CHANGING CIRCUMSTANCES AND CONTRACTS – FAIRNESS IN ACTION?

I Introduction

In my previous article entitled ´Force majeure in the sale of goods and Covid-19 logistics – legal and commercial implications´ published on 7 May 2020 at the University of Turku website[1], I left issues relating to the impact of changing circumstances on contractual relationships, nowaydays known as hardship, to be covered in a further study. The objective of that article was to portray the legal and commercial consequences of impediments beyond a party´s control, which prevent a party from performing its contractual obligations. With the prerequisites imposed by law or contractual provisions such as the ICC Model Force Majeure Clause(s) 2020, a party´s obligations are suspended and the affected party is relieved from some or all contractual remedies otherwise applicable to the other party.

The concepts of ´force majeure´ and ´hardship´ have established themselves in contract practice and legal literature although there exists a cacophony of terminology which will also be reflected in this text. For simplification, the concept of force majeure stems from Articles 1147 and 1148 of the French *Code Civil* but has been adopted in legislations and contract practice universally although with different meanings. The notion of economic hardship grew from the idea of economic impossibility perhaps in the 1950s,[2] but became much more flexible concept as it builds on the economic equilibrium of the contract rather than speculating on impossibility. ´Hardship clauses´ became increasingly used after the oil crisis started in the aftermath of the Yom Kippur War in 1973.[3]

Force majeure events impede performance of individual contractual obligations such as delivery of the goods under a contract of sale. The impediment is usually absolute so that the performance of the obligation in question is impossible. Should the performance simply become more onerous for a party, it is appropriate to consider the situation as hardship.

The division is not universal, however. Practical necessities after World War I in Germany including hyperinflation led to some judges and legal scholars started to apply the German equivalent of the French force majeure, *Unmöglichkeit* (§ 275 *Bürgerliches Gesetzbuch*, BGB) meaning impossibility to also cover ´economic impossibility´. There were obviously critics, who thought this eroded the legal certainty.

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[1] Link to the article https://sites.utu.fi/covid-supply-chains/dr-lauri-railas-force-majeure-in-the-sale-of-goods-and-covid-19-logistics-legal-and-commercial-implications/.

[2] Clive M. Schmitthoff, Frustration of International Contracts of Sake in English and Comparative Law, in Some Problems on Non-Performance and Force Majeure in International Contracts of Sale, *Studia iuridica helsingiensia* 2, Helsinki 1961 (later Schmitthoff, Frustration), p. 147; Knut Rodhe, Adjustment of contracts on account of changed conditions, *Studia iuridica stockholmiensia* 8, Stockholm 1959, p. 169.

[3] Fontaine, Marcel, Les Clauses de Hardship - Aménagement Conventionnel de l'Imprévision dans les Contrats à Long Terme, Droit et pratique du commerce international 1976, at pp. 51-88. Clive M. Schmitthoff, Hardship and intervener clauses, Journal of Business Law 1980, p. 82.

Economic impossibility was also described by the word *Unzumutbarkeit* (unreasonableness). Those advocating the broad interpretation of the concept of impossibility, the debtor cannot be forced to efforts or sacrifices which are beyond what parties reasonably envisaged in good faith at the time of the conclusion of the contract. This doctrine is also called the *Opfergrenze* (sacrifice limit). A contracting party acts contrary to the basic good faith obligations if he demands the performance of the contract is such circumstances.[4] Good faith obligations are based on §§ 157 and 242 BGB (*Leistung nach Treu und Glauben*). Good faith in observing reasonability were also deployed to adjust contracts having become excessively onerous for a party.

German legal discussions were followed in the Nordic countries, Denmark, Finland, Norway and Sweden. The Nordic Sale of Goods Acts make it possible to invoke an economic force majeure. Section 23 para 1 of the Finnish Sale of Goods Act provides as follows:

> *"The buyer is entitled to hold to the contract and to require its performance. The seller is, nevertheless, not obliged to perform the contract if there is an impediment that he cannot overcome or if the performance would require sacrifices that are disproportionate to the buyer's interest in performance by the seller."*

One can notice that the notion "sacrifices that are disproportionate to the buyer´s interest in performance by the seller" of this Finnish provision clearly builds on the concept of sacrifice limit. Why could the debtor not claim disproportionate sacrifices? The obvious answer must be sought in the observance of good faith and reasonability, which in Finland and other Nordic Countries follow from Sections 36 of the pan-Nordic Contracts Acts. This provision is also instrumental for tackling supervening circumstances as will be demonstrated in section III, *infra*.

One can also notice that the provision in the Sale of Goods Act does not contain any mention of foreseeability. Foreseeability is linked to the question, whether the party for whom the performance would require disproportionate sacrifices actually assumed the commercial risk of performance in changing circumstances.

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[4] See A.H. Puelinckx, Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances, A Comparative study in English, French, German and Japanese Law, TransLex, University of Cologne, at p. 50. Available at https://www.trans-lex.org/128100/_/puelinckx-ah-frustration-hardship-force-majeure-impr%C3%A9vision-wegfall-der-gesch%C3%A4ftsgrundlage-unm%C3%B6glichkeit-changed-circumstances-3-jintl-arb-1986-no-2-at-47-et-seq/.

