

# The paradoxes of the theory of *imprévision* in the new French law of contract: a judicial deterrent?

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Much has already been written about *imprévision*, frustration and impracticability in commercial contracts (Pédamon & Chuah, *Hardship in Transnational Commercial Contracts*, (Paris Legal Publishers, 2013)). It is however necessary to revisit the theory and practice of hardship in light of the new legal provision (Art 1195 CC) of the rewritten Civil code (CC) that now enshrines the theory of *imprévision* (unforeseeability) in French law.

The *Ordonnance* no 2016-131 of 10 February 2016 has implemented a reform of the law of contracts, the general regime of obligations and the proof of obligations that had remained nearly untouched since the original iteration of the Civil code in 1804 (See Pédamon, *The New French Contract Law and its Impact on Commercial Law*, in Heidemann, M and Lee, J (eds) *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives*, (Springer, 2018)). It has introduced a new article – Article 1195 CC – that ushers in a radical change from the well-anchored rejection of the theory of *imprévision* set in case law that dates back to the 19th century. It grants the judge power to review the contract upon the request of one party. In the Parliamentary debates on the ratification of the *Ordonnance*, the Senate attempted to limit this judicial power by requiring both parties to ask for this. It considered the unilaterally triggered power contrary to legal certainty as it could generate more litigation. After debate, the senators did agree upon the unilateral formulation of the current article on the basis that the provision is only a default rule and that in the case where a party asks the judge to adjust the contract, the other party is likely to request its termination, termination that the judge is likely to uphold. The senators nevertheless excluded securities transactions and financial contracts from the article (see the report prepared by Houlié and Pillet for the *Commission mixte paritaire* – Report no 352 (2017-2018)). The *Ordonnance* was ratified by the Act no 2018-287 of 20 April 2018.

So what did motivate the introduction of a provision allowing judicial review of contracts? Was it policy or commercial considerations? Is the new Article 1195 CC only an evolution in the footsteps of other European domestic rules and transnational legal principles or a response to commercial needs? Does this erode the principle of *pacta sunt servanda* and herald a more radical judicial approach to unforeseeability?

13th centuries in the Roman rule – *contractus qui habent tractum successivum et dependentiam de future rebus sic stantibus intelliguntur* – that set limits to contractual sanctity because of economic instability. Its implementation led to commercial uncertainty that reduced its popularity. With the rise of scientific positivism and the philosophy of Enlightenment cherishing the freedom of contract, the Napoleonic code did not incorporate any provisions on unforeseeability. Over time, the French courts continued to reject the theory of *imprévision* as they upheld the principle of *pacta sunt servanda* strictly.

This theory raises the questions whether an unforeseeable change of circumstances that renders the performance of the contracts commercially impracticable may be considered as an excuse to non-performance, and what remedies are available to the parties. It mainly applies to commercial contracts, particularly instalment contracts whose performance consists of performance of repeated actions over a period of time and long-term contracts. These commercial contracts are the focus of this paper. As businesses negotiate the terms of their contract, they are expected not only to consider the existing circumstances but also to anticipate the circumstances that might affect the performance in the longer term. The contract therefore becomes an exercise of foreseeability. This is consistent with the doctrinal theory of *imprévision* that focuses on the *unforeseeability* of the event itself rather than its economic effects.

The new Article 1195 CC reflects the influence of other European country responses to unforeseen circumstances, including the German *Wegfall der Geschäftsgrundlage* or the Italian *eccessiva onerosità sopravvenuta*, and international legal projects, such as the Principles of European Contract Law (PECL) and the Unidroit Principles of International Commercial Contracts (Unidroit Principles). The *Rapport au Président de la République* (Report to the President of the Republic relating to the *Ordonnance* no 2016-131 of 10 February 2016) in its explanatory notes on Article 1195 CC stresses the importance of the European context as part of the justification for the reform:

*France is one of the last European countries not to recognise the theory of imprévision as a moderating factor to the binding force of contract. Its enshrinement inspired by comparative law as well as European harmonisation projects makes it possible to combat major contractual imbalances arising during performance, in*

*accordance with the objective of contractual fairness sought by the Ordonnance.*

These notes explain the objective of the theory of *imprévision*, which is to balance the principle of *pacta sunt servanda*, promoting the security of transactions, and contractual fairness. More importantly, the reform has a utilitarian dimension, which aims to keep the contract alive where it still has an economic and perhaps social role to play (Mekki and Kloepfer Pelese, “Hardship and Modification (or Revision) of the Contract (2010)”, available at SSRN: <https://ssrn.com/abstract=1542511>).

The reform is also a response to concerns of small and medium sized businesses about the absence of default rules on hardship in the Civil Code, which is more problematic for a sector where contracts tend to be less complete. This contrasts with larger companies that carefully insert detailed hardship provisions, dealing with matters such as material adverse change or price adjustment mechanisms, in their more complete contracts.

