

The Codification of the Imprévision Doctrine in Modern French Civil Law: An Analytical Study of Contractual Renegotiation Stages and the Limits of Judicial Power

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Abstract:

On 10th of February 2016, the French government issued a legislative ordonnance to reform certain parts of the French Civil Code, based on prior authorization granted by Law No. 177 of 2015, enacted on 16th February, 2015. Article 8 of this Ordinance obligated the government to take the necessary measures within one year to revise the Civil Code. The aim was to modernize, simplify, and improve contract law, ensuring accessibility and legal certainty in accordance with specific regulations. Article 1195 of the Civil Code was introduced after a quarter-century of judicial debate and formally codified the doctrine of imprévision (hardship). This amendment reaffirmed contractual freedom while protecting the weaker party and the public interest, and it considered social and economic objectives in regulating contractual relationships. The ultimate goal was to achieve social solidarity by protecting the economically vulnerable party and ensuring contractual justice through the acceptance of contract review and amendment

in cases of unforeseeable change of circumstances, and by granting the judge the power to intervene when the contractual balance is disrupted. The judge became a third party to the contract, monitoring whether there was a significant equilibrium between the contracting parties and reviewing the contract terms when circumstances changed during its execution. The principle of contractual fairness was thus reinforced by defining the effects of the contract when circumstances changed.

Keywords: contract, unforeseeable circumstances, imbalance, French contract law.

Introduction

Autonomy of the will is a fundamental principle in the law of contract, which implies that contractual obligations arise primarily from the free will of the parties, who have the power to create a contractual relationship, determine its terms, and accept the arising legal consequences, emphasizing that the contract is the law of the contracting parties; thus, it cannot be revoked except by mutual agreement, and neither party can unilaterally amend it. The judge typically lacks the authority to amend or add any term to this contract.¹ However, during contract execution, unforeseen events may occur that significantly change economic or other conditions in the contract, rendering a party's performance excessively onerous, though not impossible, leading to substantial losses exceeding the ordinary risks assumed by the parties. This scenario raises the following question: What are the legal consequences of such a change in circumstances for this contract? What is the judge's role towards the debtor who entered into the contract in good faith, intending to perform their obligations fully, but was unable to perform their obligations due to substantial hardship resulting from unforeseen circumstances? And how can this situation be addressed?

On February 10th, 2016, the French lawmaker issued Ordinance No. 131, effective for contracts concluded from October 2016 onwards. This ordinance marked a major reform of French contract law. It aimed to enhance the competitiveness of French law with advanced legal systems and represented the culmination of a long process of reforms. These reforms sought to bring French contract law in line with developments in jurisprudence and specific legislation, particularly those related to consumer protection,

¹ Article 147 of the Egyptian Civil Code.

and to address its unsuitability as a model for other European legislation. The reforms ensured the stability of transactions, the rule of law, and contractual justice, which is achieved not only through legal protection for the weaker party but also by adapting solutions to evolving economic conditions.²

The French legislator's approach to reform included two fundamental aspects: the form of the legislation, which addressed the drafting style of the provision, so that some legal articles were reformulated to be clear, simpler, and more accessible to all. The titles, chapters, and sections were categorized so that the structure of the law became clearer and easier for the reader to understand. As for the substantive aspect, the established interpretations were enshrined in reviewing the contract in the event of unforeseeable events (*imprévision*), and it was characterized by moderation and balance, which has made it a model for contemporary contract reform law.

Problem Statement

The doctrine of *imprévision* (hardship), codified in Article 1195 of the French Civil Code, constitutes a substantial reform that bridges a divide between the sanctity of contracts and the need for contractual fairness; however, the extent to which the French legislator has succeeded in balancing the stability of legal transactions with the necessity of judicial intervention to restore the financial equilibrium of a contract disrupted by unforeseen events remains a subject of intense academic and legal debate. This research seeks to address the following research questions: What objective criteria has the French legislator stipulated to consider an event "unforeseen" and thus demanding review? What innovative mechanisms has the new amendment introduce? Has the new provision succeeded in granting the judge a proactive role without compromising the essence of the contractual intent? How can the new French approach be evaluated as a model to be emulated in comparative legislation?

Research Approach:

² The speech by Professor Eric Savot from the University of Poitiers at the conference on 3/16/2016, which was organized by the Faculty of Law at the Holy Spirit University of Kaslik, in cooperation with the faculties of law at Paris XII University (UPEC), the University of Poitiers, and the University of Rome Tor Vergata, under the title: Reforming Contract Law in France: From a French-Lebanese Perspective.

The researcher employed a comparative analytical approach as it is the most appropriate for examining and analyzing the provision included in the new French amendment and for comparing it with general legal models and jurisprudence, ultimately leading to the derivation of legal solutions that contribute to closing legislative gaps.

Research Plan:

To fully address the topic, the study includes two main sections: the first discusses the objective conditions for applying the doctrine of unforeseen events in the new French law. While the second section presents the legal consequences of contractual imbalance and the mechanisms for judicial intervention.

Chapter One

The Doctrine of Imprévision in the New French Contract Law

After a sustained jurisprudential debate surrounding the doctrine of imprevision (hardship), the legislature amended Article 1195 of the Civil Code on February 10, 2016.³ This amendment adopted French judicial precedent to achieve specific philosophical and legal objectives, reflecting the economic and political situation, by emphasizing contractual freedom while protecting the vulnerable party and the public interest. It also considered social and economic objectives in regulating contractual relations, aiming to achieve social solidarity by protecting the economically vulnerable and ensuring contractual justice. This was accomplished by allowing for the review and amendment of contracts in the event of unforeseen events and granting the judge the authority to intervene in cases of contractual imbalance.⁴

The judge's authority over the contract has shifted from a passive observer to a more active regulator and a third party, as Article 1195 granted the judge the right to intervene in the conclusion and execution phases, monitor the existence of a significant imbalance between the contracting parties, and review the contract terms when circumstances

³ Ashraf Jaber: The French Legislative Reform of Contract Theory: A Judicial Craft and Legislative Formulation - Insights into Some of the New Developments, Kuwait International Law School Journal, Kuwait International Law School, Kuwait, Issue 2, Part Two, Special Supplement, 2017, pp. 290, 292, 289, 286, 287, 323 and footnote.

⁴ Hala Al-Arees: The main amendments in the new French contract law, Journal of Law and Political Science, Lebanese University, Beirut, Issue 17, 2017, pp. 155, 156.

change during its performance.⁵ This reinforces the principle of contractual justice by defining the effects of the contract when circumstances change. Nevertheless, this intervention is confined by conditions that may relate to the nature of the circumstances, the importance of the imbalance, and the period in which the unforeseeability must be assessed.⁶

Section One: The Objective Conditions For Applying The Doctrine Imprévision In The New French Contract Law

Although this law has replaced the traditional French concept and mechanism that prevent the judge from intervening in the contract as a result of unforeseen events, it is cautious in its conditions and raises several argumentative questions.

1. Scope of application of the doctrine of imprévision

Neither the Egyptian nor the Jordanian legislator in the Civil Code (Article 205) confined the unforeseeable change of circumstances to a specific obligation, on the basis that an unqualified statutory provision should be interpreted according to its ordinary and unrestricted meaning unless the legislature has expressly imposed a limitation. The legislator aims to alleviate hardship on the debtor and correct any disruption to the economic balance of the contract. This disruption may affect a continuous contract or an instantaneous contract with deferred payment, which requires us to clarify the position of the French legislator.

