UNFORESEEABILITY THEORY

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When one makes a promise, one has to keep it. But what can a contracting party do if circumstances change and his obligations suddenly become excessively onerous? With the introduction of article 5.74 of the Civil Code (hereinafter: CC), the legislator grants the concept of 'change of circumstances' or the so-called unforeseeability theory a general legal basis for the first time.

Traditional view: rejection of the unforeseeability theory in Belgium

In several European countries (including the Netherlands, Italy, Greece, Portugal, Germany and Switzerland), the unforeseeability theory has been accepted for some time, and this on the basis of the obligation to execute contracts in good faith.

Belgium was therefore somewhat isolated – along with France – in rejecting the unforeseeability theory.

In Belgium, the unforeseeability theory was initially not accepted in the old Civil Code (hereinafter: old CC), case law and legal doctrine. This under the argument that the binding force of the contract creates the legitimate expectation for the party that once a contract has been concluded, its contracting party will fulfil the agreed obligations (art. 1134, paragraph 1 old CC).

New contract law: general basis in article 5.74 CC

With the introduction of article 5.74 CC, the legislator grants a general legal basis for the unforeseeability theory for the first time.

The aforementioned article first and foremost emphasizes that agreements create binding obligations between parties and that the unforeseeability theory only applies in exceptional situations. Thus, in principle, the parties must honor their obligations even when performance has become more onerous because of an increased cost of performance or a reduced value of the consideration.

Exceptionally, however, a party may ask its contracting party to renegotiate the contract, with a view to modification or termination. To this end, five conditions listed in article 5.74, second paragraph CC must be met. However, in the course of the renegotiation and during any subsequent judicial phase, the parties must

continue to fulfil their obligations.

- Condition 1: Change of circumstances makes performance of contract excessively onerous

Firstly, circumstances must change after the contract is concluded to such an extent that the performance of the contract becomes excessively onerous. The change must create such an distortion of the contractual balance between the contracting parties that performance of the contract can no longer be reasonably demanded.

A war, financial crisis or pandemic that disrupts the normal economic relations can certainly qualify as excessively aggravating circumstances in this respect.

This condition also shows the difference with force majeure. For a debtor to free himself from his contractual obligations on the basis of force majeure, he must prove that the performance of the contract has actually become absolutely impossible. If the debtor can perform his obligations in an alternative (tougher) way, he cannot invoke force majeure. After all, then the performance has not become impossible. However, the debtor may be able to invoke the unforeseeability theory.

- Condition 2: Change was unforeseeable when the contract was concluded

Secondly, the change of circumstances must have been unforeseeable at the time the contract was concluded. In B2C (Business to Consumer) relationships, case law is likely to be slightly more lenient towards consumers, as the terms of a contract are regularly imposed on consumers. For companies, the bar of this second condition will probably be higher, as they are deemed to know or at least be able to assess the risks associated with their activity better than their (weaker) contracting party.

- Condition 3: Change is not imputable to contracting party

Thirdly, the change of circumstances must not be imputable to the contracting party invoking the unforeseeability theory.

- Condition 4: Contracting party has not accepted the risk

Fourth, the contracting party may not have accepted the risk of the change at hand. They could accept the risk either explicitly (e.g. waiver) or implicitly (e.g. arising from the nature of the contract).

- Condition 5: Recourse to the unforeseeability theory is not excluded by law or contract

Article 5.74 CC is of non-peremptory law, both in terms of principle and modalities of application (art. 5.74, second paragraph, 5° CC).

Thus, on the one hand, special statutory provisions may deviate from it, for example the equitable rectification from article 1474/1 CC. On the other hand, parties can also contractually adjust or even exclude an appeal to the unforeseeability theory. Parties can decide among themselves whether they wish to use it more easily or not at all.

The parties can also apply to the judge in summary proceedings. The judge can then reform the contract or terminate it in whole or in part. If the court reforms the contract, the judge will bring the contract in line with what the parties would reasonably have agreed at the time of contract conclusion if they had taken the change of circumstances into account (art. 5.74, fourth paragraph CC).

Thus, unlike force majeure, the unforeseeability theory focuses primarily on the continuation of the contract.

Entry into force new contract law

Article 5.74 CC entered into force on 1 January 2023, six months after its publication. The regime applies to contracts concluded after this entry into force.

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