Case 7: Termination or alteration of a contract in the event of a fundamental change of circumstances?

"Pacta sunt servanda"?

"A contract validly entered into is binding upon the parties. [...]"[1]

Scenario

Jane, John and their son George book a two-week family holiday to Thailand for the following February. Three weeks before their trip, South-East Asia is devastated by a tsunami of unprecedented magnitude. Thailand is one of the worst affected countries. The family is informed by the travel agency that the city in Thailand the family is due to visit is only slightly affected. The hotel and beach resort remain intact. However, many of the inhabitants of the region, as well as many employees of the hotel, have lost family members who worked in the most devastated regions. The risk of there being another tsunami in the coming months is low.

The family is shaken by the devastation that took place in South-East Asia. The family no longer wants to take the trip as the inhabitants of the region are in shock and are mourning the deaths of thousands of their countrymen, and perhaps even family members who were in the worst affected areas when the disaster occurred. Under such circumstances, the family considers it inappropriate to take a vacation in one of the countries most heavily affected by the tsunami, and would find it impossible to relax and enjoy the stay.

The tour operator believes the family is bound by its travel contract given that neither the hotel nor the beach resort is affected by the tsunami and that there is no particular danger in the area. Also, following this catastrophe, Thailand will be in particular need of the income from the tourist industry to pay for its reconstruction. In any event, the tour operator thinks that he is entitled to compensation if the family does not go on holiday.

Is the family still bound by the contract? If so, can the family cancel its trip? In the event of a cancellation, will the family have to compensate the tour operator?

[1] International Institute for the Unification of Private Law (UNIDROIT): *Principles of International Commercial Contracts*, Art. 1.3 (Binding character of contract).

Questions

(1) What is the legal problem raised in this scenario? What are the interests involved? What principles are in conflict?

(2) Do the EU Directive on package travel, package holidays and package tours and the UNIDROIT International Convention on Travel Contracts provide a solution for such a case? What would be the legal position under the Directive if the tour operator had substituted Sri Lanka with another destination?

(3) What are the approaches to this problem taken in:
(a) *Swiss* law,
(b) *German* law,
(c) *Austrian* law,
(d) *Dutch* law, and,
(e) the law of *Serbia*,
according to the special rules on travel contracts, and according to the general rules and the case law applicable in case of change of circumstances cited in the materials? What rules found in the legislation or case law of these legal orders offer a solution to this legal problem?

What arguments would you put forward if you were representing:
(a) the tour operator
(b) the family?

(4) In the materials below, you will find Article 388 of the *Greek* Civil Code and Article 1467 of the *Italian* Civil Code. Is the approach taken in these provisions limited in a situation such as the case scenario above? Compare these articles with Article 6:258 of the *Dutch* Civil Code, § 313 of the *German* Civil Code and Articles 133 ff. of the Law of Contract and Torts from *Serbia*.

How has the issue been dealt with in the Italian case law and academic literature?

(5) The *French* Civil Code has its own particular approach to change of circumstances. What is different about French law? What is the reasoning behind the French approach, and what are its weaknesses? Under what conditions would a contracting party be freed from its contractual obligations under French law?

(6) What is *English* law's approach to changes of circumstances? (*Krell* v. *Henry* is one of the leading cases in England in this area.) What are the special features of this approach? How would the *Canal de Craponne* case be resolved under English law?

(7) What is the approach adopted in the Principles of European Contract Law, the UNIDROIT Principles, and the Draft Common Frame of Reference? Can the case scenario be resolved adequately through the application of Article 6:111 PECL, Articles 6.2.1 to 6.2.3 UNIDROIT Principles or Article III–1:110 of the Draft Common Frame of Reference?

Compare these articles with the general provisions relating to change of circumstances in the national legal orders.

(8) Which rule would you suggest for responding to the problem of a fundamental change of circumstances?

Table of contents

I. EU Directive and UNIDROIT Principles

1. Council Directive of 13 June 1990 on package travel, package holidays and package tours (90/314/EEC), OJ L 158, 23/06/1990, pp. 59–64[2]

Art. 2

For the purposes of this Directive:

(1) 'package' means the pre-arranged combination of not fewer than two of the following when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:

(a) transport;

(b) accommodation;

(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

[...]

(2) 'organizer' means the person who, other than occasionally, organizes packages and sells or offers them for sale, whether directly or through a retailer;

(3) 'retailer' means the person who sells or offers for sale the package put together by the organizer;

(4) 'consumer' means the person who takes or agrees to take the package [...]

[...]

Art. 4

[...]

(3) Where the consumer is prevented from proceeding with the package, he may transfer his booking, having first given the organizer or the retailer reasonable notice of his intention before departure, to a person who satisfies all the conditions applicable to the package. The transferor of the package and the transferee shall be jointly and severally liable to the organizer or retailer party to the contract for payment of the balance due and for any additional costs arising from such transfer.

[...]

(5) If the organizer finds that before the departure he is constrained to alter significantly any of the essential terms, such as the price, he shall notify the consumer as quickly as possible in order to enable him to take appropriate decisions and in particular:

– either to withdraw from the contract without penalty,

[2] It should be noted that, in order to be applicable to a specific case, the Directive needs to be transposed into the national laws of the EU Member States.

– or to accept a rider to the contract specifying the alterations made and their impact on the price.

[...]

6. If the consumer withdraws from the contract pursuant to paragraph 5, or if, for whatever cause, other than the fault of the consumer, the organizer cancels the package before the agreed date of departure, the consumer shall be entitled:

(a) either to take a substitute package of equivalent or higher quality where the organizer and/or retailer is able to offer him such a substitute. If the replacement package offered is of lower quality, the organizer shall refund the difference in price to the consumer;

(b) or to be repaid as soon as possible all sums paid by him under the contract.

In such a case, he shall be entitled, if appropriate, to be compensated by either the organizer or the retailer, whichever the relevant Member State's law requires, for non-performance of the contract, except where:

[...]

(ii) cancellation, excluding overbooking, is for reasons of force majeure, i.e. unusual and unforeseeable circumstances beyond the control of the party by whom it is pleaded, the consequences of which could not have been avoided even if all due care had been exercised.

[...]

2. UNIDROIT: International Convention on Travel Contracts (CCV), Brussels, April 23, 1970[3]

SCOPE OF APPLICATION

Art. 2

(1) This Convention shall apply to any travel contract concluded by a travel organizer or intermediary, where his principal place of business or, failing any such place of business, his habitual residence, or the place of business through which the travel contract has been concluded, is located in a Contracting State.

(2) This Convention shall apply without prejudice to any special law establishing preferential treatment for certain categories of travellers.

[3] Entry into force: 21.2.1976; in force in Argentina, Benin, Cameroon, Italy and Togo.

GENERAL OBLIGATIONS OF TRAVEL ORGANIZERS AND INTERMEDIARIES AND OF TRAVELLERS

Art. 3
In the performance of the obligations resulting from contracts defined in Article 1, the travel organizer and intermediary shall safeguard the rights and interests of the traveller according to general principles of law and good usages in this field.

Art. 8
Unless the parties agree otherwise, the traveller may substitute another person for the purpose of carrying out the contract provided that such person satisfies the specific requirements relating to the journey or sojourn, and that the traveller compensates the travel organizer for any expenditure caused by such substitution, including non-reimbursable sums payable to third parties.

Art. 9
The traveller may at any time cancel the contract in whole or in part, provided he compensates the organising travel agent in accordance with domestic law or the provisions of the contract.

Art. 10
(1) The travel organizer may, without indemnity, cancel the contract, in whole or in part, if before the contract or during its performance, circumstances of an exceptional character manifest themselves of which he could not have known at the time of conclusion of the contract, and which, had they been known to him at that time, would have given him valid reason not to conclude the contract.

[...]

(3) In event of cancellation of the contract before its performance, the travel organizer shall refund in full any payments received from the traveller. [...]

Art. 16
The traveller shall be liable for any loss or damage caused by his wrongful acts or default to the travel organizer [...] as a consequence of non-compliance with the obligations incumbent upon him under this Convention or under contracts subject thereto, wrongful acts or default being assessed having regard to a traveller's normal behaviour.

II. Switzerland

1. Schweizerisches Bundesgesetz über Pauschalreisen vom 18. Juni 1993 (*Swiss Federal Act on Package Holidays, 18 June 1993*)

1. Abschnitt: Begriffe

Art. 1. Pauschalreise.
(1) Als Pauschalreise gilt die im voraus festgelegte Verbindung von mindestens zwei der folgenden Dienstleistungen, wenn diese Verbindung zu einem Gesamtpreis angeboten wird und länger als 24 Stunden dauert oder eine Übernachtung einschliesst:
(a) Beförderung;
(b) Unterbringung;
(c) andere touristische Dienstleistungen, die nicht Nebenleistungen von Beförderung oder Unterbringung sind und einen beträchtlichen Teil der Gesamtleistung ausmachen.

[...]

Section 1: Definitions

Art. 1. Package holidays.
(1) Package holiday means the pre-arranged combination of at least two of the following services when sold at a total price and when the service covers a period of more than twenty-four hours or includes overnight accommodation:
(a) transport;
(b) accommodation;
(c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package.

[...]

6. Abschnitt: Wesentliche Vertragsänderungen

Art. 8. Begriff.
(1) Als wesentliche Vertragsänderung gilt jede erhebliche Änderung eines wesentlichen Vertragspunktes, welche der Veranstalter vor dem Abreisetermin vornimmt.
(2) Eine Preiserhöhung von mehr als zehn Prozent gilt als wesentliche Vertragsänderung.

Section 6: Material change of the contract

Art. 8. Definition.
(1) Material change of the contract means all significant changes to an essential element of the contract made by the tour operator before the departure date.
(2) An increase in price of more than 10 percent is considered to be a material change of the contract.

Art. 10. Konsumentenrechte.
(1) Der Konsument kann eine wesentliche Vertragsänderung annehmen oder ohne Entschädigung vom Vertrag zurücktreten.
(2) Er teilt den Rücktritt vom Vertrag dem Veranstalter oder dem Vermittler so bald wie möglich mit.
(3) Tritt der Konsument vom Vertrag zurück, so hat er Anspruch:
(a) auf Teilnahme an einer anderen gleichwertigen oder höherwertigen Pauschalreise, wenn der Veranstalter oder der Vermittler ihm eine solche anbieten kann;
(b) auf Teilnahme an einer anderen minderwertigen Pauschalreise sowie auf Rückerstattung des Preisunterschieds; oder
(c) auf schnellstmögliche Rückerstattung aller von ihm bezahlten Beträge.
(4) Vorbehalten bleibt der Anspruch auf Schadenersatz wegen Nichterfüllung des Vertrages.

Art. 10. Consumers' rights
(1) A consumer can accept a material change to the contract or withdraw from the contract without compensation.
(2) The consumer shall inform the tour operator or the retailer as soon as possible.
(3) Where the consumer withdraws from the contract, he is entitled to:
(a) a substitute package holiday of equivalent or higher quality if the organiser or retailer can offer him one;
(b) a substitute package holiday of lower quality as well as a refund of the difference in price; or
(c) a refund of all sums paid as soon as possible.
(4) The consumer reserves the right to claim damages for breach of contract.

9. Abschnitt: Abtretung der Buchung der Pauschalreise

Art. 17
(1) Ist der Konsument daran gehindert, die Pauschalreise anzutreten, so kann er die Buchung an eine Person abtreten, die alle an die Teilnahme geknüpften Bedingungen erfüllt, wenn er zuvor den Veranstalter oder den Vermittler innert angemessener Frist vor dem Abreisetermin darüber informiert.
(2) Diese Person und der Konsument haften dem Veranstalter oder dem Vermittler, der Vertragspartei ist, solidarisch für die Zahlung des Preises sowie für die gegebenenfalls durch diese Abtretung entstehenden Mehrkosten.

Section 9: Transfer of the booking of the package holiday

Art. 17
(1) If the consumer is prevented from taking the package holiday, he may transfer his booking, having first given the organiser or the retailer reasonable notice of his intention before the departure date, to a person who satisfies all the conditions applicable to the package holiday.
(2) This person and the consumer shall be jointly and severally liable to the organiser or retailer party to the contract for the payment of the price as well as for any additional costs arising from such transfer.

2. Luc Thévenoz and Franz Werro (eds), Commentaire Romand, *Code des obligations*, Vol. I (comment by Bernd Stauder) (translation of the French original)

Art. 17 of the Swiss Federal Act on Package Holidays

[...]

III. Requirements

[...]

