



Universiteit
Leiden
The Netherlands

Change of circumstances in Latin American law. A comparative overview

Momberg, R.

Citation

Momberg, R. (2012). Change of circumstances in Latin American law. A comparative overview. *Bw-Krant Jaarboek*, 27, 135-155. Retrieved from <https://hdl.handle.net/1887/36686>

Version: Not Applicable (or Unknown)

License: [Leiden University Non-exclusive license](#)

Downloaded from: <https://hdl.handle.net/1887/36686>

Note: To cite this publication please use the final published version (if applicable).

Rodrigo Momberg [■]

1 INTRODUCTION

Latin American law is without any doubt part of Western law. Besides this, Latin American jurisdictions are, to a great extent, civil-law systems. Traditional comparative law places Latin America within the Romano-Germanic legal family, attached to the French group of influence.¹ With a different terminology, Zweigert and Kötz categorize Latin America in the Romanistic legal family, i.e. those legal systems which adopted the French Civil Code as a main source of inspiration.²

Therefore, the links between Latin American private law and European private law cannot be denied, particularly with regard to its origins. However, the originality of Latin American law has also been stressed because of the variety and selection of its sources:³

‘Latin America is original in a first sense, and it is interesting to study, because it has adopted in whole neither French law, nor Spanish law, nor Portuguese law, nor Italian law, nor German law. It has made the effort to take the best of each from those laws (...).’

The special and typical features of Latin American legal systems have been sometimes oversimplified in terms of their public law being ‘more North American than European’ and their private law ‘more European than North American’.⁴ In the end, although being placed undoubtedly in the civil-law tradition, Latin American jurisdictions should be regarded as systems with

■ Rodrigo Momberg is assistant professor at the Faculty of Law, Austral University of Chile and honorary lecturer at the Molengraaff Institute of Private Law, Utrecht University.

1 See R. David, *Traité élémentaire de droit civil comparé: introduction à l'étude des droits étrangers et à la méthode comparative*, LGDJ, Paris, 1950.

2 K. Zweigert, and H. Kötz, *An Introduction to Comparative Law*, Clarendon Press Oxford, Oxford, 1998, p. 73.

3 R. David, *L'Originalité des Droits de l'Amérique Latine*; cited by J.L. Esquirol, ‘The Fictions of Latin American Law’ (Part I), *Utah Law Review* (1997), 425, p. 463.

4 J.H. Merryman, and D.S. Clark, *Comparative Law, Western European and Latin American Legal Systems: Cases and Materials*, Bobbs-Merrill, Indianapolis, 1978, p. 207.

unique and particular features, and not as simple replicas of one or more European legal systems.

This paper has the aim to present to the reader an introduction to the subject of change of circumstances or *imprevisión* as it is provided by the main Latin American jurisdictions. To this end, a comparative overview will be presented with regard to Argentina, Brazil, Chile, Colombia, Paraguay, Peru and Uruguay (section 3), followed by special reference to Argentinian private law, which both in legal doctrine and case law has developed a complex and comprehensive system for the application of the subject (section 4). Previous to the comparative survey, a brief historical approach is introduced as a means to give an idea of the development of the subject in Latin America (section 2).

2 HISTORICAL REMARKS

After independence from Spanish colonization in the early nineteenth century, one of the first objectives of the new republics was the enactment of civil codes, as a consolidation of their new status:⁵

‘the very act of establishing new national law was an assertion and validation of national identity and power.’

Additionally, Spanish colonial law was a symbol of the old regime and was also based on a complex system of sources, which included a lack of uniformity and contradictory rules, making it difficult to know and apply the law.⁶ As to the task of codification, the French Civil Code was the main source of inspiration for the drafters of Latin American codes. On the one hand, from a legal perspective, because of its strong links with Roman law, this does not represent a complete break with the previous colonial sources such as *Las Siete Partidas* or the *Fueros*; and it was the only available model of a national and unifying Code at that time.⁷ On the other hand, from a philosophical perspect-

5 M.C. Mirow, *Latin American Law: A History of Private Law and Institutions in Spanish America*, University of Texas Press, Austin, 2004, p. 104. The invasion of Spain by Napoleon in 1808 was the starting point for the independence process of Latin America. For instance, Argentina declared its independence in 1816 and Chile in 1818.

6 M.C. Mirow, ‘Individual Experience in Legal Change: Exploring a Neglected Factor in Nineteenth-Century Latin American Codification’, *Southwestern Journal of Law and Trade in the Americas* 11, 301, p. 304 (2005).

7 Zweigert and Kötz, *supra* note 2, p. 113. The Prussian General Land Law of 1794 and the Austrian Civil Code of 1811 were also available at that time, but both were linked to absolute and monarchical regimes and had a conceptualism and abstraction which was not familiar to Latin American jurists. Besides, regarding their structure, both instruments included not only private-law but also public-law provisions and also considering the huge volume of the Prussian General Land Law (almost 20,000 articles), these were decisive factors to exclude them as main sources of inspiration.

ive, it was considered a reflection of the ideals of the French Revolution as individual freedom, equality under the law, private property and the separation of powers.⁸ Finally, in practical terms, it was easily accessible for Latin American jurists and for the elites who were at that time highly competent in the French language.⁹

The influence of the French *Code Civil* on the 19th-century Latin American codifications, and more important, of the liberal doctrine on which it was based, were the main reasons for the great relevance given by that Civil Code to the *pacta sunt servanda* principle, including provisions on supervening circumstances only in cases of impossibility and force majeure. The analysis of the two most influential Latin American Civil Codes of the 19th century confirms this assertion. Thus, in its original version, the Argentinian Civil Code did not include a general provision on *imprevisión*, and on the contrary, article 1197 stated that 'Agreements made in contracts are for the parties a rule to which they should conform as to the law itself'.¹⁰ The notes of the drafter of the Code, Dalmacio Vélez Sarfield explained the provision on the ground that 'the free consent of the parties, given without fraud, mistake or duress and in accordance with the legal formalities, should make contracts irrevocable'.¹¹ In the same sense, article 1545 of the Chilean Civil Code, which is based on article 1134 of the *Code Civil*, provides that 'Contracts lawfully entered into are a law for the contracting parties and cannot be invalidated except by mutual consent or for causes authorized by law'.¹²

However, as it will be analysed in the following sections, the severe economic circumstances and social changes of the 20th century, as well as the influence of modern civil codes and the reception of new legal theories such as the socialization of private law and solidarity in contract law led to the inclusion of rules on change of circumstances in the reform of the Latin American civil codes.

