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Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law

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Abstract: This article analyzes the German, English and French law if and how contracts can be terminated or amended in response to unforeseen events. In addition, it describes the solutions in the UN Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law (PECL) and the UNIDROIT Principles on International Commercial Contracts. The starting point of this article is German law with its doctrine of *Störung der Geschäftsgrundlage* established by the courts in the 1920's and recently codified in § 313 BGB. The new provision requires a fundamental change in circumstances upon which a contract was based and that it is unreasonable to hold the party bound to its (unchanged) duty. The article then stresses some parallels to the English frustration law, though English Courts have no power to revise the contract, whereas this is the primary remedy in German law. Taking French law into account, which still rejects the concept of *imprévision*, English law is thus placed between the Germanic and Romanic legal solutions. French law only knows *force majeure* which officially results in *tout ou rien*, though there is some trend towards accepting an *obligation de renégociation.* While article 79 (1) CISG is not dealing with the change of fundamental circumstances or the adjustment of contracts, article 6:111 PECL and articles 6.2.1 to 6.2.3 UNIDROIT Principles provide for this. The fact that they do not just allow for a termination of the contract, but also its juridical adaptation to restore the equilibrium is a trend that should be welcomed from the perspective of European and international contract law.

Résumé: Cet article analyse au niveau des droits allemand, anglais et français la question de la résiliation ou de la modification des contrats suite à des évènements imprévus. De plus, il décrit les solutions de la Convention des Nations Unies sur les Contrats de Vente Internationale de Marchandises (CVIM), des Principes de droit européen des contrats (PECL) et des Principes UNIDROIT relatifs aux contrats du commerce international. Le point de départ de cet article est le droit allemand et sa doctrine de *Störung der Geschäftsgrundlage* [see above]. instauré par les tribunaux dans les années 1920 et codifié récemment par le § 313 BGB. Cette nouvelle disposition requiert deux conditions: un changement important des circonstances à la base du contrat et qu'il ne soit pas équitable d'exiger l'exécution par la partie de son obligation contractuelle (non modifiée). Des parallèles sont ensuite tracés avec le droit anglais de l'impossibilité d'exécution, et ce bien que les tribunaux anglais n'aient pas le pouvoir de modifier le contrat alors que c'est le recours principal du droit allemand. Au vu du droit français, qui rejette encore le concept d'imprévision, le droit anglais est donc situé entre les solutions germaniques et romanes. Le droit français connaît uniquement la force majeure qui se solde officiellement par tout ou rien, bien qu'il existe une certaine tendance vers l'acceptation d'une obligation de renégociation. Alors que l'article 79 (1) CVIM ne concerne par le changement des circonstances à la base du contrat ou la modification des contrats, l'article 6:111 PECL et les articles 6.2.1 à 6.2.3 des Principes UNIDROIT y pourvoient. Le fait que ces instruments ne se limitent pas à autoriser la résiliation du contrat mais permettent

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également l'adaptation juridictionnelle de celui-ci dans le but de restaurer son équilibre est une tendance qui doit être saluée au vu du droit européen et international des contrats.

Zusammenfassung: Dieser Aufsatz untersucht das deutsche, englische und französische Recht dahingehend, ob und wie Verträge beendet oder abgeändert werden können, um auf unvorhergesehene Ereignisse zu reagieren. Darüber hinaus beschreibt er die Lösungen im UN-Kaufrecht (CISG), in den Grundregeln des Europäischen Vertragsrechts (PECL) und den UNIDROIT Prinzipien für internationale Handelsverträge. Ausgangpunkt ist das deutsche Recht mit seiner in den Zwanziger Jahren geschaffenen und kürzlich in § 313 BGB kodifizierten Lehre von der Störung der Geschäftsgrundlage. Die neue Vorschrift erfordert eine schwerwiegende Veränderung der Umstände, auf denen der Vertrag basierte und die Unzumutbarkeit, die Vertragspartei an ihrer (unveränderten) Pflicht festzuhalten. Der Aufsatz hebt anschließend einige Parallelen zu dem englischen "frustration law" hervor, obschon die englischen Gerichte keine Befugnis haben, den Vertrag anzupassen, wohingegen dies die primäre Rechtsfolge im deutschen Recht darstellt. Mit Blick auf das französische Recht, das bislang das Konzept der *imprévision* ablehnt, steht das englische Recht zwischen dem deutsch- und romanischrechtlichen Lösungsweg. Das französische Recht kennt nur *force majeure*, das offiziell zu "alles oder nichts" führt, wenngleich sich eine Tendenz für die Akzeptanz einer Verpflichtung zu Nachverhandlungen (*obligation de renégociation*) abzeichnet. Während Artikel 79 (1) CISG die Veränderung grundlegender Umstände ebenso wenig kennt wie die Anpassung von Verträgen, sehen Artikel 6:111 PECL and Artikel 6.2.1 bis 6.2.3 UNIDROIT Prinzipien Entsprechendes vor. Die Tatsache, dass sie nicht nur die Beendigung des Vertrags, sondern zur Wiederherstellung des Gleichgewichts auch dessen richterliche Anpassung erlauben, sollte aus dem Blickwinkel des europäischen und internationalen Vertragsrechts begrüßt werden.

1. Introduction

Unforeseen economic, political and social events can impede or encumber the performance of a contract between its conclusion and execution: For example a monetary devaluation, an economic crisis, an armed conflict, an embargo, an export ban or any kind of unexpected procurement difficulty. This article seeks to analyze the risk allocation in the case of radical changes of the factual foundations after formation of the contract as well as for parties' errors concerning the factual basis. It should be noted that the legal question only arises in the absence of a contractual clause dealing with supervening events.[1] But since the parties' will is not always at hand, regardless

[1] Such so-called *force majeure* clauses detailing how to deal with a specified event or with events beyond the party's influence are commonly used in English law reflecting the fact that Anglo-American contracts are far more detailed than continental ones (perhaps due to *Paradine* v. *Jane*, 82. Eng. Rep. 897 [K.B. 1647]). For a comparison D. TALLON, 'Supervening Events in the Life of Contract', in H. BEALE, A. HARTKAMP, H. KÖTZ & D. TALLON (eds), *Cases, Materials and Text on Contract Law*, Hart, Oxford 2002, p. 639 et seq. Also see the model clauses INTERNATIONAL CHAMBER OF COMMERCE (draftsman-in-chief: C. DEBATTISTA), *ICC Force Majeure Clause 2003 – ICC Hardship Clause 2003: Developed by the ICC Commission on Commercial Law and Practice*, ICC Publ., Paris 2003; in particular regarding the difficulty of distinguishing the two concepts see U. DRAETTA, 'Hardship and Force Majeure Clauses', *Revue de droit des affaires internationales* 2002, p. 347;

how far one might stretch the interpretation of the contract in trying to fills its gaps,[2] further instruments are needed to address changed circumstances that fundamentally alter the equilibrium of the contract. As a general additional prerequisite for hardship, the occurrence of the event must have been unforeseeable at the time of the conclusion of the contract. In addition, the aggrieved party can solely rely on the concept if the hardship has not self-induced and does not belong to the contractual or statutory risk typically allocated to him.[3] This underlines that neither 'normal' financial loss nor mere inconvenience in performing the contract is sufficient. Planning stability and performance reliability is supreme, also as a matter of *pacta sunt servanda.*

Some legal orders provide more or – predominantly – less 'interventionist' solutions by means of case law when the inflexibility connected with the contractual stability would lead to excessively onerous performances. German law, however, has recently chosen the path of codification with a clear primacy of judicial adaptation of contract over discharge: § 313 BGB on 'hardship' was added to the German civil code (*Bürgerliches Gesetzbuch* – BGB) in the course of modernizing the German law of obligations. The legal concept analyzed here will be primarily named 'hardship' to find a comparative generic term and contrast it with impossibility (*force majeure*). Hardship applies when the performance is still possible, but when it has become much more burdensome. In this case the primary relief should be adaptation of the contract. *Force majeure* on the other hand relieves the party of its duty to perform when an event renders that performance impossible (at least temporarily).[4]

The introduction of the somewhat general and vague *Störung der Geschäftsgrundlage*[5] (to introduce the German expression for hardship) bringing the

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H. KONARSKI, 'Force majeure and hardship clauses in international contractual practice', *Revue de droit des affaires internationales* 2003, p. 405; A. PINTO MONTEIRO & J. GOMES, 'Rebus Sic Stantibus – Hardship Clauses in Portuguese Law', *ERPL* (*European Review of Private Law*) 1998, p. 319; cf. furthermore T. PLATE, *Force Majeure und Hardship in grenzüberschreitenden Langzeitverträgen: kautelarjuristische Überlegungen auf rechtsvergleichender Grundlage*, Verlag Recht und Wirtschaft, Frankfurt a/M 2005.

[2] In Germany, e.g., this is called 'ergänzende Vertragsauslegung'; cf. below under III.

[3] Cf. for these limits to the effects of supervening events M. SCHMIDT-KESSEL & K. MAYER, 'Supervening events and force majeure', in J.M. SMITS (ed), *Elgar encyclopedia of comparative law*, Edward Elgar, Cheltenham 2006, p. 689 at 694 et seq.

[4] Cf. for this common understanding D. MASKOW, 'Hardship and Force Majeure', 40. *American Journal of Comparative Law (Am. J. Comp. L.)* 1992, p. 657 at 663 et seq. However, *force majeure, vis maior*, act of God – often associated with tort law and as a defence against such claims – is not used by German law in the present context (also not its direct translation 'höhere Gewalt'); see SCHMIDT-KESSEL & MAYER, in SMITS, *supra* note 3, at 689 et seq.; cf. furthermore A. KARAMPATZOS, 'Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo American, German, French and Greek Law', 13. *ERPL* 2005, p. 105.

[5] Before the reform, *Wegfall der Geschäftsgrundlage* (disapearance of the contractual basis or collapse of the underlying basis of the transaction) was the usual term; that now the wording is disturbance of the contractual basis, however, does not correspond to a change in concept.

codification more into line with the view of the courts and the legal academia is a quite remarkable decision. It might, however, correspond to the modern trend. This will be shown in regard to the Principles as well as the reform proposal for the French civil code, which would codify the power of the court to order a renegotiation of the contract. It has to be mentioned that the *Schuldrechtsmodernisierung* of 2002 entailed the first significant reform of the BGB after 102 years with only minor revision of its core provisions.[6] Some modifications were required to implement three EC directives,[7] leading to fundamental changes in the rules governing limitation periods and the strengthening of consumer protection. But quite a considerable number of the changes were not required by European Community law. Regarding these parts, the reform is based chiefly on a proposal first discussed as early as the late 1970s; this is in particular the case regarding hardship and the law of impossibility.[8]

Due to the influence that the extensive German legal writing and the developed case law on hardship had on other legal systems[9] and the corresponding provisions in the Principles, the focus will be on German law. This article will outline the historical development (II.), explicate § 313 BGB (III.) and illustrate the new provision by cases (IV.). Then a comparative section will first describe the solutions English and French law have found as well as the answers of international instruments, such as the UN Convention on Contracts for the International Sale of Goods, the Principles of European Contract Law and finally the UNIDROIT Principles of International Commercial Contracts (V. 1 to 3.). The section will close with a

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[6] Cf. R. ZIMMERMANN, *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford University Press, Oxford 2005, p. 30 et seq.; R. ZIMMERMANN, 'Characteristic aspects of German legal culture', in M. REIMANN & J. ZEKOLL (eds), *Introduction to German law*, 2nd ed. 2005, p. 1 at 14; B. S. MARKESINIS, H. UNBERATH & A. JOHNSTON, *The German Law of Contract*, Hart Publishing, Oxford, 2nd ed. 2006, p. 382 et seq., 324; V. HENTE & R. WINTERS-NICHOLL, 'The Recent German Law Implementing a Modernisation of German Contract Law', *Revue de droit des affaires internationales* 2005, p. 359; C. BURKARDT & E. CHASSARD, 'Reform of the German Law of Contract', *Revue de droit des affaires internationales* 2002, p. 211; C. WITZ, 'La nouvelle jeunesse du BGB insufflée par la réforme du droit des obligations', *Dalloz* 2002, *Chroniques*, *p.* 3156; cf. for the challenges J. BASEDOW, 'Codification of Private Law in the European Union: The Making of a Hybrid', 9. *ERPL* 2001, p. 35; for the influence of Rabel see H. RÖSLER, 'Siebzig Jahre Recht des Warenkaufs von Ernst Rabel – Werk- und Wirkgeschichte', 70. *Rabels Zeitschrift für ausländisches und internationales Privatrecht (RabelsZ)* 2006, p. 793.

