On Contracts and Failed Renegotiations -
Laws and Principles in a Comparative Perspective

DISSERTATION

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The President:

Prof. Dr. Bernhard Ehrenzeller

To Florian

“My dear friend, says he, pleasantly, how can you advise me avoiding disputes? You know I love disputing; it is one of my greatest pleasures; however, to show the regard I have for your counsel, I promise you I will, if possible, avoid them.

I think the practice was not wise; for, in the course of my observation, these disputing, contradicting, and confuting people are generally unfortunate in their affairs. They get victory sometimes, but they never get good will, which would be of more use to them“

(BENJAMIN FRANKLIN: The Autobiography of Benjamin Franklin)

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Caroline Nordenadler

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List of Abbreviations

A.C.	Appeal Cases
acc.	According (to)
AcP	Archiv für die Civilistische Praxis
AJP	Aktuelle Juristische Praxis
All E.R	The All England Law Reports
Am. J. Comp. L.	American Journal of Comparative Law
approx.	Approximately
Arb	Arbitration
Art.	Article
Arts.	Articles
ASR	American Sociological Review
ASR	Abhandlungen zum schweizerischen Recht
BB	Betriebs-Berater
BGB	Bürgerliches Gesetzbuch
BGH	Bundesgerichtshof (The German Federal Court of Justice)
BJM	Basler Juristische Mitteilungen
BK	Berner Kommentar
B. & S.	Best & Smith's Queen's Bench Reports (England)
BSK	Basler Kommentar
CC	Code civil suisse (Swiss Civil Code)
Ch.	Chapter
CHF	Swiss Franc
CISG	United Nations Convention on Contracts for the International Sale of Good
CUP	Cambridge University Press
DB	Der Betrieb
DCFR	Draft Common Frame of Reference
Diss.	Dissertation
ed.	Edition
ed.	Editor
eds.	Editors
e.g.	Exemplī Grātiā (“example given“)
Eng. Rep.	English Reports
ERPL	European Review of Private Law
esp.	Especially
et al.	et alli (“and others“)
etc.	et cetera (“etcetera“)
f./ff.	the following page/the following pages
fn.	Footnote
FILJ	Fordham International Law Journal
GBP	Great British Pound
HD	Högsta Domstolen (the Swedish Supreme Court)
HD	Högsta Domstolen (the Finnish Supreme Court)
HLR	Helsinki Law Review

HovR	Hovrätten (Swedish Court of Appeal)
Ibid.	Ibidem
IBLJ	International Business Law Review
ICC	International Chamber of Commerce
i.e.	id est (“that is“)
I.L.M.	International Legal Materials
Int. Rev. Of Law and Econ.	International Review of Law and Economics
Int’l	International
JCL	Journal of Contract Law
JDI	Journal du droit international
JFT	Tidskrift utgiven av Juridiska Föreningen i Finland
J. L. & Com.	Journal of Law and Commerce
J. of Int. Arbitration	Journal of International Arbitration
JPA	Japanese Yen
JT	Juridisk tidskrift vid Stockholms universitet
JWELB	Journal of World Energy Law & Business
JWI	The Journal of World Investment
JZ	Juristenzeitung
KB	The Court of King’s Bench
LIBOR	London Interbank Offered Rate
LT	The Law Times
NDS	Nordiske Domme i Sjofartsanliggender
NJ	Neue Justiz
NJA	Nytt Juridiskt Arkiv, Vol. I
NJA II	Nytt Juridiskt Arkiv, Vol. II
NJM	Förhandlingarna vid Nordiska juristmöten
NJW	Neue Juristische Wochenschrift
NOK	Norwegian Krone
NRt.	Norsk Retstidende
Number	No.
OLG	Oberlandsgericht
Op. Cit.	opere citato ("in the work cited")
OR	Obligationenrecht (The Swiss Code of Obligations)
p.	Page
p.a.	Per annum
Pace Int. Law Review	Pace International Law Review Online Companion
PECL	Principles of European Contract Law
Prop.	Proposition
QB	Queens Bench
RM	Reichsmark
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
Re.	Regarding
RG	Rettens Gang (Case law from the Norwegian Court of Appeal)
RGZ	Reichsgerichts in Zivilsachen (The German Supreme Court)
RH	Rättsfall från hovrätterna (Case Law from the Swedish Court of Appeal)
Rt.	Norsk Retstidende (Case law from the Norwegian Supreme Court)

Sec	Section
RIW	Recht der Internationalen Wirtschaft
SEK	Swedish Krona
SG	Schiedsgericht
SJZ	Schweizerische Juristen-Zeitung
SOU	Statens Offentliga Utredningar
SvJT	Svensk juristtidning
TfR	Tidsskrift for rettsvitenskap
TLR	The Times Law Reports
TR	Tingsrätten (Swedish District Court)
Tul. L. Rev.	Tulane Law Review
Tul. J. Int'l & Comp. L.	Tulane Journal of International and Comparative Law
UKHL	United Kingdom House of Lords
UNIDROIT	UNIDROIT Principles of International Commercial Contracts
Unif. L. Rev.	Revue de droit uniforme / Uniform Law Review published by the International Institute for the Unification of Private Law (UNIDROIT)
Vol.	Volume
VJTL	Vanderbilt Journal of Transnational Law
Vs.	Versus
VUWLR	Victoria University of Wellington Law Review
W.L.R.	The Weekly Law Reports
WM	Wertpapier-Mitteilungen
WR	Wirtschaftsrecht Zeitschrift für Theorie und Praxis
YBCA	Yearbook of Commercial Arbitration
ZBJV	Zeitschrift des Bernischen Juristen Vereins
ZGB	Schweizerisches Zivilgesetzbuch (The Swiss Civil Code)
ZGS	Zeitschrift für das gesamtes Schuldrecht
ZK	Zürcher Kommentar
ZR	Blätter für Zürcherische Rechtsprechung
ZSR	Zeitschrift für Schweizerisches Recht

Executive Summary

The surrounding circumstances in which a long-term contract is drafted, negotiated and concluded can change. If an unforeseen change in circumstance disrupts the original contractual equilibrium, after the contract was concluded, it might become necessary for the contracting parties to renegotiate some of the contract terms to reflect the new commercial reality. Now, while the party adversely affected by the supervening event is eager to enter into such renegotiations, the counterparty may not be sharing the same enthusiasm. Such adverse events may, however, hit one party or the other just by chance.

This study explores the available routes of the disadvantaged party when initial attempts to renegotiate the contract terms have failed. A party in a weak legal position may find it difficult to refuse a quest for change. Two situations are dealt with. The disadvantaged party may either rely on the laws governing the contract or on a renegotiation clause. In conclusion of the undertaken analyses of Swedish, Swiss, German and English laws as well as international unification instruments and codifications, it can be established that the hardship rules operate under too narrow confines to induce the counterparty to renegotiate the terms. There are also no prospects of a change in attitude by courts and arbitral tribunals towards more readily granting exceptions, despite a perhaps growing need, especially in international commerce, as the hardship rules stand in direct contrast to the grand principle of pacta sunt servanda.

Based on comparative observations, it is found that dealmakers best cope with the risk of future adverse turn of events of both commercial and political character, which long-term contracts inherently are exposed to, through the inclusion of a renegotiation clause in the contract. The good will between the parties is also better preserved if the issue is dealt with proactively. A renegotiation clause, however, only provides a proactive solution to the issue of changed circumstances if carefully drafted. This thesis provides recommendations on how to draft a renegotiation clause that successfully can be invoked as well as considerations for the scenario that the renegotiations required by such clause break down.

Kurzdarstellung

Die Rahmenbedingungen, unter denen ein langfristiger Vertrag ausgearbeitet, ausgehandelt und abgeschlossen wird, können sich ändern. Wenn eine unvorhergesehene Änderung der Umstände nach Abschluss des Vertrags das ursprüngliche vertragliche Gleichgewicht stört, kann es für die Vertragsparteien notwendig werden, einige der Vertragsbedingungen neu auszuhandeln, um der neuen geschäftlichen Realität Rechnung zu tragen. Während die von der negativen Auswirkung des auftretenden Ereignisses betroffene Vertragspartei bestrebt ist, derartige Neuverhandlungen aufzunehmen, ist die Gegenpartei möglicherweise nicht mit demselben Enthusiasmus dabei. Solche nachteiligen Ereignisse können jedoch die eine oder die andere Vertragspartei durchaus zufällig treffen.

Diese Studie untersucht die möglichen Wege der benachteiligten Vertragspartei, wenn erste Bemühungen um eine Neuverhandlung der Vertragsbedingungen gescheitert sind. Eine Vertragspartei, die sich in einer schwachen rechtlichen Position befindet, kann sich möglicherweise schwertun, einen Änderungswunsch abzulehnen. Es werden zwei Situationen behandelt. Die benachteiligte Vertragspartei kann sich dabei entweder auf das für den Vertrag geltende Recht oder auf eine Neuverhandlungsklausel berufen. Die Analyse der schwedischen, schweizerischen, deutschen und englischen Gesetze sowie der internationalen Vereinheitlichungsinstrumente und Kodifizierungen hat gezeigt, dass die Härtefallregelungen zu eng gehalten sind, um die Gegenseite zu einer Neuverhandlung der Bedingungen zu bewegen. Auch eine Änderung der Position von Gerichten und Schiedsgerichten in Richtung einer erleichterten Gewährung von Ausnahmen ist trotz eines vielleicht wachsenden Bedarfs, insbesondere im internationalen Handel, nicht zu erwarten, da die Härtefallregelungen in direktem Gegensatz zum Grundsatz pacta sunt servanda, dem Prinzip der Vertragstreue im öffentlichen und privaten Recht stehen.

Auf Grundlage vergleichender Untersuchungen hat sich herausgestellt, dass Verhandlungsführer dem Risiko künftiger negativer Entwicklungen sowohl kommerzieller als auch politischer Art, dem langfristige Verträge grundsätzlich ausgesetzt sind, am besten durch die Einbeziehung einer Neuverhandlungsklausel in den Vertrag begegnen. Auch der gute Wille zwischen den Parteien wird eher gewahrt, wenn das Thema proaktiv angegangen wird. Eine Neuverhandlungsklausel ist jedoch nur dann eine proaktive Lösung für die Frage der veränderten Umstände, wenn sie mit Sorgfalt formuliert wird. Diese Arbeit enthält Empfehlungen für den Entwurf einer Neuverhandlungsklausel, die erfolgreich geltend gemacht werden kann, sowie Erwägungen für das Szenario, dass die durch eine solche Klausel erforderlichen Neuverhandlungen scheitern.

Sommaire exécutif

Les circonstances, dans lesquelles un contrat à long terme est établi, négocié et conclu, peuvent changer. Si un changement imprévu de circonstances perturbe l'équilibre contractuel initial, alors, après la conclusion du contrat, il peut s'avérer nécessaire pour les parties contractantes de renégocier certaines des clauses du contrat afin de refléter la nouvelle réalité commerciale. Toutefois, si la partie concernée par l'événement qui s'est produit est enclin d'engager de telles renégociations, il se peut que la contrepartie ne partage pas le même enthousiasme. De tels évènements adverses peuvent cependant toucher l'une ou l'autre partie au hasard.

Cette étude explore les voies disponibles à la partie défavorisée si les premières tentatives de renégociation des conditions du contrat ont échoué. Il se peut qu'une partie se retrouvant dans une position légale affaiblie ait du mal à refuser une demande de changement. Deux situations sont gérées. La partie désavantagée peut ou bien s'appuyer sur les lois régissant le contrat ou sur une clause de renégociation. En conclusion à des analyses entreprises sur les lois suédoises, suisses, allemandes et anglaises ainsi que sur les instruments d'unification et les codifications internationales, il peut être établi que les règles de rigueur fonctionnent dans des limites trop étroites pour inciter la contrepartie à renégocier les conditions. Il n'existe non plus pas de perspectives de changement d'attitude de la part des cours et des tribunaux d'arbitrage concernant une concession plus facile à des exceptions, malgré un besoin éventuellement croissant, en particulier dans le commerce international, car les règles de rigueur sont en contradiction directe avec le grand principe de pacta sunt servanda.

