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Contractual Equilibrium Mechanisms In The Implementation Phase Of Commercial Contracts: Contract Economics Confronting Contractual Equilibrium

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Abstract

The contract is exposed to numerous circumstances and variables, whether financial, economic, or even political, which have repercussions resulting in contractual imbalance liable to cause economic disruptions for the contracting parties during the execution phase, especially in the context of electronic commercial contracts due to their digital and international nature. Hence, this study delves into the economic impacts encountered by the contract, thus seeking the legal mechanisms outlined by the legislator to address these unforeseen circumstances, thereby safeguarding contractual equilibrium so that the parties can execute the contract fairly for both sides. It is at this juncture that the theory of unforeseeability assume paramount importance, offering significant solutions, notably following their evolution on the legal and judicial fronts.

Keywords: Equilibrium - Economy - Contract - Unforeseeability - Execution.

Introduction

Contractual equilibrium is an objective pursued by all legislations, constantly seeking mechanisms to protect this balance. Contracts, whether long-term or short-term, are prone to changes in circumstances during the execution phase. Electronic commercial contracts, in particular, provide fertile ground for accommodating all these variables, whether

international or domestic. Consequently, this can lead to contractual economic imbalance, also known as substantial contract imbalance.

This is where the importance of research on the content of contractual equilibrium and means of remedying this imbalance during its implementation becomes evident. Indeed, it is the weaker party to the contract, typically the consumer, who bears the burden of this imbalance. Therefore, it is essential to mention the mechanisms put in place by the legislator to preserve the contract's balance and save it from nullity.

It is also necessary to assess the extent to which these mechanisms are capable of addressing all the economic variables that occur in the world and that change the conditions of contract performance. It is also important to examine the extent to which classical mechanisms, such as the theory of unforeseeability and force majeure, remain relevant given the rapid evolution of electronic contracts. This has prompted some legislations to seek a new concept and updated conditions for the theory of unforeseeability, similar to French law.

Contract law has had to adapt to new economic innovations, particularly in the realm of new technologies. Thus, contract law has had to adjust to a new market, namely the dematerialization of our society.

Through this process, and as a result of globalization and the speed of economic exchanges, the study is confronted with a complex issue: how to elucidate the concept of contractual imbalance caused by economic fluctuations impacting the contract? What solutions can be envisaged to remedy this imbalance, which may arise during the execution of the contract due to unforeseen events?

To answer these questions, we will explore two main axes. Firstly, we will delve into the very nature of substantial contractual imbalance in commercial contracts, resulting from changes in contractual conditions. Then, secondly, we will analyze the mechanisms designed to address this contractual imbalance during the contract execution phase.

1. Contractual Imbalance Induced by Economic Fluctuations: Analysis and Implications.

To study this complex issue, it is important to examine it from several angles. Firstly, it is essential to understand the concept of contractual imbalance, which refers to injustice or inequality in the contractual relationship between the parties. The legislator plays a crucial role in preserving this balance by establishing rules and laws aimed at protecting vulnerable parties and ensuring fairness in commercial transactions.

After the conclusion of an electronic contract, especially in the field of commerce, manifestations of imbalance become more evident. Fluctuations in economic conditions can lead to substantial changes in the nature and impact of the contract, sometimes requiring renegotiation of the terms[1].

In the quest for mechanisms to remedy substantial imbalance in electronic commerce contracts, it is essential to focus on the specific content of this imbalance, especially within the context of electronic contracts. Rapid technological changes can also influence the equilibrium of electronic contracts, necessitating particular attention.

Studying mechanisms to correct contractual imbalance in electronic commerce contracts requires a thorough analysis of the content of this imbalance and its specific impact on commercial electronic contracts. The execution of these contracts holds paramount importance for the parties involved, given the stakes at hand[2].

When it comes to electronic commerce contracts, substantial contractual imbalance may exhibit particular characteristics. With the advent of technology and online transactions, electronic contracts often feature unique dynamics that can amplify the risks of imbalance between the parties.

In the context of electronic commerce contracts, contractual imbalance can result from various factors, such as opaque contractual clauses or pre-established general terms and conditions of sale that excessively favor one party.

1. Concept of Substantial Imbalance in Contracts.

[1] FRELETEAU Barbara, Devoir et incombance en matière contractuelle, LGDJ-Lextenso, Paris, 2017, p. 115.

[2] https://dumas.ccsd.cnrs.fr/dumas-01317150, Guillaume LACROIX, L'adaptation du contrat aux changements de circonstances, HAL Id: dumas 2015-01317150, p 43 consulted 15-02-24

Substantial contractual imbalance occurs when the terms of the contract are concluded in accordance with the conditions accepted by the parties, in compliance with the law. Thus, their obligations are balanced to avoid a glaring imbalance between the commitments of both parties. It entails a balance and equality between the provision provided and the benefit derived from the contract. When this proportionality is absent, the contract may be revised.

The concept of contractual equilibrium is one of the oldest and most complex ideas, as it can mean more than one thing. It can refer to equality, proportionality, balance, stability, and other meanings that are difficult to achieve in contracts characterized by imbalance or affected by economic, technical, or technological instability[3].

