



# The Theory of Contractual Imbalance in the Context of Contemporary Economic Crises: A Comparative Analytical Study of Algerian and French Civil Law

Souhila Kortebi<sup>1</sup>

<sup>1</sup>Doctor of Private Law, Faculty of Law and Political Science, Abou Bakr Belkaid University of Tlemcen, Algeria.

## Abstract:

This study aims to analyse the theory of contractual imbalance as a modern legal mechanism for achieving contractual justice in the context of contemporary economic crises, which have caused significant disruption to contractual relationships, particularly long-term ones. Rapid economic changes such as inflation, price volatility and global crises have shown that traditional civil law rules based on the principle of contractual obligation and the will of the parties are inadequate for dealing with the excessive burdens borne by one party due to unforeseen circumstances.

The study examines the conceptual and legal framework of the theory of contractual imbalance, setting it apart from related theories such as the general theory of unforeseen circumstances, economic duress and force majeure. It also highlights instances of contractual imbalance in Algerian civil law, particularly in relation to the abuse of rights and breach of the principle of good faith. The study also sheds light on legislative developments in French civil law, particularly the 2016 amendment establishing the principle of renegotiation and granting judges broader authority to modify or terminate contracts in the event of imbalances.

Employing a comparative analytical approach, the study concludes that, while the theory of contractual imbalance is not explicitly enshrined in Algerian civil law, it includes implicit mechanisms for addressing it. However, these mechanisms are less effective than those in France, which highlights the need for legislative reform that balances transaction stability and contractual justice.

**Keywords:** Contractual imbalance, Economic crises, Contractual justice, Renegotiation, Unforeseen circumstances.

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## Introduction

In recent years, successive economic crises, particularly inflation and price fluctuations, have resulted in profound transformations to contractual relationships, as well as global crises with health and economic implications. This has resulted in an obvious imbalance in contractual relationships, particularly in long-term contracts. This has raised questions about whether traditional civil law principles, which are based on the authority of will and the binding nature of contracts, can achieve contractual justice between the parties.

Against this backdrop, the theory of contractual imbalance has emerged as a legal mechanism designed to restore justice to contractual relationships by mitigating the adverse effects of imbalances in the obligations of the contracting parties, particularly when fulfilling the contract becomes onerous for one party due to unforeseen economic circumstances. This theory is particularly significant in today's economically unstable environment, where increasing economic risks necessitate the intervention of legislators and civil judges to strike a balance between transaction stability and the protection of the weaker party.

Notably, Algerian legislators, like their counterparts in many other legal systems, have not codified a comprehensive theory under the title 'contractual imbalance'. However, its provisions are implicitly reflected in several legal mechanisms, including the theories of unforeseen circumstances, economic duress, abuse of rights and good faith in contract performance. By contrast, French civil law has undergone significant development, particularly following the 2016 amendment, which explicitly recognised the principle of renegotiation in cases of contractual imbalance. This opens up the possibility of a comparative study that highlights the similarities and differences between the two legal systems.

### **Research problem**

Building on the previous discussion, this study raises the following research question: To what extent does the theory of contractual imbalance facilitate the realisation of contractual justice in the context of contemporary economic crises, and what are its limitations within Algerian civil law compared to French civil law?

This central issue gives rise to several sub-questions, including:

- What is meant by contractual imbalance, and what legal foundations does it rest upon?

How are the manifestations of contractual imbalance reflected in the current economic reality?

What legal and judicial mechanisms exist within Algerian civil law to address this imbalance?

To what extent can the French experience in this field be beneficial?

### **Importance of the study**

This study is significant because it focuses on a contemporary issue that affects the nature of contractual relationships, particularly in the context of recurring economic crises. The study aims to highlight the role of civil judges in achieving contractual justice, while also offering a critical analysis of Algerian legal texts in comparison with French legislation.

### **Methodology**

This study uses an analytical and comparative methodology to analyse the legal rules relating to contractual imbalance in Algerian civil law, comparing them with their counterparts in French civil law. Judicial rulings and legal doctrine are referenced where necessary.

### **Division of the study**

To address the research problem and achieve its objectives, the study is divided into two main sections:

- Section One: The conceptual and legal framework of the theory of contractual imbalance

- Section Two: Mechanisms for Addressing Contractual Imbalance in Algerian Civil Law in Light of Comparisons with French Civil Law.

### **Section One: The Conceptual and Legal Framework of the Theory of Contractual Imbalance**

In civil law, the contract is the primary means of organising transactions and achieving mutual interests between parties. It is fundamentally based on the principle of authority of will and the formal equality it entails between contracting parties. However, contemporary economic developments and the crises and market imbalances they have produced have revealed the limitations of this traditional perspective. They have also highlighted the need to establish legal mechanisms that ensure a minimum level of contractual justice, as embodied in the theory of contractual imbalance.

