

Between Facts and Law. The Bottleneck of Louisiana Contract Law Facing Supervening Events

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Abstract: The article examines the tension in Louisiana contract law between the strict doctrine of *pacta sunt servanda* and the realities of supervening events that drastically alter contractual obligations but do not render performance absolutely impossible. Despite its dual heritage in civil law and common law – and frequent exposure to natural disasters – Louisiana has historically upheld a narrow definition of force majeure, requiring an absolute impossibility of performance and rejecting claims based merely on severe economic or practical hardship.

Early jurisprudence set a rigid precedent by denying relief for contracts rendered significantly more burdensome by hurricanes. Scholarly efforts – led notably by Professor Litvinoff – proposed more flexible interpretations that would allow courts to consider the impracticability of performance.

Hurricane Katrina and subsequent cases reinforced the courts' adherence to a strict force majeure tradition, although occasional rulings have shown a willingness to use implied good-faith obligations to require renegotiation or specific performance. The COVID-19 pandemic has prompted renewed debate, particularly when force majeure clauses did not explicitly reference pandemics but were nevertheless interpreted to encompass them. Scholars now suggest that further reforms, potentially influenced by the French Code's new *imprévision* provision and shaped through the Louisiana State Law Institute (LSLI), could finally align Louisiana law with broader trends accommodating supervening circumstances short of true impossibility.

Résumé: Cet article examine la tension dans le droit des contrats de Louisiane entre la doctrine stricte du *pacta sunt servanda* et la réalité de circonstances imprévues qui modifient radicalement les obligations contractuelles sans pour autant rendre l'exécution absolument impossible. Malgré son double héritage de droit civil et de common law, et son exposition fréquente aux catastrophes naturelles, la Louisiane a historiquement défendu une définition étroite de la force majeure, exigeant une impossibilité absolue d'exécution et rejetant les demandes fondées uniquement sur une difficulté économique ou pratique sévère.

La jurisprudence la plus ancienne a établi un précédent rigide en refusant tout allègement pour des contrats rendus beaucoup plus onéreux par des ouragans. Des efforts doctrinaux, notamment sous l'impulsion du professeur Litvinoff, ont proposé des interprétations plus souples permettant aux tribunaux de prendre en compte

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l'impossibilité pratique d'exécution, notamment en la rattachant au concept traditionnel de la cause en droit civil et au principe de bonne foi.

L'ouragan Katrina et la jurisprudence qui en a découlé ont renforcé l'adhésion des tribunaux à une conception stricte de la force majeure, bien que certaines décisions aient fait appel à l'obligation implicite de bonne foi pour imposer une renégociation ou l'exécution en nature. La pandémie de COVID-19 a relancé le débat, en particulier lorsque les clauses de force majeure ne visaient pas explicitement les pandémies, mais ont néanmoins été jugées applicables. De nombreux auteurs soutiennent désormais qu'il est nécessaire d'adopter de nouvelles réformes, potentiellement inspirées de la nouvelle disposition du Code français sur l'imprévision et mises en œuvre via le Louisiana State Law Institute, afin d'aligner enfin le droit de la Louisiane sur une approche plus large tenant compte des circonstances imprévues sans exiger une impossibilité totale.

Zusammenfassung: Der Artikel untersucht die Spannung im Vertragsrecht von Louisiana zwischen der strikten Doktrin von *pacta sunt servanda* und dem Eintreten unvorhergesehener Ereignisse, die vertragliche Verpflichtungen drastisch verändern, jedoch deren Erfüllung nicht absolut unmöglich machen. Trotz seiner dualen Tradition sowohl aus dem Civil Law als auch aus dem Common Law – und der häufigen Aussetzung gegenüber Naturkatastrophen – hat Louisiana historisch eine enge Definition von *höherer Gewalt* beibehalten. Es wird eine absolute Unmöglichkeit der Erfüllung gefordert, während Ansprüche, die sich lediglich auf erhebliche wirtschaftliche oder praktische Schwierigkeiten stützten, abgelehnt werden.

Die frühe Rechtsprechung schuf einen strikten Präzedenzfall, indem sie keine Erleichterung für Verträge gewährte, die durch Hurrikane erheblich erschwert wurden. Wissenschaftliche Bemühungen – insbesondere unter der Führung von Professor Litvinoff – schlugen flexiblere Auslegungen vor, die es den Gerichten ermöglichen würden, die Unzumutbarkeit der Erfüllung zu berücksichtigen.

Hurrikan Katrina und nachfolgende Fälle stärkten die konsequente Haltung der Gerichte zur strikten Tradition von *Force Majeure*, obwohl einzelne Urteile gelegentlich die Bereitschaft zeigten, implizite Treuepflichten heranzuziehen, um Nachverhandlungen oder die spezifische Erfüllung zu verlangen. Die COVID-19-Pandemie hat eine erneute Debatte ausgelöst, insbesondere in Fällen, in denen *Force Majeure*-Klauseln Pandemien nicht ausdrücklich erwähnten, aber dennoch so ausgelegt wurden, dass sie diese umfassen. Wissenschaftler schlagen nun weitere Reformen vor, die möglicherweise von der neuen *Imprévision*-Bestimmung des französischen Gesetzbuchs beeinflusst und durch das Louisiana State Law Institute gestaltet werden. Diese könnten das Recht Louisianas endlich mit den breiteren Entwicklungen in Einklang bringen, die nachträglich eintretende Umstände berücksichtigen, die zwar die Erfüllung erheblich erschweren, aber keine absolute Unmöglichkeit darstellen.

Resumen: El artículo examina la tensión existente en el Derecho contractual de Luisiana entre la estricta doctrina del *pacta sunt servanda* y la realidad de los acontecimientos sobrevenidos que alteran drásticamente las obligaciones contractuales pero no hacen absolutamente imposible su cumplimiento. A pesar de su doble herencia en el *civil law* y el *common law* -y de su frecuente exposición a desastres naturales-, Luisiana ha mantenido históricamente una definición estricta de fuerza mayor, que exige una

imposibilidad absoluta de cumplimiento y rechaza las reclamaciones basadas meramente en graves dificultades económicas o prácticas.

La primera jurisprudencia sentó un precedente rígido al denegar la reparación de los contratos que se volvían significativamente más onerosos a causa de los huracanes. Los estudiosos, encabezados en particular por el profesor Litvinoff, propusieron interpretaciones más flexibles que permitieran a los tribunales considerar la impracticabilidad del cumplimiento.

El huracán Katrina y los casos subsiguientes reforzaron la adhesión de los tribunales a una tradición estricta de fuerza mayor, aunque algunos fallos ocasionales han mostrado la voluntad de utilizar las obligaciones implícitas de buena fe para exigir la renegociación o el cumplimiento específico. La pandemia de COVID-19 ha suscitado un renovado debate, en particular cuando las cláusulas de fuerza mayor no hacían referencia explícita a las pandemias pero, no obstante, se interpretó que las abarcaban. Los expertos sugieren ahora que nuevas reformas, potencialmente influidas por la nueva disposición de imprévision del Código francés y elaboradas a través del Instituto de Derecho del Estado de Luisiana, podrían alinear finalmente la legislación de Luisiana con tendencias más amplias que dan cabida a circunstancias sobrevenidas que no llegan a la imposibilidad real.