Contractual equilibrium is a relatively recent concept, as it only clearly emerged in the 20th century. However, this concept is not entirely new; it existed under different formulations. Under canonical law, it was referred to as the "just price," and later as the "equivalence of benefits." Thus, contractual equilibrium was not entirely unknown in French law, but it did not have the same strength or effects.

Furthermore, contractual equilibrium is an abstract notion that the Algerian legislator has always refrained from defining, which can be understood particularly due to the protection of the parties' autonomy. In French law, the dogma of the autonomy of wills is genuine and of paramount importance in our legislation as it is one of the foundations of the general theory of contracts. Contractual equilibrium can be defined in relation to this autonomy of wills.

Moreover, these two concepts may appear to be completely opposed or even incompatible, allowing for their definition by contrast[4].

Among the most important legal principles established to ensure the proper execution of contracts, the principle of the autonomy of the will of the parties plays a fundamental role. Indeed, the general rule in contracts is consensual: as long as the parties' wills coincide, the contract produces its legal

[3] Ezzat Salah Abdelaziz, "Contractual Rebalancing in Light of the Global Financial Crisis: A Comparative Study between Islamic Jurisprudence and Positive Law", first edition, Dar Al-Fikr Al-Jamei, Egypt, 2013, p. 28.

[4] https://dumas.ccsd.cnrs.fr/dumas-01653452 Marine-Alice Muggeo,L'équilibre contractuel, 2017 ,P 63,consulted 10-02-24.

effects with regard to their heirs and the public. Thus, the contract is like the constitution of the parties, inviolable and unalterable, and the parties are equal in rights, as the contract is subject to the principle of the sovereignty of the will, which balances the interests of the parties.

The position of the legislator is clear in the primacy of the will of the contracting parties, as stipulated in Article 106 of the Algerian Civil Code[5].

Indeed, the contract is considered the law between the contracting parties, and it can only be annulled or modified with the consent of both parties or for reasons provided by law. However, the contract cannot be dissociated from the surrounding circumstances, especially during its implementation, which may compel the contracting parties to seek termination of the contract due to its imbalance and the inability of one or both parties to execute the agreement.

Financial balance in the contract is taken into account from its negotiation and drafting phase to its execution and conclusion. This balance contributes to transactional stability and prevents conflicts, while also protecting the weaker party of the contract from the arbitrariness of the stronger party[6].

The fiduciary balance of the contract lies in the equality of rights and obligations of the parties at the time of its conclusion, so that this financial equilibrium is maintained until the completion of the contract, considering potential changes in economic and social conditions that may disrupt this balance.

Contractual security is guaranteed by the existence of legal provisions instilling confidence in the contracting parties. This justifies the intervention of the legislator in contractual relations when contractual equilibrium is disrupted during their execution. While recognizing the contractual freedom of parties to create and modify contracts according to their will, it is nevertheless prohibited to undermine what has been agreed upon, regardless of changes in circumstances. In the interest of fairness and justice, the legislator establishes rules

[5] The decree number 75-58 dated September 26, 1975, amended and supplemented by law number 07-05 dated May 13, 2007, bearing the Civil Code, published in Official Journal number 78 dated May 13, 2007, was formulated to define the rules and legislation regarding civil contracts and transactions.

[6] Ezzat Salah Abdelaziz, op, cit, p. 48.

framing this freedom to ensure transactional stability and legal security.

While respecting the parties' will, it is crucial to prevent the termination of the contract and guarantee transactional stability. Therefore, the pursuit of legal security of the contract does not contradict the parties' initial intention[7].

Thus, legislations now tend to reconcile the general framework of the contractual process with circumstances external to the contract, in addition to conferring upon the judge the power to intervene in the contractual process and redirect it in accordance with the requirements of contractual justice, while finding ways to reconcile the binding force of the contract and contractual equilibrium. The general principles of contract theory should ideally encompass the majority of the stages of the contractual process to protect its equilibrium.

The notion of contractual equilibrium remains undefined despite the reform of the law of obligations in February 2016, which came into force on October 1, 2016. This silence appears necessary to many authors as it would contradict the freedom of the parties and notably their autonomy of will, an essential foundation of the contract.

Indeed, it may be that the will of the parties precisely entails the imbalance of the contract. The best illustration is perhaps adhesion contracts which, by their nature, create a significant imbalance between the parties. This is the case, for example, in franchise contracts where the franchisor seeks to exert a certain dominance over the franchisee, or in online distribution and sales contracts[8].

From there, the French legislature took a significant step after amending the Civil Code through Decree No. 131-2016. By expanding the principle of contractual good faith to include all stages of the contract, from its formation to its execution, instead of being limited to the formation phase as provided for by Article 1103 of the French Civil Code, the aim is to protect contractual stability and balance, in order to prevent termination and ensure maximum contractual justice for the parties. This has led to the emergence of a new concept in the

[7] Youssef Bouchechi, "The Theory of Unforeseen Circumstances between Transactional Stability and Respect for Expectations", Revue de l'Université d'Alger 1, Part 1, Number 31, June 2017, p 114.