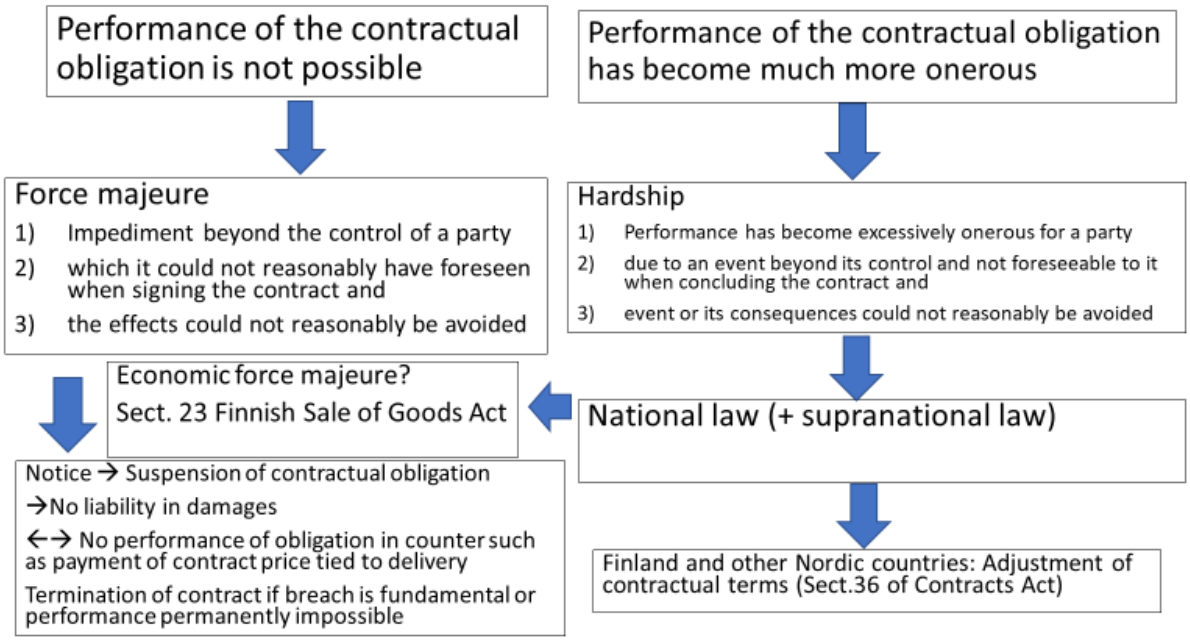

Figure 1: The two alternative paths to follow in the case of an event beyond the control of the parties. Economic force majeure such as that contained in the Nordic sales laws including the Finnish Sale of Goods Act establishes a bridge between the two approaches

Although hardship may well affect the performance of an obligation of an individual contract, especially during the Covid-19 pandemic, it is particularly important in the context of long term contracts. ´An event beyond the control of a party´ is often made of supervening circumstances, which make the performance of the contract ´excessively onerous´. The key question is again whether the parties could get a relief from their obligations and how this could happen.

We may again make reference to the concept of frustration of contracts in Anglo-American law. As stated in the previous article, frustration kills the contract and discharges both parties automatically. One approach to new circusmstances, if they are allowed to have an impact on contracts, would be similar to frustration.[5] The parties would not be bound by a contract the conclusion of which was done in completely different circumstances.

Another approach is to allow the contract to be adjusted to the new circumstances. In this approach, a contract is based on circumstances that establish an equilibrium. The parties enter into an agreement based on economic calculations which constitute factual preconditions for a party being bound by the contract. Should the circumstances change to the effect that the equilibrium of the contract has been lost the contract is adjusted in order to restore the equilibium. This means that the economic conditions are changed for the benefit of one or more parties and to the detriment of others.

[5] We shall study the concept of frustration in greater detail in section II, *infra*.

The impact of changing circumstances on contracts is quite widely covered in legal literature. Although some national laws contain express provisions on it, hardship has become an integral part of the various compilations of principles of contract law drawn up by law professors, most notably the Unidroit Principles of International Commercial Contracts, the latest update of which is from 2016. In this way, regulating changing circumstances may even be part of *lex mercatoria*. Although contract laws are generally more opposed to than in favour of interfering with the sanctity of contracts, they leave it to the parties of contracts to regulate their relationships. In this way, party autonomy is normally respected in relationships where the parties are bargaining at arm´s length.

We can see a gradual development in favour of admitting changing circumstances to reshape contracts shaken by adverse developments such as the World Wars, the Oil Crisis of the 1970s or, eventually, the Covid-19 pandemic. However, this historical development, despite having longer roots, has taken place during approximately one century only and we do not know the future developments yet.

II The relative sanctity of contracts

The history of the sanctity of contracts is fascinating as it is even stated to have divine roots. Both the Bible and the Qur´an contain wordings which may be interpreted as requirements to respect one´s obligations, also contractual ones.[6] Socioantropologists may interpret the need for respecting contracts in lay terms but share the notion of its importance in maintaining societies. Sanctity of contracts became also a cornerstone of Roman Law, which stated ”*pacta sunt servanda ex fide bona*” meaning ”agreements must be fulfilled in good faith”.

A limitation to this contractual sanctity was elaborated by the canonists of the twelfh and thirteenh century. Canon law was and is applied within the Catholic and Orthodox Churches governing mostly ecclesiastical matters but had a contract law as well, which was based on Roman Law. The canonists of the relevant period in the Catholic Church also shared the notion *pacta sunt servanda* but developed a further view to long-term contracts. According to this view, contracts providing successive performances over a period of time are subject to the condition that the circumstances in which the contract applies will remain the same. *Pacta sunt servanda* was thereby, if not superseded, at least parallelled by the doctrine of *clausula rebus sic stantibus* (the last three words meaning ”things thus standing”).[7] *Rebus sic stantibus* was first applied by ecclesiastical courts but was later adopted by other courts and became widely accepted.[8]

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[6] Aziz T Saliba, *Rebus sic stantibus*: A Comparative Survey, Comparative Law Europe, Volume 8, Number 3 (September 2001), paras 5-7.
Available at http://www5.austlii.edu.au/au/journals/MurdochUeJlLaw/2001/18.html.

[7] In this article, only the three last words are used to denote the principle for the sake of simplicity. The word *clausula* may refer to an express or implied provision in a contract, treaty or statute.

[8] Saliba, op.cit. para 11.

However, the freedom of contract and liberalism marked the demise of *rebus sic stantibus*. Its popularity started to wane under the commercial interests already in the 15th century as it produced transactional insecurity. The two doctrines nevertheless parallelled into the modern period until the end of the 18th century. The adversary, *pacta sunt servanda*, was in line with the *laissez faire* ideology of liberalism. It secured the predictability of economic relationships and investments.[9] Against this background it was obvious that the European civil law compilations such as the French Code Civil 1804 did not contain mentions of *rebus sic stantibus*. At the same time, the so called Law Merchant (*lex mercatoria*) became part of English common law ("the law of the Land"). English law of the era did not embrace *rebus sic stantibus* either.[10] So it was discarded into the ash heap of history save in public international law.