1. Introduction

1. For several decades now, but we could also say from the very beginning of contract law, the subject of supervening contractual events has been at the center of scholarly attention across various legal systems, particularly regarding supervening events that render performance impracticable but not impossible, whose relevance to the life of the contract remains a matter of debate.¹ As it is well known, the principle of the obligatory force of

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- 1 Commentaries on the subject are numerous in all jurisdictions. The literature is also extensive in the comparative field. Among comparative studies, see V. JACOMETTI, *Il mutamento sopravvenuto di circostanze tra hard law e soft law. Profili di diritto comparato* (Torino: G. Giappichelli editore 2022); S. ACETO, 'Sopravvenienze contrattuali nel dinamismo della società globale: dalla crisi pandemica a quella energetica. La normazione internazionale e le diverse soluzioni nazionali,' 18. *Actualidad Jurídica Iberoamericana* 2023, p 781; P. GALLO, 'Eccessiva onerosità sopravvenuta e problemi di gestione del contratto in diritto comparato,' *Digesto delle discipline privatistiche, sez. civ.*, updated 2012, p 470; P. GALLO, 'Changed Conditions and Problem of Price Adjustment, An Historical and Comparative Analysis,' 3. *European Review of Private Law* 1998, p 285, doi: 10.54648/204595; E. Hondius & H.C. Grigoleit (eds), *Unexpected circumstances in European contract law* (Cambridge: Cambridge University Press 2011); R.A. MOMBERG URIBE, *The effect of a change of circumstances on the binding force of contracts* (Cambridge: Intersentia 2011); M. SCHMIDT-KESSEL & K. MAYER, 'Supervening events and force majeure,' in J.M. Smits (ed.), *Elgar encyclopedia of comparative law* (Cheltenham: Edward Elgar 2006), p 689; A. KARAMPATZOS, 'Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo American, German, French and Greek Law,' *European Review of Private Law* 2005, p 105, doi: 10.54648/ERPL2005009; F.P. TRAISCI, *Sopravvenienze contrattuali e rinegoziazione nei sistemi di civil law e di common law* (Napoli: ESI 2003).

contract, a cardinal principle of modern contract law enshrined in the great European codifications and the classic model of the rules recognized by the courts in English common law, later merged – though in less rigid terms – in North American law,² was challenged by facts even before the reflection of jurists. The many crisis situations over the past century, and particularly in recent decades, that have led to exceptional changes in contractual circumstances resulting in drastic alteration of the originally intended synallagma have opened the door for the introduction of several exceptions to the principle of *pacta sunt servanda*.³

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- 2 The principle of *pacta sunt servanda*, never incorporated into Roman law as a general principle, became established following the systematization of the latter by the glossators and thanks to canon law in addition to commercial practice, which intervened to protect the certainty and security of trade. The elaboration of the *rebus sic stantibus* clause, as an exception to the principle of sanctity of contract, is also due to the canon law of medieval times, which recognized a principle of equity in the possibility of revising the contractual promise if the circumstances existing at the time of the conclusion of the contract changed. The latter principle, recognized by the 17th-century Pandectists, survived into the 18th century and is found in the earliest codifications of natural law, the Bavarian Civil Code of 1756, the Prussian Code of 1794, and the Austrian ABGB of 1811. Unlike their predecessors, the two major codifications of the 19th century, the *code civil* and the BGB, as well as the codifications derived therefrom, did not recognize relevance to changing circumstances but strongly affirmed the principle of *pacta sunt servanda* in deference to the conception of the contract centered on absolute respect for the will of the parties. This approach is also evident in common law countries, where the intangibility of the contractual regulation is not challenged on the formal level despite some correctives developed by case law, such as *frustration* in English law and *impracticability* and *commercial impracticability* in American law. On this subject, see in addition to the already cited JACOMETTI, *Il mutamento sopravvenuto di circostanze*, p 9, the studies of R. ZIMMERMANN, *The law of obligations: Roman foundations of the civilian tradition* (Oxford: Oxford University Press 1996); J. GORDLEY & A.T. VON MEHREN, *An introduction to the comparative study of private law: readings, cases, materials* (Cambridge: Cambridge University Press 2006); J. GORDLEY, *Foundations of private law: property, tort, contract, unjust enrichment* (Oxford: Oxford University Press 2006), p 289.
 - 3 Throughout the 20th century, legal theory and case law have developed a number of theories to allow for the dissolution or adjustment of the contractual bond if circumstances change. The need to introduce more flexible principles has manifested itself several times in recent decades given the succession of economic, environmental, terrorist and health crises. Indeed, in the aftermath of the COVID-19 pandemic the literature on the subject has flourished exponentially. On this, see C. PÉDAMON & R. VASSILEVA, ‘Contractual Performance in Covid-19 Times: Does Anglo-French Legal History Repeat Itself?’, *European Review of Private Law* 2021, p 3, doi: 10.54648/ERPL2021002; V. V. PALMER, ‘The Sanctity of Promises in A Capital of Force Majeure: Hurricanes, Pandemics and the Doctrine of Impossibility Under Louisiana Law’, *Journal of International and Comparative Law* 2023, p 45; H. BEALE & C. TWIGG-FLESSNER, ‘COVID-19 and English Contract Law,’ in E. Hondius, M. Santos Silva, A. Nicolussi, P. Salvador Coderch, C. Wendehorst & F. Zoll (eds), *Coronavirus and the Law in Europe* (Cambridge: Intersentia 2020), p 461; K. P. BERGER & D. BEHN, ‘Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study,’ *McGill Journal of Dispute Resolution* 2019/2020, p 79, doi: 10.2139/ssrn.3575869; E. CALZOLAIO, ‘Il Covid-19 quale “sopravvenienza contrattuale” nella prospettiva comparatistica,’ in E. Calzolaio & M. Meccarelli-S. Pollastrelli (eds), *Il diritto nella pandemia. Temi, problemi, domande* (Macerata: Eum 2020), p 121; E. DEL PRATO, ‘CoViD-19, Act of God, Force Majeure, “Hardship Clauses,” Performance and Nonperformance’, 3. *Nuova giurisprudenza civile commentata (New Commented Civil Case Law)* 2020, p 64; J. HEINICH, ‘L’incidence de l’épidémie de coronavirus sur les contrats d’affaires: de la force

2. In the varied landscape that has gradually taken shape, one enduring legal framework stands out, which, despite numerous pressures emanating both from the broader context and from authoritative voices within the legal system, remains rooted in a 19th-century notion of sovereignty and the inviolability of the contractual parties' will. It is a system subject to a dual influence of civil law and common law, which throughout its history has had to deal with numerous catastrophes of natural origin related to its geographical location and which has so far been unwilling to accommodate – either from civil law or common law – solutions that could mitigate the rigidities of an approach totally faithful to the principle of *pacta sunt servanda*: Louisiana.⁴

This study aims to reconstruct the origins and evolution of this restrictive orientation and the prospects for overcoming it with particular regard to supervening events related to cases of force majeure with consequences that render performance impracticable but not impossible. Accordingly, the objective of this article is to trace the historical and doctrinal trajectory of Louisiana's uncompromising stance on force majeure, assess its resilience facing contemporary crises, and explore the comparative reform proposals that would enable the state's contract law to accommodate supervening events rendering performance impracticable – though not impossible – without forsaking the principle of *pacta sunt servanda*.

2. *Pacta sunt servanda*: The Rigid Position of the Courts in Louisiana

3. The principle of *pacta sunt servanda* was first included in Louisiana's written law with the 1808 *Digest of the Civil Laws in Force in the Territory of Orleans*,⁵

majeure à l'imprévision', *Dalloz* 2020, p 611; M.R. SISTRUNK & L.A. TAFARO, *State of Louisiana Force Majeure Compendium (during COVID-19 pandemic)* (US Law Network inc., 2020).