A. The General Scope of Application

Article 1195 of the French Civil Code was drafted in broad and general terms, as it stated that: *“If an unforeseeable change in circumstances occurring at the time of the conclusion of the contract renders performance excessively onerous for a party that had not agreed to assume the associated risk.....”*. The revised law did not limit the unforeseeable events to a specific category of obligations, as the disruption of

⁵ Ashraf Jaber. Op cit. pp 290, 292, 289, 286, 323.

⁶ Jacques Gastin, Christophe Jamain and Marc Piot: The Comprehensive Guide to Civil Law: Effects of Contracts, University Foundation for Studies and Publishing, Beirut, 2000, p. 391.

contractual balance may affect a supply contract (successive performance) as well as a contract for the sale of immovable property with a deferred payment (immediate deferred). The text did not specify a particular type of contract (such as successive contracts), which extends its application to any contract in which the performance is deferred beyond the time of conclusion. This approach represents a departure from the “Projet Catala” project, which proposed limiting it in Article 1-1135 to “contracts with successive or installmentary execution” (Contrats à exécution successive).⁷

B. Inclusion of Instantaneous Contracts with Deferred Performance:

Both French legal doctrine and Egyptian jurisprudence held the principle that the decisive criterion is not whether a contract is classified as successive or instantaneous, but rather the existence of a time intervenen between the moment of the conclusion of the contract and the moment of performance. In an instantaneous contract, the parties agree upon a deferred date for performance (such as an installment sale or a sale with a condition of subsequent delivery). It involves the same legislative rationale for addressing economic imbalances. However, the general use of the concept “contract” under Article 1192 has been debatable by some French legal scholars. They argue that without specification, the concept may encompass all contractual obligations as long as performance has not been fully completed before the occurrence of the unforeseeable event.⁸

The Egyptian Court of Cassation has held that the application of Article 147/2 of the Civil Code depends on the remaining outstanding (unperformed) obligation at the time of the unforeseen event. The Court has ruled: “*The doctrine of unforeseen events applies only when the event occurs during a period separating the conclusion of the contract from the performance of the obligation arising from it. If the obligation has already been performed, it is extinguished, and the application of the doctrine is therefore precluded.*”⁹

⁷ Pierre Catala, *Preliminary Draft for the Reform of the Law of Obligations and the Law of Prescription in French Law*, translated by Saint Joseph University, Majd University Foundation, Beirut, 2009, p. 141.

⁸ Gaël Chantepie et Mathias Latina, *La réforme du droit des obligations*, Dalloz, 2016, p. 524.

⁹ Egyptian Court of Cassation Decision No. 245 of Judicial Year 27, Session of December 20, 1962, Technical Office Collection, Year 13, Rule 187, p. 1179.

The rational behind including deferred contracts is that excluding instantaneous contracts with deferred performance from the scope of this doctrine would undermine the principle of contractual justice. The purchaser who postponed payment of the price, or the seller who postponed delivery of the goods, has based their economic calculations on data existing at the time of contracting. If this balance collapses due to an exceptional circumstance, the judge, though, must intervene to restore the contractual equilibrium.

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2. Conditions for applying the doctrine of imprévision

Article 1195 stipulates four conditions for applying the doctrine of imprévision. First, there must be a change in circumstances occurring during the performance of an obligation. Second, the change must be unforeseeable at the time of the contract's conclusion; Third, the affected party must not have agreed in advance to assume the risk arising from such a change in circumstances; and that this change in circumstances must render the obligations of one of the parties excessively onerous.

A. A Change in Circumstances During the Performance of a Contractual Obligation:

The event giving rise to imprévision must not fall within the range of circumstances that people normally encounter or reasonably expect. Some changes in circumstances are regarded as unforeseen and exceptional simply by virtue of their rarity (e.g., wars, earthquakes, and epidemics). In contrast, others occur frequently but are only seen as exceptional if they exceed normal events (e.g., extremely high floods, unusually heavy snowfall). It is noteworthy that Article 1195 does not specify the types of changes in circumstances that justify the application of this doctrine as being economic, financial, material, legal, or technological.¹¹ The researcher argues that adopting this doctrine is

¹⁰ Egyptian Court of Cassation Decision No. 248 of Judicial Year 30, Session of February 28, 1965, Technical Office Collection, Year 16, Rule 30, p. 191; Egyptian Court of Cassation Decision No. 248 of Judicial Year 30, issued on February 28, 1965 (Technical Office, Year 16, Rule 30, p. 191); Egyptian Court of Cassation Decision No. 240 of Judicial Year 27, issued on December 20, 1962 (Technical Office, Year 13, Rule 186, p. 1174), Egyptian Court of Cassation website: www.cc.gov.eg; and Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 1013/1992 dated 30/6/1993, Your Decision website: <https://qarark.com/home/>

¹¹ Egyptian Court of Cassation Decision No. 248 of Judicial Year 30, issued on 2/28/1965, Egyptian Court of Cassation website: www.cc.gov.eg/; Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 1617/2007, dated 1/20/2008, Qarark website: <https://qarark.com/home/>

justified because unforeseen circumstances fundamentally affect the contractual relationship and economic equilibrium, regardless of their nature, provided they were unforeseeable to the parties. This raises a critical question: Is it a prerequisite for the generality of the contract to be considered an unforeseen circumstance?

Furthermore, Article 1195 of the French Civil Code does not use the general term "exceptional event" to describe the exceptional event that led to the economic imbalance of the contract, as it states, "*if a change in circumstances that was unforeseeable at the time of the conclusion of the contract...*", implying that the unforeseeable event may be specific to the contracting parties alone. In contrast, both the Egyptian and Jordanian Civil Codes require unforeseen circumstances to be of a "general" nature.

Article 147-2 of the Egyptian Civil Code states, "*if exceptional general events occur which could not have been foreseen....*" The preliminary draft of the Egyptian Civil Code only required that the events be exceptional. Still, the Review Committee deliberately narrowed the scope of the doctrine of *imprévision* (hardship) by specifying that the unforeseeable events must be general, not specifically confined to the debtor alone, but rather affect a broader category of people (such as an unexpectedly high flood that inundates a large area of land, an unexpected locust plague, or the spread of an epidemic). Similarly, Article 205 of the Jordanian Civil Code states, "*If general exceptional events occur that could not have been foreseen.*"

Under the French Civil Code, exceptional events that are specifically related to the debtor (e.g., bankruptcy, death, disruption of business activities, or the destruction of crops by fire) fall within the scope of the doctrine of *impresivion*, provided that they constitute an unforeseeable change in circumstances that renders contractual performance excessively onerous, not of a general nature.

Requiring the exceptional event to be of a general nature contradicts legal logic in terms of the nature of the event and its legal consequences, since *force majeure* may arise from a general matter, or an event specific to the debtor. The latter may impose a far greater burden on the debtor than a general exceptional event, as it makes the performance of the obligation impossible, resulting in the termination of the obligation. In contrast, the general exceptional event in the doctrine of *imprévision* renders performance excessively onerous. It is therefore difficult to justify requiring the exceptional event to

be of a general nature for the application of the doctrine of *imprévision*, when no such requirement exists in the law governing force majeure.

It is noteworthy that the French legislator adopted an approach grounded on the concept of justice, which ensures the consistency between intentions and practical application. However, it would be inconsistent to adopt the concept of justice while simultaneously requiring that the change in circumstances be of a general nature, as in the modern approach. The researcher submits that there is no compelling justification for retaining the requirement of generality in Article 147 of the Egyptian Civil Code and Article 205 of the Jordanian Civil Code, since the legal foundation of this doctrine is grounded in justice and contractual fairness. Furthermore, requiring the exceptional event to be general contradicts the new direction in this doctrine of *imprévision* and narrows its scope of application.

