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THEORY OF IMPREVISION AND JUDICIAL INTERVENTION TO CHANGE A CONTRACT.

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Theory of Imprevision and Judicial Intervention to Change a Contract*

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The comparative study of judicial intervention to change or modify a validly concluded contract is difficult. The various national laws not only describe somewhat similar legal situations in different terms,[1] but often use prima facie opposing techniques and methods of reasoning to attain the same goals. The differences between the civil and the common law on the judicial revision of contracts illustrate that fact. In many traditional civil law jurisdictions, the subject is considered a part of the general law of contractual responsibility, whereas in common law it seems the more specific jurisprudential doctrine of frustration of contracts[2] makes it part of the law of enforcement of contracts. In the French civil law tradition performance of contract is so much based on responsibility that many French authors think that no difference in concept should exist between contractual liability and liability resulting from offenses or quasi offenses.[3] When a party refuses to perform the contract, a French or Quebec court will ask itself the basic question: is non-performance of the debtor's obligation due to his fault? On the contrary it seems that in common law the judge will look first at the contract as a whole and ask himself whether or

not it would be equitable to grant performance and if some legal excuse can be found to justify non-performance such as act of God, impossibility of performance or frustration of contract.[4] This distinction is one of approach rather than of substantive law and in common law the starting point of the reasoning process seems to be the contract as a whole whereas in civil law the obligation of the debtor is firstly looked at, examined, and analyzed.

It is not the purpose here to examine the instances in which the rescision or resolution of a contract may be declared or one of the parties excused for non-performance. The exclusive concern here is with the question whether a contract may be modified by judicial action in instances where circumstances supervening between the conclusion of the contract and performance have disturbed the equilibrium existing originally between the obligations assumed therein. Two examples will serve as illustrations. A person has loaned a certain sum of money to another, to be paid back in three years. When the time of repayment comes the amount owed represents, due to economic inflation or devaluation of money, much less than the real value of the loan appraised in terms of what the sum was worth at the time of the making of the loan. A second example is the classical case in which a party agrees to sell a certain quantity of goods over a

certain period of time. Upon delivery the debtor notices that on account of certain economic changes the goods on the market are now worth many times their value at the time the contract was made.

In each case performance is possible in theory but either of little value to the creditor or harsh on the debtor. This is precisely where the question of revision of the contract arises. May the lender in the first case or the seller in the second case ask the court to revise their respective contracts, to take into account these supervening factors and re-evaluate the reciprocal obligations under the contract without having to put an end to the bargain? Relative impossibility and not absolute impossibility, revision and not discharge are the real issues.

Since dealing with this problem makes it imperative to analyze the solutions put forward by a certain number of jurisdictions, it has been thought best, to preserve the clarity of this exposé, to examine the question first by inquiring into the various techniques in comparative law and secondly by trying to appraise generally the merits of allowing judicial intervention to alter contractual obligations.

Section I. The Techniques of Revision in Comparative Law.

A. The History of Revision.

Revision of contracts is well known in certain countries and ignored in others. One might conclude from a superficial study of the modern legal systems that it is a relatively new development in the law. Although this theory assumed a new dimension at the start of this century, its origin can be traced back to the glossators and Canonist authors.[4a] They maintained that good faith is a vital element in the performance of contracts and that, where a change of circumstances independent of the will of the parties created a heavier burden on the shoulders of one of them, the court should under an implied "rebus sic stantibus" clause adjust their respective obligations in the light of these changed circumstances.

This solution, however, does not seem to have represented the recognized law in France in the 17th and 18th centuries.[5] Neither Domat[6] nor Pothier accept the validity of an implied "clausula rebus sic stantibus" in contracts. Pothier for one in his "Treatise on Loan"[7] emphasizes the fact that the borrower, to perform his obligation, has only to give back to the lender the numerical sum borrowed, regardless of the real value of the sum at the time of performance.

It is no surprise thus to find almost all the civilian countries at the time of codification omitting a general provision concerning judicial revision of contracts. In the 19th century the French, Louisianian, Quebec, and German codifiers felt no need to introduce into the law something that had not really been part of the legal tradition and which they believed unwarranted. One may add that in the case of France, the drafters of the Code were very much concerned with leaving as little discretion as possible to the courts which for historical reasons were then profoundly distrusted ("Que Dieu nous garde de l'équité des parlements").

The development of the theory of revision and the French concept of "imprévision" are closely connected with the catastrophic economic situation that prevailed in Continental Europe at the end of the first World War.[8] In France the "franc-germinal", representing 290 miligrams of fine gold, had not changed in value from March 18, 1803 to August 5, 1914.[9] At the end of the war, however, it had lost 4/5 of its original value. In Germany the effects of the war were felt deeply [illegible] and led to the sensational devaluation of the mark which prompted very strong economic measures on the part of the German government.[10] The situation in these two countries was such that all the long term pecuniary contracts left their creditors if not penniless, at least in a very precarious economic

position. Borrowers on the other hand would find themselves considerably enriched at the expense of the lender. Thus the sharp increase in the cost of living and the substantial reduction of the purchasing power of European currencies changed drastically the traditional perspective of the law of contracts.

A study of the trends in the law on the judicial revision of contracts show clearly that it has always been tied closely to the economic situation prevailing at a particular moment of one country's evolution.[11] There is very little, if any concern at all for revision or imprévision, in a given country when its currency is sound and prices stabilized. On the contrary, revision will play an important role there inflation and increases in the cost of living affect the stability of long term contractual obligations.

B. The Modern Legislations.

As it would be impracticable to review all the modern systems of law, remarks will be restricted to the techniques used by Germany and Switzerland, France, Louisiana and Quebec. These provide remarkable examples of the different lines of thought on the imprévision and revision of contracts.