8 M. Murillo, 'The Evolution of Codification in the Civil Law Legal Systems: Towards Decodification and Recodification', *Journal of transnational law policy* 11, 163-182, p. 5 (2001).

9 Mirow, *supra* note 6, p. 305, adding that 'France served as a model in mid-nineteenth century Latin America not only in politics and legislation, but also in culture, fashion, language and intellectual outlook.'

10 Art. 1197: 'Las convenciones hechas en los contratos forman para las partes una regla a la cual deben someterse como a la ley misma'. Author's own translation.

11 Cited by A. Alterini, *Teoría de la imprevisión y cláusula de hardship* (2007). Available at <<https://www.u-cursos.cl/derecho/2007/2/D122A0311/1/.../150228>>.

12 Article 1545: 'Todo contrato legalmente celebrado es una ley para los contratantes y no puede ser invalidado sino por su consentimiento mutuo o por causas legales'. Author's own translation.

3 COMPARATIVE OVERVIEW

As stated above, provisions on change of circumstances or *imprevisión* were included in Latin American civil codes during the 20th century. The main exception to this trend has been the Chilean Civil Code, whose Book IV on ‘Obligations in General and Contracts’ remains without any significant amendment to its original draft.

However, the non-existence of an express legal provision does not necessarily imply the rejection by a given legal system of change of circumstances as a ground for relief for the affected party. In this sense, a distinction will be made between receptive and unreceptive legal systems, based on the readiness (or not) of the legal system to recognise situations of changed circumstances as being legally relevant, granting the possibility to the affected party to rely on a system of remedies in that case.¹³

3.1 Receptive legal systems

3.1.1 Argentina

The *imprevisión* theory was introduced in the second part of article 1198 of the Argentinian Civil Code by Act 17.711 of 1968. The provision was based mainly on the rules of the Italian Civil Code of 1942, and has been the model for subsequent reforms in Paraguay and Brazil. Because of its relevance, Argentinian law will be analysed in detail in section 4.

3.1.2 Brazil

Although the subject of change of circumstances was not recognised by the Brazilian Civil Code of 1916, the legal doctrine and an important number of judicial decisions had accepted its application based on the principle of good faith.¹⁴ The new Brazilian Civil Code of 2002 regulates the subject under the title of ‘Termination by excessive onerosity’ (*Resolução por onerosidade excessiva*). The provisions are based on the corresponding provisions of the Italian and Argentinian Civil Codes. Thus, the affected party has the right to claim

13 For a similar approach see E. Hondius, H. Grigoleit, (eds.), *Unexpected Circumstances in European Contract Law*, Cambridge, University Press, 2011, where the legal systems are grouped in ‘open’ and ‘closed’, based on the criterion whether or not a jurisdiction recognises a general rule under which the contract can be adjusted to unexpected circumstances by the courts.

14 S. Sanches, *Questões relevantes sobre a resolução de contratos por onerosidade excessiva no direito brasileiro*, available at <http://www.fiesp.com.br/download/assessoria_juridica/artigo_sydney_sanches.pdf>; and J. Neves, *A nova dimensão dos contratos no caminho da pós-modernidade*, Doctoral thesis, Universidade Federal do Rio Grande do Sul, 2006, p. 239.

the termination of the contract in case of excessive onerousness derived from extraordinary and unforeseeable events (article 478) and the other party may prevent the termination of the contract by offering its equitable modification (article 479). In case of unilateral contracts, i.e. those with obligations for only one of the parties, the affected party may claim the reduction or modification of his performance, in order to reduce the effects of the excessive onerousness. These provisions are the consequence of the express recognition by the new Civil Code of the 'social function of contract' as a parameter for the performance and interpretation of contracts as well as a complement of the general principle of freedom of contract.¹⁵

Before the enactment of the new Civil Code, change of circumstances was already included in the 1990's Code for the Defence of the Consumer (*Código de Defesa do Consumidor*), providing as a basic right of the consumer the revision of the contract terms 'in case supervening circumstances make their performance excessively onerous for the consumer' (article 6.V). Brazilian legal doctrine has stressed that this provision is far less strict than the Civil Code's rules on the subject, this being justified by reason of the position of the consumer as the weaker party in the relationship.¹⁶

3.1.3 Colombia

The Colombian Civil Code, like its Chilean model, does not provide a legal rule on change of circumstances. However, the Colombian Supreme Court has expressly recognised *imprevisión* as a general principle of law (*principio general del derecho*). Besides, the Colombian Commercial Code of 1971 includes in its article 868 a provision on excessive onerousness which is applicable to commercial contracts with periodic or deferred performance. Under that provision, the affected party is entitled to request the adaptation of the contract and the court has the power to revise the contract based on equity parameters. If the revision is not possible, the court may terminate the contract. With regard to that article, Colombian legal doctrine has stated that such a provision is applicable vis-à-vis civil contracts.¹⁷

15 Article 421 of the new Brazilian Civil Code states that 'Freedom of contract should be exercised considering and within the limits of the social function of the contract'. Author's own translation.

16 J.H. Neto, 'A resolução por onerosidade excessiva no novo código civil: uma quimera jurídica?', *Revista da Escola Superior da Magistratura de Sergipe*, n° 04, 41-56 (2003).

17 W. Jiménez, *La teoría de la imprevisión ¿Regla o principio general del derecho?* Available at <<http://www.docentes.unal.edu.co/wjimenezg/docs/LA%20TEOR%3FA%20DE%20LA%20IMPREVISI%3FN.pdf>>; and L. Moisset de Espanés, 'Imprevisión: legislación de América del Sur', *Anuario de Derecho Civil*, 1147-1182 (1996).

