intervient « de façon à distribuer équitablement entre les parties les pertes et profits qui résultent du changement de circonstances » (art. 6:111 (3), b. Cette référence à l'équité pourrait permettre une adaptation judiciaire plus objective, mais qui risquerait de s'éloigner des prévisions des parties.

En conclusion, on peut relever que l'arrêt de la Cour de cassation belge en date du 19 juin 2009 apporte un nouvel argument à une doctrine française aujourd'hui majoritairement favorable à inscrire l'imprévision dans la théorie générale du contrat. Si les trois projets concordent sur ce point, le projet Catala semble le plus fidèle à l'esprit du droit des français qui cantonne le juge à un rôle de gardien du respect du contrat sans lui permettre de reconstruire ce que les parties ont stipulé.

La rigidité actuelle de la position jurisprudentielle française doit inciter les contractants à adopter une clause de révision du contrat,[158] comme une clause de *hardship* ou une clause d'indexation. Le droit français s'est récemment inspiré de la pratique anglo-saxone pour importer la clause de *benchmarking*, qui permet aux parties de s'assurer qu'elles bénéficieront des meilleures conditions tout au long de l'exécution du contrat,[159] ou la *MAC* clause (*material adverse change*), qui permet à un contractant de se dégager d'une opération contractuelle en cas d'évènement défavorable affectant la rentabilité de cette opération survenant entre sa conclusion (*signing*) et sa réalisation (*closing*).[160] Le plus souvent, le régime de ces clauses est abandonné à la liberté contractuelle,[161] offrant une large palette de combinaisons à l'imagination des rédacteurs de contrats. Ainsi s'explique la formule de l'article 1135-1 du projet Catala qui invite les parties à prévoir ce genre de clause et qui pourrait paraître superfétatoire au regard de la liberté contractuelle.

Comme l'observait Giraudoux dans *La guerre de Troie n'aura pas lieu*, « Le droit est la plus puissante école de l'imagination. Jamais poète n'a interprété la nature aussi librement qu'un juriste la réalité » [162] ...

5. *Hardship in Spanish Law: Past, Present and Future – Reflexions on a Belgian Supreme Civil Court Decision* (by Lis Paula San Miguel Pradera)

5.1 Overview: the Case in Question and the Approach under the Spanish Civil Code

Essentially, the parties had entered into a series of international contracts of sale involving the supply of steel materials for the manufacture of scaffolding equipment. Under the contracts, the selling party was bound, in a number of cases, to

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158 Cf. Y. Lequette, « De l'efficacité des clauses de *hardship* », in *Liber amicorum C. Larroumet*, Economica, 2010, 267 s.

159 L. Szuskin et J.-L. Juhan, « La clause dite de *benchmarking* dans les contrats de prestation de services ou comment rendre un contrat compétitif? », *RLDC* déc. 2004, n° 11, p. 5 s.

160 A.-C. Pélissier, « La *MAC* clause », *RLDC* avr. 2006, n° 26, p. 5 s.

161 Comp. Paris, 24 mai 2005, cité par A.-C. Pélissier, art. cit., qui refuse d'appliquer une *MAC* clause en faisant valoir que le demandeur avait disposé de toutes les informations utiles pour prévoir l'évolution de la dette de la société achetée.

162 Propos mis par l'auteur dans la bouche d'Hector, acte II, scène 5.

supply the steel goods referred to. Once the contracts had been concluded, the price of the steel used in manufacturing the goods to be supplied increased by 70%. This increase had not been provided for at the time of concluding the contracts, and the latter contained no price revision clause.

In view of this situation, the selling party contacted the buying company, informing the latter of the sudden increase in the price of steel and proposing a revision of the agreed prices for the items still to be supplied. The parties met but failed to reach an agreement. The buyer refused the proposal by the seller to increase the agreed price by 47.99%.

The buyer sued the seller and demanded performance of the contract. The seller entered a defence that alleged that performance of the contract would be much more costly for them as a result of the intervening unforeseeable change in circumstances, and that it was necessary to revise the terms of the contract.