1) Germany and Switzerland.

Both of these countries have admitted the possibility of certain forms

of judicial revision of contracts.[12] Articles 626 and 723 of the German Civil Code or B.G.B. provide that partnership and employment contracts can be terminated for important reasons. German courts, before the First World War read these two articles as mere illustrations of the more general rule of good faith performance, stated in Article 242 of the Code.[13] Through the years, judicial revision (Ausgleichsanspuch) developed quickly outside of these two specific instances and became more generalized. The courts broadened the strict applications of the rules concerning impossibility of performance and at the same time found in doctrine various theoretical explanations[14] of the power of the courts to "remake a contract" where its performance would offend the principle of good faith. One should note, however, that the German notion of good faith (Treu und Glauben) appears to be somewhat different from that of the traditional French law of contracts, for it includes not only good faith stricto sensu, but also what could be called "mutual and reciprocal trust and confidence." The fairness of the contract for both parties is appreciated not only by reference to what existed at the time of its conclusion, but also by reference to the circumstances surrounding its performance. Switzerland for one has been influenced considerably by the German law on this point.[15] The federal Code of Obligations provides at

least nine clear instances in which a party to a contract may obtain relief from its obligations under the form either of a legal excuse for non-performance (resiliation) or of a judicial revision of the contract by the judge.[16]

In a comparable way, the Swiss courts have utilized article 2 of the Swiss Civil Code,[17] which makes good faith imperative in the performance of contracts, to allow revision of contract in instances in which both the performance has been made more difficult by circumstances beyond the control of the parties and the inequality of the reciprocal obligations exceeds the normal contractual risks tacitly assumed by the contracting parties. Revision is granted both where the value of the debtor's obligation has greatly increased and where the value received is considerably depreciated or devaluated.[18] Both of these systems recognize revision where it would be contrary to good faith and fairness to claim performance from the promisor while offering little or nothing of value in return.

2) <u>France</u>.

French tradition, on the whole has been very reluctant to admit the possibility of judicial revision of contracts.[19] However, the economic mishaps of the 20th century prompted partial legislative recognition of revision in certain

cross of the law. The French Civil Code contains certain articles that, like provisions in many other jurisdictions, allow a certain measure of judicial intervention in contractual performance.[20] A series of laws enacted after the first and second World Wars, the best known of which is the celebrated "Loi Failliot" of 1918,[21] allowed relaxation from the strict code rules concerning performance.[22] The history of contract revision, however, belongs not exclusively to the legislation, but also to the jurisprudence. In many instances the courts were asked to admit under the general principles of the Code as in Germany and Switzerland, the general power of the judge to revise contracts. The civil Cour de Cassation in the Canal de Craponne case[23] strongely refused to allow revision, on the grounds that the rules set forth in the Code[24] on the interpretation of contracts do not go as far as to allow a court to read an implied "rebus sic stantibus" clause in every agreement and that at any rate the notion of performance in good faith set forth in article 1134 CN does not authorize the judge to remake a contract. The administrative tribunal of the Conseil d'Etat, on the other hand, held an entirely different view on the subject. This court allowed revision of administrative contracts when a change in the economic situation rendered their performance difficult or financially impossible for the debtor; a decision of

the Conseil d'Etat of March 30, 1916[25] openly admitted the imprévision theory, thus paving the way for the large discretionary powers the French administrative tribunals still enjoy today.[26] It should be pointed out, however, that the problem of imprévision as applied to administrative contracts is essentially different from that of civil contracts. The rise of the cost of living in France after the first World War and the increase in the price of raw materials had left some public utility companies in precarious financial situations. They could no longer have continued their services at the rate conventionally agreed upon before the War, without facing bankruptcy. The question put to the Conseil d'Etat had, then, very profound political and economic general implications for the country as a whole. The Conseil d'Etat ruled that if the creditor refused a fair alteration of the original contract, the company would be entitled to claim an "indemnité d'imprévision" which in fact would most probably cover at least part of the increased cost of performance.[27] The majority of the French doctrine, with the possible exception of Ripert[28] seems to agree with the solutions given by the "Cour de Cassation" that in ordinary contracts the courts should not be allowed to remake the contract or even relieve the debtor from performance unless it can be shown that the case falls precisely within the classic definition of

force majeure or *cas fortuit*.[30] This reluctance to admit revision of contracts in general is indeed consistent with the general philosophy of the French Civil Code that only absolute impossibility of performance relieves the party of his obligations. Examples of this attitude can be found in articles 1152 and 1895 of the French Code. The first one prohibits the judge from revising the amount stipulated in a penal clause, while the second one, considered by some authors to be of public order,[33] states that in the case of loan the borrower is bound to pay only the numerical sum borrowed and not the real value of such sum at the time of performance. It thus seems that in France the judicial revision of contracts has been admitted in exceptional cases only and the civil courts have refused to extend that notion throughout the general law of civil contracts.

3) Louisiana and Quebec law.

Unlike Germany and Switzerland, both Louisiana and Quebec reject the principle of judicial revision of contracts and maintain unadulterated the principle of the sanctity of contracts or security of transactions. The Louisiana jurisprudence has time and time again taken a strong position against contract revision by adhering firmly to the following principles illustrating a strict interpretation of articles 1901 and 1945 of the Louisiana Code:

1. The parties must perform their obligations under a contract however

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drastic or unreasonable its terms may be.

2. The parties to a contract must perform their obligations, regardless of the harmful consequences such contract may have on them. Difficulties, inconveniences, undesirability, hardship, expenses incurred in performing the contract, and the meagerness or uselessness of the result to the creditor are

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not valid excuses.