[8] Order No. 2016-131 of February 10, 2016, reforming French civil law.

theory of unforeseen circumstances, which is based on the principle of the good faith of the contracting parties.

The fiduciary balance of the contract rests on the mutual will of the contracting parties, which implies the existence of an agreement in the contract allowing the parties to modify the agreement in case of contractual imbalance. This is what most legislations have done to protect the weaker party of the contract. The achievement of this fiduciary balance is enshrined in legal texts, even in the absence of explicit agreement, as this idea is based on principles of justice and equality between the contracting parties, especially in electronic contracts where an imbalance can lead to the emergence of new obligations increasing the burden for the online consumer, thus exacerbating the risks of distance contracts. Therefore, the assessment of contractual imbalance depends on the impact of new circumstances on the contract[9].

Contractual equilibrium is not a criterion of validity for the contract; however, if it is not respected, the contract may be heavily penalized by the judge. Thus, with this reform, although this concept has not become a criterion of validity for the formation and execution of the contract, this notion has gradually become a source of litigation.

Therefore, it is possible to have a form of "moderate" solidarism. Economic practices and the solidarist thesis can be reconciled. This is not incompatible. This reconciliation is indeed recognized in several rulings of the French Court of Cassation[10].

1.2 The economic imbalance of commercial contracts.

All contracts are subject to transformations and risks that surpass the will of the contracting parties, thereby exposing the contract to collapse to a point where it could lose its balance, especially concerning electronic commerce contracts, which are considered one of the most significant tools and phenomena in the current world of commerce due to the evolution of marketing methods and technology transfer. There are many reasons influencing the continuity of contract execution and their radical upheaval in this context, with the

[9] https://revuealmanara.com,Hachlaf Fatima, "The Financial Balance of the Contract", Almanara Review of Legal and Administrative Studies, published by the Almanara Center, Rabat, Morocco, March 2020.

[10] Commercial Court of Cassation, May 2002, SA Fiat Auto France v. SA Sofisud.

electronic consumer facing numerous challenges that could deter them from concluding electronic transactions despite the benefits they offer for them and other parties, which certainly impacts the national economy.

In addition to the risks the electronic consumer faces during the contract conclusion process and in its initial stages, such as electronic fraud risks and electronic communication difficulties, they encounter other risks that could lead to a change in execution conditions for the contracting party. Financial circumstances may arise and change their financial situation, necessitating a modification of execution conditions, thereby making the commercial contract more difficult and complex[11].

Regardless of the legal nature of the contract, its fate is dissolution as it is considered a temporary transaction. Although the period necessary for its execution may extend over many years, it may also be exposed to fluctuations in surrounding conditions over a relatively short period. It is impossible for the contracting parties to foresee all the economic conditions that may arise. This is what Professor Tuscoz emphasized by saying: "Globalization threatens international economic stability and makes long and medium-term forecasts extremely difficult"[12].

E-commerce, dominated by consumer-oriented online exchanges, has become a crucial element for both national and global economies. However, e-commerce contracts often face challenges due to the current economic volatility. Economic crises have become the norm, while stability has become the exception. Electronic contracts are thus hindered in their commercial functioning and investment aspect. The most severe consequences of this economic instability often affect the weaker party of the contract, namely the electronic consumer, especially in contracts with a time gap between conclusion and execution[13].

Contractual equilibrium helps define a number of legal concepts, including the abuse of economic dependence. Given that financial crises occur recurrently and take various forms,

[11] Marine-Alice Muggeo , Op, cit, p 88.
[12] Marouk Ahmed, from his thesis entitled "The Renegotiation Clause in International Trade Contracts," presented in fulfillment of the requirements for the doctorate at the University of Algiers 01, for the academic year 2014-2015, page 4.
[13] Ezzat Salah Abdelaziz, cit, p 51.

such as the deterioration of financial markets or the failure of the banking system to fulfill its core functions, this can lead to currency depreciation and rapid fluctuations in exchange rates, which can affect the execution of contractual commitments. Sometimes, authorities decide to devalue the currency due to speculative operations, in addition to disparities between the size of assets and liabilities of institutions. These effects impact purchasing power, disrupting contractual equilibrium and potentially leading to bankruptcy or making contract execution difficult or even impossible[14].

2. Legal Mechanisms to Restore Contractual Equilibrium During Contract Execution.

The legislature proposes various solutions to protect the balance of these contracts. These solutions generally include classical mechanisms such as the theory of unforeseen circumstances and the concept of force majeure. However, it is important to assess the effectiveness of these classical solutions in preserving the legal certainty of the contract.

The theory of unforeseen circumstances is considered the most important legal mechanism introduced by the legislature to address changes in contractual circumstances, especially economic changes occurring during execution. It grants the judge the power to intervene in the contract to restore its balance in line with the principles of justice and equity between the contracting parties. The legislature has also enumerated external causes such as force majeure that affect contract performance and over which the debtor has no control, such as force majeure. Nevertheless, it is necessary to examine the possibility of applying these mechanisms in practice to electronic commerce contracts to determine their importance in maintaining the balance of these contracts.

