 30 years in case of a substantial decrease in his income and increase in the income of his previous wife. This decision was based on abuse of right.

2 OTHER CONCEPTS

Imprévision can be distinguished from other concepts which might also be relevant when it comes to a change of circumstances.

32 See Cass., 14 April 1994, *Pas.*, 1994, I, 365; 20 April 2006, *Juridat*, See also Cass., 7 February 1994, *Juridat*, JC94271_2, *Pas.*, I, 150; Cass., 4 September 2000, *Juridat*, JC00942_1, *Pas.*, 2000, I, 345; JL02CG1_2; Liège, 7th chamber, 16 December 2002, JL02CG1_2.; Cass., 20 April 2006, *Juridat*, JC064K1_6.

33 S. Heremans, 'Le bouleversement de l'économie contractuelle à la suite d'un changement de circonstances : quelques éclairages nouveaux', *R.G.D.C.*, 2000, 2nd part, p. 573 with the analysis of various decisions, among others comm. Liège, 15 September 1995, *R.D.C.*, 1998, p. 446; P. Wery, 'L'imprévision et ses succédanés', *J.L.M.B.* 1996, p. 105.

34 See A. Van Oevelen, *Kroniek van het verbintenissenrecht*, (1993-2004), *R.W.*, 2004-2005, p. 1644; S. Heremans, 'Le bouleversement', p. 573; L. Vael, *Beschouwingen*, p. 703; C. Delforge, *La spécificité des contrats à long terme*, (thesis), UCL, 2006, note p. 247; E. De Bock, *op. cit.*; D. Philippe, *Le changement*; J.-F. Romain, *Le principe de convention-loi (portée et limites): réflexions au sujet d'un nouveau paradigme contractuel – Les obligations contractuelles* (Jeune barreau de Brussels, 2000), n° 38.1, p. 142.

35 This case can be read on the website *Juridat*; it will be published with observations of D. Philippe in the next number of *DAOR*. (droit des affaires/ondernemingsrecht).

36 C.09.0608.F; justel 20101014-4.

2.1 Force majeure

In general, the courts are reluctant to equate an unforeseen event rendering the contract more onerous with an impossibility to perform. Accordingly, new circumstances which make the performance substantially more difficult do not constitute a case of *force majeure*.³⁷ However, some decisions have given this concept a wide interpretation so that it can be extended to cases of changed circumstances. To give an example, *force majeure* has been applied in cases of frustration of purpose. The famous case, well known in comparative law, of *Dispot Merlin v. Robillard* is the best example. A contract between the parties regulated an express service by road between Rouen and Paris. Two years later, with unexpected speed, a rail connection between these two cities was established. The judge allowed the contract to be terminated by applying the doctrine of *force majeure*.³⁸

The way in which the doctrine of *force majeure* is applied depends on how the effects of an obligation are defined.³⁹ In one case, the lessor was released from his obligation to repair because the leased property could not be retained without excessive expenses. Although it did not make the performance of the contract impossible but merely more costly, it came close to a fortuitous loss. This was based on the definition of the content of the lessor's obligation.⁴⁰ The obligation to repair was held not to extend to repairs caused by unforeseeable circumstances, which led to substantial expenses.

In Belgium, the courts have often given a broad interpretation to the concept of impossibility and the position is that the debtor is not required to ruin himself by performing the contract.⁴¹ Thus, e.g., expensive renovations to living accommodation by a landlord due to new legislation have been con-

37 See J. Carbonnier, *Les Obligations*, vol. IV, Paris: P.U.F 21st ed. 1998, n° 144, p. 270; P.H. Antonmattéi, *Contribution à l'étude de la force majeure*, Paris: LGDJ 1992, n° 118, p. 82; P. Voirin, *De l'imprévision*, pp. 81-84, Cass. civ., 18 January 1950, 1950, I, 227.

38 Comm. Rouen, 28 August 1843, upheld on appeal Rouen, 9 February 1844, *D.*, 1845, p. 4.

39 Applying the doctrine of *force majeure*, it is important to establish the content of an obligation. Tunc distinguishes between obligations of means and obligations to procure. If the contractual obligation qualifies as an obligation of means, the debtor is only liable if he is proved to be at fault, whereas with regard to obligations to procure, the debtor bears the burden of proof that he was not at fault. Nevertheless, Tunc considered that *imprévision*, on the one hand, and the determination of the content of an obligation, on the other, are distinct. While *imprévision* extends to the question whether the contract must be continued or terminated, this doctrine assesses the level of 'diligence' which is required in the performance of the obligation. Cf. A. Tunc, 'Force majeure et absence de faute en matière contractuelle', *R.T.D.Civ.*, 1945, p. 235; 'La force majeure dans ses rapports avec le contenu de l'obligation contractuelle', *J.T.*, 1946, p. 313.