3. The courts cannot under the pretext of interpretation alter or remake

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a new contract for the parties. As McCaleb, J. stated in the Supreme Court decision of Stack v. DeSoto Properties:

> "Article 1945 of the Civil Code provides that agreements have the effect of law upon the parties, who alone can abrogate or modify them, and that the courts are bound to give effect to all contracts according to the true intend of the parties when the language is clear and leads to no absurd consequences. Conformable with thatprinciple, which is also stated in Art. 1910 of the Civil Code, this Court has many times observed that it is not within its province to alter, or make new contracts for the parties, its duty being confined to the interpretation of agreements the parties have made for themselves, and in the absence of any ground for denying enforcement, to render them effective."

This seems to have been the continuous trend of Louisiana law on the subject. The only legal excuses for non-performance are restricted to irresistible force and fortuitous event which must render the performance of the obligation abso-

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lutely impossible through no fault of the debtor. There seems to be no place in Louisiana law for the revision of contracts by the judge. The Code itself in

articles 2113 and 1.15 expressly prohibits the revision of contracts as been and stipulates, as the French and Quebec counterparts, that the borrower is only obliged to return the numerical sum irrespective of increase or decrease in its value.[36] However, through a careful scrutiny of the Civil Code, one may find a certain number of dispositions that would tend to give the courts a certain limited power of revision. The first example of it can be found in articles 2492 ff. and 2541 ff. which make provisions for the adjustment of the price in a contract of sale where, in the case of an immovable, the seller fails to deliver the proper quantity and, in the case of a movable latent defects diminish the value of the thing sold.[37] The courts in these instances, by granting a reduction of the price, are in fact in the broadest sense of the term "remaking" the contract as it should have been made originally. These two cases are not, however, true examples of revision of contract in the traditional sense of the imprévision theory, for the defect that is remedied by judgment existed at the time of the making of the contract and did not arise from supervening circumstances. The same remarks can be made in relation to articles 2743 and 2785 of the Civil Code. The tenant of a prædial estate can claim an abatement of the rent if part or all of his crop has been destroyed by accident of an extraordinary nature.[38]

Under 2713 C.C. La., in the case of vices or lacks, partial loss of the thing entitles the purchaser to a reduction in proportion to the loss. These two examples are in fact specific illustrations of the effect of unforeseen and fortuitous events on the contract and not technically speaking clear admissions of the judicial power of revision. The only piece of legislation comparable to the European laws on the subject is an old Louisiana statute dating back to 1918[39] made necessary by the effects of World War I on contractual performance. One should add, however, to these few observations that in certain instances, although not authorized by the legislation, the Louisiana courts have in fact "remade" contracts for the parties. Such is for instance the case of contracts containing a penal clause. A series of judicial decisions have held that the judge has the power to investigate the "reasonableness and equity" of the contractual damages and refuse to enforce the terms of the clause when it does not meet with the court standards of what is reasonable and equitable.[39a]

As for Quebec, one finds the situation to be much the same as in Louisiana. The Quebec courts have often stated that they would not intervene in the contractual relationship of the parties unless a clear and unequivocal legislative text gave them the authority to do so. Frustration of contract is totally unknown and

only formulaic event or irresistible force can discharge the debtor of his obligation to perform.[40] However, a recent amendment to the Code has thrown a new light on the question.[41] The legislator, a few years ago, was urged by many pressure groups to enact a law protecting the ordinary citizen against the abuses of certain unscrupulous lenders. The result was the introduction in the Code of a transposition of a common law statute of the Province of Ontario.[42] This piece of legislation allows the court to annul or reducemonetary obligations under a loan of money if it should find the cost of the loan excessive and the operation harsh and unconscionable under the circumstances of the case. The author was unable, however, to find a single reported decision on the interpretation of this peculiar piece of legislation. With the exception of this unorthodox piece of legislation,[43] the Quebec courts on the whole have kept the French Civil Code tradition and have been faithful to the "pacta sunt servanda" principle.[44]

Section II. A Critical Appraisal of the Judicial Power to Remake Contracts.

If the legislative and judicial techniques used by the different legal systems[45] vary considerably, the fundamental problems relating to the judicial power of revision remain much the same. The basic question in every jurisdiction appears to be the following: is the authority of a court to remake a contract

validly entered into between the parties compatible with the general principles of the present day civilian system? If not, a supplementary question should be raised as to what would be the theoretical and practical difficulties arising out of a general admission of this judicial power in a given jurisdiction.

A. The principle of sanctity of contracts.

Both the civilian and the common law systems are forced to admit that it would be impossible to legislate efficiently in the domain of contracts without safeguarding the two fundamental cornerstones of the law of contracts: freedom to contract and sanctity of contracts. Too often, however, these principles have been examined only in a strictly legalistic perspective, losing sight of the economic substratum and dimensions of the private law contract. Sanctity of contract is not preserved only because of the desire of the legislator to ensure a reasonable stability in individual contractual relationships. One must only examine the legislative policy behind the sanctity of contract to ascertain that there is more to it than the safeguard of individual relations. Contract is in fact the most common, frequent, and current form of economic exchange, and the economic life of a country depends in a large measure on a mosaic of individually made agreements. No legislator can, without running a serious

economic risk, delete or weaken too severely the principle of sanctity of contract. The golden rule that "pacta sunt servanda" reaches deep socio-economical interests through individual interests.