In light of these considerations, the *Ordonnance* now enshrines the theory of *imprévision* with some specificities. Article 1195 CC is concerned with adjusting the rights of two *innocent* parties – on the one hand, the right of the affected party that must continue to perform but needs a way out from a situation of commercial impracticability, and on the other hand, the right of the other party entitled to the performance of the contract. As the parties are better placed to understand their respective position in the transaction and make decisions, the preferred mode of resolution envisaged in the first paragraph of 1195 CC is renegotiation. When this fails, the next port of call – and ultimate one – is the court. The novelty of the article lies in the power of the court to adjust the terms of the contract or bring it to an end. The court now appears to have a greater degree of discretion to review the contract. This raises the usual questions about the conditions under which this can be exercised and the resulting effects.

As this paper shows, Article 1195 CC raises three paradoxes:

- *the first one in the nature of the article itself as a default rule that encourages a voluntary ex-ante contractual solution over a judicial solution through careful pre-emptive drafting;*
- *The second at the renegotiation phase as the affected party has the right to request renegotiation whereas the other contracting party the right to refuse to renegotiate; and*
- *The third in the new judicial powers that play as a deterrent and favour an ex-post contractual solution through renegotiation.*

Overall, this article demonstrates a clear bias for a private contractual and negotiated solution (over a judicial one). Small and medium sized businesses are likely to avail themselves of the new framework to redefine their contractual relationship. By contrast, larger commercial enterprises are further incentivised to enhance their self-reliance by boosting forward-looking contractual and expert determination provisions dealing with changed circumstances. In the words of the rapporteur for the Senate, “(t)he hypothesis where the judge will be asked by a party to review the contract will remain theoretical” (Pillet, in

the report prepared by the *Commission mixte paritaire* –Report no 352 (2017-2018)). The fear of a snowball effect with the provision generating a more interventionist judicial attitude appears exaggerated.

To understand Article 1195 CC and the new power of the courts to review the contract, it is necessary to explore (1) the context and particularly the judicial approach to hardship in commercial contracts overtime until the recent *Ordonnance*, (2) the conditions for the exercise and effects of the new provision on *imprévision*, and (3) the perspectives this article opens up in the case of chain or group of contracts.

## A CALL FOR REFORM

Until the reform enshrined in the *Ordonnance*, commercial impracticability could not be invoked as an excuse for non-performance on the ground of the principle *pacta sunt servanda*. Despite the rigour of this constant rejection, courts nevertheless gradually ascertained the existence of an obligation to renegotiate on the basis of the principle of good faith. The conditions of application of this new obligation had remained however unclear as case law shows, thus calling for legislative clarification.

### *The consistent rejection of the theory of imprévision*

The judicial rejection of the theory of *imprévision* can be traced back to the seminal decision of *Canal de Craponne* (Civ. 6 Mach 1876, DP 1876. 1. 193). In that case, the *Cour de cassation* refused to increase the fees that landowners had to pay in exchange for the maintenance and operation of the canal that were set more than three centuries ago despite an increase by more than 400 per cent of the actual costs. It based its decision on the principle of *pacta sunt servanda* enshrined in the former Article 1134 CC that provided that *agreements lawfully formed have the force of law for those who have made them*. As a result, it firmly prohibited courts from considering time and circumstances to adjust the terms of the contract, however equitable their decisions might appear. In successive cases, the *Cour de cassation* systematically quashed any such consideration of equity by lower courts to increase the contract price in light of the changed circumstances. As such, it embraced a strict interpretation of the intangibility of contracts, even where the performance of the contract had become commercially impracticable. The rigour of the solution was aimed at reinforcing the legal certainty ascribed to the contracts. Only a few cases have actually come to the attention of the *Cour de Cassation*; clearly not enough for this court to give up the well-anchored rejection of the theory of *imprévision* and any judicial intervention in the contract. A few variants have however emerged over time.

### *A gradual emergence of a duty to renegotiate in good faith*

In a couple of cases in the 1990s (Com. 3 November 1992, Huard, n° 90-18.547, Bull. civ. IV, n° 338; Com. 24 November 1998, *Chevassus-Marche*, n° 96-18.357, Bull. civ. IV, n° 277), the *Cour de cassation* ascertained an obligation to renegotiate based on the principle of good faith in circumstances of commercial impracticability. In these cases, the court acknowledged that the party claiming hardship, ie the distributor or the commercial agent, had been deprived of the ability of charging competitive prices due to the changed circumstances

and their state of economic dependency. The continuing participation of the parties in the market was threatened by the intangibility of the seriously imbalanced contract and justified a renegotiation of the terms of the contract by the party benefitting from the circumstances. In another decision of 2007 (CA Nancy 26 September 2007, D. 2008.1120), the Court of Appeal of Nancy expanded the scope of application of the obligation to renegotiate in a supply contract on the legal basis of good faith performance. The introduction of a new legislation for the reduction of greenhouse gases had caused a significant disequilibrium in the contract against the economic interest of the supply company that justified such obligation. The generality of the obligation to renegotiate was however questioned since all the cases examined related to the distribution industry.