3.1.4 Paraguay

In 1876 Paraguay integrally adopted the Argentinian Civil Code which, as stated above, did not contain any general rule on changed circumstances. The work for reforming the code started in the middle of the 20th century and finally in 1987 a new Civil Code was adopted. The new Code includes an express rule on *imprevisión* (article 672), which is almost a literal translation of the provisions on *excessiva onerosità* (articles 1467 and 1468) of the Italian *Codice Civile*.¹⁸

3.1.5 Peru

The Peruvian Civil Code of 1984 contains a complete and innovative regulation of the subject, devoting six articles under the title of the ‘excessive onerosness of the obligation’ (*excesiva onerosidad de la prestación*, articles 1440 to 1446). The rules are applicable to bilateral and aleatory contracts whose performance has become excessively onerous because of unforeseeable and extraordinary circumstances. The affected party is entitled to request the adaptation or termination of the contract and his claim (action) is subject to a brief prescription period (three months since the occurrence of the event which has given rise to the excessive onerosness).¹⁹

3.2 Unreceptive legal systems

3.2.1 Chile²⁰

The main obstacle to the application of *imprevisión* in Chilean private law has been the above-cited article 1545 of the Civil Code, which strongly affirms the principle of sanctity of contracts. Based on that provision, traditional Chilean legal doctrine rejects the possibility of a revision of contracts in cases of *imprevisión* and in any other case which is not expressly regulated.²¹ On

18 And therefore, also very close to the provisions of the Argentinian Civil Code. See M. Liksenberg, and A. Maine, *La teoría de la imprevisión en el ámbito del Mercosur*, Academia Nacional de Derecho y Ciencias Sociales de Córdoba (2009). Available at <<http://www.acaderc.org.ar/doctrina/articulos/la-teoria-de-la-imprevision-en-el-ambito-del/?searchterm=ciencias>>.

19 See Moisset de Espanés, *supra* note 17.

20 For an extensive analysis of the subject in Chilean law, see R. Momberg, *The Effect of a Change of Circumstances on the Binding Force of Contracts. Comparative Perspectives*, Intersentia, Antwerp, 2011.

21 Some particular rules of the Chilean Civil Code do allow the modification of specific contracts in cases of unexpected circumstances: articles 2003 rule 2a (construction contracts – *contrato de construcción*), 2180 (loan for use – *comodato*) and 2227 (bailment – *depósito*). Conversely, articles 1983 (lease of rural property – *arrendamiento de predios rústicos*) and

the contrary, most of the contemporary Chilean legal doctrine argues for the application of *imprevisión* in Chilean private law, based on article 1546 of the Civil Code, which provides for the principle of good faith in the performance of contracts.²² However, in a number of decisions the Chilean Supreme Court reaffirmed the principle of the sanctity of contracts. Recently, in the *South Andes* case,²³ the Court expressly rejected the possibility of applying *imprevisión* in the light of the legal provisions in force, which were interpreted as excluding the revision of contracts in cases of changed circumstances and, on the contrary, as a manifestation of the absolute prevalence of the principle of *pacta sunt servanda*.²⁴

3.2.2 Uruguay

The situation of Uruguayan private law is analogous to that described above for Chile. Thus, there is no express recognition in the Civil Code of the theory of *imprevisión*, and legal doctrine is divided about its admission as a ground for relief for the affected party. Additionally, Uruguayan case law has unanimously rejected the application of changed circumstances in cases of excessive onerousness, stating that the legal provisions in force leave no room for the admission of *imprevisión*.²⁵

4 UNEXPECTED CIRCUMSTANCES IN ARGENTINIAN LAW

As stated above, in its original version, the Argentinian Civil Code strongly supports the principles of freedom of contract and *pacta sunt servanda*. The *imprevisión* theory was incorporated into the second paragraph of article 1198 of the Argentinian Civil Code by Act 17.711 of 1968, which introduced relevant

2003 rule 1 (construction contracts – *contrato de construcción*) expressly reject the modification of such contracts on the basis of a change of circumstances.

22 Article 1546: ‘Contracts must be performed in good faith and are consequently binding not only as to what is expressed therein, but also with regard to all consequences which are derived from the nature of the obligation, or belong to it by statute or usage’ (*Los contratos deben ejecutarse de buena fe, y por consiguiente obligan no sólo a lo que en ellos se expresa, sino a todas las cosas que emanan precisamente de la naturaleza de la obligación, o que por la ley o la costumbre pertenecen a ella*). Author’s own translation). The direct sources of this provision are articles 1134 and 1135 of the *Code civil*. However, the Chilean legislator did not incorporate the concept of equity (*l’équité*) in the provision, because it was considered unnecessary regarding other provisions of the Code. See R. Abeliuk, *Las obligaciones*, Editorial Jurídica de Chile: Santiago, 2001, p. 119.

23 *South Andes Capital S.A. c/ Empresa Portuaria Valparaíso*, Corte Suprema, 09.09.2009, rol 2651-08.

24 There is only one reported case, delivered by the Court of Appeal of Santiago, in which the application of *imprevisión* was accepted, *Guillermo Larraín Vial con Servicio de Vivienda y Urbanización de la Región Metropolitana*, (11.11.2006).

25 See Liksenberg and Maine, *supra* note 18.

reforms to the whole law of obligations in the Code. The direct source of such a rule is Recommendation 15 of the Third National Congress of Civil Law (Córdoba, 1961) which, in turn, was based on article 1467 of the Italian *Codice Civile*.²⁶

Since then, Argentinian legal theory and case law have developed a consistent doctrine with regard to the subject of unexpected circumstances. In this sense, the conditions and effects of *imprevisión* have been widely analysed in theory and tested in practice, especially in periods of economic crisis which have affected Argentina since 1975. Because of these reasons and the similarities between the Argentinian legal provisions and the corresponding articles of the Brazilian and Paraguayan Civil Codes, a detailed analysis of the matter with regard to Argentinian private law is given in the following sections.

4.1 The conditions for the application of article 1198

Article 1198 (second part) of the Argentinian Civil Code provides:

In bilateral commutative contracts and in unilateral onerous commutative contracts for deferred performance or for continuous performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the affected party may demand the termination of the contract. The same principle is applicable to aleatory contracts when the excessive onerosity is derived from causes which are external to the inherent risks of the contract.

In contracts for continuous performance, their termination will not affect that which has already been performed.

Termination cannot be demanded if the affected party has been at fault or is in default.

A party against whom the dissolution is demanded may prevent this by offering to improve the conditions of the contract equitably.²⁷

26 M.A. Araujo, *Revisión de los contratos: Teoría de la excesiva onerosidad sobreviniente o teoría de la imprevisión*. *Trabajos del Centro de Investigaciones de Derecho Civil, Facultad de Derecho, U.N.R.*, 95-101, p. 96 (1997). The Second National Congress of Civil Law (Córdoba, 1937), which analysed the reform project of 1936, also recommended the inclusion of the *imprevisión* doctrine in such a project; see Moisset de Espanés, *supra* note 17. Even before the introduction of the present text of article 1198 into the Civil Code, case law had recognized the application of the *imprevisión* theory. For reported cases see Moisset de Espanés, *supra* note 17; and L.R. Flah, M. Smayevsky, *Teoría de la imprevisión*, LexisNexis-Depalma: Buenos Aires, 2003, pp. 141-142.