6 The law requires that the consumer be **prevented** from taking the holiday. This requirement is supposed to limit the consumer's right to cases where he would be unable to go (sickness, accident, professional obligations, etc.) and exclude the right where the consumer simply changes his mind. If the unforeseen difficulty has to be interpreted objectively (impossibility to go), a consumer who does not want to travel would not have the right to transfer the holiday to someone else. In such an event, the general rule of Art. 377 of the Code of obligations would be applicable and the consumer would have to compensate the tour operator. [...]

3. Schweizerisches Obligationenrecht (*Swiss Code of Obligations*)[4]

Der Werkvertrag

The Work Contract

Art. 373. Höhe der Vergütung. Feste Übernahme.
(1) Wurde die Vergütung zum voraus genau bestimmt, so ist der Unternehmer verpflichtet, das Werk um diese Summe fertigzustellen, und darf keine Erhöhung fordern, selbst wenn er mehr Arbeit oder grössere Auslagen gehabt hat, als vorgesehen war.
(2) Falls jedoch ausserordentliche Umstände, die nicht vorausgesehen werden konnten oder die nach den von beiden Beteiligten angenommenen Voraussetzungen ausgeschlossen waren, die Fertigstellung hindern oder übermässig erschweren, so kann der Richter nach seinem Ermessen eine Erhöhung des Preises oder die Auflösung des Vertrages bewilligen.
(3) Der Besteller hat auch dann den vollen Preis zu bezahlen, wenn die Fertigstellung des Werkes weniger Arbeit verursacht, als vorgesehen war.

[4] Translation by Swiss-American Chamber of Commerce.

Art. 373. Amount of Compensation. Fixed Price.
(1) If the compensation has been precisely stipulated in advance, the contractor is obligated to complete the work for this sum and may not claim an increase even if he had more labour or larger expenditures than had been foreseen.
(2) If, however, extraordinary circumstances which could not have been foreseen or which were excluded from the assumptions made by the parties, impede the completion or render it exceedingly difficult, the judge may, at his discretion, authorise an increase of the price or dissolution of the contract.
(3) The principal shall also pay the full price if the completion of the work has caused less labour than had been foreseen.

Art. 377. Rücktritt des Bestellers gegen Schadloshaltung.
Solange das Werk unvollendet ist, kann der Besteller gegen Vergütung der bereits geleisteten Arbeit und gegen volle Schadloshaltung des Unternehmers jederzeit vom Vertrag zurücktreten.

Art. 377. Withdrawal of the principal against indemnification.
As long as the work is incomplete, the principal may withdraw at any time from the contract against compensation for the labour already performed and against full indemnification of the contractor.

4. Schweizerisches Zivilgesetzbuch (*Swiss Civil Code*)

Art. 2. Inhalt der Rechtsverhältnisse. Handeln nach Treu und Glauben.
(1) Jedermann hat in der Ausübung seiner Rechte und in der Erfüllung seiner Pflichten nach Treu und Glauben zu handeln.
[...]

Art. 2. Content of relationships. Acting in good faith
(1) Each person shall be required to exercise his rights and fulfil his duties in good faith.
[...]

5. Tribunal fédéral suisse (*Swiss Federal Court*) 4.5.1922, ATF 48 II 242

Arrêt de la 1re Section civile du 4 mai 1922
dans la cause
Segessemann & Cie contre *Dreyfus Frères & Cie.*

4. — [...] Bien que le droit suisse positif ne connaisse pas, comme cause générale d'extinction des obligations contractuelles, la *clausula rebus sic stantibus*, le législateur ne s'est pas dissimulé cependant qu'il existe des cas où les changements qui se sont produits depuis que l'engagement a été contracté doivent avoir pour effet de rendre caduc cet engagement, quand bien même aucune des causes reconnues d'extinction des obligations ne se trouvent réalisées (cf. 373, 352, 545 CO) et la jurisprudence du Tribunal fédéral (RO **45** 2 N° 60 cons. 5; **46** 2 N° 75; **47** 2 N° 54) comme aussi la jurisprudence allemande (Entscheidungen des Reichsgerichts vol. 100, N^os 38 et 39) a admis que si dans la règle celui qui a conclu un contrat assume les risques d'une transformation préjudiciable des conditions d'exécution, il peut en être autrement lorsque des événements exceptionnels, et qui ne pouvaient être prévus, ont pour conséquence de rendre l'exécution du contrat si onéreuse pour le débiteur que le maintien de l'obligation conduirait à sa ruine. Dans ce dernier cas, il est non seulement conforme à l'équité de le libérer d'un engagement contracté dans des conditions toutes différentes, mais même au point de vue juridique cela se justifie, soit qu'on fasse appel aux règles de la bonne foi, soit qu'on admette une impossibilité relative d'exécution non imputable au débiteur, soit enfin qu'on applique par analogie les dispositions légales relatives au droit de se départir de certains contrats. Mais [...] ce n'est qu'à titre tout à fait exceptionnel que la *clausula rebus sic stantibus* peut être appliquée en droit suisse. Il est dans l'esprit général du CO de s'en tenir à l'adage *pacta sunt servanda* et une application par analogie de l'article 373, al. 2 CO à d'autres contrats doit se faire avec une extrême prudence si l'on ne veut porter une sérieuse atteinte à la sécurité des transactions.

Translation

Decision of the 1st Civil Section, 4 May 1922
in the case
Segessemann & Cie v. *Dreyfus Frères & Cie.*

4. — [...] Although substantive Swiss law does not recognise the *clausula rebus sic stantibus* as a general basis for the termination of contractual obligations, the legislator has not however closed its eyes to the fact that there are cases in which changes that have occurred since the agreement was made should make the agreement void, even when none of the recognised reasons for termination are fulfilled (cf. 373, 352, 545 CO) and the Federal Court's case law [...] like German case law [...] accepted that even though, in general, the person who made the contract takes on the risk of any detrimental change of the conditions of performance, the situation is different when exceptional and unforeseeable circumstances make performance of the contract so onerous for the debtor that maintaining the obligation would lead to his financial ruin. In such a case, it is not only in keeping with equity to free him from an agreement concluded under completely different circumstances, but also, from a legal point of view, it is justified by either appealing to the rules of good faith, or admitting the relative impossibility of performance not attributable to the debtor, or lastly by admitting that the provisions on the right to withdraw from certain contracts apply by analogy. However [...] it is only in very exceptional circumstances that the *clausula rebus sic stantibus* can be used in Swiss law. The general spirit of the Code of obligations is to stick to the adage *pacta sunt servanda* and the application by analogy of Article 373 (2) CO to other contracts must be done with extreme care to avoid a serious attack on the security of transactions.

III. Germany

1. Bürgerliches Gesetzbuch, BGB (*German Civil Code*)

Reisevertrag

Travel contracts

§ 651 e. Kündigung wegen Mangels.

[...]

(3) Wird der Vertrag gekündigt, so verliert der Reiseveranstalter den Anspruch auf den vereinbarten Reisepreis. Er kann jedoch für die bereits erbrachten [...] Reiseleistungen eine [...] Entschädigung verlangen. [...]

§ 651 e. Termination for defect.

[...]

(3) If the contract is terminated, the tour operator loses the right to be paid the agreed package price. The tour operator can, however, claim damages [...] for services already provided. [...]

§ 651 i. Rücktritt vor Reisebeginn.

(1) Vor Reisebeginn kann der Reisende jederzeit vom Vertrag zurücktreten.

(2) Tritt der Reisende vom Vertrag zurück, so verliert der Reiseveranstalter den Anspruch auf den vereinbarten Reisepreis. Er kann jedoch eine angemessene Entschädigung verlangen. Die Höhe der Entschädigung bestimmt sich nach dem Reisepreis unter Abzug des Wertes der vom Reiseveranstalter ersparten Aufwendungen sowie dessen, was er durch anderweitige Verwendung der Reiseleistung erwerben kann.

(3) Im Vertrag kann für jede Reiseart unter Berücksichtigung der gewöhnlich ersparten Aufwendungen und des durch anderweitige Verwendung der Reiseleistungen gewöhnlich möglichen Erwerbs ein Vomhundertsatz des Reisepreises als Entschädigung festgesetzt werden.

§ 651 i. Withdrawal prior to the commencement of travel.

(1) Prior to the commencement of travel, the traveller can, at any time, withdraw from the contract.

(2) If the traveller withdraws from the contract, the tour operator therefore loses the right to payment of the agreed price of the package. However, the tour operator can demand some compensation. The amount of compensation is determined by the price of the travel package minus the value of the expenditure saved by the tour operator and what he can earn from the alternative deployment of the travel services.

(3) The contract may, for each type of trip, taking into account the usual expenditure saved and the profit that can usually be made from an alternative deployment of the travel services, specify a percentage of the package price as compensation.

§ 651 j. Kündigung wegen höherer Gewalt.

(1) Wird die Reise infolge bei Vertragsabschluss nicht voraussehbarer höherer Gewalt erheblich erschwert, gefährdet oder beeinträchtigt, so können sowohl der Reiseveranstalter als auch der Reisende den Vertrag allein nach Maßgabe dieser Vorschrift kündigen.

(2) Wird der Vertrag nach Absatz 1 gekündigt, so findet die Vorschrift des § 651 e Abs. 3 Satz 1 und 2 [...] Anwendung. Die Mehrkosten für die Rückbeförderung sind von den Parteien je zur Hälfte zu tragen. Im Übrigen fallen die Mehrkosten dem Reisenden zur Last.

§ 651 j. Termination for force majeure.

(1) If, through force majeure, the travel package is substantially obstructed, jeopardised or impaired, the tour operator or traveller can terminate the contract by the simple application of this provision.

(2) If the contract is terminated pursuant to paragraph 1, the provisions of § 651 e(3) sentences 1 and 2 [...] apply. The parties each bear half of the additional costs of return transport. Other additional costs are payable by the traveller.

2. Landgericht Köln (*Cologne Court*) 28.3.2001 ("Earthquake in Mexico" case), NJW-RR 2001, 1064

LG Köln, Urt. v. 28. 3. 2001 – 10 S 395/00

Zum Sachverhalt: Die Kläger, die bei der Beklagten eine am 9.10.1999 beginnende Rundreise durch Mexiko gebucht hatten, haben mit Schreiben vom 8.10.1999 ihren Rücktritt von der Reise unter Hinweis auf die Regenfälle, Überschwemmungen und Erdbeben in Mexiko erklärt. Die Beklagte hat bei der Rückerstattung des Reisepreises 90% des Preises als Stornokosten einbehalten. [...]

Aus den Gründen: [...] Die Kläger waren zwar auf Grund des § 651 i I BGB berechtigt, jederzeit vor Reisebeginn vom Vertrag zurückzutreten, jedoch hat dies gemäß § 651 i II 2, III BGB grundsätzlich zur Folge, dass der Reiseveranstalter eine angemessene Entschädigung in Höhe der [...] vereinbarten Stornogebühren verlangen kann. Einen derartigen Anspruch hat die Beklagte auch geltend gemacht und lediglich einen geringen Teil des bereits vollständig entrichteten Reisepreises zurückgezahlt. Eine grundsätzlich vollständige Befreiung von der Verpflichtung zur Entrichtung einer Entschädigung kommt hingegen nur in Betracht, falls den Klägern gemäß § 651 j BGB ein Kündigungsrecht wegen höherer Gewalt zustand, denn einen Entschädigungsanspruch im Sinne der §§ 651 j II, 651 e III 2 BGB hat die Beklagte jedenfalls nicht substantiiert dargetan.

Ein Kündigungsrecht gemäß § 651 j BGB bestand jedoch nicht, denn es fehlt zumindest an der erforderlichen konkreten Gefahr für die Durchführbarkeit der Reise im Zeitpunkt der Kündigungserklärung.

Ein Fall höherer Gewalt in dem von § 651 j BGB vorausgesetzten Sinne liegt [...] in einem von außen kommenden, unabwendbaren und unverschuldeten Ereignis [...]. Heftige Regenfälle, Überschwemmungen und Erdbeben – wie sie circa eine Woche vor dem geplanten Reiseantritt in Mexiko aufgetreten waren – sind auch grundsätzlich als Fälle höherer Gewalt in diesem Sinne einzustufen. Erforderlich ist jedoch ferner, dass durch die höhere Gewalt eine *konkrete* Gefahr für die Durchführbarkeit der Reise entstand; subjektive Befürchtungen einzelner Reisender reichen insoweit nicht aus.

