FROM *Gaz de Bordeaux* TO A CODIFIED DOCTRINE DE L'IMPRÉVISION - HOW MUCH PRE-VISION?

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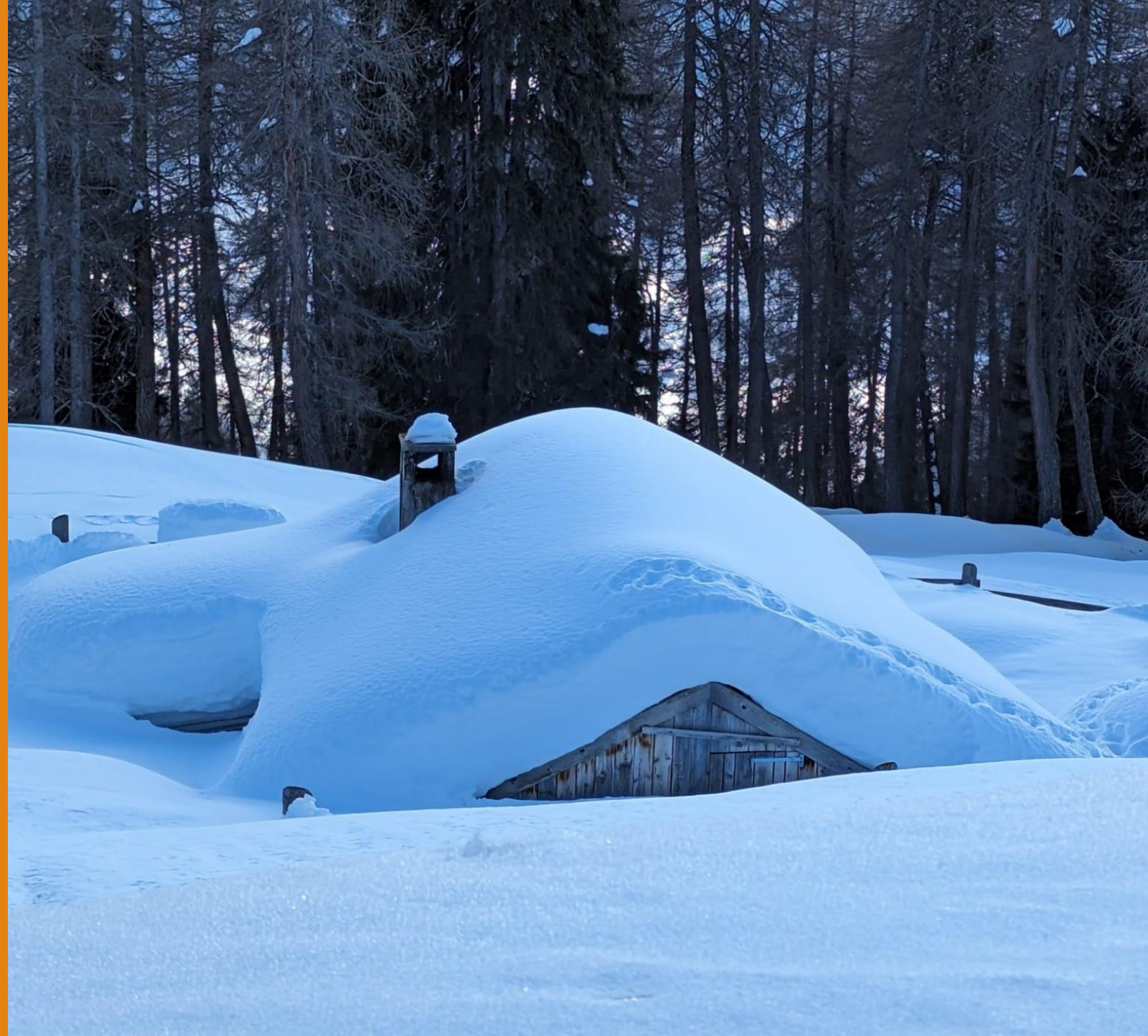

Adaptation of Contracts – A Matter of Justice, or Planning and Budgeting?