B. The impossibility of predicting changes in circumstances at the time of contract formation:

The rationale behind the doctrine of **imprévision** rests on the element of surprise, meaning that unforeseeability is relative, not absolute. Legally, an unforeseen circumstance is defined as an event that deviates from ordinary, predictable patterns since the frequency of an event dictates its predictability. In contrast, rare and exceptional changes in circumstances are fundamentally classified as unpredictable. This cognitive inability to predict is logically tied to risk allocation; to anticipate a change implies that a party either accepted its associated risks or had the opportunity to avoid it. When a contracting party could have reasonably foreseen the disruptive event at the time of performing the contract, they forfeit any right to request a judicial modification of their contractual obligations because they are deemed to have knowingly accepted the unforeseen risks.¹²

Given scientific advances, it has become feasible to predict many things; therefore, there is no place to use a sudden emergency event that hindered the implementation of contractual obligations as an excuse, as long as the agreement was concluded in light of

¹² Decision of the Egyptian Court of Cassation in Appeal No. 532 of Judicial Year 35, issued in the session of 5/5/1970 (Technical Office - Year 21 - Rule 128 - Page 787), Egyptian Court of Cassation website www.cc.gov.eg/

these events and it was possible to predict their continuation; thus, they fall within the scope of expectations.¹³ A question arises about the degree to which the standard of this expectation is measured: is it measured according to an objective or personal standard?

The French legislator did not define a change in unforeseen circumstances for the doctrine of *imprévision*; thus, it will fall to future judicial interpretation to resolve this issue. However, the possible approaches are confined to two concepts: the first is objective, and the second is subjective. According to the objective approach, a change in circumstances would not have been anticipated by a reasonable person in the contracting parties' position. Accordingly, the court is required to conduct an abstract assessment, balancing the relevant factors independently of the particular circumstances that disrupted the contractual equilibrium. In other words, this approach evaluates the change in circumstances without reference to the parties' individual perceptions or the significance they may have attached to those circumstances.

In the second subjective approach, the change in unforeseen circumstances is considered if the parties themselves did not contemplate it. If there is no condition, the judge must look for the common intention of the contracting parties, and the circumstances are considered in terms of whether the parties anticipated them or not, which will lead to undermining the binding force of the contract and give the review of the contract a broader scope than the objective concept of it.

Unforeseeability denotes the impossibility of prediction, and it relates to the mental perception of the improbability of an event occurring, even if its occurrence is conceivable. There is no obligation on the contracting party merely because that party could hypothetically have placed himself in the position of one who would bear the consequences of the event that was not actually foreseen. This raises the question: by reference to whom is this mental conception to be assessed?

Logically, what should be adopted is a standard that disregards the personal aspect of the contracting party, the ideal contracting party, including the notion of an “ideal” or “model” contracting party, and instead applies an abstract and objective assessment.

¹³Egyptian Court of Cassation Decision No. 1297 of Judicial Year 56, issued on 29/11/1990 (Technical Office - Year 41 - Rule 305 - Page 833), Egyptian Court of Cassation website: www.cc.gov.eg/; Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 3219/2001, dated 22/1/2002, Qarark website: <https://qarark.com/home/>

The event must be ordinary and common in its occurrence, or unusual and uncommon, based on the elements of the event itself (rain, storms, wars, crises) and the time and place of its occurrence. It should not be based on the contracting party's subjective perception, but rather on the event itself. Therefore, one should expect what is ordinary, not what is exceptional and unusual.¹⁴

The researcher argues that the criterion of foreseeability is objective; that is, the critical query is whether a person in the same circumstances at the time of contracting could reasonably have foreseen the occurrence of the event, without regard to what this particular debtor actually expected or failed to expect. Determining whether the supervening event was one that an ordinary person could have foreseen, or whether it constituted an unforeseeable extraordinary event, falls within the province of the trial judge as the judge of fact.¹⁵

It is an objective criterion, the standard of the reasonable person, whereby a reasonable person, with sufficient care and attention under the same circumstances, could not have foreseen the occurrence of this event, no matter what precautions they took. If the debtor in question did not foresee the event, but a reasonable person could have foreseen it had they been in the same position. The event is still considered foreseeable, and the circumstance does not warrant modifying the contract.

Both the Egyptian and the Jordanian Court of Cassation have endorsed this approach and held that the doctrine of *imprévision* requires that the incident be exceptional and unforeseeable at the time the contract is concluded. If the ruling denies this in its stated reasons, then the objective standard is that the event was not exceptional or was reasonably foreseeable at the time of contracting, the doctrine is inapplicable.¹⁶

Not all circumstances are subject to change, although it is certain that they do not possess the characteristic of *force majeure*, which makes the event impossible. There is a clear distinction between an event that makes the performance of the contractual obligation

¹⁴ Sami Badi Mansour: *The Element of Constancy and the Factor of Change in the Civil Contract*, Dar Al-Fikr Al-Lubani, Beirut, 1987, pp. 25-32.

¹⁵ Egyptian Court of Cassation Decision No. 448 of Judicial Year 43, issued on 11/1/1978, Egyptian Court of Cassation website: www.cc.gov.eg/; Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 357/1978, dated 28/10/1978, Qarark website: <https://qarark.com/home/>

¹⁶ Egyptian Court of Cassation Decision No. 74 of Judicial Year 19, issued on 8/11/1951, Egyptian Court of Cassation website: www.cc.gov.eg/; Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 310/1999, dated 28/4/1999, Qarark website: <https://qarark.com/home/>

excessively onerous, and an event that makes it impossible.¹⁷Force majeure does not require the modification of the contract, but rather its suspension or termination.¹⁸

By reviewing Article 1195, it becomes clear that there is a convergence of the hypothesis of the doctrine of *imprévision* and force majeure, as the latter is confined to the occurrence of a change that is not reasonably expected. Article 1218 of the French Civil Code defines force majeure as an event beyond the debtor's control, reasonably unforeseeable at the conclusion of the contract, and unavoidable in its effects, which prevents performance.¹⁹

Comparably, we notice a deliberate linguistic distinction between the two provisions. In Article 1195, the legislator grounds *imprévisibilité* on a change of circumstances that was unforeseeable; in contrast, Article 1218 (force majeure) assumes the occurrence of an event that could not reasonably have been foreseen at the time of the conclusion of the contract.

It is worth noting that Article 1195 did not require that the unexpected change that led to the economic imbalance of the contract must be a serious breach that cannot be avoided or prevented, i.e., the inability to resist the event, which is the inability of the debtor to overcome the circumstances or events that occurred during the performance of the contract. It does not indicate that the debtor must be unable to face the event that occurred.

Additionally, the change in circumstances that leads to the application of Article 1195 or Article 1218 is distinct not only concerning the effects, as this change makes performance excessively onerous for the former and impossible for the latter, but also concerning their nature. The legislator used a more stringent approach in Article 1195, as it is argued that adopting the doctrine of *imprévision* is a concession of the principle of the binding force of contracts. Article 1195 cannot be applied to address the effects of the change in circumstances unless the change was radically unexpected at the time of the conclusion of the contract, and not just reasonably unexpected as in force majeure,

¹⁷ Jacques Gustin, Christophe Jamain and Marc Piot: *The Effects of the Contract*, op. cit., pp. 378, 379, 391, 392.

¹⁸ Ibid, p 392.

¹⁹ Nafi Bahr Sultan: *The New French Contract Law*, Arabic Translation of the Official Text, University of Fallujah, Iraq, 2017, pp. 45, 54.

and the contracting parties are expected to bear the risks that were reasonably foreseeable at the time of contracting.