[7] In particular Directive 1999/44 EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees, OJ L 171/99, 12.

[8] A corresponding proposal of the Commission for the Modernization of the Law of Obligations – almost identical to § 313 BGB – can be found in Bundesminister der Justiz (ed), *Abschlußbericht der Kommission zur Überarbeitung des Schuldrechts*, Bundesanzeiger, Köln 1992, p. 146 (§ 306-BGB-KE [Kommissionsentwurf]); cf. for the general reform development ZIMMERMANN, *supra* note 6, p. 30 et seq.

[9] For the export of this notion (to Austrian and Italian law) recently P. ANCEL, B. FAUVARQUE-COSSON & R. WINTGEN, 'La théorie du «fondement contractuel» (Geschäftsgrundlage) et son intérêt pour le droit français', *Revue des contrats* 2006, p. 897 at 902 et seq.

comparative analysis (V. 4.). The article will then proceed to consider the criticism the doctrine has faced in academia (VI.). The conclusion will highlight the role of the judiciary in the development of the concept and will stress the need for European and international approximation (VII.).

2. *Clausula Rebus Sic Stantibus* and its Evolution

The German legislator of 1896 did not adopt the medieval Canon law[10] doctrine of *clausula rebus sic stantibus*, i.e. the assumption that matters or circumstances remain the same, which was contained in several natural law codifications.[11] This equitable concept had lost appeal in the 19th century; due to the influence of the German historical school in general[12] and the rise of the will theories of contract in particular.[13] The omission had to be reconsidered between 1920 and November 1923, the month when the currency reform ended Post-World War I hyperinflation that had struck the Weimar Republic. At the end of 1921 – to some degree also due to the reparation payments of the Versailles Treaty of 1919 – prices were 35 times higher than before the war. And a year later they had risen to a level that was 1.475 times higher. In less than two years the price of a stamp of 20 Pfennig rose to 500 Trillion Mark. To counteract the effects of currency devaluation upon private contracts, the then highest German court (the *Reichsgericht – RG*) first resorted to applying a provision dealing with the impossibility of performance. Creating the concept of

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[10] E.g. H. GROTIUS, *De iure belli ac pacis libris tres*, Amsterdam 1646, II.xvii.l: 'this condition is always understood: if matters remain in the same state'; cited according to J. GORDLEY & A. T. VON MEHREN, *An Introduction to the Comparative Study of Private Law: Readings, Cases, Materials*, Cambridge University Press, Cambridge 2006, p. 503; see furthermore J. GORDLEY, 'Impossibility and Changed and Unforeseen Circumstances', 52. *Am. J. Comp. L.* 2004, p. 513, where he also explains that the problem has been dealt with by two concepts: the concept of impossibility with Roman origin and the concept of clausula. For the development of the clausula doctrine, tracing back to Seneca, Cicero and St. Augustine, see the account of R. ZIMMERMANN, *The Law of Obligations: Roman Foundations of the Civilian Tradition*, Clarendon Press, Oxford 1996, p. 579 et seq.

[11] Chiefly IV, c. 15 § 12 Bavarian Code (*Codex Maximilianeus Bavaricus Civilis*) of 1756; I, 5, § 378 Prussian Code (*Preußisches Allgemeines Landrecht*) of 1794; on the contrary § 864 Civil Code of Saxony (*Bürgerliche Gesetzbuch für das Königreich Sachsen*) of 1863; P. HAY, 'Frustration and Its Solution in German Law', 10. *Am. J. Comp. L.* 1961, p. 345 at 358 et seq.; G.H. JONES & P. SCHLECHTRIEM, 'Breach of contract', in A. T. von Mehren (ed), *International Encyclopedia of Comparative Law*, Mohr Siebeck, Tübingen, vol. VII (1999), s. 216 et seq.; cf. R. KÖBLER, *Die 'clausula rebus sic stantibus' als allgemeiner Rechtsgrundsatz*, Mohr Siebeck, Tübingen 1991; M. RUMMEL, *Die 'clausula rebus sic stantibus'*, Nomos Verlagsgesellschaft, Baden-Baden 1991; W. WIEGAND, 'Clausula rebus sic stantibus – Bemerkungen zu den Voraussetzungen ihrer Anwendung', in P. FORSTMOSER, H. HONSELL & W. WIEGAND (eds), *Festschrift für Hans Peter Walter*, Stämpfli, Bern 2005, p. 443.

[12] M. REIMANN, 'Nineteenth Century German Legal Science', 31. *Boston College Law Review* 1990, p. 837; R. ZIMMERMANN, 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of a European Science', 112. *Law Quarterly Review (L. Q. Rev.)* 1996, p. 576.

[13] GORDLEY & VON MEHREN, *supra* note 10, p. 504.

economic impossibility, it applied § 275 (1) BGB on the impossibility of performance to those contracts whose performance constituted unreasonable and unforeseeable hardship for one party, releasing that party from its duty to perform.[14]

But in 1922, as will be further detailed in the case section (IV. 1.), the *RG* changed tack. It stated that the rules governing impossibility were not apt to deal with the situation. Instead, it started applying the concept of change of fundamental circumstances (or a collapse of the basis of the contract, as some also translate). It was based on § 242 BGB, the rule of good faith.[15] The courts commonly and until today define fundamental circumstances to be 'perceptions shared by both parties as evident at the closing of the contract, or perceptions of one party, discernible to and not objected to by the other party, of the existence, present or future, of certain circumstances that form the basis of their willingness to contract'.[16] Thus, these assumptions forming the foundation of contract can either be absent from the outset or disappears later – may that be just part or totally.

From the case law that developed, three elements can be distilled. They formed the guidelines for the 2002 legislator in overcoming his historical reluctance towards the concept:[17] The basis of the contract is seen as a factor, whose existence, present or

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[14] RG 15.10.1918, *RGZ* 94, 45, 47; 21.9.1920, *RGZ* 100, 129, 130 et seq. (the latter translated by K. Lipstein, in MARKESINIS, UNBERATH & JOHNSTON, *supra* note 6, p. 793 et seq.) also dealing with the *clausula rebus sic stantibus* doctrine; RG 3.6.1921, *RGZ* 102, 272, 273; 29.11.1921, *RGZ* 103, 177 (translated in GORDLEY & VON MEHREN, *supra* note 10, p. 515 et seq.); 12.11.1923, *RGZ* 107, 156, 157; the development is detailed in G. KEGEL, 'Empfiehlt es sich, den Einfluß grundlegender Veränderungen des Wirtschaftslebens auf Verträge gesetzlich zu regeln und in welchem Sinn?', *Gutachten für den 40. Deutschen Juristentag*, vol. I, Mohr Siebeck, Tübingen, 1953, p. 135, at 157 et seq. (also comparative); J. EMMERT, *Auf der Suche nach den Grenzen vertraglicher Leistungspflichten – Die Rechtsprechung des Reichsgerichts 1914-1923*, Mohr Siebeck, Tübingen 2001, S. 347 et seq.; H. RÖSLER, 'Nachträgliche Risikozuweisung durch die Lehre von der Geschäftsgrundlage', *Juristische Arbeitsblätter (JA)* 2001, p. 215; cf. furthermore W. SELLERT, 'Das BGB in der Weimarer Epoche', in W. SELLERT & U. DIEDERICHSEN (eds), *Das BGB im Wandel der Epochen*, Vandenhoeck & Ruprecht, Göttingen 2002, p. 73; P. GALLO, 'Changed Conditions and Problems of Price Adjustment, An Historical and Comparative Analysis', 3. *ERPL* 1998, p. 285.

[15] RG 3.2.1922, *RGZ* 103, 328; 27.6.1922, *RGZ* 104, 394 (for a translation of the two cases see TALLON, in *Cases, Materials and Text on Contract Law*, *supra* note 1, p. 631-633; the first one is also translated by K. Lipstein, in MARKESINIS, UNBERATH & JOHNSTON, *supra* note 6, p. 797 et seq.); 15.12.1941, *RGZ* 168, 121, 126; cf. detailed MARKESINIS, UNBERATH & JOHNSTON, *supra* note 6, p. 319 et seq.; also W.F. EBKE & B. M. STEINHAUER, 'The Doctrine of Good Faith in German Contract Law', in J. BEATSON & D. FRIEDMAN (eds), *Good Faith and Fault in Contract Law*, Oxford University Press, Oxford 1995, p. 171 at 180 et seq.

[16] BGH 1.6.1979, *BGHZ* 74, 370, 372 et seq.; upheld after the reform of 2002, cf. BGH 28.4.2005, *BGHZ* 163, 42, 48.

[17] For more detail about the lasting significance of such general principles of law founded on the concept of reasonability see K. LUIG, 'Die Kontinuität allgemeiner Rechtsgrundsätze: Das Beispiel der clausula rebus sic stantibus', in R. ZIMMERMANN, R. KNÜTEL & J.P. MEINCKE (eds), *Rechtsgeschichte und Privatrechtsdogmatik*, C.F. MÜLLER, Heidelberg 2000, p. 171 et seq.; F.J.A. SANTOS, 'Was erwartet sich die Geschichte des Europäischen Privatrechts von der deutschen Rechtswissenschaft?',

future, is cognisably presupposed by at least one party at the time of the creation of the contract (factual element). Without this factor the contract would have not been concluded or would have had a different content. The factor would have been made part of the contract by that party if he or she had thought to include it (hypothetical intention) and the other party would reasonably have agreed to the inclusion (normative element).[18] The presupposed circumstance may not be as tentative as a one-sided motive, but also not as firm as to be included in the contract.[19] The normative element is thus the most important of the criteria since it ensures that the factor forms the contractual basis for both parties.

3. The New Legal Norm

The new legal provision for change of fundamental circumstances (*Störung der Geschäftsgrundlage*) deals in subsection (1) with a change in the objective foundations of the contract after its formation.[20] Covered are in particular disruptions of equivalence of the mutual performances[21] or cases where the performance has become more burdensome for one of the parties. The alteration needs to be significant enough so that the parties, had they known about it in advance, would not have concluded the contract as it is. In that case, § 313 (1) BGB has the right to an adjustment of the contract if one party cannot be reasonably held to its contractual duty.

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in C. BALDUS & P.-C. MÜLLER-GRAFF (eds), *Die Generalklausel im Europäischen Privatrecht – Zur Leistungsfähigkeit der deutschen Wissenschaft aus romanischer Perspektive*, Sellier, München 2006, p. 93 at 106 et seq.

[18] D. MEDICUS, *Bürgerliches Recht*, Heymann, Köln et al., 20th ed. 2004, para. 165a.; cf. for the different theories of Geschäftsgrundlage A. CHIOTELLIS, *Rechtsfolgenbestimmung bei Geschäftsgrundlagenstörungen in Schuldverträgen*, C.H. BECK, München, 1981.

[19] G.H. ROTH, in *Münchener Kommentar zum BGB*, vol. 2a: Schuldrecht, Allgemeiner Teil, §§ 241-432, C.H. BECK, München, 4th ed. 2003, § 313 para. 65.

[20] § 313 BGB reads as follows:

1. If circumstances which have become the basis of the contract have changed fundamentally after the contract was concluded, and the parties, had they foreseen this change, would not have made this contract or would have made a different contract, adaptation of the contract may be demanded insofar as one of the parties, considering all circumstances of the particular case and having regard especially to the contractual or statutory distribution of risk, cannot reasonably be expected to abide by the unchanged contract.
2. It is equivalent to a change of circumstances if essential assumptions which have become the basis of the contract turned out to be wrong.
3. If adaptation of the contract is not possible or would be too hard on one of the parties, the aggrieved party may terminate the contract. In continuing contracts termination is replaced by giving notice.

Translation by W. Lorenz; cited according to D. COESTER-WALTJEN, 'The New Aproach to Breach of Contract in German Law', in N. COHEN & E. MCKENDRICK (eds), *Comparative Remedies for Breach of Contract*, Hart, Oxford 2005, p. 123 at 155. A modern translation of nearly the whole BGB by R. Youngs can be found in MARKESINIS, UNBERATH & JOHNSTON, *supra* note 6, p. 865 et seq.

[21] 'Störung des Äquivalenzverhältnisses'; comparatively JONES & SCHLECHTRIEM, 'Breach of contract', in von Mehren, *supra* note 11, s. 219 et seq.

Negative results are hence borne by both parties. Whether performance can reasonably be demanded has to be determined by considering all the circumstances of the individual case, as well as the risk allocation provided by contract or by law.