Sur la base d'observations comparatives, force est de constater que les négociateurs mêmes sont les mieux en mesure de faire face au risque de tournure défavorable d'événements à caractère à la fois commercial et politique à l'avenir, auquel les contrats à long terme sont intrinsèquement exposés, grâce à l'inclusion d'une clause de renégociation dans le contrat. La bonne volonté entre les parties est également mieux préservée si la question est traitée de manière pro-active. Une clause de renégociations peut toutefois uniquement offrir une solution pro-active au problème de circonstances changées si cette dernière a été établie avec soin. Cette thèse fournit des recommandations relatives à la manière de rédiger une clause de renégociation pouvant être invoquée avec succès ainsi que des prises en compte pour le scénario dans lequel les renégociations requises par cette clause devaient échouer.

Part 1: Introduction

A. Structure of the Research

This study on renegotiation of long-term contracts is structured, based on the objectives and purposes of the research, in the following way: 1

The first part introduces the topic. It describes the framework of the research and how the research will be carried out. The subject and purposes of the study are presented, along with scope of the study, limitations and applied methods. Some important terms and concepts on contract renegotiation are also defined. Issues identified with respect to the chosen subject are highlighted, as well as solutions to overcoming such obstacles. Part one also comprises the renegotiation clause's place in the law of contract. Renegotiation and the adaptation of contracts are put in relation to the general principles of contract law. Since the sanctity of contracts is a fundamental principle of contract law, the discussion in part three and four would only be meaningful once its conflicting relation to renegotiation and adaptation has been dealt with. 2

Part two contain the dissertation's first main chapter. It gives an overview of the legal arguments available for a party to bring about an adjustment of the contract terms to changed circumstances under the laws of England, Germany, Sweden, and Switzerland, including comparative observations. International approaches to the legal problem are also examined. 3

Part three contains the dissertation's second main chapter and deals with contractual renegotiation i.e., where the contract provides for a solution to deal with future change. This part concludes the prior chapters and attempts to translate them into drafting recommendations. Advice is given on how to best draft a renegotiation clause in order to make the clause "renegotiation proof" and free from major complications or interruptions during the term of the contract if the renegotiation clause is triggered. The main issues and strategic considerations will be outlined both from a buyer and seller perspective. Which dispute resolution mechanism a renegotiation clause preferably should be supplemented by is also dealt with under this section. In this part, the enforceability of renegotiation clauses as well as the arbitral tribunals' authority to interfere by way of adaptation in a contract is dealt with as well. 4

Lastly, key-findings, conclusions, and comments on renegotiation of long-term contracts will be summarised in a final chapter four. 5

B. Subject and Purpose

I. The Problem

No one wants to think about or bring up the (uncomfortable) topic of potential future disputes when closing a long-term contract. Instead, transacting parties may rather choose to rely on the counterparty's integrity or good will if, in the future, an unexpected change in circumstances occurs that fundamentally alters the economic equilibrium of the contract. While there is an inherent risk in long-term contracts that a supervening event may occur sometime during the life of the contract, transacting parties simply want to get the deal done, whether 6

unaware of such risks or in spite of them. Hence, potential "escape clauses" such as renegotiation, hardship, and adaptation clauses or other contractual provisions dealing with changed circumstances may not be appropriately addressed in the contract. This is surprising since change of circumstances is probably one of the major issues facing transacting parties in international trade. In practice, transacting parties presumably engage in voluntary ad hoc renegotiations in order to maintain a good business relationship. The social capital that has been invested in a long-term deal or partnership often has a high value and the continued cooperation is more important than the strict performance of the contractual obligation according to the terms of the contract. Contracting parties may therefore be willing to modify the contract terms voluntarily, as they know that once the renegotiations fail and the dispute finds its way to court, social capital is lost and difficult, if not impossible, to restore.[1] A long lasting business relationship simply has a higher value. Therefore, it is much more likely that the contracting parties take a forward-looking approach, hoping for future business, avoidance of reputational risks, and loss of good-will.[2] There can also be other economic incentives behind the decision to enter into renegotiations instead of taking the dispute to court. Renegotiations inter partes preserves secrecy and the parties can avoid exposing contractual details of economic value in a court proceeding.

7 The arguments being used during renegotiations are typically of both a legal and non-legal nature.[3] Strict legal arguments typically increase when the parties realise that it will be difficult to find an amicable solution.[4] The strongest arguments may however be of a non-legal nature. The result of a renegotiation of the contract terms is ultimately a reflection of the parties bargaining positions.[5] A study carried out on contractual practice shows that business people seldom use legal sanctions even if the contract is crystal clear and legal sanctions are available to enforce the contract, as plenty of other effective non-legal sanctions are available. The study reveals that legal arguments are rather used as a last resort.[6] It does not mean that legal arguments are non-compelling or unimportant. Instead, it can be argued that it is one out of several factors that the contracting parties consider in a renegotiation situation although not necessarily the strongest argument available.

8 According to the legal literature, voluntary ad hoc renegotiations inter partes are widespread in business life with or without a renegotiation clause in the contract.[7] In industries where long-term contracts form part of the daily business and in international trade, transacting parties are presumably more sophisticated and the contract contains a renegotiation clause or other clauses providing for flexibility in case of unexpected events.[8] However, as renegotiation clauses are fairly technical in nature, they may not be given the time and attention they deserve or they are simply included in a routine manner as part of a standard contract or template rather than being individually negotiated for the specific transaction. It should also not be overlooked that the vast majority of contracts are concluded among small to medium sized companies that may not have the internal resources to

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[1] SOHLBERG, JT 1996, 972, 973 f.; *Similarly*, KOLO/WALDE, JWI 2000, 5, 6.; BARTELS, 68.
[2] *Compare*, ADLERCREUTZ, Avtalsrätt I, 21; SACKLÉN, JT 1996, 380, 381 f.; LANDO, Renegotiation and Revision of International Contracts, 37, 57. *See hereto also,* KOLO/WALDE, JWI 2000, 5, 5 f.
[3] SACKLÉN, JT 1996, 380, 392; LEHRBERG, ERPL 1998, 265, 266.
[4] LEHRBERG, 28 ff.
[5] PETER, 240.
[6] MACAULAY, ASR, 507, 516 ff.
[7] *See e.g.*, GRÖNFORS, 62 ff.; HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 136 ff.; LEHRBERG, 15; MACAULAY, ASR, 507, 517 ff.; PETER, 203 and 231; SACKLÉN, JT 1996, 380, 390; DRAETTA/NANDA/LAKE, 9; CRAIG/PARK/PAULSSON, 105. *See also*, along the same lines, SALACUSE, FILJ 2000. 1319 p. 1331; FRICK, 38.
[8] *Compare*, JENKINS, Tul. L. Rev. 1998, 2015, 2020; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 11; DRAETTA/NANDA/LAKE, 170.

negotiate contracts with respect to the issue of changed circumstances. Or, the contracting parties are not sophisticated enough or simply too careless to recognise the issue.[9]

Another explanation for not properly addressing the issue of changed circumstances through a renegotiation clause could be that lawyers simply are let into the transaction too late i.e., when the commercial terms have already been agreed on and when the parties are reluctant to reopen items in the contract that potentially would delay the closing of the transaction. As one CEO of a large company expressed it with respect to involving lawyers at an early stage of the transaction: *"You don't bring your parents along on the first date!"*[10] That may be a valid point, however, you probably want to bring your parents along once it gets more serious! Or, to use the words of Prof. Böckstiegel with respect to international business disputes: "*In the beginning (during the contract negotiations) there are too few lawyers involved, and at the end (in case of dispute) too many".*[11] Part of the problem may also lie in the fact that renegotiation clauses, for the non-lawyer, cannot easily be translated into money and are therefore, if included at all, only brought up towards the end of the contract negotiations. Or, it is a strategic decision as part of the rational that the transaction costs to negotiate such a clause are simply higher than the cost of allocating the losses. Typically, and unsurprisingly, the focus rather lies on the economic terms of the transaction and legal technicalities are neither prioritised nor given due attention.[12] Furthermore, a renegotiation clause in the contract makes it subject to future changes, which may be considered controversial. This problematic will be further discussed in later chapters. **9**

1. The Renegotiation Clause

While there are many variants of renegotiation clauses, the aim is to lead the parties back to the bargaining table in order to restore an economic equilibrium of the contract acceptable to both parties by way of adapting the terms to the new situation. The wording of the renegotiation clause is, among other factors, dependent on the contractual relationship and the risks involved in the transaction in question. Naturally contracting parties focus on the core risks of the transaction, but a renegotiation clause could also be generally drafted and cover any new circumstance that creates a fundamentally different situation.[13] Depending on the wording, renegotiation clauses could, from a legal perspective, be more or less useful. A renegotiation clause in its simplest form imposes a duty to renegotiate if a certain event occurs. It does not, however, provide any legal consequences for the event that the renegotiations fail. It merely provides an obligation to consult with the counterparty. A counterparty refusing to engage in renegotiations would constitute breach of contract.[14] To prove that the counterparty did not renegotiate in good faith may, however, be difficult, and even if it could be proven, it is unlikely that it would entitle a party to any damages, as the renegotiation clause typically does not include an obligation to reach an agreement.[15] Strictly speaking, it could be argued that a renegotiation clause without any sanctions only pro- **10**

[9] *Compare*, LANDO/BEALE, 113.
[10] The Swedish General Counsel Report 2014, 17. A survey carried out among CEOs and general counsels in 50 large Swedish companies analysing the function and commercial value added by in-house legal teams.
[11] BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 165.
[12] *Compare*, BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 160 f. *See also*, LANDO, A European Uniform Commercial Code, 269 stating: "People do not give careful attention to the terms of their contracts. They are mainly interested in knowing the quality of the goods or services offered, the price, and the terms of payment."
[13] SACKLÉN, JT 1996, 380, 380 f.
[14] GRÖNFORS, 78; SOHLBERG, JT 1996, 972, 974 f.; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 417; PETER, 246.
[15] GOUTANDA, VJTL 2003, 1461, 1465; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 420; PETER, 247.

vides an obligation to consult with the counterparty on the topic of amending the terms of the contract. [16] How useful such generally drafted clauses are is questionable as such renegotiations will most likely take place in any case, with or without a clause included in the contract at least if one does not wish to sacrifice the business relation and potential future business. As Prof. C.M. Schmitthoff expresses it in his essay on hardship and intervener clauses: *"A hardship clause without sanctions is hardly worth the paper on which it is written"*.[17] The distinction between hardship clauses and renegotiation clauses will be dealt with later in this chapter. Nonetheless, a very simple renegotiation clause could still have a moral effect on the counterparty to enter into serious renegotiation talks. Such a simple renegotiation clause expresses the will of the contracting parties to revise the contract if a change in circumstances occurs.[18] Other renegotiation clauses are more aggressive and stipulate that certain efforts to renegotiate must occur within a certain period of time and if the parties do not reach an agreement the issue will be resolved by an independent third-party or the contractual obligations will be suspended. A well-drafted renegotiation clause, especially if linked to economic consequences, can be valuable as it affects the parties bargaining position.[19]

11 Renegotiation clauses typically leave out harsh remedies such as termination or suspension.[20] An explanation could be that the dynamics in long-term contracts, where such clauses are most frequently included, are different. The main interest of the parties is to find a solution as the entire deal or project could otherwise be endangered, which probably already involved considerable investments on both sides.[21] The contract simply needs to be kept alive. Contracting parties in long-term contracts are therefore highly motivated to solve the issue without involving external parties and suspension or termination of the contract is a worst-case scenario. Nevertheless, no matter how motivated the parties are to reach an amicable solution, there is of course the risk that the contracting parties do not come to an understanding. What happens when the renegotiations imposed by the clause fail or when voluntarily ad hoc renegotiations fail?

2. Failed Renegotiations

12 The inclusion of a renegotiation clause does not guarantee a successful outcome unless the clause has been carefully drafted to suit the specific transaction. Even then, if the renegotiations fail and the dispute finds its way to court, the wording of the renegotiation clause will be exposed to the court's interpretation, as it is difficult to draft a clause that covers the spectrum of all potential adverse events.[22] In the event that any non-contractual renegotiation efforts fail or the court comes to the conclusion that the renegotiation clause is unenforceable or not applicable to the situation, due to the scope or wording of the clause, the law applicable to the contract will determine the legal consequences of a change in circumstances. The party adversely affected by the changed circumstances will have to rely on whether the general rules of law applicable to the contract provide for relief to perform the contractual obligations, and to what extent, or if the applicable laws simply enforce the contract with the outcome that it shall continue in full force and effect irrespective of the supervening event.