2.1Contract Execution through the Mechanisms of the Theory of Unforeseen Circumstances: Analysis, Applications, and Perspectives.

The concept of contractual economic balance has been enshrined by the theory of unforeseen circumstances, aiming to achieve contractual justice. Consequently, the legislator has granted the judge the power to restore this balance in case of disruption due to unforeseen circumstances at the time of contract conclusion. This is aimed at preserving the contractual

[14] Similar to the Nasdaq index crisis, which resulted in a temporary shutdown of the American financial markets.

relationship and ensuring the legal security associated with the evolution of the principle of contractual binding force. The latter now relies on principles of justice and fairness rather than solely on the principle of the sovereignty of will. This shift is intended to achieve the objective of contract execution without causing harm to any of the contracting parties[15].

The Algerian legislator has enshrined the theory of unforeseen circumstances since the promulgation of the Civil Code, through Article 107 paragraph 3, which states: "However, when, as a result of exceptional, unforeseeable events of a general nature, the performance of the contractual obligation, without becoming impossible, becomes excessively burdensome in a way that threatens the debtor with an exorbitant loss, the judge may, considering the circumstances and after taking into account the interests of the parties, reduce, to a reasonable extent, the obligation that has become excessively burdensome. Any contrary agreement is null and void." This article has summarized the theory of unforeseen circumstances in a single paragraph, with a simple wording determining the necessary conditions for its application and the consequence of meeting these conditions, which is the "reduction" by the judge of the obligation that has become excessively burdensome. Unlike Algerian law, French law took time to integrate the theory of unforeseen circumstances into its texts. While the French legislator did not want to recognize the theory in the Civil Code of 1804, it nevertheless recognized the change of circumstances as a characterization of the principle of good faith during contract performance during the reform of civil law[16].

The conclusion of an electronic contract in an easy and simple manner does not imply that it is an instantaneous contract. It can be for a fixed or indefinite term, with deferred performance for a period following its conclusion. Since the legislator has not specified the contracts covered by the theory of unforeseen circumstances, it applies to all instantaneous and term contracts, whether traditional or electronic, provided that they involve a deferred element in their performance[17].

[15] Youssef Bouchechi, op, cit, p 116.

[16]ATMANI Bilal, DELEBECQUE Philippe, "The Theory of Unforeseen Circumstances: Study in Algerian and French Law", Les Annales de university of Algiers 1, No. 33-Volume III / September 2019, p 546.

[17] It is also crucial to note that the theory of unforeseen circumstances can be applicable to all contracts, whether traditional or electronic, provided that the contract's execution is contingent

To mitigate this imbalance, the parties may renegotiate the contract; however, when they fail to find a solution, in case of dispute, it is the judge who will intervene to remedy the harm or rebalance the contract.

This imbalance can also arise during the life of the contract. New circumstances may arise that were unforeseeable at the time of contract conclusion. Thus, the judge may intervene through the theory of unforeseen circumstances. This is also one of the major provisions of the ordinance of February 10, 2016, which allows the judge to revise the contract in case of unforeseen circumstances[18].

The provisions regarding unforeseen circumstances are considered classical principles applicable to all contracts, including traditional commercial contracts as well as electronic contracts. They are particularly suitable for protecting online consumers when financial imbalances between the contracting parties are more common than in other types of contracts. Indeed, in a digital environment prone to technical and technological imbalances, the consumer may find themselves in a vulnerable position during contract execution, even if its execution does not necessarily require payment in traditional cash. However, electronic payment methods such as credit cards, e-wallets, or electronic checks may encounter execution issues in the event of sudden changes in economic conditions[19].

For a debtor to benefit from the theory of unforeseeability, several conditions must be met. First, the event must be exceptional and unusual, such as wars or natural disasters, and it must be general and not solely related to the debtor itself. Additionally, the event must be unpredictable according to an objective criterion, that is, that of a reasonable person, as stipulated in Article 107 of the civil code. Moreover, unforeseen circumstances must make the performance of the

upon an unforeseen event. Thus, flexibility in contract execution can be considered without necessarily requiring an explicit postponement in all cases. However, it is important to ensure that the contract is well-defined, as a probabilistic contract may potentially encompass all circumstances, which would contradict the principle of the theory of unforeseen circumstances.

[18] The Ordinance No. 2016-131 of February 10, 2016, on the reform of French civil law, introduced significant changes to the legal framework governing civil contracts in France.

[19] Ibrahim Al-Desouki Abu Lail, "The Conclusion of Electronic Contracts in Light of the Provisions of UAE Law and Comparative Law," Arab Legal Information Journal, Jordan, 2014, p 4.

contract particularly difficult for the debtor. The legislator refers to the expression "serious loss" suffered by the contractor according to an objective criterion, which is assessed based on the rights acquired and obligations imposed by the contract.

It is important to distinguish between the theory of unforeseeability and force majeure, mentioned in Article 176 of the Algerian civil code[20].