C.E. avis of September 2022 (and the cited references since Gaz de Bordeaux) concern a „deep“ jurisprudential issue on the nature and extent of „legal decisions“ and their „context of justification“. How much „law“, how much „economics“? Who is „budgeting“ the extra pay?

Is „fairness“ – finally – a sufficient reason for contract adaptation if the „economics of the contract“ are upset?

Is there any guidance from private business contracting?

Code civil

Article 1195

Version en vigueur depuis le 01 octobre 2016

Livre III : Des différentes manières dont on acquiert la propriété (Articles 711 à 2278)
Titre III : Des sources d'obligations (Articles 1100 à 1303-4)
Sous-titre Ier : Le contrat (Articles 1101 à 1231-7)
Chapitre IV : Les effets du contrat (Articles 1193 à 1231-7)
Section 1 : Les effets du contrat entre les parties (Articles 1193 à 1198)
Sous-section 1 : Force obligatoire (Articles 1193 à 1195)

Article 1195 **Version en vigueur depuis le 01 octobre 2016**

Modifié par Ordonnance n°2016-131 du 10 février 2016 - art. 2

Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.

En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe.

Art. 79 CISG

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and
(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

← (/cisg-article-by-article/part-3/art.-78-cisg)

→ (/cisg-article-by-article/part-3/art.-80-cisg)

Bürgerliches Gesetzbuch (BGB)
§ 313 Störung der Geschäftsgrundlage

(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.

(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.

(3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.

Fußnote

(+++ § 313: Zur Nichtanwendung vgl. § 10 Abs. 5 KredWG +++)

Re-reading Gaz de Bordeaux (1916)

In 1916 gas was produced from coal. Cheap supply of coal was interupted by the German occupation. The people of Bordeaux needed gas. The CE had to settle the issue „adminstratively“.

Serious contract lawyers always doubted whether this has been a „doctrinal“ decision on a matter of [private] contract law.

Aside: Take-or-Pay of Russian Pipeline Gas (2022)?

Russian pipeline gas was imported to Europe based on long-term contracts. The deliveries were terminated by the European counterparts sanctioning the Russian illegal warfare (in terms of public international law).

Looking at the very low cost of gas at the wellhead and the huge cost of the pipeline investment reflected (partially) in **take-or-pay agreements** - who has to come up for the risk of interruption? What could be the doctrinal background for an arbitral decision?

An equivalent situation to „Gaz de Bordeaux“?

Yes! But only on the „next level“: the relationship beween the local/ regional gas suppliers and the customers (industry, households). Once again, the issue was settled by the governments „admistratively“ – in Germany mainly by a payment of subsidies to firms and households.

Result: once again no „doctrinal“ decision on contract law.

In France **C.E.**, AVIS, 15 septembre 2022 relating to procurement. Key terms (objective/subjective): „*bouleversement* d.e.d.c.“. „*imprévision*“, working with threshholds: 10%, 50%.

Questions: What is the „economy of a contract“? No sanctions for lack of „foresight“? „Invitation to adjust“ ? Matter of „material law“ or procedure?

„Gaz de Bordeaux“ (C.E., 1916) and „Canal de Craponne“(Civ., 1876)

Conventional understanding: Art. 1195 Cc (2016) is finally settling the stubborn attitude of the Cour de Cassation by codifying the theory of l‘imprévision – an advance of law to a better, more equitable understanding of the problem.

My understanding: The new “guided” settlement procedure does not fully capture the variety of situations – and *may* invite dubious re-negotiation claims. However, it is more sophisticated than the “direct” solution of § 313 I BGB (2002).

Adaptation of contracts as a „civil“ remedy?

From a perspective of **remedies**, civil courts may (traditionally) grant

1. **injunctions**

2. **damages**

3. **specific performance**

4. a **declaration** that **void**s or **terminate**s a legal relationship.

5. They may arrange for an enforceable **settlement.** In this instance the court may assist the parties to adapt a binding „unfair“ relationship (**procedure** envisaged in Art 1195, but…).

Within the confines freedom of contract the parties may, and, indeed, should, specifiy procedures and rules for contract adaptation in the **contract text.**

It is obvious that this does not work in the area of consumer contracts.