It took over one hundred years and the outbreak of the World War I until the doctrine of *rebus sic stantibus* was again discovered and recycled. In the calamity of the world war, European lawyers needed a theoretical justification for excusing contractors for which performance had become excessively onerous. The Pandora´s Box had been opened and a century has passed now with the doctrine having become applied whenever major shakeups such as the Oil Crisis of the 1970s have forced to look for justification for not respecting contractual obligations. The doctrine first found its way into the case law of national courts, then into national legislation. As freedom of contract has prevailed, the parties adopted contract clauses to tackle supervening circumstances. As soon as the movement to declare the emergence of the new *lex mercatoria* became active, and transnational contract law was recorded by law professors into a set of principles, tackling changing circumstances became an integral part of these compilations.

III Changing circumstances in national laws and case law

This Chapter provides a look into some main legal systems in Europe, which have had a fundamental impact on the legal cultures of the world, first through colonialism and then through voluntary reception of legal principles, also becoming *lex mercatoria*. The latest noticeable impact of the European civil codes was the adoption of the brand new Civil Code of the People´s Republic of China at the turn of May/june 2020. The Chinese Civil Code used the German BGB and, to a lesse extent, the French Code Civil as a model.[11]

Although the history of taking account of supervening circumstances usually concentrates on the main traditional jurisdictions of Europe, it is worth mentioning that the 1933 Code of Obligations of **Poland**,

[9] Ibid. para 13.

[10] *Pacta sunt servanda* was confirmed by English courts in 1647 in the case *Paradine v Jane*.

[11] According to Liu Bin, Associate Professor, China University of Political Science and Law at the virtual meeting of the ICC Commercial Law and Practice (CLP) Commission, 8 June 2020.

which was later repealed, was probably the first law[12] to provide for adjustment on the basis of changed circumstances.[13]

Italy started to apply *rebus sic stantibus* after the First World War through transitional legislation allowing the use of *force majeure* to cases, in which the war had made the performance extremely onerous to one party. Some courts continued this practice although it was rejected by appellate courts. On top of the Nordic countries, this is another example of economic *force majeure*. In 1942, Italy became the second country to include *rebus sic stantibus* in its legislation. Article 1467 of the Italian Codice Civile provided that in contracts for continuous, periodic or deferred performance in which extraordinary and unforeseeable events make the parformance exceedingly burdensome, the party responsible for the performance can terminate the contract. Termination cannot take place if the supervening onerousness is part of the normal risk of the contract. The other party, who is not aggrieved by the supervening circumstances, can avoid termination by offering to adjust the contract.[14]

We can note that the Codice Civile does not recognize the possibility for courts to adjust contracts. It is not known to the author, whether Italian courts have found a way to follow the developments in the rest of the Continental Europe.

Germany had adopted its civil code Bürgerliches Gesetzbuch (BGB) at the turn of the 20th century. Like its contemporaries, BGB did not contain any provision relating to changing circumstances. However, World War I led to hyperinflation. One of the illustrative examples of instability was that the value of the dish in a restaurant sometimes changed between placing the order and the arrival of the bill.

As was described earlier, German courts extended the statutory provisions on impossibility (BGB § 275) to economic impossibility. But there was another path to the same solution, which gained ground and finally replaced economic impossibility. The notion of good faith was as contained in §§ 157 and 242 BGB was increasingly invoked. Parties were allowed to terminate contracts which they could not perform

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[12] Puelickx, op.cit. p. 54.

[13] Article 269 of the Code provided as follows:

"When, as a result of exceptional events, *e.g.* wars, epidemics, total loss of harvest and other natural catastrophes, the execution of the obligation will encounter excessive difficulties or would threaten one of the parties with enormous loss which the parties were not able to foresee at the time of the conclusion of the contract, the judge may, if he thinks it necessary, in accordance with the principle of good faith and after he has taken into consideration the interest of the two parties, determine the way in which the contract will be executed, and the amount of the importance of the obligation, or he may even decide to terminate the contract."

[14] Saliba, op.cit. paras 26-29.

without a serious risk of bankruptcy. The next step was to mofify contracts and thus to apply *rebus sic stantibus*.[15]

In 1922, the German *Reichsgericht* adopted a doctrine called *Wegfall der Geschäftsgrundlage* which can be translated as the disappearance of the foundation of the transaction. This had been developed by German civilist Paul *Oertmann*.[16] The court initially defined the contractual foundation narrowly as a belief as to the existence of certain essential circumstances held by the parties and apparent at the moment of the conclusion of the contract.[17]

German history of the 20th century included events which gave *Reichsgericht* and its successor called *Bundesgerichtshof* ample opportunity to apply and develop the doctrine. The fall of the Third Reich, the blockage of Berlin in 1948 and the reunification of the two Germanies serve as good examples. However, the doctrine was applied also in relatively trivial situations such as the existence of a building licence to a construction contract.[18]

The application of the *Wegfall der Geschäftsgrundlage* requires a change of circumstances such that, with the awareness of its possibility, the parties would not have concluded the contract and an equitable element meaning that it would not be equitable for a party (in line with his good faith obligations) to deny the other party any amendment of the contract to remedy the situation.[19] Thus, the doctrine essentially builds on the good faith obligations of the parties. The circumstances at the time of the conclusion of the contract constitute the foundation on which the contract is built. However, if only one party has assumed a commercial risk, this party could not invoke the doctrine.

A doctrine related to *Wegfall der Geschäftsgrundlage* is *ergändenzende Vertragsauslesung* (completive interpretation). Following this doctrine, the court completes the contract by gap-filling. In doing so, the court may apply the test of reasonableness to determine the hypothetical intentions of the parties in concluding the contract.[20] The relationship and distinction between these two doctines has been the subject of controversies by scholars.[21]

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[15] Tobias Lutzi, Introducing Imprévision into French Contract Law, Lessons to be Learned from the German Codification in 2002. Draft, Ius Commune Workshop on Contract Law 2015, at p. 10. The text has been published as amended in 2016 Introducing Imprévision into French Contract Law A Paradigm Shift in Comparative Perspective in Styns/Jansen (eds), The French Contract Law Reform: a Source of Inspiration? (Intersentia 2016) 89–112.

[16] Paul Oertmann, Die Geschäftsgrundlage, Ein neuer Rechtsbegriff, 1921.

[17] Lutzi, op.cit. p. 10.

[18] Ibid.

[19] Ibid.

[20] Markesinis, Unberath, Johnston, The German Law on Contract, A Comparative Treatise, 2006, pp. 140-141.

[21] Puelinckx, op.cit. p. 61.