The non-dispositive provision[22] also includes subjective criteria: § 313 (2) BGB extends the principles of the first subsection to the cases of mutual errors of the parties concerning the basic factual circumstances underlying the contract. § 313 (3) BGB, finally, offers a different solution in cases where an adaptation is not possible or not reasonable: the disadvantaged party can, as a remedy of last resort, terminate the contract retroactively in accordance with the law on termination in §§ 346 et seq. BGB (*Rücktrittsrechts*). In the case of a contract for the performance of a continuing obligation such a declaration of termination is only possible with *ex nunc* effect (§ 314 BGB).[23] Since German law follows a systematic approach, it makes sense to first look at the structure. The new codification has not been placed with § 242 BGB, which deals with good faith in the law of obligations, as both the Contract Law Reform Commission and the legislator had thought possible. Rather, it is located in the Second Book of Law of Obligations, section 3: 'Contractual Obligations', title 1: 'Foundation, Content and Dissolution', subtitle 3: 'Adaptation and Dissolution of Contracts'. The rules in this section apply to contracts, including those in the areas of succession, family, labour and property law. They logically cannot apply to obligations by law, which are not based on an agreement between the parties, or to one-sided legal acts such as last wills and testaments (§§ 1937, 2231-2264 BGB) or terminations of contract.[24]

It should be noted that § 313 BGB is strictly subsidiary. The first means of dealing with unforeseen changes should be – as indicated – contractual provisions, such as flexible price clauses and construction of the contract itself. The legal rules governing rescission (*Irrtumsanfechtung* – §§ 119 et seq. BGB), impossibility of performance (*Unmöglichkeit* – § 275 BGB) and the liability for defects (*Mängelhaftung*),[25] amongst other legal remedies, also take precedence over § 313 BGB. If this does not provide a solution, a supplementary contract construction (*ergänzende Vertragsauslegung* – based on §§ 157, 242 BGB) can be performed by the judge. Such a construction calls for an unintentional gap in the contract that could be closed by

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[22] Because § 313 BGB is an expression of good faith; ROTH, in *Münchener Kommentar*, *supra* note 19, § 313 Rdnr. 112 et seq.

[23] For further references see H. RÖSLER, 'Die Geschäftsgrundlagenstörung nach der Schuldrechtsreform', *Zeitschrift für das gesamte Schuldrecht (ZGS)* 2003, p. 383 at 385 et seq. § 314 BGB on the termination, for good cause, of contracts for the performance of a recurring obligation and the issues about hardship in long-term contracts are not further discussed here. Cf. for this C. HIRSCH, *Kündigung aus wichtigem Grund und Geschäftsgrundlage – Eine Untersuchung am Schnittpunkt von Miet- und Schuldrechtsreform*, Duncker & Humblot, Berlin 2005.

[24] Though is also disputed; in favour of including one-sided acts e.g. ROTH, in *Münchener Kommentar*, *supra* note 19, § 313 Rdnr. 127 et seq.

[25] §§ 437 et seq. BGB on sale, §§ 536 et seq. BGB on rent, §§ 634 et seq. BGB on the manufacturing contract, §§ 651c et seq. BGB on the travel contract.

recurring to the parties' intentions. It allows for a bridging of the gap by means of the contract itself. Thus, if the circumstances have been a part of the contract, the concept of *Geschäftsgrundlage* is not applicable. The contractual hardship doctrine codified in § 313 BGB is concerned with circumstances outside the actual contract. The borders between supplementary construction and § 313 BGB are quite fluid in practical application. § 313 BGB, however, can only apply when other remedies fail and when the change in circumstances is outside the realm of the consent of the parties.

4. Case Law

4.1 Inflation

A case of detrimental change in value of a performance of an agreed exchange led to the first judicial recognition of the doctrine of change of circumstances under the old BGB. The importance of this move was already briefly mentioned, but it calls for a more detailed analysis. The change happened in the following case[26] that deals with the disastrous economic circumstances after World War I. In May 1919, one of several owners of a spinning mill agreed to sell his part ownership. The ownership was to be transferred on 1 January 1920 in exchange for one half of the agreed purchasing price. The second half was to be paid in the first months of 1921. Between May 1919 and the beginning of 1920, however, the purchasing power of the currency fell by 80 per cent. The price one party had agreed to pay no longer stood in any relation to the value of the other party's performance. The buyer nonetheless demanded performance according to the conditions the parties had agreed upon the previous May.[27] The case came before the *RG* in 1922.

Several such cases where put before the *RG*. Because no suitable provision in the BGB was available, the *RG* first relied – among *clausula rebus sic stantibus* – on a concept of *economic impossibility*.[28] But in its judgment rendered in 1923 (dealing with the just mentioned sale of a spinning mill) the *RG* turned towards the principle of fundamental change.[29] In creating this subsidiary concept the *RG* relied heavily on the German scholar *Oertmann*, whose doctrine of the 'basis of transaction' (*Geschäftsgrundlage*) was published in 1921.[30] This approach had several advantages

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[26] For details of this case and the following ones, amongst other examples, see H. RÖSLER, 'Grundfälle zur Störung der Geschäftsgrundlage', *Juristische Schulung (JuS)* 2004, p. 1058 (part 1), *JuS* 2005, p. 27 (part 2), *JuS* 2005, p. 120 (part 3); V. EMMERICH, *Das Recht der Leistungsstörungen*, C.H. BECK, München, 6th ed. 2005, p. 429 et seq.

[27] Simplified summary of the judgment in *RGZ* 103, 328.

[28] Already mentioned above, see footnote 14.

[29] *RGZ* 103, 328, 332, cf. footnote 15.

[30] P. OERTMANN, Geschäftsgrundlage – Ein neuer Rechtsbegriff, Deichert, Leipzig 1921; cf. HAY, 10. *Am. J. Comp. L.* 1961, p. 345 at 361 et seq.; comparatively R. ZIMMERMANN & D. VERSE, 'Case 25: Effect of Inflation', in R. ZIMMERMANN & S. WHITTAKER (eds), *Good Faith in European Contract Law*, Cambridge University Press; Cambridge 2000, p. 557 et seq.; S. RENNER, *Inflation and the enforcement of contracts*, Edward Elgar, Cheltenham 1999.

in comparison to other known means of solving the problem, which showed a much stronger tendency towards dissolution of the contract. Under the private law version of the *clausula rebus sic stantibus* doctrine, too many errors in motivation could result in dissolution of contract. The theory of the 'undeveloped condition of the transaction' conceptualized by *Windscheid*[31] was hardly more restrictive, taking into account even those assumptions held by one party of whose existence the other party did not and could not know. *Windscheid* did not include mere motivations for purchase in his doctrine. The circumstances he intended to cover fell somewhere in between motivations and conditions. However, this doctrine did not sufficiently take into account the interests of the other party in the contract.

In the case outlined above, the *RG* came to the decision that a change in value of the agreed price could also amount to an unforeseen and fundamental change in circumstances, if the parties had assumed the balance of performance and price to be a basis of the contract. The court also affirmed the precedence of contract adjustment, leaving dissolution for those cases in which adjustment did not result in a reasonable contract.[32] Today, such a case would fall in the realm of application of § 313 (1) BGB. Seen from a present-day perspective, the standard consequence of a significant upward adjustment of the purchasing price would hardly be considered a reasonable result for the buyer in light of the rapid deterioration in value the currency suffered in the early 1920s. Hence, the exception of § 313 (3) BGB would have to apply, giving the seller a right to withdraw from the contract according to § 346 BGB.[33] An ordinary change in purchasing power, however, cannot result in an adjustment of contract. It is one of the founding principles of a monetary economy that a debt is defined as a specific sum and not as a fluid value. The obligor hence bears the risk of inflation in all but the most severe cases.

4.2 Unreasonability of Performance

So far we have looked at the duties of the creditor. But the contractual equilibrium can also be disturbed due to changes in the sphere of the other party. A disturbance can result, for example, from a market development leading to an increase in performance cost to the obligor. Such an increase could potentially upset the balance of the transaction as well. In considering such cases, the judge typically takes into account not only the objective impairment to the contract equilibrium, but also the duration of contractual relationships and the individual circumstances. This is

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[31] B. WINDSCHEID, *Die Lehre des römischen Rechts von der Voraussetzung*, J. Buddeus, Düsseldorf 1850; undeveloped means that the parties never consciously willed the condition.

[32] *RGZ* 103, 328, 333 et seq.

[33] H. EIDENMÜLLER, 'Der Spinnerei-Fall – Die Lehre von der Geschäftsgrundlage nach der Rechtsprechung des Reichsgerichts und im Lichte der Schuldrechtsmodernisierung', *Jura* 2001, p. 824 at 830; J. P. DAWSON, 'Effects of Inflation on Private Contracts: Germany, 1914–1924', 33. *Michigan Law Review (Mich. L. Rev.)* 1934, p. 171.

illustrated by the following case:[34] During the 1973 oil crisis, an oil import company refused performance of its contract with a city on the grounds that continuation of performance without an adjustment in price had to be considered unreasonable.[35]

The corresponding judgment of the German Federal Supreme Court (*Bundesgerichtshof – BGH*),[36] focused in particular on how far a 'duty to obtain' in a supply contract could extend. The successor to the *Reichsgericht* decided that the oil supplier was at fault for the financial losses he had suffered. As the advent of the crisis became apparent, he had neglected to take preventative measures, such as purchasing larger amounts to accumulate a reserve. The contract also included a fixed price agreement, showing whom the parties intended to bear the risk of a change in oil prices. In denying the claim, the *BGH* also referred to the fact that the supply contract was to expire a mere two and a half months after the supplier's refusal to perform. According to the reasoning of the court, the doctrine of fundamental change of circumstances was to be applied extremely restrictively. An adjustment or even dissolution of contract hence had to be refused in this case. This judgment illustrates that the doctrine cannot apply when a change in circumstances is foreseeable: in that case the party concerned by the potential change is responsible for taking precautionary measures. A lack thereof cannot constitute a case of unreasonable contractual hardship.

4.3 The Difference between Hardship and Impossibility

Impossibility (*force majeure*) and hardship are closely related concepts. As seen in the first response of the *RG* to post-World War I inflation, there are cases imaginable where the principles are very difficult to distinguish.[37] The just mentioned oil-crisis case also requires such a differentiation. The contractual performance, and § 275 BGB determining its fate, take precedence before remedies such as § 313 BGB.[38] The new norm § 275 (2) 1 BGB permits the obligor to refuse performance if and as long as

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[34] For the solution to this case if English law were to be aplied see H. RÖSLER & G. TÜNGLER, 'Modalitäten der Ersatzleistung im englischen und deutschen Vertragsrecht', *JuS* 2002, p. 782.

[35] BGH 8.2.1978, *Zeitschrift für Wirtschafts- und Bankrecht (WM)* 1978, p. 322, 323 et seq.

[36] Not to be confused with the German Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*). Both are based in Karlsruhe.

[37] The UNIDROIT Principles, Art. 6.2.2, comment No. 6, which will be dealt with shortly, state expressly that both concepts can coincide, leaving the affected party the choice of which remedy to pursue.

[38] The first three sections of § 275 BGB on termination of the obligation to perform, that were also reformed in 2002, according to Lorenz, *supra* note 20 at p. 139):

1. The claim to performance is terminated insofar as performance is impossible for the debtor or for every one.
2. The debtor may refuse to perform insofar as this would require an effort which, having regard to the substance of the obligation and the requirements of good faith, would be grossly disproportionate to the creditor's interest in such performance. In determining the effort reasonably to be expected from the debtor it must also be considered whether the debtor is responsible for the failure to perform.

it requires efforts exceeding those that can be reasonably required. The limit of what is reasonable is determined by asking whether, in examining the contract at hand and with regard to the principle of good faith, the efforts required are grossly disproportionate to the obligee's interest in contract performance (factual impossibility). § 275 (2) 2 BGB extends the borders of reasonability in cases where the obligor has acted negligently or purposefully in creating the impediment.[39]

The famous 'ring case' may help to illustrate the principle.[40] A contract for the sale of a ring is concluded. Yet before the ring can be handed over to the purchaser, it falls into a lake and sinks to the ground. Since recovery is technically possible by draining the lake and using a metal detector – even if exceedingly difficult – contract performance is not impossible in the sense of § 275 (1) BGB. The effort required, however, is grossly disproportionate to the value of the ring and the obligee's interest, which has remained unchanged. The prevention of extreme cases of waste of resources being the macroeconomic goal of § 275 (2) BGB, the criterion of reasonability is examined in a cost-utility-analysis. It is no longer given when the costs of performance largely exceed the utility of performance, when in other words the exchange of performances is – economically speaking – grossly inefficient.[41] Thus, in the case of the ring, the interest of the obligee in obtaining this specific ring has to take the back seat.