In the context of an international sales contract subject to the Vienna Convention on Contracts for the International Sale of Goods (CISG) (1980), the issue of hardship has come up too. Whereas it is well-established that Article 79 CISG provides an excuse for a failure to perform any obligations in case of impossibility, domestic courts have to decide if it also applies in case of commercial impracticability. The now well-known case *Scafom International BV v Lorraine Tubes SAS* (Belgian C. Cass, 19 June 2009, C.07.0289.N, available at <http://cisgw3.law.pace.edu/cases/090619b1.html>) confirmed the existence of an obligation to renegotiate in good faith; it also showed the confusion of the courts when faced with a dispute on hardship. This case related to a number of contracts of sale between a Dutch buyer and a French seller for the delivery of steel tubes in Belgium. Following the increase in the price of steel by 70 per cent, the seller tried to renegotiate a higher contract price but in vain as the buyer refused and requested delivery of the goods at the contract price. The lower Commercial Court of Tongeren highlighted the failure of the parties to insert a clause in their contract for price adjustment and confirmed in line with French case law that “in the absence of such provisions, it was for the buyer to bear the risk of non-performance without being able to benefit from the provisions of Article 79 CISG...” (Civ 30 June 2004, RTDC 2004.845, obs Delebecque). The Court of Appeal of Antwerp overturned the lower court’s decision and, applying French law, held that the buyer had an obligation to renegotiate the terms of the contracts. Finally, the Belgian *Cour de cassation* rejected the application of French law. That said, it reached the same conclusion as the Court of Appeal and confirmed the obligation of the buyer to renegotiate the contracts (in good faith) as the unforeseen price increase gave rise to a “serious disequilibrium (in the obligations of the parties) that rendered the subsequent performance of the contract in the same conditions particularly detrimental (to the seller).” It based its decision on the Unidroit Principles as the general principles of international trade law that can be used to fill the gaps in the CISG in a uniform manner. Paradoxically, it confirmed that Article 79 CISG could, in certain cases, cover cases of hardship as changed circumstances that were not reasonably foreseeable at the time of conclusion of the contract and were unequivocally of a nature to increase the burden of performance of the contract in a disproportionate manner could constitute an “impediment.”

### *A case of judicial confusion?*

A succession of cases thereafter showed the confusion of the

*Cour de cassation* in its quest for a legal doctrine that could ground the theory of *imprévision* and justify an obligation to renegotiate – either on the basis of “cause” (Com. 29 June 2010, no 09-67.369; Com 17 February 2015, no 12-29550), or more recently on the basis of a duty of loyalty between the franchisor and franchisee (Com. 15 March 2017, no 15-16.406), or even the principle of good faith, as already mentioned. In passing it should be noted that the concept of “cause” has been removed from the rewritten law of obligations. Nevertheless, against the emergence of a contractual and amicable solution, the *Cour de cassation* re-asserted that courts did not have the power to adjust the terms of the contract (Civ 3e, 18 March 2009, No 07-21.260).

Another case – *Dupire Invicta Industrie (D21) v Gabo* (Com. 17 February 2015, no 12-29.550, 13-18.956 and 13-20.230) – once again considered the excuse of hardship in international sales. It related to a contract of sale between a French seller and a Polish buyer for the delivery of heating units. The buyer was also the seller’s exclusive distributor in Poland and Slovakia. The sale contract was governed by Polish law and did not contain a hardship clause as commonly done in the trade for these specific goods. Following an increase in the market price of raw materials, the seller refused to deliver the goods at the contract price invoking a case of hardship. As a result, the buyer sought compensation for the actual loss and loss of profit, as well as the payment of a penalty for late delivery as provided for in the contract.

The Commercial Court of Sedan denied the seller’s contention that it was entitled to withhold performance, even in a case of hardship. The Court of Appeal of Reims (Reims, 4 September 2012, n° 11/02698) also refused to grant any relief to the seller as it had failed to produce evidence that the price increase it suffered satisfied the requirements of hardship and, that even if he had suffered losses, the Unidroit Principles did not authorise the affected party to suspend performance. It held that the CISG did not exclude hardship, and that the Unidroit Principles could be used to interpret and supplement the CISG. It added that the seller had not demonstrated that the buyer had violated the principle of good faith when it had failed to renegotiate the price or postponed meetings to discuss the situation.

In its decision of 17 February 2015 (Com. 17 February 2015, no 12-29550, 13-18956, and 13-20230), the *Cour de cassation* held that the Court of Appeal had failed to ascertain whether the price fluctuations exceeded normal variations in the relevant marketplace and changed the additional burden on the seller into an excusable hardship, thus depriving its decision of a legal basis under the former Articles 1131 CC (“An obligation without a cause or with a false cause or with an unlawful cause cannot have any effect”) and 1134 CC (“Agreements lawfully formed have the force of law for those who have made them. They may be revoked only by their mutual consent, or on grounds which legislation authorises”. (...)), and Article 6.2.1 of the Unidroit Principles (“Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”) Nevertheless, it upheld the appellate decision on this point as the seller failed to prove that the increase in the cost of performance of its contractual obligations, or the new situation

that profoundly altered the balance of the contract, constituted a case of hardship. It also implicitly adopted the conclusions of the Court of Appeal that hardship falls within the CISG and that the Unidroit Principles define the scope and consequences of hardship. On the *renvoi*, the Court of Appeal of Nancy (Nancy, 14 March 2018, no 15/01554) confirmed the decision of the Commercial Court of Sedan on hardship, and rejected all the claims made by the two parties. Even in international sales, these cases show the difficulty for the courts in determining hardship.