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[16] *Compare*, FINKENAUER, MüKo zum BGB zu § 313, 1904 (Rn. 65), referring to such incomplete adaptation clauses as "Sprechklauseln".
[17] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 420.
[18] *Compare*, PETER, 240 f.; ROTH, MüKo zum BGB zu § 313, 1799, (Rn. 33); *Compare hereto*, NJW-RR 2001, 636, 637.
[19] PETER, 129.
[20] *Compare*, DRAETTA/LAKE/NANDA, 177 f. stating that hardship situations only occasionally permit termination of the contract.
[21] *Compare*, BONELL, Italian National Reports 1978, 221, 222 f.
[22] BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 166.

This study explores the routes available to a party that wishes to motivate the counterparty to renegotiate the contract terms following an unexpected change in circumstances that has fundamentally altered the economic equilibrium of the contract. Two situations will be dealt with: 13

(i) *Renegotiation by Operation of Applicable Laws*. When the contract is silent on how changed circumstances should be dealt with, the laws governing the contract may provide for contractual adaptation and thereby provide a starting point for renegotiations inter partes; and

(ii) *Renegotiation According to the Terms of the Contract*. The contract contains a renegotiation clause imposing a duty on the parties to renegotiate relevant terms.

A party in a weak legal position may find it difficult to refuse a quest for change of the contract terms knowing that the issue will ultimately be settled in court. Therefore, it is crucial for the contracting parties to understand the legal arguments available, as failed renegotiations inter partes, with or without a renegotiation clause in the contract will ultimately fall back on the law applicable to the contract. A renegotiation clause only provides for a pro-active solution to the issue of changed circumstances if carefully drafted. The aim is therefore to give recommendations on how to best draft a renegotiation clause that can be successfully invoked. 14

The court's authority to revise contracts must also be considered. A judge or an arbitrator that is required to issue a decision following the parties failed renegotiations will first have to turn to the applicable law that determines the extent of his power to adapt the contract.[23] An interesting question arises as to whether the court or the arbitral tribunal has the necessary qualifications, know-how, expertise and sufficient data to adapt the contract, especially with respect to complex commercial international long-term contracts. 15

In summary, the overall objective of the study is to outline a party's possibility to achieve renegotiation of the contract following a change in circumstances when the initial renegotiation attempts inter partes have failed. In that way, a party facing a renegotiation situation understands how to evaluate its bargaining position in relation to legal arguments and how to strategically position itself. 16

II. Purpose

As Europe merges and economic exchange increases, and both social and economic changes frequently occur, it is crucial, especially in the context of transnational long-term contracts, that transacting parties, before closing a deal, pay due attention to how changed circumstances should be dealt with in the contract as well as how changed circumstances are dealt with under the laws governing the contract. The purpose of this study is to answer the following questions: Firstly, under what circumstances can a party be relieved of its contractual obligations when an unexpected fundamental change in circumstances, following the conclusion of the contract, renders the performance of the contractual obligation economically (much) more burdensome to carry out? Secondly, is the renegotiation clause an effective and suitable method to resolve disputes in long-term contracts with respect to changed circumstances and how are such clauses to be best drafted for that purpose? This study aims to promote pro-active contracting of long-term contracts with respect to the issue of changed circumstances 17

[23] PETER, 248.

and to give guidance on how to best draft a renegotiation clause so that the contract can be upheld with modified terms following an unexpected change in circumstances. I.e., to keep the contract alive despite a supervening event occurring that fundamentally upsets the economic equilibrium of the contract.

18 The purpose of this study has now been introduced. How the subject is approached along with a couple of notes on scope, terminology, material and methodology as well as the place of the renegotiation clause in the law of contract are presented below.

C. Demarcations and Terminology

19 A couple of important limitations on the topic will be described under this section. Terms and concepts essential to the study will also be clarified hereunder.

I. Demarcations

20 This study is limited to exploring possible routes for a party to achieve the renegotiation of a long-term contract when an unexpected change in circumstances fundamentally alters the *economic* equilibrium of the contract after the contract has been concluded. I.e., it still remains physically possible for the disadvantaged party to perform its obligations; they have only become more burdensome to perform. This study is thus limited to external events rendering performance economically more onerous i.e., more costly (e.g. due to a material adverse change in a product‘s market unrelated to general economic recession).

21 This study focuses on purely commercial contracts where the transacting parties are on an equal footing i.e., no party is in an inferior position and there is symmetry with respect to the transacting parties‘ knowledge, information and negotiation leverage etc. at the time of the contract’s conclusion. Hence, consumer contracts are excluded since they typically are subject to special rules of mandatory character aimed at protecting private individuals acting otherwise than in the course of a business. Furthermore, a contract that is voidable due to circumstances at the time when the parties entered into the contract (e.g., deceit, fraud, duress, undue influence or usury) are also excluded. Likewise, situations where there is an actual breach of contract (which could be used as leverage to enforce renegotiations) falls outside the scope of this study on renegotiation. This study also excludes the situation where a party realises, after entering into the contract, that the assumptions on which it entered into the contract were wrong. I.e., the factual circumstances did not change but were merely discovered too late. Additionally, this study does not consider legal solutions available where the consequence of applicable laws or rules is that the entire contract is set aside and terminated. Furthermore, other than with respect to the interpretation of the renegotiation clause itself, contract interpretation and gap-filling as support of a claim for modification of the contractual terms have been excluded from this study since they are highly dependent on the circumstances in the individual case. The content of the relevant contractual terms will be assumed to be clear. Voluntary ad hoc renegotiations inter partes are also not considered. It is merely noted that in practice such renegotiations are likely to take place as a first measure when contracting parties are facing a problem with respect to the performance of the contractual obligations. Instead, this study targets the situation where the non-contractual renegotiation talks either fail or where one party refuses to engage in renegotiations despite such a duty being imposed by a renegotiation clause in the contract or where there is a disagreement on how the renegotiation clause in the contract should be interpreted with respect to the supervening event. It is not within the scope of this research to analyse in detail the situation where the parties specifically deal with the change of circumstances in the contract. Lastly, while non-legal arguments, as already mentioned, typically are strong arguments to motivate the counterparty to engage in renegotiations to adapt the contract, such arguments will not be covered. Purely legal arguments will be considered.

II. Terms and Concepts

1. Terminological Difficulties: Force Majeure, Hardship and Renegotiation Clauses

There are several different kinds of contract clauses dealing with the issue of changed circumstances. Some provisions target very specific situations, so-called special risk clauses (e.g., price revision clauses, most favoured nation clauses, index clauses, tax clauses and currency clauses) where the contract terms automatically are adapted to reflect the new situation, while other clauses target a wide scope of events e.g., force majeure clauses, hardship clauses and renegotiation clauses.[24] The concepts of the latter category will be analysed next. There is not necessarily always a clear line between an event of force majeure and a hardship event.[25] In turn, hardship clauses and renegotiation clauses are sometimes inserted as synonyms in the legal doctrine. The area of law provides difficulties with respect to terminology. Nevertheless, some degree of standardisation can be distinguished. 22

2. The Relationship Between the Force Majeure- and Hardship Defence

Force majeure and hardship are two closely related concepts. Both the force majeure and hardship defence are triggered when there has been a change of circumstances, after the contract was concluded, which severely and adversely affects one of the contracting parties to perform its contractual obligations. The force majeure clause is traditionally limited to unforeseeable events that go beyond the disadvantaged party's control and which make the performance impossible either temporarily or permanently.[26] The requisites resemble, to a large extent, that of the hardship exemption. However, the events triggering a force majeure clause typically fall under one of the following two categories: (i) "Acts of God" (e.g. hurricanes, earthquakes and flooding); or (ii) "Man-made events" (e.g. war, acts of government and riots).[27] The traditional force majeure clause covers a wide range of extraordinary events rendering performance impossible while a hardship clause could be triggered by any event as long as the contractual equilibrium is fundamentally disturbed by such an event and thereby renders the performance under the contract excessively more onerous for the obligor to carry out (typically economically) but not impossible. [28] Thus, the hardship situation falls short of impossibility while absolute impossibility is a prerequisite for the force majeure exemption to apply. For example, if a person enters into a contract to sell a Monet oil painting and, following the conclusion of the contract, the painting is destroyed in a fire it is simply impossible (absolute impossibility) for the seller to perform his or her obligation under the contract. 23

[24] RAMBERG/RAMBERG, 206; FRICK, 177 ff.
[25] DRAETTA/NANDA/LAKE, 178.
[26] BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 159; FRICK, 179 f.; HORN, 111, 134; PETER, 235; SCHWENZER, VUWLR 2008, 709, 714; TALLON: in Bianca and Bonell, Commentary on the International Sales Law, the Vienna Sales Convention, Milan, 572, 578; Art. 7.1.7 UNIDROIT Principles; Art. 8:808(1) PECL; Art. III – 3:104(1) of the DCFR.
[27] HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 132; PETER, 231.
[28] *Compare*, PETER, 237; HORN, Standard Clauses on Contract Adaptation in International Commerce, 111 131; BRUNNER, 400; FRICK, 180; RAMBERG/RAMBERG, 208; RODNER, Hardship under the UNIDROIT Principles, 677, 681; GARRO, Tul. L. Rev. 1995, 1149, 1184 ff.; MASKOW, Am. J. Comp. L. 1992, 657, 663 f.; KONARSKI, IBLJ 2003, 405, 407; TALLON, Hardship, in: Hartkamp and Hesselink (ed), Towards a European Civil Code, 327, 328; BONELL, Italian National Reports 1978, 221, 225.

a) Absolut Impossibility

24 Sometimes the line between absolute impossibility and economic hardship (unaffordability) is very fine and in some situations the effects of the change in circumstance may be considered to constitute both an event of hardship and force majeure.[29] Firstly, it has been argued that most supervening events today do not render performance objectively impossible. Due to technological developments and worldwide procurement alternatives available they merely render the performance more or less onerous.[30] Secondly, it can be argued that any physical impossibility also can be translated into money.[31] For example, if there is an outbreak of war or an earthquake in a region, the producer may have to turn to other more expensive countries or regions in order to produce the goods on time. Another example is the oft-referred to "ring case". A ring is sold and prior to delivery it falls into a lake. It is not impossible for the seller to recover the ring as the lake can be drained but the contractual duty to deliver the ring can only be carried out at an excessive cost. Hence, performance is still technically possible, but only at an exorbitant cost. Such situation can be compared with the hardship situation where the performance becomes excessively burdensome (costly) as a result of a sudden abnormal change of market conditions, which is so ruinous for the obligor that it would result in bankruptcy. Imagine, a producer of goods is faced with severe price increases due to a sudden change of market conditions and does not have the money to pay for supplies and is therefore unable to produce the goods contracted for. Thus, it could be argued that some events fall under both categories, or, at least, that it would be illogical to make a distinction where in a force majeure situation the impediment can be overcome at an excessive cost since there is no clear line in such cases.[32] Given that, once can assume that in international contractual practice the two concepts are sometimes used interchangeably.[33]

b) Distinctive Features of the Force Majeure Defence

25 In couple of concrete ways the traditional force majeure clause differs from a hardship clause. Force majeure clauses deal with the non-performance of contractual obligations and provide for automatic contractual relief once triggered. The consequences are rigid – the obligor is either relieved of its obligation to perform or has to perform as provided in the contract.[34] The remedial consequences available are traditionally termination or suspension of the contract.[35] Hardship clauses do not provide for automatic contractual relief. Instead, the hardship clause aim to keep the contract alive by way of requiring the parties to renegotiate the contract terms to reflect the new situation.[36] Failed renegotiations may however lead to an intervention by a third party having the authority to either terminate, uphold or adapt the contract terms in order to re-establish the contractual equilibrium.[37] In the classic force majeure situation the parties know beforehand what party stands at risk for a certain

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[29] MELIS, J. of Int. Arbitration 1984, 213, 215.
[30] SCHWENZER, VUWLR 2008, 709, 725. *Similarly also*, BRUNNER, 215.
[31] *Compare,* BRUNNER, 215.
[32] BRUNNER, 215. *Compare hereto also*, Comment No. 6 on Art. 6.2.2 of the UNIDROIT Principles (2016 edition); DRAETTA, IBLJ 2002, 347, 349 f.; MELIS, J. of Int. Arbitration 1984, 213, 215.
[33] *Compare*, MELIS, J. of Int. Arbitration 1984, 213, 215.
[34] FRICK, 177; TALLON, Hardship, in: Hartkamp/Hesselink (Ed.), Towards a European Civil Code, 327, 328; DRAETTA, IBLJ 2002, 347, 348 f.; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 7. RODNER, Hardship under the UNIDROIT Principles, 677, 681.
[35] HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 132; PETER, 231; MASKOW, Am. J. Comp. L. 1992, 657, 658.
[36] MCKENDRICK, Frustration of Contract, 62; FRICK, 178; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 21; RAMBERG/RAMBERG, 208.
[37] Art. 6.2.3(4) UNIDROIT Principles; Art. 6:111 (3) PECL; FLECHTNER, Belgrade Law Review 2011, 84, 90; BRUNNER, 392.

potential future event as well as how it will be dealt with. That differs from the hardship situation where the outcome may be that one of the parties has to bear the risk of the supervening event depending on whether the contract is terminated or the contract is being enforced according to its original terms or, alternatively, the economic risk is apportioned among the parties by way of adapting the contract terms to the new situation.[38] In that sense it could be argued that, in contrast to force majeure clauses, hardship clauses protect *both* contracting parties against supervening events that no party has clearly taken on the risk for in exchange for something else in the contract.[39] It is however not excluded that renegotiation attempts are made although contract renegotiations remain the standard for hardship clauses and not of force majeure clauses.[40]Also the drafters of the UNIDROIT Principles systematically deal with force majeure and hardship separately by placing the provisions for force majeure in the chapter on 'Non-Performance' while the provisions for hardship are found in the chapter on 'Performance'.