27 Art. 1198 (second paragraph): 'En los contratos bilaterales conmutativos y en los unilaterales onerosos y conmutativos de ejecución diferida o continuada, si la prestación a cargo de una de las partes se tornara excesivamente onerosa, por acontecimientos extraordinarios e imprevisibles, la parte perjudicada podrá demandar la resolución del contrato. El mismo principio se aplicará a los contratos aleatorios cuando la excesiva onerosidad se produzca por causas extrañas al riesgo propio del contrato. En los contratos de ejecución continuada

4.1.1 Contracts covered by the provision

Article 1198 is applicable to bilateral commutative contracts and to unilateral onerous commutative contracts for deferred performance or for continuous performance, and to aleatory contracts when the excessively onerous nature is derived from causes external to the inherent risks of the contract.

As in Chilean law, *bilateral contracts* are those with reciprocal obligations (art. 1138) and *unilateral contracts* are those where only one of the parties assumes an obligation to the benefit of the other. The contract is *onerous* if the mutually expected benefit relies on the performance of the reciprocal obligations, and *gratuitous* if one party obtains a benefit without any performance of its own (article 1139). Finally, the contract is *commutative* where the reciprocal obligations are considered to be equivalent by the parties;²⁸ and *aleatory* if the expected equivalent consists of an uncertain possibility of a loss or gain for one of the parties (article 2051). With regard to the latter, the provision requires that the excessively onerous nature was not the consequence of the inherent risk of the contract. For instance, contracts which included a 'U.S. dollar clause', i.e. a clause linking the amount of the contract price to the value of the U.S. dollar on the exchange market, concluded during the economically extremely unstable period after the governmental change in the exchange policy of February 1981, were considered by the courts to be aleatory contracts and therefore excluded from the application of article 1198, because the risk of variations in the U.S. dollar exchange rate was considered to be inherent to the contract.²⁹ The express inclusion of aleatory contracts is arguable because in such contracts uncertainty is part of the nature of the agreement, and therefore, the parties have assumed the change of circumstances as a normal consequence. In this regard, the Italian *Codice Civile* expressly excludes aleatory contracts from the application of the rules of *eccessiva onerosità*.³⁰

As a common feature the contract should concern deferred or continuous performance, i.e. those obligations which are not performed at the same time as the conclusion of the contract but during a period of time after such conclusion. In this sense, it has been held that for the application of this requirement it is enough that

la resolución no alcanzará a los efectos ya cumplidos. No procederá la resolución, si el perjudicado hubiese obrado con culpa o estuviere en mora. La otra parte podrá impedir la resolución ofreciendo mejorar equitativamente los efectos del contrato.' Author's own translation.

28 The Civil Code contains no definition of such a category of contracts, but legal doctrine agrees with the concept set out above. See Flah, Smayevsky, *supra* note 26, p. 34.

29 C1° Civ. y Com., San Isidro, sala II, 1985/02/19, *Climberg G. c/ Chiro Tarrab, A.*; CNCiv., sala B, 1987/04/07, *Spada de Makintach, S. c/ Tonelli, C.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, Leiva Fernández, L. (Dir.), La Ley, Buenos Aires, 2003, p. 235.

30 See article 1469 of the Italian *Codice Civile*.

‘the change of circumstances takes place in the period of time between the conclusion of the contract and its performance, without formally requiring a contract for deferred or for continuous performance.’³¹

Moreover, most of the case law agrees that the obligation which is alleged to be excessively onerous should not yet have been performed. Therefore, if the price has been paid completely, the seller who has accepted it without any reservation of his/her rights cannot subsequently invoke the remedies of article 1198 to terminate or revise the contract. In general, ‘the provision of article 1198 is not applicable when the juridical relationships derived from the contract have already been extinguished’.³²

4.1.2 *The excessively onerous nature of the performance*

Article 1198 requires that the performance of one of the parties has become excessively onerous. This condition has been linked by Argentinian legal doctrine and case law to the (relative) equivalence of the counter-obligations which is considered to be part of the nature of commutative contracts. Thus, it is argued that the contract, as the most important instrument for the exchange of goods and services, is subject to the principle of commutative justice and therefore intervention by a third party (the judge) in the contract is legitimate when extraordinary circumstances lead to a complete rupture in the economic balance of the contract as was intended by the parties upon its conclusion.³³ Therefore, the performance becomes excessively onerous if it loses its economic relationship with the counter-performance, making the sacrifice much larger than the benefit for one of the parties and vice versa.³⁴

As a consequence, the assessment of this degree of onerousness requires a comparison between the counter-performances, is intrinsic in the contractual relationship and cannot be made only with reference to the performance of the affected party.³⁵ Therefore, if both counter-obligations have increased or

31 CNCiv., sala C, 1979/07/05, *Hofman, M. c/ González, E.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 234.

32 CNCiv., sala E, 1978/09/05, *Barcheta, C. y otro c/ Asociación Civil Santísima Cruz*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, with further references to similar cases on pp. 244-246.

33 See M. Cornet, ‘La aplicación de la teoría de la imprevisión y la emergencia económica’, *Anuario de Derecho Civil, Universidad Católica de Córdoba* 7, 77-115 (2002).

34 C. Ghersi, *Contratos civiles y comerciales*, p. 307, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 164.

35 Flah, Smayevsky, *supra* note 26, p. 38. See CNCom. Sala D, 08.03.84 *Beltramino A. c/ Banco Argentino de Inversión*: ‘The onerousness required by article 1198 cannot be valued taking into account only the performance of the party which alleges the *imprevisión*, but is related to the equivalence of the reciprocal obligations of the parties, so that the deferred performance ceases to be economically correlative and therefore the performance of the contract as concluded leads to a disproportion in such a performance to the benefit of one of the parties and to the detriment of the other’; cited by Cornet, *supra* note 33.

decreased in value with similar intensity, the original balance is not altered and so there is no case of an excessively onerous performance.³⁶ Similarly, external considerations, such as the effects of the contract's performance on the economic situation of the affected party, are not sufficient or adequate standards for the configuration of excessive onerousness if they do not affect the internal equilibrium of the counter-obligations of the parties.³⁷

