

# VAN BAEEL & BELLIS



**The doctrine of change of  
circumstances (finally) codified in  
Belgian civil law**

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The economic recovery in the aftermath of the Covid-19 pandemic, the military conflict between Russia and Ukraine and the recent skyrocketing energy and gas prices are causing a significant increase of prices of finished products, semi-finished products and raw materials, as well as supply problems for certain of these products. In many ongoing contractual relationships, this drastically disrupts the contractual balance between the parties.

As for a very long period of time Belgian civil courts systematically rejected in civil law the doctrine of change of circumstances or hardship (*imprevisieeler/théorie de l'imprévision*) as a valid legal basis to revise a contract, contracting parties have been forced to use creative methods to remedy the disrupted balance in their contractual relationship. These creative methods did not always result in success. However, as from 1 January 2023, contracting parties (finally) will no longer have to resort to creative methods, but will be able to rely on Article 5.74 of the new Belgian Civil Code to invoke the doctrine of change of circumstances.

The present newsflash guides you through the codified doctrine of change of circumstances to ensure that, in the event of changed circumstances, the disrupted balance in your contractual relationship can at all times be successfully restored.

## 1. CHANGE OF CIRCUMSTANCES IN BELGIAN CIVIL LAW: ARTICLE 5.74 OF THE NEW BELGIAN CIVIL CODE

The principle remains unchanged: contracts are the law of the parties, and each party must perform its obligations even if their performance would have become more onerous, either because the cost of performance has increased or because the value of the consideration has decreased.

Nonetheless, as from 1 January 2023, Article 5.74 of the new Belgian Civil Code provides for a legislative exception to this principle. If a change of circumstances disrupts the contractual balance between the parties, the debtor can rely on this Article as a valid legal basis to revise the contract and restore the contractual balance.

In particular, the debtor may request the creditor to renegotiate their contract when the following five strict conditions are met:

i) *a change of circumstances makes the performance of the contract excessively onerous, to such an extent that its performance can no longer reasonably be required;*

This condition implies that the change of circumstances must not have been present at the time of the conclusion of the contract, but must occur during the performance of the contract. The nature of the change of circumstances is, however, irrelevant. Consequently, changes such as a pandemic (Covid-19), inflation, military conflict, etc., can constitute valid grounds for the application of this Article.

The debtor will nevertheless have to prove that the performance of the contract became excessively onerous to an extent that it can no longer reasonably be required, this either because the cost of performance has increased or because the value of the consideration has decreased. This is thus a subjective criterion, whereby a simple unbalance shall in any case not be sufficient.

ii) *the change of circumstances was unforeseeable at the time the contract was concluded;*

The fact whether the change was unforeseeable or not shall be assessed at the time of the conclusion of the contract. For this assessment, it is expected that the criterion of a prudent and diligent person in similar circumstances shall be applied.

This condition does not imply that the change must be completely non-existent before the conclusion of the contract: a progressive change can still be unforeseeable in case of spectacular evolution.

iii) *the change of circumstances is not imputable to the debtor;*

The change of circumstances may not be attributable to the debtor. Both the debtor and any auxiliary may not be negligent.

iv) *the debtor did not assume this risk; and*

The debtor may not have taken on the risk of a change of circumstances.

v) *neither the law nor the contract excludes this possibility.*

The parties may not have excluded in their contract the possibility to renegotiate their contract.

However, this condition also implies that the parties can deviate from this Article of supplementary law, both in terms of its principle and modalities of application. The parties may thus, for example, exclude any revision of the contract based on a change of circumstances, or, amend the aforementioned conditions for the debtor to request the creditor to renegotiate their contract.

When the conditions to invoke Article 5.74 of the new Belgian Civil Code are met, the debtor may request the creditor to renegotiate their contract. During these (re)negotiations, the parties must continue to perform their obligations of the contract.

If the creditor unlawfully rejects the request of the debtor to renegotiate the contract, or, when the renegotiations do not succeed within a reasonable period of time, either party may initiate judicial proceedings before the competent court. The court, ruling as in summary proceedings, can subsequently:

- amend the contract to bring it in line with what the parties would reasonably have agreed at the time of the conclusion of the contract if they had taken into account the change of circumstances; or
- terminate the contract, in whole or in part, on a date that may not precede the change of circumstances and in accordance with additional rules determined by the court.

## **2. CHANGE OF CIRCUMSTANCES IN THE CONTEXT OF PUBLIC PROCUREMENT AND INTERNATIONAL SALES OF GOODS**

For the sake of completeness, we note that (the doctrine of) change of circumstances was already codified in the context of public procurement and in the context of international sales of goods. Public procurement

If a change of circumstances disrupts the contractual balance between the parties in the context of [public contracts](#) entered into following a [public procurement procedure](#), the contractor can in particular resort to the review clause relating to unforeseeable circumstances as provided for by Article 38/9 of the Royal Decree of 14 January 2013 laying down the general rules on the enforcement of public contracts (**RD GRE**).

In addition, a contractor could invoke (i) price revision clauses based on Article 38/7 RD GRE, (ii) a de minimis review of the public contract by virtue of Article 38/4 of the RD GRE, or, (iii) a non-substantial modification of the public contract by virtue of Articles 38/5-6 of the RD GRE. In particular for contracting

authorities responsible for the execution of a public contract, a review clause based on Article 38/10 of the RD GRE could also provide a solution to review the public contract if the contractual balance of this contract is disrupted in favor of the contractor for any reason beyond the control of the contracting authority.

When the situation so requires, both successful tenderers and contracting authorities could invoke these review clauses to renegotiate public contracts or even to enforce a review of these contracts before the competent courts. However, each review clause has its own conditions that must be fulfilled, and, in addition, there are general conditions that must be strictly respected (e.g. informing the contracting authority in writing and submitting a substantiated justification within the prescribed time-limits) in order to successfully invoke these review clauses. Moreover, parties may deviate from some of these review clauses provided that a contractual counterpart is provided. Each public contractual relationship thus demands a case-by-case analysis.

Nevertheless, also in this context the parties may not slow down, interrupt or not resume the performance of the public contract during ongoing discussions regarding the application of certain review clauses.

### 3. INTERNATIONAL SALES OF GOODS

The [Vienna Convention on the International Sales of Goods \(CISG\)](#) provides in its Article 79 for a broad definition of force majeure. It states that *“a party is not liable for a failure to perform if he provides that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”* Force majeure under the CISG is thus interpreted more broadly than force majeure under Belgian law and is considered to also include the doctrine of change of circumstances/hardship. Therefore, if the supplier and the customer are located in different countries which have ratified the CISG (e.g., Belgium, Brazil, Canada, Japan, United States), Article 79 of the CISG could be invoked as the legal basis for a request for a contract revision by the supplier.

However, parties are free to exclude in their contract or in their general terms and conditions the application of the CISG or to derogate from any provision of the CISG. In practice, supply contracts and general terms and conditions quite often exclude the applicability of the CISG. This will have to be checked on a case-by-case basis.

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## How can VBB assist? VBB would be pleased to assist you with:

- Conducting an analysis of your situation if a change of circumstances disrupts the contractual balance in your contractual relationship;
- Providing a solution to revise your contract and restore its contractual balance, both in civil law as in the context of public procurement and international sales of goods;
- Drafting clauses to incorporate the doctrine of changes of circumstances for future contracts or as addenda to existing contracts; and
- Any other queries you may have regarding the above.

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