### Lessons to be drawn from these cases

These cases highlight a few interesting points. The first one is the confirmation from the *Scafom* and *D21* international sales cases that the *Cour de cassation* is of the opinion that the CISG covers hardship, and that the Unidroit Principles can be used to interpret and supplement the CISG, particularly in a case of hardship. With the introduction of the theory of *imprévision* into the law of contract, there is now a risk of discrepancy in the application of the rules relating to hardship in domestic and international sales contracts. Such discrepancy may however be mitigated if the new Article 1195 CC is read itself in light of the Unidroit Principles, something that needs to be kept in mind. In any case, a contractual term can always set aside Article 79 CISG as well as Article 1195 CC. The second point relates to the emergence of an obligation to renegotiate in changed circumstances. This obligation is the precursor to the new right to request renegotiation in Article 1195 CC. It is very much in the spirit of settling the dispute through conciliation. Paradoxically, there is no obligation that the renegotiation leads to a common solution, even pursuant to the principle of good faith. As acknowledged in *D21*, a failure to renegotiate the price or the postponement of meetings to discuss the situation does not amount to a breach of good faith. This is consistent with previous decisions (Com. 3 October 2006, D.2007, at 765-770) that in the absence of abusive behaviour, the party that refuses to modify the terms of the contract does not attract liability. The limits to renegotiation are clear - if and when renegotiation fails, the next port of call remains the court. This leads to the third point that shows the traditional consistency of the *Cour de cassation* that always refused to adjust the terms of the contract in a case of hardship on the ground of *pacta sunt servanda*.

In the wake of these cases, and a growing sense of confusion, a legislative framework was therefore expected. It is now done following the *Ordonnance* as the new Article 1195 CC enshrines the theory of *imprévision* in the Civil code.

## THE PARADOXES OF THE (NEW) THEORY OF IMPREVISION

Except in rare cases where statutes were enacted to address specific economic circumstances had the French legislator ever allowed judicial adjustment of contracts. Examples of these instances are the Act of 21 Jan 1918 (*Loi Failliot*) (supplemented by the Act of 9 May 1920) and the Act of 23 April 1949 that provided for the termination of commercial contracts concluded before the beginning of the two World Wars, and the circular no 90-72 of 18 October 1990 that admitted *imprévision* in the context of the Gulf War if one of the parties suffered a prejudice exceeding the reasonable expectations at the date of

conclusion of the contract. In a (radical) move, the *Chancellerie* has now granted (ultimate) powers of review to the courts in case of changed circumstances when parties have exhausted means of conciliation. It is one of the most striking novelties of the reform. It is however interesting to note that French law is already familiar with the well-established theory of *imprévision* in administrative law (*Compagnie générale d'éclairage de Bordeaux*, CE, 30 March 1916, Rec. 125). It also follows in the footsteps of the recent Article L 441-8 of the Commercial Code that requires that a "clause relating to the terms of renegotiation of the price" be inserted in contracts of sales of products whose "costs of production are significantly affected by the fluctuations of prices of agricultural commodities and food products" (see Pédamon, *The New French Contract Law and its Impact on Commercial Law*, in Heidemann and Lee (eds) *The Future of the Commercial Contract in Scholarship and Law Reform: European and Comparative Perspectives*, (Springer, 2018)).

Article 1195 CC is contained in sub-section 1 on the binding force (of contract) that is part of section 1 on the effects of contract between the parties, itself in Chapter IV on the Effects of Contract. Article 1195 CC deals with the effects of hardship, but is silent as to whether it is an exception to the binding force principle. Is the new provision an exception, or simply a "moderating factor", as claimed in the *Rapport au Président*? Regardless of which it is, the juxtaposition of the binding force principle with the unforeseeability paradoxically reinforces the primary rule. By contrast, the equivalent provision in the PECL and Unidroit Principles is written as an exception. More substantively, the aim of this article, as expressly stated in the *Rapport au Président de la République*, is to "play a preventive role: the risk of destruction or adjustment of the contract by the court should encourage the parties to negotiate." It could not be clearer – in its activism for a conciliatory solution, the legislative focus is on the *renegotiation* of the contractual terms by the parties. This is consistent with the spirit of the overall reform, which empowers the parties to *avoid litigation or settle the dispute without judicial interference*.

Article 1195 CC is furthermore a default rule that is commonly set aside in sophisticated and complex commercial contracts that provide for hardship terms or indexation clauses, thus leaving the applicability of this article mainly to smaller commercial contracts as well as standard and non-commercial contracts. A distinction must be drawn between voluntary or anticipated renegotiation and involuntary renegotiation (Pédamon & Chuah, *Hardship in Transnational Commercial Contracts*, (2013), p 86). A hardship term commonly provides for renegotiation if and when certain defined or undefined events occur. As it has been contractually negotiated, the renegotiation is voluntary. By contrast, where there is no such clause in the contract, the statutory right to call for a renegotiation leads to involuntary renegotiation. Only with the threat of judicial review will this type of renegotiation succeed. Article 1195 CC provides as follows:

*If a change of circumstances that was unforeseeable at the time of conclusion of the contract renders performance excessively onerous for a party who had not agreed to bear the risk of such a change, that party may ask the other contracting party to renegotiate the contract. This party must continue to perform her obligations during the renegotiation.*



*In the case of refusal or failure of renegotiation, the parties may agree to terminate the contract from the date and on the conditions which they determine, or ask the court, by a common agreement, to set about its adjustment. In the absence of agreement within a reasonable time, the court may, upon request of one party, adjust the contract or put an end to it, from a date and subject to such conditions as it shall determine.*

The conditions of application of this new article and its effects must be considered.