Case law has stated that because of the general terms of article 1198, the determination of excessive onerousness cannot be made by arithmetical parameters, but is a task for the judge who has to consider the circumstances of the particular case in order to establish the seriousness of the detriment in the balance of the contract as considered by the parties at the time of its conclusion.³⁸

Finally, the loss of value of the agreed counter-performance has also been recognized by case law as a situation of excessive onerousness, especially in cases related to the sale of immovable property where the contract price has become insignificant because of the devaluation of currency or hyperinflation.³⁹

4.1.3 *Extraordinary and unforeseeable events*

For the application of article 1198, the excessively onerous nature of the performance should be caused by extraordinary *and* unforeseeable events. Both concepts are intrinsically linked and it is mostly difficult to distinguish them in legal doctrine and especially in case law. As a common feature, the events have to take place after the conclusion of the contract and should be external to the parties.⁴⁰

However, due to the theoretical difficulties in distinguishing the above-mentioned conditions, the concept of 'extraordinary' has been related by legal doctrine to unusual events, which do not normally occur and are therefore unpredictable for the average citizen. The event should be of a general nature, affecting society as a whole or at least an entire category of parties in the same situation and should not only be related to the personal circumstances of the affected party.⁴¹ On the other hand, unforeseeability is related to the aptitude

36 M. Smayevsky, *Reflexiones acerca de la aplicación de la teoría de la imprevisión en el contrato de compraventa*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 166.

37 R. Lorenzetti *La excesiva onerosidad sobreviniente*, p. 165; and case law cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 167 and pp. 260-262.

38 See references to case law in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 260-261.

39 CNCiv., sala B, 1981/05/14, *Pasqualucci, D. y otra c/ Sticca, J.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 259, with further references to case law.

40 See *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 250-252.

41 See C. Ghersi, *Contratos civiles y comerciales*, p. 307, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 164.

of the parties to foresee and to anticipate such events, acting with proper diligence and care, according to the circumstances of the particular case.⁴²

Additionally, for qualifying a circumstance as extraordinary and unforeseeable, case law has usually used the same parameters as in cases of *force majeure*, especially in relation to articles 514 and 901 of the Argentinian Civil Code, stating that ‘such an event should be analysed in relation to the provision of article 514 of the Civil Code, and therefore it should be supervening, external to the will of the parties and outside the normal standard of foreseeability for such parties, as well as being unavoidable even with the diligence required in similar cases’ and that ‘similar to the cases of *force majeure* and *cas fortuit*, the events in cases of *imprevisión* have to be serious, exceptional, abnormal and unavoidable, supervening in the conclusion of the contract and outside the *alea* or risk inherent to the contract’.⁴³

4.1.4 Inflation as an extraordinary and unforeseeable event

The fact that Argentina has suffered at least three serious economic crises since the 1970s with devastating effects on the performance of deferred or periodic obligations derived from contracts concluded before such crises, makes it necessary to analyse inflation as a relevant event for the application of article 1198. All of the above-mentioned crises were characterized by an accelerated hyperinflationary process and/or a dramatic drop in the value of currency caused by the government’s economic decisions and policies.⁴⁴

Bearing that in mind, both legal doctrine and case law have stated that since inflation became a normal feature of the Argentinian economic system from the early twentieth century onwards, its occurrence and effects are indeed foreseeable for the parties to long-term contracts or to contracts with deferred performance. Thus, inflation has become an inherent risk in most types of contracts and then the parties cannot invoke it as an extraordinary and unforeseeable event to appeal to the remedies provided by article 1198.⁴⁵ In this sense, case law has stated that ‘according to settled and uniform case law, endemic or structural inflation is not an unforeseeable event which can be alleged for the termination or readjustment of the counter-performance under

42 H. Cáceres and R. Pizarro, *Cláusula de pago en ‘valor dólar’*, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 165.

43 CNEsp., Civ. y Com, sala III, 1979/12/18, *Minedar S.A. y otro c/ Cohen, L.*, and CNFed. Civ. y Com., sala II, 1979/08/30, *López, M y otra c/ Gobierno Nacional*. See also CNCom., sala B, 1985/08/28, *Turimar S.A. c/ Banco Río de la Plata*, interpreting *a contrario sensu* article 901 and stating that an event is extraordinary and unforeseeable if ‘it is totally outside the ordinary and natural course of things’. All cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 252-253.

44 The three crises mentioned above are those of June 1975 (*‘rodrigazo’*), February 1981 and December 2001 (*‘corralito’*).

45 J. Mayo, *Teoría de la imprevisión y cláusula dólar*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 162.

the doctrine of *imprevisión*, because it has been part of our economy for a long time';⁴⁶ and that 'the inflation in Argentina is a circumstance which is not extraordinary or unforeseeable, because it was incorporated many years ago as a normal trend in our economy'.⁴⁷ The same criterion is applicable when the contract was concluded in a period of economic instability or when hyperinflation had already begun. Then it is considered that the parties deliberately assumed the risks related to serious variations in the value of currency: 'the parties who concluded a contract before June 1975 were astonished by a sudden inflation which was extraordinary and unforeseeable; but the contracts concluded after that date, in a period of extreme economic instability, should be regarded as transactions in which the economic consequences of the governmental policies were foreseen by the parties'.⁴⁸

However, both legal doctrine and case law agree that the general rule set out above is not applicable in cases of a sudden and accelerated inflation deriving from the government's economic policies which could not be anticipated by reasonable and diligent parties. In such cases, the normal evolution of the inflationary curve is disrupted dramatically and cannot therefore be regarded as integrating the foreseeable risks assumed by the parties in a completely different social and economic environment.⁴⁹ More precisely, it is the *intensity* of the inflation which can be regarded as an extraordinary and unforeseeable circumstance, and therefore totally outside the legitimate expectations of the parties.⁵⁰ Therefore, even if the contract includes devices such as stabilization clauses, such clauses do not prevent the application of *imprevisión* when the contract was concluded under normal economic conditions which were subsequently radically disturbed by extraordinary and unforeseeable events. It is argued that the aim of such clauses is to anticipate reasonably foreseeable circumstances and consequently cannot be regarded as covering events which were never considered (because they were unforeseeable) by

46 CNCiv., sala C, 1978/10/19, *Buscarini L. c/ Rut Don S.A.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 278.

47 CNCiv., sala F, 1979/06/29, *Vitulio, A. c/ Wadek, S.A.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 280.

48 CNCiv., sala C, 1978/11/16, *Bocaratto, O. y otros c/ Asociación Santísima Cruz*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 264.

