1. Belgian law: an overview

1.1. Definition

In the Belgian legal discourse, the doctrine of imprévision is the focus of attention as a form of relief in cases in which one party is extraordinarily burdened by the contract because of unexpected circumstances. Like in French law, this concept applies if new circumstances arise which are beyond the control of the parties and which were unforeseeable, render the contract substantially more burdensome, or substantially alter the economic balance between the obligations.¹

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The more general approach of frustration of purpose is not covered by this doctrine. We can give an example of frustration of purpose: a ten-year licence contract for the use of a patent with fixed royalties is agreed; each party assumed that the patent would keep its value over the ten-year period; however, two years later, a new invention renders the patent useless, thereby frustrating the purpose of the licence contract. This hypothetical scenario is not directly dealt with by imprévision.

1.2. Recognition in Belgian law
Until recently, the Belgian Cour de cassation did not recognise explicitly the doctrine of *imprévision*. However, some lower courts have referred to this principle, but have frequently rejected its application because the conditions for its application have not been met. In the literature, various authors argue that this principle should be recognised.

Unlike in France, the Conseil d'Etat is not competent to deal with public contracts; therefore the restrictive approach of the Belgian Cour de cassation to unforeseen circumstances would, in principle, also be applied to public contracts.

The Belgian case law seems to initiate an evolution. We have to stress an important decision of the Supreme Court of 19 June 2009. A French seller entered into a long-term sales contract for steel with a Dutch buyer. The steel price increased sharply at the beginning of this century due to a rise in demand in developing countries. The seller asked the buyer for a renegotiation of the price due to hardship. It was refused by the buyer. The seller brought the case before the Commercial court of Tongeren. The judge considered that the Vienna Convention on the sale of goods (the ‘CISG’) applied. Article 79 of this Convention deals with exemption in the case of new circumstances beyond the control of the parties. The exemption requires the presence of an impediment; however, concluded the judge, a rise in the price does not constitute an impediment and the claim was dismissed.

On appeal, the court of appeal of Antwerp considered that the CISG did not address the question of hardship. In the event of a gap, article 7.2 of the CISG applies. To fill the gaps, the judge said that in accordance with article 7.2 of the CISG, one must find the rules applicable firstly in the general principles which underlie the CISG, and secondly in the law applicable by virtue of the rules of international private law. The appeal court considered that no principle underlying the CISG could apply, and so applied the law applicable on the basis of international private law, i.e. French law.

The French law introduced an obligation of renegotiation of the contract in the case of hardship.
The buyer refused the renegotiation and was thus liable for the damage suffered by the seller. The damage was fixed \textit{ex aequo et bono} at 450,000 euro. The buyer brought an appeal before the Supreme Court. The appeal revealed that the CISG sanctions the \textit{pacta sunt servanda} principle. The Court rejected the appeal. The two main grounds for the Court’s decision were the following:

1. Article 79 of the CISG applies in the case of hardship and not only in the case of force majeure.

2. The CISG does not contain a provision organizing the renegotiation of the contract in case of change of circumstances. The gap has to be fulfilled by virtue of article 7.2. The Supreme Court considered that the gap in the CISG must be filled with the principles underlying the CISG whereas the court of appeal did not find any general principles underlying the CISG to regulate this question of unforeseen circumstances and applied the rules of international private law.

The Unidroit principles are, according to the Supreme Court, the underlying principles for the CISG; notably, article 6.2.2 of the Unidroit Principles foresees the renegotiation of the contract in case of a change of circumstances. In this case, the Belgian buyer had to renegotiate the contract with the French seller.

In a decision dd. 12 April 2013\textsuperscript{7}, the Supreme Court has once more explained his view concerning article 79 CISG. We can read in the summary preceding the decision of the Court that a \textit{force majeure} has another interpretation in Belgian law and in the CISG. The conditions of application are broader in article 79 CISG. We think that this abstract does not reflect the decision. In fact, in this case, there was absolute impossibility of performance and the Court has considered that the solution would be the same in case of application of article 79 CISG or in the common law of obligations. In the body of the text, the Court does not declare that the concept of a \textit{force majeure} is more strict in internal law than in the CISG.

Another interesting and recent case was rendered by the Belgian Supreme Court on 14 October 2010 concerning alimony.\textsuperscript{8}

In 1979, a husband promised his wife, before their divorce, to pay a monthly alimony of 8,500
Belgian Francs. Some 20 years later, the alimony amounted to 568.91 euro, the incomes of the man decreased to 1049 euro whereas the incomes of the wife amounted to 1050 euro. In the meantime, the wife had established a new household with another partner.

The court of first instance of Tournai considered that the wife had committed an abuse of rights by continuing to claim this amount in these new circumstances and that the husband was released from the payment of this alimony.

The plaintiff on appeal to the Supreme Court saw in this decision a violation of the *pacta sunt servanda* principle. The Supreme Court rejected this appeal, considering that the tribunal had rightly applied the concept of abuse of rights in this case.

We think that in this case, to our knowledge the first case of its kind, the Supreme Court endorsed the application of the doctrine of abuse of rights in the case of a substantial change of circumstances creating a disequilibrium between the obligations of the parties.\(^9\)\(^\text{10}\)

We hope that the Belgian Supreme Court will recognise the doctrine of unforeseen circumstances in a more explicit way, as other countries and European and international instruments do, and as economical and equitable principles require.