In the same context, it is worth noting the decision of the French Court of Cassation issued on March 9, 1994, which held that if the irresistibility of the event by itself is sufficient to create force majeure, if the foreseeability of the said event did not prevent its consequences from occurring, then it requires that the debtor have taken all the required measures to avert the occurrence of the event or to mitigate its effects.

The court affirmed this, exceeding the basic conditions of force majeure, by excluding the condition of unforeseeability and the independence of the event, and was satisfied with verifying the availability of the condition of the impossibility of resisting the event. If the impossibility of resisting the event alone would constitute force majeure, if its foreseeability did not prevent avoiding its effects, then the debtor must have taken all the required measures to avoid the occurrence of the event.²⁰

The researcher argues that, similar to force majeure, which requires irresistibility of the event, in emergency circumstances, despite Article 1195 does not expressly impose such condition for the application of hardship, if the debtor fails to exert the necessary effort to mitigate the effect of the emergency circumstances or prevent the consequences, where such efforts were possible, should not be entitled to invoke the doctrine of *imprévision*. Such failure constitutes negligence on the part of the debtor, and the debtor cannot shift the consequences of his own failure onto the creditor.

The researcher argues that Article 1218 combines both subjective and objective elements by requiring that the event be beyond the debtor's control while also being one that could not reasonably have been foreseen at the time of contracting. Consequently, it remains uncertain whether the French Court of Cassation will ultimately adopt a subjective or objective standard when applying Article 1195. What is decisive, however, is that the disruption of the contractual equilibrium must not be attributable to the disadvantaged party; rather, the source of the contractual imbalance must lie outside that party's own conduct.

²⁰ Cass.civ.1 ere,4 mars 1994; Bull.RTD.CIV.1994 P;871, No 5. « <http://Legifrance.fr//>

C. The Change in Circumstances Must Render the Performance of One Party's Obligations Excessively Onerous

Contracts are characterized by their contingent nature, allowing for both profit and loss. Ordinary and foreseeable contractual burdens are inherent in contractual relations and presumed to have been accepted by the parties in light of the nature of the contract, their intentions, and prevailing commercial circumstances; otherwise, they become unacceptable and not presumed to have been accepted, and constitute unforeseen events. However, an unforeseen event is not valid if it results in negative consequences that disrupt the assumed balance between obligations. This balance is achieved when the performance of the obligation becomes burdensome, but not impossible, and threatens the debtor with substantial loss.²¹ Article 1195 demands that the performance of the obligation be extremely onerous for the debtor, but not impossible.

Unforeseeable change affects the balance of the contract only by disrupting its economic basis. Although adverse economic conditions may disadvantage both parties, they must perform their contractual obligations unless they prove a disruption in the contract's economic basis; otherwise, there is no possibility of revising the contract. The party invoking Article 1195 must demonstrate a genuine disruption of the contract's economic equilibrium. Ordinary market fluctuations and foreseeable commercial risks are presumed to have been accepted by the parties. In contrast, hardship arises only where there is a profound imbalance in the reciprocal rights and obligations, resulting in losses that substantially exceed the normal and foreseeable risks inherent in the contract.²² It is not sufficient for the application of Article 1195 that the condition of an unexpected change in circumstances and the burden of implementation be met. Rather, this change, in the event of the debtor continuing to implement the obligation, must lead to the latter being burdened as a result of excessive onerousness, which is an essential condition for the application of the text of Article 1195.

Determining whether the performance has become excessively onerous involves establishing that the change in circumstances has imposed such a significant burden on one of the contracting parties that continued performance would expose that party to substantial or severe financial loss if compelled to perform its contractual obligations as

²¹ Sami Badi Mansour op cit, p. 25.

²² Ibid, pp 47, 48

originally agreed. Only under these conditions can the contract be amended or terminated. However, if the loss arose from unsubstantial emergency circumstances, the mechanism contained in Article 1195 cannot be applied.

Consequently, it remains for the judiciary to define and interpret the ambiguity of what constitutes unusual excessive onerousness, i.e., that which can cause the debtor a substantial loss.²³ What we conclude from judicial rulings is that the assessment of excessive onerousness is based on objective standards, taking into account the circumstances of the transaction itself, and not the personal circumstances of the contracting party. Therefore, the debtor's financial position should not be taken into account in determining whether or not there is excessive onerousness. In this regard, the Egyptian Court of Cassation stated²⁴: "The judge's intervention to reduce the obligation to a reasonable level, according to Article 147-2 of the Civil Code, is a legal prerogative. Its application requires specific conditions, the most important of which is the existence of excessive threatening a substantial loss, and the assessment of the extent of such onerousness suffered by the debtor as a result of the unforeseen event. This falls within the discretionary power of the trial judge.

The relevant criterion is based on objective considerations relating to the transaction itself, rather than circumstances personal to the debtor, since the appealed judgment concluded that there was excessive onerousness based on the circumstances of the transaction, and that the decrease in the rental value per feddan, in addition to the reduction in the agriculture area with sugarcane and and the resulting decrease in annual revenue—such losses may constitute a burden exceeding ordinary limits. Therefore, the argument that the losses incurred by the purchasers were merely minor and customary losses is unfounded where the trial court's assessment falls within its discretionary authority.

²³ Decision of the Egyptian Court of Cassation in Appeal No. 585 of Judicial Year 52 issued in session of 24/12/1985 (Technical Office - Year 36 - Rule 243 - Page 1178), Egyptian Court of Cassation website www.cc.gov.eg/.

²⁴ Decision of the Egyptian Court of Cassation in Appeal No. 580 of Judicial Year 43 issued in session of 1/3/1977 (Technical Office - Year 28 - Rule 110 - Page 600), Egyptian Court of Cassation website www.cc.gov.eg/.

Similarly, the Jordanian Court of Cassation addresses the same issue :²⁵ “Whereas the lightning strike that caused the damages, for which the appellant is seeking a judgment for the amount she paid to repair it, constitutes force majeure, because it is not possible in the prevailing weather conditions in the Hashemite Kingdom of Jordan to predict its occurrence, especially in the southern regions, due to the scarcity of conditions that cause such phenomena, so that it is not common for them to occur and cause damage, in addition to the rarity of such incidents, which keeps them within the description of force majeure.”

The French Court of Cassation elucidated on what grounds the performance of the contract is regarded as excessively onerous under Article 1195. It held that the company had failed to provide sufficient evidence to prove the contractual imbalance, thus preventing the application of the hardship clause (onerousness) contained in the contract agreement. This was even though the company had informed the shareholders that the price had increased from 4% to 6%, resulting in a 58% reduction in the gross profit margin.²⁶ Likewise, the Egyptian Court of Cassation stated in its decision: "Article 147-2 of the Civil Code stipulates that the hardship suffered by the debtor in fulfilling their obligation due to an unforeseen event must be such that it threatens the debtor with substantial loss."²⁷

Therefore, the loss commonly experienced in transactions, as established by the jurisprudence of this court, is insufficient to apply the provision of unforeseen circumstances."²⁸ Furthermore, the onerousness or substantial loss suffered by the debtor is defined as a significant disruption of the economic equilibrium of the contract, not a complete collapse of the debtor's financial position. Nevertheless, Article 1195 of the French Civil Code remains somewhat ambiguous as it does not provide specific criteria for determining the threshold of excessive onerousness. However, the assessment is left primarily to judicial discretion to define what constitutes excessive

²⁵ Decision of the Jordanian Court of Cassation in its capacity as a civil court in case No. 310/1999 dated 4/28/1999, Qarark website: <https://qarark.com/home/>

²⁶ la Cour de cassation 12 février 2015(n° 12-29.550), www.village-justice.com/

²⁷ Decision of the Egyptian Court of Cassation in Appeal No. 502 of Judicial Year 39 issued in the session of 9/6/1975 (Technical Office - Year 26 - Rule 223 - Page 1163), Egyptian Court of Cassation website www.cc.gov.eg/.