Section One: The Concept of Contractual Imbalance and Its Distinction from Similar Theories

#### **First: The Concept of Contractual Imbalance**

Contractual imbalance refers to a fundamental disruption in the contractual relationship whereby one party's obligations become excessive or burdensome in a manner that is disproportionate to the other

party's obligations. This imbalance can arise due to economic, social or legal circumstances that occur after the contract is formed, or as a result of disparities in the power dynamics between the parties at the time the contract is concluded<sup>1</sup>.

Furthermore, contractual imbalance signifies a disruption to the contractual relationship caused by exceptional circumstances that could not have been anticipated at the time of contract formation, resulting in one party shouldering excessive burdens, such as a substantial increase in performance costs or a significant reduction in agreed benefits<sup>2</sup>.

Contractual imbalance is not limited to the formation stage of the contract; it can also manifest during the execution phase, particularly in long-term contracts where economic conditions can change unexpectedly due to severe inflation, sudden price increases or general economic turmoil. In such instances, while the contractual obligation remains executable, it becomes so onerous that it threatens the economic balance of the contract.

Notably, contractual imbalance does not imply a lack of consent or invalidate the contract. Rather, it primarily concerns the fairness of continuing obligations in their original form, distinguishing it from other traditional civil law theories.

## **Second: distinguishing contractual imbalance from similar theories**

Contractual imbalance refers to any situation in which the balance of rights and obligations arising from the contract is disrupted in a way that undermines contractual justice, whether during the formation or execution of the contract. It is therefore necessary to distinguish it from certain legal theories that address specific manifestations of this imbalance.

### **1. Distinguishing contractual imbalance from the theory of unforeseen circumstances**

Contractual imbalance is characterised by a disruption in the balance between the rights and obligations stemming from the contract. This results in one party being burdened with obligations that are disproportionate to the benefits gained by the other party. This violates the principle of contractual justice. This imbalance may arise from disparities in economic or negotiating power between the parties at the time the contract is formed, or from subsequent conditions affecting the performance of obligations that are not necessarily exceptional or widespread.

Legal scholars have approached this concept in the context of the theory of unforeseen circumstances. For instance, L. JOSSERAND defines it as unexpected events that arise during the execution of the contract and lead to an imbalance, justifying judicial intervention to reassess the contract to restore its equilibrium<sup>3</sup>. Similarly, Professor Abd Al-Razzaq Ahmad Al-Sanhouri defines it as any general incident occurring after the contract's formation that was not anticipated at the time of contracting and which renders the debtor's performance of their obligation excessively burdensome, risking significant loss<sup>4</sup>.

Despite this conceptual overlap, the distinction between contractual imbalance and the theory of unforeseen circumstances remains. Contractual imbalance is a broader and more flexible concept, encompassing various types of disruption that may affect the contractual relationship at any stage, without requiring a general extraordinary event to occur. In contrast, the theory of unforeseen circumstances is based on the occurrence of specific conditions: namely, an unforeseen general incident occurring after the

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<sup>1</sup>- Rachwan, H. (1994). *The Impact of Economic Conditions on the Binding Nature of Contracts*, 1st edition, Dar Al-Hani, Egypt, p. 437.

<sup>2</sup>- R. Fabre (1983). 'Adaptation Clauses in Contracts', *Quarterly Review of Civil Law*, p. 10.

<sup>3</sup>- Youssef Kbeiti (2020). 'Protecting the Contractor Through the Theory of Unforeseen Circumstances: The Failure to Fulfill Contractual Obligations Due to the Coronavirus Pandemic as a Model', *Journal of Business Disputes*, No. 54, p. 5.

<sup>4</sup>- Abd Al-Razzak Ahmad Al-Sanhouri (1998). *The Mediator in Explaining Civil Law: The General Theory of Obligations, the Theory of Contracts\**, 2nd edition, Part One, Halabi Legal Publications, Beirut, Lebanon, p. 705.

contract is concluded that leads to the debtor being burdened without making performance impossible. This justifies the court's intervention to modify the obligation and return it to a reasonable limit<sup>5</sup>.

The emergence of the unforeseen economic impacts of the contemporary example of the global pandemic, the Coronavirus (Covid-19) crisis, illustrates the application of the theory of unforeseen circumstances, due to the disruption of economic activities, increased performance costs and supply chain disturbances it caused. This has resulted in many contractors being burdened in fulfilling their obligations without reaching a point of impossibility. This opens the door to judicial intervention to restore contractual balance in accordance with the legal provisions governing unforeseen circumstances<sup>6</sup>.

Therefore, it can be said that the theory of unforeseen circumstances is just one legal mechanism for addressing certain cases of contractual imbalance. Contractual imbalance, however, remains a broader framework aimed at achieving justice within the contractual relationship in various ways, either through judicial intervention or other contractual mechanisms.