- 4 On Louisiana law as a mixed jurisdiction where common law and civil law coexist, see V.V. Palmer (eds), *Mixed Jurisdictions Worldwide: The Third Legal Family* (Cambridge: Cambridge University Press 2012); V.V. PALMER, 'Two Rival Theories of Mixed Legal Systems,' 1. *Journal of Comparative Law* 2008, p (7) at 33; V.V. PALMER, 'The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana,' 7. *Tulane Law Review* 1994, p 8; J.-R. TRAHAN, 'The Continuing Influence of le Droit Civil and el Derecho Civil in the Private Law of Louisiana,' 63. *Louisiana Law Review* 2003, p (1019) at 1066; J. ZEKOLL, 'The Louisiana Private Law System: the Best of Both Worlds,' 10. *Tulane European & Civil Law Forum* 1995, p 1, doi: 10.37381/jxsaq310; A. LEVASSEUR & V. FELIÜ, 'The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!,' *Louisiana Law Review* 2009, p 716, doi: 10.2139/ssrn.2043175.
- 5 To address the need for clarity and certainty of the law, made particularly articulate in Louisiana by the various cessions of this territory since 1699 between Spain, France, and, finally, the United States, a commission – in which Louis Moreau-Lislet and James Browun, distinguished jurists belonging to the two souls of the territory, the civilian and the common law, were particularly prominent – was tasked with drawing up an initial collection/codification of the regulations in force. Thus took shape the *Digest of the Civil Laws now in Force in the Territory of Orleans* that went into effect in 1808. V.J.-R. TRAHAN,

which reproduced the rules from Article 1134 to Article 1148 of the *Code Napoléon*.⁶ This approach remained essentially unchanged in both the first proper civil code of 1825⁷ and its 1870 version, which is still in force today, except for sporadic amendments to the code's text.⁸

63. *Louisiana Law Review* 2003 available at digitalcommons.law.lsu.edu/lalrev/vol63/iss4/10. For the text of the Digest, see law.lsu.edu/clo/digest-online/.

- 6 The 1808 *Digest* was inspired by the Code Napoléon (1804), but it was not a mere translation. In fact, it incorporated norms and institutions of the previous Spanish law. Divided into three books, the compilation devoted the third volume to 'Different manners of acquiring the ownership of things'. In Title III ('Of contracts and of conventional obligations in general'), Ch. III ('Of the effect of obligations'), s. IV ('Of the damages resulting from the non-execution of the obligation') devotes 10 rules to this topic (Arts 46-55 - the numbering of the articles restarts from 1 at the beginning of each new title in the compilation). Article 48 states 'There is no room for any damages, when by irresistible force, or a fortuitous event, the debtor has been hindered from giving or doing what he was obliged to give or do, or has been compelled to do what he was bound not to do,' faithfully reproducing Art. 1148 of the Code Napoléon, which establishes 'Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit'.

While Art. 34 (s. I, Ch. III, 'The effect of obligations', s. I 'general dispositions'), states that 'Agreements legally entered into, have the effect of laws on those who have formed them. They cannot be revoked, unless by mutual consent of the parties, or for causes acknowledged by law. They must be performed with good faith'. Thus literally translating Art. 1134 of the Code Napoléon of 1804, which reads 'Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi'.

- 7 Like the *Digest*, the civil code of 1825, drafted in a bilingual French/English version, remains divided into three books: book three is also dedicated to 'Different modes of acquiring the ownership of things', while the internal organization of the book changes, and the regulation dedicated to the 'irresistible force or fortuitous event' that destroys the object of the obligation is now Art. 1927, inserted in Title IV ('Of conventional obligations'), Ch. III ('Of the effect of obligations'), s. IV ('Of the damages resulting from the inexecution of obligations'), which consists of 15 articles. Article 1927 states that 'When the breach has been passive only, damages are due from the time that the debtor has been put in default, in the manner directed in this chapter. The rules contained in this and the preceding articles, however, are subject to the following exceptions and modifications: (...) 2. Where, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do, or is from the same causes compelled to do what the contract bound him not to, no damages can be recovered for the inexecution of the contract; 3. There are two exceptions to the last rule; first, when the party in default has by his contract expressly or implicitly undertaken the risk of the fortuitous event, or of the irresistible force; secondly, if the fortuitous event, or cause of force, was preceded by some fault of the debtor, without which the loss would not have happened; 4. Although the responsibility of the debtor for the object he was bound to deliver, is incurred from the moment he is put in default, yet if it is lost by some fortuitous event or irresistible force, by which it would also have been lost, had it been in the hand of the creditor, the debtor is not answerable for the value, but only for the delay' (archive.org/details/civilcodeofstate00loui/page/262/mode/2up?view=theater).
- 8 In 1870, after the American Civil War, the state adopted a new version of the Civil Code that essentially reworked and reorganized the previous texts. Despite the linguistic changes (English

4. The drafters of the Louisiana Civil Code of 1870 also borrowed the principle of force majeure from the Code Napoléon, stipulating in Article 1933 that ‘Where, by a fortuitous event or irresistible force, the debtor is hindered from giving or doing what he has contracted to give or do or is from the same causes compelled to do what the contract bound him not to do, no damages can be recovered for the inexecution of the contract’.

The model centred on the cardinal principle of *pacta sunt servanda*, with the sole exception of force majeure as governed by Article 1933, provides the backdrop for a series of jurisprudential decisions that rigidly apply such principle without leaving room for possible adjustments. This is also the case when faced with the very exceptional circumstances arising from the hurricanes that periodically ravage the state of Louisiana.⁹

5. Here we mention two leading cases from the 1920s and 1960s, respectively *Sickinger v. Board of Directors of Public Schools for the Parish of Orleans*¹⁰ and *Schenck v. Capri Construction co.*¹¹ In both cases the courts (Supreme Court for the Sickinger case and Court of Appeals for the Schenck case) denied relevance to the exceptional event that significantly altered the content and balance of the originally concluded contract. The plaintiffs in both Sickinger and Schenck had cited Article 1933 to excuse their performance of obligations under the contract. Schenck argued that Hurricane Betsy made it ‘economically’ impossible. However, in this case the Court of Appeals clearly affirmed the principle that in order to be recognized as relevant for the release of the debtor from the contractual obligation assumed, the fortuitous events

was now dominant and no French version was drafted) and minor amendments, the 1870 Code retained the basic imprint of the earlier Roman-French-inspired codes.

In the 1870 Code, the reference to the ‘irresistible force or fortuitous event’ that destroys the object of the obligation is in Art. 1933, inserted in s. IV (‘Of the damages resulting from the inexecution of obligations’), of Ch. 3 (‘Of the effect of obligations’), Title IV (‘Of conventional obligations’), Book 3 (‘Of the different modes of acquiring the ownership of things’), which substantially reproduces the 1825 version. Compare Louisiana, Title IV. Of Conventional Obligations (Arts 1761-2291), 1940, Book III. 5. Available at digitalcommons.law.lsu.edu/la_civilcode_book_iii/5.