In the oil supply case outlined above, however, circumstances are different. The obligor cannot refuse performance on the basis of § 275 (2) BGB, since the sharp increase in costs has led to a parallel increase in utility on the side of the obligee.[42] The latter would have to pay significantly higher prices to obtain his supply elsewhere and stands to gain large amounts if he were to sell the oil provided to him at the contract price. Hence the cost-utility ratio does not show gross disproportion. The obligor has to bear the risk of contract performance without regard to the necessary

3. Furthermore, the debtor may refuse to perform if he has to perform personally and such performance cannot reasonably be expected from him when weighing the impediment preventing him from performing against the creditor's interest in the performance.

[39] For § 275 (2) and (3) BGB also cf. MARKESINIS, UNBERATH & JOHNSTON, *supra* note 6, p. 413 et seq.

[40] Fundamental P. HECK, *Grundriß des Schuldrechts*, Mohr Siebeck, Tübingen 1929, p. 89; for examples of solutions under the modernized law see F. FAUST, in P. HUBER & F. FAUST, *Schuldrechtsmodernisierung*, C.H. BECK, München 2002, Rdnr. 2/73 et seq.; for the ring and more cases see A. SCHMIDT-RECLA, 'Echte, faktische, wirtschaftliche Unmöglichkeit und Wegfall der Geschäftsgrundlage', in B.-R. KERN, E. WADLE, K.-P. SCHROEDER & C. KATZENMEIER (eds), *Festschrift für Adolf Laufs*, Springer, Berlin et al. 2006, p. 641 at 652 et seq.

[41] For more details on allocation efficiency as a basis for rational jurisprudence in the realm of the doctrine see H.-B. SCHÄFER & C. OTT, *The economic analysis of civil law*, Edward Elgar, Cheltenham 2004, p. 320 et seq.; especially focussing on the CISG see C. KESSEDJIAN, 'Competing Aproaches to Force Majeure and Hardship', 25. *International Review of Law and Economics* 2005, p. 415; regarding English and US law, R.A. POSNER & A.M. ROSENFIELD, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis', 6. *Journal of Legal Studies* 1977, p. 83.

[42] ZIMMERMANN, *supra* note 6, p. 46.

effort.[43] Market shifts as the typical cases of a parallel and proportionate increase in cost and utility are hence borne by the obligor – unless there is a case of change of circumstances in the sense of § 313 BGB.[44] This leads to a more restrictive application of § 275 (2) BGB.[45]

§ 275 (2) 1 BGB therefore does not cover cases in which the performance leads to greater expenses on the side of the obligor, with a proportional rise in the obligee's interest.[46] Since § 313 BGB expressly requires consideration of *all* circumstances of the individual case, the relation between the two parties' interests with regard to the agreed price, moral or family issues and other personal impediments can be taken into account when applying this provision.[47] § 275 (2) 1 BGB, on the contrary, takes the *obligee's* interests as its starting point for examining the reasonability of performance. It focuses on the obligee's interest as compared to the cost of performance to the obligor, leaving aside all concerns and interests on the side of the obligor. To sum up: § 275 (2) BGB is applicable in cases where an exchange of performances is grossly inefficient in economic terms because costs far exceed utility. § 313 BGB, on the other hand, can apply when the exchange of performances is grossly unfair because the price paid for performance is significantly lower than the cost of performance.

This conceptually sophisticated distinction is no doubt difficult to put into practice. Even after the reform some overlaps might remain. However, as regards the legal consequences of § 275 (2) BGB and § 313 (2) BGB the outcome can be the same: If the upholding of the contract has become unbearable to one of the parties, even the doctrine of the disturbance of fundamental circumstances leads not just to adaptation of the contract. Rather the aggrieved party may also terminate the contract according to § 313 (3) 1 BGB. The situation is different in the case of 'personal impossibility' dealt with in § 275 (3) BGB. It governs contractual performance *in person*, like contracts of employment and service. Due to the nature of the contract tailoring the performance to one specific individual, the focus cannot be limited to objective facts – personal circumstances affecting performance have to be considered in determining whether performance can be refused.[48] Hence, unlike § 275 (2) BGB, § 275 (3) BGB focuses on the relation between the interests of both parties.[49] The German textbook

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[43] For more detail about this concept see BGH 4.7.1996, *NJW* 1996, 3269, 3270; RÖSLER, *JA* 2001, p. 215 at 216 et seq.

[44] ERNST, in *Münchener Kommentar*, *supra* note 19, § 275 para. 21.

[45] ROTH, in *Münchener Kommentar*, *supra* note 19, § 313 para. 140.

[46] This omission was one of the main motivations for the call for reconceptualization of § 275 BGB, see C.-W. CANARIS, 'Die Reform des Rechts der Leistungsstörungen', *JZ* 2001, p. 499 at 501.

[47] Official Motivation: DEUTSCHER BUNDESTAG, Drucksache 14/6040 of 14 May 2001, p. 130.

[48] DEUTSCHER BUNDESTAG, Drucksache 14/6040 of 14 May 2001, p. 130; elaborate S. GREINER, *Ideelle Unzumutbarkeit – Dogmatik und Praxis der Leistungsverweigerung bei Rechtsgüter- und Pflichtenkollisionen im Zivilrecht*, Duncker & Humblot, Berlin 2004.

[49] ERNST, in *Münchener Kommentar*, *supra* note 19, § 275 para. 113 and 116.

example is that of the opera singer whose child suffers from a life-threatening illness – she can refuse performance on the basis of § 275 (3) BGB.

4.4 Disturbances in the Subjective Realm

While § 313 (1) BGB provides solutions for a fundamental change in objective circumstances, § 313 (2) BGB deals with an initial absence of a so-called subjective circumstance.[50] This includes cases of a common error in motivation as well as situations where one party erroneously assumed the presence of certain circumstances and the other party acknowledged this assumption without sharing it. A classic example is the case of a *Leibl* painting changing hands. At the time, both parties assumed it had been painted by another artist. Shortly after the transaction, the painting was correctly attributed to *Leibl*, increasing its value significantly.[51]

This should be contrasted with one-sided errors in a statement of intent (*Willenserklärung*), which are dealt with by the rules of mistake (§§ 119 et seq. BGB). A good example for such an error is the one in calculation. However, in the case of a two-sided open and external error about the basis for a price calculation, the *BGH* assumed a change in circumstances even before the modernization of the BGB.[52] Today, it would fall into the realm of § 313 (2) BGB, since both parties were mistaken on a ground known to each of them, at least to a certain degree. But as stressed, this 'involvement' of the other contractual party has to go beyond normal circumstances. The nature of § 313 (2) BGB as an exception to the rule would be distorted if one were to regard each acquiescence on one side in light of a potential error on the other side as sufficient for the establishment of a common contractual basis. In addition, the normative and the 'unreasonableness' criterion will often not be met.[53]

The difference between an initial absence of subjective circumstances and the fundamental change in circumstances after conclusion of the contract, on which the two different subsections rest, is not as clear as it may seem at first sight.[54] This becomes evident with regard to § 313 (2) BGB when the parties have simply not thought about the circumstances that later became relevant. Then one has to make do by assuming those circumstances which are evidently and normally the

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[50] C. GRÜNEBERG, in *Palandt, Kommentar zum BGB*, C.H. BECK, München, 66th ed. 2007, § 313 para. 3.

[51] BGH, 8.6.1988, *NJW* 1988, 2597. In a reverse scenario, the mistake would constitute a defect in the sense of § 434 (1) 2 No. 1 BGB, which now, after modernization, codifies the 'subjective defect': a painting by *Ruisdael* turns out to have been painted by someone unknown after the sale has been concluded. Such a case would be governed by contractual liability; see C. KRAMPE, '*Eichen am Wasser – Der Ruisdael-Fall RGZ 135, 339*', *JuS* 2005, p. 773.

[52] BGH 22.12.1966, *BGHZ* 46, 268, 273; BGH, 19.11.1971, *NJW* 1972, 152; 20.3.1981, *NJW* 1981, 1551; 23.2.1995, *NJW* 1995, 1425, 1428. Expressly so DEUTSCHER BUNDESTAG, Drucksache 14/6040 of 14 May 2001, p. 176.

[53] For the issues surrounding the distinction see RÖSLER, *JuS* 2005, p. 120 at 123–125.

[54] GRÜNEBERG, *supra* note 50, § 313 para. 4 even advocates a departure from the concept of a subjective basis altogether, since all such cases would also constitute objective circumstances.

basis of the type of contract concerned. Thus, for the application of § 313 (2) BGB, the absence of a notion about the circumstances must be sufficient – in contrast to § 119 BGB, the central provision on mistake, where a positive assumption is required. § 313 (1) BGB, in turn, cannot be reduced to being completely objective either. Hence, in delimiting § 313 (1) and (2) BGB, the focus should not be on the difference between subjective and objective circumstances, but rather on the point in time at which the disturbance occurred – before or after conclusion of the contract. § 313 BGB furthermore does not require distinction, as their consequences are identical. In other words, § 313 (2) BGB simply clarifies one particular case of subjective circumstances (namely, that of their initial absence) while § 313 (1) BGB serves as the general provision for fundamental changes in both subjective and objective circumstances.

5. Comparative Account

5.1 English Law

English law has never known the medieval *clausula* doctrine. Even now there exists no change of circumstances or hardship rule. English law tackles the problems by means of the doctrine of frustration, which sets the contract aside if factual or legal circumstances have changed to such an extent that the performance of the parties' contractual obligations has turned out to be drastically different from what they had initially intended.[55] The concept does not just deal with destruction of the subject-matter[56] or other unavailability of a specific good, but also covers impossibilities that are only of partial or temporal nature, cases of illegality and frustration of purpose or even – but quite seldom – cases of impracticality.[57]

The leading authority is *Taylor* v. *Caldwell* where a music hall that had been hired for a series of concerts burnt down (without the fault of the parties). Here Blackburn, J. – drawing on the continental *clausula rebus sic stantibus* and the Roman rule about impossibility[58] – stated that 'in contracts in which the performance

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[55] G. TREITEL, *Frustration and Force Majeure*, Thomson Sweet & Maxwell, London, 2nd ed. 2004, para. 2-044 et seq.; E. MCKENDRICK, 'Force Majeure and Frustration – their Relationship and a Comparative Assessment', in MCKENDRICK (ed), *Force Majeure and Frustration*, Lloyd's of London Press, London, 2nd ed., 1995, p. 33 at 37 et seq.; E. MCKENDRICK, in *Chitty on contracts, General principles*, Sweet & Maxwell, London, 29th ed. 2004, para. 23-001 et seq.

[56] For the classic form of statutory frustration of the sale contract read s. 7 Sale of Goods Act 1979: 'Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of seller or buyer, perish before the risk passes to the buyer, the agreement is hereby avoided'.

[57] Cf. SCHMIDT-KESSEL & MAYER, in SMITS, *supra* note 3, 689 at 693 et seq.

[58] For these two continental lines of authority see GORDLEY & VON MEHREN, *supra* note 10, p. 498 and M. RHEINSTEIN, *Die Struktur des vertraglichen Schuldverhältnisses im anglo-amerikanischen Recht*, de Gruyter, Berlin et al., 1932, p. 175. Cf. furthermore for the hidden influence of the German change of fundamental circumstances doctrine on § 2-615 UCC S. RIESENFELD, 'The Influence of German Legal Theory on American Law: The Heritage of Savigny and His Disciples', 37. *Am. J. Comp. L.* 1989, p. 1 at 4 et seq. Cf. comparatively S.H. JENKINS, 'Exemption for Non-Performance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment', 72. *Tulane Law Review* 1998,

depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance'.[59] Due to this implied condition discharging the contract, the defendant hirer was not liable for damages. This fictional will of the parties[60] was also used to solve the case of *Krell* v. *Henry*. Here the defendant had rented a room in a house on Pall Mall for a specific day in order to watch the Coronation procession of Edward VII which after conclusion of the contract was postponed to a later date due to illness of Edward VII. Henry was released from his contractual duty to pay the agreed price. The Court of Appeal held that the hire contract had been frustrated since the coronation parade constituted the 'foundation of the contract'.[61]

Modern cases do not rely any longer on party intention. In a case dealing with a chartered vessel that was stuck due to the closure of the Suez Canal, Lord Denning MR wrote: 'If it should happen, in the course of carrying out a contract, that a

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p. 2015; M.B. BAKER, 'A hard rain's a-gonna fall' – Terrorism and excused contractual performance in a post-September 11th world' 17. *The Transnational Lawyer* 2004, p. 1; the leading cases in US are *Mineral Park Land Co.* v. *Howard*, 172 Cal., 289, 156 P. 458 (1916); *Transatlantic Financing Corp.* v. *United States*, 363 F.2D 312 (D.C. Cir. 1966).