²⁸ Decision of the Egyptian Court of Cassation in Appeal No. 248 of Judicial Year 30 issued in the session of 28/12/1965 (Technical Office - Year 16 - Rule 30 - Page 191), Egyptian Court of Cassation website www.cc.gov.eg/.

onerousness, although there is no guidance on how to assess and determine the line between a performance that is excessively onerous and one that is not.

The debtor, affected by the emergency that renders the performance onerous, has two options. The first is to invoke the mechanism contained in Article 1195 by seeking the renegotiation, modification, or termination of the contract. The second is to await action by the creditor, who may seek specific performance under Article 1221 after placing the debtor in default, unless performance is impossible or there is a clear disproportion between its cost to the debtor and its benefit to the creditor.²⁹

If performance is impossible, Article 1218 applies, which suspends performance of the contract if the impediment is temporary, unless the resulting delay justifies termination of the contract. If the impediment is definitive, the contract is automatically terminated by operation of law, and the debtor is discharged from their contractual obligation. If the obligation is still possible to perform but burdensome, there is no room to say that performance is impossible, as the obligation remains in place. Its performance remains required, even if the debtor has to bear an additional cost and burden.³⁰

D. Neither party to the contract must have previously accepted the risk of changing circumstances.

Parties to a contract must not have agreed in advance to accept the risks arising from unforeseen circumstances that render the performance of the contractual obligation excessively onerous because if a party has expressly or implicitly accepted such risks, that party may no longer invoke the doctrine of *imprévision* or request judicial revision of the contract.

Article 1195 of the French Civil Code stipulates that the mechanism for hardship applies provided that neither party has assumed responsibility to bear the risks arising from a potential change in circumstances, recognizing that contracts are naturally exposed to economic risks and their legal consequences. Therefore, one of the contracting parties may assume the risk that could arise in the contract, hoping to gain or retain a profit from the other party in exchange for that risk. However, these clauses allocating the risk

²⁹ Nafi Bahr Sultan: op. cit., p. 55.

³⁰ Ibid, p 54

of unforeseen circumstances must be drafted with precision and clarity. There is no legal impediment preventing their inclusion in contracts, and a party may bear unforeseen risks.

The judge must determine whether the change in circumstances was unforeseen by the contracting parties at the time of contracting. It is required that the event must not be attributed to the debtor; the debtor must neither have caused the event, contributed to its occurrence, nor placed himself in a position where he knowingly accepted its consequences. The party who caused the event cannot benefit from it.³¹ Therefore, the law indicates that neither party must have accepted to bear the consequences of the change in circumstances, i.e., they must not have accepted the risk or gamble. The parties are obligated to perform the contract regardless of its consequences for them, even if... this execution becomes excessively onerous for one of them.

Some legal scholars³² hold that stipulating that the debtor must not have assumed the consequences of a change in circumstances is a natural right of the contracting parties to manage the effects of unforeseen events. This is in accordance with the principle of freedom of contract, enshrined in Article 1102 of the French Civil Code.³³, which guarantees everyone the freedom to enter into or refuse a contract, to choose their contracting partner, and to determine the content and form of the contract within the limits prescribed by law. If a contracting party acts in accordance with natural and possible measures to avoid the unforeseen event before or during the performance of the contract, they have satisfied their obligations, according to the nature of the event and the content of the contractual obligation. However, if their conduct is contrary to what is possible and natural in avoiding the event and its consequences, they have breached their contractual obligations. They are liable for breach of contract, the degree of which varies according to the nature of the contract and the content of the resulting obligation.

³¹ Mohamed Abdel Gawad Mohamed: Subsequent Injustice and Emergency Circumstances, Journal of Law and Economics, Cairo University, Issue 1, March 1963, p. 184.

³² PELLIER Jean-Denis Réflexions sur l'imprévision dans le projet de réforme du droit des contrats (observations sur l'article 1196 du projet de réforme) Petites affiches n° 228 du 16 novembre 2015 pages 8 à 12.

³³ Article 1102 of the French Civil Code: "Every person is free to enter into a contract or not to enter into a contract, to choose the other contracting party, and to determine the subject matter and form of the contract within the limits provided by law."

The contracting parties can address the effects of unforeseen changes in circumstances through contractual adaptation clauses. However, a clause excluding the assumption of risk must not be drafted in excessively broad terms; otherwise, it may be regarded as an unfair or abusive contractual provision and become subject to judicial review.

Chapter Two

Mechanisms and Effects of Applying the Doctrine of Imprévision and its Relationship to Public Order

When the legal requirements for the doctrine of imprévision are satisfied, parties to the contract are vested with varying rights that directly affect the debtor's continued performance of their contractual obligations, which have become excessively onerous. The legal mechanisms employed to address the consequences of changing circumstances operate through a gradual framework. These mechanisms generally prioritize a negotiated solution between the contracting parties to restore contract equilibrium. Judicial intervention may only be resorted to in the case of refusal or failure to renegotiate. The remedial framework outlined in Article 1195 of the French Civil Code is founded upon allocation of responsibilities between the parties to the contract whose contractual equilibrium has been disrupted by the change in circumstances, as we discuss below:

Section One: Mechanisms and Effects of Applying The Theory of Imprevision

1. Continuation of Contractual Performance

Article 1195 stipulates that the debtor must continue performing his contractual obligations during negotiations without defining the duration and consequences. Consequently, even where performance has become excessively onerous due to unforeseen circumstances and may expose the debtor to substantial financial losses, the debtor is not entitled to suspend performance unilaterally while renegotiations are ongoing. If the debtor refuses to perform his contractual obligations, this non-performance constitutes a breach of contract rendering him liable for compensatory damages for non-performance or delay of performance, unless it is proven that force

majeure was the impediment to performance. It is noteworthy that a debtor is bound only to damages which were either foreseen or which could have been foreseen at the time of conclusion of the contract, except where non-performance was due to a gross or dishonest fault.³⁴

On the other hand, a party seeking to invoke the doctrine of hardship must continue to perform his contractual obligations, despite the impact of unforeseen circumstances.³⁵ If he refuses to perform his obligations as stated in the contract, he forfeits the protection provided by Article 1195, including assistance in performing his contractual obligations and reducing the damages caused by the unforeseen circumstances.

The researcher contends that it is better to protect the victim of unforeseen circumstances by suspending performance of the contract until negotiations are concluded. Continuing execution despite the unforeseen circumstances encourages the other party to prolong negotiations or engage in dilatory tactics. As long as the debtor is obligated to continue performing the contract, the other party may seize the opportunity to fulfill their obligations. This is especially relevant given that Article 1195 makes no mention of Article 1112 of the French Civil Code,³⁶ which requires good faith in pre-contractual negotiations. The requirements of good faith must be observed in the negotiations themselves, and their progress must be ensured to prevent procrastination and delays.

Nevertheless, such protection may be derived from Article 1104 of the French Civil Code,³⁷ which establishes the general principle that contracts must be negotiated, formed, and performed in good faith. This obligation is even considered a matter of public order. A contracting party who fails to negotiate in good faith and within a reasonable timeframe is liable for compensation based on contractual liability, without prejudice to the possibility of seeking judicial review of the contract due to unforeseen circumstances. In this regard, this raises the question of whether a debtor who has fully

³⁴ Article 1231-1 of the French Civil Code, Nafeh Bahr Sultan: Previous reference, p. 58, which corresponds to Article 215 of the Egyptian Civil Code.