However, elementary reasons of justice and equity require that sanctity of contract be not applied without exceptions. No court of law should, or for that matter, does oblige a party to abide by this rule when his contractual obligation's performance has become absolutely impossible through no fault of his.[46] It is nevertheless necessary for the 20th century jurist to ask himself whether the principle of sanctity of contract, as well as the principle of freedom to contract, need not be reappraised in the light of modern social conditions. These two principles were expressed in the French, Louisianian and Quebec Codes in the 19th century, at a time when complete economic liberalism required their strict application. Nowadays, however, the famous dictum of Fouillée, "Qui dit contractuel, dit juste"[47] seems largely obsolete. Contract in our modern world is no longer in many instances synonymous with justice. Every day life tends to demonstrate the opposite proposition. The supremacy of the contract of adhesion, the frequent economic discrepancy or gap between the contracting parties often transform the contract into a technique of exploitation by the economically strong

party. The other contracting party has too often no real contractual freedom, his alternative being often enough reduced to a choice between not contracting (and thereby depriving himself of goods or services that are essential), or contracting under the conditions, terms, and obligations imposed by the other.[48]

This is precisely the reason why the problem of judicial revision should not be examined and analysed only by strict reference to the traditional schemes of thought of the traditional approach to the law of contracts. A study of the law in the various civilian systems reveals that the law affords a good measure of protection to the contracting party at the time of the making of the contract. The legislator makes sure that his consent has not been given in error, by fraud, or induced by violence.[49] In certain circumstances the law even requires a measure of equivalence between the obligations through the medium of lesion.[50] But, when time of performance comes, only fortuitous event or irresistible force can excuse him from non-compliance with the terms of the contract. Supervening difficulties or hardships are not in theory valid reasons for relief.[51] In the light of these various factors it thus becomes necessary to enquire whether any legislative justification could be found in the actual texts of the Civil Code of France, Louisiana and Quebec to admit as part of the

law the judicial authority to revise a contract.

B. Legal basis for admission of the right to revision.

Switzerland and Germany, both of which have admitted generally the principle of judicial revision of contract, offer most interesting legal justifications,[52] while on the contrary, French authors appear extremely conservative in their attempt to find a legal basis for it. It is not our intention here to investigate the German and Swiss point of view, but rather to enquire whether in the French inspired legal tradition a reasonable ground can be found for revision of a contract the content of which has changed due to supervening economic difficulties. Among the numerous tentative explanations given by the authors,[53] the rules of good faith, unjust enrichment, error and interpretation of contracts will be considered.

1) Good faith. Good faith in French law, as well as in Louisiana and Quebec law, is a duty imposed on the parties not only at the time of formation, but also at the time of performance.[54] Contractual relationship must reflect a certain "fair play" between the parties. It would naturally be presumptuous even to attempt to give a definition of good faith, but it seems admitted generally that in the French tradition a party normally is held to be in bad faith if he causes

prejudice to the other and had the intent to cause such prejudice. This is a more restrictive rule than the Swiss and German's, which good faith (Treu und Glauben) appears to include also the idea of reasonableness and fair dealing.[55]

It consequently seems that there is very little possibility of considering the power of judicial revision as a sanction to the rule of good faith in the traditional sense of the term, for it would have to be shown that the creditor would contravene the obligation of good faith by simply asking the courts to enforce a contract as it stands. Claiming what is due is not per se contrary to good faith and it would be difficult indeed to conceive that the primary interest in asking for performance is to cause prejudice. It is suggested, however, that the French civilian tradition might profit from the extensive German and Swiss notion of good faith; but under the present state of the law the rule of good faith alone does not appear to be a valid justification for the judge to "remake" a contract.

2) Unjust enrichment. There again, the search for a valid justification seems to run into insuperable difficulties. Two main arguments appear to settle the case. In the first place, under the classical doctrine of unjust enrichment, relief can not be had where there exists a legal cause for the enrichment.[56]

a contract has always been considered as a valid legal cause. In the second place, the introduction of unjust enrichment in the law of contracts would, practically speaking, encounter serious difficulties. Applied to the extreme limit it would have the effect of allowing judicial intervention in all cases where, for any reason whatsoever, the reciprocal obligation is proven to be unequal. This would, in other words, be the equivalent of admitting revision based on lesion and would probably seriously affect security of contracts and especially of commercial transactions.

3) Error. Can revision be justified on the grounds of error, by saying that the contracting party has erred as to the substantial qualities or the principal consideration for the contract? Here again serious objections may be raised. First, to be a cause of nullity or of revision, error must have existed at the time of the making of the contract. Mistake as to a future fact or a future quality is not recognized as a good ground for annulment unless such factor or quality was made a condition to the contract. Secondly, the error which would be sought in case of imprévision, would really be an error on the economic value. Admitting it would again be admitting lesion, which under the French, Louisiana, and Quebec Civil Codes is restricted to certain types of contracts and is not of

general applicable throughout the commercial field. In the civil theme lesion is admitted, moreover, lesion must have existed at the time the contract was made and lesion arising out of performance is generally not taken in consideration.[58]

4) Interpretation of contracts. The Civil Codes of France, Louisiana and Quebec have somewhat similar provisions on the interpretation of contracts.[59] They require the courts to interpret the agreements by looking into the "common intent" of the parties.[60] One may then argue that implicitly the basic common intent of the parties to a contract is to get a reasonable personal gain or profit (pecuniary or other). Should this profit be frustrated by circumstances independent of the will of the parties, it could be maintained that enforcing the contract as it stands at the time of performance would contravene the basic rule of interpretation. The judge then should be allowed to modify the agreement to equate the results of the performance with that which the parties expected when they agreed to be bound. This reasoning, however, meets with serious difficulties. First, as it is stated in article 1945 of the Louisiana Civil Code, and implied in French and Quebec law, the common intent of the parties is really the intent of all the parties and not only that of one of them. Secondly, often

enough the parties themselves when making the contract could have foreseen the possibility of important changes and incorporated in the contract stipulations to cover the case. Indeed, legal practice has over the years devised certain clauses such as the gold clause or the "clause d'echelle mobile" (the validity of which has been disputed in certain cases), [61] which may protect the parties against a certain number of economic risks. One may presume then nowadays that, if the contract is important and the parties have not taken these precautions, their common intent was not to consider them. It would, in our opinion, be stretching too far the law of interpretation of contract to read an implied "rebus sic stantibus" clause into every contract.