[59] *Taylor* v. *Caldwell*, (1863) 3 B. & S. 826 (QB); cf. for Blackburn's contemporary and foreign influences (will theory) to argue with the will of the parties and the assumption of an implied assumption R. ZIMMERMANN, 'Heard Melodies are sweet, but those unheard are sweeter' – Condicio tacita, implied condition und die Fortbildung des europäischen Vertragsrechts', 193. *Archiv für die civilistische Praxis (AcP)*, 1993, p. 121 at 138 et seq.; W.W. BUCKLAND, 'Casus and Frustration in Roman and Common Law', 46. *Harv. L. Rev.* 1932–1933, p. 1281.

[60] *Cf. supra* note 59, for further criticism L.E. TRAKMAN, 'Frustrated Contracts and Legal Fictions', 46 *Modern Law Review* 1983, p. 39; A.H. PUELINCKX, 'Frustration, Hardship, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage, Unmöglichkeit, Changed Circumstances: A Comparative Study in English, French, German and Japanese Law', 3. *Journal of International Arbitration* 1986, p. 47 at 49 observes that the theory of the implied condition was 'the first inroad by an English judge into the static and formalistic wording of an agreement'.

[61] *Krell* v. *Henry* [1902] 2 KB 740; see similarly *Herne Bay Steamboat* v. *Hutton* [1903] 2 KB 683, dealing with the hiring of a vessel to see a naval review; for a comparative analysis of frustration see K. LARENZ, *Geschäftsgrundlage und Vertragserfüllung*, C.H. BECK, München, 3rd. ed. 1963, p. 74 et seq.; S. SCHMIEDLIN, *Frustration of contract und clausula rebus sic stantibus*, Helbing und Lichtenhahn, Basel, 1985, p. 39 et seq.; G. HAMMER, *Frustration of contract, Unmöglichkeit und Wegfall der Geschäftsgrundlage*, Duncker & Humblot, Berlin 2001, p. 113; G.H. TREITEL, *Unmöglichkeit, 'Impracticability' und 'Frustration' im anglo-amerikanischen Recht*, Nomos Verlagsgesellschaft, Baden-Baden 1991; cf. also P. HELLWEGE, *Die Rückabwicklung gegenseitiger Verträge als einheitliches Problem: deutsches, englisches und schottisches Recht in historisch-vergleichender Perspektive*, Mohr Siebeck, Tübingen 2004, p. 253 et seq.; M. SCHMIDT-KESSEL, *Standards vertraglicher Haftung nach englischem Recht – limits of frustration*, Nomos Verlagsgesellschaft, Baden-Baden 2003, p. 45 et seq.; G. QUASS, *Die Nutzungsstörung: Zur Problematik der Störung des Verwendungszwecks und des Wegfalls der Geschäftsgrundlage*, Duncker & Humblot, Berlin, 2003; for the frustration of purpose ('Zweckstörung') see comparatively JONES & SCHLECHTRIEM, 'Breach of contract', in von Mehren, *supra* note 11, s. 229 et seq.; fundamental V. BEUTHIEN, *Zweckerreichung und Zweckstörung im Schuldverhältnis*, Mohr Siebeck, Tübingen 1969; H. KÖHLER, *Unmöglichkeit und Geschäftsgrundlage bei Zweckstörungen im Schuldverhältnis*, C.H. BECK, München 1971.

fundamentally different situation arises for which the parties made no provision – so much so that it would not be just in the new situation to hold them bound to its terms – then the contract is at an end. [. . .] It has frequently been said that the doctrine of frustration only applies when the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated', as if that were an essential feature. But it is not so. [[62]] The only thing that is essential is that the parties should have made no provision for it in their contract. [. . .] We are thus left with the simple test that a situation must arise which renders performance of the contract 'a thing radically different from that which was undertaken by the contract' [[63] . . .]. It must be more than merely more onerous or more expensive. It must be positively unjust to hold the parties bound'.[64] From the facts, this case belongs to the hardship category that English law does not recognize. The resemblance of English frustration law to the theory of change of fundamental circumstances is palpable. But the court in the Suez Canal precedent rejected a frustration of the contract, since the voyage round the Cape of Good Hope was not 'fundamentally different'.[65]

The effect of frustration is the parties' automatic release from the contract.[66] Therefore, the performance of a continuing or recurrent obligation is not amended by law. Rather, the parties will often negotiate a new contract with different terms and conditions.[67] However, common law had left the obligations that had accrued prior to frustration untouched. To cure the defects of the legal consequences Parliament passed the Law Reform (Frustrated Contracts) Act 1943.[68] The Act aims at preventing unjust enrichment:[69] One party can be entitled to repayment of the money

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[62] This is, however, contested; E. MCKENDRICK, *Contract Law – Text, Cases, and Materials*, 2nd ed. Oxford University Press, Oxford 2005, p. 884, cites authority to the contrary, and TREITEL, Frustration and Force Majeure, *supra* note 55, para. 13-011 et seq. limits 'foreseeability' to those cases where parties can be 'expected to foresee [the occurrence of an event] as a real likelihood'.

[63] The court refers to *Davis Contractors Ltd.* v. *Fareham Urban District Council* [1956] AC 696, 729, where according to Lord Radcliffe frustration occurs, 'whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni.* It was not this that I promised to do'.

[64] *Ocean Tramp Tankers Corp.* v. *V/O Sovfracht (The Eugenia)* [1964] 2 QB 226, 238 et seq.; cf., however, *British Movietonews Ltd.* v. *London and District Cinemas Ltd.* [1952] AC 166, 185 per Viscount Simon.

[65] With the same result the House of Lords in another Suez Canal case *Tsakiroglou & Co Ltd* v. *Noblee Thorl GmbH*, [1962] A.C. 93. For cases following the outbreak of the war between Iran and Iraq cf., however, MCKENDRICK, in *Chitty on Contracts*, *supra* note 55, para. 23-043.

[66] *Hirji Mulji* v. *Cheong Yue Steamship Co Ltd* [1926] AC 497.

[67] Cf. S.A. SMITH, *Atiyah's Introduction to the Law of Contract*, Clarendon Press, Oxford, 6th Ed. 2005, P. 191 et seq.

[68] MCKENDRICK, in *Chitty on Contracts*, *supra* note 55, para. 23-070 et seq.

[69] *B.P. Exploration Co (Libya) Ltd* v. *Hunt (No. 2)*, [1979] 1 W.L.R. 783, 799 per Robert Goff J.; note, however, that this view was dismissed by the Court of Appeals [1981] 1 W.L.R. 232, 243; agreeing

received before the frustrating event occurred. Insofar the contract is adapted retroactively.

5.2 French Law

French private law officially rejects the concept of *imprévision* as the equivalent to hardship up to now.[70] Non-performance[71] is only excused when there a *cause étrangère*, as article 1147 Code Civil prescribes, and according to article 1148 Code Civil when there is a case of *force majeure* or *cas fortuity* (utter accident). The relationship of the two provisions (also in regard to the standard of duty according to Art. 1137 Code Civil)[72] remains unclear until now and cannot be detailed in this article.[73] That French private law refuses to give relief to on the grounds of a change of circumstances is demonstrated in the *Canal de Craponne* case of 1876,[74] which is still established case law. Here the *Cour de Cassation* decided that the *Cour d'appel d'Aix-en-Provence* had violated Art. 1134 Code Civil in adapting a contract dealing with the maintenance costs of the Craponne canal. The fact that the contract was signed in 1567, and hence long before promulgation of the Code on 21 March 1804, did not lead to a different result in the opinion of the *Cour de Cassation.* The *pacta sunt servanda* rule contained in article 1134 Code Civil was held to be general and

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with Goff J. MCKENDRICK, in *Chitty on Contracts*, *supra* note 55, para. 23-073; disagreeing LORD GOFF & G. JONES, The Law of Restitution, Sweet & Maxwell, London, 6th ed. 2002, § 20-060.

70 D. TALLON, 'La révision du contrat pour imprésivion au regard des enseignements récents du droit comparé, Droit et vie des affaires', in *Etudes à la mémoire d'Alain Sayag*, Litec, Paris 1997, p. 403; H. LESGUILLONS, 'Frustration, Force Majeure, Imprévision, Wegfall der Geschäftsgrundlage', 5. *Droit et Pratique du commerce international* 1979, p. 507; E. CASHIN-RITAINE, 'Imprévision, Hardship und Störung der Geschäftsgrundlage: Pacta sunt servanda und die Wege zur Anpassung des Vertrages im deutsch-französischen Rechtsverkehr', in T. HELMS et al. (eds), *Jahrbuch junger Zivilrechtswissenschaftler 2001: Das neue Schuldrecht*, 2001, Boorberg, Stuttgart et al., p. 85; K. ANGERMEIR, *Geschäftsgrundlagenstörung im deutschen und französischen Recht*, Verlag Recht und Wirtschaft, Heidelberg 2004, p. 75 et seq.; P. JUNG, *Die Bindungswirkung des Vertrages unter veränderten geschäftswesentlichen Umständen – Eine vergleichende Betrachtung des deutschen und französischen Rechts*, Nomos Verlagsgesellschaft, Baden-Baden 1995, p. 20 et seq.

71 Cf. Art. 1142 Code Civil.

72 Cf. R. DEMOGUE, *Traité des obligations en général*, Rousseau, Paris, vol. 5 (1921–33), § 1237 for the two standards he developed: the duty to use best efforts (*obligation de moyens*) and the duty actually to achieve a specific result in other contracts (*obligation de resulted*).

73 For a short introduction to the concept of force majeure (and a comparison to the PECL) see C. RADE, 'La force majeure', in P. RÉMY-CORLAY & D. FENOUILLET (eds.), *Les concepts contractuels français à l'heure des Principes du droit européen des contrats*, Dalloz, Paris, 2003, p. 201 et seq.; cf. with 'imprésivion' P. MALINVAUD, *Droit des obligations*, LexisNexis Litec, Paris, 9th ed. 2005, p. 427 et seq.; F. TERRE, P. SIMLER & Y. LEQUETTE, *Droit civil: les obligations*, Dalloz, Paris, 9th ed. 2005, p. 468 et seq.

74 Cass. Civ., 6 mars 1876, *Canal de Craponne*, D. 1876.I.93 (for a partial translation see GORDLEY & VON MEHREN, *supra* note 10, p. 525); Cass. Civ., 6 June 1921 D. 1921.1.73 (for a translation and note on this stock-rearing contract see TALLON, in *Cases, Materials and Text on Contract Law*, *supra* note 1, p. 627–629). For more cases see already PUELINCKX, 3. *Journal of International Arbitration* 1986, p. 47 at 55 et seq.

absolute. – In contrast, French administrative law accepts the notion of *imprévision*, enabling adjustment. Leading case is the famous judgment *Gaz de Bordeaux* from 1916.[75] Here the *Conseil d'Etat* allowed a readjustment of a gas supply contract. Else the bankruptcy of the 'Compagnie générale de Gaz' would have led to a disconnection of the gas supply to Bordeaux.

Whether this split law is going to subsist remains to be seen.[76] In recent times the *économie du contrat* has gained ground. This economy of the contract is regarded as the contractual standard according to which useful contracts can be kept, while others are terminated or adapted to restore their economic and social sense.[77] Despite the intense discussion about this equivalent to the hardship concept, French judges are not willing to adapt private law contracts. Having said that, the courts recently imposed an obligation to renegotiate contracts to rebalance disproportionate contractual duties. This quite pragmatic duty of renegotiation stems from the general principle of good faith (*bonne foi*).[78] It might be codified in the near future. Articles 1135-1,-2 and -3[79] of the 'Avant-projet de réforme du droit des obligations et de la

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[75] Conseil d'Etat, 30 mars 1916, *Gaz de Bordeaux*, S 1916.III.17.

[76] Especially when thinking about public-private partnership. Cf. T. KIRAT (ed), *Économie et droit du contrat administratif: l'allocation des risques dans les marchés publics et les délégations de service publique*, La Documentation française, Paris 2005.

[77] S. PIMONT, *L'économie du contrat*, Presses Univ. d'Aix-Marseille, Aix-en-Provence 2004; A. ARSAC-RIBEYROLLES, *Essai sur la notion d'économie du contrat*, thèse, Université de Clermont I 2005; J. MOURY, 'Une embarassante notion, l'économie du contrat', D. 2000, p. 382; with many further references CASHIN-RITAINE, *supra* note 70, p. 86 et seq.; 98 et seq.