What would be the solution to this dispute under Spanish law? The answer is not easy. The reason is obvious – the Spanish Civil Code (CC) of 1889, as did the other Codes of its time (in particular, its French and German equivalents), did not provide for the possibility that the *pacta sunt servanda* principle, which is the very essence of the contract as a concept, could be disapplied under certain exceptional circumstances. Therefore, a quick prima facie answer would appear to be that in a situation such as that described above, in which there is an intervening change of circumstances, which makes the performance of the contract in the agreed terms too onerous for one of the parties, the *pacta sunt servanda* principle would continue to apply.

However, the courts, especially after the Spanish civil war (1936–1939), have become increasingly conscious of the fact that, in certain cases where intervening circumstances occur, the question arises whether it is fair that the contract should remain on its original terms.[163] Thus, since the middle of the twentieth century, both the Spanish courts and the nation's leading authors have used a mechanism that circumvents the *pacta sunt servanda* principle by using the so-called *rebus sic stantibus* clause.[164] At the same time, other European legal systems closely related to that of Spain, which had not contemplated an exception in law to the *pacta sunt servanda* principle, have adopted similar solutions by resorting to different mechanisms. Thus, in France, the administrative courts apply the *théorie de l'imprévision*, whereas the German courts, prior to the 2002 reforms, solved the problem by applying the bona fide principle under Article 242 of their Civil Code (BGB).[165]

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[163] For an exception to this trend, see M.A. Egusquiza Balmaseda, 'Ley 493', in *Comentarios al Fuero Nuevo. Compilación del Derecho Civil Foral de Navarra*, ed. E. Rubio Torrano (Cizur Menor-Navarra: Editorial Aranzadi, 2002), 1664–1673.

[164] This stems from the canon law. See R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Oxford University Press, 1996), 579–582 and F. de Castro, *El negocio jurídico* (Madrid: Civitas, 1985), s. 379.

[165] For more comparative law on this subject, see K. Zweigert & H. Kötz, *An Introduction to comparative Law*, 3rd edn (Oxford: Clarendon 1998), 518–527.

5.2 The Doctrine of the Rebus sic Stantibus as Applied by the Civil Division of the Spanish Supreme Court

The contribution made by the courts has been essential in shaping and applying the *rebus sic stantibus* doctrine. The decisions of the Spanish Supreme Court (*TribunalSupremo*) have laid down the criteria required for being able to rely on this theory in Spanish law. Thus, the Supreme Court decision (STS) of 17/5/1957[166] was the first judgment to list the elements required for the application of the *rebus sic stantibus* theory.[167] The same principles have been used in more recent court decisions.[168] They are:

(a) It is a requirement that, at the time when the contract needs to be performed, there has occurred an extraordinary change in circumstances, as compared to those that applied at the time when the parties entered into the contract.
(b) There must be such a serious disproportion, beyond any foreseeable calculation, between the obligations of the parties that it makes the contract unviable because the balance of performance between the parties has been destroyed.
(c) Both these requirements must have occurred as a result of entirely unforeseeable intervening circumstances.

These highly stringent requirements are probably inspired by the consideration that the Tribunal Supremo does not recognize the *rebus sic stantibus* clause as a legally acceptable device and that, although it has been held admissible and applied by the courts for reasons of fairness, it should only be used in extremely exceptional circumstances.

Where the elements specified above are present simultaneously, it is, according to the case law of the Supreme Court, necessary for the party that has been disadvantaged by the change in circumstances to apply to the court for a decision on the fate of the contract. In other words, the contracting party adversely affected by the change in circumstances may not unilaterally decide what will be the implications of such a change for the contract in question. As far as the court's decision is concerned, there has been a lively debate as to whether the intervening change of circumstances should lead to termination of the contract (*resolución*) rather than to its revision and, where appropriate, amendment. The Supreme Court regards the revision and amendment of the contract as a more satisfactory remedy than termination, since it is at all times preferable to retain the contract wherever possible.[169]

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[166] STS of 17/5/1957 (RAJ 1957/2164).