Abflugtermin sollte erst der 9.10.1999 sein. Zu diesem Zeitpunkt kam es jedenfalls nicht mehr zu weiteren heftigen Regenfällen; auch ein weiteres Erdbeben wurde nicht gemeldet. Dafür, dass weitere Unwetter bzw. Erdbeben unmittelbar bevorstanden, ist auch nichts dargetan. Im Zeitpunkt des Antritts der Reise lagen auch keine fortwirkenden erheblichen Gefährdungen bzw. Erschwerungen infolge der vorausgegangenen Naturereignisse – beispielsweise in Form von Überschwemmungen – vor. Zumindest objektiv gab es bei der Durchführung der Reise – wie auch der tatsächliche Ablauf der Ereignisse zeigt – keinerlei Schwierigkeiten. Die durch vorhergehende äußere Ereignisse und Pressemeldungen veranlassten Befürchtungen der Kläger reichten jedoch nicht aus, um gleichwohl ein Kündigungsrecht im Sinne des § 651 j BGB zu begründen.

[...] Da die Kläger als Pauschalreisende in Hotels untergebracht worden wären, dürfte sie die beklagenswerte Obdachlosigkeit von Teilen der Bevölkerung ebenso wenig tangiert haben wie eine mögliche Seuchengefahr. [...]

[...]

Die Kläger können sich damit lediglich auf ihr allgemeines Kündigungsrecht gemäß § 651 i BGB berufen. Dies hat zur Folge, dass die Beklagte gemäß § 651 i III BGB für die bereits erbrachten Leistungen eine angemessene Entschädigung verlangen kann. Dies hat die Beklagte [...] getan und unter Berufung auf die Allgemeinen Geschäftsbedingungen 90% des Reisepreises als Entschädigung einbehalten.

[...] Je kürzer die Zeit zwischen der Rücktrittserklärung des Kunden und dem geplanten Reiseantritt ist, desto geringer sind die wirtschaftlichen Dispositionsmöglichkeiten des Reiseveranstalters für eine anderweitige Verwendung der für den Kunden vorgesehenen Reiseplätze [...]

[D]ie Vereinbarung einer Pauschale von 90% für den Fall des Rücktritts innerhalb von zwei Wochen vor Reisebeginn [ist] nicht zu beanstanden.

Translation

Facts: The claimants, who had booked a tour of Mexico beginning 9.10.1999 with the defendant on 8.10.1999, informed the defendant in writing of their withdrawal from the travel package with reference to the rain, flooding and earthquake in Mexico. Upon reimbursement, the defendant retained 90% of the price of the trip as a cancellation fee. [...]

Reasons: [...] Although the claimants are, pursuant to § 651 i (1) BGB, authorised to withdraw from the contract at any time prior to the commencement of travel, this means, in general, according to § 651 i (2) sentence 2, (3) BGB, that the tour operator can claim compensation up to [...] the sum agreed upon as a cancellation fee. The defendant asserted such a claim and only reimbursed a minimal part of the price of the trip already paid in its entirety. Release, generally complete, from the obligation to pay compensation only becomes a possibility if the claimant has the right to terminate the contract for force majeure pursuant to § 651 j BGB as the defendant has, in any case, not substantially presented a claim for compensation in the sense of § 651 j (2) and 651 e (3) sentence 2 BGB.

There was, however, no right to terminate the contract by virtue of § 651 j BGB as there was no concrete danger to the performance of the travel package at the moment termination was declared.

There is force majeure in the sense of § 651 j BGB [...] where there is an external, unavoidable event attributable to no-one [...] Heavy rain, floods and an earthquake, like those that occurred in Mexico approximately one week before the planned commencement of travel, are events which should generally be considered to be cases of force majeure in this way. However, it is also necessary for a *concrete* danger to the performance of the travel package to result from the force majeure. The subjective fears of an isolated traveller are not enough.

Departure should only have been on 9.10.1999. However, at that time, the heavy rain had stopped and no other earthquake had been reported. Furthermore, there was no immediate indication that more bad weather or another earthquake were going to recur.

At the commencement of travel, there were no more threats of natural disaster nor was there any significant worsening of the situation following the natural disasters that had occurred, such as, for example, the floods. From an objective point of view at least, as can be seen by the actual course of events, there was no difficulty for the trip to take place. The claimant's fears caused by the previous events and by the information disseminated by the press are not, however, enough upon which to base a right to withdraw from the contract in the sense of § 651 j BGB.

[...] As the claimant was in hotel accommodation as part of a package holiday, the fact that a part of the population is homeless should not affect him, particularly with regards to the possible danger of an epidemic [...]

[...] The claimants can thus only base their claim on the general right to withdraw in § 651 i (3) BGB. The consequence of this is that the defendant can, by virtue of § 651 i (3) BGB, demand compensation for the service already provided. That is what the defendant [...] did and, by referring to the general terms of business, he retained 90% of the sale price as compensation.

[...] The shorter the time between the client's withdrawal and the commencement of travel, the less chance the tour operator has to deploy the travel services alternatively [...].

[The] agreement stipulating a fixed rate of 90% in cases of withdrawal in the two weeks preceding the commencement of travel [is] not open to criticism.

3. Amtsgericht Dachau (*Dachau Court of First Instance*), 22.11.2005 ("Tsunami" case), RRa 2006, 78

AG Dachau, Urt. v. 22.11.2005 – 3 C 687/05

Entscheidungsgründe

Die Klägerin hat Anspruch auf die geltend gemachte Entschädigung in Höhe der in

Ziffer 5) ihrer Allgemeinen Geschäftsbedingungen geregelten Stornogebühren, nämlich 15% des ursprünglichen Reisepreises von 3.300.- EUR, somit in Höhe von 495.- EUR.

[...] Dem Klageanspruch kann nicht mit Erfolg entgegen gehalten werden, dass der Beklagte den Vertrag mit Schreiben vom 3.1.2005 stornierte.

Zwar kann der Beklagte gemäss § 651i BGB berechtigt, jederzeit vor Reiseantritt vom Vertrag zurücktreten, jedoch hat dies gemäss § 651i Abs. 2 Satz 2, Abs. 3 BGB zur Folge, dass der Reiseveranstalter eine angemessene Entschädigung in Höhe der durch Allgemeine Geschäftsbedingungen vereinbarten Stornogebühren verlangen kann. Einen derartigen Anspruch macht die Klägerin im vorliegenden Fall geltend.

Auf ein Kündigungsrecht gemäss § 651j BGB wegen höherer Gewalt kann sich der Beklagte nicht berufen, denn es fehlt an der erforderlichen konkreten Gefahr für die Durchführbarkeit der Reise im Zeitpunkt der Kündigungserklärung.

Die zu Weihnachten 2004 eingetretene Flutkatastrophe, die auch das vom Beklagten gebuchte Reiseziel betraf, ist als Fall höherer Gewalt in dem von § 651j BGB vorausgesetzten Sinne eines von aussen kommenden, unabwendbaren und unverschuldeten Ereignisses einzustufen; erforderlich ist jedoch ferner, dass durch die höhere Gewalt eine konkrete Gefahr für die Durchführbarkeit der Reise bestand. Die blossen subjektiven Befürchtungen des Beklagten und seiner Reisebegleiter reichen insoweit nicht aus.

Es kann letztlich dahingestellt bleiben, ob eine konkrete Gefahr für die Durchführbarkeit der Reise zum Zeitpunkt des Eintritts der Flutkatastrophe bestand, ob also das vom Beklagten gebuchte Hotel und die Region von der Flutkatastrophe betroffen waren, denn darauf kommt es letztlich nicht an. Massgeblich ist vielmehr der Zeitpunkt des Beginns der geplanten Reise und zu dem Zeitpunkt bestand eine derartige konkrete Gefahr jedenfalls nicht mehr.

Abflugtermin sollte der 20.2.2005 sein. Bis zu diesem Zeitpunkt kam es nicht zu weiteren Überflutungen und der Beklagte hat auch nicht dargetan, dass zu diesem Zeitpunkt noch fortwirkende erhebliche Gefährdungen, bzw. Erschwerungen in Folge der vorausgegangenen Naturkatastrophe vorgelegen hätten.

Die Klägerin trug vielmehr vor, dass die vom Beklagten gebuchte Rundreise im Land durchgeführt werden konnte und weder das Hotel noch die Infrastruktur der Region durch die Flutwelle beeinträchtigt worden seien. Gegenteiliges wurde vom insoweit beweisbelasteten Beklagten nicht substantiiert vorgetragen und nicht nachgewiesen.

Die durch die vorhergehenden äusseren Ereignisse und Pressemeldungen zwar nachvollziehbaren Befürchtungen des Beklagten reichen nicht aus, ein Kündigungsrecht im Sinne von § 651j BGB zu begründen, denn es kommt auf den Zeitablauf an, der zwischen dem Ereignis und dem Reisebeginn liegt. Je länger ein Naturereignis zurückliegt, desto mehr müssen derartige Befürchtungen zurücktreten. Ferner muss sich der Reisende gegebenenfalls auf Informationen des Reiseveranstalters dazu verweisen lassen, inwieweit bei Reisebeginn noch mit Beeinträchtigungen zu rechnen sein mag und damit korrespondierend besteht die Verpflichtung des Reiseveranstalters, sich über die Lage vor Ort zu informieren. Grundsätzlich ist bei Naturkatastrophen jedenfalls davon auszugehen, dass deren Folgen schneller abklingen als etwa politische Gefahrenlagen.

Nachdem seit der Naturkatastrophe bis zum Reiseantritt mehr als sieben Wochen verstrichen waren, konnte damit gerechnet werden, dass – selbst wenn im Reisegebiet Beeinträchtigungen bestanden – diese beseitigt waren bis zum Reiseantritt. Dem Beklagten war es zuzumuten, auf die Informationen des Reiseveranstalters über die Durchführbarkeit der geplanten Reise zu vertrauen.

Der Beklagte kann sich daher lediglich auf sein allgemeines Kündigungsrecht gemäss § 651i BGB berufen und schuldet deshalb die geltend gemachte Entschädigung in Höhe der durch wirksame Einbeziehung der Allgemeinen Geschäftsbedingungen der Klägerin vereinbarten Stornogebühren.

[...]

Translation

The claimant has a right to compensation of the amount specified in subsection (5) of their general business conditions for the regular cancellation fee, namely 15% of the initial package price of 3300 euros, consequently the amount of 495 euros.

[...] The defendant cannot successfully counter the claim by advancing that he terminated the contract in writing on 3.1.2005.

Admittedly, the defendant can, at any time before the commencement of travel, legitimately, in accordance with § 651i BGB, withdraw from the contract; however this has the result that the tour operator can demand reasonable compensation of the amount agreed upon as the cancellation fee in the general business conditions. The claimant makes such a demand in the present case.

The claimant cannot refer to a right to terminate the contract in accordance with § 651j BGB because of the lack of the requisite concrete danger to the practicability of the trip at the time of the notice to terminate being given.

At Christmas 2004, the destination booked by the defendant was affected by a flood disaster, an act of god as in § 651j BGB, which is classified as an outside event for which no-one is to blame; [in order for § 651j BGB to apply,] it is however necessary for there to be a concrete danger to the practicability of the trip. The merely subjective fears of the defendant and his travelling companion are not sufficient in this respect.

Ultimately, it is unimportant to assess whether there was a concrete danger to the practicability of the trip at the time of the flood disaster and also, whether the hotel booked and the region were affected because, in the end, it does not depend on this. What is decisive is rather the time of the beginning of the planned trip and at the time there was certainly no longer such a concrete danger.

The departure date should have been 20.2.2005. There was no further flooding before this date and the defendant has not demonstrated that, at this time, there continued to be a considerable threat, that is, an impediment [to the trip] as a consequence of the preceding natural disaster.

The claimant, on the contrary, expressed that the tour booked for the defendant was possible and that neither the hotel nor the region's infrastructure had been damaged by the tidal wave. In this respect, evidence to the contrary has not been substantially demonstrated or proven by the defendant.

The defendant's fears, though admittedly comprehensible due to the prior events and press reports, are not sufficient upon which to base a right of termination under § 651j BGB, because this depends on the lapse of time between the event and the commencement of travel. The further back in time a natural event occurred, the more such fears subside. Furthermore, the traveller would be required, if applicable, to ask the tour operator if there were still any adverse effects and the tour operator would be under the

corresponding obligation to find out about the situation in the place of destination. In principle, the effects of a natural disaster subside quicker than a political situation.