49 M. Smayevsky, *Reflexiones acerca de la aplicación de la teoría de la imprevisión en el contrato de compraventa*; E. Abatti, A. Dibar and I. Rocca, *La imprevisión contractual*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 160-161. A large number of decisions handed down in relation to the economic crises of 1975 and 1981 have confirmed these statements. See Flah, Smayevsky, *supra* note 26, pp. 166-176; and *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 263-286.

50 See Cornet, *supra* note 33, adding that in some cases the contract changed its nature from being commutative to aleatory.

the parties.⁵¹ Thus, it has been held that ‘when the contractual terms which were agreed upon to provide stability to monetary obligations are surprisingly altered in their normal course by an event which is external to the parties and is extraordinary and unforeseeable, then judicial intervention is allowed to reduce the unfair effects of a contractual unbalance’.⁵²

4.1.5 *The influence of the affected party in relation to the disruptive events: fault and default*⁵³

The condition that the party affected by *imprevisión* should not be in default when invoking article 1198 has been criticized by Argentinian legal doctrine. The main objection is that in most cases a breach of contract by the affected party will be precisely the consequence of the excessively onerous nature of its performance. Thus, if that party cannot rely on the remedies provided by article 1198, the *ratio legis* of such a provision would be distorted.⁵⁴ As a consequence of such criticism, this requirement has been strictly construed: only if the debtor’s default is the *cause* of the excessive onerousness, will the affected party not be allowed to invoke *imprevisión* to be released from its obligations. Conversely, if the breach of contract is irrelevant to the occurrence of the excessive onerousness, which is independent from such a breach, the affected party is not prevented from relying on the provision of article 1198.⁵⁵ Thus, case law has stated that ‘the breach of contract of the affected party is not an absolute obstacle to invoke the *imprevisión* theory, if its default has been irrelevant to the excessive onerousness of its performance, since in that case the cause of such excessive onerousness is not the debtor’s default but an external cause and therefore it would also have taken place without such default’.⁵⁶ In the same vein, it has been held that ‘only if the breach of contract

51 J. Mosset Iturraspe, *Dólar e imprevisión*; and H. Cáceres and R. Pizarro, *Cláusula de pago en ‘valor dólar’*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp.159-160.

52 CNCiv. Sala C, 24.11.83 *Rinkevich Alberto y otra v. Uresandi Jorge A.*, E.D. 107-631, cited by Cornet (2002). However, rejecting the application of article 1198 in such a case, see CNEsp., Civ. y Com., sala III, 1981/06/19, *Fipa S.A. c/ Casco S.A.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 246.

53 In the context of this research, default means any nonperformance of his obligation by the debtor or affected party.

54 Flah, Smayevsky, *supra* note 26, p. 40.

55 C. Ghersi, *Contratos civiles y comerciales*, p. 308; and A. Alterini, *Contratos civiles, comerciales y de consumo*, p. 452; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 168-169.

56 CNCiv., sala g, 1984/10/09, *Scialabba, M. c/ Petracca Inmobiliaria S.R.L.*; cited by Flah, Smayevsky, *supra* note 26.

is previous to the extraordinary and unforeseeable event, is the debtor prevented from relying on the provision of article 1198'.⁵⁷

Closely related to the above condition, the provision also requires the absence of fault on the part of the affected party, i.e. that the event which is the cause of the excessive onerousness should be external to the affected party.⁵⁸ Therefore, such an event should not be caused by the affected party's fault and neither should the fault be the cause of the excessive onerousness deriving from such an event.⁵⁹ If the debtor had the opportunity to avoid the consequences of the disruptive events he cannot subsequently invoke the provision of article 1198.⁶⁰

This requirement is also strongly linked to the unforeseeable nature of the events, because the party who did not take the necessary measures with regard to a foreseeable event which might affect its performance can be regarded as negligent and, therefore, is prevented from requesting the termination or adaptation of the contract within the terms of article 1198. Thus, 'if the excessive onerousness alleged by the debtor is the consequence of omitting to take measures which he could take, he is not allowed to rely on his own negligence to obtain relief from his obligations'.⁶¹

4.1.6 *Express assumption of risks. The exclusion of article 1198 by the parties*

Similarly to most Western legal systems, one of the basic principles of the Argentinian law of contracts is freedom of contract (article 1197). As a consequence, the parties may freely agree on the allocation of risks in the contract, e.g. stating that one or more particular risks are assumed exclusively by one of the parties. Argentinian legal doctrine agrees that this kind of clause is valid, provided that the party assuming the risk consents thereto.⁶² Thus, the bargaining process and the situation of the parties are relevant in establishing the extent of the clause. Furthermore, such an assumption should be strictly construed and in good faith, being only applicable to the specific situations provided in the contract and in cases which can be regarded as reasonably

57 CNCiv., sala B, 1982/05/17, *Amestoy, R. c/ Pontineri, L. y otros*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 291.

58 J. Mosset Iturraspe, *Contratos en dólares*, Ediciones La Rocca, Buenos Aires, 1990. p. 76 ff., cited by Araujo, *supra* note 26.

59 A. Spota, *Desvalorización monetaria e imprevisión contractual*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29.

60 CNCiv., sala D, 1981/06/12, *Ragno C. c/ Lovecchio, N.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 288.

61 CApel. Concepción del Uruguay, sala civ. y com., 1978/07/11, *Musachi, V. c/ Benítez, R.*, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, 288.