Reasons for a numerus clausus of civil remedies

Of course, legislation can, as it has done, grant more powers to a court, and allow new remedies.

But they must „work“ in the specific procedural context.

If one party in the context of **civil proceedings** asks a court for adjustment (and the other party does not agree) this causes a conflict with two basic rules of civil procedure:

(1) the **maxim of disposition** (a civil court does not have inquisitorial competences),

(2) the **specificity of the claim** (the parties would have to put numbers on their estimate what they deem „fair“ under the changed circumstances – including the risk that they partially loose the suit).

This demonstates that we are rather in the realm of **administrative justice** - if we empower a court to order a „forced settlement“.

The „codification trap“

„Whole“ civil law codifications are ageing.

Their inherent „on-size-fits-all“ approach (the just solution comes from heaven/ from deeper jurisprudential insights) does not capture the divergent paths of current consumer and business transactions, nor can it accommodate the „architectural needs“ of 21st century deals.

The classical codifications have attracted numerous regulations in the consumer context (that may be perfectly justified and well working in this sphere) that may negatively affect drafted business transactions. The borderlines are fuzzy, leading to uncertainty.

From a drafting perspective, the Continental codified law of obligations has lost its function of „facilitating transactions“ (Lon Fuller). Rather, it impedes, or complicates workable solutions without resolving serious „justice problems“ in the area of drafted transactions.

How much „Pré-Vision“? -1

The Cour de Cassation (like present common law courts) insisted on full foresight for commercial contracts, eventually constructing/ granting a right of termination in cases of *force majeure*.

This stiff „legal position“ enforces

(1) drafting foresight clauses,

(2) settlement.

It is understood that the „practice“ of contractual parties (inserting routinely re-negotiation clauses) does NOT support an identical „legal rule“ (but contra: German doctrine and majority of French doctrine, e.g. Kahn, Tuscoz, M-A-SM refer to „practice“).

New Art. 1195 Cc takes a „relatively“ cautious **procedural approach**: „if not, if not“…

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How much „Pré-Vision“? - 2

The interesting incentive feature in Art 1195 is the **structural arbitrariness** of the **final** judicial **decision** (termination, or determination of the new contract price?). This staged arrangement incentivizes an advantaged non-co-operative contract party to settle with the disadvantaged party, in view of the possible costs of the suit, thereby remaining in the realm of contract law.

The relatively simple mechanism of Art 1195 - that does **not fit** for adapting **all** transactions – contains the procedural rudiments of more sophisticated drafted solutions, **e.g.**, in M&A contracts in the MAC/ OCB context. Here, advanced MAC clauses contain a four-stage rule/exception mechanism incentivizing parties to settle (my paper on OCB-clauses 2024)*.

With its „direct approach“ *Gaz de Bordeaux* is trying to cut a Gordian Knot of contract law. The solution of Alexander (333 B.C.) can be hardly understood as a principled approach, and it comes at a cost. I argue that disentangling the complex knot by using some insights of the theory of incentive compatible contracts may be advantageous for the rope, and for society at large.

* footnote: M&A adaptation of performance procedure (typical clause scheme for present billion $ targets, reference *Schanze, OCB-Klauseln, 2024, in print*)

Note: M&A is, in principle, a "one-shot" transaction, neither a "long-term", nor a "step-wise" performance contract ("sequential synallagma"), nor a "project arrangement", however, it contains a time element "**interim period**".

Step 1: specific performance, but possible **small adjustments** in the "bring down" conditions.

Step 2: **release** of buyer in case of a **"material adverse change"** in the target.

Step 3: **exception,** despite MAC, in stipulated cases of **force majeure**: return to step 1.

Step 4: **release** of buyer, if seller violates "**ordinary care of business**".

Step 5: return to step 1, if seller observes OCB.

For concessions/ long-term procurement:

Here, the initial bidding process should be accompanied by a "General Investment Plan", including DCF-projections. This would offer a fact-based starting point for adjusting the "*économie du contrat*".

(reference: *Jaenicke, Schanze, Hauser, A Joint Venture Agreement for Seabed-Mining, 1981 [!])*.