³⁵ Ashraf Jaber: op cit, p. 324.

³⁶ Article 1112 of the French Civil Code, Nafi Bahr Sultan: Previous reference, p. 19.

³⁷ Article 1104 of the French Civil Code states: "Contracts must be negotiated, concluded, and executed in good faith. This provision is a matter of public order." Nafi' Bahr Sultan: Previous reference, p. 16.

performed the contractual obligations may still invoke the doctrine of hardship after performance has been completed?

The French judiciary on this matter can not be predicted, given that the Egyptian Court of Cassation has ruled that the applicability of the doctrine of imprevision, stated in Article 147/2 of the Civil Code, hinges on the event occurring within a period of time separating the conclusion of the contract from the performance of the resulting obligation. Once the obligation has been performed, it is extinguished, and there is no basis for applying the doctrine of imprevision, as it pertains only to an existing obligation that remains unperformed.³⁸

The application of the doctrine of imprevision can not be invoked where the contractual obligation has already been performed, because the full performance of the contract indicates that it has been terminated by performance. Hence, the contract is no longer in existence, so that a claim to amend it is possible. It is not possible to demand that the onerous obligation be reduced to a reasonable level, because the obligation has been performed and terminated by performance. The court's intervention to restore the economic balance of the contract disrupted between the creditor and the debtor as a result of unforeseen circumstances presupposes the existence of an existing contract between the two parties for it to be modified. If it has been terminated by performance, a non-existent contract cannot be modified. Likewise, modifying the contract under the doctrine of imprevision requires hardship for the debtor. If the contract has been performed, then the hardship of the contractual obligations has been eliminated. The purpose of applying this doctrine is to assist the burdened debtor in performing his contractual obligation as the performance has become excessively onerous due to the change in contractual circumstances; however, the complete performance of the obligation indicates that the debtor was able to perform the contract and that the alleged hardship no longer constitutes a basis for judicial intervention.

2. Request for Amicable Renegotiation (The Contractual Stage):

³⁸ Egyptian Court of Cassation Decision No. 245 of Judicial Year 27, issued on 20/12/1962 (Technical Office - Year 13 - Rule 187 - Page 1179), Egyptian Court of Cassation website: www.cc.gov.eg/. Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 4456/2024, dated 10/12/1999, Qarark website: <https://qarark.com/home/>

The French legislator has established that contracts can only be modified or revoked by the parties' mutual consent or on grounds which legislation authorizes.³⁹ This is further reaffirmed in Article 1195, which prioritizes negotiated solutions, permitting parties to negotiate to resolve contractual imbalances arising from changed circumstances before resorting to the courts to request modification or termination of the contract. If the parties' goal is solely termination, then renegotiation is not required. Article 1195 identifies the stage at which a debtor may request judicial intervention or termination of the contract, specifically the refusal or failure of negotiations stage. The legislator adopted this approach to underscore that judicial intervention is a last resort.

A party whose performance of contractual obligations has become excessively onerous due to unforeseen circumstances at the time of the contract's conclusion must seek to renegotiate the contract with the other party. Just as parties are free to request a review of the contract, they are also free to refuse renegotiation, since renegotiation is fundamentally a contractual and consensual process that depends on the mutual will of the parties rather than the unilateral will of one party, and because its consensual nature confirms that the judiciary has no role in the agreement, it is mandatory. The legislator has obligated the contracting party whose obligations have become excessively onerous due to a change in the contractual circumstances to initiate this process. They must request renegotiation of the contract before invoking judicial intervention.⁴⁰

The contractual obligations must continue to be fulfilled. In the event of renegotiation, the contracting parties are free to either agree to amend or terminate the contract.⁴¹ This reflects the principle of freedom of contract, which underlies both the binding force of contracts (*pacta sunt servanda*) and the possibility of renegotiating contractual terms when exceptional circumstances disrupt the contractual equilibrium.⁴²

Therefore, contractual performance must continue until the judge issues a decision to either review or terminate it. The purpose of this precautionary measure is to avoid

³⁹ Article 1193 of the French Civil Code, Nafi Bahr Sultan: Previous reference, p. 45.

⁴⁰ Ashraf Jaber: Previous reference, p. 324.

⁴¹ Ibid, p 324

⁴² **L.Etienne: Théorie de imprévisionde sa réception par le Code civil á son incidence en matière d'ingénierie contractuelle:**

<http://www.village.justice.com//>

attempts at abuse by a party acting in bad faith. Ideally, the party wishing to benefit from renegotiation, to avoid bad faith and in accordance with the requirements of good faith in negotiation, and based on Article 1104 of the Civil Code, must submit the request by registered letter with acknowledgment of receipt, including all the elements that represent the desire to renegotiate and the reasons for its success and failures. Such documentation enables the court to verify that the renegotiation process was conducted in good faith. The duty of good faith constitutes.⁴³ Therefore, the wording of Article 1195 does not exempt the debtor from continuing to perform their contractual obligations and requesting renegotiation to review the contract. Any unilateral suspension of contractual performance during this stage constitutes a breach capable of giving rise to contractual liability.

3. Amicable Review (Semi-Consensual Stage):

The second limb of Article 1195 provides the parties with two alternative options in the event of refusal or failure to renegotiate the initial contract. The first option is to agree to terminate the contract from the date and on the conditions which they determine. If no such agreement is reached, the possibility of an amicable settlement is exhausted. The second option is to request the court to revise the contract or terminate it, from a date and subject to such conditions as it shall determine. In this case, the parties may refer the matter to the court to reach an amicable agreement.⁴⁴

In this context, the court does not adjudicate a legal dispute in the traditional judicial sense. Rather, it acts with the consent of both parties to facilitate the adaptation of the contract, performing a role comparable to that of an expert entrusted with assessing the true economic value and equilibrium of the parties' contractual obligations. Accordingly, if renegotiation fails or is refused, the contracting parties may either terminate the contract on mutually agreed terms or jointly request the court to revise the contract and restore its economic balance.⁴⁵

⁴³ L.Etienne o.p.cit.<http://www.village.justice.com/> - : Hala Al-Arees: Previous reference, pp. 161-163.-: Muhammad Hassan Qasim: The New French Contract Law in Arabic, Al-Halabi Legal Publications, Beirut, 2018, p. 29.

⁴⁴ Ashraf Jaber: Previous reference, p. 178.

⁴⁵ Ibid, p 325

Some scholars submit that this stage is quasi-contractual, and the court cannot intervene in the contractual relationship except by their agreement. If an agreement is reached, the judge has the authority to review the terms of the contract. They argue that the statute did not specify limits to the authority of the contracting parties after they asked the judge to determine the fate of the contract. Although the parties may present to the court the terms or proposals on which they have reached partial agreement, these proposals do not bind the court. Rather, they serve only as guidance in determining the appropriate outcome. Consequently, the court retains broad discretion either to adopt the parties' proposed solutions or to disregard them entirely to fashion a revision that restores the contractual equilibrium in accordance with the objectives of Article 1195.

Article 1195 encourages the parties to renegotiate, but does not obligate them to do so. Accordingly, if they do not negotiate, the debtor may proceed directly to request the court to amend or terminate the contract. In such circumstances, the party benefiting from the change in circumstances forfeits control over the concessions that might otherwise have been negotiated and may also lose the commercial advantages that could have been preserved through a consensual settlement. Instead, that party risks becoming subject to a judicial adaptation of the contract based on the supervening change in circumstances. The beneficiary's non-obligation to renegotiate in response to the change in circumstances is what distinguishes Article 1195. The contractor is free to request renegotiation while expecting the possibility of the other party's refusal, so it does not constitute a fault or breach of good faith.