Conclusion

One can realize that under a formal interpretation of the present legislation of France, Louisiana and Quebec no really solid legislative ground can be found for the admission of a general authority for judicial revision. It is suggested on the contrary that the assumption of such authority would be contrary both to the text and the tradition of these legal systems. The introduction of such power should, however, be given serious consideration, and future legislative attempts on the subject should not overlook certain principles and considerations

of primary importance.

The power of revision given to the courts by certain countries is based on a postulate of explicit confidence and trust in the wisdom of the magistrate's decisions. This system appears to have worked out very well indeed in Germany and Switzerland. However, a large margin of discretion (the judge having the power not only to resiliate but to remake the contract) may lead to considerable variations in practical solutions and results. Each court would really have no alternative but to apply to each particular instance its own ideas and notions of what is "just and equitable". This might very well pave the way to uncertainty and confusion. Moreover, broad revision authority would no doubt create dangerous instability in contractual relationship, especially insofar as aleatory contracts are concerned. Parties aware of the possibility of future revision, might perhaps enter into "risky contracts" with the thought they might avoid them should they prove later on unprofitable. The traditional reliance on the promise given would undoubtedly suffer from that.

Another important factor to be taken into consideration is the effect that revision could have on credit. In most aleatory contracts, especially in loans, parties often speculate on the economic circumstances. The borrower in a period

of moderate inflation for instance will readily use his credit, knowing full well that if the terms of repayment are spread over a long enough period of time, the sum that he will eventually have to repay will represent but a fraction of the real purchasing power of the sum he borrowed.

Finally, one cannot overlook the danger of greater state intervention and control in the domain of contracts. Frequent judicial revisions might affect the economic stability and in turn greater state legislative intervention might become necessary to counterbalance the resulting ill effects.

On the other hand, however, one cannot but feel frustrated in his sense of justice when, on account of extrinsic supervening circumstances, a contract becomes an instrument of exploitation in the hands of one of the parties. There would be good grounds, if reciprocity of obligations is not meaningless, for allowing judicial revision in cases where considerable hardship is felt by one of the parties. It is the writer's opinion that the limits drawn by Ripert[62] are sound and realistic. Revision should only be admitted, if at all, when three sine qua non conditions are met. First, the contract for which relief is asked should never be of a speculative nature, for then the parties may be deemed to have assumed the risks of a change of circumstances. Secondly, relief could

be granted only if the party asking for it would suffer considerable prejudice. Reasonable difficulties or hardships would not then be taken into consideration. Finally, the debtor would have to prove that the creditor of the obligation would obtain an "unjust profit" from the performance of the contract as it stands. This is in fact basing revision on a large theory of abuse of right and would again restrict revision to cases where the profit derived from the contract is really immoral and unjust.

The principle of the sanctity of contracts should not be a mere pretext to shut one's eyes to serious injustices in the performance of contracts, and the difficulties of drafting adequate legislation on the subject should be no excuse to avoid the problem.

FOOTNOTES

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1. The French terms "imprévision," "révision du contract," réduction des obligations," the English "impossibility of performan," "frustration of contract," "frustration of purpose", and the German "unmöglichkeit," "unvermögen," and "fortfall der Geschaftsgrundlage," etc. cover somewhat similar legal entities.

2. See generally, Corbin, Contracts (1952) 1353 and fn. 1128 ff.; Halsbury, Laws of England (3d ed. 1954) Verbo Contracts, Vol. 8, n. 178 ff., 307 ff.; W. Buckland, Causes and Frustration of Contract in Roman and Common Law, 46 Harv. L. Rev. 1281 (1933); L. Corbin, Frustration of Contract in the United States of America, 29 J. of Comp. Leg. and Int'l Law (1947 3d series) 1; M. Gutteridge, La révision des contrats par le juge en droit anglais, Travaux de la semaine internationale de droit (Paris 1937) 33 ff.; H. Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 Col. L. Rev. 287 (1958); S. Wade, The Principle of Impossibility in Contract, 56 L.Q. Rev. 519 (1960); W. Chapman, Contracts, Frustration of Purpose, 59 Mich. L. Rev. 98 (196(

3. 1 Mazeaud, Traité théorique et pratique de la responsabilité civile délictuelle et contractuelle (4th ed. 1947) 94 and fn. 96 ff. 2 Lecons de droit civil 313 and fn. 390 ff. (1956).

4. It should be pointed out that under the Anglo-American common law system, frustration of contracts seems in certain of its aspects to cover both absolute impossibility of performance (Unmöglichkeit) and relative impossibility of performance (Unvermögen).

4a. See B. Osti, La casi detta clausola rebus sic stantibus vel suo ovilunno storico, Riv. Dir. Civ. 1 (1912).

5. 1 Domat, Les lois civiles dans leur ordre naturel, Liv. I, Tit. I, Sec. II, Sec. III, No. 10, 12; Tit. VI, Sec. I, No. 8.