The latter represents a form of external force beyond the contract and the parties' will, but it renders the performance of the obligation impossible. The debtor must prove the absence of a causal link between his act and the damage suffered by the creditor. This is a mechanism under the general rules that apply to all contracts, including electronic contracts. Force majeure plays a similar role to unforeseen circumstances in that it constitutes an exception that affects the principle of forced execution of the contract. However, it exempts the debtor from performance due to the occurrence of an unforeseen and inevitable event. In contrast, under the theory of unforeseen circumstances, the debtor remains bound to the creditor, but the judge moderates the obligation to make it reasonable and not excessive for the debtor[21].

Within the context of discussing the conditions for the judge's application of the theory of exceptional circumstances the existence of a valid contract between the parties seems evident, but several questions remain to be clarified, notably regarding the contracts that may be subject to the application of the theory of unforeseen circumstances. Take, for example, a purchase promise, where the promisor has committed to buying the item at a specified price if the owner of the item makes the request within the agreed-upon timeframe. However, in the meantime, prices have suddenly dropped, and the performances of the parties have become imbalanced[22].

[20] Article 176 of the Civil Code: "If performance in kind becomes impossible, the debtor shall be ordered to compensate for the damage suffered due to the non-performance of his obligation, unless it is established that the impossibility of performance is due to a cause that cannot be attributed to him; the same applies in case of delay in the performance of his obligation."
[21] Mohammed Saïd Abdel Rahman, "Force Majeure in Judicial Law: A Comparative Study," first edition, Publications of Al-Halabi Law Bookstore, Lebanon, 2011, p 30.
[22] ATMANI Bilal, DELEBECQUE Philippe, op, cit, 549.

Furthermore, the incident constituting an unforeseen circumstance in the theory of unforeseen events must be general, affecting everyone or at least a large portion of them, and not only the contractor. Specific exceptional incidents affecting only the debtor, such as their bankruptcy, a strike by their workers, or their illness, are not considered general incidents as they are individual incidents and represent a binding force[23].

In other words, it is an exceptional and unforeseen event, but it is not considered a general event because it is specific to the debtor himself, without affecting other parties[24].

The requirement of generality has been criticized by Algerian doctrine, as it may lead to the non-application of the theory of unforeseen circumstances in cases where it is legitimately possible to do so. For instance, a debtor who is ill and finds it very difficult to fulfill their obligations could still be held liable, as illness does not meet the criterion of generality, thus preventing the application of the theory of unforeseen circumstances. Therefore, it would be appropriate for the Algerian legislator to reconsider its position on this matte[25]r.

It is necessary to mention here the coronavirus pandemic that has struck the world; even major powers have been unable to contain this virus, which has had repercussions on all sectors, including the economic and commercial sectors. Since the beginning of the Covid-19 virus crisis, problems have arisen in the execution of contractual obligations between individuals and businesses. The issue of adapting the non-performance of these contractual obligations as a case of force majeure or exceptional circumstances has emerged.

By examining the conditions of both theories, we find that the solution lies in the extent of non-performance. If performance becomes completely impossible due to force majeure, the contract is automatically terminated under the law[26].

Upon examining the conditions of both theories, we find that the solution lies in assessing the extent of non-performance. If performance becomes entirely impossible due to force

[23] Mohammed Sabri Al-Saadi, Al-Wadhih fi Sharh Al-Qanun Al-Madani Al-Jazairi, Al-Nazariyah Al-Amah lil Al-Tazamat , Fourth Edition, Dar Al-Huda, Algeria, 2007, p 306.
[24] Ali Filial, Obligations: General Theory of Contract, 2nd edition, Mouwafq Publishing, Algeria, 2005, p 302.
[25] ATMANI Bilal, DELEBECQUE Philippe, op, cit, p 551.
[26] Under Article 121 of the Civil Code.

majeure, the contract is automatically terminated under the law. However, it is incumbent upon the debtor to prove the absence of a causal link between their act and the harm suffered by the creditor. If this pandemic has made the debtor's obligation more burdensome, they have the right to request the intervention of the judge to modify the contract terms. Indeed, the COVID-19 pandemic has necessitated dealing with contractual reality using all available means. Thus, the judge adapts the impact of the pandemic based on the circumstances of each transaction and each contract individually.

Nonetheless, the economic effects of this pandemic closely correspond to the conditions of the theory of unforeseen circumstances regarding the general nature of the event. Indeed, the pandemic constitutes an infectious disease for which no vaccine or treatment has been discovered[27].

In Islamic law, epidemics are linked to easing hardships and grievances for the parties involved in contracts. Islamic law discourages imposing excessive burdens or causing undue hardship to any party. This principle is particularly evident in Islamic legislation concerning epidemics. Islamic law encourages avoiding harm to others and promoting cooperation and mutual assistance during times of crisis. Therefore, within the framework of Islamic legislation on epidemics, it is encouraged to alleviate financial or legal obligations imposed on individuals if it contributes to easing their hardships and reducing grievances for the parties involved[28].