The German case law of the 1920s and 1930s provided inspiration for Italian legislator in drafting Arts. 1467 and 1468 of the *Codice Civile* as well as Art 6.258 of the Dutch *Burgerlijk Wetboek*.[22] However, Italy did not include the possibility of an adjustment of contracts when passing its legislation in 1943.

When Germany revised the BGB and the law on obligations, they also codified the *Wegfall* doctrine in order to give it a statutory basis without touching the content.[23] The resulting BGB § 313 is therefore the German codification of the *rebus sic stantibus* principle. BGB § 313 states as follows (translation of the German Ministry of Justice):

> (1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.
> (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.
> (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.

The wording of this provision is seen as a restatement of former case law. However, a court cannot apply this provision *ex officio* but the party wanting to terminate the contract or have it adapted to the new circumstances must invoke it.[24] The text of § 313 BGB does not contain an obligation on the parties to renegotiate prior to seeking termination or adaptation. However, *Bundesgerichtshof* has found that § 313 BGB, where applicable, obliges a party to renegotiate, failing which the contract may be terminated even if the contract could otherwise be modified, and the party seeking renegotiation in vain may be awarded damages.[25]

Generally, German courts have exercised restraint in applying *the Wegfall* doctrine and this has not been considered to undermine legal certainty although the case law where it has been applied.[26] German courts do not consider normal inflation to justify invoking the doctrine and consequent adaptation or

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[22] Lutzi, op.cit. p. 11 and the sources contained in n. 123.

[23] Lutzi, op.cit. p. 12.

[24] Ibid.

[25] BGH 30 Sept 2011, Lutzi, op.cit. p. 13

[26] Lutzi op.cit., p. 12.

termination. However, a substantial increase (60 %) in production costs has been considered sufficient to trigger it.

In **Switzerland**, Article 373 of the Code of Obligations allows contractors of works to raise the price where extraordinary circumstances, which could not be foreseen, or which were excluded by the basis upon which both parties entered into contract, prevent or unduly impede the completion of the works, the court may, upon its discretion, increase the price or terminate the contract. After World War I, Swiss courts started to apply this provision analogically beyond the original scope of the provision, which effectively made *rebus sic stantibus* a general rule of Swiss law. The amended Swiss Code of Obligations introduced the German Wegfall der Geschäftsgrundlage doctrine in Article 24(4).

In the **Nordic countries** Denmark, Finland, Norway and Sweden[27] there has been legal writings on the treatment of changing circumstances already since the 1920s. The prevailing theories were the doctrines of impossibility, which represents a force majeure approach, and precondition (*Voraussetzung*), which follows from the concept of the 19th century German pandectist[28] Bernhard Windscheid. The Nordic countries especially Denmark, Norway and Sweden, built on the doctrine of economic impossibility but this was gradually replaced by the notion of hardship.[29] According to the theory of precondition having gained ground in Continental Europe, contracts are based on certain preconditions, the non-occurrence of which makes them void or voidable.[30] It is not uncommon to insert into contracts conditions precedent or subsequent, which affect their validy. For example, contracts for acquisition of companies include ´warranties´ and loan agreements ´covenants´ to this effect. The theory of precondition in a way implies such provisions. Otherwise, the theory of preconditions has given way to considerations of equitability.[31]

The four Nordic countries have had similar Contracts Acts since the 1920s and these were amended in the early 1980s by adding Section 36 providing a possibility of equitability or fairness test to contracts. Section 36 of the Finnish Contracts Act (228/1929) as provided for in Act 956/1982 states as follows:

> ” (1) If a contract term is unfair or its application would lead to an unfair result, the term may be adjusted or set aside. In determining what is unfair, regard shall be had to the entire contents of the contract, the positions of the parties, the circumstances prevailing at and after the conclusion of the contract, and to other factors.

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[27] Iceland is also a Nordic country, but is seldom referred to in commercial law treatises as it does not take part into the legislative co-operation to the same extent that the four bigger Nordic countries.

[28] Pandectists were a legal school in Germany in the 19th century to systemize civil law that preceded the adoption of the Bürgerliches Gesetzbuch.

[29] Knut Rodhe, op.cit. p. 169, Schmitthoff, Frustration, p. 147.

[30] See Bert Lehrberg, Förutsättningsläran, 1989, skrifterfrån Juridiska Fakulteten i Uppsala 23.

[31] As late as in 2012, the Finnish Supreme Court was considered by some commentators to have applied the preconditions theory in case KKO 21012:1, although the Court did not refer to it expressly. In other Nordic countries, courts may quote legal literature in their judgments more often than in Finland.

> (2) If a term referred to in paragraph (1) is such that it would be unfair to enforce the rest of the contract after the adjustment of the term, the rest of the contract may also be adjusted or declared terminated.
> (3) A provision relating to the amount of consideration shall also be deemed a contract term.
> (4) The provisions of the Consumer Protection Act (38/1978) apply to the adjustment of consumer contracts. (1260/1994)"

The provisions of Section 36 thus make it possible to take into account the circumstances prevailing at and after the conclusion of the contract. The provisions have been designed to constitute a general clause for a variety of situations and not introducing *rebus sic stantibus* into the Nordic laws. It can nevertheless be applied for such purposes. It can be noted that the foreseeability of changed circumstances is not mentioned in the text. However, the courts have wide powers to determine the fairness or equitability of a provision.

Section 36 of the Contract Acts has been in force almost forty years by now and has not been applied extensively to set aside or adjust contract terms.[32] The reason is that legal certainty has been the priority for courts.

In **France**, *rebus sic stantibus* was renamed *imprévision* (unforeseeability). In a case between the gas company of the City of Bordeaux and the City itself after World War I, the gas company requested an increase of the contractual rate due to soaring coal prices. The French administrative court *Conseil d´État* held that the increased costs exceeded the outer limits of the increases that could have possibly been contemplated by the parties when the contract was concluded. The court envisioned the possibility to adjust the terms of the contract should the parties fail to negotiate an adjustment of the price.[33]

The French *imprévision* was for a long time confined to public contracts only and was widely regarded as an escape for public-owned institutions. Other contracts were subject to Article 1134 of *Code Civil* which requires contracts to be executed in good faith. This article has three paragraphs and the third paragraph on good faith was considered subordinate to the two previous paragraphs following the principle of *pacta sunt servanda*.[34] The requirement of good faith was therefore not applied to constitute a ground for adjustment like in Germany.[35]

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[32] Cases in which adjustment was denied during the economically turbulent times in the 1990s: KKO 1992:50 and KKO 1994:140 in Finland as well as NJA 1994 p. 359 in Sweden.