- 9 On the subject in Louisiana law, see C.R. HANDY, ‘No Act of God Necessary: Expanding Beyond Louisiana’s Force Majeure Doctrine to Imprévision,’ 79 *Louisiana Law Review* 2019, p 241; J. MARULLO, L. SPRINGER BROWN, ‘Revisiting Force Majeure: The Texas and Louisiana Perspectives,’ *The Energy Law Blog. Insight and Analysis of Legal Issues Impacting the Energy Industry* 2020, available at theenergylawblog.com/2020/03/articles/energy/energy-natural-resources/covid-19-as-a-force-majeure-the-texas-and-louisiana-perspectives/; V. PALMER, *Journal of International and Comparative Law* 2023, p 45; as well as the important contribution of S. LITVINOFF, ‘Force Majeure, Failure of Cause and Théorie de l’Imprévision: Louisiana Law and Beyond,’ 45. *Louisiana Law Review* 1985, p 1, on which see more extensively below.
- 10 *Sickinger v. Board of Directors of Public Schools for the Parish of Orleans*, Supreme Court of Louisiana 10 Jun. 1920, available at www.courtlistener.com/opinion/7257750/sickinger-v-board-of-directors-of-public-schools-for-parish/.
- 11 *Schenck v. Capri Construction co.*, Louisiana Court of Appeal fourth circuit 13 Feb. 1967, at [courtlistener.com/opinion/1880278/schenck-v-capri-construction-co/](https://www.courtlistener.com/opinion/1880278/schenck-v-capri-construction-co/).

must result in an objective impossibility of performance. This principle had been clearly affirmed by a 1926 precedent which, intervening in a case in which a natural calamity had made it impossible for either contracting party to perform, had pointed out that for the impossibility to have relevance it had to be absolute, which was not the case in the matter at hand since performance could be fulfilled by procuring the good that was originally due and that had been destroyed due to the calamity from a third party.¹²

6. It is noteworthy that in adjudicating the Schenck case, the Louisiana 4th Circuit Court of Appeals expressed a concern toward the appellants, a sentiment that was also expressed by the lower court. The case involved a contract for the extension of a home that was later hit and seriously damaged by Hurricane Betsy. The owners of the property demanded to be released from the obligations incumbent on them under the contract, as these obligations had become more onerous, exorbitantly so, to the point of creating a serious financial hardship for the family. In this regard the Court of Appeals expressly stated:

While we sympathize with the plaintiffs, as did the trial court, we must affirm a judgment against them. Our settled jurisprudence is that the obligor is not released from his duty to perform under a contract by the mere fact that such performance has been made more difficult or more burdensome by a fortuitous event or an irresistible force.¹³

7. The two decisions recalled above come on the heels of two Louisiana Supreme Court precedents that are still widely cited in matters concerning supervening contractual events. These are, in addition to the aforementioned *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, the famous case of *Losecco v. Gregory*,¹⁴ in which the court condemned the plaintiff to pay the full amount agreed upon for the purchase of a batch of oranges, despite the fact that the crop had been destroyed by frost, arguing how the contract signed by the parties was a particular type of contract relating to the sale of future things, which involved the assumption of the risk by the buyer of not obtaining the contracted goods.¹⁵

12 This is the case of *Dallas Cooperage & Woodenware Co. v. Creston Hoop Co.*, Louisiana Supreme Court 5 Oct. 1926, 109 So. 844 = 161 La. 1077 = 1926 La. LEXIS 2181 at courtlistener.com/opinion/3470060/dallas-cooperage-woodenware-co-v-creston-hoop-co/, which concerned the buying and selling of elm wood discs used for making barrels. Due to the heavy rains that made the wood unsuitable for the purpose stated in the contract, the defendant was unable to fulfill its obligation to deliver the goods. The plaintiff then sued for damages under Art. 1933 of the Civil Code.

13 *Schenck v. Capri Construction Co.*, So. p 380.

14 *Losecco v. Gregory*, Louisiana Supreme Court 1 Jul. 1901, 32 So. p 985, at app.midpage.ai/document/losecco-v-gregory-7163948?utm_source=webapp.

15 Compare Louisiana Supreme Court 1 Jul. 1901, p 996. The definition of sale of a future thing, or, paraphrasing from the letter of the Louisiana Code, the sale of expectations, is found in s. 2451 of

3. The Proposals of Legal Theory

8. Faced with the assumption of these rigid positions, a part of the Louisiana legal theory argues in favour of the need to introduce correctives within the code, believing legislative action to be a mandatory step to intervene effectively in the matter. Taking the lead in this thinking is Professor Saul Litvinoff,¹⁶ who contributed significantly to drafting a law reforming Book III of the civil code, which, in emulation of the *Code Napoléon*, is entitled ‘Of the different modes of acquiring the ownership of things’.¹⁷

The intent behind Litvinoff’s drafting of the new provisions of the code is to open a way for more flexible jurisprudential interpretations of supervening contractual events by tying the issue to a classic theme of French contract law, namely that of the cause of the contract.¹⁸

9. The 1984 reform led to the inclusion of a new section entitled ‘impossibility of performance’,¹⁹ which opens with the following provision: Article 1873:

Obligor not liable when failure caused by fortuitous event. An obligor is not liable for his failure to perform when it is caused by a fortuitous event that makes performance impossible. An obligor is, however, liable for his failure to perform when he has assumed the risk of such a fortuitous event. An obligor is liable also when the fortuitous event occurred after he has been put in default. An obligor is likewise liable when the fortuitous event that caused his failure to perform has been preceded by his fault, without which the failure would not have occurred.

It then specifies the definition of fortuitous event, in Article 1875, as an event that ‘at the time the contract was made, could not have been reasonably foreseen’. Immediately thereafter, it is specified in Article 1876 that ‘When the entire

the Code, which states: ‘A hope may be the object of a contract of sale. Thus, a fisherman may sell a haul of his net before he throws it. In that case the buyer is entitled to whatever is caught in the net, according to the parties’ expectations, and even if nothing is caught the sale is valid’.

16 In 1985 Professor Litvinoff published the important article S. LITVINOFF, 46. *Louisiana Law Review* 1985, in which he argues in detail for the need to make Louisiana’s law on supervening events more flexible and adapted to the peculiarities of the region. His thinking rests on the analysis not only of Louisiana law on force majeure, but also of major foreign legal systems, most notably those of France and Germany.

17 The revision of Book III of the Louisiana civil code, which took effect on 1 Jan. 1985, is contained in Act 331 of 1984 by the Louisiana Law Institute, led by Prof. William Crawford. For an analysis of the revision see S. LITVINOFF, ‘Introduction,’ 45. *Louisiana Law Review* 1985, p 747. All of volume 45 of the journal is devoted to the reform.

18 Compare S. LITVINOFF, 45. *Louisiana Law Review* 1985, p 13; ID, 45. *Louisiana Law Review* 1985, p 750.

19 This is s. 2 of Ch. 6 (‘Extinction of obligations’) of Title III (‘Obligations in general’) of Book III (‘Of the different modes of acquiring the ownership of things’).

performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved’.

10. Litvinoff attributes potential to this new set of provisions with respect to the entry of less drastic rules for supervening events into the system. This potential is seen in the possibility of invoking arguments related to the cause of the contract as expressed by the French courts in a number of rulings that, although pertaining to the past, are an interesting point of reference for Litvinoff.²⁰ Events that result in major alterations in the performance of the contract in the context of force majeure may result in the parties’ failure to achieve the purpose pursued through the contract, even under circumstances in which performance remains possible. Litvinoff’s reasoning offers Louisiana courts additional operational insights through an extensive comparative examination of what happens in civil law and common law countries on the subject of supervening events,²¹ developing blended arguments that inevitably characterize the legal reasoning of a jurist operating in a mixed-jurisdiction environment. Indeed, it is also associated with the systematic premise of connection with the subject of the cause of the contract to refer to the other major principle to which we owe a strong creative thrust in contractual matters, namely the principle of good faith, which has been the beacon for the evolution of the subject matter we are discussing in the civil law system that first opened the door to supervening contractual events, namely the German system.²²