## 2. Distinction from economic duress

Economic duress refers to a situation in which the value of what one contracting party receives does not equate to what they offer, meaning the performance does not equate to the reciprocation that the other party is obligated to provide<sup>7</sup>. This equivalence is assessed based on the material value of the contract's subject matter, according to economic valuation principles, primarily the law of supply and demand. Any personal value that one of the parties might attribute to the contract's subject is not considered<sup>8</sup>.

Some legal scholars define economic duress as an imbalance between what a party gives and receives. However, it is important to note that complete equivalence between exchanges in reciprocal contracts is rare, necessitating a degree of tolerance. Economic duress is only recognised when it becomes excessive. If contracts were voided due to minor discrepancies, it would destabilise civil transactions and commercial relationships, contradicting the requirement for legal security<sup>9</sup>.

For this reason, Algerian<sup>10</sup> civil law does not recognise economic duress as an absolute general rule, but rather confines it to specific cases. For example, economic duress in the sale of real estate is recognised if the price is less than one-fifth of the market value<sup>11</sup>, enabling the seller to claim the difference up to four-fifths of the market value. Furthermore, economic duress in voluntary partition is recognised if it exceeds one-fifth of the co-sharer's share<sup>12</sup>, enabling them to request the annulment of the partition within a year of it taking place. Additionally, the legislator has formally acknowledged economic duress as a general rule in exceptional situations specified by civil law<sup>13</sup>.

Economic duress only occurs in reciprocal contracts, as it is not applicable to aleatory contracts, such as insurance contracts, which are based on the probability of one of the parties making a gain or loss. Similarly, economic duress does not arise in donation contracts due to the absence of reciprocity.

Furthermore, economic duress is evaluated at the time the contract is formed, taking into account the equivalence of the parties' contributions at that time. Any subsequent changes in value, whether increases

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<sup>5</sup> - Abdul Rahman Osama (1983). 'The Theory of Unforeseen Circumstances: Theory and Practice', Diploma of Higher Studies in Private Law, Rabat, p. 13.

<sup>6</sup> - Saleh Ahmad Al-Lahibi (2020). 'A Legal Reading of the Novel Coronavirus', Global Kuwaiti Law Journal, Eighth Year, Special Supplement, No. 6, p. 603.

<sup>7</sup> - Mahmoud Mohammad. *Exploitation and Economic Duress in Contracts*, Dar Al-Nahda Al-Arabiya, Cairo, no edition, no publication year, p. 12.

<sup>8</sup> - Al-Sanhouri, op. cit., p. 446.

<sup>9</sup> - Mahmoud Muhammad, op. cit., p. 12.

<sup>10</sup> - Ordinance No. 75-58, dated 26 September 1975 and containing the Algerian Civil Code (Official Gazette No. 78, published 30 September 1975, amended and supplemented).

<sup>11</sup> - See Articles 358-359 of the Algerian Civil Code.

<sup>12</sup> - See Article 732 of the Algerian Civil Code.

<sup>13</sup> - See Article 90 of the Algerian Civil Code.

or decreases, are not considered. If a change occurs after the contract is concluded, it does not constitute economic duress, but may instead represent unforeseen circumstances<sup>14</sup>.

Despite their apparent similarity, economic duress and the theory of contractual imbalance are based on different legal foundations. Economic duress is regarded as a defect in the material equilibrium of the contract. It is evaluated exclusively at the time the contract is formed and is limited to specific cases outlined by law. It is only considered when it reaches an excessive degree<sup>15</sup>.

By contrast, contractual imbalance is considered a broader and more comprehensive concept. It may arise at the time of contract formation or during execution, and can result from subsequent economic conditions or disparities in contractual positions. It is not limited to mere material equivalence between performances. There is also no requirement for the imbalance to reach a specific threshold; rather, it is evaluated based on its impact on contractual justice and the burdens it imposes on one of the contracting parties<sup>16</sup>.

Therefore, economic duress can be considered a traditional and limited manifestation of imbalance in a contract, whereas contractual imbalance is a more modern and flexible framework for achieving justice within the contractual relationship in light of contemporary economic transformations.

### **3. Distinction from force majeure**

Force majeure is one of the fundamental concepts in the theory of obligations. It refers to any unforeseen event arising entirely independently of the debtor's will that they could not have anticipated when the obligation arose and could not prevent or avoid, resulting in an absolute impossibility of performing the obligation<sup>17</sup>. Legal scholar Abd Al-Razzaq Al-Sanhouri defines it as an event that cannot be foreseen or resisted<sup>18</sup>, while another school of thought considers it an unexpected event that cannot be averted, thus compelling the debtor to breach their obligation<sup>19</sup>.

These definitions make it clear that force majeure encompasses a range of extraordinary events that occur during the execution of contracts and are outside the control of the parties involved. Such events cannot be anticipated or resisted through normal human means, leading to the impossibility of performing the obligation. Consequently, the debtor is exempt from liability for non-performance. Such events include health epidemics and natural disasters such as earthquakes, volcanoes, floods, severe storms and tsunamis.