Indeed, within the context of Islamic jurisprudence, the foundation upon which the management of pandemics rests is the alleviation of hardship and the prohibition of unjust appropriation of people's property, as well as the protection of contracting parties against any injustice resulting from unforeseen circumstances. Thus, the theory of unforeseen

[27] The term "pandemic" is used by the World Health Organization to describe a disease that spreads globally, according to specific numbers and proportions.

[28] According to Islamic jurisprudence, the context of pandemics is categorized as a "natural calamity" or a "human-made event" that cannot be avoided.

circumstances shares similarities with pandemic management in Islamic law[29].

However, contracts often have an economic purpose, materializing economic transactions between parties. Thus, the economic nature of the contract can lead to imbalance, prompting the legislator to regulate or even sanction certain practices. The legislator has indeed sanctioned imbalances arising not only from the nature of the contract but also from other factors. Consequently, it has enshrined the theory of revision for unforeseen circumstances, allowing a party to address unforeseeable economic events occurring at the time of contract conclusion. This defense mechanism enables a party to rebalance the contract.

There are several means to obtain contract modification. One such means is to include a "hardship clause" in the contract. When parties include such clauses, they commit to renegotiating the contract in the event of circumstances disrupting its balance. Another means of obtaining contract modification was rescission for lesion or for lack of consideration. However, these are restricted cases and can sometimes be difficult for parties to prove[30].

2.2 The application of the theory of unforeseen circumstances to commercial contracts.

The principle is that once a contract is properly concluded, the resulting obligations must be fulfilled. Electronic obligations are subject to the general rule of the binding force of the contract, which requires the parties to fulfill contractual obligations in good faith. If the debtor does not voluntarily comply, they are compelled to do so through enforcement as soon as possible. In case of non-performance, the creditor is entitled to compensation. Thus, in case of total or late non-performance, the breach is evident unless the debtor relies on the presence of a force majeure or external cause.

In the execution phase of commercial electronic contracts, the supplier is required to provide a product that meets the consumer's demand, deliver it within the agreed timeframe, repair or replace the product in case of hidden defects, and

[29] Mohamed Boukamash, The theory of exceptional circumstances and its connection with pandemics, Review of Social and Human Sciences, University of Batna 1, Algeria, number 26, 2012, p 57.
[30] Marine-Alice Muggeo, op, cit, p 36.

provide a secure payment method under their responsibility to ensure reimbursement to the consumer[31].

In this case, the question becomes less clear when it comes to suspending the execution of the contract due to temporary unforeseen circumstances that prevent its continuation or commencement. Although the unforeseen circumstance does not terminate the debtor's obligation, unlike force majeure, suspending the execution of the contract requires the judge to grant the debtor a period to fulfill their obligation, to avoid its impossibility of execution, and to maintain the contract and complete it in the future once the temporary realistic and legal difficulties have disappeared[32].

While the suspension of execution may seem like a solution aimed at preserving the content of the contract from an objective standpoint, with obligations retaining their value without being affected by this temporary suspension, changes in market competition conditions in the international market resulting from economic changes, and the increase in raw material prices particularly in the event of unexpected regulations that may increase raw material prices, push the debtor to request a modification of his commitment by granting him a deadline to fulfill it. However, this conflicts with the nature of commercial transactions, which generally do not allow granting a commercial debtor a deadline to fulfill, as a general rule[33].

furthermore, the perspective of liberal interpretation, as stipulated by the Algerian legislator in Article 119 of the Civil Code, may converge with the suspension of execution as an effect of the application of the theory of exceptional circumstances, as both are subject to the discretionary power of the judge. Moreover, both involve a postponement of the performance of the obligation to a later date, provided that such postponement does not cause serious harm to the creditor. However, the liberal perspective differs from the suspension of execution included in the theory of exceptional

[31] Mohamed Hussein Mansour, Electronic Liability, Dar El Gamaa El Gadida, Alexandria, 2007, p 86.

[32] Malika Abdulkarim, The Impact of Economic Changes on the Stability of International Trade Contracts, Review of Law and Political Science, Abbas Laghrour University of Béchar, Number five, 2016, p 407.

[33] Due to the distinctive characteristics of commercial transactions, including the speed and close interdependence of commercial operations, as well as the risk incurred by the creditor in case of non-payment at maturity.

circumstances in that the reason why the liberal perspective grants a deadline is individual and specific to the debtor, whereas the reason why a deadline is granted in exceptional circumstances is an exceptional general event.

It is undeniable that the judge, in his discretionary power to assess the circumstances surrounding the performance of the obligation, often opts for the suspension of execution rather than for the modification of the contract content. However, before making this decision, the judge must first balance the interests of the parties to the contract. Indeed, the creditor's willingness to delay the debtor's performance may not be evident, as this solution may relieve the debtor while burdening the creditor. Thus, balancing the interests is not an easy task for the judge.

The judge's task becomes even more difficult in cases where the obligation is reduced on one side and increased on the other, as he must resort to two means to bring the obligation to a reasonable level. However, Article 107 of the Civil Code has not specified a specific means for this, thus leaving the judge with broad discretionary power in his decision. The judge may reduce the obligation in terms of quantity[34].