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- 20 These are the decisions: *Bertrand v. Junot*, Tribunal de la Seine 3 Feb. 1905, p 11. *Gazette du Tribunal*, in which the contract was discharged because a party’s physical incapacity prevented him from performing personally – even though the contract did not strictly require personal performance – so the unforeseen event that befell the obligor did not render performance entirely impossible; *Letellier v. Carvalho*, Tribunal de la Seine 17 Apr. 1869, 4. *D. Jur.*, p 211, in which the contract was discharged because fulfilling the obligation would have endangered the obligor’s life, even though the performance itself was not entirely impossible. Again, in *Aguado v. DeBearn*, Cour d’Appel de Paris 1875, *Dalloz Juridique*, p 11204, in which a tract of land was leased specifically for hunting, but the authorities later prohibited hunting in that area. The court determined that the lessee was entitled to a rent reduction. Clearly, this prohibition did not render the lease contract impossible to perform, because it did not prevent the lessee from occupying the property or paying rent. Instead, it simply undermined the expectations of one of the parties. Finally, *Esteve v. Dubois*, Cour d’Appel de Toulouse 1916, *Dalloz*, p 112, in which the question concerns a long-term contract under which the plaintiff, a tailor, was hired to produce fine clothing for the defendant’s establishment. However, World War I caused most of the defendant’s customers to disperse, making the plaintiff’s services unnecessary. Although the traditional view would hold that performance remained physically and legally possible, the commercial court terminated the contract. Evidently, the court’s decision stemmed from the fact that unforeseen events prevented the parties from achieving the contract’s intended purpose.
- 21 S. LITVINOFF, 45. *Louisiana Law Review* 1985, p 13. See also C.R. HANDY, 79 *Louisiana Law Review* 2019, p 251.
- 22 In Litvinoff, the reference to the German legal system is on p 17 and following. The German civil code was reformed in 2002. In Germany, the reform took the opportunity of the transposition of some EU directives on contractual matters to make organic changes to the code, reforming what had become old and inadequate for practical application. On the reform of the German civil code

Litvinoff also cites the French theory of *imprévision* in this regard, siding with the then still minority position of French legal theory and advocating the implementation of this theory in contractual matters as well.²³ In fact, the American scholar points out that at the origins of this theory lies ‘a combination of the overriding principle of good faith, as expressed in Article 1134 of the *Code Napoléon*, and the reading of a sort of implicit condition *rebus sic stantibus* into the contract’.²⁴

4. Hurricane Katrina and Its Impact on Contracts

11. Professor Litvinoff thus delivers into the hands of Louisiana jurisprudence his interpretive key to break through the rigidity of the rules on supervening contractual events and also give prominence to supervening events that render performance impracticable but not impossible. A decisive test for Louisianan courts with respect to the use of the analytical tools proposed by Litvinoff came with one of the most violent and devastating natural disasters in Louisiana’s modern history, namely Hurricane Katrina, which hit the New Orleans area on 29 August 2005, claiming more than 1,500 lives and heavily flooding more than 80% of the city of New Orleans.²⁵

12. In the years between 2005 and 2008, a series of cases that addressed the issue of supervening events related to the natural calamity that had caused so much misfortune to the state of Louisiana were brought to court. In chronological order, the following rulings were issued: *National Automotive Insurance Co. v. Champ’s New Orleans Collision Center*²⁶; *Associated Acquisitions, L.L.C. v. Carbone Properties*²⁷; *Payne v. Hurwitz*.²⁸

see E. FERRANTE, ‘Il nuovo “Schuldrecht”: ultimi sviluppi della riforma tedesca del diritto delle obbligazioni e dei contratti’, 2. *Contratto e impresa. Europa* 2001, p. 761; B. MARKESINIS, H. UNBERATH, A. JOHNSTON, *The German Law of Contract: A Comparative Treatise* (Oxford: Hart Publishing 2006); P. RIDDER-M.-P. WELLER, ‘Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law,’ *European Review of Private Law* 2014, p. 371; R. ZIMMERMANN, *Breach of Contract and Remedies Under the New German Law of Obligations* (Roma: Centro di studi e ricerche di diritto comparato e straniero 2002).

23 On the 2016 French reform see more extensively below, para. 5.

24 S. LITVINOFF, 45. *Louisiana Law Review* 1985, p. 15.

25 Compare A. WOLD, ‘NOAA: Climate change played significant role in Louisiana’s torrential August rainfall,’ *ADVOCATE* 7 Sep. 2016, available at theadvocate.com/baton_rouge/news/environment/article_dc458f5e-750b-11e6-a0dd-93b70f9bfa04.html.

26 *National Automotive Insurance Co. v. Champ’s New Orleans Collision Center*, Louisiana Court of Appeal, fourth circuit, 28 Feb. 2007, at caselaw.findlaw.com/court/la-court-of-appeal/1294820.html.

27 *Associated Acquisitions, L.L.C. v. Carbone Properties*, Louisiana Court of Appeal, fourth circuit, 11 Jul. 2007, at case-law.vlex.com/vid/associated-acquisitions-v-carbone-890097631.

28 *Payne v. Hurwitz*, Louisiana Court of Appeal, first circuit, 16 Jan. 2008, at caselaw.findlaw.com/court/la-court-of-appeal/1212961.html.

The first of these cases involves a contract to deposit a car (a Titan) at Champ's New Orleans Collision Centre. Delivered before 29 August 2005, the car was destroyed by the fury of the hurricane along with the other 60 cars left in the garage at the time of the flood. National Automotive, which insured the Titan automobile, filed a subrogation claim against Champ's. Champ's had a deposit contract with the Titan's owner but was unable to return the vehicle after Hurricane Katrina disaster. In its lawsuit, National Automotive alleged that Champ's had negligently failed to safeguard the Titan. Champ's responded that it 'could not be held liable for the destruction' of a vehicle caused by 'an unprecedented disaster'.²⁹ Both the district court and the appeals court sided with Champ's. As recognized by the 4th Circuit, a depositary is 'not answerable ... for accidents produced by overpowering force, unless he has delayed improperly to restore the deposit'.³⁰ The court found no delay on the part of Champ's and held that Champ's was powerless to protect the Titan from the 'unforeseeable and unprecedented ... devastation' caused by Hurricane Katrina.

In this decision, the courts exempt the defendant from contractual liability by recognizing its full diligence in the performance of the deposit contract and thus establishing a situation of impossibility of performance under Article 1873 of the Louisiana civil code.

13. Apart from this first ruling, a string of decisions in subsequent cases remained true to the 'strict force majeure tradition' of Louisiana courts.³¹

In *Associated Acquisitions*, the plaintiff had an interest in Carbone, a company constructing a Hilton Inn in New Orleans. After Hurricane Katrina damaged the property, Carbone claimed that the increased construction costs caused by the storm made it impossible to pay interest on a promissory note to Associated Acquisitions. Carbone's argument was based on the termination of its construction loan by the bank and the expiration of the hotel franchise agreement. However, the Court ruled in favour of Associated Acquisitions, relying on the precedents *Dallas Cooperage* and *Schenck*, asserting that Carbone should pay the interest in full, as payment remained feasible despite the heightened difficulty.³²

14. The *Associated Acquisition* case was followed by the *Payne* case, which involved a contract for the sale of a property. The owner of a home in Madisonville, signed a purchase agreement with a buyer with a closing date on 26 September 2005. The agreement also provided for an automatic

29 Compare Louisiana Court of Appeal, fourth circuit, 28 Feb. 2007, para. 198.

30 Louisiana Court of Appeal, fourth circuit, 28 Feb. 2007, para. 199.

31 Compare C.T. CHOCHÉLES, 'No Excuses: Hurricanes and the "Act of God" Defense to Breach of Contract Claims', 57. *Louisiana Bar Association Journal* 2010, p 380.