#### ***A limited application due to stringent conditions***

Several conditions must be met before any effect can be produced – the first one relates to the unforeseeable change of circumstances at the time of conclusion of the contract; the second one implies that the risk of changed circumstances has not been allocated to the party who is affected by the change, that is for the most part the seller; and the third one relates to the financial excessive performance of the contract.

#### ***An unforeseeable change of circumstances at the time of conclusion of the contract***

The broad formulation of Article 1195 CC covers all kinds of changed circumstances – from a legal event, such as the introduction of a new legislation to an economic or financial one relating to a market fluctuation or bankruptcy or an environmental disaster. It is assessed against a test of unforeseeability that relates to the occurrence of the event itself as well as its scale (Deshayes, Genicon, Laithier, *Réforme du droit des contrats, du régime général et de la preuve des obligations*, Commentary, LexisNexis, 2016, p 393). Although not explicitly stated, the test of unforeseeability is objective in the sense that it requires that the affected party proves that a reasonable party in the same circumstances would not have foreseen the changed circumstances. It is commonly read in accordance with Article 1218 CC that defines *force majeure* as “an event beyond the control of the debtor, which could not reasonably have been foreseen at the time of conclusion of the contract (and whose effects could not be avoided by appropriate measures...)” despite the (unfortunate) difference in formulation (see Chantepie & Latina, *Le nouveau droit des obligations*, (Dalloz, 2nd ed) no 524, p 474). This analysis is consistent with the approach already adopted by the *Cour de cassation* despite the absence of the adverb “reasonably” qualifying “unforeseeable” in Article 1195 CC. The reasonable unforeseeability of changed circumstance must be assessed at the time of conclusion of the contract. In *D21 v Gabo*, previously discussed, the *Cour de cassation* criticised the Court of Appeal as it did not consider if the increase in costs of raw materials amounted to *abnormal* fluctuations in the relevant market.

Given the absence of clear standards and the imprecision of the notion, the test of *unforeseeability* leaves a rather wide margin of appreciation to the court, particularly as the market and relevant commercial practices evolve and become complex. How will the courts decide whether the changed circumstances – ie a labour shortage or an increased cost of production due to Brexit - fall within the ordinary range of commercial probability?

#### ***A risk of change that has not been allocated to the party who is affected by the change***

The allocation of risks must be assessed as at the time of conclusion of the contract; it requires that courts ascertain the contemporaneous intention of the parties pursuant to the principles of contractual interpretation. These risks may not necessarily be expressly allocated in the contract; they may follow implicitly from the nature of the contract itself or by implication from the absence of any contractual provision. In a case of 2004 (Civ. 30 June 2004, RTDC 2004.845), the *Cour de cassation* held that:

*as a professional who is familiar with the practices of international trade, it was for the buyer to provide contractual mechanisms of guarantee or revision of contract. (...) (I)n the absence of such provisions, it was for the buyer to bear the risk of non-performance without being able to benefit from the provisions of Article 79 CISG (...).*

If that party bears the risk, it has to support the losses due to the changed circumstances.

Underlying this condition is the assumption that the parties are in a better position to make decisions about the risks associated with their transactions. Professor Gillette in “Commercial Rationality and the Duty to Adjust Long-Term Contracts” (69 Minn L Rev 521, 524 (1985)) argues that even if parties cannot foretell the future accurately, they can anticipate the existence of uncertainty and rationally provide mechanisms to estimate and control the consequences. His view is that rational planners tend to eliminate those risks at a cost less than their perceived cost. The presumption of completeness can however be rebutted if evidence of incomplete contracting is established. Parties can be prevented from writing complete contracts if the cost of actually negotiating the contracting terms is high – higher than the perceived cost of the risk itself. The function of contract law is therefore to provide default terms that a majority of parties would have chosen, thus reducing the cost of contracting *ex ante*. To what extent is it the case with respect to Article 1195 CC? This must be answered when considering the effects of the new legal provision.

It should be noted that, as a compromise negotiated by the senators during the parliamentary debates for the ratification of the Ordonnance, a new provision – Article L 211-40-1 of the Monetary and Financial Code – was adopted that excludes from the scope of application of Article 1195 CC, the promises arising from securities transactions and financial contracts (Art L. 211-1 I-III of this (same) code). These contracts escape the new statutory provision because of their speculative nature.