The ongoing legal and judicial discussions surrounding the classification of the ongoing global health crisis sparked by the SARS-CoV-2 virus as force majeure are extensive. Some French court rulings have considered it to be an event that may constitute force majeure if certain conditions are met. However, this interpretation is not universally accepted, and the application of force majeure remains subject to judicial review based on the circumstances of each case and the date of contract formation<sup>20</sup>.

The French legislator has explicitly enshrined the concept of force majeure in Article 1218 of the French Civil Code<sup>21</sup>. This states that force majeure occurs when an unforeseeable event outside the debtor's control arises and cannot be avoided through appropriate measures, leading to the non-performance of the

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<sup>14</sup> - Mohammad Sabri Saadi (1992). *Commentary on the Algerian Civil Code*, Dar Al-Huda, Algeria, 1st edition, Part One, pp. 202-203.

<sup>15</sup> - Jamal Al-Sharqawi (1993). *The Theory of Invalidity of Legal Acts*, Dar Al-Nahda Al-Arabiya, Cairo, no edition, pp. 256-258.

<sup>16</sup> - Al-Sanhouri, *op. cit.*, p. 447 and following.

<sup>17</sup> - Hasab Al-Rasool Al-Sheikh Al-Fazari (1979). "The Impact of Unforeseen Circumstances on Contractual Obligations in Comparative Law," PhD Thesis, Faculty of Law, Cairo University, Al-Giza Printing, Alexandria, p. 537.

<sup>18</sup> - Al-Sanhouri, *op. cit.*, p. 876.

<sup>19</sup> - Suleiman Marqus (1964). *Commentary on Civil Law: Sources of Obligation*, Al-Matba'a Al-Alamiya, Egypt, p. 367.

<sup>20</sup> - P. Guiomard (2020). 'Influenza, Epidemics, and Force Majeure in Ten Rulings', *Dalloz Actualité*, p. 5.

<sup>21</sup> - Ordinance No. 2016 of 10 February 2016 regarding the reform of contract law, the general regime and the proof of obligations.

obligation. Upon acknowledgement of force majeure, depending on the circumstances, either the obligation is temporarily suspended or permanently extinguished if the impossibility is enduring.

At the national level, the Algerian legislator referenced force majeure in Article 127 of the Algerian Civil Code. This states that if a person can prove that the damage resulted from a cause beyond their control, such as an unforeseen event or force majeure, or the fault of the injured party or a third party, their liability to compensate for this damage is extinguished, unless a legal provision or agreement states otherwise. Notably, the Algerian legislator did not provide an explicit definition of force majeure, merely stating its legal effects among the causes leading to exemption from liability. This leaves the interpretation of the concept and its parameters to legal scholars and the judiciary<sup>22</sup>.

It is important to distinguish between force majeure and theories of contractual imbalance, particularly the theory of unforeseen circumstances. Force majeure results in the absolute impossibility of performing the obligation, justifying its extinction or the debtor's exemption from liability. In contrast, the theory of unforeseen circumstances relies on the occurrence of an unexpected general event that makes performance burdensome for the debtor, short of rendering it impossible.

Therefore, the distinguishing criterion between force majeure and theories of contractual imbalance is the degree to which the event impacts the obligation. If it leads to an absolute impossibility of performance, it is considered force majeure. Conversely, if the event merely makes performance difficult or burdensome without rendering it impossible, it falls within the scope of the theory of unforeseen circumstances and the restoration of contractual balance.

## **Section Two: The Enshrining of Contractual Imbalance in Algerian and French Civil Law**

### **First: Manifestations of Contractual Imbalance in Algerian Civil Law**

Contractual imbalance in Algerian civil law is evident through various manifestations that reflect the disruption of the contractual relationship between the parties. These include:

1. Abuse of rights: This is one of the most prominent manifestations of bad faith, leading to contractual imbalance. It occurs when a rights holder exercises their legitimate rights in a manner that exceeds the reasonable limits set by law, thereby causing harm to others. While the abuser may have a valid right and legitimate interest, exceeding the bounds of that right constitutes a fault resulting in civil liability<sup>23</sup>.

This concept has been expressly enshrined in Article 124 bis of the Algerian Civil Code, which states that the exercise of a right is deemed abusive if it is intended to harm others, if it seeks to obtain a small benefit that is disproportionate to the harm inflicted on others, or if it aims to achieve an unlawful benefit.

From this text, it can be inferred that the Algerian legislator has established two complementary criteria for identifying the abuse of rights: the subjective criterion, pertaining to the intention to harm others (as indicated in the first case); and the objective criterion, manifesting as disproportionality between the anticipated benefit and the resultant harm, or unlawfulness of the benefit sought by the right holder (as illustrated in the second and third cases).