The reduction of the quantity of goods can be achieved more easily than reducing the quality or characteristics of the merchandise. However, this solution compromises the integrity of the contract, which is an essential element of the agreement between the parties, contradicting the principle of the binding force of the contract. Moreover, it conflicts with the wide discretion granted by the legislator to the judge to reduce excessive obligations, as the judge faces practical difficulties in choosing the method to follow. Even if the judge decides to increase the debtor's obligations, it would lead to the same result, namely compromising the integrity of the agreed-upon contract[35].

An ambiguity exists regarding the application of Article 107, paragraph 3 of the Civil Code. The origin of this ambiguity lies in the approximate wording of the article in both Arabic and

[34] In the event that the subject matter of the contract involves large quantities of a specific commodity, but after an unexpected event, the quantity available in the market decreases, the judge may then decide to reduce this quantity, as supplying the agreed-upon quantity has become extremely difficult for the debtor.

[35] The method of increasing the creditor's obligations has not been mentioned, indicating that the legislator's intention has focused solely on reducing the debtor's obligations.

French languages. The phrase "rendre l'obligation excessive plus raisonnable" used in the Arabic text could potentially allow the judge to claim to make the obligation more reasonable in several ways, such as reducing the burden on the debtor, asking the creditor to bear some of the losses, or even postponing the execution of the obligation.

However, the wording of the same text in French significantly narrows down the possibilities available to the judge to revise the contract, using the terms "le juge peut..., réduire..., l'obligation devenue excessive...", which limits the judge's power to the possibility of reducing the excessive obligation. Therefore, it is suggested that the Algerian legislator readjust the terms used to allow for better coordination of the text[36].

One of the first questions to address is whether the creditor can refuse to renegotiate the contract. In this regard, French legislation shows some flexibility towards the creditor, as paragraph 2 of Article 1195 allows for refusal to renegotiate. However, it should be noted that refusing to renegotiate may lead to civil liability if the creditor acts in bad faith, as we will discuss later.

It should be noted that some texts clearly state that both parties must renegotiate the contract in case of unforeseen circumstances, leaving little choice for the creditor, who will be obliged to comply with this requirement. For example, Article 6111 of the European Contract Law Principles not only obliges parties to renegotiate but also provides for the possibility of damages in case of the creditor's refusal to comply with this requirement. Therefore, some authors consider the creditor's obligation to renegotiate the contract as an obligation of results[37].

Furthermore, due to the economic and commercial nature of electronic commerce contracts, it is difficult to apply the provisions of the theory of unforeseen circumstances to changes occurring in the contract during its execution. These provisions constitute rules of the general regime that parties, and even the judge, cannot bypass, even though the judge enjoys broad discretionary power in this matter. On the other

[36] L'article 107 du code civil algérien : Le contrat doit être exécuté conformément à son contenu et de bonne foi il oblige le contractant, non seulement à ce qui y est exprimé, mais encore à tout ce que la loi, l'usage et l'équité considèrent comme une suite nécessaire de ce contrat d'après la nature de l'obligation

[37] ATMANI Bilal, DELEBECQUE Philippe, op, cit, p555.

hand, revising contract clauses falls within the judicial domain and is not subject to the will of the parties, which goes against the commercial freedom characteristic of electronic commerce contracts. This makes the theory difficult to apply to these contracts because it does not rely on the agreed contractual form. Even the theory of force majeure, which cancels the obligation in case of the debtor's impossibility to perform, is not appropriate because it differs legally and conceptually from the unforeseen circumstance, which makes the performance of the obligation difficult but not impossible.

Therefore, it was necessary to seek a new concept of the theory of unforeseen circumstances and formulate it in a way that could more easily adapt to the parties' will. This is what the French legislator did by amending Article 1195 of the Civil Code in Chapter IV relating to the effects of the contract, which states the following: "In the event of unforeseen changes making the execution of the contract difficult, the parties may, if the contracting party knew of these changes and accepted them before being confronted with them, request renegotiation. In case of refusal or failure of renegotiation, they may mutually terminate the contract or resort to the judge who will adapt or terminate the contract according to the terms and date defined by the contracting parties."[38]

Article 1195 of the Civil Code establishes the possibility for parties to revise the contract in the event of unforeseen circumstances. This revision is possible provided that several conditions are met:

The contract must first witness a change in unforeseeable circumstances at the time of conclusion of the contract. In the absence of specific provisions in the text, circumstances can be broadly understood. In this regard, they may include legal, factual, technological, or even political events. The COVID-19 crisis has indeed provided an opportunity for courts to apply the obligation of good faith to the renegotiation of contracts impacted by the health crisis.

The Paris Judicial Tribunal thus deduced in a 2021 judgment that "even if the provisions of Article 1195 of the Civil Code do not apply to the present lease signed before October 1, 2016, it follows from Article 1104 of the Civil Code that contracts must be executed in good faith, which implies that the parties

[38] Art 1195 Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit civil Français.

are required, in the event of exceptional circumstances, to ascertain whether these circumstances do not necessitate an adaptation of the terms of performance of their respective obligations."