[167] L. Díez-Picazo, 'La cláusula rebus sic stantibus', in *Extinción de las obligaciones*, ed. J.R. Ferrandiz (Cuadernos de Derecho Judicial, XXVI, 1996), 675.

[168] For example, in the STS of 25/1/2007 (RAJ 207/592).

[169] Thus, for example, the STS of 6/11/1992 (RAJ 1992/9226) and the judgments quoted in it. Furthermore, this is one of the few judgments in which the Spanish Supreme Court considers

In reality, however, the Supreme Court has been extremely reluctant to apply the *rebus sic stantibus* theory in the disputes submitted to it.[170] In fact, the Court has described it as an 'extra-legal' and 'dangerous' remedy which can only be accepted in highly exceptional circumstances and with extreme care. Recently, the author Salvador Coderch, having studied the Spanish relevant court decisions, has offered two explanations as to why the Spanish courts have been reluctant to apply the *rebus sic stantibus* theory. In the first instance, there is the excessive stringency applied by the courts when deciding whether it is applicable – a factor that can be explained by the context in which it first arose. The period in which the courts started to apply this theory was that which followed the Spanish civil war (1936–1939). The idea was to correct, in exceptional circumstances, certain anomalies that the special legislation adopted after the civil war ended had failed to take into consideration. This may have contributed towards the mindset that this theory was indeed very much an exception, which resulted from the aftermath of the civil war, and that the manner in which it was applied became fossilized from that point onwards, never to be revisited afterwards.[171]

To this (and here, we are giving a second reason to justify reducing the number of decisions in which the Supreme Court accepts the applicability of the *rebus sic stantibus* theory) must be added that the latter is often pleaded in response to claims for non-performance of the contract where there is little or no basis for such non-performance,[172] where the change in circumstances had been either foreseen or was foreseeable, or where the parties had already renegotiated the contract.[173]

All the factors specified above make it very difficult to predict whether the *rebus sic stantibus* theory, as formulated by the Supreme Court, can be applied to the case before us. However, given the strict definition of the relevant criteria, and the fact that the Supreme Court is not favourably disposed towards applying it because of its extra-legal nature and the dangers it presents, it is highly likely that in the case that gave rise to the Belgian *Cour de Cassation* Decision of 19/6/2009, the Spanish courts would have dismissed the application by the selling party to have the contract revised.

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that all requisites for applying the *rebus sic stantibus* doctrine have been met in this case. See D. Bello Janeiro, 'Comentario STS de 6 de noviembre de 1992', *Cuadernos Civitas de Jurisprudencia Civil* 30, (1992): 1009–1025.

170 In this sense, see for example, Díez-Picazo, 678; R. Verdera Servet, 'Comentario a la STS de 17 de noviembre de 2000', *Cuadernos Civitas de Jurisprudencia Civil* 56 (2001) 499 and C. Amunátegui Rodríguez, *La cláusula rebus sic stantibus* (Valencia: Tirant lo Blanch, 2003), 38.

171 P. Salvador Coderch, 'Alteración de circunstancias en el art. 1213 de la Propuesta de Modernización del Código civil en materia de Obligaciones y Contratos', *Indret* 4 (2009): 19 and 20, <www.indret.com>.

172 *Ibid.*, 3 and 17.

173 *Ibid.*, 18.

5.3 The Leading Spanish Authors and Intervening Changes in Circumstances

In contrast to the Spanish CC, some of the more modern codes have filled this legal gap and expressly inserted provisions governing cases where the performance of the contract becomes too onerous for one of the parties. This has been the case with Article 1457 of the Italian CC, Article 437 of the Portuguese CC, and Article 6:258 of the Dutch CC. In addition, the Principles of European Contract Law (PECL) and the International Institute for the Unification of Private Law (UNIDROIT) Principles of International Commercial Contracts also contain rules of this type (Article 6:111 PECL and Articles 6.2.1 to 6.2.3 UNIDROIT Principles). German law included the concept in Article 313 BGB when it carried through the reforms of 2002.