32 Compare Louisiana Court of Appeal, fourth circuit, 11 Jul. 2007, paras 104-108.

extension of the closing date for 60 days if the house required repairs. During the Hurricane Katrina events, the property was rather damaged. Meanwhile, the buyers tried to contact the seller to arrange for an extension of the closing date. On 20 September 2005, the seller responded that it would take months to repair the house and that he was ‘not interested in selling the house for the same amount since the house goes up in value every day’.³³ The buyers then filed suit, demanding specific performance of the purchase agreement. The seller argued that no repairs had been made by the original closing date and that repairs had still not been completed at the time of trial (May 2006). The District Court ruled for the buyer, and the seller appealed in front of the 1st Circuit Court of Appeal, claiming that an ‘Act of God’ had rendered the obligations in the purchase agreement null and void. The Court rejected the seller’s argument, reasoning that the parties could have agreed on a ‘mutual extension of the closing deadline’.³⁴ But the seller was unwilling to ‘pursue reasonable alternatives to render performance in a different manner, since he wanted to profit from Katrina’s destruction’³⁵ in order to obtain a higher price. Finding that this unwillingness stemmed from the seller’s bad faith, the 1st Circuit ordered the seller to convey the property to the buyer at the agreed-upon price.³⁶

15. The court’s willingness to apply the strict force majeure tradition of Louisiana law is such that it led the court to an extreme argument that has been the subject of criticism by Louisiana legal theory.³⁷ Specifically, in interpreting the contract in dispute, the court went so far as to go beyond what the parties expressly stipulated. In a situation like the case in question, a court would defer to a party’s free choice to decline to extend the repair deadline where there is no express provision requiring it to extend the deadline.³⁸ But, in this case, where the seller gave ‘disingenuous’ reasons for exercising that choice, the court wrote that the ‘nonperformance of a contract is not excused by a fortuitous event where it may be carried into effect, although not in the manner contemplated by the obligor at the time the contract was entered into’.³⁹ In reaching its decision, the 1st Circuit relied not on any explicit contractual provision, but on the implicit duty to perform contracts ‘in good faith’. Hurricane Katrina may have made it impossible to repair the house within days of the closing date, but it was not impossible for the seller to agree to an extension of the repair deadline. The

33 Compare Louisiana Court of Appeal, first circuit, 16 Jan. 2008, para. 1102.

34 Louisiana Court of Appeal, first circuit, 16 Jan. 2008, para. 1106.

35 Louisiana Court of Appeal, first circuit, 16 Jan. 2008, para. 1107.

36 See the comments of C.R. HANDY, 79. *Louisiana Law Review* 2019, p 251; C.T. CHOCHÉLES, 57. *Louisiana Bar Association Journal* 2010, pp 382-383.

37 Thus C.T. CHOCHÉLES, 57. *Louisiana Bar Association Journal* 2010, p 380.

38 C.T. CHOCHÉLES, 57. *Louisiana Bar Association Journal* 2010, p 384.

39 See the decision Louisiana Court of Appeal, first circuit, 16 Jan. 2008, para. 1005.

seller's failure to do so was, according to the 1st Circuit, 'volitional in nature, rather than the type of insurmountable obstacle necessary to invoke the defence of force majeure'.⁴⁰ Following the Court reasoning, extending the repair deadline would have been a reasonable alternative to voiding the contract, but the seller refused to make such an accommodation. The courts seized on this refusal to justify an order that compelled the seller to perform its obligations under the contract.

5. The Influences of Uniform and Foreign Law

16. Just as these cases were being decided, an article was published by Charles Tabor, a student of Professor Litvinoff who later went on to practice law, who returned to the subject of supervening contractual events by proposing a new revision of the Louisiana civil code.⁴¹ Drawing inspiration from the two then-emerging soft law instruments in the field of contracts, namely the Unidroit principles (PICC) on international commercial contracts and the Principles of European Contract Law (PECL),⁴² Tabor proposed the inclusion of eleven new articles in the Louisiana civil code that were presented and illustrated in an essay that appeared in the *Louisiana Law Review* in 2008. Tabor suggests resolving a situation that has a dual negative effect on the state of Louisiana, isolating it legally and making it economically inefficient. Tabor proposes to add a new section VI, in Chapter 8 ('Effects of conventional obligations'), Title IV, Book III of the civil code entitled 'Substantial change of circumstances'. The eleven articles of the proposal codify the principle that contractual obligations must be performed as the parties wrote them unless a 'substantial change of circumstances occurs',⁴³ that is when a 'fortuitous event causes a fundamental alteration of either the obligor's or obligee's equilibrium, such that had the circumstances been present at the time the contract was formed, either the obligor or obligee would not have consented to the agreement'.⁴⁴ The proposal also defines the boundaries of the courts' power to dissolve or modify the contract (Arts h, i, j, k), which is always subject to the will of the parties, where they agree.

40 See Louisiana Court of Appeal, first circuit, 16 Jan. 2008, para. 1009.

41 See C. TABOR, 'Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law,' *Louisiana Law Review* 2008, p 568. The 11 new articles in the Louisiana civil code were specifically meant to regulate the dissolution of the contractual bond in the case of supervening circumstances that are determinative for the performance of the contract.

42 In his proposal, Tabor also considers the US Uniform Commercial Code and the Restatement (second) on contracts, as well as the Russian, Italian, Greek, Uzbek, and Turkmen civil codes. C. TABOR, *Louisiana Law Review* 2008, p 593.

43 Compare Art. b of Tabor's proposal, C. TABOR, *Louisiana Law Review* 2008, pp 568, 572.

44 Compare Art. c, C. TABOR, *Louisiana Law Review* 2008, pp 568, 575.

17. However, Tabor's proposal was not adopted by the legislature.⁴⁵

In light of the static nature of the latter and the state courts, a growing number of scholars have come forward to urge innovation within the existing rules. The papers being published to this end by influential scholars working at leading Louisiana universities and legal practitioners engaged on the operational front all have a strong comparative focus.⁴⁶ A great deal of attention is given to American law and the instruments that it has developed as exceptions to the rule of the sanctity of the contract, and in particular specific attention is given to the notion of impracticability, which has found express recognition in section 2-615 of the Uniform Commercial Code.⁴⁷ 'Frustration', derived from English common law and accepted along with 'impracticability' in the Second Restatement on Contract, is also referred to by several parties as a model for what appears to be a necessary reform of the Louisiana civil code.⁴⁸ Great attention is also paid to the instruments that regulate contracts on the international level, and in particular the Vienna Convention on the International Sale of Goods (CISG) and the aforementioned PICC and PECL, which, as we know, respectively

45 Compare C.R. HANDY, 79. *Louisiana Law Review* 2019, pp 255-256.

46 In this sense, see the contributions of V. PALMER, 'Excused Performances: Force Majeure, Impracticability and Frustration of Contracts,' *American Journal of Comparative Law* 2022, p 70; V. PALMER, *Journal of International and Comparative Law* 2023, p 48; J. RILEY, 'The Civilian Lawyer: The Doctrine of Fortuitous Event,' *Louisiana Bar Association Journal* 2008, p 381; R.A. PASCAL, 'On the Civil Code and US,' *Louisiana Law Review* 1998, p 302; S. HERMAN, 'Under My Wings Everything Prospers: Reflections upon Vernon Palmer's *The Louisiana Civilian Experience*. Critiques of Codification in a Mixed Jurisdiction,' *Tulane Law Review* 2006, p 1491; A. LEVASSEUR, V. FELIÚ, 'The English Fox in the Louisiana Civil Law Chausse-Trappe: Civil Law Concepts in the English Language; Comparativists Beware!,' *Louisiana Law Review* 2009, p 715. In addition to the previously mentioned essays by C.R. HANDY, 79. *Louisiana Law Review* 2019; C. T. CHOCHÉLES, 57. *Louisiana Bar Association Journal* 2010; S. LITVINOFF, 45. *Louisiana Law Review* 1985.