Other jurisdictions have adopted the same reasoning, elevating good faith as a possible support for sudden contractual imbalances[39].

Other jurisdictions have adopted the same reasoning, establishing good faith as a possible support for sudden contractual imbalances. The same happened with the theory of force majeure after its evolution, becoming in its modern form an effective technique for preserving the contract and its balance. Commercial operators now turn to cooperation to preserve the contract due to its commercial and economic importance, in order to mitigate the effects of force majeure[40].

The concept of force majeure is no longer based on absolute impossibility of performance in the realm of international commerce, especially in electronic commerce contracts, as they entail numerous risks and obstacles. Consequently, the force majeure theory has become one of the most important bases for ensuring legal stability[41].

This has led the modern concept of force majeure to approach the renegotiation technique, although it remains limited in its legal effect as it is based on the impossibility of fulfilling the obligation on the debtor's side. Thus, the debtor cannot resort to the judge to mitigate his commitment by invoking force majeure.

Therefore, the renegotiation technique, based on the agreement of the parties, does not rely on the impossibility of fulfilling the obligation, nor even on the intervention of the judge to bring the commitment to a reasonable level, as is the case with the traditional theory of foreseeability. Thus, the new

[39] Court of Appeal of Riom, 1st Chamber, March 2, 2021, No. 20/01418; Judicial Tribunal of Paris, 18th Chamber, Section 2, July 10, 2020, No. 20/04516.

[40] "Hani Abdelatif , Limits of Adopting the Idea of Contract Renegotiation: A Comparative Study," a doctoral thesis submitted to obtain a degree in Public Law, Faculty of Law, University of Tlemcen, Algeria, 2015-2016, p. 33.

[41] Mohamed Said Abdel Rahman, The Binding Force in Procedural Law, a Comparative Theoretical Study, first edition, Al-Halabi Legal Publications, Lebanon, 2011p 30.

direction of the theory of foreseeability offers an additional guarantee to preserve the balance of contracts.

The new Belgian law on obligations, integrated into Book 5 of the Civil Code, introduces the theory of foreseeability. This theory allows one party to request renegotiation of the contract or its termination if certain conditions are met: a change in circumstances makes the performance of the contract excessively burdensome, this change was unforeseeable at the conclusion of the contract, it is not attributable to the debtor, the debtor did not assume this risk, and neither the law nor the contract exclude this possibility. During renegotiations, the parties must continue to fulfill their obligations unless a contractual clause excludes this obligation. It is therefore necessary to check for the presence of such clauses before exercising this right to renegotiation[42].

Conclusion.

In conclusion, despite the advancements in science and technology, particularly in the fields of computing and communications, which have altered traditional measures of foreseeing debtor anticipation and narrowed the realm of the unforeseen to a limited domain, the execution phase of contracts can still be subject to changes imposed by unforeseeable circumstances. Based on this, we have concluded that the principle of contractual freedom provides parties to commercial contracts with the opportunity to resort to contractual technologies to ensure contract balance in the face of unforeseen circumstances, especially in the context of e-commerce contracts, which are sensitive to rapid changes in their environment.

It is evident from the above that the specificities of e-commerce contracts do not align with the traditional solutions proposed by legislators in general rules to establish contractual balance between parties. Therefore, it is necessary to seek legal provisions that promote greater consecration of contractual freedom by bridging the perspectives of contracting parties, without resorting to judicial intervention in this type of contracts, thus limiting contractual freedom, considered the cornerstone of commercial contracts.

[42] The law of April 28, 2022, bringing Book 5 "Obligations" of the Civil Code into force, came into effect on January 1, 2023, along with Book 1 "General Provisions". This law forms the foundation of the new law of obligations in Belgium.

we can recommend the following:

Legislators should work on developing laws and regulations to keep pace with technological advancements in the field of electronic contracts. These laws should be flexible to ensure a balance between contractual freedom and protection of contracting parties against unforeseen circumstances.

The principle of contractual freedom should be strengthened in the legislative and judicial environment, especially in the negotiation phase, allowing parties to execute contracts freely and flexibly based on their particular circumstances.

Parties to electronic contracts should develop preemptive mechanisms to address unforeseen circumstances, such as introducing flexibility clauses in contracts to modify obligations or conditions in the event of unforeseen circumstances.

The importance of the negotiation phase in electronic contracts should be emphasized, with parties agreeing clearly and precisely on all contract terms, including how to deal with unforeseen circumstances.

Promoting awareness and education on the principles and mechanisms of electronic contracts as well as how to deal with unforeseen circumstances, to enable individuals and businesses to make informed decisions.

Promoting cooperation and harmonization of international laws and standards on electronic contracts can facilitate cross-border exchanges and enhance parties' confidence in international transactions.

Given the rapid pace of technological advancements, it is crucial for legislators and regulators to continuously monitor developments in the field of electronic contracts and adapt laws and regulations accordingly to reflect best practices and emerging standards**.**

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