[78] *Cour de Cassation*, Chambre civile 1, 16 mars 2004, Dalloz 2004, Jur. P. 1754, note D. MAZEAUD; C. GATVOTY & O. EDWARDS, 'Vers une extension de l'obligation de renégociation en matière contractuelle?', *Les Petites Affiches*, n° 128, 28 juin 2004; H. BOUTHINON-DUMAS, 'Les contrats relationnels et la théorie de l'imprévision', *Revue internationale de droit économique* 2001, p. 339; CASHIN-RITAINE, *supra* note 70, p. 99 et seq.; C. WITZ, 'Force obligatoire et durée du contrat', in RÉMY-CORLAY & FENOUILLET, *supra* note 73, 175 et seq.

[79] The suggested provisions read as follows:

> Art. 1135. Conventions are binding not only as to what they expressly state, but also as to all that equity, usage or statute relate to an obligation according to its nature.
> It is necessary, in particular, to provide the existence in the contract of those clauses which are of common use, even though they are not expressly included.
>
> Art. 1135-1. In contracts to be performed in successive stages or in increments, the parties may bind themselves to negotiate a modification of their convention should it happen that, because of the circumstances, the initial balance in their reciprocal prostrations has been so affected that one of the parties has no longer any interest in the contract.
>
> Art. 1135-2. In the absence of such a contractual stipulation, the party who has no longer any interest in the contract may request the president of the tribunal de grand instance to order that a new negotiation take place.
>
> Art. 1135-3. Should it be the case, the negotiations would be governed by the provisions of chapter 1st of this title. The failure of the negotiations, in the absence of bad faith, would give each party the right to rescind the contract without incurring either expenses or damages.
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> Translation by A. Levasseur and D. Gruning. It was taken from ⟨http://henricapitant.org/article.php3?id_article=47⟩ where one can also find the French original.

prescription' take account of the new flexibility in French contract law. The proposal, which was handed over to the French ministry of justice in 2005,[80] allows in article 1135-2 for the possibility of the judge to order a *négociation salvatrice* of a contract in which one of parties has lost any interest. If the party's negotiations fail because of other reasons than bad faith, each party has the right to rescind (*résilier*) the contract without damages (Art. 1135-3).

5.3 International Instruments

Of further importance are the provisions of the UN Convention on Contracts for the International Sale of Goods (CISG), the Principles of European Contract Law (PECL) and the UNIDROIT Principles on International Commercial Contracts, which have all been taken into consideration during the last stages of the reform of the BGB, moving the Code far closer to the rules recognized internationally.[81]

5.3.1 CISG

The CISG does not include a provision for a change of fundamental circumstances or the adjustment of contracts. But article 79 (1) CISG[82] provides a narrow exception to the no-fault principle of the CISG.[83] Four requirements have to be fulfilled: 'A party is not liable for a failure to perform any of his obligations if he [first] proves that the failure was due to an impediment [secondly] beyond his control and that he [thirdly] could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or [fourthly] to have avoided or overcome it or its consequences'. Although the provision is somewhat unclear, it seems to exclude the concept of hardship. This is disputed and it is suggested that in exceptional cases

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[80] P. CATALA & Ministère de la justice (eds), *Avant-projet de réforme du droit des obligations et de la prescription*, Documentation française, Paris 2006; the proposal can also be found in the *Revue des contrats* 2006, p. 199 et seq.

[81] Cf. J. BASEDOW, 'Towards a Universal Doctrine of Breach of Contract: The Impact of the CISG', 25. *International Review of Law and Economics* 2005, p. 487; ZIMMERMANN, *supra* note 6, p. 77.

[82] H. STOLL & G. GRUBER, in P. SCHLECHTRIEM & I. SCHWENZER (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)*, Oxford University Press, Oxford, 2nd ed., 2005, Art. 79 CISG, paras. 30 et seq.; P. WINSHIP, 'Exemptions under article 79 of the Vienna sales convention', 68. *RabelsZ* 2004, p. 495; P. RÉMY-CORLAY, 'Force majeure, imprévision et faute: la repartition des risques dans la Convention de Vienne', *Revue trimestrielle de droit civil* 2005, p. 354; J. RIMKE, 'Force majeure and hardship: Aplication in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Commercial Contracts', in Pace University (ed), *Review of the Convention of the Sale of International Goods 1999-2000* 2001, p. 193; N.N. FISCHER, *Die Unmöglichkeit der Leistung im internationalen Kauf- und Vertragsrecht*, Duncker & Humblot, Berlin 2001; M.J. BONELL, 'Force Majeure' e 'Hardship' nel diritto uniforme della vendita internazionale', *Diritto del Commercio Internazionale* 1990, p. 543.

[83] Set forth in Art. 45 (1) CISG; comparatively H. SUTSCHET, *Garantiehaftung und Verschuldenshaftung im gegenseitigen Vertrag*, Mohr Siebeck, Tübingen, 2006.

'impediment' can also be interpreted as 'radically changed circumstances'.[84] But the diplomatic attempt to insert a hardship provision in the CISG was turned down by the Vienna Conference.[85]

It would thus overstretch the CISG when one argues[86] that hardship could be regarded as a 'general principle' which has to be taken into account according to article 7 (2) CISG. The codification of hardship in public international law does not change this appraisal. Else it would have been included like it happened in article 62 Vienna Convention on the Law of Treaties 1969. Obviously there is a gap in the CISG which the drafters accepted. Hence, not just the described functional and conceptual distinction between hardship and *force majeure* but also the clear wording and intention of article 79 CISG speaks against a broad interpretation. Here the Principles (especially the UNIDROIT ones) come into play since their Working Groups, consisting of academics, were able to address this core matter of contractual fairness, which is – as shown – subject to such diverging national perspectives.[87] Regarding the contractual practice, it should be noted that parties not uncommonly make use of their contractual freedom according to article 6 CISG and agree on a 'force majeure clause'[88] that supplements or alters the gap-filling rule in article 79 CISG.

5.3.2 PECL and UNIDROIT Principles

The two Principles are non-binding 'restatements' of European and international contract law. Article 8:108 PECL[89] similarly to the CISG allows an 'excuse due to

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[84] See STOLL & GRUBER, in SCHLECHTIEM & SCHWENZER, *supra* note 82, Art. 79 CISG, paras. 30 to 32, 43 (arguing with the limit of sacrifice – the 'Opfergrenze'), with many further references; like M.C. DE ALMEIDA PRADO, *Le hardship dans le droit du commerce international*, FEC, Paris, 2003; B. ZELLER, Art. 76 CISG, in J. FELEMEGAS (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law*, Cambridge University Press, Cambridge 2006.

[85] It was suggested by the Norwegian delegation; cf. A. GARRO, 'The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG', 69. *Tulane Law Review* 1995, p. 1149 at 1182; STOLL & GRUBER, in SCHLECHTIEM & SCHWENZER, *supra* note 82, Art. 79 CISG, paras. 30 (p. 823), 42.

[86] Discussed by C. KESSEDJIAN, 25. *International Review of Law and Economics*, 2005, p. 415 at 419 et seq.

[87] Cf. GARRO, 69. *Tulane Law Review* 1995, p. 1149 at 1160 et seq.

[88] See *supra* note 1.

[89] O. LANDO & H. BEALE, *Principles of European Contract Law, Parts I and II*, Kluwer Law International, The Hague, 2000; O. LANDO, E. CLIVE, A. PRÜM & R. ZIMMERMANN (eds), *Principles of European Contract Law, Part III*, Kluwer Law International, The Hague 2003; D. FLAMBOURAS, 'The Doctrine of Impossibility of Performance and Clausula Rebus Sic Standibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law', 13. *Pace International Law Review* 2001, p. 261; W. ERNST, 'Die Verpflichtung zur Leistung in den Principles of European Contract Law und in den Principles of International Commercial Contracts', in J. Basedow (ed), *Europäische Vertragsrechtsvereinheitlichung und das deutsche Recht*, Mohr Siebeck, Tübingen 2000, p. 129.

an impediment'.[90] Article 7.1.7 of the UNIDROIT Principles[91] makes provisions for *force majeure*, which is a different way of expressing the same concept. But the Principles have – after prolonged hesitation – also decided in favour of including a hardship provision, following the modern trend: The PECL in article 6:111 calls it change of circumstances, the UNIDROIT Principles in articles 6.2.1 to 6.2.3 names it hardship. Both of the instruments stress that the contract has to be observed, even if performance becomes more onerous for one of the parties after its conclusion, either through an increase in the cost of a party's performance or a diminution in value of the performance received (Art. 6:111 (1) PECL and Art. 6.2.1 UNIDROIT Principles).

They both then detail the conditions for an exception. According to article 6:111 (1) PECL the contract needs to become excessively onerous[92] due to a change of circumstances. Article 6.2.2 UNIDROIT Principles defines hardship as an occurrence of events that fundamentally alter the contract's equilibrium, either increasing the cost of a party's performance or diminishing the value of the performance received.[93] However, there is one difference regarding the prerequisites. Whereas article 6.2.2 (a) UNIDROIT Principles also includes those events that have become known to the disadvantaged party after the conclusion, the PECL leave this category to the rules regarding mistake (Art. 4:103 PECL).[94] As a first remedy, the parties either have to negotiate a solution (according to Art. 6:111 (2) PECL) or the disadvantaged party is entitled to request such renegotiations (under Art. 6.2.3 (1)

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[90] See further Art. 8:101 PECL on the available remedies and Art. 9:303 (4) PECL for the notice of termination.

[91] M.J. BONELL, *An International Restatement of Contract Law*, Transnational Publishers, Ardsley, 3rd ed. 2005; J.M. PERILLO, 'Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts', 5. *Tulane Journal of International & Comparative Law*, 1997, p. 5; M. ALMEIDA PRADO, 'La théorie du hardship dans les Principes de l'UNIDROIT relatifs aux contrats du commerce international – Une aproche comparative des Principes et les solutions adoptées par le droit français', *Diritto del commercio internazionale* 1997, p. 323; M. FONTAINE, 'Les dispositions relatives au hardship et à la force majeure', in M.J. BONELL & F. BONELLI (eds), *Contratti commerciali internazionali e Principi UNIDROIT*, Giuffrè, Milano 1997, p. 183; A.G. DOUDKO, 'Hardship in Contract: The Approach of UNIDROIT Principles and Legal Developments in Russia', *Uniform Law Review* 2000, p. 483; A. JANZEN, 'Unforeseen circumstances and the balance of contract: A comparison of the approach to hardship in the UNIDROIT Principles and German Law of Obligations', 22. *Journal of Contract Law* 2006, p. 156; J.O. RODNER, 'Hardship under the UNIDROIT Principles of International Commercial Contracts', in G. AKSEN et al. (eds), *Global Reflections on International Law, Commerce and Dispute Resolution: Liber Amicorum in Honour of Robert Briner*, ICC, Paris 2005, p. 677.

[92] Borrowing from Italian law; see LANDO & BEALE, *supra* note 89, Art. 6.2.1, Comment A (p. 324); cf. also Art. 97 (1) European Contract Code-Project of Gandolfi. The ICC Hardship Clause 2003 (see *supra* note 1) also uses the expression 'excessively onerous'.

[93] Accounting to more than 50 per cent of the cost or value of the performance in question, as Comment No. 2 to Art. 6.2.2 UNIDROIT Principles explains.

[94] With the possibility of avoidance or, according to Art. 4:105 PECL, with the view to adapt the contract; cf. LANDO & BEALE, *supra* note 89, Art. 6.2.1, Comment B (ii) (p. 325).

UNIDROIT Principles). If the parties have been unable to find a solution within a reasonable period, the instruments provide for a termination of the contract at a date and on terms to be fixed by the court. Alternatively, the court can adapt the contract in order to restore its equilibrium. It is noteworthy that the rules show no preference for one or the other option (Art. 6:111 (3) PECL and Art. 6.2.3 (4) UNIDROIT Principles).

However, the Principles accomplish more than just to 're'-state the law. They rather try to find the best solution, not just a minimum standard or common core. This becomes clear when one recalls that the CISG has not managed to address the hardship issue due to sceptical national views on the validity and scope of this concept. Thus, it is questionable if the solution found in the UNIDROIT Principles really represents a common international understanding[95] that can be used to fill the gap that the CISG has left.[96] Here the important role of arbitration becomes relevant.[97] In international arbitration at least, there is still a clear tendency to follow a formalist view and thus take a restrictive approach even towards *force majeure*.[98] An award by the ICC International Court of Arbitration in Paris refused the idea that the solution found by the UNIDROIT Principles represented the practice of international trade.[99] The details of this discussion are, however, beyond the scope of this article. It seems that in particular the newer UNIDROIT Principles can only fill the gap that the CISG has left in 1980 (when it was signed in Vienna) if the judge or arbitrator finds some further concrete reference for accepting the notion of hardship for that particular case. But as it further seems, in international and national law there is a corresponding revival of modern versions of the doctrine of *clausula rebus sic stantibus*.[100]

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[95] Cf. for the discussion JANZEN, 22. *Journal of Contract Law* 2006, p. 156 at 162 et seq.