40 See, Y. Rouquet, 'De l'étendue de l'obligation d'entretien du bailleur', *Dalloz* 2001, p. 3622.

41 Comm. Brussels, 9 March 1981, *J.C.B.*, 1982, p. 165.

sidered as a case of *force majeure*. The judge considered that these expenses were disproportionate to the equilibrium of the contract.⁴²

2.2 Cause

A *cause* is the legal reason for an obligation, but it is also used as an expression for the motives or the counterpart of an obligation. In the absence of a *cause*, an obligation does not have to be performed. In the last few years, this concept has been applied more and more frequently.⁴³ The *cause* must be present at the formation of the contract so that future developments are consequently not taken into consideration. However, some situations are very close to the concepts of *imprévision* and frustration of purpose. If, for example, a patent does not lead to the results that the parties had sought in the contract, case law considers that the contract lacks any *cause*.⁴⁴ Similarly, a contract concluded between potential heirs and a genealogist was held to lack a *cause* when the heirs could have had knowledge of the succession without the intervention of a genealogist. A promise to sell agreed in 1908 but only invoked in 1965 was declared void due to a lack of cause because the price had become ridiculous.⁴⁵ In certain borderline cases, future circumstances can deprive a contract of its cause, which is seen as the purpose of the contract.⁴⁶

In Belgian law, the cause must be present at the conclusion of the contract and does not apply in principle in case of a change of circumstances.⁴⁷

2.3 Mistake

A contract which has been concluded due to a mistake is void. A mistake is only considered relevant (1) if it determined the consent of the mistaken party, (2) if it concerns essential qualities of the object of the contract, and (3) if the mistaken party is not at fault. A unilateral mistake is not operable under the

42 Civ. Brussels, 15 February 1973, *J.T.*, 1973, p. 258.

43 J. Ghestin, *La notion d'erreur en droit positif français actuel* (1963), p. 262 et seq. Cf. J.M. Guegen, 'Le renouveau de la cause en tant qu'instrument de justice contractuelle', *D.*, 1999, p. 352; criticising this concept, see X. Lagarde, 'Sur l'utilité de la théorie de la cause', *D.*, 2007, p. 740; the draft Catala maintains the concept of cause (see Articles 1124 to 1126-1).

44 Cass., 21 February 1837, *S.*, 1837, I, 187; 22 August 1844, *S.*, 1844, I, 831; Cass. req, 12 April 1861, *S.*, I, 735. J. Ghestin, *L'erreur*, n. 220.

45 Cass. civ., 20 February 1974, *Bull. civ.*, III, nr. 85, p. 65.

46 See société pour l'extension et l'embellissement de la ville de Biarritz *c/* Guillaume, quoted by E. de Gaudin de la Grande, 'La cause', *Jurisclasseur Périodique*, art. 1131-133 Cciv.

47 See J. Dabin, *La théorie de la cause*, Brussels, 1919; P. Van Ommeslaghe, Observations sur la théorie de la cause dans la jurisprudence et doctrine moderne, *RCJB* 1970, p. 326 et seq.

doctrine of mistake.⁴⁸ A mistake must be present at the formation of the contract; mistakes as to future circumstances cannot be taken into consideration. For example, the fact that an advertisement is not as successful as expected is not sufficient to apply the rules of mistake.⁴⁹

A mistake concerning motives is only considered relevant if the motives and their realisation in the future become part of the contractual agreement. Some borderline cases concern the following situation: a piece of land was sold and the buyer's intention was to build a house.⁵⁰ No guarantee was given by the seller that planning permission would be granted, but the property was sold at the normal price for building land. Furthermore, the seller knew of the buyer's plans. Planning permission was eventually refused, however. In the absence of a contractual guarantee the seller was not held liable. However, the doctrine of mistake was applied.⁵¹ This case concerned circumstances which were present at the formation of the contract (no planning permission) although there were strongly related unexpected developments which occurred subsequently (the refusal of planning permission although both contracting parties had expected that it would be granted).