62 Cornet, *supra* note 33; Flah, Smayevsky, *supra* note 26, p. 44.

foreseeable by the parties.⁶³ It is added that outside the cases which can be clearly derived from the nature of the contract, this assumption should be express.⁶⁴ Case law has held that waiving the right to invoke *imprevisión* by the affected party *after* the occurrence of the disruptive events may also be implied from the behaviour of the affected party and the circumstances surrounding the case, e.g. whether such a party has completely performed its obligation despite the excessive onerousness.⁶⁵ Nevertheless, the mere fact that the affected party did not rely on the *imprevisión* remedies immediately after the occurrence of the extraordinary events, or that the burdensome obligation was partially performed, are not sufficient to amount to an implied waiver of its right.⁶⁶

It is disputed in legal doctrine whether the parties may exclude the application of *imprevisión*, as provided by article 1198, in their contractual relationship. Based on the freedom of contract and the undisputed right of contractual parties to assume the consequences of *force majeure* (article 513 of the Argentinian Civil Code), some of the legal authors accept the validity of clauses which generally exclude the application of article 1198. It is argued that if the debtor is legally allowed to assume the consequences of a performance which has become impossible, the debtor may equally assume the consequences of a performance which has become *only* excessively onerous.⁶⁷ On the other hand, it has been stated that as an application of the principle of good faith, the provision of article 1198 is imperative and therefore cannot be excluded from the contract by the parties.⁶⁸ It is added that the provision allowing for a waiver of force majeure as an excuse for performance is related to ordinary and reasonably foreseeable cases of force majeure, and therefore the same logic should be applied to cases of *imprevisión*: a party cannot assume the risk of an unknown or unforeseeable event, because such an assumption logically implies the foreseeability of the event and the associated risk.⁶⁹ Therefore, the consequences of an unforeseeable risk which is not allocated by the nature of the contract or by a specific and express provision in that contract must be shared by the parties with regard to the circumstances of the particular

63 G. Borda, *La reforma del Código Civil. Teoría de la imprevisión*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29; and L. Rezzónico, *Estudios de las obligaciones en nuestro Derecho Civil*, T. I, p. 184; cited by Cornet, *supra* note 33.

64 See Cornet, *supra* note 33.

65 CNCiv., sala B, 1987/04/07, *Spada de Makintach, S. c/ Tonelli, C.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 303.

66 CS, 1981/10/13, *Cicero, R. c/ Romero, J.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 303.

67 Cornet, *supra* note 33.

68 A. Borda, *Influencia de las medidas económicas del año 2002 sobre las relaciones contractuales entre particulares*; cited by Cornet, *supra* note 33.

69 J. Mosset Iturraspe, *La Interpretación económica de los contratos*, Rubinzal Culzoni: Santa Fe (1994).

case. In any case, the exclusion of *imprevisión* is not allowed in consumer contracts because such a provision is regarded as an unfair contractual term.⁷⁰

With regard to this subject, case law has accepted the validity of a general exclusion of article 1198, stating that such a provision is inapplicable 'if the parties foresee in the contract 'any' kind of alteration in the exchange market' and that 'there is no impediment to give full effect to the waiver of the right to invoke the *imprevisión* theory (...)',⁷¹ but also stressing that such an exclusion cannot be presumed and should be interpreted under strict standards.⁷²

4.2 The effects of *imprevisión*

4.2.1 *The rights of the parties*

Provided that the above-mentioned requirements are met, article 1198 states that the affected party can demand the termination of the contract and the other party has the right to avoid such a dissolution by offering to modify, in an equitable way, the conditions of the contract.

Nevertheless, an important part of legal doctrine supports the opinion that the affected party has the right to request not only the termination of the contract, but also its modification or adaptation to the new circumstances. In this sense, it is argued that the principle of *favor contractus*, which can be derived from several provisions of the Civil Code (e.g. articles 656, 1069, 1633, 1638 and 2056) and the aim of Act 17.711 to introduce equity standards in contractual relationships, also allows the affected party to request an adaptation of the contract.⁷³ Therefore, the interpretation of article 1198 should provide a solution which preserves the reasonableness and equity of the transaction as concluded by the parties, an aim which is not satisfied in all cases with the termination of the contract.⁷⁴ Additionally, it is argued that if the affected party may claim the termination of the contract, which is an extreme remedy, logically he is entitled to request a less absolute and not expressly prohibited remedy such as the modification of the contract.⁷⁵ On the other hand, it is contended that compared with the provision of article 954 where in cases of

70 Article 37 of Act 24.240 on the Defence of the Consumer and its regulation (D.R. 1798/94).

71 CNCom., sala E, 1984/10/08, *Nelson, J. c Di Tomaso, Z.*, cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 241.

72 CCiv. y Com. Rosario, sala IV, 1981/09/24, *Izquierdo, J. c/ Miotto, A.*; cited by Cornet, *supra* note 33.

73 Flah, Smayevsky, *supra* note 26.

74 See A.M. Morello, *La adecuación del contrato: Por las partes, por el juez, por los árbitros*, Librería Editora Platense: La Plata, 1994.

75 A. Spota, *Desvalorización monetaria e imprevisión contractual*; and G. Borda, *Tratado de Derecho Civil*, pp. 146-147; cited by *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 174.

laesio the affected party is expressly entitled to request the adaptation of the contract, in article 1198, in contrast, the legislator has not provided such a remedy to the party affected by *imprevisión*. Therefore the will of the legislator cannot be interpreted differently from that expressed in the legal norm. Moreover, it is argued that the revision of a contract is a much more complex and significant remedy than its termination, because it implies setting the common consent of the parties aside and imposing the will of a third party (the judge) upon them.⁷⁶

Case law is not uniform with regard to this subject, but in a 1992 decision the Argentinian Supreme Court strongly rejected the right of the affected party to request the adaptation of the contract in cases provided for by article 1198. The Court stated that⁷⁷

‘the text of article 1198 only gives the affected party the right to request the termination of the contract, granting the offer of an equitable modification only to the other party. This Court has repeatedly decided that the first rule for the interpretation of the law is to give full effect to the legislator’s intention, that the first source for the determination of that intention is the text of the law, and that judges should not replace the legislator but should apply the legal norm as is stated. It would be a serious infringement of such rules to concede to one of the parties a right that the law does not confer upon him (...) especially when an omission or mistake by the legislator cannot be presumed, which clearly chose one of the different options proposed by the foreign legal doctrine and legislation(...)’

In the same sense, the Supreme Court has rejected *ex officio* modifications in cases where neither party had requested the revision of the contract, but only its termination, based on the constitutional right to due process and other procedural rules as *ultra petita*.⁷⁸

Finally, with regard to the right of the advantaged party to propose an equitable modification of the contract, although some decisions have stated that such a proposal should be made in specific terms and the judge may only assess its equity with no power to modify it,⁷⁹ most of the doctrine and case law supports the possibility for the advantaged party to propose the modification in general terms, indicating its willingness to modify the conditions of

76 Flah, Smayevsky, *supra* note 26, p. 41.

77 CS 21/04/92 *Kamenszein, Víctor J. y otro c/ Fried de Goldring, Malka y otros*; J.A. 1992-IV-166; full text in Morello, *supra* note 74, pp. 21-24.