47 Section 2-615 UCC *Excuse by Failure of Presupposed Conditions*: 'Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid. (b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contracts as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable. (c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer'.

48 Compare C.R. HANDY, 79. *Louisiana Law Review* 2019, p 257.

regulate the cases of hardship (Art. 6.2.1–6.2.3)⁴⁹ and change of circumstances (Art. 6:111).⁵⁰

18. The PICC and the PECL in particular are often read together as complementary restatements of the modern doctrine of hardship. Their respective hardship/change-of-circumstances provisions share the same architecture – an initial reaffirmation of *pacta sunt servanda*, a stringent definition of the exceptional situation, and a remedial mechanism that privileges renegotiation over judicial intervention – yet they differ in nuance and vocabulary.⁵¹

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- 49 UNIDROIT Art. 6.2.1: ‘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’. Art. 6.2.2 (*Definition of Hardship*): ‘There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party’; Art. 6.2.3 (*Effects of Hardship*): ‘(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based. (2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance. (3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed; or (b) adapt the contract with a view to restoring its equilibrium’.
- 50 Article 6:111 PECL: ‘(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished. (2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that: (a) the change of circumstances occurred after the time of conclusion of the contract, (b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and (c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear. (3) If the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing’.
- 51 For a comparison on the PICC and PECL and their approach to hardship and change of circumstances see J. PERILLO, ‘Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts’, 5. *Tulane Journal of International and Comparative Law* 1997, pp 5 ff; D. MASKOW, ‘Hardship and Force Majeure’, 40/3. *The American Journal of Comparative Law* 1992, p 657 ff, doi: 10.2307/840591; A. HARTKAMP, ‘The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law’, 2. *European Review of Private Law* 1994, pp 341–358, doi: 10.54648/ERPL1994040; P. SIRENA, ‘Principles and Rules in the Emerging European Contract Law: From the PECL to the CESL, and Beyond’, 9. *European Review of Contract Law* 2013, pp 313ff, doi: 10.1515/ercl-2013-0001; R. MOMBERG, ‘Change of Circumstances in International Instruments of Contract Law. The Approach

For instance, each text obliges parties to renegotiate before litigating, reflecting modern emphasis on cooperation. PECL's additional sanction (damages for refusal to negotiate) strengthens that duty. Conversely, PICC's mandate that adaptation aim at restoring equilibrium suggests a more restorative approach, whereas PECL empowers the court to redistribute losses and gains 'just and equitably', a broader equity-infused discretion. Moreover, PICC adopts the civil-law vocabulary of hardship and is designed for worldwide use, making it attractive in international arbitration. PECL, embedded in the EU private-law conversation, couches the doctrine as a 'change of circumstances', aligning with the *Wegfall der Geschäftsgrundlage* in German law and the French *imprévision* (after 2016).

19. In fact, what most attracts the attention of scholars and is seen as the most relevant solicitation for the Louisiana legislature, even more than the rules of American and international law, is actually the new French discipline of *imprévision*. Louisiana legal theory continues to look very closely at the law that has indelibly marked the Louisiana civil code, namely French law.⁵²

As is well known, in 2016 France enacted a long-sought reform of its contract law, in which an important part was played precisely by projects to harmonize contract law at the supranational level, and in particular at the European level.⁵³ As part of this reform, a new Article 1195 was introduced that gives relevance to the *changement des circonstances imprévisibles* that make performance excessively burdensome for one of the parties. The provision establishes as main remedies the renegotiation of the contract without suspending its execution, and its revision as well as the possibility of

of the CISG, PICC, PECL and DCFR', 15. *Vindobona Journal of International Commercial Law and Arbitration* 2011, p 233.

52 Reference to the 2016 post-reform French model can be found in the arguments of C.R. HANDY, 79. *Louisiana Law Review* 2019; V. PALMER, *Journal of International and Comparative Law* 2023, p 45; C. TABOR, *Louisiana Law Review* 2008, p 568.

53 On the reform of the French civil code see D. MAZEAUD, 'La réforme du droit français des contrats, La lettre de France', 44. *Revue Juridique Thémis* 2010, p 243; B. FAUVARQUE-COSSON, 'Le changement de circonstances,' *Revue de Droit Civil* 2004, p 67; ID., 'Negotiation and Renegotiation: a French Perspective,' in J. Cartwright-S. Vogenauer-S. Whittaker (eds), *Reforming the French Law of Obligations, Comparative Reflections on The Avant-Projet de Réforme du Droit des Obligations et de la Prescription ('the Avant-Projet Catala')* (Oxford: Hart Publishing 2009), p 44; ID., 'Does Review on the Ground of Imprévision Breach the Principle of the Binding Force of Contracts?,' in J. Cartwright-S. Whittaker (eds), *The Code Napoléon Rewritten French Contract Law after the 2016 Reforms* (London: Hart Publishing, 2017), p 187; ID., 'Le changement de circonstances,' *Revue de Droit Civil* 2004, p 67; M. MEKKI, 'Réforme des contrats et des obligations: l'imprévision,' in 3. *La semaine juridique* 2017, act. 155; R. TAFOTIE, 'L'imprévision comme manifestation de l'incomplétude contractuelle,' *Revue de droit International et comparé* 2017, p 39; P. STOFFEL-MUNCK, 'L'imprévision et la réforme des effets du contrat,' *Revue de Droit Civil* 2016, p 30.

terminating the contract or asking the court to adjust it in the event of failure to renegotiate.⁵⁴

20. The new discipline of the French code is presented as a useful point of reference for the Louisiana legislature, and a strong point is found in the fact that this discipline maintains the options of both *imprévision* and force majeure. The preservation of the basic system is considered a favourable condition for incorporating a new discipline in the Louisiana civil code that is inspired by the French *imprévision* without distorting the framework of rules already developed by Louisiana courts with respect to force majeure.⁵⁵ ‘Leaving the jurisprudence concerning *force majeure* intact ensures consistency in the law by keeping present Louisiana Civil Code Article 1873, thus providing the remedy of dissolution for actual impossibility’.⁵⁶

6. The Most Recent Developments: Supervening Events and COVID-19

21. In light of the persistent rigidity of the courts in using the instrument of force majeure to handle cases of supervening contractual events that greatly alter the balance of the contract without resulting in absolute impossibility of performance, contractual parties have increasingly begun to include force majeure clauses in agreements that allow for the termination of the contract upon the occurrence of certain circumstances. However, when faced with this type of clause, Louisiana courts have consistently required explicit reference to the event justifying the termination of the contract. In the absence of such explicit reference, the clause is not considered usable by case law.⁵⁷ It is worth noting that early signs of revision of the rigid approach followed in this matter by Louisiana courts have been seen in recent years, when in the wake of the COVID-19 pandemic a request for eviction under a lease was rejected,

54 *Imprévision* made its entry into the *civil code* with the 2016 reform, which affected the law of obligations. As mentioned in the text, it was inserted in Art. 1195, which reads ‘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’.