In Belgium, a mistake relating to future circumstances cannot be taken into consideration.⁵²

A mistake as to motives is only accepted if such motives were integrated into the framework of the contract.⁵³ When, for example, a feasibility study carried out by the seller was a decisive element in the buyer entering into the contract, and the subsequent sales were not in line with the forecasts in the study, the Cour de cassation held that the contract was void.⁵⁴

2.4 Sujétions imprévues (unforeseen burden)

The doctrine of *sujétions imprévues* applies under similar conditions as *imprévision*, i.e. with regard to new circumstances, which are unforeseeable and

48 Cass., 24 April 2003, n° 01-17.458 (n° 503 FS-P+B) , D., 2004, p. 450.

49 See Cass., 16 May 1939, *Giurisprudenza comparata di diritto civile*, 1948, n° 88 and obs. G.B. Funaioli. See J. Ghestin, *L'erreur*, p. 63.

50 See also Rennes, 28 March 1999: The case also concerned a contract for the sale of land where planning permission was subsequently refused. The Court of appeal decided that the lack of a possibility to build constituted a substantial quality of the land and applied the regime of hidden defects instead of the regime of mistake. An appeal was rejected, Cass. civ., 11 February 1981, *Bull. Civ.*, III, n° 31.

51 Riom, 17 May 1979, D., 1980, J, p.12 with obs. G.A.

52 See Ghent, 12 May 1923, *Pas.*, 1924, II, p. 1, Brussels, 8 June 1972, *Pas.*, 1972, II, p. 167.

53 See Ghent, 5 April 1979, *Recueil général de l'enregistrement et du notariat* 1980, p. 436, n° 22551.

54 Cass., 27 October 1995, *Pas.*, 1995, I, 95, *J.T.*, 1996, 61 (this case is not so clear-cut because the feasibility study had been carried out by the other party; the buyer could also have invoked misrepresentation); Cass., 3 March 1967, *Pas.*, I, 811.

beyond the control of the parties, leading to a substantial distortion of the contractual framework. However, contrary to *imprévision*, it concerns ordinary circumstances which are a *natural* occurrence (for instance, the discovery of rocks in the ground) in a construction contract. Sporadically, the courts have extended this doctrine to cases where the circumstances did not have a natural essence. This has been the case with regard to the increased prices for raw materials.⁵⁵

If the requirements of *sujétions imprévues* are met, French law recognises a change of circumstances and grants the contractor an indemnification.⁵⁶ Article 1793 Cciv provides that, in a construction contract, the price of the work cannot be modified when a lump-sum payment has been stipulated. This article has been subject to various exceptions in cases of a substantial disruption of the contractual agreement due to unforeseen circumstances.⁵⁷

The same principles apply in Belgium. *Sujétions imprévues* has also been applied by the courts, although rarely, in cases where the circumstances were not ones which occurred naturally. This was the case with regard to price increases for raw materials, for example.^{58/59}

2.5 Interpretation

According to Article 1156 Cciv, in case of doubt, judges will interpret the will of the parties in order to determine the effects of a contract. Frequently, parties have not thought about various situations that give rise to a dispute and have not expressly regulated this matter. Some authors have denounced the hypocrisy of determining a will that does not exist, arguing that a more honest approach would be to construe a solution based on good faith or usage.⁶⁰ The *rebus sic stantibus* clause is related to interpretation. The parties only accept

55 See Civ. Brussels, 11th chamber; 30 May 1969, SABCA v. Etat belge, unpublished, confirmed by Brussels, 4th chamber, 10 December 1970, RG 1753, quoted by A. De Grand Ry, M.A. Flamme & P. Matheï, n° 374, p. 607.

56 F. Llorens, p. 300; Cass. civ., 23 June 1873 & Cass. req., 20 April 1874, *D.P.*, p. 329; Cass. civ., 6 March 1967, *J.C.P.*, IV, p. 58.

57 L. Fin-langer, *L'équilibre contractuel*, Paris: LGDJ, p. 384, n° 542; Cass., 8 March 1965, *G.P.*, 1997, 32 with obs. M. Peisse; Cass. civ., 12 March 1997, *Bull.*, III, n°54; S. Primont, *L'économie*, p. 274.

58 Brussels, 8 March 2001, *Juridat* JB01381_1, RG 95/AR. See for a recent application, Brussels, 4th chamber, 3 April 2007, RG 1999/AR/2591.

59 See Civ. Brussels, 11ch; 30 May 1969, SABCA v. Etat belge, unpublished, confirmed by Brussels, 4th chamber, 10 December 1970, RG 1753, quoted by A. De Grand Ry, M.A. Flamme & P. Matheï, n° 374, p. 607.