More than seven weeks passed between the natural disaster and the beginning of the trip, it can therefore be estimated, that – except if there are adverse effects in the area in which the trip is to take place – there would be no problem preventing the trip from going ahead. The defendant was expected to trust the tour operator's information on the feasibility of the planned trip.

The defendant is therefore referred to the general right to withdraw from the contract in accordance with § 651i BGB and for that reason owes the requested compensation of the amount that was effectively included in the claimant's general terms of business as the agreed cancellation fee.

[...]

(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.

4. Bürgerliches Gesetzbuch, BGB (*German Civil Code*)

Anpassung und Beendigung von Verträgen

Adaptation and termination of contracts

§ 313. Störung der Geschäftsgrundlage[5]
(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.
(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.
(3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.

§ 313. *Interference with the basis of the contract*
(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.

[5] In cases not falling within the scope of § 651j BGB, recourse can be had to the general rule of § 313 BGB.

IV. Austria

The Austrian legislator transposed Directive 90/314/CEE into Austrian law in a law on consumer protection (*Konsumentenschutzgesetz*). The legislator did not introduce a consumer right to withdraw from a travel contract which would go further than what is provided for in the Directive. The doctrine of "variation of contract in case of change of circumstances" is recognised by the Austrian Supreme Court of Justice in a constant line of case law. After the September 11 terrorist attacks, the court decided as shown in the following extract.

Österreichischer Oberster Gerichtshof (*Austrian Supreme Court of Justice*) 26.8.2004 ("11. September 2001"), 6Ob145/04y, RIS-Justiz, RS 0111961

OGH 26. August 2004, 6 Ob 145/04 y

Mag. Rupert L***** hatte bei der Beklagten über ein Reisebüro für die Zeit vom 2. bis 11.10.2001 eine Reise von Salzburg nach New York und Chicago gebucht. Aufgrund der durch die Terroranschläge vom 11.9.2001 in den USA veränderten Lage stornierte er am 15.9.2001 diese Privatreise. Die Beklagte zahlte einen Teil des Entgelts zurück, behielt aber eine "Stornogebühr" [in Höhe von 487 Euro] zurück. Mag. Rupert L. trat seinen Rückforderungsanspruch an den klagenden Verband ab. Dieser stützt das Zahlungsbegehren seiner Klage vom 21.8.2002 im Wesentlichen darauf, dass wegen der Terroranschläge in den USA die Geschäftsgrundlage für die Reise weggefallen sei. Die Kriegserklärung einer islamistischen Terrororganisation habe sich gegen das ganze Land gerichtet. Über die Ereignisse und die künftigen Sicherheitsrisiken sei in den Medien breit berichtet worden. Der Antritt der Reise sei für den Kunden der Beklagten unzumutbar geworden.

Die Beklagte beantragte die Abweisung des Klagebegehrens. [...] Die Terroranschläge hätten sich nicht gegen touristische Ziele gerichtet. Ab dem 26.9.2001 habe es für Reisende in die USA keine unzumutbaren Beeinträchtigungen gegeben. Es habe regulärer Flugbetrieb geherrscht.

Das **Erstgericht** wies das Klagebegehren ab. [...] Das **Berufungsgericht** gab der Berufung des Klägers nicht Folge. [...] Die Terroranschläge vom 11.9.2001 hätten sich an einem einzigen Tag ereignet, woran sich massive Sicherheitsvorkehrungen angeschlossen hätten, sodass eine ernsthafte Bedrohungslage nicht mehr gegeben gewesen sei. Reisen nach dem 26.9.2001 seien ohne Behinderungen möglich gewesen [...]

Aus der Begründung:

Die Revision ist zulässig und berechtigt.

[...] Zum Wegfall der Geschäftsgrundlage als Anspruchsbasis für einen kostenlosen Rücktritt vom Reisevertrag wurde in den beiden einschlägigen Vorentscheidungen 8 Ob 99/99p = SZ 72/95 und 1 Ob 257/01b = ZVR 2003, 58/19, in denen es ebenfalls um Terroranschläge ging, anerkannt, dass das nur als subsidiäres und letztes Mittel aufzufassende Institut des Wegfalls der Geschäftsgrundlage unter gewissen Voraussetzungen einer Partei es ermöglicht, sich von rechtsgeschäftlichen Bindungen zu lösen. Von den Parteien des Reisevertrags nicht voraussehbare Erschwerungen, Gefährdungen oder Beeinträchtigungen der Reise können zum Rücktritt berechtigen, wenn die Reise für den Kunden unzumutbar geworden ist. Wann dies der Fall ist, hängt grundsätzlich von den Umständen des Einzelfalls ab. Wenn es sich nur um vereinzelte Anschläge handelt, mögen sie auch terroristischer Natur sein, steht kein Rücktrittsrecht zu. Die Anschläge müssen eine Intensität erreichen, die unter Anlegung eines durchschnittlichen Maßstabes als Konkretisierung einer unzumutbaren Gefahr derartiger künftiger Anschläge erscheint. Nur dann berechtigen sie zur Auflösung des Vertrages wegen Wegfalls der Geschäftsgrundlage. [...] Es ist zu fragen, wie ein durchschnittlicher, also weder ein besonders mutiger, noch ein besonders ängstlicher Reisender die künftige Entwicklung an dem in Aussicht genommenen Urlaubsziel beurteilt hätte. [...]

Die Intensität der Terroranschläge hatten eine historische Dimension, die selbst bei mutigen, jedenfalls aber bei sogenannten "Durchschnittsreisenden" Angstgefühle auslösten. Vor der Gefahr weiterer Anschläge wurde nahezu in allen Medien mit plausiblen Gründen [...] gewarnt. Die Urheberschaft der Anschläge war nicht näher geklärt. Zum Zeitpunkt der Rücktrittserklärung am 15.9.2001 war nicht damit zu rechnen, in absehbarer Zeit ein verlässliches Bild über die Gefährdungslage zu erhalten. Die Rücktrittserklärung des Kunden war nicht diejenige einer besonders ängstlichen Person. [...] An dieser Beurteilung vermögen auch die vom Berufungsgericht hervorgehobenen Umstände, dass massive Sicherheitsvorkehrungen in den USA getroffen wurden und dass sich dadurch das Sicherheitsrisiko verringert habe, nichts zu ändern. Dem ist entgegen zu halten, dass nach erfolgten Terroranschlägen im betroffenen Land jeweils die Sicherheitsmaßnahmen verstärkt werden, dass dadurch aber weitere Anschläge nicht verhindert werden können. Insbesondere der Flugverkehr kann nicht vollständig gesichert werden; es ist unmöglich, alle sogenannten "weichen Ziele" in Großstädten zu bewachen und vor Terror zu schützen. Es ist gerade die neue Dimension der Anschläge vom 11.9.2001, dass es trotz der weltweiten Sicherheitskontrollen auf Flughäfen gelungen ist, vier Flugzeuge im amerikanischen Luftraum gleichzeitig zu entführen und die Selbstmordanschläge auszuführen. Da die Reise des zurücktretenden Kunden der Beklagten gerade in das Zielgebiet New York erfolgen sollte, und gerade diese Großstadt in der Berichterstattung von Anfang an immer wieder wegen ihrer politischen Bedeutung und Symbolkraft als Ziel möglicher Großanschläge genannt wurde, ist der hier strittige kostenlose Rücktritt vom Reisevertrag aus den angeführten Gründen als gerechtfertigt zu qualifizieren. [...]

Translation

Mr Rupert L. had booked a trip from Salzburg to New York and Chicago for the period 2 to 11.10.2001 with the defendant company, through the intermediary of a travel agency. Owing to the change of circumstances caused by the terrorist attacks of 11.9.2001, he cancelled this trip on the 15.9.2001. The defendant company refunded part of the sum already paid but withheld a "cancellation fee" [of 487 Euros]. Mr Rupert L. transferred his claim for restitution to the claimant association. The association essentially bases its

claim for payment dated 21.8.2002 on the fact that, because of the terrorist attacks in the USA, the foundation of the contract would have disappeared. An Islamic terrorist organisation's declaration of war would have been directed at the whole country. The media had widely reported the events and security threats to come. It would not have been reasonable for the defendant's customer to go on the trip.

The defendant demanded the claim be rejected. [...] The terrorist attacks had not been directed towards tourist locations. From 26.9.2001, there would no longer have been any unreasonable prejudice for travellers to the USA and normal air traffic would have prevailed.

The **Court of first instance** rejected the complaint. [...] The **Court of appeal** did not follow up the claimant's appeal. [...] The September 11 attacks had only occurred on one day and had been followed by massive security measures, so that there was no longer a serious threat. Trips after 26.9.2001 would have been possible without any difficulties [...]

Reasons:

The appeal is admissible and well founded.

[...] On a change of circumstances as the basis for a claim for termination of a travel contract without charge, it was recognised in two previous analogous decisions (8 Ob 99/99p = SZ 72/95 und 1 Ob 257/01b = ZVR 2003, 58/19), in which there were also attacks, that the doctrine of change of circumstances is to be considered as a means of last resort authorising one party to sever contractual obligations under certain conditions. Parties are entitled to terminate the travel contract where unforeseeable worsening of the situation, threats and interferences with the trip make it unreasonable for the customer to take the trip. As a rule, it depends on the individual circumstances of the case as to whether this is the case. When there are only isolated attacks, which can also be terrorist in nature, there is no right to withdraw. The attacks must have reached an intensity which, on an ordinary scale, appears to be the concretisation of an unreasonable threat of a future attack. It is therefore only in such cases that contracts can be terminated for change of circumstances because of attacks. [...] The question is how an ordinary traveller, *i.e.* not particularly brave or particularly fearful, would have assessed the future development of the situation in the planned holiday destination. [...]

The intensity of the terrorist attacks was on a historic scale which sparked fear even amongst the brave but certainly amongst "ordinary travellers". Nearly all the media warned against the risk of further attacks, citing plausible reasons [...] The origin of the attacks was not clear. At the moment termination was declared, on 15.9.2001, it was estimated not to be possible to obtain a reliable assessment of the security situation in the foreseeable future. The customer's declaration of termination was not that of a particularly anxious person.[...] The circumstances stressed by the court of appeal, that is to say the massive security measures taken in the USA and through this the decrease in the security risk, do not change anything for this judgment. On the contrary, it must be remembered that following the occurrence of terrorist attacks, security measures are always reinforced in the country concerned without other attacks necessarily being avoided. Air traffic, in particular, cannot be completely secured; it is impossible to watch over all the "weak points" in cities and protect them from terror. It is precisely the new dimension of the September 11 attacks that succeeded, despite worldwide security checks in airports, in simultaneously hijacking four aeroplanes in American airspace and carrying out suicide attacks. The customer who terminated the contract was due to take a trip precisely in the New York region. From the beginning, this city was always, and rightly, classed as the possible target for a large-scale attack due to its political significance and symbolic stature. For these reasons, the termination of the travel contract without charge, which is in question here, is assessed as being justified. [...]

V. The Netherlands

Burgerlijk Wetboek (*Dutch Civil Code*)

Art. 7:503

(1) De reiziger kan de reisovereenkomst te allen tijde met onmiddellijke ingang opzeggen.

(2) Indien de reiziger opzegt wegens een aan hem toe te rekenen omstandigheid, vergoedt de reiziger de reisorganisator de schade die deze tengevolge van de opzegging lijdt. De schadevergoeding bedraagt ten hoogste eenmaal de reissom.

(3) Indien de reiziger opzegt wegens een niet aan hem toe te rekenen omstandigheid, he eft hij recht op teruggave of kwijtschelding van de reissom of, indien de reis reeds ten dele is genoten, een evenredig deel daarvan.

Art. 7:503

(1) The traveller may, at any time, terminate the travel contract with immediate effect.

(2) If the traveller terminates the contract for a reason attributable to himself, he must compensate the tour operator for the damage resulting from this termination. Compensation cannot exceed the total value of the trip.

(3) If the traveller cancels his trip because of circumstances not attributable to himself, he is entitled to a refund of the package price or to be exempt from paying it; if he has already used part of the travel package, he is only entitled to part of the price calculated accordingly.

Art. 6:258

(1) De rechter kan op verlangen van een der partijen de gevolgen van een overeenkomst wijzigen of deze geheel of gedeeltelijk ontbinden op grond van onvoorziene omstandigheden welke van dien aard zijn dat de wederpartij naar maatstaven van redelijkheid en billijkheid ongewijzigde instandhouding van de overeenkomst niet mag verwachten. Aan de wijziging of ontbinding kan terugwerkende kracht worden verleend.