6. Pothier, Obligations 33, 34, and 365.

7. Pothier, Traité due prêt á consommation 36.

8. See F. Cooper, Effects of Inflation on Private Contracts: France 1916-26, 6 Detroit L. Rev. 63 (1936); J. Noirel, L'influence de la dépréciation monétaire dáns les contrats de droit privé, Influence de la dépréciation monétaire sur la vie juridique privé 69 ff. (1961). M. Vasseur, French Monetary Depreciation and Methods Used to Remedy It, 30 Tul. L. Rev. 73 (1955).

9. J. Noirel op. cit. 73.

10. J. P. Dawson, Effects of Inflation on Private Contracts - Germany 1914-24, 33 Mich. L. Rev. 171 (1934).

11. J. P. Dalmas Saint Hilaire, L'adaptation du contrat aux circonstances économiques, La Tendance á la stabilité du rapport contractuel 189 (1960); J. Noirel op. cit. 69.

12. M. Volkmar, La révision du contrat par le juge en Allemagne, Travaux de la Semaine internationale de droit 15 ff. (Paris 1937); E. J. Cohn, Frustration of Contract in German Law, 28 J. of Comp. Leg. and Int'l Law 15 (1946 3d series); R. David, Traité élémentaire de droit civil comparé 143-145 (1950).

13. E. J. Cohn op. cit. p. 18 ff.

14. See E. J. Cohn op. cit; Volmar op. cit. note 13; P. J. Zepos, Frustration of Contracts in Comparative Law and in the New Greek Civil Code, 11 Mod. L. Rev. 36 (1948); H. Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 Col. L. Rev. 287, 296-299 (1958).

15. H. Descheneaux, La Révision des contrats en droit Suisse, 30 J. of Comp. Leg. and Int'l Law 55 (3d series 1948); A. Simonius, La révision des contrats pour cause d'imprévision en droit suisse, Travaux de la semaine internationale

du droit 173 (Paris 1937); E. Thilo, La Révision des contrats par le juge en Suisse, Travaux de la semaine internationale de droit 121 (Paris 1937).

16. Art. 163 (reduction by the judge of excessive penal clause); Art. 287 (abatement of rent for the predial estate lessee); Art. 373 (raise or reduction of obligations in the "contrat d'énterprise"); Art. 417 (reduction of excessive salary paid to agents); Art. 527 (fixtion of rents and annuities).

17. Art. 2 of the Swiss Civil Code can be translated in the following manner:

> Everyone is bound to use his rights to obligations according to the rules of good faith. Manifest abuse of a right is not protected by law.

See R. Paty, Le principe de la confiance et la formation du contrat en droit Suisse (1953).

18. H. Deschûneaux op. cit. For a closer analysis of Swiss jurisprudence see E. Thilo op. cit.

19. See R. David, Frustration of Contract in French Law, 28 J. of Comp. Leg. and Int'l Law 11 (3d series 1946); M. Lalou, La Révision des contrats par le juge en droit francais, Travaux de la semaine internationale de droit 46 ff. (Paris 1937).

20. Such as for instance the power given to the courts to grant a delay for per-

formance (Art. 1244 C.N.) and to grant abatement of rent to farmers (Art. 1769 C.N.)

21. Loi du 21 janvier 1918.

22. The most important of these laws are: Loi du 6 juillet 1925; Loi du 9 juin 1927; Loi du 21 juillet 1927; Loi du 29 juin 1935; Loi du 18 Avril 1966; Loi du 25 Août 1948; Loi du 25 Mars 1949; Loi du 22 Avril 1949; Loi du 2 Août 1949; Loi du 24 Mai 1951; Loi du 22 Juillet 1952; Loi du 9 Avril 1953.

23. Cass. Civ. 6 Mars 1876, D.1876.1.193. See also Cass. Civ. 6 Juin 1921, D.1921.173; Cass. Civ. 18 Octobre 1926, D.1927.1.101; Cass. Civ. 15 Novembre 1933, S.1934.1.13.

24. Arts. 1156-1164 C.N.

25. Conseil d'Etat, 20 Mars 1916, D.1916.3.25; S.1916.3.17 note Hauriou. Comments by R. Demogue, Rev. Trim. de Dr. Civ. 517 (1916).

26. See Conseil d'Etat 27 Mars 1926, D.1927.3.17; Conseil d'Etat 9 Décembre 1932, D.1933.1.17; S.1933.3.9.

27. Josserand, Le contrat dirigé, D.1933 Chr. 89; Capitant, Le régime de la violation des contrats, D.1934 Chr. 1; M. Trasbot, La dévaluation monétaire

et les contrats du droit privé, 2 Etudes à l'honneur de Georges Ripert 159 (1950). P. Ancel, L'imprévisibilité monétaire et la notion d'équivalence dans les contrats, J.C.P. 1953.I.1092; Planiol et al. cit. Vol. 2, 663, No. 732.

28. G. Ripert, La règle morale dans les obligations civiles 139 ff. (3d ed. 1935). At pg. 166 the author would favor the adoption of the following text (translation):

> The judge may order resolution or revision of the original contract when, on account of unforeseeable circumstances, the debtor would suffer considerable prejudice and the creditor would obtain an unjust profit from a contract that was not motivated by speculation.

See also J. Hoëtel loc. cit. 101 ff.

29. Arts. 1147-1148 C.N.; see J. D. Smith, Impossibility of Performance as an Excuse in French Law: the Doctrine of Force Majeure, 45 Yale L. J. 452 (1936).

30. Colin et Capitant, II Cours élémentaire de droit civil 293 (7th ed.); compare with same (10th ed. 1948) No. 487, p. 353. See Cass. Req. 25 Février 1929, D.1929.I.161; 25 Octobre 1932, D.1933.556.