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<sup>22</sup>- It is noted that the Algerian legislator did not adopt a unified term to express 'force majeure', as multiple terms are used in different provisions of the Civil Code. These include 'force majeure', 'sudden accident' in Articles 127, 130, 162, 176 and 178, and 'foreign cause' in Articles 307 and 336. The expression 'unforeseen circumstances' is also mentioned in Article 599. Despite this terminological diversity, these terms converge on a single goal: exempting the debtor from liability whenever it is proven that the non-performance is due to a cause outside their control. This leaves the matter of unifying the concept to jurisprudence and the judiciary.

<sup>23</sup>- Issa Mohammad Issa Al-Amari (2014). 'The Impact of Gross Error on Contractual Liability under the Provisions of Jordanian Civil Law', Master's thesis, Faculty of Graduate Studies, University of Jordan, January, p. 9.

Therefore, abuse of rights is not just a deviation in contractual behaviour, but a clear manifestation of contractual imbalance. This justifies subsequent judicial intervention to mitigate its effects and restore balance between the contracting parties<sup>24</sup>.

2. Breach of the Principle of Good Faith in Contract Performance: Contractual imbalance occurs when one party acts in bad faith when performing their contractual obligations, which leads to the other party bearing unexpected or unjustifiable burdens and undermines the fair purposes of the contract.

The principle of good faith in contract performance refers to the obligation of each party to fulfil their commitments in good faith, with honesty and integrity, and to cooperate with the other party to achieve the legitimate purpose of the contract without exploitation, abuse or harm<sup>25</sup>. This principle goes beyond merely respecting the literal text of the contract, extending to consideration of its purposes and the requirements of contractual justice<sup>26</sup>. The Algerian legislator has explicitly enshrined this principle in Article 107, Paragraph 2, of the Civil Code, which states that contracts must be performed in accordance with their terms and in good faith.

Breaching this principle is one of the most significant manifestations of contractual imbalance. It occurs when one party acts in bad faith during the execution of the contract, exploiting their legal or economic position. This leads to the other party bearing unexpected or unjustifiable burdens, thereby undermining the contract's fair purpose. This situation justifies subsequent judicial intervention to restore balance between the contracting parties.

Disproportionate imbalance between counter obligations refers to a lack of reasonable equivalence between what each party commits to, whereby one party bears excessive or unequal burdens compared to the reciprocal benefits they receive, thereby violating contractual justice. This can occur at the time of the contract's formation, as with certain forms of economic duress, or through the imposition of abusive terms that disrupt the balance of the contract<sup>27</sup>. It may also arise during the execution phase due to changing circumstances or the exploitation of one party's legal or economic position. This imbalance is considered a manifestation of contractual imbalance when it becomes so significant that it renders the continuation of the contract unjust, without reaching the point of absolute impossibility<sup>28</sup>.

## **Second: The Development of Contractual Imbalance in French Civil Law**

Unlike Algerian legislation, French civil law has seen substantial progress in this area, particularly since the reforms introduced in 2016 enshrined the principle of renegotiation in cases of contractual imbalance.

The French legislator has established the possibility of judicial intervention in contracts at the request of one party when unforeseen circumstances arise, with the aim of restoring contractual balance. This approach is explicitly stated in Article 1195 of the French Civil Code, which broadens the scope of judicial intervention by allowing judges to review, modify or terminate a contract if changes in circumstances make it excessively difficult for one of the parties to fulfil their obligations, unless they agreed to bear the risks of this change.

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<sup>24</sup>- Abdul Majid Baltyb (2018). 'The Theory of Abuse of Rights and Its Applications in Contract Termination: A Comparative Study Between Islamic Jurisprudence and Algerian Civil Law', PhD in Islamic Sciences, University of Algiers 1, p. 60.

<sup>25</sup>- R. Hassan, *op. cit.*, p. 82.

<sup>26</sup>- Abdul Mun'im Musa Ibrahim (2006). *Good Faith in Contract Performance: A Comparative Study\**, Zain Legal Publications, Cairo, Egypt, p. 73.

<sup>27</sup>- Coercive conditions are among the most prominent forms of contractual imbalance as they are imposed by one party, particularly in adhesion contracts. This leads to excessive obligations for the weaker party or deprives them of essential rights, thus undermining the balance between obligations. See Articles 70, 110 and 112 of the Algerian Civil Code.

<sup>28</sup>- See Article 107, Paragraph 3 of the Algerian Civil Code.

According to Article 1195 of the French Civil Code, if an unforeseen change in circumstances at the time of entering into a contract results in excessive costs for one of the parties, that party may request the other party to renegotiate the contract, provided that they continue to fulfil their obligations during the negotiation period. If the other party refuses or fails to renegotiate, the parties may agree to terminate the contract at a specified date and under specified conditions, or they may jointly request the judge to adapt the contract. If an agreement cannot be reached within a reasonable timeframe, upon the request of one party, the judge may reconsider the contract or order its termination at a date and under conditions determined by them<sup>29</sup>.

This development represents a qualitative shift in contractual thinking, reflecting a balance between transaction stability and respect for contractual intent, and the achievement of contractual justice. It also indicates a clear legislative trend towards recognising contractual imbalance as an independent reason for judicial intervention.