55 See C. TABOR, *Louisiana Law Review* 2008, p 570; S. LITVINOFF, 45. *Louisiana Law Review* 1985, p 16.

56 Thus C.R. HANDY, 79. *Louisiana Law Review* 2019, p 275.

57 See M.R. SISTRUNK, L.A. TAFARO, *State of Louisiana Force Majeure Compendium (during COVID-19 pandemic)*, US Law Network inc., 2020, pp 2-3; V. PALMER, *Journal of International and Comparative Law* 2023, p 58; J. MARULLO, L. SPRINGER BROWN, *The Energy Law Blog. Insight and Analysis of Legal Issues Impacting the Energy Industry* 2020, available at theenergylawblog.com/2020/03/articles/energy/energy-natural-resources/covid-19-as-a-force-majeure-the-texas-and-louisiana-perspectives/.

upholding the tenant's argument that it was seeking adjustment of the contract based on a force majeure clause included in the contract. That clause contained a long list of possible events, including the now-classic one for Louisiana law related to hurricanes and tornadoes, but did not explicitly provide for a situation related to the outbreak of a pandemic.⁵⁸ Both the trial and appeal courts ruled that a pandemic was deemed implicitly included in this provision, referring to the closing formula of the force majeure clause that mentioned 'other reasons of a similar nature beyond the reasonable control of the parties'.

22. An analogous, more accommodating, approach can be found in German law: the Federal Court of Justice (BGH), questioned on a very similar case regarding a lease contract,⁵⁹ held that the COVID-19 lockdown amounted to an 'interference with the basis of the transaction' under section 313 of the Bürgerliches Gesetzbuch (BGB) and permitted an equitable rent-reduction, thereby reallocating the economic risk between landlord and tenant instead of insisting on strict performance.⁶⁰ The BGH decision is regarded as a landmark decision not only by German doctrine but it has also been closely analysed by foreign civil law scholars.⁶¹ Interestingly, also in Civil law traditions, it is

58 This is the case of *Richards Clearview, LLC. v. Bed Bath & Beyond, Inc.*, 2020 WL 5229494, decided in the first instance by the US District Court, Eastern District of Louisiana, 2 Sep. 2020. The District Court's decision was upheld on appeal by the US Court of Appeals for the fifth Circuit (Case No. 20-30614) on 8 Mar. 2021.

59 BGH, 12 Jan. 2022, XII ZR 8/21, BGHZ 232, p 178 ff. Confirmed by BGH, 16 Feb. 2022, XII ZR 17/21, *Neue Juristische Wochenschrift (NJW)* 2022, p 1378 ff.

60 For a comment on the case see O. MEYER, 'Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The German Federal Court of Justice on the Distribution of Risk Between Tenants and Landlords', *European Review of Private Law* 2023(2-3), pp 577-586, doi: 10.54648/ERPL2023008. See also J. AMOULONG & A. PASTORE, 'Performance of Contracts and Social Crisis - A Comparative Study of French and German Legal Systems regarding unexpected changes', 15. *Comparative Law Review* 2024(2), pp 45-67.

61 See the interesting comments by foreign civil law scholars published on the European Review of Private Law 2023. In particular: L. COPPO, 'The Impact of Pandemics on the Landlord-Tenant Relationship: An Italian Reading of the German Federal Court's Solution', *European Review of Private Law* 2023(2-3), pp 601-614, doi: 10.54648/ERPL2023010; M. DE POTTER DE TEN BROECK, 'The Covid-19-Pandemic and the Forced Closure of a Rented Premises: A Belgian Perspective on the Judgment of the Bundesgerichtshof of 12 January 2022', *European Review of Private Law* 2023(2-3), pp 587-600, doi: 10.54648/ERPL2023014; H. SHELHAAS, 'The Decision of the German Bundesgerichtshof of 12 January 2022 on Lease and Corona from a Dutch Perspective', *European Review of Private Law* 2023(2-3), pp 615-626, doi: 10.54648/ERPL2023019; A.I. AFONSO, 'Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The Portuguese Juridical System Solution', *European Review of Private Law* 2023(2-3), pp 643-652, doi: 10.54648/ERPL2023020; M. ZACHARIASIEWICZ, 'The Lease of Commercial Premises in Time of COVID-19: The Decision of the German Bundesgerichtshof of 12 January 2022 from a Polish Perspective', *European Review of Private Law* 2023(2-3), pp 627-642, doi: 10.54648/ERPL2023015; C. FOUNTOLAKIS, 'Obligation to Pay Rent for Commercial Premises During the Covid-19 Lockdown: The Swiss Perspective', *European Review of Private Law* 2023(2-3), pp 653-664, doi: 10.54648/ERPL2023011.

clear the matter shall be solved on a case to case basis. Moreover, most of the comments highlights how the other national courts would have probably followed a different legal reasoning with, nonetheless, a similar outcome, showing a convergence on the form of protection awarded, as far as lease contracts are concerned.

23. Following the above mentioned early signs of movement, the recommendations and proposals from the Louisiana legal theory have re-entered the debate, as it now considers intervention on supervening contractual events no longer postponable. Considering the inaction of the Louisiana legislature, there are those who see a potentially decisive role for another institutional entity that, in the state of Louisiana, embodies the aims and practices of one of the key players in American law. We are talking about the Louisiana State Law Institute (LSLI), a local version of the American Law Institute.⁶² In a system with a French-style civil code, which translates the principle of the centrality and supremacy of the code in the hierarchy of sources of law, the intervention of this type of institution in the legislative process is neither contemplated nor customary. But in light of the evolution seen in this crucial matter in the Louisiana legal system, it seems desirable, rather than a perspective of legal transplant from the French code with its new discipline on *imprévision*, to combine regulatory sources and procedures straddling the French-inspired civil law and the American-inspired common law, linking the LSLI's work with a process of revision of the civil code.⁶³

24. In light of the situation mapped in these pages, it seems that the Louisiana legislator can no longer remain a spectator. A narrowly-tailored 'substantial change of circumstances' regime could be enacted, whether by reviving Tabor's eleven-article draft or by inserting a prudently adapted analogue of French Article 1195 *Code Napoléon*, so that courts would have the legislative ground on which ordering renegotiation, equitable adjustment or discharge, when performance has become excessively onerous though still physically possible, all while preserving Article 1873 of the Louisiana Civil Code for cases of true impossibility. The reform process itself should be entrusted to the LSLI, whose mixed-jurisdiction pedigree uniquely equips it to blend civil-law notions of *imprévision* with the Uniform

62 See F.F. STONE, 'The Louisiana State Law Institute,' *The American Journal of Comparative Law* 1955, p 85, doi: 10.2307/837046. The LSLI was founded in Apr. 1938 by a group of scholars led by Louisiana State University. The group aimed to establish an institute dedicated to law revision, law reform and legal research. The purposes of the institute are declared by the legislature to be: 'To promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs; to secure the better administration of justice and to carry on scholarly legal research and scientific legal work'. See the website of the LSLI lsli.org/purpose.

63 Louisianan scholars who have dealt with the subject seem to move in this direction, starting with S. LITVINOFF, 45. *Louisiana Law Review* 1985, who however seems more inclined toward legislative review. See also C. TABOR, *Louisiana Law Review* 2008 and especially C.R. HANDY, 79. *Louisiana Law Review* 2019.

Commercial Code's (UCC) doctrine of impracticability and the common-law frustration defence, thereby avoiding a crude transplant and ensuring coherence with the Code's existing architecture. The reform process could embed a statutory duty to renegotiate in good faith, coupled with moderate judicial powers to reallocate risk when negotiations fail, mirroring the cooperative ethos of the PICC/PECL 'hardship' model and aligning Louisiana with the modern comparative consensus. Taken together, these measures would release Louisiana contract law from the nineteenth-century bottleneck without forsaking *pacta sunt servanda*; instead, they would reaffirm it by showing that promises remain binding even when the law supplies fair mechanisms to recalibrate them in the face of unforeseeable upheaval.