This development has undoubtedly had a significant impact on the leading Spanish authors. Until a few years ago, they had contended themselves with citing court judgments on the subject and had taken the view that only where the requisites for the application of the *cláusula rebus sic stantibus* had been met could the party disadvantaged by the change in circumstances apply to the courts to have the contract terminated or to have it adjusted to the new circumstances. Recently, no one has entertained any doubts about the convenience of incorporating a rule in the Spanish CC, which governs those cases in which intervening changes of circumstances may affect the contract, as well as the concrete effects which such changes have on that contract, the favoured option being the remedy of revising the contract rather than terminating it, whenever possible.[174] Furthermore, in recent years, the leading Spanish authors have been reluctant to share the courts' fear of the wholly exceptional and dangerous nature of this theory. It is very likely that had they been faced with the case of intervening change of circumstances adjudicated by the Belgian *Cour de Cassation* on 19/6/2009 such authors would have held that the contract should be revised as having become excessively onerous for the seller.

5.4 Towards the Modernization of Spanish Contract Law: A Proposal to Regulate Cases of Hardship

In 2009, the Spanish Ministry of Justice published a proposal for the modernization of Spanish contract law drafted by the Civil law section of the *Comisión General de Codificación* (further referred to as PMDOC). This proposal aims to amend those parts of the 1889 Spanish CC, which deal with the law of contracts in order to adjust it to present-day demands, and, for the first time, proposes to introduce the

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[174] L.P. San Miguel Pradera, 'La excesiva onerosidad sobrevenida: una propuesta de regulación europea', *Anuario de Derecho Civil* 55 (2002): 1115–1132, 1119, defends the solution which consists in compelling the parties to renegotiate the contract, resorting to the courts only if they fail to reach agreement; C. Amunátegui Rodríguez, 293 and 311–312; L.M. Martínez Velencoso, *La alteración de las circunstancias contractuales. Un análisis jurisprudencial* (Madrid: Civitas, 2003), 357 and 362.

'extraordinary change in circumstances' concept into the Code.[175] In order to do this, a new Chapter VIII entitled 'Extraordinary Changes in the Basic Circumstances of Contracts' would be added to Part (*Libro*) IV, which is devoted to civil obligations and contracts (*de las obligaciones y contratos*). This Chapter VIII features one provision only, that is, Article 1213 PMDOC, which is worded as follows:

> Where the circumstances upon which the contract was based change in an extraordinary and unforeseeable manner during the performance of the contract, and the result of such change is that performance becomes excessively onerous for one of the parties or the purpose of the contract becomes thereby frustrated, the contracting party who, given the circumstances of the case – particularly in terms of the contractual or legal allocation of the risk burden – could not reasonably be expected to remain bound by the contract may request that the contract be revised. Where this outcome is neither possible nor enforceable against one of the parties, the latter may apply for termination of the contract.
>
> Such application for termination may only be granted where it is not possible to obtain, on the basis of the proposal or proposals for revision put forward by each of the parties, a solution that restores the mutual interests in the contract.

This proposal would incorporate into Spanish law a rule on extraordinary changes in circumstances, which reveals clear influences from foreign legal systems and enshrines the principles on which the theories of *rebus sic stantibus, Geschäftgrundlage*, frustration of contract and hardship are based.[176] The text of Article 1213 PMDOC expressly includes the concepts of excessive onerousness and frustration of contracts.