#### ***The excessive financial burden of performance***

The formulation of Article 1195 CC reproduces Article 6:111 of the PECL that requires an “excessively onerous” performance that may be the result of an increase or diminution in cost; it is a formulation centred on the economic value of the performance due. How excessive should the performance have become to be excused, in other words, how significant should the financial losses be? As there is no set test to assess the excessive financial burden, lower courts can exercise their discretion in their consideration of the relevant factors. Furthermore, these considerations are matters of fact that

escape any control from the Cour de cassation. The vagueness of the criteria is problematic as it may lead to unpredictable outcomes, but from the cases already discussed, courts have been inclined to avoid assessing the financial losses. Additional questions remain unanswered, such as whether the undue financial burden can cover the loss of profits. Such uncertainties are an incentive for the parties to find a contractual solution.

A formulation closer to Article 6.2.2 in the Unidroit Principles would have been preferable as it refers to a fundamental alteration of the *equilibrium* in the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished. It sets an objective test anchored in the contract itself as it consists of assessing the equilibrium as originally agreed upon in the contract compared with the disequilibrium caused by the unforeseen circumstances. As held by the Belgian *Cour de cassation* in the *Scafom* case, the unforeseen price increase had given rise to a "serious disequilibrium (in the obligations of the parties) that rendered the subsequent performance of the contract in the same conditions particularly detrimental (to the seller)." The disequilibrium raises the question as to what the effect of this should be contractually.

### **The effects of *imprévision* – the bias for a contractual solution**

The novelty of Article 1195 CC lies in the effects of the *imprévision* in terms of remedies available to the parties – either to find a common contractual solution further to (involuntary) renegotiation or to request by common agreement or unilaterally that the judge finds the appropriate remedy – by either adjusting the terms of the contract or avoiding the contract itself. Although the court may decide to keep the contract as is, it is quite unlikely since the excessive financial burden calls for a solution.

### **The right to request renegotiation**

Once the conditions of hardship are met, the first remedy now available is the right for the party to call for a renegotiation of the contract. Such request may be accepted or refused (as indicated in the following sentence of Article 1195 CC – ie in the case of rejection or failure of renegotiation). Was legal permission necessary to grant this right as Article 1195 CC only provides for the ability to request renegotiation? Paradoxically it even departs from previous case law that had asserted an obligation to renegotiate in good faith. Underlying this provision is the idea that parties are willing to overcome together a situation of hardship and work out a solution to save their contractual relationship and avoid economic waste. During the phase of renegotiation, performance of the contract must continue. Does it imply *a contrario* that the affected party is entitled to suspend performance when the renegotiation stops or the other party refuses to renegotiate? Courts are likely to consider this remedy in light of the circumstances and against good faith.

Even if good faith permeates the whole life of the contract (as stated in the new Art 1104 CC – ("Contracts must be negotiated, formed and performed in good faith" (...)), courts have however traditionally narrowly interpreted the obligation to renegotiate in good faith. There is no obligation to reach an

agreement so long as the parties do not act contrary to good faith. As seen in *D21*, a failure to renegotiate the price or the postponement of meeting to discuss the situation does not amount to bad faith. Article 2.1.15 of the Unidroit Principles defines negotiations in bad faith in case where a party enters into or continues negotiations when intending not to reach an agreement with the other party; bad faith may consist of actual misrepresentation or non-disclosure of facts that should have been disclosed. It goes beyond foot dragging or even walking away.

More surprisingly is indeed the ability of the party who benefits from the unforeseeable changed circumstances to refuse to renegotiate. Refusing (involuntary) renegotiation is a right and does not amount to a breach of good faith. It is another paradox of Article 1195 CC given that renegotiation is the option pushed by the legislator to avoid unnecessary economic waste, but it is also a more realistic understanding of the commercial reality. What is the point to force a party to attend renegotiations against its will? The refusal to renegotiate must however be understood against the other remedies now available to the affected party, particularly the ability of the party to request the judge to review the contract or put an end to it. As a result, the beneficiary of the changed circumstances would lose its ability to bargain, and, in the worst-case scenario, the benefit of the contract itself. There is potential for double disadvantage for the party benefitting from the changed circumstances: loss of the ability to demand performance on favourable terms and need to supply itself in an altered (more expensive) market. This party is arguably penalised for having planned and contracted its original bargain carefully. (This disadvantage is nonetheless mitigated by incentives within the provision which re-balance the rights of both parties. Article 1195 CC operates a double set of incentives. The incentive for the benefitting party to maintain as much of the economic advantage as possible and therefore to renegotiate against the threat of a judicial intervention. In parallel, the incentive for the suffering party to settle the matter quickly since it must continue to perform its obligations during the renegotiation and may only request a court to review the contract *in the absence of agreement within a reasonable time*. The obligation to continue to perform is aimed at defeating opportunistic tactics from the affected party. Paradoxically it could be used by the benefitting party to drag out the renegotiations, but this could amount to a breach of good faith pursuant to Article 1112 CC ("The beginning, continuation and breaking-off of pre-contractual negotiations are free. They must mandatorily meet the requirements of good faith") by analogy. Additionally, by failing or refusing to renegotiate the advantaged party may commit a breach that leaves it exposed to liability pursuant to Article 1112 CC. This article provides however that "(i)n case of fault during the negotiations, the reparation of the resulting loss may not compensate either the loss of benefits expected from the contract or the loss of the chance of obtaining these benefits."

Article 1195 CC implies that the affected party has approached the other party to renegotiate the contract, at least as a pre-condition to lodging a claim. In practice, in light of previous case law, this is what happens, and what should happen.