(2) Een wijziging of ontbinding wordt niet uitgesproken, voor zover de omstandigheden krachtens de aarde van de overeenkomst of de in het verkeer geldende opvattingen voor rekening komen van degene die zich erop beroept.

[...]

Art. 6:258

(1) Upon the demand of one of the parties, the judge may modify the effects of a contract, or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the co-contracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form The modification or the setting aside of the contract may be given retroactive force.

(2) The modification or the setting aside of the contract is not pronounced to the extent that the person invoking the circumstances should be accountable for them according to the nature of the contract or common opinion.

[...]

VI. Serbia

Zakon o obligacionim odnosima (*The Law of Contract and Torts*)

Raskidanje ili izmena ugovora zbog promenjenih okolnosti

Repudiation or alteration of contract due to changed circumstances (hardship)

Član 133. Pretpostavke za raskidanje.

(1) Ako posle zaključenja ugovora nastupe okolnosti koje otežavaju ispunjenje obaveze jedne strane, ili ako se zbog njih ne može ostvariti svrha ugovora, a u jednom i u drugom slučaju u toj meri da je očigledno da ugovor više ne odgovara očekivanjima ugovornih strana i da bi po opštem mišljenju bilo nepravično održati ga na snazi takav kakav je, strana kojoj je otežano ispunjenje obaveze, odnosno strana koja zbog promenjenih okolnosti ne može ostvariti svrhu ugovora može zahtevati da se ugovor raskine.

(2) Raskid ugovora ne može se zahtevati ako je strana koja se poziva na promenjene okolnosti bila dužna da u vreme zaključenja ugovora uzme u obzir te okolnosti ili ih je mogla izbeći ili savladati.

(3) [...]

(4) Ugovor se neće raskinuti ako druga strana ponudi ili pristane da se odgovarajući uslovi ugovora pravično izmene.

(5) Ako izrekne raskid ugovora, sud će na zahtev druge strane obavezati stranu koja ga je zahtevala da naknadi drugoj strani pravićan deo štete koju trpi zbog toga.

Art. 133. Prerequisites for Repudiation.

(1) Should, after concluding the contract, circumstances emerge which hinder the performance of the obligation of one party, or if, due to them, the purpose of the contract cannot be realized, while in both cases this is expressed to such a degree that it becomes evident that the contract no longer meets the expectations of the contracting parties, and that, generally speaking, it would be unjust to maintain its validity as it stands, the party having difficulties in performing the obligation, namely the party being unable, due to the changed circumstances, to realize the purpose of the contract, may request its repudiation.

(2) Repudiation of the contract may not be requested if the party claiming the changed circumstances had a duty, at the time of entering into contract, to take into account such circumstances, or if he could have avoided or surmounted them.

(3) [...]

(4) A contract shall not be repudiated should the other party offer or accept that the relevant terms of contract be altered in an equitable way.

(5) After pronouncing repudiation of the contract, the court shall, at the request of the other party, impose a duty against the party requesting it, to compensate the other party for equitable part of the loss sustained due to repudiation.

Član 134. Dužnost obaveštavanja.
Strana koja je ovlaščena da zbog promenjenih okolnosti zahteva raskid ugovora dužna je da o svojoj nameri da traži raskid ugovora obavesti drugu stranu čim je saznala da su takve okolnosti nastupile, a ako to nije učinila, odgovara za štetu koju je druga strana pretrpela zbog toga što joj zahtev nije bio na vreme saopšten.

Art. 134. Duty of Notification.
A party authorized due to changed circumstances to request repudiation of the contract shall have a duty to notify the other party of his intention to request repudiation immediately after becoming aware of the emergence of such circumstances, and in case of not acting accordingly, the first party shall be liable for loss sustained by the other party because of the failure to be notified of the request on time.

Član 135. Okolnosti od značaja za odluku suda.
Pri odlučivanju o raskidanju ugovora, odnosno o njegovoj izmeni, sud se rukovodi načelima poštenog prometa, vodeći računa naročito o cilju ugovora, o normalnom riziku kod ugovora odnosne vrste, o opštem interesu, kao i o interesima obeju strana.

Art. 135. Circumstances Relevant for Court Decision.
While deciding on repudiation of the contract or on its alteration, the court shall be directed by the principles of fair dealing, while especially taking into consideration the purpose of the contract, the normal risk involved with such contracts, the general interest, as well as the interests of both parties.

Član 136. Odricanje od pozivanja na promenjene okolnosti.
Strane se mogu ugovorom unapred odreći pozivanja na određene promenjene okolnosti, osim ako je to u suprotnosti sa načelom savesnosti i poštenja.

Art. 136. Disclaim by Reason of Hardship.
The parties may, in their contract, exclude in advance the right to claim changed circumstances, unless that is contrary to the principles of good faith and fair dealing.

VII. Greece

Αστικος Κωδικας (*Greek Civil Code*)

'Αρθρο 388. Απροοπρη
(1) Αν τα περιστατικά στα οποία κυρίως, ενόψει της καλής πίοτης και των συναλλακρικών ηθών τα μέρη στήριζαν τη σύναψη αμφοτεροβαρούς σύμβασδης, μεταβλήθηκαν ύστερα από λόγους που ήραν έκτακτοι και δεν μπορούσαν να προβλεφθούν, και από τη μεταβολή αυτή η παροχή του οφειλέτη, ενόψει και τφς αντιπαροχής, έγινε υπέρμετρα επαχθής, το δικαστήριο μπορεί κατά την κρίση τον με αίτηση του οφειλέτη να την αναγάηει στο μέτρο που αρμόζει και να αποφασίσει τη λύση της σύμβασης εζολοκλήρου ή κατά το μέρος που δεν εκτελέστηκε ακόμη.
(2) Αν αποφασιστεί η λύση της σύμβασης, επέρχεται απόσβεση των υποχρεώσεων παροχής που πηγάζουν απ΄ αυτήν και οι συμβαλλόμενοι έχουν αμοιβαία υποχρέωση να αποδώσουν τις παροχές που έλαβαν κατά ρις διατάζεις για τον αδικαιολόγφτο πλουτισμό

Art. 388. Unforeseeable change of circumstances.

(1) If, having regard to the requirements of good faith and business usages, the circumstances on which the parties had based the conclusion of a bilateral agreement have subsequently changed on exceptional grounds that could not have been foreseen and the performance due by the debtor, taking the counter-performance into consideration too, has as a result of the change become excessively onerous, the Court may, at the request of the debtor and according to its appreciation, reduce the debtor's performance to the appropriate extent or decide on the dissolution of the contract in whole or with regard to its non performed part.
(2) If the dissolution of the contract has been decided upon, the obligations to perform arising therefrom shall be extinguished and the contracting parties shall be reciprocally obligated to restitute the performances by which each benefited pursuant to the provisions governing enrichment without just cause.

VIII. Italy

1. Codice civile italiano (*Italian Civil Code*)

Art. 1467. Contratto con prestazioni corrispettive.
(1) Nei contratti a esecuzione continuata o periodica ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccesivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall'articolo 1458.
(2) La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell'alea normale del contratto.
(3) La parte contro la quale è domandata la risoluzione può evitarla offrendo di modificare equamente le condizioni del contratto.

Art. 1467. Contract for mutual counterperformances.
(1) In contracts for continuous or periodic performance or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand dissolution of the contract, with the effects set forth in Article 1458.
(2) Dissolution cannot be demanded if the supervening onerousness is part of the normal risk of the contract.
(3) A party against whom dissolution is demanded can avoid it by offering to equitably modify the conditions of the contract.

2. Pietro Trimarchi, *Istituzioni di diritto privato*, 16th edn (translation of the Italian original)

NON-PERFORMANCE OF A CONTRACT AND ALTERATION OF THE CONTRACTUAL BALANCE

[...]

256. Outline of the issues.

[...]

There are circumstances in which a contract's content, although not expressly stated, has been determined in such a way that there would be no economic justification if it were not accepted that one party's reason [for entering into the contract] was not only known by the other party but set as the foundation of the contract. In such a case, the reason becomes part of the structure of the contract: one talks of "presupposition" (*presupposizione*).

A classic example is the renting of a balcony at an elevated price for the day set for the queen's coronation procession. If the route of the procession is altered or if the ceremony is postponed, the necessary precondition of the contract is lacking.

[...]

If the plan for the procession is altered after the contract is entered into, [...], one finds oneself [...] within the limits of [...] "unexpected circumstances" (*sopravvenienza*). The theory is very similar to the theory [...] according to which the law grants remedies where obligations subsequently become excessively onerous. In fact, from the moment it was decided that the procession would not pass beneath the balcony, the value of granting the use of the balcony reduced significantly and the counter-performance became disproportionate. There is, however, a difference: where an obligation subsequently becomes excessively onerous, there is still a sense to the contract if it is altered in such a way as that the balance between the service and the counter-performance is re-established (and, in fact, [...] termination can be avoided by way of an offer to restore the balance of the contract); here, on the other hand, the contract is, for the renter, devoid of any utility as well as all justification.

Although there is no express legal provision, constant case law considers that the absence (initial or subsequent) of a necessary precondition justifies the resolution of a contract (Cass. Civ., 28 agosto 1993, n. 9125; [...]). This solution results from either the application by analogy of the provisions on subsequent excessive onerousness, or from the principles of [...] cause and motives, or finally, from the fundamental idea of implicit conditions.

IX. France

1. Code civil français (*French Civil Code*)[6]

Art. 1134
(1) Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites.
(2) Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise.
(3) Elles doivent être exécutées de bonne foi.

Art. 1134
(1) Legally formed agreements shall act as law for those who have made them.
(2) They may only be revoked by mutual consent, or for reasons permitted by law.
(3) They must be performed in good faith.

Art. 1147
Le débiteur est condamné, s'il y a lieu, au paiement de dommages et intérêts, soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part.

Art. 1147
A debtor shall be ordered to pay damages, if appropriate, for either the non-performance of the obligation, or for delay in performance, whenever he cannot prove that the non-performance is due to an external cause which cannot be attributed to him, even when there is no bad faith on his part.

Art. 1148
Il n'y a lieu à aucun dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.

Art. 1148
Damages are not appropriate where a debtor was prevented from transferring or from doing that which he was bound to do, or did what he was forbidden from doing, because of force majeure or of an unexpected event.

[6] Translation by EG.

2. Cour de cassation (ch. civ.) 6.3.1876 (*De Galliffet* c. *Commune de Pélissanne*), in HENRI CAPITANT *et al.*, *Les grands arrêts de la jurisprudence civile*, Tome 2, 12th edn, n° 165

IMPRÉVISION. CONTRAT À EXÉCUTION SUCCESSIVE. CHANGEMENT DES CIRCONSTANCES. DÉSÉQUILIBRE DES PRESTATIONS. ABSENCE DE RÉVISION

Civ. 6 mars 1876

(*D.* 76. 1. 193, note Giboulot)

De Galliffet C. Commune de Pélissanne

La règle que consacre l'article 1134 du Code civil étant générale et absolue et régissant notamment les contrats à exécution successive, il n'appartient pas aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qu'elles ont librement acceptées.

Faits. — Ils sont complètement rapportés dans le jugement du tribunal civil d'Aix, du 18 mars 1841, dont les passages essentiels sont reproduits ci-dessous:

«Attendu que, par l'acte du 22 juin 1567, Adam de Craponne s'oblige à faire et construire un canal destiné à arroser les vergers, vignes, prés et autres propriétés des habitants de la commune de Pélissanne sous diverses clauses et conditions qui sont, entre autres, que: [...] pour chaque fois que lesdits particuliers arroseront leurs propriétés, ils payeront audit Adam de Craponne ou à ses hoirs: 3 sols pour chaque carteirade, payables à chaque arrosage, incontinent et ainsi perpétuellement [...];

— Attendu qu'il est évident que le prix de 15 centimes payés aujourd'hui, comme il y a trois siècles, pour chaque arrosage d'une carteirade, qui contient environ 190 ares, est insuffisant et hors de toute proportion avec le prix des eaux que le marquis de Galliffet paye lui-même à l'œuvre générale de Craponne, pour les fournir ensuite aux arrosants de Pélissanne [...], tous prix, dépenses et salaires augmentés considérablement; — Attendu que l'insuffisance du produit des arrosages a été reconnue [...] puisqu'on lit dans un rapport officiel transmis au Gouvernement en 1778 que le canal de Craponne ne pourrait exister longtemps si on n'augmentait pas le prix de ces arrosages; [...]