60 Mazeaud, n° 346; F. Llorens, p. 302; J. Maynau, *Les fictions de contrats dans le Code civil et depuis le Code civil* (thesis), Montpellier: 1924, p. 146; F. Terre, *L'influence de la volonté individuelle et qualification*, Paris: 1957, p. 200.

that they are bound by the contract on the basis of an implied term that the contract will not be binding if unforeseeable circumstances occur, which render the performance of the contract extremely burdensome for one of the parties.⁶¹

Judges have, for instance, applied the mechanism of interpretation in the following case of unexpected circumstances: a labour contract signed before World War II contained a clause referring to the jurisdiction of Rouen. The war divided the country into two parts and the contracting parties were subsequently in the free zone of the country. The judge disregarded the competence clause and held that the court of Lyon had jurisdiction.⁶²

In Belgium, there have indeed been decisions in which interpretation has been invoked as the legal basis for amending the contract in cases of changed circumstances.⁶³

Furthermore, the presence of a tacit condition precedent can be implied by the judge on the basis of interpreting the contract. For instance, with the sale of land the parties may assume that planning permission will be granted. If planning permission is refused after the conclusion of the contract, the contract can be brought to an end *ex tunc* on the basis of the condition precedent doctrine.⁶⁴

2.6 Lésion

The doctrine of *lésion* allows a party to rescind the contract when there is a profound imbalance between the values of the respective obligations at the time of concluding the contract.⁶⁵ This doctrine is only recognised by the legislator under specific assumptions.⁶⁶ As a general rule, a change of circumstances after the conclusion of the contract does not give rise to the notion of *lésion*.⁶⁷

There are some cases, however, in which the courts have invoked *lésion* in a case of unexpected circumstances. For example, a judge resorted to *lésion* instead of *imprévision* to justify the rescission of a contract. The contract,

61 Bomsel, *La théorie de l'imprévision en droit civil français*, Paris: Jouve 1922, p. 22.

62 Cass. soc., 11 June, 1942, *D.C.*, 1943, p. 135 with obs. J. Flour.

63 See Civ. Brussels, 24 May 1884, *Pas.*, 1884, III, p. 247; see P. Orianne, *Le contrat de concession*, *Novelles*, p. 247; E. Causin, 'L'interprétation des contrats', in *L'interprétation en droit*, Brussels, 1978.

64 See Liège, 25 March 1970, *J.Lg.*, 1970-1971, p. 115.

65 C. Chantepie, 'La lésion', *L.G.D.J.*, 2006; I; Fin-Langer, 'L'équilibre contractuel', *L.G.D.J.*, 2002; M.A. Perot-Morel, *De l'équilibre des prestations dans la conclusion du contrat*, Paris, 1961.

66 For instance, in case of the sale of land, if the difference in value is higher than 7/12; Art. 1674 *et seq.* of the Civil Code.

67 P. Voirin, *De l'imprévision*, p. 70 *et seq.*; J. Ghestin, *Le contrat*, p. 451; B. Margo, *Lésion « a posteriori » et imprévision dans les contrats* (thesis), Paris: 1949, pp. 150-179.

concluded just before World War I, granted one of the parties an option to buy property some years later at a fixed price. The option could be cancelled within 5 years. Due to a significant depreciation in currency after World War I, the actual price represented only 70% of the value of the original agreed price. In order to overcome this unjust result, the judge applied the doctrine of *lésion*.⁶⁸ This solution was confirmed by the legislator in the Act of 28 November 1949, according to which a *lésion*, in case of a unilateral promise to sell, must be assessed at the time of performance.⁶⁹

Similar solutions apply in Belgium.⁷⁰

2.7 Good faith (Article 1134, 3 Cciv) and equity (Article 1135 Cciv)

The parties are bound by the content of a contract, but the contract must be performed in accordance with the norms derived from the law, usage and equity. The relationship between good faith (Article 1134, 3 Cciv) and equity is not clearly defined. Good faith can entail an obligation to renegotiate a contract. However, the effects of good faith remain uncertain in French law.⁷¹ Nonetheless, it is admitted that, in principle, good faith cannot have a corrective effect.⁷² In a recent decision, the Cour de cassation refused to intervene concerning the content of contractual obligations.⁷³ The judge nevertheless sanctioned an unfair use of contractual rights. For example, it needs to be stressed, as mentioned earlier, that the obligation of renegotiation in case of a change of circumstances is based on good faith.