[33] Saliba, op.cit. paras 19-25.

[34] The *Canal de Craponne* case from 1876 was a leading precedent. see Lutzi, op.cit. p. 5.

[35] There were a couple of exceptions in French case law, see Lutzi, op.cit. p. 7 (n. 59).

The revision of the BGB was followed in France in 2016, almost a hundred years after the introduction of the concept of *imprévision*, the *Code Civil* was amended by Article 1195 which brought the application of the concept into the French civil law as a whole.[36] The provision reads as follows:

> *"Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l'exécution excessivement onéreuse pour une partie qui n'avait pas accepté d'en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.*
>
> *En cas de refus ou d'échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu'elles déterminent, ou demander d'un commun accord au juge de procéder à son adaptation. A défaut d'accord dans un délai raisonnable, le juge peut, à la demande d'une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu'il fixe."*

This provision lays down the rules on how changing circumstances, which make the execution of a contract excessively onerous for a party which has not accepted the risk therefor, the party in question can request the contracting party to renegotiate the terms of the contract, but must perform his obligations during the renegotiation. If the other party refuses to negotiate, or the parties fail to reach agreement during the negotiations, the parties can terminate the contract at a date and on the conditions they decide. The parties may, by a common agreement, as a court to adapt the contract. Should the parties not reach an agreement in a reasonable time, a court may, at the request of one party, revise or adapt the contract, or terminate it at the date on the conditions fixed by the court.

This provision is very similar to the hardship provision of the Unidroit Principles for International Commercial Contracts. *Lex mercatoria* and examples of other European countries has paved the way for adjusting contracts on the basis of *imprévision*.

Under **English law**, as has been stated, contracts may be frustrated. English common law did not know force majeure at the outset. The starting point was ´an absolute contract´ with no excuses.[37] Frustration of contracts law started from physical impossibility[38], was extended to legal impossibility[39] and finally to fundamental change in circumstances making the original common design of the parties no longer attainable although the contract was still capable of performance.[40] Originally, English courts referred to ´supervening impossibility´, but began to use the concept of frustration instead. The two approaches still exist formally.

English courts have applied the doctrine of frustration where supervening circumstances had rendered the performance more burdensome to a degree that it would be fundamentally different from what was

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[37] *Paradine v. Jane* (1647) Aleyn 26.

[38] *Taylor v. Caldwell* (1863) 3 B & S 826.

[39] *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] A.C. 32.

[40] *Krell v. Henry* [1903] 2 KB 740 (CA). See Schmitthoff, Frustration, pp. 131-133.

originally agreed.[41] Frustration as regulated by English common law did not, however, provide much guidance as to what happens to the contractual performance prior to the moment of frustration. In 1943, this matter was partly regulated by the Law Reform (Frustrated Contracts) Act. If the high threshold for frustration is fulfilled, the contract is dead, both parties are automatically discharged, without any intervention of the parties or the courts, and the 1943 Act is applied to the respective obligation of the parties. No modification by courts is possible.

Nevertheless, force majeure clauses made their way also into the contracts in the English legal culture apparently with the aim to preserve the contracts from falling away. The same problem apparently made hardship clauses necessary as the limitations of regulating the consequences of frustration including a possible adjustment of the contract required the use of hardship clauses.[42]

In the **United States**, section 2-615 of the Uniform Commercial Code, non-performance may be excused if performance has been made impracticable by a contingency, the non-occurrence of which was a basic assumption of the contract. A ´basic assumption´ resembles the ´preconditions´ theory of Windscheid or the *Wegfall der Geschäftsgrundlage* approach of German law. English law on frustration applied a similar concept of ´foundation of contract´.

IV Changing circumstances and the *lex mercatoria*

As national laws may lag behind developments in contract law, parties, courts and arbitrators may turn their eyes to transnational law, which is commonly called the *lex mercatoria*. The movement to recognize and define the emergence of the new *lex mercatoria* began some sixty years ago at the beginning of the 1960´s by a handful of legal scholars such as *Berthold Goldman*[43] and *Clive M. Schmitthoff*[44]. The theory has been advocated and opposed. National laws have not lost their meaning as the underlying legal framework. However, there is ample justification to consider a movement to a new *lex mercatoria* to exist.

The relative breakthrough of the United Nations Convention on Contracts for the International Sale of Goods (CISG) marks a milestone alhough the CISG is not conceptually part of the *lex mercatoria* for many commentators as it is implemented through national laws.

International contractual instruments such as the Incoterms® 2020 and the Uniform Customs and Practice for Documentary Credits UCP 600 of the International Chamber of Commerce regularly take precedence

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[41] *Metropolitan Water Board* v. *Dick Herr* [1918] AC 119 (HL)

[42] See Puelinckx, op.cit. p. 52.

[43] Berthold Goldman, Frontières du droit et "lex mercatoria", Archives de philosophie du droit No 9, 1964, pp. 177-192.

[44] Clive M. Schmitthoff, The Law of International Trade, its Growth, Formulation and Operation, in Schmitthoff (Ed.), The Sources of Law of International Trade, 1964, pp. 3-30.

to national laws where such exist in the field. The reason is that national laws allow a considerable freedom of contract.

The development by law professors of contract law principles, namely the UNIDROIT Principles of International Commercial Contracts 1994, 2004, 2010 and 2016,[45] the Principles of European Contract Law (PECL) 1997, 1999 and 2003[46] and the draft Common Frame of Reference (DCFR) 2008,[47] represent such a development. The PECL and the DCFR are European instruments like the Commission proposal for a Common European Sales Law (CESL) 2013.[48] These principles may be incorporated into contracts by the parties as contractual provisions or, more ambitiously, naming them the ´applicable law´ thereby substituting national laws. Additionally, however, courts[49] and arbitrators may refer to them in their decisions. It is generally thought that arbitrators may base their award on the *lex mercatoria* when expressly authorised by the parties or the contract, or where the parties have not selected any applicable law to govern their relationship.[50]

Article 6.2.3 of the UNIDROIT Principles, Article 6:111 PECL, Part III, Chapter 1, Section 110 DCFR, as well as Article 89 CESL all allow the courts to amend or terminate a contract if performance becomes so onerous that it would be manifestly unjust to hold the debtor to an obligation. All these instruments contain an express requirement for the parties to attempt to negotiate first at the initiative of one party. The DCFR does not use the concept of hardship.