Attendu qu'il serait injuste de soumettre le marquis de Galliffet à continuer de supporter une charge augmentée par l'état actuel des choses, et cela sans augmenter le droit d'arrosage, qui n'est plus une indemnité proportionnée à cette charge, avec laquelle ce droit a cessé d'être en rapport; [...] — Attendu qu'en demandant dans ses conclusions [...], que le droit d'arrosage fût à l'avenir payé 60 centimes au lieu de 15 centimes, le marquis de Galliffet a entendu nécessairement que cette augmentation ait son effet à partir de la demande judiciaire, et que c'est ainsi qu'elle doit être ordonnée, etc.»

[L]e 31 décembre 1873, un arrêt de la cour d'Aix statua en ces termes sur l'augmentation de la redevance d'arrosage:

«Attendu que si les conventions légalement formées tiennent lieu de loi aux parties et si elles ne peuvent être modifiées que du consentement commun, il n'en est pas de même pour les contrats qui ont un caractère successif; — Qu'il est reconnu, en droit, que ces contrats, qui reposent sur une redevance périodique, peuvent être modifiés par la justice, lorsqu'il n'existe plus une corrélation équitable entre les redevances d'une part et les charges de l'autre; [...]

Attendu, en fait, que les conventions de 1560 et 1567 présentent ce caractère successif; que l'œuvre de Craponne, en prenant l'engagement de fournir de l'eau aux arrosants de Pélissanne, a stipulé, comme compensation, une redevance déterminée; que cette redevance de 3 sols par carteirade, qui pouvait être suffisante à cette époque, cesse de l'être aujourd'hui que les dépenses pour l'entretien du canal ont considérablement augmenté; [...] — Attendu que les premiers juges, en fixant cette augmentation à 60 centimes par carteirade, ont sagement apprécié les faits du procès; [...] que c'est là le chiffre, en moyenne, que coûte l'arrosage d'un hectare; qu'il y a donc lieu d'adopter les motifs des premiers juges et de confirmer, sur ce chef, leur décision; [...]»

Pourvoi [en Cassation] par la commune de Pélissanne et par les syndics des arrosants.

Moyens. — 1° Excès de pouvoir et violation de l'article 1134 du Code civil, en ce que, sous le prétexte qu'il s'agissait d'un contrat successif, l'arrêt attaqué a substitué un prix nouveau à celui qui résultait de la convention des parties. [...]

ARRÊT

La Cour; — [...] *sur le premier moyen du pourvoi*: — Vu l'article 1134 du Code civil; — Attendu que la disposition de cet article n'étant que la reproduction des anciens principes constamment suivis en matière d'obligations conventionnelles, la circonstance que les contrats dont l'exécution donne lieu au litige sont antérieurs à la promulgation du Code civil ne saurait être, dans l'espèce, un obstacle à l'application dudit article; — Attendu que la règle qu'il consacre est générale, absolue, et régit les contrats dont l'exécution s'étend à des époques successives de même qu'à ceux de toute autre nature; — Que, dans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse leur paraître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants; — Qu'en décidant le contraire et en élevant à 30 centimes de 1834 à 1874, puis à 60 centimes à partir de 1874, la redevance d'arrosage, fixée à 3 sols par les conventions de 1560 et 1567, sous prétexte que cette redevance n'était plus en rapport avec les frais d'entretien du canal de Craponne, l'arrêt attaqué a formellement violé l'article 1134 ci-dessus visé; — *Par ces motifs*, casse...

Translation

UNFORSEEABILITY. CONTRACT INVOLVING SUCCESSIVE PERFORMANCES. CHANGE OF CIRCUMSTANCES. IMBALANCE OF OBLIGATIONS. ABSENCE OF REVISION

Civ. 6 March 1876

(*D.* 76. 1. 193, note Giboulot)

De Galliffet v. Commune de Pélissanne

The rule laid down in Article 1134 of the Civil code being general and absolute and governing, in particular, contracts involving successive performances, it is not for the courts, however equitable their decision may seem, to take into account the times and the circumstances in order to modify the parties' agreements and substitute new clauses for those that were freely accepted.

Facts. — They are fully reported in the Civil Court of Aix's ruling of 18 March 1841, the essential passages of which are reproduced below:

"Given that, by an act of 22 June 1567, Adam de Craponne bound himself to construct a canal to irrigate the orchards, vineyards, meadows and other properties belonging to the inhabitants of the commune of Pélissance under various clauses and conditions which are, *inter alia*, that: [...] each time the aforementioned individuals irrigate their land, they shall pay the aforementioned Adam de Craponne or his heirs: 3 sols[7] for every carteirade,[8] payable upon each irrigation, forthwith and in perpetuity [...];

— Whereas it is clear that the price of 15 centimes paid today, as it was three centuries ago, for each irrigation of a carteirade, which contains about 190 ares,[9] is insufficient and out of all proportion with the price of water that the marquis of Galliffet himself pays to l'Œuvre Générale de Craponne,[10] to then provide irrigation for the people of Pélissanne [...], all prices, expenses and salaries having increased considerably; — Whereas the insufficiency of the income from the irrigations had been recognised [...] since it states in an official report sent to the government in 1778 that the de Craponne canal could not exist for much longer if the price of irrigation was not increased; [...]

Whereas it would be unfair to subject the marquis de Galliffet to continuing to bear a charge increased by the current state of affairs, and this without increasing the right to irrigation, which is no longer compensation in proportion with this charge, with which this right ceased to be in line; [...] — Whereas by asking in his submissions that the right to irrigation be paid for at a rate of 60 centimes instead of 15 centimes, the marquis of Galliffet necessarily meant this increase to take effect from the time the legal claim was made and so this is how it should be ordered, etc."

[On t]he 31 December 1873, the court of Aix gave a decision ruling on the increase in the irrigation charge in the following terms:

7 Old French money, equivalent to 15 centimes.
8 Old unit of measurement, equal to approximately 19 000 square metres.
9 Old unit of measurement, equivalent to 100 square metres.
10 Association of mill owners and users of the canal water.

"Whereas even though legally formed agreements shall act as law for the parties and can only be modified by mutual consent, this is nevertheless not the case for contracts that are successive in nature; — That it is recognised, in law, that these contracts, which are based on a periodic charge, can be modified by the courts, when there is no longer a fair correlation between the charge on the one hand and the burden of the other;

Whereas, in fact, the 1560 and 1567 agreements are indeed successive in nature; that l'Œuvre Générale de Craponne, when taking on the commitment to provide water to the people irrigating their land in Pélissanne, stipulated as compensation, a given charge; that this charge of 3 sols per carteirade, which would have been sufficient at this time, ceases to be sufficient today now that the expense of maintaining the canal has increased considerably; [...] — Whereas the judges at first instance, by fixing this increase at 60 centimes per carteirade, wisely considered the facts of the case; [...] that that is the average cost of irrigating one hectare; that it is therefore necessary to adopt the reasoning of the judges at first instance and to confirm, on this count, their decision; [...]"

Appeal [to the *Cour de cassation*] by the commune of Pélissanne and by the irrigation managers.

Grounds for the appeal. — 1° Abuse of power and violation of Article 1134 of the Civil code that, on the pretext of it being a contract involving successive performances, the contested decision substituted a new price for the price that resulted from the parties' agreement. [...]

DECISION

THE COURT; — [...] *on the first ground for appeal:* — In view of Article 1134 Civil code; — Whereas the provision of this article simply repeats established principles constantly followed in relation to contractual obligations, the fact that the contracts, the performance of which gives rise to these proceedings, were made prior to the promulgation of the Civil code shall not, in this instance, stand in the way of the application of the aforementioned article; — Whereas the rule that it enshrines is general, absolute, and governs contracts for which the performance extends over successive periods as well as those of any other nature; — That, in no case is it for the courts, however equitable their decision may seem, to take into account the times and the circumstances in order to modify the parties' agreements and substitute new clauses for those that were freely accepted; — That by deciding to the contrary and raising the irrigation fee, fixed at 3 sols by the 1560 and 1567 agreements, to 30 centimes for 1834 to 1874 and to 60 centimes from 1874, on the pretext that the fee was no longer in proportion with the maintenance costs of de Craponne's canal, the contested decision manifestly violated Article 1134 above; — *For these reasons*, quashes ..."

OBSERVATIONS[11]

[...]

I. — Refusal of revision for unforseeability

2 No case, in this area, is more significant than that of *Canal de Craponne*. The purpose of the agreements in question made in 1560 and 1567 was to provide water to feed the irrigation canals in the Arles plain, for a charge of 3 sols per carteirade (190 ares). During the 19th century, the company that used the canal, citing the fall in the value of money and the rise in the cost of labour, requested an increase in the tax which was no longer in proportion with the maintenance costs. The court in Aix having increased this charge to 60 centimes, its decision was quashed. No consideration of the times or of equity can, in actual fact, according to the *Cour de cassation*, allow the courts to change the parties' agreement; Article 1134 of the Civil code, a general and absolute text, lays this down. The law of the contract is an "iron law" which imposes itself on the courts like it does on the parties.

The solution was not without precedent. [...] The period of inflation following the First World War was the occasion for the *Cour de cassation* to reaffirm the solution in the most diverse domains [...] Despite its age and steadfastness, this case law should not have been followed by the administrative courts. In the *Gaz de Bordeaux* case, the *Conseil d'Etat*, on the contrary, actually accepted the theory of unforseeability. Noting that an unforeseen increase of coal had shaken up the economics of a concession contract, the court recognised the concessionaire's right to compensation from the authority granting the concession [...] Again the disruption of the contract must be due to an unforeseeable event, unrelated to the contracting parties and must only be temporary in nature; if the imbalance is permanent, it is possible to terminate the contract [...]

3 The diversity of points of view proves, if this was indeed necessary, the difficulty of the problem to be solved.

In favour of the solution maintained by the *Cour de cassation*, it has been pointed out that the situation cannot simply be seen as one of the hypothetical cases in which the parties would have been allowed not to execute the contract or possibly to readjust it. Indeed, there is not force majeure, as the performance of the obligations has admittedly become difficult but not impossible; nor is there overcharging, as the imbalance does not come from an initial inequality of the obligations, but from an external upheaval which occurred after the conclusion of the contract. Nevertheless, the technical means likely to form the basis of a revision of a contract are not totally lacking. The idea that the *cause* should not only play a role at the moment a contract is formed but also during its performance may also be put forward. Consequently, a certain equivalence ought to be maintained between the contracting parties' obligations. Recourse could also be had to the rule which requires agreements to be performed in good faith (Article 1134(3)); is it not flouting this principle to demand the strict performance of a contract when the change of circumstance makes the burden of one party overwhelming and the obligation of the other derisory? (see, for the position of the German courts, Rieg, *Le rôle de la volonté dans l'acte juridique en droit civil français et allemand*, 1961, [...]).

Similarly, the possibility for revision could also have been inferred from Article 1135 of the Civil code which stipulates that "agreements are binding not only as to what is expressed therein, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature." However, as has been seen, the court challenges all references to equity in the decision reproduced above. Lastly, it would always have been possible to imply a specific clause, a *rebus sic stantibus* clause, into all contracts of long duration, pursuant to which consent is dependent on the continuation of the state of affairs that existed on the day on which it was expressed. [...]

[11] Translation of the French original.

4 Consequently, it can be claimed that, the courts made a deliberate choice to refuse to take up revision for unforeseeability [...] This can be explained by mainly legal as well as economic reasons. *Legal* reasons: the courts were afraid, on the one hand, that contracting parties in bad faith were trying to get out of their commitments and, on the other hand, that judges' arbitrary power which favours contractual instability, were going against legal certainty. *Economic* reasons: the revision of the contract is admittedly often the only way to avoid the financial ruin of one of the parties and from that the non-performance of the contract. [...] However, allowing revision in one case risks making it impossible for the other party to perform obligations taken on by him under other contracts and from this even to cause a generalised unbalance "by a game of chain reactions which is impossible to limit or even plan for" [...] Yet, the court is not in the position to assess whether its decision, by definition individual, will be good or bad for the national economy. Hence their refusal to carry out a revision. It is for the legislator, better equipped to assess the economic consequences of whatever choice, to intervene promptly, where the contractual injustice is particularly blatant and where a significant category of people risk financial ruin. Such was the case notably after the two world wars. [...]

II. — Criticism of the solution

5 Accepted by nearly all civil [law] academic opinion, this argument is not however totally convincing. In fact, the comparative law example shows that, whereas it was very widely accepted in the 19th century in other European countries, this position has been abandoned since then, sometimes following an evolution in the case law (Great Britain, Germany, Spain, Switzerland), sometimes due to legislative intervention (Italy, Greece, Portugal) [...] Yet, it seems that in none of these countries has the acceptance of revision for unforeseeability led to the feared uncertainty [...]