31. Blakesly v. Rousseau, 105 So. 354 (1926); Yates v. Batteford, 139 So. 37 (1932); Stafford, Darbes and Roy, Inc., 137 So. 62 (1932); Oil Field

Supply and Soap Material Co. v. Gifford-Hill Co., 16 So.2d 77 (1944), 16 So.2d 403 (1944); Arkansas Fuel Oil Co. v. Maggio, 141 So.2d 516 (1962); Léon v. Dupré, 144 So.2d 667 (1963). See also Stewart, Hyde and Co. v. Bozard and Dranguet, 23 La. Ann. 201.

32. In Picard Construction Co. v. Board of Comrs of Caddo Levee Dist., 109 So. 816 (1926), St. Paul, j. said (p. 818):

> But under our law there is a sanctity about contracts as great as elsewhere. . . . Hence it follows that a party is obliged to perform a contract entered into by him if performance be possible at all, and regardless of any difficulty he might experience in performance.

See also Pratt v. McCoy, 54 So. 1012 (1911); Benson and Co. vi Simon Rice Milling Co., 92 So. 711 (1922); Cook and Laurie Contracting Co. v. Davis, 49 So. 1014 (1909); Dallas Cooperage and Woodenware Co. v. Creston Soap Co., 109 So. 844 (1926); Stewart McGhee Const. Co. v. Caddo Parish School, 115 So. 458 (1928); Terrill Construction Co. v. Town of Pineville, 123 So. 611 (1929); Hughes v. Grant Parish School Board, 145 So. 794 (1933); Marionneaux v. Smith, 163 So. 206 (1935); Oil Field Supply and Soap Material Co. v. Gifford-Hill and Co., 16 So.2d 403 (1944); Brasher v. City of Alexandria,

41 So.2d 819 (1949); Barbour v. Barbour, 228 La. 822 (1955).

33. Freeport Sulphur Co. v. Aetna Life Ins. Co., 107 F. Supp. 508 (1928); Wiley v. Davis, 115 So. 280 (1928); Kirschman v. Thomas Cusak Co., 120 So. 720 (1929); American Cotton Co. Ass'n v. New Orleans and Vicksburg Packet Co., 157 So. 733 (1934); Moriarty v. Weiss, 195 So. 34 (1939); Vincent v. Bullock, 187 So. 35 (1939); Texas Co. v. State Mineral Board, 216 La. 742 (1949); ; Martin Parry Corp. v. New Orleans Fire Detection Service, 60 So.2d 83 (1952); Isadore v. Washington Fire and Marine Ins., 75 So.2d 247 (1954). See also Kijoidri Fujiyama v. Sunrise Soda Water Works Co., 158 F.2d 490 (1967) (Hawaii).

34. 221 La. 384 (1952), at 391.

35. La. Civil Code Arts. 1933 ff. See dictum of Land, j., in Cook and Laurie Contracting Co. v. Denis, 49 So. 1014; 124 La. 161 (1909) at 1015:

> A cause beyond human control mayybe a fortuitous event or irresistible force. By the latter is meant such an interpositionof human agency as is, from its nature and power absolutely uncontrollable.

See also J. Hunley, Supervening Impossibility as a Discharge of an Obligation, 21 Tul. L. Rev. 603 (1947); J. D. Smith, Some Practical Aspects of the

Doctrine of Irresponsibility, 32 Ill. L. Rev. 672 (1937).

36. Arts. 1095 C.N. and 1779 C.C.Q.; see Montreal Tramways Co. v. Savignac (1923) 34 K.B. 245.

37. Beale's Heirs v. DeGray, 2 La. 468 (1831); Hawkins v. Brown, 3 Rob. 310 (1842); Pike v. Kentwood Bank, 83 So. 904 (1919); Standard Motor Car Co., v. St. Amant, 138 So. 461 (1931); Wilfamco Inc. v. Interstate Electric Co., 58 So.2d 833 (1952); McEachren v. Plauche Lumber and Construction Co., 57 So.2d 405 (1952).

38. Viterbo v. Friedlander, 120 U.S. 707 (1887); Shaw v. Splane, 99 So. 530 (1924).

39. La. Act 208 (1918). One should observe, however, that the Constitution of Louisiana, Art. IV, Sec. 15, prohibits any "ex post-facto law or any law impairing the obligation of a contract."

39a. Goldman v. Goldman, 25 So. 555 (1899); Pruyn v. Gay, 106 So. 536 (1925); Haeb v. Codifer and Bonnabel, 110 So. 178 (1926); Ekman v. Vallery, 169 So. 521 (1936); Louisiana Delta Farms Co. v. Davis, 12 So.2d 213 (1942); see also Federal Sign System v. Leopold, 120 So. 898 (1929).

40. G. Trudel, 7 Traité de droit civil de la Province de Québec 309 (1946); L. Baudouin, Le droit civil de la Province de Québec 729 ff. (1953);

P. B. Mignault, La Frustration du contrat, 2 R. du B. 387 (1942); P. B. Mignault, The Frustration of Contract, 21 Can. Bar. Rev. 32 (1943); A. Bohémier and F. Fox, De l'effet des changements de circonstances sur les contrats dans le droit civil québécois et en common law, 42 Thémis 77 and 147 (1962).

See also G. Wasserman, Impossibility of Performance in Quebec Law, 12 R. du B. 366 (1952).

41. 12-13 Eliz II, Chap. 48, art. 1, new articles 1040a-1040e of the Civil Code.