The UNIDROIT Principles were the first of these sets of principles to be published to include a hardship clause. It has also gained most acceptance. The Unidroit Principles are referred to in model contracts and in arbitral awards.[51] Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles reads as follows:

6.2.1 Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions of hardship.

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[45] The 2016 Principles are published at https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf

[46] Published at https://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/portrait.pdf

[47] Published at https://www.law.kuleuven.be/personal/mstorme/2009_02_DCFR_OutlineEdition.pdf

[48] COM (2011) 635 final, at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52011PC0635&from=EN

[49] For example, the Finnish Supreme Court referred to the DCFR 2008 in assessing the appropriateness of a termination period in a long-term contract, see KKO 2018:37.

[50] Ole Lando, Lex Mercatoria in International Commercial Arbitration, 34 International and Commercial Law Quarterly, October 1985, pp. 747-768.

[51] See ICC Court of Arbitration Bulletin Volume 10 No. 2 -1999, Special Supplements 2002 and 2005.

6.2.2 There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party´s performance has increased or because the value of the performance of a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
(c) the events are beyond the control of the disadvantaged party; and
(d) the risk of the events was not assumed by the disadvantaged party.

6.2.3 (1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
(3) Upon failure to reach agreement within a reasonable time either party may resort to court.[52]
(4) If the court finds hardship, it may, if reasonable,

- terminate the contract at a date and on terms to be fixed, or
- adapt the contract with a view to restoring its equilibrium.

The CISG is silent on hardship. However, it is possible to construe Article 79 to cover ´economic force majeure´ at least in those jurisdictions, which have a positive attitude towards this possibility like the Nordic countries in their domestic sales laws. The preamble of the CISG refers, as a gap filling method, to the principles on which the Convention is based. In the extreme, one could argue that this could incorporate the UNIDROIT Principles.

Furthermore, as many national laws in countries which have taken the CISG part of their legislation, there is a question whether hardship constitutes a question of validity being excluded from the scope of the CISG, in which case the national laws on exceptional circumstances would apply. Another possibility is to consider hardship as a question of performance to which Article 79 on force majeure applies, which could exclude hardship where economic force majeure were not allowed.

[52] This should not be construed as a jurisdiction clause if the parties have decided to have their disputes settled by arbitration although may create uncertainty.

Parties, who do not wish hardship rules to become part of their contract, it may be necessary to consider an express exclusion of hardship. The reason is that hardship may follow the selection of the rules of law[53] or, if not selected, as amending the national law as was found in one ICC arbitration.[54]

V The ICC Hardship Clause 2020

The International Chamber of Commerce had adopted its first Model Force Majeure Clause already in 1985. At the time it was revised in 2003, the ICC also adopted and published a Model Hardship Clause. The first ICC Hardship Clause did not contain the possibility for a court or arbitral tribunal to amend or adjust the contract. The ICC Model Hardship Clause 2003 could be stated to have followed the approach of the Italian *Codice Civile*. The parties have a duty to renegotiate contractual terms which reasonably allow for the consequences of the event. A failure to propose or accept a reasonable adjustment was not as such a breach of contract. However, in some jurisdictions, a duty to accept reasonable adjustments follows from the obligation of good faith and fair dealing. Therefore, in order to claim damages, the disadvantaged party had to plead breach of contract on such a basis. Obviously, a failure to negotiate would be a breach should the prerequisites for hardship exist.

The ICC had over the years adopted a number of model contracts for various types of business contracts but had not adopted a uniform approach to hardship or the UNIDROIT Principles.[55] The author of this article called for a more coherent approach at the meeting of the Commercial Law and Practice (CLP) Commission held in Helsinki on 27 May 2009. The new ICC Hardship Clause 2020 could well serve as the basis for a coherent approach should the approach of the new Clause be coherent as such.

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[53] The concept ´rules of law´ follows from the UNCITRAL Model Law on International Arbitration 1985 and its revisions and include, on top of national laws, other potential legal rules such as international contract law principles.

[54] ICC arbitration 9994, see ICC Arbitration Bulletin, Special Supplement 2005. The arbitral tribunal referred to Articles 6.2.1-6.2.3 of the UNIDROIT Principles as amending French law without the parties having referenced to the Principles. At the time of the award, the French Civil Code did not contain the rules of impévision (art. 1195).

[55] The ICC Model International Transfer of Technology Contract 2009, ICC Publication No. 674E, incorporated expressly the ICC Model Hardship Clause 2003 but also referred to the UNIDROIT Principles. It is submitted that the ICC Model Hardship Clause 2003 prevails in such a situation.

The ICC Model Franchising Contract 2000, ICC Publication No. 557, made reference to ”rules and principles generally recognized in international trade including the UNIDROIT principles without pointing hardship as an exclusion.

The ICC Model Contract for Turnkey Supply of an Industrial Plant 2003, ICC Publication No. 653E, refers to the principles of law generally recognized, the CISG, usages and the UNIDROIT principles with the exclusion of clauses 6.2.1-6.2.3.

When the ICC Commission of Commercial Law and Practice (CLP) decided to revise the ICC Force Majeure Clause 2003 three years ago, the revision of the ICC Hardship Clause 2003 was a natural ´bonus´ for the work. The starting point was unclear as many members of the CLP Commission including its leadership had voiced doubts about the feasibility of letting courts or arbitrators to adjust the contract. This was considered contrary to the need for legal certainty by companies. Obviously everybody realized the developments in contract law principles and, most recently in French law.

The Drafting Group for the ICC Model Hardship Clause 2020 was the same as that for the ICC Model Force Majeure Clause.[56] As there were many views, the Group decided to leave the decision in a situation, where the parties fail to reach an agreement on alternative contractual terms, to the parties when incorporating the clause.[57]

Figure 2: The ICC Hardship Clause calls for the parties to make a selection of what will happen if negotiations fail.

Unfortunately, and the author of this article is also to blame, the Clause does not provide any fallback should the parties not make any selection. One way to solve the problem is to apply the minimum commitment approach so that the parties have not agreed to allow courts or arbitrators to adjust the

[56] The Working Group was chaired by Professor *Fabio Bortolotti*. The writer of this article was also a member of the Drafting Group.