The next step to the phase of renegotiation that has failed or

been refused is the ability of the parties by common agreement to terminate the contract. This is a manifestation of *mutuus dissensus*, as already expressed in Article 1193 CC (“Contracts can only be modified or revoked by the parties’ mutual consent or on grounds which legislation authorises.”) Termination occurs in an amicable fashion (*résolution amiable*). The concept used in French to refer to this mode of termination (*résolution*) is surprising given that termination can be agreed upon without any breach of performance (Chantepie & Latina, *Le nouveau droit des obligations*, (Dalloz, 2nd ed) no 529, p 480). How realistic is this option since the renegotiation has failed showing the unwillingness of parties to accommodate each other’s interests? It is even more unrealistic to expect that the parties jointly “ask the court to adjust the terms of the contract.”

### **Judicial review of the contract – the choice between adjustment and termination**

This judicial solution – the solution of last resort - is the one that gives rise to much controversy, as it legalises the judicial review of the contract in a case of changed circumstances. Any fear of excessive judicial interference in the contract is however ungrounded. The paradox that emerges here lies in the deterrent effect of the judicial option as parties are now encouraged to work out a contractual solution. As such, this article reinforces the binding effect of the free will of the parties.

Where the renegotiation fails or the other party refuses to re-negotiate, the parties may jointly request the judge to adjust the terms of the contract. How likely is this judicial voluntary adjustment in a commercial context? Given that it is so unlikely, the practical consequence of this option is for the parties to reach agreement between themselves at an earlier stage. More relevant, is the ability of one party – any party? – to request the judge to adjust the terms of the contract or terminate it in the absence of agreement within a *reasonable time*. This is the novelty so much expected, and *de facto* so limited.

The judicial power is very much framed as a recourse of last resort. The threat of judicial review plays as a deterrent for the party that has an interest in keeping the contract in force to find a renegotiated solution. Although it is phrased quite unclearly, the purpose of this provision is to request that the affected party engage first with the other party for a renegotiation before going to court. The other party may refuse and go to court instead, so what can the judge do?

The judge has a choice between adjusting the terms of the contract or bringing it to an end “from a date and subject to such conditions as it shall determine”. There is no hierarchy between these remedies. The choice depends on the claim of the party. Can the judge impose an adjustment of the terms if the party has lodged a claim for termination, or vice versa? (T Revet, *Le juge et la révision du contrat*, RDC 2016, n° 16). The civil procedure rules appear to prohibit this. The judge may in fact exercise greater discretion if the claim made by one party is contested by the other party since under this scenario the judge will have to make a decision for the parties. In such a case, the court may consider the parties’ intention as expressed in the terms of the contract, the circumstances at the time of conclusion of the contract, and, as suggested in Article 92 of

the *projet Terré*, the *legitimate expectations of the parties*, together with the usage and practice of the market. The distinction between adjustment and termination may not be so easy to draw in practice.

It is striking how difficult it might be for the court to adjust the terms of the contract. How can the parties’ mutual practices in long-term contracts be discerned as they evolve and develop over a period of time? Which are relevant? However, courts are already familiar with the practice of adjusting the terms of the contract in other circumstances defined by the legislator. For instance, pursuant to Article 1231-5 CC, the judge may, even at her/his initiative, adjust the terms of contractual performance by moderating or increasing a contractually agreed penalty if it is manifestly excessive or derisory, or, pursuant to Article 1343-5 CC, defer payment of sums that are due or allow payment in instalments. A straightforward way of adjusting the terms of the contract will be for the court to modify the price in light of the indexes or other formulae extracted from the relevant market. An expert or any other neutral third party may be involved in the process of determining the appropriate adjustment terms. Other types of adjustment – at least in theory – may be considered as the term “revision” is broad; it can consist of reviewing the terms of delivery, the quantity of the goods, or any other contractual terms. Termination is the other option available to the judge. To do so may defeat the objective pursued in Article 1195 CC that is to avoid economic waste by forcing the parties to renegotiate the terms of the contract. However, there might be circumstances where adjustment is impossible for economic or opportunistic reasons.

Overall, the solution will depend on the (economic) benefits for one party to save the relationship and renegotiate the terms of the contract, or even on their common decision to terminate the agreement. Parties in an ongoing long-term relationship – the usual situation here – have a strong incentive to work out disagreements amicably rather than see the relationship destroyed by litigation. Through this lens, the (new) power of judicial review is limited, another paradox of Article 1195 CC. As a default provision, it rather encourages the parties to include in their contracts *ex ante* price variation clauses defining the parameters and mechanism for adjusting prices in cases of sudden and unexpected market fluctuations. Even if this inevitably adds up to the cost of contracting – ie the front-end costs – it may also save the cost of litigation or arbitration – ie back end costs. In practice, long-term contracts and complex transactions commonly include highly detailed provisions relating to hardship. However, even in this case, the notions used and the dispute resolution mechanisms in place can be imprecise. In the context of changed circumstances, the contractual relationship tends to become adversarial as each party focuses on the short-term and its own partisan interests. The new article can create an incentive for the parties to refer the adjustment of their contract to a (neutral) third party well versed in their markets, or even private arbitrators.