This section demonstrates that the theory of contractual imbalance is a necessary legal response to contemporary economic changes and a natural evolution of traditional contractual thinking. While Algerian civil law implicitly acknowledges this theory through various mechanisms, French civil law is moving towards its explicit recognition. This opens up the possibility of benefiting from this experience to improve contractual rules and achieve more realistic justice in contractual relationships.

## **Section Two: Mechanisms for Addressing Contractual Imbalance in the Context of Contemporary Economic Crises**

Contemporary economic crises, such as inflation and market fluctuations, have led to imbalances in contracts, requiring legislators and judges to find flexible legal solutions that ensure contractual fairness while maintaining transaction stability. In this context, alongside contractual and legislative mechanisms, the role of civil judges has emerged as a fundamental means of addressing contractual imbalance.

### **Subsection One: The Role of the Civil Judge in Restoring Contractual Balance**

#### **First: The basis for judicial intervention**

Judicial intervention by civil judges in restoring contractual balance is considered an exception to the principle of the binding nature of contracts. However, this exception is justified by the need to achieve justice and fairness between the contracting parties, particularly when strict adherence to the terms of the contract leads to an unjust outcome for one party.

Such intervention is based on several legal principles, including good faith, prohibition of rights abuse, and economic public policy requirements<sup>30</sup>.

During economic crises, a judge's authority to monitor contractual balance increases, especially when it is proven that unforeseen circumstances after the contract was formed led to a significant disruption to one party's obligations without reaching the point of impossibility.

#### **Secondly, the scope of judicial intervention in Algerian civil law**

The Algerian Civil Code grants civil judges the indirect authority to intervene and restore contractual balance. This intervention is primarily manifested through:

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<sup>29</sup> - Article 1195 of the French Civil Code states: 'If a change in circumstances unforeseen at the time the contract was concluded makes performance excessively burdensome for a party not accepting to bear the risk, that party may request renegotiation of the contract from their co-contractor. It continues to perform its obligations during the renegotiation process. If the renegotiation is refused or fails, the parties may agree to terminate the contract on a date and under conditions they determine, or jointly request that the judge adapt it. If no agreement is reached within a reasonable timeframe, the judge may, at the request of one party, revise or terminate the contract, setting the date and conditions.'

<sup>30</sup> - Hanan Marini (2004): 'The Public Economic Order and Its Impact on the Contractual Relationship', Master's thesis, Faculty of Law, University of Algiers, p. 26.

1. Modification of burdensome obligations within the framework of the theory of unforeseen circumstances: This modification aims to balance the interests of both parties. However, the judge cannot rule for the termination of the contract due to unforeseen circumstances, as this would place the full burden of the situation on the creditor. Instead, the judge's role is limited to modifying the contract by reducing the burdensome obligation to a reasonable level. The judge has discretionary authority to choose how to restore contractual balance, and may reduce the burdensome obligation or increase the reciprocal obligation to distribute losses between the creditor and debtor. Alternatively, if the unforeseen circumstance is expected to be resolved soon, the judge may prefer to temporarily suspend the execution of the contract<sup>31</sup>.

The contract should be modified to the extent necessary to strike a balance between the contracting parties. This requires distinguishing between two types of loss: ordinary and foreseeable losses, which the debtor must bear alone; and extraordinary losses, which should be distributed fairly between both parties, thereby fulfilling the requirements of contractual justice<sup>32</sup>.

2. Limiting abuse of rights: This is particularly pertinent when one party insists on their contractual rights in a manner that unjustly harms the other party. The civil judge plays a crucial role in limiting the abuse of rights by overseeing how rights are exercised within legal relationships, particularly in contractual contexts. This ensures that the purpose for which these rights were conferred is not distorted. The judge assesses the legitimacy of the right holder's conduct, relying on the principles of good faith, justice and equity rather than merely adhering to a formal assertion of the right's existence.

The judge is also empowered to mitigate the effects of such abuse by restricting the right's scope, modifying its consequences or determining civil liability, thus protecting the aggrieved party and restoring equilibrium to the contractual relationship. This judicial intervention demonstrates the judge's role in balancing respect for individual rights with ensuring contractual justice, particularly in the context of evolving economic conditions<sup>33</sup>.

Interpreting the contract according to the principle of good faith allows obligations to be adapted in line with changing circumstances. The legislator has granted the judge the authority to interpret the contract when its wording is ambiguous or its meaning is unclear. This is based on Article 111, Paragraph 2, of the Algerian Civil Code, which enables the judge to determine the parties' mutual intent when entering into the contract.

The judge is also granted a set of criteria to aid completion of the contract, including laws, customs and the requirements of justice, as well as values such as cooperation, honesty and integrity, and the prohibition of the abuse of rights. The aim is to achieve contractual balance in accordance with the principle of good faith in contract performance.