[57] Obviously such choice could be made after the situation has arisen should the parties be able to come to terms in this respect.

contract unless not expressly so agreed. Nevertheless, there must be a choice whether termination can be made by a party itself or whether the involvement of a court is needed. A wrongful termination could lead to a liability for damages. Another approach, which is supported by the author, is to look into the applicable law. Should adjustment of contracts be possible under the applicable law, it would be natural to consider the parties having envisaged that when concluding the contract. There could obviously be a variety of circumstances to consider. Consequently, the parties should be alerted of the problem, or the ICC Model Hardship Clause 2020 be amended.

The ICC Hardship Clause follows the wording of the UNIDROIT Principles Articles 6.2.1-6.2.3 but do not mention the requirement that the application of the hardship rules requires that the diadvantaged party did not assume the risk of event disturbing the equilibrium of the contract. In a way, this requirement is built in the non-foreseeability requirement. Assuming a risk that adverse developments take place require normally the contemplation of the risk, however minimal. It is difficult to prove that a party did not assume a risk as the disadvantaged or aggrieved party has the burden of proving that the hardship criteria are met.

The significance of a hardship clause in a contract is to be a safeguard against the unexpected in a situation where the applicable law does not provide an adequate and predictable legal framework to tackle the consequences of changed circumstances. Alternatively, where the parties do not want to be impacted by a law allowing the adjustment of contracts, they may protect themselves by choosing an option which does not allow such a possibility. However, where the parties foresee a possibility that some form of turbulence may happen, the parties have a possibility to draft a specific clause to regulate the problem.

VI Specific contractual clauses to tackle identified changes in circumstances

The purpose of this section is to briefly describe the various contractual provisions that are used to tackle such changes in circumstances, the happening or risk of which the parties identify when drafting the contract. The purpose of this section is not to list exhaustively various provisions or to analyse their characteristics but to acknowledge their role in risk management in general.

One could say that the role of general contract law including statutory law and case law is to provide a safety net against unforeseen changes in circumstances *in abstracto* whereas the parties should remain responsible for tailoring their contracts against such adverse developments that they can envision. Should the parties not address such developments expressly, or impliedly through the interpretation of the contract where allowed by the applicable law, they may not invoke the change of circumstances.

The test for hardship is what the disadvantaged party reasonably ought to foresee when drafting the contract. Should that party be deemed to foresee the supervening events and not insert clauses to tackle those events, that party may be considered to have assumed the risk for those events. Such an approach does not, however, recognize the actual imbalance that prevails in contractual relationships at the outset. A stronger party may impose harsh conditions on a weaker party, which very often is a small subcontractor. It would be unfair to consider such party voluntarily assuming a risk of unforeseen circumstances.

Clauses to protect against currency risks and price risks are typical contractual terms to protect against identified risks of spervening circumstances.

Currency clauses may refer to an international tradable currency other than that of the transaction. Reference may also be made to a combination or a basket of currencies including an institutional basket currency such as the Special Drawing Rights of the International Monetary Fund. Payment could be made possible in different alternative currencies. Furthermore, the depreciation of the currency of payment could be indexed until the date of payment to restore its contractual value.

Price adjustment clauses, often called **escalator** or **escalation** clauses, are provisions stipulating an increase or a decrease of a price based upon increased costs of labour, raw materials or energy. This is particularly important when the value of the raw material is volatile and constitutes an important component of the product.

A **cost-plus agreement** could be made through an escalator clause by tying the change of the price to an index independent of the will of any of the parties. Technology, equipment, oil, gaz and grain are products which are traded using cost-plus agreements. The adjustment of price by an increase or decrease of a cost index could be tied to exceeding a certain percentage or threshold of change. Alternatively or additionally, it could be made the subject of a notification by a party and the transactions during the notice period would occur on the old price.

Prices could also be subject to a **price re-determination clause** giving the parties a right to ask renegotiation of the price for examply annually based on predetermined criteria such as the prices of competitors.

With a **cost and fee clause** the price is determined after the performance of the obligations by calculating the production costs and allowing the contractual partner a calculated profit.

A **best price clause** gives the buyer a price and other conditions that the most favored customer would get. Price of a merchandise may not necessarily be the only obligation subject to an adaptation. Quality, packaging, transportation and environmental friendliness and terms of delivery amongst other may all be subject to adaptation in connection with the price.

In public procurement, the most economically advantageous tender may be calculated on the basis of the selection criteria established by an economic entity. Public procurement principles, most notably equal treatment,do not allow post-contractual adjustments, unless the conditions are the same for all bidders.

A **take-or-pay** (TOP) clause became used in the gas and liquid natural gas sector but spread to electricity. It is meant to spread the production or volume risk including the distribution and the price risk between the seller and the buyer. The buyer undertakes to pay a minimum quantity at a set price, but the contract may also allow flexibility.[58]

In loan agreements there are covenants and default clauses protecting the lender. Conditions precedent and subsequent as well as warranties used in acquisitions guarantee that envisaged risks do not change the contractual status of a party. Some clauses relate to the precontractual stage. For instance, in the context of the acquisition of a target company or business, a **Material Adverse Change clause** aims to give

[58] Guy Block, Arbitration and Changes in Energy Prices: A Review of ICC Awards with respect to Force Majeure, Indexation, Adaptation, Hardship and Take-or-Pay Clauses, in ICC International Court of Arbitration Bulletin Vol 20 No. 2 -2009, pp. 62-64.

the buyer the right to walk away from the acquisition before closing, if events occur that are detrimental to the target company.

VII Conclusions

A century has passed since the end of World War I and the 1918 pandemic, also know as the Spanish flu, which both devastated the world. Turbulent times causing losses and risk also bring about changes in law. The losses caused by German submarines to the American commercial fleet during the World War I led to the adoption of the American Foreign Trade Definitions 1919 by the US Chamber of Commerce,[59] a collection of trade terms. Trade terms address the allocation of risks between the seller and and buyer during sea voyage, which had become a harsh reality for traders and their insurance companies. During the same year in Atlantic City, US, the International Chamber of Commerce was established and found, one hundred years ago in 1920, a seat at 38, Cours Albert Ier in Paris. Among other things, the ICC started immediately its work of harmonizing the interpretation of trade terms, which work finally led to the adoption of Incoterms 1936, to be followed by a number of collections, the latest being Incoterms® 2020.