Consequently, although both clauses deal with the fair allocation of risk with regard to future supervening events, the two doctrines, in their traditional sense, operate within different confines. While the doctrine of force majeure operates in the context of non-performance and deals with extraordinary events such as war, flooding, earthquakes etc. rendering performance impossible, the hardship doctrine traditionally covers less dramatic events rendering performance economically much more burdensome, but with the aim of the contractual obligations being carried out albeit on altered terms. In essence, the distinction lies in the trigger event and the remedial consequences. The force majeure clause falls outside the scope of this study as the focus is on changes which make performance more onerous to carry out, but not impossible, and as force majeure clauses traditionally lead to the termination of the contract and do not seek to keep the contract alive by renegotiations. **26**

3. Defining Hardship and Hardship Clauses

The hardship doctrine is far less established and acknowledged than the doctrine of force majeure. It is mainly civil law systems that recognize a comparable theory as ground for exemption. In order to further clarify the concept, the Articles on hardship under the UNIDROIT Principles and the PECL will be used as reference point[41] bearing in mind that the Articles do not necessarily correspond to current contractual practices in international trade [42] and that hardship is not yet a settled concept.[43] **27**

a) Trigger Event and Other Qualifiers

The hardship clause deals with a fundamental change of circumstances and is frequently found in (international) commercial contracts.[44] The typical hardship clause is triggered when a change of circumstance renders the performance of the contractual duty excessively burdensome for one party, normally economically, resulting in a substantial imbalance between the parties' contractual obligations, but without rendering the performance impossible.[45] That entails that any given event such as a sharp drop in market prices or a typical force majeure **28**

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[38] BRUNNER, 392.
[39] HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 135 f. *Compare also*, RAMBERG/RAMBERG, 208.
[40] DRAETTA, IBLJ 2002, 347, 349 f.; PETER, 238; *Compare hereto also*, BERGER, VJTL 2003, 1347, 1352.
[41] Art. 6.2.2 the UNIDROIT Principles and Art. 6:111(2) PECL.
[42] *See hereto*, ICC Case No. 8873 of 1997, JDI 1998, 1017, 1019.
[43] TALLON, Hardship, in: Hartkamp and Hesselink (ed), Towards a European Civil Code, 327, 327 f.
[44] BEALE, 1165; CHITTY, 1636.
[45] Art. 6.2.2 (a) through (d) UNIDROIT Principles; Art 6:111 subsection (1) and (2) PECL; BRUNNER, 400; BÖCKSTIEGEL,

case may trigger the hardship clause as long as the occurrence of the supervening event *fundamentally* alters the contractual equilibrium. The trigger event is one of its distinctive features but also the crux of the matter. How should such a threshold be ascertained? When is the contractual equilibrium so fundamentally altered that relief under the hardship exemption is motivated? Part II, subsection D of this study will deal with this. The hardship defence is typically further qualified in that the occurrence of the event must have been unforeseeable, outside the disadvantaged party's control (i.e. not self-induced) and the risk of the consequences of the event cannot not have been assumed by the disadvantaged party either in the contract or derived from the nature of the transaction. The supervening event shall also have occurred after the conclusion of the contract.[46] Hence, factual mistakes at the time of execution of the contract are irrelevant for the hardship exemption also when they are only discovered after the conclusion of the contract.[47]

b) Remedial Effects

29 Another distinctive feature of the hardship clause is the remedies available. It it is not an excuse of non-performance. Rather, it primarily seeks the performance or the fulfilment of the contract by way of adapting the terms of the contract to the new situation.[48] In order to keep the contract alive the hardship clause, as a first remedy, imposes a duty/right on the parties to enter into renegotiations with the view to restore the (original) contractual equilibrium. Termination of the contract is a measure of last resort only.[49] Should such renegotiation efforts fail, the original contractual terms continue to apply assuming that the parties have negotiated in good faith.[50] It is not uncommon that the hardship clause states that the contract is suspended until the renegotiations have been finalised.[51] Moreover, there is typically no requirement that the renegotiation efforts should result in agreement. Therefore, hardship clauses frequently stipulate that if the parties are unable to reach an amicable solution, the next recourse is third-party intervention with the possibility that a court or arbitral tribunal (or other third-party interveners such as experts or mediators) terminates, suspends or imposes changed contractual terms (perhaps not as contemplated by the parties) in order to restore the economic equilibrium.[52] While renegotiations inter partes are the cornerstone remedy of the hardship clause,[53] judge-imposed adjustments could be argued to be less common depending on the contracting parties.[54] For example, from a common law perspective, contractual readjustment may simply be too controversial or impossible for the court or the arbitrator to follow where

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Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 159. HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 136; GARRO, Tul. L. Rev. 1995, 1149, 1184 ff.; RAMBERG/RAMBERG, 208; BURKHARDT, 98; MASKOW, Am. J. Comp. L. 1992, 657, 663 f.; KONARSKI, IBLJ 2003, 405, 407; TALLON, Hardship, in: Hartkamp and Hesselink (ed), Towards a European Civil Code, 327, 328; DRAETTA/NANDA/LAKE, 196.

[46] Art 6.2.2 subsections (a) through (d) UNIDROIT Principles; Art. 6:111(2) subsections (a) through (c) PECL; PÉDAMON/CHUAH, 63; FRICK, 179; BURKHARDT, 97.

[47] Art. 6:111(2)(a) PECL; Art. 6.2.2 (a) UNIDROIT Principles; DRAETTA/NANDA/LAKE, 195.

[48] PETER, 239; DRAETTA/NANDA/LAKE, 196; MCKENDRICK, in: VOGENAUER (ed), Commentary on the UNIDROIT Principles, 808, 810; NASSAR, 178; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 21; HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 131 f.; RODNER, Hardship under the UNIDROIT Principles, 677, 681.

[49] HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 132; KONARSKI, IBLJ 2003, 405, 423 f.; DRAETTA/NANDA/LAKE, 196 f.; PÉDAMON/CHUAH, 63; BURKHARDT, 99; *See also*, KESSEDJIAN, Int. Rev. of Law and Econ. 2005, 415, 425; *Compare also*, FRICK, 180.

[50] DRAETTA/NANDA/LAKE, 197.

[51] DRAETTA/NANDA/LAKE, 198.

[52] Art. 6.2.3(1) of the UNIDROIT Principles and Art. 6:111(2) of the PECL; DRAETTA/NANDA/LAKE, 197; HORN, Gutachten und Vorschläge, 623 f.; KONARSKI, IBLJ 2003, 405, 423. *Compare hereto also*, HORN, 175; FRICK, 180.

[53] HONNOLD/FLECHTNER, 629; PÉDAMON/CHUAH, 65 f.

[54] *Compare*, DRAETTA, IBLJ 2002, 347, 350 f.

the legal system does not allow for judge led adaptation of contracts.[55] To deal with that problem, a third-party intervener clause may instead be included in the contract.[56]

c) Contractual Practice

In international contractual practice it may look slightly different. Contracting parties are more likely to agree on a hardship clause reflecting the specific needs of the transaction.[57] First of all, contracting parties are free to decide the seriousness of the event triggering the hardship clause as well as its consequences. For example, hardship clauses may include a general description of a trigger event that is further illustrated by a list of specific trigger events or a list of events excluding a trigger of the clause.[58] Also, the trigger event does not necessarily have to live up to the strict requisite of being unforeseeable.[59] Furthermore, hardship clauses will indicate what sanctions are applicable in case the renegotiations fail.[60] These provisions are frequently supplemented by sanctions such as third-party intervention, suspension or termination.[61] Some hardship clauses lay down in detail the adaptation procedure that should be applied or even the specific type of adjustment (e.g. price adjustment)[62] or there is a predetermined distribution of cost caused by the supervening event.[63] In that way, the parties can protect the business relation that could suffer from an adaptation through intervention by a third party that may or may not have the necessary know-how, expertise, and understanding of the commercial terms of the contract. **30**

To propose a standard definition of a hardship clause is difficult if not impossible. The variations are many with respect to scope and terminology as well as remedial consequences,[64] especially since in practice the parties are likely to tailor the clause to reflect their own specific needs. However, in the legal literature, hardship clauses are generally described to operate when a supervening event renders the performance (much) more burdensome but not impossible to carry out and where the aim is to keep the contract alive by restoring the original contractual equilibrium through renegotiations as an initial effort and enforced revision of the contract by a third-party intervener as a second attempt to keep the contract alive. The right/duty to initiate renegotiations inter partes is a key feature of the hardship clause, and it could be argued that a hardship clause always should contain this element.[65] In addition, they may be supplemented with remedies such as termination and/or suspension of the **31**

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[55] PETER, 231; FLECHTNER, Belgrade Law Review 2011, 84, 90 f.; KESSEDJIAN, Int. Rev. of Law and Econ. 2005, 415, 422; HORN, Gutachten und Vorschläge, 623 f.; VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 122; *See also*, British Movietonews Ltd. v. London and District Cinemas Ltd. [1952] AC 166, 168 and 183 f.

[56] HORN, Gutachten und Vorschläge, 623 f.

[57] *Compare*, Comment No. 7 on Art. 6.2.2 of the UNIDROIT Principles (2016 edition).

[58] DRAETTA/NANDA/LAKE, 196 f.; KONARSKI, IBLJ 2003, 405, 419 ff.; HORN, Die Anpassung langfristiger Verträge im internationalen Wirtschaftsverkehr, 27.

[59] KONARSKI, IBLJ 2003, 405, 419 ff.

[60] PETER, 237 f.

[61] KONARSKI, IBLJ 2003, 405, 420; VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 109; BURKHARDT, 100. *See hereto also*, SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419 f.

[62] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 418; KONARSKI, IBLJ 2003, 405, 419 and 424; DRAETTA/NANDA/LAKE, 193.

[63] HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 131.

[64] VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 109; KONARSKI, IBLJ 2003, 405, 406.

[65] *Compare*, PÉDAMON/CHUAH, 63; HONNOLD/FLECHTNER, 629.

contract. For the purpose of this study, the focus will merely be on situations of economic hardship where the aim is to keep the contract alive by way of renegotiating the contract terms.

4. Hardship and Renegotiation Clauses – Is there a Difference?

32 The hardship clause is a frequently used contract adaptation clause[66] and has thereby received a lot of attention in the legal doctrine. In comparison to the hardship clause, the literature on renegotiation clauses is scarce. Since it is difficult to define a standard definition of the two provisions and there are many variants in contractual practice, the two concepts are sometimes conflated.[67] However, a couple of differences distinguishing the two types of clauses can be discerned.