42. Unconscionable Transactions Relief Act, R.S.O. (1950) ch. 402.

43. A. Bohémier and F. Fox loc. cit. 80 ff.

44. For the development of the law in other countries see Brazil: J. P. Ajevedo, Frustration of Contract in Latin America and Particularly in Brazil, 29 J. of Comp. Leg. and Int'l. Law 15 (3d series 1947). Greece: P. J. Zepos, Frustration of Contracts in Comparative Law and in the New Greek Civil Code of 1966, 11 Mod. L. Rev. 36 (1948). Italy: G. Cohino, Impossibilità sopravvenuta della prestazione e la responsabilità del debitore (1955); M. Andreoti, Revesione delle dottrine sulla sopravenienza contrattuale, 30 Riv. di Dir. Civ. 309 (1938); A. Montel, La Révision des contrats par le juge en Italie, Travaux de la Semaine Internationale du droit 73 (Paris 1937).

Scandinavia: K. Rodhe, Adjustment of Contracts on Account of Changed Conditions, 3 Scandinavian Studies in Law 153 (1959).

Scotland: J. Cooper, Frustration of Contract in Scots Law, 28 J. of Comp. Leg. and Int'l Law (3d series 1946). South Africa: A. W. Lee, Frustration of Contract in the Union of South Africa, 28 J. of Comp. Leg. and Int'l Law 5 (3d series 1946). Uruguay: E. Couture, Frustration of Contract in Uruguayan Law, 29 J. of Comp. Leg. and Int'l. Law 13 (3d series 1947).

45. For an excellent summary of these techniques in comparative law see H. Smit, Frustration of Contracts: A Comparative Attempt at Consolidation, Col. L. Rev. 287 (1958).

46. Impossibility of performance of "inexecution" caused by fortuitous event or force majeure are valid excuses for non-performance. It seems there is little difference in the practical solutions of common law and civil law though the techniques of reasoning and application differ. J. D. Smith, Impossibility of Performance as an Excuse in French Law: The Doctrine of Force Majeure, 45 Yale L. J. 452 (1936); M. Hunley, Supervening Impossibility as a Discharge of an Obligation, 21 Tul. L. Rev. 603 (1946).

47. As cited by 2 Ripert and Boulanger, Traité elementaire de droit civil 7 (4th ed. 1952).

48. G. Ripert, De la morale dans les obligations civiles 102 ff. (3d ed. 1935); G. Ripert, La Règle démocratique et le droit civil moderne, 105 ff. (2d ed. 1940); L. Josserand, Aperçu des tendances actuelles de la théorie des contrats, 36 Rev. Trim. de Dr. Civ. 1 (1937). F. Kessler, Contracts of Adhesion, Some Thoughts about Freedom to Contract, 43 Col. L. Rev. 629 (1943). P. Dawson, Economic Duress and the Fair Exchange in French and German Law, 11 Tul. L. Rev. 345 (1936).

49. Arts. 1109-1117 C.N.; Arts.1819-1859 C.C. La.; Arts. 991-1000 C.C.Q.

50. Arts. 887, 891,1118, 1305-1314, 1674-1685 C.N.; Arts. 1850-1880, 2589-2600, 2664-2666 C.C. La.; Arts. 1001-1012, 1040, C.C.Q.

51. See supra note 32.

52. See supra notes 12 and 15.

53. For an interesting discussion onthe applicability of the notion of cause as a justification to the admission of judicial revision see S. Tanaglio, De l'obligation judiciaire 136 ff. (1965).

54. G. Lyon-Caen, De l'évolution de la notion de bonne foi, 44 Rev. Trim. de Dr. Civ. 75 (1946); G. Rosenberg, The Notion of Good Faith in the Civil Law of Quebec, 7 McGill L. J. 2 (1960).

55. See D. Piotet, La théorie de la confiance et la formation des contrats en droit Suisse (1953).

56. Mazeaud op. cit. vol. 2, No. 702-704, 640-641; Ripert and Boulanger op. cit. Vol. 2, No. 1270-1272, p. 447. L. Baudouin op. cit. p. 768; P. B. Mignault, L'enrichessement sans cause, 13 Rev. du Dr. 157, p. 165 (1934). L. Faribault, Traité de droit civil du Québec, 7 bis., p. 61 ff. (1957). See also B. Nicholas, Unjust Enrichment in the Civil Law and Louisiana Law, 36 Tul. L. Rev. 605 at 624 (1962). It should be noted, however, that this specific condition does not seem to be part of the Louisiana law of unjust enrichment: Nicholas op. cit. at pp 60 and 63. However, a recent decision of the Supreme Court of Louisiana seems to make it a requirement: Minuard v. Curtis Products Inc., 205 So.2d 422 (1968).

57. Art. 1109 C.N.; Art. 1819 C.C. La.; Art. 992 C.C.Q.

58. Art. 1871 C.C. La.

59. Arts. 1156-1164 C.N.; Arts. 1945-1962 C.C.La; Arts. 1013-1021 C.C.Q.

60. Arts. 1156 C.N.; 1945 C.C.La.; 1013 C.C.Q.

61. J. Fréjaville, Les clauses d'échelle mobile, D.1952.Chr.31; M. Eubert, Observation sur la nature et la validité de la clause d'échelle mobile,

Rev. Trim. de Dr. Civ. 1 (1947); H. Pédamon, Le régime contemporain des clauses monétaires, D.1950.Chr.101; M. Vasseur, Le droit les clauses monétaires et les enseignements de l'économie politique, Rev. Trim. de Dr. Civ. 431 (1952). See also Mazeaud op. cit. Vol. 2, No. 872 ff., pp. 755 ff.; A. Nussbaum, Comparative and International Aspects of American Gold Clause Abrogation, 44 Yale L. J. 53 (1934); H. Schmithoff, The Gold Clause in International Loans, 18 J. of Comp. Legl and Int'l. Law 266 (1936).

62. See supra note 28.