While this authority granted to the judge is an exception to the principle of contractual freedom, it is justified by the need to prevent future disputes between the contracting parties. By enabling the judge to organise the contract and regulate its content, this authority promotes fairness and stability in contractual relationships<sup>34</sup>.

Nevertheless, the authority of the Algerian judge remains constrained by the absence of an explicit provision enshrining contractual imbalance as an independent ground for intervention. This makes the judge's intervention subject to strict controls, which are intended to maintain the stability of transactions.

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<sup>31</sup>- Nabil Omar (1984). *The Discretionary Power of the Judge in Civil and Commercial Matters*, Dar Mansha'at Al-Ma'arif, Alexandria, p. 261.

<sup>32</sup>- Jalal Al-Adawi (1994). *Sources of Obligation: A Comparative Study in Egyptian and Lebanese Laws*, Dar Al-Jami'a, p. 267.

<sup>33</sup>- Abdul Majid Baltyb, *op. cit.*, p. 61.

<sup>34</sup>- Abdul Halim Abdul Latif Al-Qoumi (2010). *Good Faith and Its Impact on Transactions in Islamic Jurisprudence and Civil Law*, Dar Al-Matbu'at Al-Jami'iya, Alexandria, pp. 347-348 onwards.

## **Subsection Two: Contractual and Legislative Mechanisms for Addressing Contractual Imbalance**

### **First: Renegotiation as a Preventive Mechanism**

The renegotiation clause is a contractual mechanism that addresses imbalances affecting contractual equilibrium due to exceptional circumstances that arise during contract performance. It allows the contracting parties to seek an amicable solution that enables them to overcome difficulties that were not anticipated at the time the contract was formed.

Negotiation refers to the parties' efforts to settle their ongoing dispute through direct dialogue or representatives acting on their behalf. Legal scholars have defined it as the condition that permits reconsideration of the organisation of the contract whenever substantial changes occur in the initial data upon which it was based, leading to a disruption of contractual balance and a severe burden on one of the contracting parties<sup>35</sup>. Renegotiation can also be understood as a mechanism for revisiting the contract according to specific procedures agreed upon by the parties or entrusted to a third party<sup>36</sup>.

Following the 2016 amendment, the French legislator enshrined this concept in Article 1195 of the Civil Code, a move that was later adopted by the Egyptian legislator<sup>37</sup>. However, Algerian legislation does not provide an explicit definition of the renegotiation clause. It can therefore be defined as a provision whereby the parties commit to convene for negotiations when certain unforeseen events beyond their control occur, resulting in a serious disruption to the contractual balance and significant losses for one of the parties.

For renegotiation to be invoked, the incident must be exceptional, unfamiliar, rare and unpredictable<sup>38</sup>, and must lead to a deviation from the normal course of contract execution, as stipulated in Paragraph 3 of Article 107 of the Algerian Civil Code. Furthermore, the incident must result in a real imbalance in contractual equilibrium, imposing unbearable burdens on one of the parties, taking into account the effects of unforeseen circumstances on the contract's economy<sup>39</sup>. Additionally, the event must be of a general nature, affecting a wide range of people and leading to a change in the general conditions under which the contract was concluded, not just the debtor. Furthermore, the incident must be beyond the debtor's control, meaning they did not contribute to its occurrence or the inability to fulfil their obligation<sup>40</sup>. Consequently, the renegotiation clause will not apply if the imbalance results from personal reasons, such as the debtor's bankruptcy, illness or the burning of their business premises.

The renegotiation clause is a vital tool for promoting the principle of contractual freedom by striking a balance between the binding nature of contracts and safeguarding the legitimate interests of the contracting parties.

### **Second: the role of contractual conditions in achieving balance**

Contractual conditions are one of the most important preventive mechanisms that contracting parties rely on to address imbalances in contracts in the context of contemporary economic crises. They allow the parties to organise potential economic risks from the moment the contract is formed, thereby ensuring a degree of legal security and continuity in the contractual relationship<sup>41</sup>. The renegotiation clause is

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<sup>35</sup> - B. Oppetit (1974): 'Adapting International Contracts to Changes in Circumstances: The Hardship Clause', *Journal of International Law*, No. 4, p. 794.

<sup>36</sup> - M. Trari, Tani and W. Pissort (2007). *International Commercial Law*, Berti Editions, Algiers, p. 156.

<sup>37</sup> - See Article 86 of Egyptian Commercial Law No. 17 of 1999 regarding technology transfer contracts.

<sup>38</sup> - Abdul Karim Muka (2023). *The Legal Aspects of International Contracts*, Dar Balqis, Algeria, p. 106.

<sup>39</sup> - A. Marouk (2015). 'The Renegotiation Clause in International Trade Contracts', PhD thesis in law, University of Algiers 1, Ben Youssef Ben Khadda, p. 174.