Some authors propose that equity could have a corrective function so that the judge can adjust the contract in case of a change of circumstances.⁷⁴ Article 1135 Cciv permits a court to impose obligations on the parties on the basis

68 See Cass. req., 19 April 1926, *S.*, 1926, I, p. 128. See Article 1674 of the Civil Code.

69 Art. 1675, §2 of the French Civil Code.

70 See Cass., 13 July 1923, *Pas.* 1923 with the conclusions of Terlinden, rejecting recourse against Brussels, 5 April 1922, *Pas.*, 1922, II, p. 65, appeal by the judgment of Civ. Brussels, 22 June 1921, *Pas.*, 1923, II, p. 67; Civ. Ghent, 23 May 1923, *J.T.*, 1921-1924, c. 490; Civ. Liège, 10 July 1923, *Pas.*, 1923, III, p. 145. In my opinion this was an incorrect application of the doctrine of *lésion* because the imbalance was not present when the contract was concluded, but only when the contract was performed.

71 See B. Fauvarque Cosson & S. Amrani Mekki, *Droit des contrats*, 2007, p. 2966.

72 C. Albiges, *De l'équité en droit privé*, 200, n° 305, Paris: LGDJ 2000; concerning the distinction between article 1134-3 and article 1135 C.Code, see P. Jacques, 'Regards sur l'article 1135 du Code civil', *Dalloz*, 2005, 295.

73 Cass. com., 10 July 2007, n° 06-14.768, 2007, *AJ* 1955, obs. X. Delpech.

74 D. Tallon, *La révision du contrat pour imprévision au regard des enseignements du droit comparé*, *Droit et vie des affaires, Etudes à la mémoire de A. SAYAG*, Paris: Litec 1998; F. Cherigny, *La révision judiciaire des conventions en droit privé français* (thesis), Poitiers: 1994.

of equity while Article 1134, par. 3 Cciv concerns the behaviour of the parties in the performance of the contract.⁷⁵

Under Belgian law good faith requires collaboration and cooperation between the parties in the performance of the contract.

With regard to the performance of a contract, the concept of good faith is recognised by Article 1134, par. 3 Cciv, while the aspect of good faith with regard to the completion of a contract is recognised by Article 1135 of the Civil Code.⁷⁶

In the literature four different implications of good faith are distinguished, namely (1) the completion, (2) modification, (3) derogation or (4) adaptation of a contract. However, the Cour de cassation has rejected the adaptive effect of good faith.⁷⁷ Sometimes the courts have decided that insisting on the performance of a contract that is not based on a just equilibrium is contrary to good faith.⁷⁸ However, as we will explain in the next paragraph, the court has recognised the abuse of rights in case of a change of circumstances and abuse of rights is based on Article 1134, par. 3 Cciv.

The completing effect of good faith can, in principle, be based on Article 1135 Cciv, but only insofar as this principle can accommodate a change of circumstances. For instance, when an unforeseen event occurs, the judge can complete the contract in order to provide a legal regime for this new circumstance.⁷⁹

2.8 Abuse of rights (Belgium)

The doctrine of abuse of rights applies when a person uses his legal position to intentionally cause harm to another person or to obtain an advantage which is disproportionate in comparison with the damage caused to another person.⁸⁰

Based on the doctrine of abuse of rights, the courts might consider it abusive to insist on the performance of a contract if the debtor incurs a substantial commercial loss and the creditor realises high profits.⁸¹ In the past, Belgian law did not recognise, in principle, unexpected circumstances on the

75 Jacques, p. 306, n° 163.

76 D. Philippe, *De Rechter en de inhoud van de overeenkomst*, in *De overeenkomst vandaag en morgen* (Kluwer, 1990), p. 543 *et seq.*

77 *Cass.*, 7 February 1994, *Juridat*, JC94271_2, *Pas.*, I, 150; *Cass.*, 4 September 2000, *Juridat*, JC00942_1, *Pas.*, 2000, I, 345; JL02CG1_2; Liège, 7th chamber 16 December 2002, JL02CG1_2.

78 Liège, 21 December 2001, *J.T.*, 2002, p. 564; see Liège 12 October 1999, *J.L.M.B.*, 99/1221.

79 D. Philippe, 'De inhoud'.

80 P. A. Foriers, 'Observations sur le thème de l'abus de droit en matière contractuelle', *R.C.J.B.*, 1994, pp. 189 to 240.