78 Araujo, *supra* note 26, p. 99.

79 CNCiv., sala C, 20/10/78; CNEsp., Civ. y Com., sala V, 13/12/76; CNEsp., Civ. y Com., sala III, 18/12/79; cited by Araujo, *supra* note 26, p. 100.

the contract equitably and allowing the judge to establish the specific terms of such a modification.⁸⁰

4.2.2 Remedies provided by article 1198: Termination and adaptation of the contract

Regarding the termination of the contract, article 1198 states that in contracts for continuous performance their termination (*resolución*) will not affect that which has already been performed. Thus, in these cases a termination has no retroactive effect, e.g. in a lease contract the lessor does not have to return to the lessee the payments already made and the same can be applied to contracts for personal services. But in a sales contract by instalments,

‘the sums already paid by the buyer should be returned monetarily corrected (...) to attempt a fair compensation to the creditor’ and ‘to preserve, even in the termination of the contract, the equivalence of the counter-performances which have to be returned’.⁸¹

In addition, the remedy of termination has to be limited to ‘cases where a revision is not possible or does not lead to satisfactory solutions’.⁸²

On the other hand, if the advantaged party’s proposed equitable modification is accepted or the contract is revised by the judge, the adaptation of the contract should have as its primary aim the equitable share between the parties of the effects of the unforeseeable risk and ‘to correct the evident unfairness imposed by the new circumstances, so that the transaction will still be a good deal for the creditor and a bad but bearable deal for the debtor’.⁸³ Thus, the judge does not have to restore the counter-obligations to an absolute equivalence or to rewrite the contract to ideally adapt it to the standards of commutative justice, but only to equitably rectify the significant imbalance between the counter-performances.⁸⁴ In this sense, the Supreme Court has stated that⁸⁵

80 CCCiv. y Com. Córdoba, 1978/06/05, *Yapur, J. c/ Giorno, M.*; adding that ‘such an interpretation prevents the risk that the judge, confronted with an insufficient proposal by the advantaged party, determines that a termination of the contract is necessary’. Cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 330.

81 SC Bs.As. 03.06.80; cited by Cornet, *supra* note 33.

82 CNCiv., sala G, 1982/05/03, *Fucaracce, J. c/ Capellán, J.*; cited by *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 318.

83 CNCiv., sala D, 1984/02/22, *Martínez, M. c/ Gentile*; CNCiv., sala G, 1981/02/10, *Hughes, L. c/ Alonso Soto, L. y otros*, adding that ‘the *imprevisión* doctrine is not an instrument to set aside bad deals but to avoid a gross infringement of justice’. Cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, pp. 317-318.

84 CNCiv. Sala G, 1980/10/03, *Sommer, E. c/ Kirschenheuter, L.*; cited in *Digesto Práctico La Ley: Revisión de los Contratos*, *supra* note 29, p. 319.

85 C.S., 10/06/992, *Astilleros Príncipe y Menghi S.A. c/ Banco Nac. De Desarrollo*; cited by Morello, *supra* note 74.

‘the protection granted to the affected party by article 1198 of the Civil Code cannot lead to simply transferring to the other party the consequences of the imbalance which was sought to be remedied (...) the nature of the *imprevisión* theory prevents that, under the excuse of protecting one of the parties, the burden is placed on the other party, thereby resulting in a situation which is analogous to the alleged unfairness and creating a new affected party replacing the former’.

Therefore, the application of the remedies provided by article 1198 cannot involve the transfer of the excessive onerousness from the affected party to the creditor.

5 CONCLUSIONS

The comparative overview of the Latin American jurisdictions included in this paper has shown a clear trend towards the acceptance and recognition of cases of change of circumstances as a ground for relief for the party affected by supervening onerousness. Thus, of the seven jurisdictions included, only Chile and Uruguay may be qualified as unreceptive, and conversely, Argentina, Brazil, Colombia, Paraguay and Peru are receptive legal systems, even where the subject is not expressly regulated by a legal provision (as in the case of Colombia).

This tendency is in line with modern developments in contract law. Non-legislative codifications such as the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) include a set of one or more rules to deal with the subject.⁸⁶ The same can be said with regard to modern codifications such as the Dutch Burgerlijk Wetboek (Dutch Civil Code 1992) and the German Bürgerliches Gesetzbuch (German Civil Code, after the reform of 2002).⁸⁷

Finally, it is interesting to note that most of the receptive Latin American jurisdictions have followed the Italian *Codice Civile* on this subject.⁸⁸ Then, the system of remedies for the case of change of circumstances is structured by granting as primary and exclusive remedy to the affected party the right to claim the termination of the contract; a claim that can be avoided by the advantaged party offering to equitably modify the terms of the contract. Therefore, the affected party is not entitled to request any adaptation or modification of the contract by the court, and no duty to renegotiate is imposed

⁸⁶ Articles 6.2.1 to 6.2.3 of the PICC, article 6:111 of the PECL and article III.- 1:110 of the DCFR.

⁸⁷ Article 6:258 of the BW and §313 of the BGB.

⁸⁸ For an outline of the Italian law on the subject, see F. Macario, ‘Change of circumstances’, in: L. Antonioli, A. Veneziano (Eds.), *Principles of European Contract Law and Italian Law*. Kluwer Law International: The Hague, 2005.

on the advantaged party, who is free to decide whether or not to offer an equitable modification of the contract.⁸⁹

In this regard, the system of remedies provided by the PICC and the PECL seem to be a better alternative to protect the interests of both parties in a situation of changed circumstances. Thus, as a first effect of a change of circumstances a duty to renegotiate must be imposed on the parties. If negotiations do not succeed within a reasonable period, either party may resort to the court to request an adaptation of the contract to the new circumstances, and the court has wide powers to either modify the contract or terminate it, according to the circumstances of the particular case.⁹⁰ Together with the important and interesting domestic developments (such as in the case of Argentinian law), future reforms of both receptive and unreceptive Latin American jurisdictions should consider the above-mentioned instruments as a model for the regulation of the subject.

89 However, as mentioned above, Argentinian legal doctrine and some case law has argued that the court has the power to adapt the contract.

90 It is not the aim of this paper to analyse the best alternatives for a system of remedies in case of a change of circumstances. For a comprehensive study of the subject, see Momberg, *supra* note 20.

11 | France and Belgium

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

■ Denis Philippe is attorney at law, professor at the Catholic University of Louvain and visiting professor at the University of Paris X (dphilippe@philippe-law.eu).

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.