The researcher questions the practical value of referring a contract to a judge, who only intervenes if the contracting parties agree to the referral. Why should we expect a judge to annul a contract that he can amend? The researcher further submits that the absence of mandatory negotiation in Article 1195 is unjustifiable and inappropriate. Requiring the beneficiary of a change in circumstances to renegotiate at the disadvantaged party's request compels all contracting parties to engage in negotiation, even if they are reluctant. Each party must deal honestly, transparently, and in good faith with the other to ensure the contract is executed accordingly. If any party unjustifiably refuses to negotiate, such conduct can be translated in bad faith. Such conduct should be penalized for breaching the positive obligation of honesty and integrity towards the other contracting party.

4. The Judge's Role in Restoring Economic Balance to the Contract (Judicial Review and Termination)

Judicial review is considered the true new contribution of Article 1195 of the Civil Code. In the absence of an agreement within a reasonable time period, the judge may, at the request of one of the contracting parties and at the time and under the conditions he specifies, either review or terminate the contract. However, if the parties reach an amicable agreement to review the contract, the judge cannot intervene, and he can only intervene if the amicable method of renegotiation fails. One or both parties may resort to the court if they cannot reach an agreement within a reasonable period regarding the conditions of terminating the contract, or if they fail to do so. Whoever wishes to resort to the judge must provide proof of his adherence to the reasonable period. As a result of resorting to him, the judge may reconsider the contract, or he may rule to terminate the contract on the date and under the conditions he specifies.⁴⁶

Nonetheless, several questions arise: Which court has jurisdiction to hear an application under Article 1195? Moreover, what is the scope of the court's powers once such an application has been made by one of the contracting parties? Is the court bound by the applicant's request for either termination or revision of the contract, or may it choose the remedy it considers most appropriate, even where this conflicts with the wishes of one or both parties? More fundamentally, what are the limits of judicial intervention in a contract founded upon the parties' mutual consent? The court's intervention conflicts with the principle of freedom of contract, as they become a third party to the contract. There is a conflict between the fundamental principle of freedom of contract and the principles established by the new Article 1195.⁴⁷

The researcher argues that this stage is the judicial stage, where the judge has the authority to determine the ultimate fate of the contract by reviewing its terms or terminating it according to the criteria they deem appropriate. They possess discretionary power to review or terminate it, and they also have broad authority to determine the effective date of the contractual terms they deem necessary to restore

⁴⁶ *ibid*

⁴⁷ *ibid*

balance between the contracting parties, whether through termination or review. Furthermore, they can apply the consequences of this authority retroactively.⁴⁸

However, what is the practical value of referring the matter to the court, which only intervenes after the parties to the contract agree? So why do we expect the judge to cancel a contract that he can amend? The absence of mandatory negotiation in Article 1195 is surprising and inappropriate, because imposing an obligation on the party benefiting from the change in circumstances to renegotiate at the debtor's request would compel all contracting parties to negotiate, even where they have no desire to do so. Each contracting party must deal honestly and in good faith with the other party to ensure the implementation of the contract; if any party refuses to negotiate, it is inevitably bad faith and must be punished because it breaches a positive obligation to be truthful and honest towards the other contracting party.

Under Article 1195, the civil judge becomes a third party to the contract, mediating between the contracting parties by virtue of the authority granted to revise or terminate the contract. In the event of refusal or failure to renegotiate, the parties can agree to cancel the contract effective from the specified date, according to the conditions they determine, or they can request the judge to amend the contract. If no agreement is reached within a reasonable period, the judge can, at the request of either party, amend or terminate the contract effective from the date specified, according to the conditions they determine. Thus, the legislature has granted the judge, at the request of the party adversely affected by the change in circumstances, not only the power to revise the contract but also the power to terminate it.

The researcher contends that the content of Article 1195 contains much ambiguity and imprecision, especially since it stipulates that the stage at which a contracting party can resort to the judge to amend or terminate the contract is the stage following the failure to reach an agreement or the refusal of negotiations between the contracting parties, and after a reasonable period has passed in the event of failure to reach an agreement. This raises the question: what agreement does the law refer to? Is the reference in this case

⁴⁸ Ashraf Jaber op cit, p. 178.

to the agreement to restore balance to the contract, or to the amicable solution resulting from the negotiations, or to the amicable request for judicial review?

Furthermore, Article 1195 does not clearly reveal the legislator's intent behind the provision. It is unlikely that the absence of an attempt at negotiation should automatically lead to judicial review of the contract. If there is no obligation to negotiate, the text is unclear, as it indicates that if an agreement is not reached within a reasonable period, one of the contracting parties can request judicial review or terminate the contract. However, this can also be done even if no negotiations take place.

Article 1195 does not specify the extent of the court's discretion to either approve the request for judicial review or revoke the contract at the request of one of the contracting parties. Despite the lack of precision in the wording of Article 1195, the judge can, if the conditions of the theory of unforeseen circumstances are met and according to his discretionary authority, adapt the contract in various ways. This may include modifying the amount or scope of the obligation, reducing excessive onerous obligations to a reasonable level, temporarily suspending performance of the contract, or granting the affected debtor additional time to perform, provided that the balance between the interests of the two parties is taken into consideration.

The approach adopted by the French legislature is similar to that of the Egyptian and Jordanian legislatures in recognizing judicial adaptation of the contract as a means of reducing an excessively onerous obligation to a reasonable level. Depending on the circumstances, the judge can reduce the debtor's burdensome obligation, increase the creditor's obligations, suspend the contract's execution, or extend it to preserve the contract and ensure its continuity. This is evident in French law, where the debtor cannot automatically renege on their obligation due to unforeseen circumstances. Instead, they must continue performance until the court decides on assistance, a decision that is not entirely within their control.

The Egyptian and Jordanian legislatures do not grant the judge the right to annul the contract in the event of a change in circumstances. The judge's authority is limited to reducing the excessively onerous obligation to a reasonable level, thus distributing the responsibility for the unforeseen circumstances between the creditor and the debtor.

Section Two: The Relationship between the Doctrine of Imprévision and Public Order

The relationship between the doctrine of *imprévision* (hardship) and public order (*ordre public*) in the new French Civil Code is one of the most controversial legal issues following the 2016 reform. It represents the fundamental point of conflict between the principle of contractual stability, embodied in the doctrine of the binding force of contracts (*pacta sunt servanda*), and the principle of contractual justice, which mandates judicial intervention to restore the economic equilibrium of the contract that exceptional and unforeseen circumstances have fundamentally disrupted.

French civil courts, following the landmark decision of the French Court of Cassation in the Canal de Craponne case (1876), consistently rejected intervention to modify contracts, regardless of the degree of hardship suffered by one party, considering the binding force of the contract to be paramount. However, the French legislature, under Ordinance No. 131 of 2016, made a historic shift by adopting Article 1195, which permits the revision or termination of a contract in the event of an unforeseen change in circumstances.

The principal legal issue lies in determining the legal nature of Article 1195. The central question is whether the provision constitutes a default rule, which the parties are free to exclude or modify by agreement in accordance with the principle of freedom of contract, or whether it embodies a rule of protective public policy, particularly in contractual relationships characterized by a significant imbalance in bargaining power. The central question is the legal nature of Article 1195, which permits the review or termination of a contract in the event of an unexpected change in circumstances. While one trend considers it a supplementary rule that the parties may exclude by agreement to uphold the principle of autonomy of will (*l'autonomie de la volonté*), another contends that the doctrine of hardship serves broader objectives of contractual fairness and therefore approaches the domain of protective public policy, especially in contracts marred by an imbalance of power between the parties.