81 See L. Champion, *La théorie de l'abus des droits* (1925), n° 226 to 227.

basis of an abuse of rights. It has, however, been recognised in the case of 14 October 2010 quoted above.

2.9 Caducité

The doctrine of *caducité* applies if, after the formation of the contract, new circumstances arise that lead to a lacuna regarding an essential element of the contract (i.e. the subject matter of the contract). *Caducité* does not necessarily require a distortion of the contractual equilibrium, as is the case with *imprévision*, or an impossibility to perform, as in case of *force majeure*; furthermore, the new circumstances must not have been unforeseeable. *Caducité* allows the aggrieved party to terminate the contract *ex nunc*.⁸² The lapsing of an index mechanism to determine prices in a long-term supply contract has been considered to be an example of *caducité*.⁸³

In a decision dated 16 November 1989, the Cour de cassation admitted that the doctrine of *caducité* not only applies in cases where certain elements of the contract are absent, but also when the *cause*, i.e. the purpose of the contract, is frustrated, thereby converging with the notion of frustration of purpose. However, the relevant decision concerned a gratuitous contract and it is questionable whether this doctrine could also be applied with regard to non-gratuitous contracts. More recently, the Cour de cassation has held in an important case that this doctrine is not relevant for non-gratuitous contracts.⁸⁴

2.10 Deferred payment

Debtors may encounter difficulties in making payment due to unforeseeable circumstances. In such situations the judge is entitled to reschedule the payment according to Art. 1244-1 Cciv. This provision cannot be considered as a rule concerning unexpected circumstances because the content of the debtor's obligation remains unchanged.⁸⁵ However, in connection with the problems

82 Civ. Namur 26 April 1990, *R.R.D.* 1990, p. 489.

82 J. F. Romain, 'Clarifications concernant la théorie de la caducité des actes juridiques, en particulier des libéralités testamentaires, par disparition de leur cause-mobile déterminant'; obs. under Cass., 21 January 2000, *R.C.J.B.*, 2004, 77; for a recent discussion on the application of this doctrine following the entry into force of regulation 1400/2002 in case of exclusive distribution agreements, comm. Brussels, 28 March 2006, *J.T.*, 2006, and observations P. Kileste & C. Staudt, p. 511; P.-A. Foriers, *La caducité des obligations contractuelles par disparition d'un élément essentiel à leur formation*, Brussels: Bruylant 1998.

83 See D. Philippe, *Les clauses relatives au changement de circonstances dans les contrats à long terme* in *La vie du contrat à prestations successives*, 1991, p. 170.

84 Rôle C980335F, N Justel F-20000121-7.

85 D. Philippe, *Changement de circonstances et bouleversement de l'économie contractuelle*, Bruylant 1986, p. 143; P. Voirin, *De l'imprévision*, p. 208.

in performing obligations after World War I, some judges used this provision as a legal basis for correcting contractual obligations.⁸⁶

2.11 Unjust enrichment

The rules on unjust enrichment could have been considered as a legal basis for renegotiating a contract in case of an imbalance in the contractual obligations where one party would profit to the detriment of the other party who suffers a loss. The application of unjust enrichment is, however, dependent upon four conditions, namely (1) an enrichment of one party, (2) at the expense of the other party, (3) a causal link between the enrichment and the expense, and (4) subsidiarity, which means that this doctrine will not apply if the enrichment has a legal cause. This concept does not apply, in principle, to a change of circumstances because in such cases the unjust enrichment can be put down to a cause. The agreed terms of the contract provide a legal ground for the enrichment and the expense incurred.⁸⁷

The same solution applies in Belgium.

3 CONCLUSION

We can first specify that in commercial contracts, the change of circumstances is contractually regulated by hardship clauses.

Furthermore, this doctrine is in full evolution in Belgium and France and the adoption of the European optional instrument on contract law, which organises the change of circumstances, will certainly have an influence on internal national French and Belgian law.⁸⁸

⁸⁶ M. Planiol & G. Ripert, p. 549; P. Voirin, *De l'imprévision*, p. 208; Rouen, 19 May 1871 (the war between France & Germany), *D.*, 1871, 2, 179.

⁸⁷ J. Ghestin, Ch. Jamin & M. Billiau, *Les effets du contrat*, Paris: 2001, n° 312, p. 357.

⁸⁸ See Proposal for a regulation of the European Parliament and the Council on the common European sales law, 11 October 2011, COM (2011) 635 final, 2011/284, COD, article 89 of the proposal.