33 First of all, the renegotiation clause can be found under a variety of different terms such as review, revision, adjustment, adaptation, restructuring or variation clauses etc.[68] Secondly, the renegotiation clause is much wider in scope in the sense that it is not limited to the typical hardship situation.[69] Instead, a renegotiation clause may be triggered by any undetermined event such as hardship or, alternatively, a well-specified event as provided by the parties.[70] It can also be triggered by an event that the parties know will occur sometime during the term of the contract, making renegotiation of the terms a fact.[71] More and more renegotiation clauses tend to include a point of tolerance triggering renegotiations[72] taking on the features of hardship. That threshold can be set higher or lower than for example the threshold set by the laws applicable to the contract. Thirdly, renegotiation clauses differ in that they do not follow an automatic or predetermined procedure but are rather intended to lead to contract adaptation by way of imposing a single remedy i.e. the duty to renegotiate the contract.[73] At least in its simplest form the renegotiation clause only imposes such remedy[74] and there is no duty to actually reach an agreement.[75] The renegotiation clause is generally not linked to sanctions such as termination or suspension.[76] It often tends to be silent on this point and, if at all, the route is to enforce renegotiation of the contract terms through third-party intervention if the initial renegotiations inter partes fail.[77] Lastly, there are no predetermined patterns of what such renegotiations should result in, as is often the case with hardship clauses i.e., either to restore the original contractual equilibrium or for example an adjustment of the price. Thus, the renegotiation clause is operating under much freer confines than the hardship clause. There is also no requirement that the supervening event shall fundamentally have altered the contractual equilibrium in order to request renegotiations and the aim with the renegotiations are not necessarily that of restoring the *original* contractual equilibrium.

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[66] FRICK, 177; BONELL, Italian National reports 1978, 221, p. 225.
[67] There is a wide range of different names on the clauses being used by international practitioners in dealing with the issue of changed circumstances, e.g. harshness clauses, saving clauses, hardship clauses, renegotiation clauses, unforeseeability clauses. *See hereto*, BEALE, 1165.
[68] PETER, 231.
[69] *See e.g.*, BRUNNER, 513; BERGER, VJTL 2003, 1347, 1354; FRICK, 176 f.; PETER, 239 and 257 f.; LEHRBERG, 68 ff.; *See also*, HORN, Neuverhandlungspflicht, Acp 1981, 255, 261.
[70] HORN, Die Anpassung langfristiger Verträge im internationalen Wirtschaftsverkehr, 24; BRUNNER, 513; SORNARAJAH, J. of Int. Arbitration 1988, 97, 109. *Compare also*, PETER, 243. JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 211 f.
[70] PETER, 242. *Compare hereto also*, ROTH, MüKo zum BGB zu § 313, 1798, (Rn. 32); RAMBERG/RAMBERG, 208.
[71] PETER, 243; BRUNNER, 513.
[72] PETER, 242; RAMBERG/RAMBERG, 208.
[73] GRÖNFORS, 78; PETER, 239 and 246; HORN, Die Anpassung langfristiger Verträge, 9, 24. RAMBERG/RAMBERG, 208.
[74] SOHLBERG, JT 1996, 972, 974. *Compare*, SCHMITTHOFF, Hardship and Intervener Clauses, 415, p. 420.
[75] PETER, 249; RAMBERG/RAMBERG, 208.
[76] PETER, 239.
[77] PETER, 249; VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 121 f.

Renegotiation clauses may instead include qualifiers requiring that the change is fundamental, unforeseeable, unavoidable, and outside any party's control sphere in order to limit the situations when renegotiations can be initiated by the counterparty. In those cases, the clause corresponds to the requirements of a typical hardship clause.[78]

Moreover, it could be argued that the renegotiation clause is not to be regarded, in comparison with the typical hardship clause, as a provision providing for an emergency solution when a supervening event occurs driving one party beyond the last "limit of sacrifice". Rather, the renegotiation clause is much more commercial in its nature. The very essence of a renegotiation clause is to protect the social capital invested rather than to find an entirely equitable solution by resetting the initial contractual balance. Continued cooperation and carrying out the transaction (in one form or the other) is simply more important or has a higher value than enforcing the contractual obligations as initially agreed on. That could be one reason for why renegotiation clauses often leave out other more harsh (but perhaps more effective) remedies. 34

At present there is no clear distinction between the two types of adaptation clauses. Both provisions operate under the context of contract performance aiming to avoid conflicts and to keep the contract alive by way of adapting the terms of the contract. In an attempt to classify the clauses it could be argued that a renegotiation clause aims to adapt the contract to the changed circumstances by way of establishing a fair and equitable outcome in the view of both parties while a hardship clause is directed at protecting the economic balance between the parties as *initially* bargained for (i.e., to maintain the economic equilibrium).[79] One could also note that hardship is a more standardised concept and has also found its place in international unification instruments. For the purposes of this study, the hardship clause will be treated as a specific kind of renegotiation clause simply operating within more narrow confines.[80] However, both clauses generally require the participation of both parties (or a third party intervener). It is, however, important to not overlook that the renegotiation clause operates much more freely![81] 35

5. "Renegotiation"

For the purposes of this study, "renegotiation" shall be deemed to mean that one or more terms initially agreed upon in the contract have been revisited and adapted to reflect the new situation either through renegotiations inter partes or by a third party intervener as designated in a renegotiation clause in order to continue the existing relationship under partly new and different terms. I.e., the existing contract is upheld with changed terms without the intervention of a court or arbitral tribunal not contemplated by the contracting parties in the contract. 36

6. Contracts Neutral to Renegotiation

Depending on the type of contract, the possibility to renegotiate may differ. Some contracts are drafted to prevent renegotiations, while others are intended to develop and be further negotiated after the conclusion of the contract.[82] For example, there are contracts (e.g. joint venture agreements) that deliberately leave certain terms 37

[78] PETER, 242.
[79] BERGER, VJTL 2003, 1347, 1352.
[80] *Compare with*, SORNARAJAH, J. of Int. Arbitration 1988, 97, 108; PETER, 242; BERGER, VJTL 2003, 1347, 1352; BURKHARDT, 99; PETER, J. of Int. Arbitration 1986, 29, 31 and 34. *See hereto also*, HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 180 stating that modern hardship clauses contain a duty to renegotiate.
[81] PETER, J. of Int. Arbitration 1986, 29, 31.
[82] GRÖNFORS, 59.

open-ended with the intention to negotiate such terms at a later stage of the transaction.[83] Other contracts may be drafted specifically to prevent renegotiations (e.g. severance payment contracts). The contracts targeted in this study are contracts "neutral" to renegotiation. I.e., contracts that neither exclude the option to renegotiate the terms nor those where there is already an understanding between the parties that the contractual obligations have to be further developed and negotiated as the contractual relationship moves forward.

7. "Contract Adaptation"

38 As used in this study, the term contract "adaptation", "adjustment" or "revision" refers to one or several contractual terms that have been modified, e.g., the agreed-upon price has been lowered, the date or place of performance has changed or relief is granted to procure a certain amount of goods. Thus, it goes beyond the mere filling of gaps or clarifications of contractual terms. Whether termination of the contract is to be considered a form of contract adaptation is difficult to decide and perhaps a matter of taste.[84] Strictly speaking it could be argued that it is not. For the purposes of this study, termination of the contract will only be treated as a form of contract adaptation when the original contract is terminated and replaced by a new contract but where the old contract serves as the basis for the new contract. In that sense, it is not an entirely new contract since the old contract still has a function and influence on the renegotiations as well as the end result.[85] Moreover, a contract that is partially upheld while another part is terminated will be considered to fall under the term "adaptation".

8. "Change of Circumstances"

39 Change of circumstances shall mean that an unexpected event has occurred after the conclusion of the contract that fundamentally alters the equilibrium of the contract either because the cost of performance has increased or because the value of the performance to be received has diminished. Hence, situations where the imbalance following a change of circumstances consists of windfall profits for one party without having a negative adverse effect on the counterparty are not considered in this study. As one scholar expresses it: "envy is no harm for the less lucky party."[86]

9. Long-term Contracts

40 The life of a contract can be short or long. Long-term contracts are particularly vulnerable to both internal and external changed circumstances. There is simply a higher risk that an event upsetting the economic equilibrium occurs if the term stretches over a longer period of time. Parties to long-term international commercial contracts (e.g. investment contracts, joint-ventures, construction projects, instalment contracts, oil or gas contracts) are presumably even more concerned with the issue of changed circumstances.[87] They operate in a context of uncertainty where both regionally and internationally economic, political and social changes are more likely to

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[83] GRÖNFORS, 43 and 59 f.; LEHRBERG, ERPL 1998, 265, 266.
[84] RODHE, NJM 1951, 181, 189.
[85] GRÖNFORS, 11.
[86] HORN, Standard Clauses on Contract Adaptation in International Commerce, 111, 136. *See e.g.*, the Norwegian arbitration case, in N.D.S 1990 s. 204 ff. where the agreed price for the construction of oil pipes and transport of oil remained un changed despite that the oil field turned out to contain double as much oil as the parties expected when concluding the contract.
[87] BÖCKSTIEGEL, 159, 159; HORN, Die Anpassung langfristiger Verträge im internationalen Wirtschaftsverkehr, 9; BEALE, 1149. *Compare hereto also*, SCHWENZER, VUWLR 2008, 709, 709; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 11; DRAETTA/NANDA/LAKE, 170 f. with reference to footnote 3.

occur and may develop in a direction entirely unpredictable by the contracting parties. [88] It would be a difficult task and go beyond reasonable efforts if the parties would need to contract for every potential adverse event that may crop up during the life of the contract,[89] not to say too costly. Therefore, renegotiation clauses or other contractual adaptation clauses are frequently included in international commercial contracts with long duration involving sophisticated parties.[90]

The issue of changed circumstances and contract adaptation is of course also applicable to contracts with a short duration (e.g., a sales contract that must be performed immediately) although the issue is mainly relevant in relation to long-term international business contracts of a complex nature.[91] Parties to a contract that extends over a long period of time involving large values presumably also have a greater interest in keeping the contract alive by adaptation rather than have it terminated.[92] Hence, there is a wish for flexibility in long-term contracts. Consequently, there is a greater need for the inclusion of a renegotiation clause in a contract with a long duration than in an over-the counter-sale or a sales contract executed within a short timeframe (e.g. sale of goods) since the latter does not require "an approach for the future".[93] This is not to say that it is not prudent to contract for changed circumstances also in more simple exchange contracts especially if high volumes, large values or other special risks are involved. 41

Contracts with a duration that extends over a longer period of time from the conclusion of the contract to its completion will be considered long-term contracts. I.e., only contracts where the contractual obligations of the seller and buyer are exchanged simultaneously are excluded. 42

10. Non-Speculative Contracts

This study only considers long-term *non-speculative* contracts. Contracts associated with high risks or where the risk itself is the object of the contract such as derivatives (e.g. forwards, futures and swaps) are excluded from this study. Such "risk-taking" contracts are used for risk management as an insurance against price movements (i.e., to hedge risk). It is a contract to buy or to sell an asset at a specified time in the future at a price already agreed upon. It would be unreasonable for a party to request renegotiation of the purchase price or the date of performance if, in the meantime, the circumstances developed in an unexpected way turning it into a bad deal for one of the parties. Hence, there is no ground for relief with respect to contracts of pure risk even if changed 43

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[88] BRUNNER, 439; DRAETTA/NANDA/LAKE, 170 f.; SCHWENZER, VUWLR 2008, 709, 709; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 415; HORN, Neuverhandlungspflicht, Acp 1981, 255, 257.

[89] *Compare*, VOGENAUER, Commentary on the UNIDROIT Principles, 808, 810; DRAETTA/NANDA/LAKE, 171; VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 110.

[90] *Compare*, BÖCKSTIEGEL, 159, 159; DRAETTA/NANDA/LAKE, 170 f.; LÖRCHER, DB 1996, 1269, 1270; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 11; HORN, AcP 1981, 255, 261 f.; RODNER, Hardship under the UNIDROIT Principles, 677, 685.

[91] BRUNNER, 438; FRICK, 145 f.; ABAS, 1; SCHWENZER, Schweizerischen Obligationenrecht, 269 f.; KONARSKI, IBLJ 2003, 405, 419; *Compare hereto also*, VOGENAUER, Commentary on the UNIDROIT Principles, 808, 810; Comment No. 5 on Art. 6.2.2 the UNIDROIT Principles (2016 edition); *See also, e.g., for Swiss law, stating that the issue is mainly relevant in relation to long-term contracts* OFTINGER, SJZ 1939, 229, 235; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 562; BSK-HONSELL zu Art. 2 ZGB, p. 46; WIEGAND zu Art. 18 OR, 175; *For Swedish law, e.g.,* GRÖNFORS, Avtalslagen, 210, 250f; LEHRBERG, ERPL 1998 265, 266; DOTEVALL, SvJT 2002, 441, 449; ADLERCREUTZ, 284 f. Prop. 1975/76:81 p. 127; SOU 1974:83, p. 156. *The same view is expressed in the Scandinavian doctrine. See, e.g.,* ANDERSEN, 244: WILHELMSEN, 131; WOXHOLTH, Avtalerett, 400; GOMARD, 186 f.