The draft of the proposal to modernize the Spanish law of contracts is currently subject to a public information process in order that the experts may put forward their opinion on it. In line with this objective, Professor Salvador Coderch has published a paper on the proposal to regulate changes in circumstances as contained in Article 1213 PMDOC. This author considers it a very positive development that the notion of changes in circumstances has received acknowledgement in Spanish law and that the revision or termination of the contract is no longer regarded as an equitable remedy without any express statutory basis – as is currently the case with the *rebus sic stantibus* clause; instead, it has become a legal remedy for extraordinary changes in circumstances, which result in performance having become excessively onerous for one of the parties.[177]

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[175] The Commercial Law Division of the *Comisión General de Codificación* in 2006 presented a proposal to amend the Commercial Code on the subject of commercial contracts and time limits. This proposal contained an article on 'hardship' (Art. 61).

[176] Salvador Coderch, 8.

[177] *Ibid.*, 24.

5.5 Solving the Case in Accordance with the Modernization Proposal

At this point, let us examine whether the judgment of the Belgian *Cour de Cassation* dated 19 June 2009 could be accommodated by the extraordinary change of circumstances rule laid down in Article 1213 PMDOC and, more concretely, by the notion of excessive onerousness, the applicability of which is subject to less stringent criteria than those required for the *rebus sic stantibus* theory.[178]

In the first place, the draft of the new article requires that the change in circumstances that formed the basis for the contract should occur during the performance of the contract and that such change of circumstances be extraordinary and unforeseeable. In the case under review in this article, the increase in price of the steel used in order to manufacture the finished products took place during the performance of the contract.[179] In addition, an increase in price of 70% is considered by the courts to constitute extraordinary and unforeseeable change.[180]

Secondly, Article 1213 PMDOC requires that the change in circumstances should cause the performance of the contract to become excessively onerous for one of the parties (or that the purpose of the contract be frustrated). This element also seems to be present in the case in question, since the courts consider it as a proven fact that a rise in the price of steel constitutes an exorbitant increase in the manufacturing costs of the product relative to those that the seller had envisaged when concluding the contract. This circumstance causes a serious imbalance between the parties to arise, as a result of which performance of the contract on the terms initially agreed becomes particularly results particularly burdensome for the selling party.

Thirdly, the draft of Article 1213 PMDOC requires the circumstances of the case, and especially the contractual or legal allocation of the risk burden, to be taken into consideration, in order to determine that it is unreasonable to expect the party who has been disadvantaged by the change to continue to be bound to the terms of the contract as originally agreed. In the case under review, the courts considered that the risk of a sudden increase in the price of steel should not be imposed, either contractually or legally, on the selling company. In reaching this conclusion, the courts took account of the fact that contracts contained no price revision clause. The next step is to determine whether the rise in the price of the steel used in manufacturing the goods sold makes it unreasonable to expect the seller to perform the contract under the agreed terms.

If we accept that, in the case under review, the requirements of Article 1213 PMDOC have effectively been met, what remains is to determine the effects of the extraordinary change in circumstances. Under the proposed article, the party who has been affected by the change in circumstances may apply to have the contract

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[178] *Ibid.*, 27.

[179] On the requirement that the change in circumstances must occur during performance of the contract, see San Miguel Pradera & P. Salvador, 25.

[180] It is true that the judgment neither discusses nor justifies the fact that the rise in price of steel was not foreseeable at the time of concluding the contract.

revised and, where this proves impossible, to have it terminated.[181] Such termination is conditional, since it can only be awarded where the proposals for revision are inadequate for the purpose of restoring the contractual balance. In the case before us, the seller proposed a revision of the price that would have increased it by 47.99%. The courts regarded this revision proposal as reasonable in view of the prevailing circumstances. On this particular issue, Article 1213 PMDOC does not expressly require the parties to renegotiate the contract. This has prompted Salvador Coderch to suggest that the proposed article should contain an express requirement that the parties renegotiate the contract, on the understanding that recourse to the courts will only be possible where attempts at renegotiation between the parties have failed.[182] While the present author shares this view, it remains true that, to a certain extent, Article 1213 PMDOC already requires the parties to negotiate the contract revision sought, referring as it does to the revision proposals put forward by the parties. In addition, there can be no doubt that these proposals are perfectly capable of being negotiated out of court.[183]