Also another dimension of risk of management, namely tackling the sanctity of contracts by addressing economical impediments beyond the control of the parties including supervening circumstances, called for being addressed first by courts and then by legislators. In history, there had been wars, but these were of a much smaller scale compared to armies with millions of conscripts torn into the war. The destruction and ensuing indebtedness and hyperinflation created the environment of necessity to allow interventions to the binding nature of contracts. Furthermore, there were now means to do that. Contract law was developed from the 19th century onwards in the form of civil codes and codes of obligations in the Continent, and through a volume of case law brought about industrial revolution and maritime might in England. Even the English legislator contributed to the concept of frustration in 1943.

The approaches have differed from jurisdiction to jurisdiction. There has been a considerable amount of debate inside individual jurisdictions. There has nevertheless been a considerable amount of willingness of courts and scholars to study and understand the approaches of other jurisdictions.

The first tool to break the sanctity of contracts in the Continent, most notably in Germany was to expand the application of impossibility to cover economic impossibility. This was an awkward construction and was soon parallelled and gradually replaced by an approach based on reasonability, fairness or equitability, whatever you call it.[60] The parties acting in good faith would have to accept that the obligations of a contract partner having become unreasonable could be adjusted to the new circumstances. This was an interference on the sanctity of contracts and the predictability as a cornerstone of the risk management in the economy. In order to justify the interference, contract law developed similar ideas of the foundation of the contract in English law, the basic assumption on which the contract was made in

[59] The Foreign Trade Definitions 1919 were replaced by the Revised American Foreign Trade Definition 1941 on the eve of Pearl Harbor.

[60] Economic force majeure is a convenient instrument to tackle the impediments of the performance of an individual contract.

UCC 2-615 of the United States or the *Geschäftsgrundlage* in § 313 BGB.[61] The starting point is therefore the real or imagined intentions of the parties when concluding the contract. However, apart from this subjective approach, an objective feasibility may be equally relevant. UCC 2-615 of the United States uses the term impractibility.

National laws in Continental Europe adopted approaches based on the *rebus sic stantibus* approach with a possibility for the courts ulmately to adapt the contract in the case of supervening circumstances. Transnational law in the form of contract law principles adopted it as well. There is legal framework consisting of the imagined foundation of the contract constituting an equilibrium, the non-foreseeability of the event and the non-assumption of the risk of the event by a disadvantaged party.

When contracts are adjusted or terminated, the driving force is necessity. ”Necessity knows no law”, as the saying goes. What is at stake is not a legal test but a ”resigned acceptance of the view that in reality no juridical text exists but the experience and wisdom of the judge or arbitrator deciding the issue”.[62]

Necessity stems from the need the need to preserve the position of the parties. Under German law, the parties owe a duty of good faith to accept an equitable adjustment of contracts in exceptional circumstances. In the Nordic countries, the requirement of good faith has during the past few decades been enshrined into the duty of loyalty.[63] Although not the originator of this principle, Justice Gustaf Möller has phrased the essential of the principle as follows:

> *"The underlying idea is to conceive a contractual relationship as a cooperative project for the parties instead of an arrangement which entitles a party to a contract to pursue only his or her own interests."*[64]

The contractual relationship as a cooperative project could also need perseverence i the event of supervening circumstances. *Kurt Grönfors* has expressed this so that contracts need be followed out (*genomföra*) rather than upheld.[65] Grönfors lays emphasis on the purpose of the agreement and refers to company law principles and the increasing principle of loyalty. Most often, the parties give priority to preserving their contractual relationship.

Sections 36 of the Nordic Contracts Acts are formulated very generally to tackle unfairness in its various forms in contracts. The provision is not especially designed to address changes in supervening

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[61] Schmitthoff, Frustration, pp. 147-148.

[62] Ibid. p 149.

[63] In Finland, the doctrine was first introduced by Professor Lars-Erik Taxell, Avtal och rättskydd, pp. 81-82. Åbo Akademi 1972, and Om lojalitet vid avtalsförhållanden, Defensor Legis 1977, pp. 148 – 155. There are dissertations on the doctrine, see Jori Munukka, Kontraktuell lojalitetsplikt, Stockholm 2007.

[64] Gustaf Möller, The Nordic tradition: application of boilerplate clauses under Finnish law in Giuditta Cordero-Moss (Ed.) Boilerplate Clauses, International Commercial Contracts and the Applicable Law, Cambridge University Press, 2011 at pp. 254-264.

[65] Kurt Grönfors, Avtal och omförhandling, Stockholm 1995, pp. 25-26. see also Grönfors Avtalgrundande rätts-fakta, Stockholm 1993 and Lars Gorton, Ändrade förhållanden i kontraktuella relationer, Erhvervsjuridisk Tidskrift nr. 1, 2008, pp. 4-13.

circumstances. It does not expressly require unforeseeability for adjustment. Foreseeability may not be necessary for frustration of contracts under English law either.[66]

The contractual equilibrium at the time of the conclusion of the contract is generally supposed to be fair. Should this not be the case, the notions of equitability, reasonability or fairness would require more than preserving the equilibrium. It may be that the disadvantaged party was even forced to accept the risk of some unforeseen events at the outset. The Covid-19 pandemic surprised virtually everybody. Now that there is talk about the second wave of the pandemic, the unforeseeability of such an adverse change may be questioned. But we may ask, whether this is a fair outcome. If not, everybody should be drafting specific clauses for the pandemic´s second wave.

The conclusion is that, ideally, the hands of the court or arbitral tribunal requested to assess whether to terminate or adjust a contract on the basis of supervening events should not be tied to confusing legal criteria. As established in case law practically everywhere, the possibility to intervene in contracts should be a rare exception.

The salesmen of financial services tend to say something like ”the past profit does not guarantee the future ones”. Inferences can nevertheless be made from history. If I am not mistaken, the developments during the past one hundred years give us a reason to believe that the discussion on the impact of unforeseen circumstances will continue as we may now predict the occurrence of the unpredictable.[67]

Helsinki 10 June 2020

Lauri Railas

[66] See also Schmitthoff, Frustration, pp. 151-152.

[67] The materials to this article were partly collected for seminar presentations in 2008 after the bankruptcy of Lehman Brothers, which led to a global economic depression. After a little more than a decade, a new crisis in the form of the Covid-19 pandemic emerged and made the subject acute once again.

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