6 [...] Putting forward an obligation of good faith reactivated by a solidarist conception of contracts, an active trend in academic opinion argues in favour of the acceptance of judicial revision of contracts from the moment that their execution, because of their imbalance, risks to cause the financial ruin of one of the contracting parties [...] Certain recent decisions can be seen as a first step in this direction. In the famous decision in *Huard*, the *Cour de cassation* agreed with the court of Paris which considered that where there is a change of circumstances exposing a distributor to strengthened competition, the supplier is compelled by the requirement of good faith, to negotiate a commercial cooperation agreement with the distributor in order to allow him to align himself with his competitors [...] And more recently, the *Cour de cassation* condemned the courts of first instance which had refused the revision of a contract of a commercial agent who complained of the competition he found himself confronted with from buying syndicates who got supplies from his principals [...] Admittedly, in both cases, the problem was not, strictly speaking, one of unforeseeability, since far from being due to unexpected events, the situations justifying the adjustment of the price had been the situation of one of the contracting parties. The fact remains that these decisions "directly lead to the requirement to renegotiate the price" [...]

The Principles of European Contract Law (Art. 6-111) and the Unidroit Principles (Art. 6.2.1–2.3) give the courts the power to either terminate or modify the contract. However, they emphasise the exceptional nature of the action which is only available if performance is excessively onerous for one of the parties. The texts insist upon the parties' primary obligation which is to reach an amicable agreement. [...]

3. Cour de Cassation (civ. 1re) 8.12.1998 (*Sté Castorama* c. *Sté ICEV Lid'air voyages*), Bull. Civ. 1998 I n° 346 p. 238

LA COUR: — *Sur le moyen unique, pris en ses deux branches:* — Attendu que, suivant contrat du 29 mai 1990, la société Castorama a confié à la société ICEV Lid'air voyages le transport et l'hébergement de cinq cents membres de son personnel, du 21 au 24 janvier 1991, à Marrakech, au prix de 2 848 000 francs; qu'après avoir envisagé de renoncer au voyage en raison des tensions au Moyen-Orient et dans les pays arabes, la société Castorama a déclaré, le 21 décembre 1990, en maintenir la réalisation; que, le 14 janvier 1991, veille de la guerre en Irak, elle a annulé le voyage «en raison de l'aggravation de la crise du Golfe»; qu'elle a demandé le remboursement de la totalité des sommes versées à l'organisateur du voyage en invoquant, pour justifier la rupture unilatérale du contrat, la force majeure résultant de la guerre du Golfe; — Attendu que la société Castorama fait grief à l'arrêt attaqué (Paris, 12 avril 1996 [...]) d'avoir [... rejeté la demande][12]; — Mais attendu, d'une part, que la cour d'appel, ayant retenu que les circonstances invoquées comme constitutives de la force majeure n'étaient pas insurmontables, a, par ce seul motif, légalement justifié sa décision, sur ce point; — Attendu, d'autre part, que la cour d'appel a relevé que la ville de Marrakech et le Royaume du Maroc n'étaient pas, en janvier 1991, des lieux à haut risque d'attentats et que le ministre des Affaires étrangères, dans sa circulaire du 17 janvier 1991, n'avait pas cité le Maroc parmi les pays dans lesquels il dissuadait les ressortissants français de se rendre, mais seulement parmi ceux pour lesquels des conseils de prudence étaient prodigués aux touristes; qu'elle a ainsi répondu, en les écartant, aux conclusions invoquées; — D'où il suit que le moyen ne peut être accueilli en aucune de ses branches;

Par ces motifs: — rejette le pourvoi.

Translation

THE COURT: – *on the sole ground for appeal taken in its two parts:* — Whereas, according to the contract of 29 May 1990, the Castorama company entrusted the transport and accommodation of five hundred of its members of staff, from 21 to 24 January 1991, in Marrakech for the price of 2 848 000 Francs, to the company ICEV Lid'air voyages; that after having considered cancelling the trip because of tensions in the Middle East and in Arabic countries, the Castorama company, on 21 December 1990, stated that it was to stand by the trip; that, on 14 January 1991, the eve of the Iraq war, it cancelled the trip "because of the worsening of the crisis in the Gulf"; that it requested reimbursement of the totality of the sums paid to the tour operator, citing force majeure resulting from the Gulf war as justification for the unilateral breach of the contract; — Whereas Castorama challenged the decision under review (Paris, 12 April 1996 [...]) for having [... rejected the request]; — However, whereas, on the one hand, the Court of appeal, having held that the circumstances cited as constituting the force majeure were not insurmountable, by this sole reason, legally justified its decision on this point; — Whereas, on the other hand, the Court of appeal noted that the city of Marrakech and the kingdom of Morocco were not,

12 Added by the author.

in January 1991, areas at high risk of attacks and that the foreign minister, in his circular on 17 January 1991, had not cited Morocco amongst the countries that he was dissuading French citizens from going to, but only amongst those for which safety advice was being given to tourists; that the court thus responded, by dismissing them, the cited conclusions;
— It therefore follows that the ground for appeal cannot be upheld in either of its parts;
For these reasons: — rejects the appeal.

X. England

1. W. T. Major and Christine Taylor, *Law of Contract*, 9th edn, pp. 255–65

DISCHARGE BY FRUSTRATION

16. Absolute contracts

The general rule is that a contractual obligation is absolute, and if a party undertakes to contract to do something he is absolutely bound to do it. If subsequent events make it impossible for him to comply with his obligations then he will be in breach of contract and liable in damages to the other party. This view of contractual obligations being 'absolute' can be seen in the early case of *Paradine* v. *Jane* (1648) where the plaintiff brought an action to recover rent due under a lease and was met with the defence that the defendant has been deprived of possession of the land by the action of an enemy army of a German prince, Prince Rupert. The court held that if the defendant sought to be excused from his contractual obligations in particular circumstances, then he should have made provision for such eventualities in his contract.

17. The doctrine of frustration

Obviously, the stipulation that the contract should cover every eventuality is somewhat unrealistic. Consequently, over a period of time, the doctrine of frustration has developed a number of exceptions to this general rule of absolute contractual liability. These exceptions allow the parties to be discharged from further performance of their obligations if, without fault on the part of either party, some unforeseeable event occurs after the formation of the contract which makes further performance impossible or illegal so that any attempted performance would amount to something quite different from what must have been contemplated by the parties when they made their contract.

18. The basis of the doctrine of frustration

The strict rule in *Paradine* v. *Jane* was first relaxed so as to allow the development of the doctrine of frustration in the case of *Taylor* v. *Caldwell*.

> *Taylor* v. *Caldwell* (1863): The defendants agreed to let the plaintiff have the use of the Surrey Gardens and Music Hall on four specific days for the purpose of giving a series of four concerts and day and night fetes. After the making of this agreement and before the date fixed for the first concert, the Hall was destroyed by fire. The contract contained no express stipulation with reference to fire. The plaintiffs, who had spent money on advertisements and otherwise in preparing for the concerts, brought this action to recover damages. It was contended that, according to the rule in *Paradine* v. *Jane*, the destruction of the premises by fire did not exonerate the defendants from performing their part of the agreement. HELD: The continuation of the contract was subject to an implied condition that the parties would be excused if the subject matter was destroyed. Both parties were excused from the performance of the contract as the contract was discharged by frustration.

In reaching this decision the court stipulated that the principle in *Paradine* v. *Jane* was confined to 'positive and absolute' contracts, in other words contracts in which performance had been guaranteed, irrespective of all risks. [...]

[...] In the *Joseph Constantine* case, Viscount Simon said: "The doctrine of discharge from liability by frustration has been explained in various ways, sometimes by speaking of the disappearance of a foundation which the parties assumed to be the basis of their contract, sometimes as deduced from a rule arising from impossibility of performance, and sometimes as flowing from the inference of an implied term. Whichever way it is put, the legal consequence is the same". [...]

[...] Lord Radcliffe [said] that "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. [...] There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".

FACTUAL CIRCUMSTANCES IN WHICH A CONTRACT MAY BE FRUSTRATED

19. Impossibility

Decisions show that the doctrine of frustration may be invoked in circumstances where the contract becomes impossible to perform due to the total or partial destruction of some object necessary to the performance of the contract. This is obviously the basis on which the case of *Taylor* v. *Caldwell* proceeded. [...]

20. Supervening illegality

Frustration may also occur where a change in the law or state intervention renders any attempted performance illegal. [...]

21. Non-occurrence of an event

Where an event which is fundamental to the contract does not occur then the contract may be frustrated despite the fact that it is still physically possible to carry out the contract. This is demonstrated by the [...] case *Krell* v. *Henry* (1903) [...]

22. Frustration of purpose

It is very rare for a contract to be held to have been frustrated by an event which leaves it possible to perform but which makes it much more onerous to one party. [...]

[I]t is accepted that it is unlikely that a contract will be frustrated merely because an event has occurred which renders that contracted for by one party worth less than he anticipated or where an unexpected event merely makes the contract more expensive to perform. [...]

Tsakiroglou & Co. Ltd v. *Noblee Thorl GmbH* (1962): Here the contract was to sell groundnuts c.i.f. Hamburg. HELD: The contract was not frustrated by the blockage of the Suez canal, even though the nuts were to be loaded at Port Sudan and would normally have been carried through the canal. The seller could have performed by shipping them via the Cape of Good Hope even though that would have taken longer and been more expensive.

2. Court of Appeal: *Krell* v. *Henry* [1903] 2 KB 740; [1900–03] All ER Rep 20

Historical Context

Very particular facts gave rise to this leading case in English law. Queen Victoria had just died after reigning for 64 years. The coronation of the new king, Edward VII, was therefore being planned. Such an occasion involves great celebrations, including a procession through the streets of London. Members of the public rented windows and balconies from which they could watch the royal procession going past. The London ceremonies were planned for 26 and 27 June 1902.

Mr Henry rented Mr Krell's London flat for 26 and 27 June. There was no reference to the procession in the contract, but it was due to pass in front of the flat and there would be a good view of it from the flat's window. The rent and the short rental period were only justified in those very special circumstances.

At the last minute, the King became ill and the ceremonies were cancelled. Mr Krell demanded payment of the rent from Mr Henry.

KRELL *v.* HENRY

[COURT OF APPEAL (Vaughan Williams, Romer and Stirling, L.J.J.), July 13, 14, 15, August 11, 1903]

[Reported [1903] 2 K.B. 740; 72 L.J.K.B. 794; 89 L.T. 328; 52 W.R. 246; 19 T.L.R. 711]

Contract—Frustration—State of things foundation of contract—Destruction by event not in contemplation of parties—Extrinsic evidence as to surrounding facts and knowledge of parties when making contract—Contract for hire of seats to view coronation processions—Cancellation of processions.

Aug. 11, 1903. **VAUGHAN WILLIAMS, L.J.**, read the following judgment.— [...]

> "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

[...] The doubt in the present case arises as to how far this principle extends. [...] The English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. [...]

[…] I think that you first have to ascertain, not necessarily from the terms of the contract, but, if necessary, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties, as the foundation of the contract, there will be no breach of the contract thus limited.

What are the facts of the present case? […] In my judgment, the use of the rooms was let and taken for the purpose of seeing the royal processions. It was not a demise of the rooms or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract. […]

It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the processions in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and processions along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take someone to Epsom on Derby-day at a suitable enhanced price for such a journey, both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible, but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said: "Drive me to Epsom, I will pay you the agreed sum, you have nothing to do with the purpose for which I hired the cab"— and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day, whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation processions, but it is the coronation processions and the relative position of the rooms which is the basis of the contract as much for the lessor as the hirer"; […]

Each case must be judged by its own circumstances. In each case one must ask oneself, first: What, having regard to all the circumstances, was the foundation of the contract?; secondly: Was the performance of the contract prevented?; and thirdly: Was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation processions were the foundation of this contract, and that the non-happening of them prevented the performance of the contract; and, secondly, I think that the non-happening of the processions, to use the words of SIR JAMES HANNEN in *Baily* v. *De Crespigny* […], was an event

"of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened."

The test seems to be, whether the event which causes the impossibility was or might have been anticipated and guarded against. […]

[…] I think for the reasons which I have given that the principle of *Taylor* v. *Caldwell* ought to be applied. […]

ROMER L.J [and] **STIRLING L.J** [concurred].