There is, however, one issue presented by this case which is not covered by the PMDOC proposal. On the one hand, where it regulates extraordinary changes in circumstances, Article 1213 PMDOC requires the affected party to request revision of the contract, but does not expressly state that the debtor shall be exempted from performance. At the same time, Article 1192 PMDOC lays down that the creditor shall lose his right to demand performance where this becomes excessively onerous for the debtor.[184] These two articles regulate different situations, although these may coincide in certain cases. Article 1192 PMDOC therefore has a wider scope than Article 1213 PMDOC, since the former is not restricted to cases where performance has become more costly as a result of extraordinary and unforeseeable circumstances. However, what is the position where these two situations occur simultaneously? There is no legal rule to cover this. Several possible solutions present themselves:

(a) Firstly, it could be held that the provision regulating extraordinary changes in circumstances constitutes a special rule, and that as such it takes precedence

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[181] As has been correctly noted by Salvador Coderch, 33, this incorporates into the system the doctrine of contract revision, which provides a flexible response to case where changes have arisen in the essential circumstances of the contract.

[182] P. Salvador Coderch, in particular 8–9. A good example of this is Art. 6:111 (2) PECL, which imposes upon the parties the obligation to enter into negotiations, and Art. 6.2.1. of the UNIDROIT *Principles*.

[183] A similar possibility is presented by the new Art. 313 BGB, which states that the first solution should be to adjust the contract to the new circumstances and, although this is not expressly mentioned, admits that such amendment is capable of being negotiated by the parties. By contrast, Arts 6:258–6:260 of the Dutch CC clearly stipulate that the contract must be amended or terminated by a court decision.

[184] Article 1192.II PMDOC. See N. Fenoy Picón 'La modernización del régimen del incumplimiento: propuestas de la Comisión General de Codificación. Parte Segunda: Los remedios', *Anuario de Derecho Civil* 63 (2010), 47 ff.

over the provisions in the chapter devoted to remedies for non-performance. This would mean that the consequences of the excessive onerousness (contract review) prevail over the creditor's right to rely on other remedies for non-performance other than demanding performance (such as termination as result of non-performance).[185]

(b) Another solution could consist in leaving it to the disadvantaged party to decide whether to resort to this remedy and apply for renegotiation of the contract, or alternatively seek to obtain that the creditor may not demand performance. Nevertheless he may well use the other existing remedies for non-performance, including termination.[186]

(c) Finally, another possible solution could be to determine that the provisions on non-performance, and the remedies for it, prevail over the provisions on extraordinary changes in circumstances, in such a way that the possibility of contract revision will only be considered where the debtor has not been relieved of his obligation to perform, in accordance with Article 1192.

5.6 Exploring Alternative Avenues: Bona Fide *as Instrument in Contract Renegotiation*

Pending adoption of the proposal for reform of the Spanish CC on this subject, and leaving aside the case law-based doctrine of *rebus sic stantibus* in view of its exceptional and extraordinary nature, it is possible to resort to other mechanisms in order to try to find a solution for the case in question. In particular, we must consider the possibility of applying the bona fide principle to find such a solution, on the basis of revision of the contract.

The *Cour d'appel* Decision of 15 February 2007, having rejected the *imprévision* theory, goes on to assert that in French law (which is applicable to the case according to the *Cour d'appel*) the bona fide principle that must govern performance of contracts entails that the parties are obliged to renegotiate the terms of the contract in certain cases. This is especially so where, once the contract has been concluded, unforeseeable circumstances arise that create a serious imbalance between the mutual obligations, in such a way that subsequent performance of the contract becomes exceptionally burdensome for one of the parties. Would Spanish law allow a similar solution?

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[185] This is the solution proposed by the *PECL*, Arts 6:111 and 9:102.