1. Article 1195 as a Supplementary (Default) Rule

The majority of legal scholars in France, most notably François Terré and Philippe Simler, have held that Article 1195 is not a matter of public order, but rather a default rule that contracting parties may exclude or modify in the contract (*clauses d'exclusion*). This is based on the principle of freedom of contract, as stipulated in Article 1102 of the Civil Code. The fundamental principle is the freedom of the parties to determine the content of the contract, unless the legislator explicitly states that the rule is a matter of public order.⁴⁹

The official report of the French Minister of Justice to the President of the Republic, accompanying Ordinance No. 131-2016, explicitly confirms that Article 1195 is a supplementary (default) law (*caractère supplétif*), stating: "*This provision is not of public policy; the parties are free to exclude it or determine its effects.*"⁵⁰ The mechanism adopted by the French legislature regarding the relationship of the doctrine of imprevision to public order is defined by the permissibility of agreements to the contrary. This contrasts with the Egyptian and Jordanian legislation, where, despite the flexibility in applying this doctrine, it is considered a matter of public order, rendering any agreement to the contrary void.

This default character is further reinforced by the wording of **Article 1195**, which requires that the debtor must not have previously accepted the risk of a change in circumstances before the doctrine may be invoked. This underscores the supplementary nature of the theory and the possibility of disregarding its provisions and agreeing that the debtor bears the consequences of unforeseen circumstances.

In contrast, under the Egyptian and Jordanian statutory law, any advance agreement requiring the debtor to bear the consequences of unforeseen hardship is invalid because the doctrine is regarded as a mandatory rule of public policy from which the parties may not derogate. However, there is no rule preventing an agreement contrary to the doctrine of imprevision after they have occurred.

⁴⁹ Terré (F.), Simler (P.), Lequette (Y.) et Chénéde (F.), "Droit civil : Les obligations", 12e éd., Dalloz, 2018, n° 642

⁵⁰ Rapport au Président de la République relatif à l'ordonnance n° 2016-131 du 10 février 2016, JORF n°0035 du 11 février 2016.

Both the Egyptian Court of Cassation and the Jordanian Court of Cassation have consistently held that the application of this doctrine falls under public order, and any agreement to the contrary, and any prior agreement to exclude the application of this doctrine, is null and void. However, once the unforeseeable event has occurred, the presumption that the debtor acted under economic pressure no longer exists, and accordingly, the affected debtor may validly waive the right to invoke the doctrine after the event has materialized.⁵¹

2. Restricted Public Order:

Despite the broad agreement that Article 1195 is, in principle, a suppletive (default) rule, the judiciary and legal scholars have placed strict restrictions that prevent absolute exclusion in certain cases, which functionally brings it closer to public order. While Article 1195 may appear supplementary on the surface, its application, surrounded by the duty of good faith (Article 1104) and the protection of contractual balance, makes it approach the rules of public order that cannot be circumvented to create a blatant injustice:⁵²

a. Limitation in Adhesion Contracts (*Contrats d'adhésion*):

According to Article (1171) of the French Civil Code, any condition in an adhesion contract (*Contrats d'adhésion*) that creates a significant imbalance between the rights and obligations of the parties is considered null and void. Legal scholars believe that a condition excluding unforeseen circumstances in an adhesion contract may be considered an arbitrary and void condition if it is imposed in favor of the stronger party; Since the freedom to exclude Article 1195 is not absolute, in contracts of adhesion, the clause excluding contract review is subject to the oversight of Article 1171. If it is proven to favor the stronger party and create a significant imbalance, it is subject to nullity.⁵³

⁵¹ Egyptian Court of Cassation Decision No. 8714 of Judicial Year 80, issued on 21/1/2015 (Technical Office - Year 35 - Rule 36 - Page 168, Egyptian Court of Cassation website: www.cc.gov.eg). Jordanian Court of Cassation Decision in its capacity as a civil court in Case No. 1618/1998, dated 9/9/1998, Qarark website: <https://qarark.com/home/>

⁵² Mustapha Mekki, "Le juge et l'imprévision : entre silence, murmure et fracas", *Revue des contrats*, n° 2, 2016, p. 228.

⁵³ Gaël Chantepie et Mathias Latina, *Le nouveau droit des obligations*, 2e édition, Dalloz, Paris, 2018, n° 534, p. 482.

b. Limitation arising from essential obligation (*Obligation essentielle*):

Further limitation derives from the principle established by the Chronopost decision, which was subsequently codified in Article 1170 of the French Civil Code. Under this principle, a clause excluding unforeseen circumstances may not deprive the debtor's obligation of its essence. If the unforeseen circumstance would render performance of the obligation economically impossible, then invoking the exclusion of Article 1195 may be considered an infringement on the essence of the contract. The protection granted through Article 1170, which enshrined the principle of the Chronopost case issued by the Court of Cassation on October 22, 1996, represents a general protective system that prevents any contractual condition, including conditions for excluding unforeseen circumstances, from emptying the essential obligation of its actual content, especially if the performance of the contract under the new circumstances leads to the destruction of the debtor's economic benefit.⁵⁴

Conclusion

Results and Recommendations

The chief goal of this research is to demonstrate the French legislator's adoption of the doctrine of imprevision "*hardship*", in terms of its scope and conditions of application, and to elucidate its legal effects and its relation to public order, drawing upon Egyptian judicial precedent.

A. Results:

1. Article 1195 of the French Contract Law did not explicitly specify the nature of the change in unforeseeable circumstances, whether it was a change in economic, political, or social conditions, nor did it clearly define the meaning of "excessive" or "excessively onerous."
2. The effectiveness of any legal remedy depends upon its ability to address the effects of unforeseen circumstances and restore contractual equilibrium. Dispute resolutions and contractual imbalances that fail to address these situations and their

⁵⁴ Muriel Fabre-Magnan, *Droit des obligations : Volume 1 - Contrat et engagement unilatéral*, 5e édition, PUF (Thémis droit), Paris, 2019, p. 521.

legal effects lose their appeal and purpose. Regarding these stages of contractual review:

- The new provision, in the first stage, did not impose a general obligation to renegotiate the contract in the event of a change in contractual circumstances. This renders contractual liability impossible if renegotiation is refused, thus making the request for renegotiation pointless in addressing the effects of unforeseen circumstances, as it is essentially redundant.
- The consensual judicial stage largely duplicates the first. In the first stage, the contracting parties can agree to terminate or amend the contract according to the principle of freedom of contract, which does not preclude such agreement. Furthermore, resorting to a court at this stage requires the agreement of the contracting parties. The legislator has limited judicial intervention at this stage remains dependent upon the consent of both parties. This is a supplementary role for the judge, to be invoked only if negotiations fail or are rejected outright.
- In the third stage, the court's authority is limited to either amending the contract or terminating it. However, the provision provides no guidance or criteria to assist the court in exercising its power of revision. This lack of a clear hierarchy of powers highlights that granting the judge the power to terminate the contract exceeds the purpose of the doctrine of imprevision, which aims to address the imbalance in the contract and rescue and adapt the contract as an economic asset, not to extinguish it.

B. Recommendations

Given the in-depth review of the application of the doctrine of imprevision, we call upon the Egyptian and Jordanian legislators to consider the French reform experience as a catalyst for reconsidering their civil law, to critically evaluate and examine it to benefit from its modern developments while avoiding the ambiguities and shortcomings that have emerged in its application. To benefit from the updates contained therein and avoid the ambiguity and shortcomings that have affected it, as such a comparative approach would facilitate the refinement and modernization of the general law of contracts, enabling it to respond more effectively and resiliently to contemporary

international developments and to the evolving demands of economic, social, and scientific change.

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