[92] *Compare*, BISCHOFF, 234; OFTINGER, 1939/40 SJZ, 245, 248.

[93] LEHRBERG, 27; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 415; PETER, 232; *Compare*, Comment No. 5 on Art. 6.2.2 the UNIDROIT Principles.

circumstances completely unexpected by the parties upset the market conditions.[94] Similarly, contracts that are aleatory in nature (i.e. contracts dependent on chance or contingency) such as insurance contracts are also excluded from this study, as there is no ground for relief if the risk occurs due to unforeseeable events.[95] Also commodity contracts fall under a category of contracts that are speculative in nature. The contracting parties must expect price fluctuations and bargain for that risk accordingly in the contract. Adaptation of the terms following a drop or rice in price is not prudent, unless perhaps there is an abnormal explosive rise or drop in the price?[96] Any other contract that by its nature is of a speculative nature will not be considered as the parties are deemed to have taken that into consideration as an inherent risk associated with the transaction and therefore reflected in the contract price.

D. The Functions of a Renegotiation Clause: Flexibility, Conflict Avoidance and Risk Allocation

44 The renegotiation clause has several functions. First of all, the core of the renegotiation clause is to keep the contract alive in order not to jeopardise the entire deal or project and in that way secure the investments already done by the parties. The renegotiation clause strives to assure that the primary purpose of the contract is fulfilled and at the same time safeguards a minimum level of balance between the contractual obligations. Thus, it provides for increased flexibility in contractual relationships assuring that the contractual obligations remain fair with respect to the economic interests of the parties throughout the duration of the contract and not only at the time when the contract was concluded. It replaces the static model of a contract by taking into consideration the context in which the contractual relationship operates. Secondly, it is a means of conflict prevention developed by the business community reflecting the needs of international trade. The renegotiation clause is designed to hinder conflicts and other disruptions that could jeopardise the transaction. As mentioned above, it is simply more important for the parties to continue their cooperation and secure future business than to stick to the strict letter of the contract. Thus, the renegotiation clause has a forward-looking function as well. Lastly, the renegotiation of the terms allows the economic risk of an unexpected supervening event to be apportioned between the two contracting parties. While the termination of the contract or the strict appliance of the contractual terms would place the burden of an unexpected event entirely on one of the contracting parties, an adaptation of the contract through renegotiations attempts to apportion the economic risk of such supervening event between the parties. Thus, an adaptation of the contract provides a pragmatic solution to the issue of change in circumstances where a termination of the contract many times would be unsatisfactory as it merely shifts the burden of the supervening event on to the other side.

E. Renegotiation and the General Principles of Contract Law

I. The Sanctity of Contract

45 The starting point for a discussion on renegotiation and adaptation of contracts following changed circumstances is the sanctity of contracts. All contracts are based on the principle that "contracts shall be kept" (*Lat*. "pacta sunt servanda"). It is a fundamental principle and the basis of contract law in most major legal systems as well

[94] BRUNNER, 424 f.; DRAETTA, IBLJ 2002, 347, 357; PERILLO, Tul. J. Int'l & Comp. L. 1997, 14; WEBER, 60.
[95] BRUNNER, 424; DAWWAS, Pace Inter. Law Review 2010, 1, 11.
[96] *Compare*, RAMBERG/RAMBERG, 203.

as of the Lex Mercatoria.[97] A strict interpretation of the principle places the economic risk of a change of circumstances entirely on the party adversely affected by the unexpected event. Renegotiation and adaptation of the contract tamper with that principle. Here, a distinction must be made between an adaptation of the contract by the operation of the law and adaptation of the contract through renegotiations. If the contracting parties, following changed circumstances, either decide to enter into ad hoc renegotiations to amend the contract or there is a renegotiation clause in the contract, an agreed-upon revision of the original contract terms does not necessarily contradict or challenge the principle of pacta sunt servanda. Rather, it could be argued that a renegotiated contract is in line with the principle.[98] The original contract is simply terminated and replaced by an amended contract as agreed-upon and contemplated by the parties from the beginning. Hence, a modification of the contract terms through renegotiations inter partes could instead be seen as a prolongation of the principle of pacta sunt servanda as such variation gives effect to the contract. The principle is only jeopardized when the contract is silent on how changed circumstances should be dealt with and adaptation is enforced through third-party intervention (by court or arbitral tribunal).[99]

As mentioned above, a strict application of pacta sunt servanda places the burden of a change in circumstances entirely on the disadvantaged party. International contractual practice shows that transacting parties are unwilling to accept such risk allocation.[100] Instead, the business community has created more pragmatic ways to deal with the issue of changed circumstances. By including a renegotiation clause in the contract, transacting parties overcome the strict principle of pacta sunt servanda. It is, however, commonly argued that the inclusion of a renegotiation clause weakens the stability of the contract.[101] That is true from a purely legal standpoint if the applicable laws do not allow for adaptation since an inclusion of a renegotiation clause in the contract could result in significant changes.[102] However, to rigidly uphold the principle of pacta sunt servanda and the contractual terms as originally agreed upon is not necessarily a guarantee for contractual stability.[103] Instead, an adaptation of the contractual terms through renegotiations could be viewed to strengthen the principle of pacta sunt servanda as a revision of the terms to the new circumstances could be a prerequisite to achieve the primary objectives of the contract.[104] In that sense a renegotiation clause rather has a stabilising effect on the contract and pacta sunt servanda is not necessarily a convincing argument against contract adaptation.[105] Instead, the principle of pacta sunt servanda can be used as an argument in favour of renegotitation. Moreover, a termination of the contract could be argued to threaten the principle of pacta sunt servanda more than an adaptation of the contractual terms.[106] That is particularly relevant with respect to long-term contracts where the contracting

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[97] HORN, The Concepts of Adaptation and Renegotiation in the Law of Transnational Commercial Contracts, 6. *Compare also*, VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 108 f.; MOMBERG, 23; KONARSKI, IBLJ 2003, 405, 406.
[98] FRICK, 147; HELLNER, in: Bratholm and Eckhoffs (ed), Samfunn Rett Rettferdighet. Festskrift til Torstein Eckhoffs 70-årsdag, 1986 Oslo, 335, 343. *Compare also*, ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR.
[99] FRICK, 146.
[100] LAKE/NANDA/DRAETTA, 193; SORNARAJAH, J. of Int. Arbitration 1988, 97, 101.
[101] PETER, 240; GRÖNFORS, 23 ff.; SALACUSE, FILJ 2000. 1319 p. 1321, 1328.
[102] *Compare*, PETER, 240.
[103] GRÖNFORS, 93.
[104] *Along those lines*, LARENZ, 165 ff.
[105] GRÖNFORS, 23 and 33. *Compare*, SALACUSE, FILJ 2000. 1319 p. 1330.
[106] BÜRGI, ASR 1939, 1, 143; RÖSLER, ERPL 2007, 483, 511; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1148 f. *Compare also*, LARENZ/WOLF, 709. *See also* HEDEMANN, SJZ 1921, 305, 305 questioning if the sanctity of contract always entails the strict adherence to the words of a contract. *See however*, FINKENAUER, MüKo zum BGB zu § 313, 1915 (Rn. 102), who is of the opinion that an adaptation of the contract is an interference with the autonomy of the contracting parties that may be just as strong as the termination of the contract.

parties need to collaborate during the term of the contract in order for the common and primary purpose of the contract to be fulfilled.[107] It could be argued that the primary purpose of a long-term contract for the successive delivery and supply of goods is the mutual guarantee against changing business cycles and price fluctuations and that from this reciprocity it also follows that in order to fulfil the primary purpose the contracting parties need to collaborate along the way.[108] The approach of the British common law for example views the issue of a change in circumstances as if the parties never intended to be bound in a radically different situation since, as per Viscount Simon in the British Movietonews Ltd. v London District Cinemas: "on its true construction it does not apply in that situation.[109] With such reasoning it is the principle of pacta sunt servanda motivating interference in the contract.

II. Clausula Rebus Sic Stantibus

1. Origins and Historical Development

47 While the inclusion of renegotiation clauses is a fairly new phenomenon, the issue of changed circumstances following the conclusion of the contract is hardly a new legal problem in the law of contract. The doctrine of changed circumstances, also commonly referred to as the doctrine of rebus sic stantibus, has its roots in Roman philosophy and was further developed by medieval Canon Lawyers.[110] The clausula rebus sic stantibus permits changes to the contractual obligations if the equilibrium of the contract has been upset. It is the competing doctrine to pacta sunt servanda. The principle received legal authority when it was first included in Gratian's *Decretum*, a collection of Canon Law. From there it is derived that all promises are subject to the implied term that the circumstances shall remain the same as at the time when the promise had been given (rebus sic stantibus).[111] This doctrine often referred to as "Clausula Rebus Sic Stantibus" entails that the contract remains valid *provided that things remain as they are at the time of its formation*.[112] I.e., in its "original" version no changes at all affecting the contract shall have occurred, since the formation of the contract.[113] Today the rebus sic stantibus principle is more commonly referred to as a silent term in the contract to the effect that contractual relief may be granted if the circumstances change *to such an extent* that the party never would have entered into the contract had he foreseen what would happen.[114]

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[107] GRÖNFORS, 23; MERZ, ZSR 1942, 393, 503 f.
[108] SANDSTRÖM, SvJT 1917, 12, 183; MERZ, ZSR 1942, 393, 503 f.
[109] British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185.
[110] GORDLEY/VON MEHREN, 503; MOMBERG, 29; DESCHENAUX, 196; LEU, Vertragstreue in Zeiten des Wandels, in: Dedeyan (ed.), Vertrauen, Vertrag, Verantwortung. Festschrift für Hans Caspar von der Crone zum 50. Geburtstag, 2007 Zürich, 107, 113.
[111] MOMBERG, 29 f.; FINKENAUER, MüKo zum BGB zu § 313, 1888, (Rn. 20); PICHONNAZ, Fundamina 2011, 125, 135 f. The Gratian's Decretum included the example given by Augustinus, inspired by Cicero, that one would not be required to fulfil a promise to return a sword to a person who is in a state of insanity, *See hereto,* GORDLEY/VON MEHREN, 503 f. referring to Gratian, Decretum C. 22, q. 2, c. 14.
[112] ZIMMERMANN, 579; VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 111.
[113] ICC Case No. 6281 of 26.08.1989, Y.B. Com. Arb. 1990, 96, 98. Available at: > http://www.cisg.law.pace.edu/cases/896281i1.html#ct.
[114] LEHRBERG, ERPL 1998, 265, 265. *Compare hereto also*, BRUNNER, 401 f.; SCHMIEDLIN, 89.