There are also some specific provisions concerning different kinds of contract (lease contract, alimony, publics works)\(^11\)

Finally, other legal mechanisms are used indirectly to adapt the contract.\(^12\) The judge has adapted the contract in case of unforeseen circumstances under the cover of the concept of interpretation of the contract.\(^13\) In a case of 12 April 2012, the appeal court of Ghent applied the force majeure in a case of unforeseen circumstances.\(^14\)
II How would this case be approached by the Belgian courts?

In Belgium we have, as far as we know, no cases related to unforeseen circumstances due to the financial crisis.

This case is interesting because it deals with the consequences of the financial crisis of 2008 on a swap contract.\(^{15}\)

A swap is a contract in which the parties to it exchange liabilities on outstanding debts, often exchanging fixed interest-rate for floating-rate debts\(^ {16} \)\(^ {17} \)

The contract aims to cover financial risks\(^ {18} \) and the fluctuation is of the essence of the contract. The defendant also underlined that the plaintiff was assisted by persons who presented themselves as specialists in these financial matters.

The Portuguese Court considered that the risk, assumed by parties, exceeded the risk that parties could reasonably foresee at the conclusion of the contract and underlined that it would be contrary to the good faith to stick to the clauses of the contract, which were envisioned in a total other contractual frame than the frame resulting from the financial crisis.

The Court underlined that the increase of interests was a mutual assumption of the parties. The presence of this assumption is a question of interpretation of the contract, and can be disputable but we agree with the Court that the subprime crisis of 2008 was unforeseen for the ordinary economic operators but we are not convinced that parties could count on an increase of the interests on the 8th of August 2008. We can add that, in August 2008, time of conclusion of the swap contract, the first signs of the subprime crisis could be detected, but maybe only professionals could foresee them or the effects of the crisis on the interest rate were unforeseeable. The interest rate decreased in fact sharply.\(^ {19} \)

We think however that in Belgium, even if the doctrine of unforeseen circumstances was expressly recognised, the judge would consider that the swap contract is an aleatory contract and that the risk of fluctuation of interests must be supported by the contracting parties and are not subject to adaptation. The parameters of the risk cover were well-defined in the contract. Furthermore, the decrease of the interest rate had occurred already before the subprime crisis.
In some legislations, the aleatory contract is always excluded from the scope of application of the doctrine of unforeseen circumstances. We think however that the aleatory contract must fall within the scope of the doctrine of unforeseen circumstances but the application must be more severe due to the nature of these contracts.

Maybe the fact that the bank took a very advantageous position in the contractual relations was sufficient to convince the judge that the doctrine of unforeseen circumstances must apply even if the contract was aleatory.

In Italy, where this concept exist, case law stated that the concept of normal risks includes the fluctuation in the value of the performances deriving from regular and normal market fluctuations, but maybe the Italian judge would also consider that the financial crisis of 2008 was an exceptional event.

The doctrine of unforeseen circumstances finds generally application in contracts with successive obligations. The Supreme Court has decided that it was a case for a swap contract. This affirmation is of course justified.

Finally, we think also that it would be more appropriate in this case to adapt the contract so that the risk of the new circumstances would be shared on an equitable basis between both parties.

ENDNOTES:


5 In France, the case law prescribes an obligation for negotiation in the case of hardship.


7 Cass., 12 avril 2013, Pas., I, n° 231, p. 864.


10 In the Netherlands, hardship is expressly recognised in article 6:258 of the Civil Code, but the conditions of application of this article are interpreted very strictly by the case law E. HONDIUS


14 See NJW, 2013, p.32 and obs. C.LEBON, see also VAN LOOK, Quousque..

15 See on the application of the doctrine of unforeseen circumstances in case of depreciation of the currency or in case of fluctuation of foreign currency: E. HONDIUS and H.C. GRIGOLEIT (eds.), Unexpected Circumstances in European Contract Law, Cambridge University Press, 2011, case 2, p 250; see over the inflation and the foreign currency agreement, the following references

16 See also the definition of the Oxford dictionary: An exchange of liabilities between two borrowers, either so that each acquires access to funds in a currency they need or so that a fixed interest rate is exchanged for a floating rate.


18 R. MOMBERG URIBE, 2011, The effect, p 77

19 See for instance the evolution of the Euribor rate among others on the website fr.euribor-rates.eu (captured the 4th of August 2014)

20 See article 1469 of the Italian Civil Code; See D. PHILIPPE, « Changement de circonstances et bouleversement de l'économie contractuelle », op.cit., p 115
21 See D. PHILIPPE, « Changement de circonstances et bouleversement de l'économie contractuelle », p 624

22 See R. MOMBERG URIBE; Cass. It., 17 July 2003, n° 11200; Cass., 4 March 1998, n° 2386; for a refusal of application of eccessiva onerosità in case of a put option contract affected by the financial crisis, Tribunal of Milan, section entreprise, sentence 1419/2014 registration number 43201/2011

23 We can also stress that swap contracts can be annulled if the bank has not respected its obligation of information See C.J.E.U. - Judgment of May, 30 2013 in the case no C-604/11; see in Italian law, appeal Milan, causa RG 2652/09, 17 July 2013; see on Mifid in Belgian law, S. DELAEY, De contractuele verhouding inzake portefeuillebeheer: op de wip tussen Mifid en privaatrecht, Intersentia, 2010.