[186] This is the solution put forward by the UNIDROIT Principles where 'hardship' and 'force majeure' occur simultaneously, since they provide the party affected by the extraordinary circumstances with the right to decide which of the two remedies he wishes to use. If he chooses to apply the 'hardship' remedy, he may claim renegotiation of the contract. On the other hand if he relies on 'force majeure' he may avoid paying damages, and although the creditor cannot request performance of the contract if this has become particularly onerous for the debtor (Art. 7.2.2.b), he may alternatively choose to terminate the contract.

It has already been mentioned that the Spanish CC neither expressly accepts nor rejects the possibility that intervening circumstances may have an impact on the contract. Article 1258 Spanish CC stipulates that contracts oblige the parties to deliver what has been expressly agreed and to undergo all the consequences arising from acting in good faith. Does the behaviour of the parties in the case in question conform to the bona fide rules? In view of the circumstances of the case, can it be affirmed that the buyer had the obligation to renegotiate the contract? In addition, if this is indeed the case, will non-performance of such an obligation give rise to compensation for loss?

In order to answer these questions, it is necessary to bear in mind all the circumstances of the case in question and, more particularly, the behaviour of the parties. In order to do this, we start from a proven fact: the intervening change in circumstances was not foreseeable and has caused a contractual imbalance that has rendered performance of the contract under the agreed terms excessively onerous for the selling party.

On the one hand, it is possible to assert that the seller acted in good faith. As soon as the selling party became aware of the increase in the price of steel, they contacted the other party and proposed to renegotiate the contracts pending performance, pointing to the effect that the change in circumstances had on performance of the contract and even offering a proposal to revise the prices by 47.99%, which was reasonable and constituted a sound starting point for negotiations.

On the other hand, the conduct of the buyer was contrary to good faith. Confronted with the situation created by the increase in the price of steel, and with the proposal to renegotiate made by the seller, it would seem reasonable to hold that good faith requires the buyer to participate in the renegotiation of the contract. However, not only did the buyer fail to agree to the sellers' proposal, without putting forward an alternative suggestion – he also requested that the selling party should perform the remaining contracts under the terms originally agreed.[187] Nevertheless, the present author is unable to determine with absolute certainty whether there is an obligation on the part of the seller to renegotiate, since the judgment in question makes no reference to the market in question and fails to indicate whether or not it is custom and practice to renegotiate and revise contracts of this type. If it is customary to proceed to the revision of the contract, there can be no justification whatsoever of the buyers' conduct, because it infringes the obligation to take part in the renegotiation and review of the contract imposed by the bona fide principle. Such behaviour that is contrary to this principle could give rise to compensation for the loss caused to the other contracting party.[188]

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[187] Salvador Coderch,7, holds that refusing a proposal to revise the contract goes against good faith where this refusal is arbitrary, infringes custom and practice in the relevant sector and is not justifiable by the particular circumstances of the contract in question.

[188] This is expressly so stipulated by Art. 6:111(3) PECL.

On the other hand, the *Cour d'appel* judgment, which applies French law, acknowledges that, where an obligation to renegotiate the contract arises as a result of an intervening change in circumstances, the party affected by such a change may discontinue performance where the other party unjustifiably refuses to renegotiate the contract. In Spanish law, the bona fide principle has a positive and a negative aspect. On the positive side, it generates an obligation to renegotiate the contract; on the negative side, it allows the seller to reject an application to perform the contract made by the seller on the basis that, under the changed circumstances, he cannot be compelled to perform the contract under the terms originally agreed as this would be excessively onerous for him.

5.7 Final Observations

Following these brief thoughts on the way in which both the present and, perhaps, the future Spanish law would deal with the case in question, it remains to be said that, although the Spanish Supreme Court continues to apply the *rebus sic stantibus* theory with excessive rigour, and that it would not have applied this theory to this case, a different response can nevertheless be expected in the not too distant future. Thus, in recent years, the leading authors and the Civil Division of the *Comisión General de Codificación* have shown a distinct tendency to abandon this position and to propose that the law should acknowledge the notion of excessive onerousness, using rules with similar characteristics to those that are present in other European legal systems and international agreements.