In the 17th and 18th century the Clausula was acknowledged as a general principle of law [115] During the course of the 19th century, however, the will-theories of contract gained ground and there was a general tendency to reject doctrines on changed circumstances, unless the parties expressly agreed differently at the time of the formation of the contract. [116] If at all recognised as an excuse to perform it was limited to cases where there had been an *essential* change in the circumstances.[117] In the 20th century, the doctrine of rebus sic stantibus was revived, mainly as a result of the first World War and its aftermaths (strong inflation and shortage of goods), as well as the worldwide economic downturn in the 1930s,[118] and can today be found in most European legal systems, either as codified rules, and/or based on case law and academic writing. 48

2. The Doctrines of "Changed Circumstances"

Today the clausula rebus sic stantibus is considered to be a general principle of international law.[119]Domestic legal systems as well as international codifications have however adopted different solutions to deal with the issue of changed circumstances and the adaptation of contracts. For instance, the doctrine of clausula rebus sic stantibus is not applied in Swedish law. Instead, the disadvantaged party would need to seek an exemption to perform its contractual obligations or an adaptation of the contract under the statutory rule concerning unreasonable contract terms (§36 of the Swedish Contracts Act) or under the doctrine of assumptions, in English law under the doctrine of frustration, in German law the party would revert to §313 of the new German Civil Code for relief and, finally, under Swiss law a party would refer to the doctrine of clausula rebus sic stantibus recognised by case law and Art. 2 (2) of the Swiss Civil Code. When referring herein to the "doctrines of changed circumstances", the different approaches of domestic legal systems as well as international codifications are deemed to be included. 49

III. Two Contradictory Principles?

The renegotiation and adaptation of a contract following changed circumstances is often described as a conflict between pacta sunt servanda and the clausula rebus sic stantibus.[120] It could be argued that both operate to safeguard the sanctity of contracts. The general view, however, is that the principle of pacta sunt servanda is paramount and the latter is an exception that only should be applied in extraordinary situations.[121] As long as the 50

[115] LEU, Vertragstreue in Zeiten des Wandels, in: Dedeyan (ed.), Vertrauen, Vertrag, Verantwortung. Festschrift für Hans Caspar von der Crone zum 50. Geburtstag, 2007 Zürich, 107, 113.
[116] ZIMMERMANN, 579; GORDLEY/VON MEHREN, 504; MERZ, Die Revision, 394, 394 f.; DESCHENAUX, 196; MOMBERG, 38 f.; LEU, Vertragstreue in Zeiten des Wandels, in: Dedeyan (ed.), Vertrauen, Vertrag, Verantwortung. Festschrift für Hans Caspar von der Crone zum 50. Geburtstag, 2007 Zürich, 107, 113 f.
[117] MOMBERG, 33.
[118] *Compare* e.g., GORDLEY, Am. J. Comp. L. 2004, 513, 526 f.; MOMBERG, 39; HESSELINK, 121; ABAS, 2; HEDEMANN, Die Flucht in die GeneralKlauseln, 12; LEU, Vertragstreue in Zeiten des Wandels, in: Dedeyan (ed.), Vertrauen, Vertrag, erantwortung. Festschrift für Hans Caspar von der Crone zum 50. Geburtstag, 2007 Zürich, 107, 113 f. *For Swiss case law see e.g.,* BGE 45 II 351; BGE 45 II 386; Zürich Handelsgericht, Abt. B., 03.02.1921, ZR 1922, 79 ff.; St. Gallen Handelsgericht SJZ 1968; Zürich, Obergericht, ZR 1967, 217 ff. *For German case law see e.g.*, RGZ 100, 129; RGZ 100, 134; RGZ 103, 328; RGZ 103, 177; RGZ 106, 7; RGZ 106, 11; *For the discussion under Swedish law see e.g,* NJA 1918, 20, p. 31; SANDSTRÖM, SvJT 1917, 12, 178 ff.; SANDSTRÖM, NJM 12 (1922), 113 ff.; RODHE, NJM 1951, 181, 182 f.
[119] NASSAR, 200; VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 111; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 13.
[120] MERZ, Die Revision, 404, expressing the relation between the two principles as "Rechtssicherheit und Vertragsgerecht igkeit".
[121] *For Swedish law,* Prop. 1975/76: 81, p. 127; VON POST, 258 ff. and with respect to the doctrine of assumptions see e.g., LEHRBERG, 50 f. NJA 1981 p. 269, p. 271; NJA 1985 p. 178, p. 191 f.; NJA 1997 p. 5, p. 17; NJA; NJA 1999 p. 793, p. 808.

issue of changed circumstances is viewed as a choice between being bound to a promise or not, then it is enough to refer to the principle of pacta sunt servanda as an argument against an adaptation of the contract.[122] Instead, it could be argued that the clausula rebus sic stantibus operates alongside the principle of pacta sunt servanda.[123] For instance, if what the contracting parties have foreseen upon the conclusion of the contract should be respected, then this mechanism would help to restore the equilibrium of the contract as initially contemplated by the parties, which was only was interrupted by a supervening event following the conclusion of the contract. In that sense, the adaptation of the contract would not necessarily be seen as an exception conflicting with the principle of pacta sunt servanda, but rather as a technique aiming to enforce and safeguard the binding force of the contract as originally contemplated by the parties with the aim of maintaining the balance between the contractual obligations as initially agreed upon and to fulfil the actual purpose of the contract.[124] An interesting parallel can be drawn to the manufacture of goods and the right of withdrawal under Art. 377 of the Swiss Code of Obligations and §52 of the Swedish Commercial Code, giving the buyer the right to withdraw from the contract as long as the work is unfinished against compensation for the work already carried out and against full indemnification of the contractor but which does not constitute the fully agreed-upon price.[125] Such a right to withdraw from the contract appears to leave the principle of pacta sunt servanda unthreatened despite giving the buyer the right to terminate the contract at any time for any reason!

51 The relationship between the two principles is controversial and remains unsettled. It appears to be a legal issue that is strongly influenced by what attracts more political appeal i.e., an individualistic rule or a social rule.[126] And indeed, during the course of the 20th and 21st century there has been a shift in the approach to the issue. Efforts have been made in modern laws to provide protection for the obligor in the event of unexpected fundamentally changed circumstances. For example, in Germany and in many other European countries, in the aftermath of the World Wars, the issue was revisited and, again during the oil crisis in the seventies new efforts to find a legal solution to the issue were considered.[127] European consumer protection legislation is also a testament to a new softened attitude towards the principle of pacta sunt servanda as well as the fact that renego-

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For Swiss Law, BSK-HONSELL zu Art. 2 ZGB, 46; BSK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 562; CARONI, 207; BÜRGI, ASR 1939, 1, 116 and 143 f.; BGE 101 II 17, p. 19; BGE 48 II 443, p. 451; Obergericht Zürich, decision from 12.11.1982, ZR 1987, 2, 3; OFTINGER, SJZ 1939, 229, 235. *Compare hereto also*, BGE 54 II 257, p. 277 where the starting point in a case for adaptation is that the role of the judge is not to remedy but to respect the contract as concluded by the parties. *For German Law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 530 (Rn. 1); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117; RÖSLER, ERPL 2007, 483, 511; HORN, Gutachten und Vorschläge, 636; BEALE, 1148. *For the position under International laws*, RODNER, Hardship under the UNIDROIT Principles, 677, 677; ICC Case 1512 of 1971, Collection of Arbitral Awards I, 3, 4.; MASKOW, Am. J. Comp. L. 1992, 657, 661; LANDO/BEALE, 113; BONELL; MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 247. *See hereto also*, ICC Case No. 8486 of 1996, Collection of ICC Awards I, 321, 326 where the tribunal stressed the exceptional character of the hardship provision of the UNDROIT Principles in relation to a sales contracts.

[122] HELLNER, in: Bratholm and Eckhoffs (ed.), Samfunn Rett Rettferdighet. Festskrift til Torstein Eckhoffs 70-årsdag, 1986 Oslo, 335, 344 f.

[123] *Compare*, DRAETTA, IBLJ 2002, 347, 347.

[124] *Compare hereto e.g.* MEKKI/KLOEPER-PELÈSE, Hardship and Modification (or 'Revision') of the Contract in: Hartkamp and Hesselink (ed.), Towards a European Civil Code, 651, 653 f. *See also*, MERZ, 403 f., noting that with respect to the choice between holding a party to its promise regardless of its consequences i.e., legal certainty and contractual justice where the original contractual equilibrium is considered (Ge. "*Rechtssicherheit und Vertragsgerechtigkeit*"), the former is not only a formal principle, but should also serve to realize justice. *Compare with,* MERZ, ZSR 1942, 392, 503 f.

[125] *Compare*, HELLNER, in: Bratholm and Eckhoffs (ed), Samfunn Rett Rettferdighet. Festskrift til Torstein Eckhoffs 70-årsdag, 1986 Oslo, 335, 344 f.

[126] *See hereto*, HESSELINK, 121 stating that with respect to changed circumstances, most European legal systems moved from an individualist rule to a more social rule in the 20th century.

[127] MASKOW, Am. J. Comp. L. 1992, 657, 658; ABAS, 2.

tiation of contracts is increasingly seen as a legitimate route for contracting parties to take when an unexpected event upsets the contractual equilibrium.[128] Prior to that, as mentioned above, during the 19th century the doctrines on changed circumstances were generally forgotten and rejected in favour of the autonomy of the will principle,[129] while two centuries before, maybe as a result of the series of wars in the first half of the 17th century, the Clausula was in full swing.[130] It shows how cyclical and dependent on legal policy the problem is and how periods of crises trigger a discussion on how the balance between pacta sunt servanda and clausula rebus sic stantibus should be struck.[131] So, while during the last couple of decades there has been a willingness to grant relief in the event of unforeseen changed circumstances to a greater extent than before, the pendulum might shift and swing back to a more restrictive approach. It can only be noted that both principles deserve legal consideration and must be carefully balanced in determining a fair allocation of risks between contracting parties.

52 It is repeatedly emphasised in national court decisions, arbitral awards as well as in legal academic writing that exceptions to the principle of pacta sunt servanda should be made with great caution and only be motivated in extraordinary situations.[132] Under international unification instruments the UNIDROIT Principles (Art. 6.2.1), the PECL (Art. 6:111(1)) and the DCFR (II. - 1:103), the provisions for changed circumstances are either linked to a reminder of the binding character of the contract as the general rule or arranged so that the priority of the principles is clear. Depending on how the balance between the two principles is struck the allocation of who should bear the risk of the changed circumstance is decided. A strict application of pacta sunt servanda let the loss lie where it falls regardless of the fact that one of the contracting parties must bear the whole burden of the supervening event. Hence, it must be considered whether it is convincing to allocate the risk of all unexpected supervening events that may occur during the contract term entirely to one party based on the principle of pacta sunt servanda.[133] If an adaptation of the contract is permitted, the economic risk of the supervening event can instead be apportioned among the parties.

53 It is a conflict between legal certainty and contractual justice. Should contracts be allowed to be adapted following a change in circumstance whenever equity and fairness so require? Are the courts able to establish rules in determining a fair allocation of risks, which would give business people enough guidance? Or, should a contract be performed whatever the cost? There are mainly two lines of thought. One considers the adaptation of the contract a threat to the principle of sanctity of contracts and risking legal certainty and predictability in business, while the other prioritise fairness in contractual relations.

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[128] ADLERCREUTZ, Avtalsrätt I, 21.
[129] ZIMMERMANN, 581; MOMBERG, 38 f. *See also*, PFAFF, 4.
[130] ZIMMERMANN, 581.
[131] *See*, MERZ, 392 stating that it is a sign of political and economical unstable times when the issue of changed circumstances and the right for the judge to interfere in the contractual relationship is being discussed; RODHE, NJM 1951, 182.
[132] *See e.g.*, WIEGAND, Clausula rebus sic stantibus, 443, 455; KRAMER, SJZ 2014, 273, 278; ICC Case 1512 of 1971, Collection of Arbitral Awards I, 3, 4; KONARSKI, IBLJ 2003, 405, 406; FRICK, 147; Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. (*The Nema*) [1982] UDC 724, 744.
[133] HONDIUS/GRIGOLEIT, 4.

1. The Traditional View

54 The principle of pacta sunt servanda stands for legal certainty and predictability in contractual relations. The most common argument against adaptation of contracts is that it is crucial for international commerce and economic cooperation that transacting parties can rely on the contract and that the obligations and the agreed-upon risk allocation laid down in the contract are respected, upheld and enforced by the courts.[134] To set the principle aside could undermine transacting parties respect for the contract as an effective instrument to conduct business.[135] Contracting parties must, at the time when the contract is concluded, be able to predict and assess the economic consequences of the contract they enter into in order to plan their business and they need to be able to foresee the outcome of a potential dispute with reasonable certainty. [136] It is sometimes argued that legal certainty simply is more important than a completely equitable and fair outcome of a case.

2. A Just and Reasonable Result

55 The very idea of a contract is that it should be mutually profitable for both parties. Thus, for the contract to fulfil such a function it could be argued that the contracting parties must take each other's interests into account to an extent that goes beyond the letter of the contract.[137] I.e., in the same way as the promisee has an interest in receiving the benefits when the contract is carried out, the obligor has an interest in avoiding performance on the terms initially agreed on when performance would turn unreasonably burdensome due to a supervening event.[138]

56 The strict applicability of pacta sunt servanda provides one single solution for all types of contracts and situations. That does not necessarily promote legal certainty. It is static and it fails to recognise the nature of the transaction, the kind of contract involved and its structure and, perhaps, the reality of commercial dealings. For example, the time factor in long-term contracts causes difficulties for the contracting parties' as they need to anticipate and contract for future developments. That involves a high degree of speculation as to potential future events,[139] which may prove difficult and costly to cover. Therefore, it could be argued that in order for transacting parties to view the contract as a secure instrument with which to conduct business there may be a legitimate need for adaptation and renegotiation of the contractual terms in certain situations when the outcome would not only be inequitable but also unreasonably burdensome, unprofitable or unfair for one party to bear.[140] Many legal systems have also introduced solutions to deal with the issue of unexpected change in circumstances as an exception to the binding force of the contract in favour of fairness and flexibility in contractual relations.