[96] Regarding the question if national law (e.g. § 313 BGB) could fill the gap cf. C. DÜCHS, *Die Behandlung von Leistungsstörungen im Europäischen Vertragsrecht*, Duncker & Humblot, Berlin 2006, p. 114, 351 who negates that possibility.

[97] Take e.g. the Mississippi Flood Disaster that led to an export prohibition on soya bean meal and then to about 1000 arbitration procedures in London; M.G. BRIDGE, 'The 1973 Mississippi Floods: 'Force majeure' and export prohibition' in MCKENDRICK, *supra* note 55, p. 287.

[98] Cf. already *supra* note 1; see furthermore H. KONARSKI, 'Force majeure and hardship clauses in international contractual practice', *Revue de droit des affaires internationales* 2003, p. 405.

[99] ICC Award No. 8873 of July 1997, *Journal de droit international* 1998, p. 1017; cf. generally R. HERBER, 'Lex mercatoria' und 'Principles' – 'gefährliche Irrlichter im internationalen Kaufrecht', 3. *Internationales Handelsrecht* 2003, p. 1; however, J. BASEDOW, 'Die UNIDROIT-Prinzipien der Internationalen Handelsverträge und die Übereinkommen des einheitlichen Privatrechts', in J. BASEDOW, K.J. HOPT & H. KÖTZ (eds), *Festschrift für Ulrich Drobnig zum siebzigsten Geburtstag*, Mohr Siebeck, Tübingen, 1998, p. 19; U. MAGNUS, 'Die allgemeinen Grundsätze im UN-Kaufrecht', 59. *RabelsZ* 1995, p. 468 at 492 et seq.

[100] See *supra* note 11; E. RABEL, 'Die Haager Konferenz über die Vereinheitlichung des Kaufrechts', 17. *RabelsZ* 1952, p. 212 at 220 mentioned that the 'obstacle' provision in his 1939 draft for a Uniform Law for the International Sale of Goods (a forerunner of article 79 CISG) would be a careful *clausula rebus sic standibus* inspired form English legal thinking. Cf. DÜCHS, *supra* note 96, p. 114 et seq.

5.4 Analysis

The legal norms and case law provide for quite different answers to the question if and how contracts can be amended or terminated prematurely in response to unforeseen events. In terms of the prerequisites, the English and German law are not so dissimilar: The German law requires a fundamental change in 'circumstances upon which a contract was based', and the English case law on frustration asks for a 'fundamentally different situation'. Not any such fundamental change will suffice. It must be unreasonable to hold the party bound to its duty (in the German rule) or 'positively unjust' (as the English rule requires). Insofar the two provisions share a common understanding. The doctrine of frustration can only apply when events occur *after* conclusion of the contract – parties' errors about events *before* conclusion are governed by the concept of common mistake.[101] The German provision, on the other hand, also encompasses parties' mistaken assumptions about events previous to contract closure in § 313 (2) BGB.[102] That German law thereby also covers the initial absence of the subjective basis of the contract, is a major peculiarity of German hardship law, which is not followed by the other domestic laws and the international instruments analyzed here.

The consequences of the two rules also differ widely: while German law and – with a similar tendency – Dutch,[103] Austrian,[104] and Greek law[105] see adaptation of the contract as a possible solution to the problem,[106] English law only knows disappearance of the contract. English courts do not have the power to revise the contract.

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[101] MCKENDRICK, in *Chitty on Contracts*, *supra* note 55, para. 23-001.

[102] See text before *supra* note 23.

[103] Art. 6:258 Nieuw Burgerlijk Wetboek (NBW) dealing with unforeseen circumstances (*onvoorziene omstandigheden*); A. VAN PLATERINGEN, *Onvoorziene omstandigheden in Latijns-Amerika: lessen voor het Nederlandse recht?*, University Amsterdam, 2001.

[104] See for the case law G.M. PEER, 'Die Rechtsfolgen von Störungen der Geschäftsgrundlage', in *Jahrbuch junger Zivilrechtswissenschaftler 2001*, *supra* note 70, p. 61 at 71 et seq.; G.H. ROTH, 'Vom Wegfall der Geschäftsgrundlage zur richterlichen Vertragsanpassung', in E. BERNAT, E. BÖHLER & A. WEILINGER (eds), *Festschrift für Heinz Krejci*, Verlag Österreich, Wien 2001, vol. II, p. 1251. For Swiss law see P. PICHONNAZ, *Impossibilité et exorbitance, étude analytique des obstacles à l'exécution des obligations en droit suisse (Art. 119 CO et 79 CVIM)*, thèse, AISUF 168, Fribourg 1997; P. ANCEL, B. FAUVARQUECOSSON & R. WINTGEN, *Revue des contrats* 2006, p. 897 at 904 et seq.

[105] See Art. 388 Civil Code; P. PAPANIKOLAOU, 'Rebus Sic Stantibus und Vertragskorrektur auf Grund veränderter Umstände im griechischen Recht', 3. *ERPL* 1998, p. 303.

[106] The Italian doctrine of doctrine of *eccessiva onerosità sopravvenuta* (Art. 1467 Codice Civile) regards the adaptation of the contract just as 'secondary' solution: The party against whom termination of the contract is requested can save the contract by offering an equitable indemnity; after all, the principle of pacta sunt servanda (Art. 1372 Codice Civile) is still quite strong; cf. F. MACARIO, *Adeguamento e rinegoziazione nei contratti a lungo termine*, Jovene, Napoli 1996; P. GALLO, *Sopravvenienza contrattuale e problemi di gestione del contratto*, Giuffrè, Milano 1992; C. REITER, *Vertrag und Geschäftsgrundlage im deutschen und italienischen Recht*, Mohr Siebeck, Tübingen 2002; see, however, P.G. MARASCO, 'La rinegoziazione e l'intervento del giudice nella gestione del contratto', *Contratto e impresa* 2005, p. 539.

A frustrating event leads to an automatic discharge of the contract, inducing the parties to negotiate a new contract for maintaining their future business connection. It has to be stressed that the English concept of frustration is broader than impossibility (*force majeure*).[107] The German solution, in contrast, aims at sharing the contractual risk between the parties,[108] giving the courts the role of a 'moderator'. Taking French law into account, which still rejects the concept of *imprévision*, English law is thus placed between the Germanic and Romanic legal family: While the laws of France, Belgium and Luxembourg demand the fulfilment of the original contract, regarding the contract as law between the parties,[109] unless it is *force majeure*, which officially results in the strict rule of *tout ou rien*,[110] the common law sets the contract aside (based on the notion of a intangibility of contract and acknowledging no revising power of the courts) and then Germany, Austria, Greece and the Netherlands primarily modify the contract, which represents the most flexible and extensive model.

The CISG only has a narrow range of excuses. But under the PECL and UNIDROIT Principles the judge has the same extensive powers also provided by § 313 BGB, which, however, contains a preference for readjustment. § 313 BGB does not list examples of events which alter the contractual equilibrium to such an extent as to constitute hardship, in contrast to article 6.2.2 of the UNIDROIT Principles and article 6:111 (1) PECL. This omission is deliberate. The Motivation for the legislative proposal of § 313 BGB does mention several typical examples,[111] but concludes by stating that examples would have to remain extremely general and hence would not serve to provide guidance in understanding and applying the rule. In keeping the codification as general as it is, the legislation leaves the establishment of groups of cases expressly to the judiciary. This is a typical legislative method in using general clauses. After all, § 313 BGB can be qualified as such because of its normative elements, which rely heavily on judicial interpretation.

While the German provision – as mentioned – also covers subjective assumptions made by the contract parties, both Principles only deploy objective criteria to

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[107] For a further comparative overview of the French, German, English and uniform laws on impossibility of performance see TALLON, in *Cases, Materials and Text on Contract Law*, *supra* note 1, at 592-626. Also K. ZWEIGERT & H. KÖTZ, *Introduction to Comparative Law*, translated by T. WEIR, Oxford University Press, Oxford, 3rd ed. 1998, p. 517 et seq.; W. LORENZ, *Contract Modification as a Result of Change of Circumstances*, in BEATSON & FRIEDMAN, *supra* note 15, p. 357.

[108] *Cf.* for such economic aspects J. ELOFSON, 'The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Test', 30. *Columbia Journal of Law & Social Problems* 1996, p. 1; P. TRIMARCHI, 'Commercial Impracticability in Contract Law: An Economic Analysis', 11. *International Review of Law and Economics* 1991, p. 63.

[109] For the voluntaristic concept cf. Art. 1134 (1) French Code Civil.

[110] H. KÖTZ, *European Contract Law*, vol. I, translated by T. WEIR, Clarendon Press, Oxford, 1998, p. 189 et seq.; see also F. RANIERI, *Europäisches Obligationenrecht*, Springer, Wien et al., 2nd ed. 2003, p. 356 et seq.

[111] DEUTSCHER BUNDESTAG, Drucksache 14/6040 of 14 May 2001, p. 174.

determine a fundamental change of the balance of contract, especially in form of a disruption of the equivalence between performance and counter-performance. At least the UNIDROIT Principles thereby take into account the nature of the transaction, because due to its international character a determination of the subjective assumptions by a judge or arbitrator would be even more difficult than in the national arena.[112] The fact that according to Art 6.2.3 (1) UNIDROIT Principles the disadvantaged party is entitled to request renegotiations is a further tribute to international commercial customs.[113] Also the PECL, the ICC Hardship Clause 2003 (representing a model for international contracts)[114] and the proposed reform of the French Code Civil establish a duty to renegotiate in good faith, if the disadvantaged party requests so. But there is no such obligation in German hardship law[115] and English frustration law. This is rightly so because the parties will try to find a cheaper solution, if at all possible, than going to the courts anyway. In addition, a guiding judge[116] or arbitrator can lead the way by suggesting a renegotiation if the parties have omitted to do so beforehand.

6. Hardship in the Face of Criticism

6.1 Negative Effects on the Inviolability of Contract?

It is a common fear that a concept of hardship serves to weaken the sanctity of contract known as *pacta sunt servanda.*[117] Some advocate limiting its realm of

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[112] Cf. for the UNIDROIT Principles JANZEN, 22. *Journal of Contract Law* 2006, p. 156 at 159 at 167 et seq.

[113] JANZEN, 22. *Journal of Contract Law* 2006, p. 156 at 169; B. LEHRBERG, 'Renegotiation clauses, the doctrine of assumptions and unfair contract terms', 3. *ERPL* 1998, p. 265.

[114] See *supra* note 1.

[115] As mentioned, according to § 313 BGB the disadvantaged party can immediately seek adaptation or termination. Nonetheless, there is a discussion in Germany, whether there is a duty to renegotiate; accepting EIDENMÜLLER, *Jura* 2001, p. 824; H. HEINRICHS, 'Vertragsanpassung bei Störung der Geschäftsgrundlage: eine Skizze der Anspruchslösung des § 313 BGB', in S. LORENZ, et al. (eds), *Festschrift für Andreas Heldrich*, München, C.H. BECK, 2005, p. 183 at 195.

[116] Cf. for the duties of the judge and the objective of facilitating an early settlement of disputes in the German Code of Civil Procedure G. RÜHL, 'Preparing Germany for the 21st Century: The Reform of the Code of Civil Procedure', 6 *German Law Journal* 2005, 909, 914 et seq.; P.L. MURRAY & R. STÜRNER, *German Civil Justice*, Carolina Academic Press, Durham, North Carolina 2004.

[117] Cf. for the influence of the hardship doctrine in this regard generally K.M. SHARMA, 'From 'Sanctity' to 'Fairness': An Uneasy Transition in the Law of Contracts?', 18. *New York Law School Journal of International and Comparative Law* 1999, p. 95; K.P. BERGER, 'The Relationship Between the UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria', *Uniform Law Review* 2000, p. 153 at 168 et seq.; H. KÖTZ, 'Freiheit und Zwang im Vertragsrecht', in U. IMMENGA, W. MÖSCHEL & D. REUTER (eds), *Festschrift für Ernst-Joachim Mestmäcker*, 1996, p. 1037 at 1041; N. NASSAR, *Sanctity of Contracts Revisited: A Study in the Theory and Practice of Long-Term International Commercial Transactions*, Nijhoff, Dordrecht, 1995, p. 160 et seq. For the dangers of too flexible approach in regard to hardship B. RÜTHERS, *Die unbegrenzte Auslegung – Zum Wandel der Privatrechtsordnung im Nationalsozialismus*, Mohr Siebeck, Tübingen, 6th ed. 2005, p. 36 et seq.

application to certain types of changes or omitting it altogether. For this discussion let us focus on the German code once again with its quite general provision. Regarding the effects of § 313 BGB one has to note, however, the carefully differentiating system, oriented towards commensurability, in which dissolution of contract is *ultima ratio.* Additionally, the consequences of § 313 BGB do not apply *ipso iure* but constitute independent claims that can be realized by suing for adapted performance or – for a defendant – can be claimed as an exception. Hence the disadvantaged party can decide whether to sue for adjustment. Until then the contract remains standing as it is. Dissolution additionally requires a declaration of rescission or cancellation.[118] That the previous formula of the judiciary ('an unbearable result, intolerable to law and justice') was not included also does not lead to an undue expansion of hardship: This wording, properly construed, is synonymous with the new term of 'unreasonableness'.