The absence of such contractual provision can be held against the affected party, as seen in previous cases. As a point of attention, it must be noted that a waiver in a standard form contract that would be non-negotiable and determined in advance by one party and would cause a significant imbalance in the rights and obligations of the parties, may be deemed not written pursuant to Article 1171 CC. Careful drafting is

therefore required.

## NEW PERSPECTIVES – THE EFFECTS OF IMPREVISION ON OTHER CONTRACTS

Another aspect of this new provision that must be considered is how the theory of *imprévision* will have a knock-on effect for other contracts in a vertical chain or transactional group. It raises an issue of allocation of risks. Whereas the facts are quite similar in the case of a chain or group of contracts, their legal consequences are different. In both cases, the economic consequences can be significant. Special care will be needed to ensure consistent application of Article 1195 CC across the group or chain of contracts. There may also be timing issues if Article 1195 CC is invoked sequentially.

### *Imprévision in a group or chain of contracts – Article 1195 CC*

As already discussed, Article 1195 CC implicitly requires that the affected party request a renegotiation before approaching the court. In theory, however, the party who benefits from the changed circumstances has no obligation to renegotiate, but in practice its conduct will be assessed against standards of good faith (See Com. 15 March 2017, no 15-16.406 for the liability of a franchisor who refused to renegotiate). It is likely that courts will be more robust with parties to groups or chains of contracts by forcing them to renegotiate because of the higher economic stakes. Although Article 1195 CC does not force the benefiting party to come to the table, the principle of good faith can be deployed by the court to bring pressure to bear on reluctant negotiators. If, as provided for in Article 1195 CC, the court is asked to intervene, it is likely that it will consider the economic operation as a whole and also the interdependence between the contracts, to understand the effects of *imprévision* and the remedies available. It may decide to adjust or terminate the contract. Termination can have serious economic consequences on the other contracts. One can imagine the courts exercising their powers of review with even greater caution in these scenarios? (Fauvarque-Cosson, “Does Review on the Ground of *Imprévision* Breach the Principle of the Binding Force of Contracts”, in Cartwright and Whittaker (eds) *The Code Napoléon Rewritten*, (Hart, 2018), p 201).

### *Imprévision in a group of contracts – Article 1186 & 1187 CC*

Article 1186 CC adopts a unique solution for groups of contracts. It provides for the lapse (*caducité*) of contracts whose performance is rendered impossible by the disappearance of one of them. It is consistent with the first paragraph of Article 1186 CC that states: “(a) contract which has been validly formed lapses if one of its essential elements disappears.”

This article enshrines the legal notion of group of contracts (*ensemble contractuel*), a concept previously developed by case law. What matters in the definition is to establish the link of indivisibility (*lien d’indivisibilité*) between the contracts.

This link can be an express term in the contracts or implied from the facts, particularly in light of the coherence of the contractual group that contributes to the same economic operation (Chantepie & Latina, *Le nouveau droit des obligations*, (Daloz, 2nd ed) n° 495, p 441).

Although the effect of lapse is significant, it is justified since the performance of the other contract has become impossible. Lapse is however a remedy only if the party against whom it is held knew of the existence of the contractual group when it gave its consent.

Article 1187 CC furthermore provides that the lapse brings an end to the contract and may give rise to restitution as set out in Articles 1352 to 1352-9 CC. In that sense, it differs from the appreciation of hardship as the disappearance of an essential element automatically causes its lapse that the judge (or the parties) must uphold. Restitution triggers other considerations in its application by the courts that go beyond this paper.

## CONCLUSION

In the footsteps of other European models and harmonisation projects, the theory of *imprévision* is now enshrined in the French Civil Code. The novelty of Article 1195 CC lies in the new judicial power of review. Some lawyers may fear a snowball effect of judicial intervention in commercial affairs. This paper should appease this anxiety as it is expected that French courts will exercise restraint when wielding their new power. Certainly, large businesses need not fear judicial discretion since they already have the know-how, which allows them to self-solve unforeseeability in detailed and sophisticated clauses. For smaller businesses, the framework for renegotiation, and when all else fails, the helping hand of experienced judges may be welcome.

The paradoxical attributes of Article 1195 CCC – the default rule, the dynamics of renegotiation and the judicial power of review – all operate to encourage parties to resolve disputes arising out of changed circumstances themselves. The strength of Article 1195 CC lies in its deterrent effect to avoid judicial interference and favour commercial solutions. The parties remain in control and the pact, albeit modified, is affirmed, thus reinforcing the principle of binding force of contracts. It highlights the importance of “the flexibility rather than the rigidity of the contract, its durability and its survival” in the face of unforeseeability as legal certainty requires some contractual flexibility (Pédamon & Chuah, *Hardship in Transnational Commercial Contracts*, (Paris Legal Publishers, 2013), p 37). This is consistent with a utilitarian and more pragmatic vision of the contract that concentrates on its economic value and the need for variation under the threat of contractual failure due to unforeseeable events that render the performance commercially impracticable (Mazeaud, *La révision du contrat*, Rapport Français aux journées Capitant, les Petites Affiches, 30 January 2005, n° 6).

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