Appeal dismissed.

Solicitors: *Cecil Bisgood; M. Grunebaum*

[*Reported by* E. A. SCRATCHLEY, ESQ., *Barrister-at-Law*.]

3. Court of Appeal, *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.* [1978] 1 WLR 1387

Staffordshire Area Health Authority v South Staffordshire Waterworks Co

COURT OF APPEAL, CIVIL DIVISION

[1978] 3 All ER 769, [1978] 1 WLR 1387, 77 LGR 17, (101 LQR 102)

HEARING-DATES: 21, 24, 25, 26, 27 APRIL, 2 MAY 1978

2 MAY 1978

Contract – Time – Duration of contract – Determinable by reasonable notice – Contract by water company to supply water at set rate to hospital – Contract expressed to continue 'at all times hereafter' – Inflation increasing normal water charges twentyfold since contract made – Whether water company entitled to terminate contract by reasonable notice – Whether contract to be construed in context of circumstances in which made.

LORD DENNING MR. Four simple words "at all times hereafter" have given rise to this important case. […]

Contracts which contain no provisions for determination […]

[…] The cost of supply of goods and services goes up with inflation through the rooftops and the fixed payments goes down to the bottom of the well so that it worth little or nothing. Rather than tolerate such inequality, the courts will construe the contracts so as to hold that it is determinable by reasonable notice. […] They say that in the circumstances

as they have developed – which the parties never had in mind – the contract ceases to bind the parties forever. It can be determined on reasonable notice. [...]

Inflation

[...] We have [...] had mountainous inflation and the pound dropping to cavernous depths. [...] Here we have in the present case a striking instance of a long term obligation entered into 50 years ago. [...] In these 50 years, and especially in the last 10 years, the cost of supplying the water has increased twentyfold. [...] It seems to me that we have reached the point which Viscount Simon contemplated in *British Movietone Ltd* v. *London and District Cinemas Ltd* [1952] A.C. 166, 185. Speaking à propos of the depreciation of currency, he envisaged a situation where "a consideration of the terms of the contract, in the light of circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, [and he went on to say that when such a situation emerges] the contract ceases to bind at that point – not because the courts in its discretions thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply to the situation." [...]

So here the situation has changed so radically since the contract was made 50 years ago that the term of the contract "at all times hereafter" ceases to bind: and it is open to the court to hold that the contract is determined by reasonable notice.

Conclusion

I do not think that the water company could have determined the agreement immediately after it was made. [...] But, in the past 50 years, the whole situation has changed so radically that one can say with confidence: "The parties never intended that the supply should be continued in these days at that price." Rather than force such unequal terms on the parties, the courts should hold that the agreement could be and was properly determined in 1975 by the reasonable notice of six months. [...]

4. *Guenter Treitel, The Law of Contract*, 12th edn, ed. by EDWIN PEEL

19-037 **Contracts of indefinite duration.** [...] In *Staffordshire Area Health Authority* v. *South Staffordshire Waterworks Co.* a hospital had in 1919 contracted to give up to a waterworks company its right to take water from a well, and the company had in return promised "at all times hereafter" to supply water to the hospital at a fixed price specified in the contract. In 1975, the cost to the company of making the supply had risen to over 18 times that fixed price and the company gave seven months' notice to terminate the agreement. It was held that this notice was effective. Lord Denning M.R. regarded the contract as frustrated by the change of circumstances which had occurred between 1919 and 1975. But this view is, with respect, open to question, as it was based on the very passage of his own judgment in the *British Movietonews* case which had there been disapproved by the House of Lords. The preferable reason for the decision in the *Staffordshire* case is, therefore, that of the majority, who held that the agreement was, on its true construction, intended to be of indefinite (and not of perpetual) duration: hence the case fell within the general principle under which, in commercial agreements of indefinite duration, a term is often implied entitling either party to terminate by reasonable notice. It follows from this reasoning that the decision would have gone the other way if the agreement had been for a fixed term, e.g. for 10 years. The agreement could then not have been terminated by notice before the end of the 10 years, nor would an increase in the suppliers' costs during that period have been a ground of frustration. This view is supported by later authority and seems also to be correct in principle: if parties enter into a fixed term fixed price contract they must be taken thereby to have allocated the risks of market fluctuations. [...]

XI. Principles of Contract Law

1. Commission on European Contract Law: *Principles of European Contract Law*

Art. 6:111. Change of Circumstances.

(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) end 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.

Comment

A. *General*

The majority of countries in the European Community have introduced into their law some mechanism intended to correct any injustice which results from an imbalance in the contract caused by supervening events which the parties could not reasonably have foreseen when they made the contract. In practice, contracting parties adopt the same idea, supplementing the general rules of law with a variety of clauses, such as "hardship" clauses.

The Principles adopt such a mechanism, taking a broad and flexible approach, as befits the pursuit of contractual justice which runs through them: they prevent the cost caused by some unforeseen event from falling wholly on one of the parties. The same idea may be expressed in different terms: the risk of a change of circumstances which was unforeseen may not have been allocated by the original contract and the parties or, if they cannot agree, the court must now decide how the cost should be borne. The mechanism reflects the modern trend towards giving the court some power to moderate the rigours of freedom and sanctity of contract.

[...]

On the other hand, this concept of *"imprévision"* (it is convenient to borrow this term from French administrative case law) is distinct from "impossibility", which is covered by Article 8:108. Although in either case an unforeseen event has occurred, impossibility presupposes that the event has caused an insurmountable obstacle to performance, whereas in *"imprévision"* performance may still be possible for the debtor but will be ruinous for it. Of course there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a performance which is only very difficult even if it may drive the debtor into bankruptcy. It is up to the court to decide which situation is before it (see also the comment to Article 8:108).

"Imprévision" is also differentiated from impossibility by its consequences. The latter, if it is total, can only lead to the end of the contract (see Article 9:301 and comment). *"Imprévision"* gives the court the choice of declaring the contract terminated or revising its terms.

However, the court's decision to terminate or to modify the contract is very much a last resort. The whole procedure is devised to encourage the parties to reach an amicable settlement: hence the obligation to enter negotiations. The court may also remit the matter to the parties for a last effort of negotiation. In the absence of an agreement, it is up to the court to decide. [...]

B. *Conditions for the procedure to apply*

Strict conditions must be fulfilled for the renegotiation mechanism to be triggered. These are set out in Article 6:111(2).

(i) Performance Excessively Onerous

The first condition follows directly from the first subsection: the change in circumstances must have brought about a major imbalance in the contract. Any contract, especially one of a long duration, is made in a particular economic context which may not last – it is this notion which underlies the ancient *"clausula rebus sic stantibus"*. A subsequent change in the economic context is not enough to give rise to the right to have the contract revised. The *"imprévision"* mechanism only comes into play if the contract is completely overturned by events, so that although it still can be performed, this will involve completely exorbitant costs for one of the parties. The terms of the paragraph show clearly that the court should not interfere merely because of some disequilibrium.

The "excessive onerosity" may be the direct result of increased cost in performance – for example, the increased cost of transport if the Suez Canal is closed and ships have to be sent round the Cape of Good Hope. Or, as the paragraph states, it may be the result of the expected counter-performance becoming valueless; for example, if the cost of building work which has already been executed is to be determined by reference to some index of a price which collapses in a quite unforeseeable way.

[...]

Illustration 1: A canning business buys the whole of a producer's future crop of tomatoes at 10 pence per kilo. It cannot demand renegotiation when by harvest time the market price has fallen to 5 pence per kilo because of an unexpected flood of imported tomatoes.

Illustration 2: A contract is made to supply for irrigation for fifty years at a fixed price but the price becomes derisory through inflation. The supplier may be able to demand renegotiation.

(ii) Time Factor

The second condition is that the change of circumstances must have occurred after the contract was made. If, unknown to either party, circumstances which make the contract excessively onerous for one of them already existed at that date, the rules on mistake will apply, see Articles 4:103 and 4:105.

(iii) Circumstances could not have been taken into account

Thirdly, the change of circumstances should not have reasonably been taken into account by the parties. This condition is parallel to that applicable to impossibility of performance and should be interpreted in the same way. Hardship cannot be invoked if the matter would have been foreseen and taken into account by a reasonable man in the same situation, by a person who is neither unduly optimistic or pessimistic, nor careless of his own interests.

Illustration 3: During a period when the traffic in a particular region is periodically interrupted by lorry drivers' blockades, the reasonable man would not choose a route through that region in the hope that on the day in question the road will be clear; he would choose another route.

(iv) Risk

Lastly it must be decided whether the party affected by a change in circumstances should be required to bear the risk of the change, either because it expressly undertook to do so (for instance by taking the risk of a shift in exchange rates) or because the contract is a speculative one (for instance a sale on the futures market). If so, the party cannot make use of this section.

C. *The obligation to renegotiate*

Like many expressly agreed clauses, Article 6:111 envisages at the outset a process of negotiation to reach an amicable agreement varying the contract. [...]

The obligation to renegotiate is independent and carries its own sanction in paragraph (3)(c). The compensation provided by (3)(c) will normally consist of damages for the harm caused by a refusal to negotiate or a breaking off of negotiations in bad faith (for instance, the expenses of bringing the action insofar as these have not been recouped by an award of costs). It may be awarded against either party.

D. *The court's powers*

If the parties' negotiations do not succeed, either of the parties may bring the matter before the court.

The court will intervene only in the last resort, but it is given wide powers. The court may, in effect, either terminate the contract or modify its terms. In accordance with the purpose of the provision, its first aim should be to preserve the contract. The court could even require the parties to make a last effort at renegotiation if it believes that there is still a chance of saving the contract. It may employ any means that are permitted under its national law, such as appointing a mediator to assist the parties. If the negotiations are unsuccessful it will have to make a decision on the merits in accordance with paragraph (3).

The modification of the clauses of the contract must be aimed at re-establishing the balance within the contract by ensuring that the extra cost imposed by the unforeseen circumstances are borne equitably by the parties. They may not be placed solely on one of them.

Illustration 4: A town council has arranged for the supply of electricity by a private company at a fixed tariff. If the price of the coal used to produce the electricity increases dramatically because of shortages, the additional payment which the town should be required to make should not cover the whole of the additional cost of the coal. Part of the extra cost should fall on the company. Unlike the risks which result from total impossibility, the risks of unforeseen events are to be shared.

[...]

2. Study Group on a European Civil Code and Research Group on EC Private Law (Acquis Group): *Draft Common Frame of Reference*

III. – 1:110: Variation or termination by court on a change of circumstances

(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred,

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

3. UNIDROIT: *Principles of International Commercial Contracts*

HARDSHIP

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

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

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

Art. 6.2.3. Effects of hardship.
(1) In case of hardship, the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.
(4) If the court finds hardship it may, if reasonable,
(a) terminate the contract at a date and on terms to be fixed, or
(b) adapt the contract with a view to restoring its equilibrium.

XII. Further reading

HUGH BEALE *et al.* (eds), *Cases, Materials and Text on Contract Law* (Ius Commune Casebooks for the Common Law of Europe), Oxford: Hart Publishing, 2002, Ch. 5, 592–657.
ALLAN FARNSWORTH, *Contracts*, 3rd edn, New York: Aspen Publishers, 2004, 619–47 (USA).
NANCY KIM, "Mistakes, Changed Circumstances and Intent", 56 (2008) *Kan. L. Rev.* 473–516.
MARTIN SCHMIDT-KESSEL AND KATRIN MAYER, "Supervening events and force majeure", in Jan M. Smits (ed.), *Elgar Encyclopedia of Comparative Law*, Cheltenham: Elgar Publishing, 2006, 689–98.
RUTH SEFTON-GREEN, "The DCFR, the Avant-projet Catala and French legal scholars: a story of cat and mouse?", *Edin. L.R.* 2008, 12(3), 351–73.
DENNIS TALLON, "Hardship", in Arthur Hartkamp *et al.* (eds), *Towards a European Civil Code*, 3rd edn, Nijmegen: Kluwer, 2004, Ch. 27, 499–504.
GUENTER TREITEL, *Frustration and Force Majeure*, London: Sweet & Maxwell, 1994.
REINHARD ZIMMERMANN, *The Law of Obligations – Roman Foundations of the Civilian Tradition*, Cape Town: Juta & Co., 1990, 579–82.
KONRAD ZWEIGERT AND HEIN KÖTZ, *An Introduction to Comparative Law*, 3rd edn, Oxford: Oxford University Press, 1998, 516–36.