The modernized code still seeks to uphold the contract and insists upon specific performance if at all possible, but adapted in order to accommodate the change in circumstances, if need be. Insofar as the contract is changed but upheld, the principle of *pacta sunt servanda* is left untouched in its core existence. Such a commensurate means of modification is essential to ensure justice in extreme cases. Of course, this objective is connected with a modern conception of contact law in general and the role of judge therein. The new contract law model[119] is also stressed by the German Federal Constitutional Court, the *Bundesverfassungsgericht* (BVerfG). It decided that contracts forcing impecunious relatives of a bank's potential obligor to stand surety for him are against good morals and therefore void. In its decision of 1993, the court stated agreeing that 'legal science agrees that the principle of good faith constitutes an intrinsic border of the liberty to design contracts and hence provides an authorization for judicial content control'.[120] This ruling reflects the turn away from contracts as entirely free and subject only to the will of their autonomous designer and from the dominance of the individual volition, towards a balancing of interests even in the realm of contracts.

6.2 The Role and Relationship of Legislators and the Courts

The relation between case law and legislation is an ever interesting issue in legal thought and political theory. This is especially true in regard to German law, since one of the common criticisms regarding the modernization of the law of obligations was that it would lead to an undue expansion of judicial power. Let us briefly recall the different historical premise influencing content and methodological approach: While

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[118] §§ 313 (3), 349 or 314 BGB.

[119] H. RÖSLER, *Europäisches Konsumentenvertragsrecht – Grundkonzeption, Prinzipien und Fortentwicklung*, C.H. BECK, München, 2004, p. 48 et seq.

[120] BVerfG 19.10.1993, *BVerfGE* 89, 214, 233.

common law was developed by custom, civil law historically descends from the tradition of Roman law, in particular *Justinian's Corpus Juris Civilis.* Since civil law perceives legislation (not cases) as the primary source of law, judges found their judgments on the codes, trying to fill gaps on the basis of general principles of the code and by drawing analogies. Nonetheless, the constructive and practical significance of judgments in the realm of private law becomes apparent in the light of contractual hardship, as the concept was developed by the judiciary (taken up from suggestions provided by academia) and goes far beyond a construction of contract clauses guided by the parties' intentions.[121] The shaky footing on the general good faith rule of § 242 BGB as well as judicial custom was replaced by the firm base of the new § 313 BGB. In codifying this concept on 1 January 2002, the legislature officially departed from the insofar formalist view of the law, which the judiciary had left behind already in September 1920 in (at first) adopting the doctrine of *clausula rebus sic stantibus.*[122]

The role of the judiciary is now limited to determining the circumstances on a case-by-case basis that require adaptation or even dissolution of a contract in the individual case. That this requires a wise judge and that some case law still has to serve as guidelines leading through the perils do not detract from the value of the codification, which necessarily cannot predict all possible cases in need of adaptation or dissolution. A careful judicial development of categories serves to meet § 313 BGB with its quite general requirements, similar to other concepts originally derived from the principle of good faith (§ 242 BGB): The concept of change of fundamental circumstances was not the only previously uncodified but commonly applied notion that is now adapted into the code. Also included for the first time were, amongst others, the secondary contractual duties to respect the other party's rights and interests[123] as well as the concept of *culpa in contrahendo*, which extends protection to the time period before a contract has been concluded, starting with negotiations or similar such business contacts.[124] It should be noted that both *culpa in contrahendo* and the *Geschäftsgrundlagenstörung* relativize the principle of *pacta sunt servanda.* While the first concept 'constructs' a consensus, the *Geschäftsgrundlagenstörung* has a consensus, but the law allows a partial or total termination of the resultant contract.[125]

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121 For further references see RÖSLER, *ZGS* 2003, p. 383 at 384, 388.

122 *Supra* note 14.

123 Formerly positive malperformance (*positive Forderungsverletzung*). The different scenarios and their legal consequences are now codified in §§ 241 (2), 280 (1), (3), 281, 282, 323 (1), 324 BGB.

124 A classic is the lettuce case in BGH 28.1.1976 *BGHZ* 66, 51, where the daughter of a potential buyer suffers various injuries due to a slippery lettuce leaf on the floor. This constitutes a breach of the shop owner's duty, subjecting the owner to a liability according to *culpa in contrahendo.* Codified since 2002 in §§ 311 (2), (3), 241 (2), 280 (1) BGB.

125 C. BALDUS, 'Verbraucherschutz zwischen Vertrag und Nicht-Vertrag?', in *Festschrift für Laufs*, *supra* note 40, at 558, 564.

Some have criticized the mere fact of codification of modern concepts[126] doubting that they could or should be codified sensibly. But the rising importance of case law and other decodification tendencies (e.g. by soft law) on the Continent and the codification-like patchwork in Anglo-American law illustrates the convergence of the legal families, which the German legislation could not afford to ignore. It had to prove that the aim behind the codification idea, i.e. to provide a central and coherent source of the law, is alive. The adoption of concepts developed by the judiciary was thus necessary to allow for a *rapprochement* of 'law in the books' and 'law in practice'. It returned the BGB to its position as the complete civil law codification and halted the tendency to stray from the code,[127] adding to the transparency and predictability of the law.

7. Conclusions

7.1 As to German law

The assumption that a judge, due to the original conception of the separation of powers, should be reduced to only applying the law[128] has proved to be illusionary. In keeping the wording of § 313 BGB open for interpretation, the most recent codification of hardship has accepted as much. It is left to the judiciary to establish the details of its structure, content and limits. Central to the two possible options of adjustment – i.e. adaptation or dissolution – is the concept of 'unreasonableness', which provides the necessity to re-establish economic or personal balance of the contract. The new codification expressly demands that adaptation be performed, if at all possible (§ 313 (3) 1 BGB), and reserves dissolution for those cases where an adaptation makes no sense. The terms 'basis of the contract' and 'fundamental change' are also left to the judges to define. These normative terms need to be used restrictively to preserve the character of § 313 BGB as a last-means resort in exceptional circumstances, relying on the risk allocation foreseen by the law or by the contract.

The underlying principle of *pacta sunt servanda* as the indispensable basis of contract law must not be endangered. The pre-eminence of adaptation over termination of the contract is a method to keep the sanctity of the contract where possible. The cautious approach of the German judiciary has proven that hardship does not open the doors to arbitrariness generally. This also due to the close dialogue between the judiciary and academia, which, in part, explains the innovative role German law plays here. After all, a too broadly conceptualized hardship is a dangerous instrument.[129] It can be used for 'wrong' 'public' purposes since hardship is closely

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[126] In particular in the case of consumer law.

[127] Cf. N. IRTI, *L'età della decodificazione*, Giuffrè, Milano, 4th ed. 1999.

[128] Just 'the mouth of the law' as MONTESQUIEU, *L'esprit des lois*, Livre XI, Chapitre 6, Barrillot & fils, Geneve, 1748 demanded.

[129] As its abuse in the Third Reich showed; see RÜTHERS, *supra* note 117.

connected with such issues. This is revealed by those legal orders that only recognize hardship in the public sphere to save public companies and/or the supply of services of general interest – a one-sidedness that is inappropriate in times of privatizations and public-private partnerships.

7.2 As to the other Solutions Analyzed

The comparative attempt showed a wide divergence regarding the possibility and ways to adapt or terminate a contract in response to changed circumstances.[130] To some degree the problems are due to the terminological variety, especially since English lawyers' associate hardship chiefly with contractual hardship clauses.[131] *Tallon* notes: 'There is a paradox here. The English language, which appears to be the new *lingua franca* for contract law, has no appropriate word, perhaps because it does not really know the notion'.[132] Hardship as a characteristic daughter of good faith[133] is not accepted in English law and likewise in the CISG, as both are known to be more or less at odds with the notion of good faith in general.[134] The UNIDROIT principles and the PECL academic instruments have shown more wisdom. Yet, the notion of frustration found in English law bridges at least some of the distance between English law and the PECL and UNIDROIT principles, leaving behind French law, which in private law officially only recognizes *force majeure.*

Beyond, even broader divergences in the conceptual understandings of contracts and of the function of courts become apparent. In differently balancing fairness and legal certainty, the legal systems analyzed here demonstrate the deviating viewpoints about the relation between the will to contract and judicial power to (re-)shape an agreement. Parties are always free to provide for corresponding contractual provisions. But beyond this common ground, the diverse solutions reveal differences in attitude towards the social function of contract law and the necessary degree of contractual fairness[135] foreshadowing the difficulties in finding a common contract law

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130 Cf. M. BARENDRECHT & M. LOOS, *The law governing service contracts*, in European Parliament, DG for Research (ed), Study of the systems of private law in the EU with regard to discrimination and the creation of a European Civil Code (PE 168.511), Brussels 1999, p. 17 at 25.

131 Cf. *supra* note 1.

132 D. TALLON, Hardship, in A. HARTKAMP, M. HESSELINK, E. HONDIUS, C. JOUSTRA, E. du PERRON & M. VELDMAN (eds), *Towards a European Civil Code*, New York, Kluwer Law International, 3rd ed. 2004, p. 499 at 500.

133 As TALLON, in *Towards a European Civil Code*, *supra* note 132, p. 499 at 503 puts it.

134 Art. 7 (1) CISG mentioning the good faith principle just refers to the interpretation of the Convention.

135 Cf. in general the criticism regarding the aims of the Commission to establish a more coherent European Contract Law *Study Group on Social Justice in European Private Law*, 'Social Justice in European Contract Law: a Manifesto', 10. *European Law Journal* 2004, p. 653; H. COLLINS, 'The Alchemy of Deriving General Principles of Contract Law from European Legislation: In Search of the Philosopher's Stone', *European Review of Contract Law, ERCL* 2006, p. 213–226. See further O. LANDO, 'Liberal, Social and 'Ethical' Justice in European Contract Law', 43. *Common Market Law Review (CML Rev.*) 2006, p. 817.

and putting it into practice. Creating a corresponding provision on hardship as part of a larger and real European instrument might prove to be quite a challenge. Because of this, the French discussion about the *économie du contrat* and even more the general tendencies towards the possibility of the judge to order a renegotiation are so important.

7.3 Prospects for Harmonization

The principle of *pacta sunt servanda* is the essential foundation of the market system. But in our globalizing economy, international dynamics are more and more beyond the control of the contractual partners. Therefore, a national, European and international concept of changed circumstances makes sense in extreme cases. It represents a form of after-the-fact risk allocation by means of judgments. It is thus quite likely that – through the influence of article 6:111 PECL – the concept of the change of circumstances will form part of the Common Frame of Reference for Contract Law (CFR) that is currently being drafted for the EU Commission. It is still unclear for what the CFR might serve one day and what status it will have. But a European and also an international approximation is needed, given that currently legal systems with flexible solutions – like Germany – favour 'their' companies, whereas companies subject to stricter laws face bankruptcy.[136]

A hardship provision – as articles 6.2.2 et seq. UNIDROIT Principles leads the way – should also be integrated into the CISG. In practice one can note quite an uncertainty how a court or tribunal might approach a hardship case under CISG. This is even the case when the parties were so wise to insert a hardship clause into a contract[137] in order modify e.g. the strict English law or article 79 CISG.[138] Thus, not just a European 'harmonization', but also an international 'unification' is desirable. It would increase the predictability of law regarding supervening effects to the benefit of judges, arbitrators and, last not but least, business men around the globe, which depend more and more on continuous and international cooperation.

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[136] Regarding the (self)-discriminating French law CASHIN-RITAINE, *supra* note 70, p. 103; also see *Gaz de Bordeaux supra* note 75.

[137] E.g. what can be regarded as 'war' in the sense of such a clause?

[138] Regarding the CISG see STOLL & GRUBER, in SCHLECHTRIEM & SCHWENZER, *supra* note 82, Art. 79 CISG, para. 51; cf. already *supra* note 1.