Comparative Private Law

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Change of Circumstances, Hardship and *Imprévision*
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Problem, whether a party may be released from her obligations by supervening events which make the contract much more onerous

- Especially in long-lasting contracts
- In periods of economic instability
- In presence of unforeseeable events (war, natural catastrophes)

Principles:

- *Pacta sunt servanda* (contracts are to be observed)
- *Clausula rebus sic stantibus* (a contract depends on the continuation of circumstances existing at the time of formation)
Art. 6: 111 PECL

(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract,

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) terminate the contract at a date and on terms to be determined by the court; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances. In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.
A modern definition of Change of Circumstances

Characteristics:

• Performance has become excessively more onerous
• Change of circumstances, i.e. new conditions that alter the costs of performance
• The change of circumstance occurs after the time of conclusion of the contract and could not be reasonably foreseen
• One party did not accept the risk for the change of circumstance

Consequences:
(1) The parties are bound to enter into negotiations in order to adapt the contract
(2) The court may terminate the contract, if parties fail to reach agreement, or the court may adapt the contract
French Law

• Two opposite sets of rules regarding the question of supervening events

• Rigid protection of the contractual freedom in private law

• *Revision pour imprévision* in the field of administrative law
French Law

art. 1134 Code civil:
«Contracts which are lawfully concluded take the place of legislation for those who have made them. They can be modified or revoked only by the parties’ mutual consent or on grounds which legislation authorises. They must be performed in good faith.»
The French Rigidness: Canal de Craponne

Facts:
By contracts of 1560 and 1567 Craponne undertook the obligation to provide water to the waterers of Pélisanne. The contracts stipulated by way of compensation for a set charge. This charge of 3 sols per unit of water, which was sufficient at the time of the conclusion of the contracts, was no longer sufficient in 1873.

The Cour d’appel d’Aix set an increase of 60 centimes per unit of water.

The Cour de cassation: «That under no circumstances is it for the courts, however fair their decision may appear to them to be, to take into account the time and the circumstances in order to substitute new terms for those which have been freely accepted by the contracting parties». 
The argument of the Cour de cassation

• The contract is binding for the parties and for the judge as if it would be a statute
• The parties may reserve a right to withdraw or to renegotiate their obligations in the contract
• The protection of:
  – legal security
  – certainty
  – parties’ autonomy
New tendencies in French Law

French Ministry of Justice Project (2008):
Art. 136
If an unforeseeable and unsurmountable change of circumstances makes performance excessively onerous for one party, and that party had not taken the risk, he may demand that the other party renegotiate the contract, but the first party must continue to perform during the re-negotiations.
If re-negotiations are refused or break down, the judge may adapt the contract if the parties so agree, or may put an end to it from a date and on conditions that he may fix.
German Law

- **BGB**: The contract has to be performed, except in case of absolute impossibility.

- **Case law**:
  - 1920 *clausula rebus sic stantibus* is used by the *Reichgericht* to adapt the price agreed in the contract.
  - 1922 doctrine of the disappearance of the basis of transaction (*Wegfall der Geschäftsgrundlage*).
The 1919 inflation

**Facts:** The defendant M and the trader B were owners of a partnership. After dissolving the partnership, M entered into relations with the plaintiff R in order to save his investment.

**Judgement:** “The parties will have to enter fresh negotiations before the courts which will have to take account of the disappearance of the contractual basis. However, the courts must be careful to ensure that the defendant M does not avail himself of that opportunity to withdraw completely from his contractual obligations. The courts must seek to maintain the contract whilst adapting it. That obligation arises from Article 242 concerning good faith.”
The 1919 inflation

• Recognition of the judicial revision of contract
• Preference for the judicial revision over rescission
• Disappearance of the basis of transaction as the Ground for the revision
• Maintenance of the contract as it stands considered contrary to good faith
The German reunification

“The BGH recalls that the contractual basis is constituted by the intentions of the two parties respectively. In this case the intention to enter into legal relations was dependent upon the economic plan. Whilst the BGH was entitled to consider that refusal of aid did not amount to disappearance of the contractual basis, it should be emphasised that the defendant had no freedom of choice and had to implement the plan. On the adjustment of the contract the requirements of good faith have to be taken into account. It is a question as a matter of principle of upholding the contract as far as possible and of adapting it in the interests of the parties to the new circumstances.”
German Law: Wegfall der Geschäftsgrundlage

2002: § 313 BGB

(1) If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form.

(2) If material assumptions that have become the basis of the contract subsequently turn out to be incorrect, they are treated in the same way as a change in circumstances.

(3) If adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party may terminate the contract. In the case of a contract for the performance of a recurring obligation, the right to terminate is replaced by the right to terminate on notice.
English Law

• English law holds the parties to their bargain
• Principle *pacta sunt servanda* (as in French Law)
• Possibility and duty of the parties to make their provisions
• The doctrine of frustration
English Law

Staffordshire Area Health Authority v South Staffordshire Water Works Co

• The contract of water supply at a fixed price “at all times hereafter”
• The court allowed the contract to be ended by the water company
• The basis of the decision: the parties intended the contract for an indefinite period which can be brought to an end after a reasonable period of notice
Impossibility of performance

• Supervening events make performance impossible
• The supervening events occur without the fault of the debtor
• The debtor is discharged from his obligation
French Law: *force majeure*

- By impossibility the debtor is freed on the ground of *force majeure*
- *Force majeure* = an event that is
  - Irresistible (at the time of performance)
  - Unforeseeable (at the time the promise was made)
  - External to the debtor
Effects of *force majeure*

- Temporary impossibility (if time is not the essence of the contract) → suspension
- Partial non-performance → debtor is relieved only to the extent of the impossibility of performance
- Full impossibility → the contract falls away both parties are released from their obligations
German Law

Impossibility (*Unmöglichkeit*):

- initial ↔ subsequent
- objective ↔ subjective
- temporary ↔ definitive
- full ↔ partial
- attributable to the debtor ↔ not attributable to the debtor
German Law

• In case of non attributable impossibility the debtor is released from obligation
• The debtor will not be liable for damages
• The liability for damages depends on intention or negligence
• Even if the non-performance was not the debtors fault the creditor has the right to terminate the contract
English Law: the doctrine of frustration

Events occur which make performance:

• Impossible, illegal or radically different from which was envisaged by the parties at the time of contract

• Performance of the contract in the new circumstances would be fundamentally different from what was foreseen by the parties at the time of contract
Davis Contractor LTD v Fareham UDC

- **Facts**: An undertaking contracted to build 78 houses for local authority in 8 month. 22 month were required for completion, because of the lack of labour.

- **Judgement**: For frustration to occur, there must be such a change in the significance of the obligation, that the thing undertaken would, if performed, be a different thing from that contracted for.
Lord Ratcliffe:
«a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it, in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist.»
Effects of frustration

• Frustration causes the contract to disappear
• The parties are discharged for the future
• Old rule: any payment made before the frustration occurred were unaffected (no restitution)
• Where there has been a total failure of consideration the payments can be recovered
• Frustrated Contracts Act 1943: recoverability
Hardship Clauses

• The parties can make provisions in the contract for situations arriving from supervening events
• Indexation clauses
• Force majeure clauses
• Hardship clauses