<sup>40</sup> - Hani Abdul Latif (2016). 'The Limits of Adopting the Idea of Renegotiation in Contracts: A Comparative Study', PhD thesis in public law, Faculty of Law and Political Science, Abou Bakr Belkaid University, Tlemcen, p. 91.

<sup>41</sup> - Scholars have differed in their translations of the term 'Renegotiation Clause' (Hardship Clause), resulting in various linguistic equivalents. It has sometimes been translated as 'Clause d'imprévision', 'Clause de sauvegarde', 'Clause de révision', or 'Clause d'équité'. In light of these differences, a notable

particularly important in this regard, as it obliges the parties to return to negotiations when specific economic conditions affecting the financial balance of the contract arise. This reinforces the principles of good faith and cooperation between the parties<sup>42</sup>.

However, the effectiveness of renegotiation clauses depends on how clearly and precisely they are formulated. Ambiguity in these clauses can provoke further disputes between the contracting parties, contradicting the very purpose for which they were included, namely to prevent conflicts during contract performance. Additionally, the price review clause enables adjustments to the financial consideration in line with changes in economic factors, particularly in long-term contracts<sup>43</sup>.

Conditions relating to risk distribution also help to define each party's responsibility for the consequences of unforeseen economic events, provided they do not result in a significant imbalance in contractual equilibrium or contravene public order. Despite their significant importance, these conditions' effectiveness depends on proper drafting and adherence to principles of contractual justice. Furthermore, they cannot entirely replace civil judicial intervention in cases of abuse by one party or when they fail to achieve the desired objective. This highlights the supplementary role of contractual conditions in addressing contractual imbalance.

This section demonstrates that resolving contractual imbalances in the context of economic crises requires a flexible approach combining civil judicial intervention and the activation of contractual mechanisms. While Algerian civil law is cautious in this area, French civil law is more advanced in enshrining contractual justice. This opens avenues for legislative reform that balance transaction stability with protection for the aggrieved party.

### **Conclusion:**

This study concludes that the theory of contractual imbalance is one of the most important modern legal mechanisms for achieving contractual justice in the context of contemporary economic crises. These crises have produced unequal contractual situations, particularly in long-term contracts. Rapid economic transformation has revealed the limitations of traditional civil law rules based on the principle of the binding nature of contracts in addressing substantial imbalances affecting the economic equilibrium of contractual relationships.

Despite not explicitly enshrining the theory of contractual imbalance, the study demonstrated that Algerian civil law implicitly contains legal mechanisms that allow for the restoration of balance through the theory of unforeseen circumstances, the principle of good faith in contract performance and the prohibition of abuse of rights. However, the effectiveness of these mechanisms is limited by the absence of a clear, comprehensive legislative framework addressing contractual imbalance as an independent ground for judicial intervention.

By contrast, France has demonstrated significant legislative progress, particularly following the 2016 reforms, which explicitly recognised the right to renegotiate in cases of contractual imbalance and granted judges broader authority to modify or terminate contracts when an agreement could not be reached between the parties. This approach has helped to strike a balance between the stability of contractual transactions and the achievement of contractual justice, in line with the demands of contemporary economic realities.

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segment of French jurisprudence has preferred to retain the foreign term (Clause de hardship) to avoid conceptual confusion. Jean-Jacques Ghestin and Marc Billiau, *The Price in Long-Term Contracts*, LGDJ, p. 136.

<sup>42</sup>- M. Fontaine (1976). 'Arbitration Clauses: Conventional Arrangement for Unforeseeable Events in Long-Term International Contracts', *DPCI*, p. 42.

<sup>43</sup>- Sherif Muhammad Ghanem (2007): *The Impact of Changes in Conditions on International Trade Contracts*, Dar Al-Jami'a Al-Jadida, Egypt, p. 84.

## **Findings:**

Contemporary economic crises have highlighted the urgent need to move beyond the traditional view of contracts and adopt a more flexible approach that considers the economic balance of the contractual relationship.

While contractual imbalance does not constitute grounds for annulment, it can justify judicial intervention or renegotiation to amend obligations and achieve fairness between the parties.

Algerian civil law relies on indirect mechanisms to address contractual imbalance, which limits the effectiveness of the legal protection afforded to the aggrieved party.

In contrast, French civil law is an advanced legislative model, explicitly recognising contractual imbalance and the right to renegotiate.

## **Recommendations:**

1. The Algerian legislator should explicitly enshrine the principle of renegotiation in civil law as a fundamental mechanism for addressing contractual imbalance.
2. The authority of civil judges should be expanded to allow them to modify contracts in cases of substantial imbalance in economic equilibrium, while precise legal controls should be established to ensure the stability of transactions.
3. Encourage parties to include flexible contractual conditions that allow for the review of obligations in the event of substantial changes in economic circumstances.
4. Draw on the French experience in this area while bearing in mind the specifics of the Algerian legal and economic system.
5. Strengthen the role of legal scholarship and judicial interpretations in establishing clear criteria for identifying cases of contractual imbalance.

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