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[134] *See e.g.*, HORN, The Concepts of Adaptation and Renegotiation in the Law of Transnational Commercial Contracts, 6; MASKOW, Am. J. Comp. L. 1992, 657, 658; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58).
[135] HONDIUS/GRIGOLEIT, 4 f.; LEHRBERG, Förutsättningsläran, 279. *Compare also*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1133; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58). *See also*, NJW 1976, 142 p. 142.
[136] *See e.g.,* Prop. 1975/76:81, 101 and 104; BERNITZ, 75; GOODE, The Concept of "Good faith" in English Law, 3, 9; The strict approach in English law towards the honouring of contractual obligations.
[137] VOTINIUS, Avtalslagens Generalklausul och den rättvisebaserade kontraktsuppfattningen, in: Flodgren, Gorton, Lindell-Franz, Samuelsson (ed), Avtalslagen 90 år – Aktuell Nordisk rättspraxis, Stockholm 2005, 335, 336.
[138] *Compare*, LEHRBERG, Förutsättningsläran, 279.
[139] *Compare*, LEU, Vertragstreue In Zeiten des Wandels, 107, 110; BÜHLER, Die clausula rebus sic stantibus als Mittel der Zukunftsbewältigung, 38 f.
[140] *Argumenting along those lines*, NASSAR, 195.

F. Methodology

I. Jurisdictions

As outlined above, the aim of this study is to ascertain possible routes for a party to achieve renegotiation of a contract following an unexpected fundamental change in circumstances. Several jurisdictions as well as international unification work will be analysed. 57

The main focus of this study is the legal frameworks of Switzerland and Sweden. They will be reviewed in the same broadness and depth. As legal unity in the field of contract law has been maintained in Scandinavia, both Danish and Norwegian case law will be reviewed as guidance to judicial practice in Sweden. The lack of dogma in Swedish law may bring an aspect to the analyses that differ from other jurisdictions.[141] English (although not in the same depth) and German law will also be analysed in order to cover two influential representatives from the common and civil law traditions. The latter jurisdiction will also be covered in detail due to its interesting history with respect to the legal problem. No adequate question on the subject is possible without studying the German experience in detail. Additionally, the customs of international trade, or, in other words, mercantile laws, will be part of the analysis in order to ensure that theory does not overtake practice and to exclude the risk of a one-sided analysis. The solutions promoted by the UNIDROIT Principles of International Commercial Contracts (2016), the Principles of European Contract Law (revised 1998 and 2002) created by the Lando Commission, the Draft Common Frame of Reference (2009) as well as the United Nations Convention on Contracts for the International Sale of Goods, Vienna (1980) will also be analysed. Thus, both domestic solutions and international approaches to the issue of unexpectedly changed circumstances are covered in order to procure a basis for a broader view of the problem. While a comparative analysis like this one should cover a jurisdiction from the Romanistic legal family, traditionally France or Italy[142], such jurisdictions have been excluded from the study due to language barriers. 58

II. Sources of Law

The analysis is based on an examination of legal rules, case law and legal doctrine. Under the selected jurisdictions the issue of changed circumstances is dealt with either as a codified rule and/or based on case law and academic writing. For those selected jurisdictions that have dealt with the issue through legislative measures the analysis is primarily based on an examination of primary sources of law, i.e., statutes, preparatory materials and case law. Scandinavian courts attach great importance to the preparatory materials. The primary sources will be supplemented by secondary legal sources such as legal academic writing as well as generally accepted principles in contract law. Any source of law affecting the positive law in a specific jurisdiction with respect to the legal issue will be considered.[143] The Lex Mercatoria will be analysed by reviewing international unification works, codifications and guidelines issued by non-governmental international organizations as well as arbitral awards to the extent available. It is acknowledged that a complete review of the issue in international practice is difficult to carry out since many arbitral awards on the subject never have been published or simply are resolved through mediation. Definite conclusions and generalisations may therefore be problematic. 59

[141] ZWEIGERT/KÖTZ, 41.
[142] ZWEIGERT/KÖTZ, 41.
[143] MÜLLER-CHEN/MÜLLER/WIDMER LÜCHINGER, 60; ZWEIGERT/KÖTZ, 36.

60 With respect to the drafting of renegotiation clauses other contract provisions with similar content and purpose e.g., material adverse change clauses (also called a MAC clause) and hardship clauses will be considered for guidance on contractual practice.

III. The Comparative Method

61 As outlined above, the research question relates to a factual concrete legal problem. The task is to identify how the issue is dealt with in the different chosen legal systems. The *functional* comparative method is therefore suitable for this problem-solving approach.[144] The comparative method will be valuable to investigate the principles on which the legal problem is grounded. Besides describing and analysing the positive laws of each jurisdiction, the similarities and differences of the various solutions provided in the different national legal systems will also be described, explained and evaluated.[145] In that way, a new point of view on the matter may be presented. Despite principles of commerce being less culture-specific than many other fields of law (e.g. family law), the approach to the issue under each jurisdiction will be viewed solely in the way they operate to solve the legal problem. I.e., freed from the context of the national legal system that they operate in and set in the context of the findings provided in the other jurisdictions.[146]

62 The subject is suitable for a comparison in order to examine whether a common core among the legal systems with respect to the legal problem can be found and to explore the chances for uniform legal answers. The functional method is a suitable method to identify the broad principles of the legal problem.[147] The comparative method is also a useful tool for the interpretation of the law and legal principles under a jurisdiction where the current status of law is uncertain.[148] The comparative results may also have immediate practical value as a party to a long-term contract may seek to escape unwanted or unexpected surprises by bargaining either for a specific jurisdiction to govern the contract or, preferably (and perhaps more likely), for the inclusion of a suitable renegotiation clause in the contract. The knowledge of the different solutions for a lawyer practicing international law is important if they want to avoid hardship for the client. Moreover, this study may also show whether a "modern" law of contract is on the rise where the focus is on cooperation and keeping the contract alive rather than holding a party strictly to its promise.[149] Therefore, the study has both a practical standpoint and a scholar standpoint.

[144] MÜLLER-CHEN/MÜLLER/WIDMER LÜCHINGER, 57 f.
[145] MÜLLER-CHEN/MÜLLER/WIDMER LÜCHINGER, 58.
[146] MÜLLER-CHEN/MÜLLER/WIDMER LÜCHINGER, 90.
[147] MÜLLER-CHEN/MÜLLER/WIDMER LÜCHINGER, 92.
[148] BOGDAN, 20.
[149] GRÖNFORS, 23; LEHRBERG, 110 ff.

Part 2: Consequences of Failed Renegotiations in the Absence of a Renegotitaion Clause

A. Legal Concepts of Contract Adaptation

If the renegotiation efforts inter partes break down and the contract is silent as to how the issue of a change in circumstances should be dealt with, the only way for the disadvantaged party to bring about a change is to resort to the laws governing the contract. If the counterparty is in a weak legal position it may be difficult to resist a quest for change by the party adversely affected by the supervening event. Thus, the bargaining position of the disadvantaged party is to some extent dependent on the applicable laws. This chapter will investigate if and under what circumstances applicable laws provide for an appropriate starting point to initiate renegotiations of the contract. As per one commentator on the issue: "The court's right to adapt a contract to changed circumstances is the most efficient remedy to bring about successful renegotiations."[150] That line of thought may be illusionary or at least too optimistic. In reality it is more likely that the laws governing the contract only become relevant once it is excluded that the parties will come to an understanding on how the adverse turn of event should be dealt with and it is a fact that the issue will be resolved before a court or arbitral tribunal. To illustrate, the outcome of the case in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*, where the House of Lords confirmed the notice of termination by the disadvantaged party as valid, incentivised the counterparty to initiate renegotiations to avoid a termination of the contract.[151] To fall back on applicable laws as an argument for contract adaptation is, however, not to be underestimated. Instead, it is advisable for contract drafters and contracting parties to consider the effects of the contract under the law governing the contract rather than to solely rely on the strict letter of the contract that once was signed. Moreover, also with a renegotiation clause in the contract, it is difficult to fully understand a renegotiation clause in a contract without a solid understanding of the rights the parties have without one. **63**

The legal systems dealt with herein all speak of the concept of changed circumstances albeit under different notions. From a legal standpoint they are not synonymous but differ with respect to scope and effects (hereinafter collectively referred to as, "hardship exceptions"). In order to use legal leverage to achieve a renegotiation of the contractual terms, the disadvantaged party's position under the applicable laws must be reasonably clear. I.e., in order to convince the counterparty to agree to modifications of the contract, the party initiating renegotiations on such grounds must have good legal arguments (that bear) that the rules are applicable to the situation and a solid understanding of how the concrete situation would be assessed should the dispute ultimately be settled in court or in an arbitral tribunal. **64**

I. The General Rule: The Binding Force of the Contract

A change in circumstances following the conclusion of the contract may result in the transaction initially agreed upon turning out to be unfavourable for one of the parties. The starting point under all legal systems dealt with herein is the general rule that contracts shall be kept (*Lat.* "Pacta sunt servanda"). I.e., unless the contract states differently, the disadvantaged party carries the risk that a supervening event renders the contractual obligation **65**

[150] DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 503.
[151] MOMBERG, 157.

more burdensome to perform.[152] The same point of departure can be found under the non-legislative international codifications of the UNIDROIT Principles of International Commercial Contracts (2010) (hereinafter, the "UNIDROIT Principles"), the Principles of European Contract Law (revised 1998 and 2002) created by the Lando Commission (hereinafter, the "PECL") and the Draft Common Frame of Reference (2009) (hereinafter, the "DCFR"). The sanctity of the contract is spelled out in all three instruments (Art. 1.3 and Art. 6.2.1 UNIDROIT Principles; Art. 6:111 (1) PECL and Art. II. - 1:103 DCFR). The principle of pacta sunt servanda is not expressly mentioned in the United Nations Convention on Contracts for the International Sale of Goods, Vienna (1980) (hereinafter, the "CISG") but the general rule is implied in several provisions and indirectly in Art. 79 CISG.[153]

66 The conventional argument used to motivate a strict adherence to the sanctity of contracts is that it promotes stability in contractual relations.[154] The principle allows parties to overview the consequences of the contract and plan accordingly, which in turn is a fundament for a functioning business life that vague concepts of fairness could endanger.[155] That argument is even more strongly emphasized under English law. The sanctity of contract is the bedrock of the common law of contracts where promises generally are to be kept also in hardship situations.[156] As stated by Viscount Simonds in one of the well-known Suez-cases: "*If the parties do not specifically protect themselves against change, the loss must lie where it falls*".[157] Thus, English courts show little sympathy for events of hardship created by contractual obligations, which undoubtedly leads to harsh results from time to time.

II. Exceptions to the General Rule under Swedish Law

67 As one author rightly points out, there is no hardship rule in Scandinavian contract law.[158] Swedish law, however, provides two potential legal grounds to incentivise the counterparty to engage in renegotiations of the contract terms following a change in circumstances. One route is to argue on the basis of the general clause on unfair contract terms codified in §36 of the Swedish Contracts Act, embedded in the Commercial Code (hereinafter, the "General Clause" or "§36 AvtL").[159] Another available route is the doctrine of assumptions (*Sw.* "Förutsättningsläran") as developed in case law and academic writing.

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[152] *For Swiss law*, SCHWENZER, Schweizerisches Obligationenrecht, 270; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 209 f.; KRAMER, SJZ 2014, 273, 274; BSK-WIEGAND zu Art. 18 OR, 174; BSK-HONSELL zu Art. 2 ZGB, p. 46; BGE 88 II 195, p. 203; BGE 135 III 1, p. 9; ZR, 1936, 245, p. 245; ZR 1987, 2, p. 3 f.; BGE 104 II 314, p. 315; BGE 107 II 343, p. 347; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 245; BSK-WIEGAND zu Art. 18 OR, 174; ZK-BAUMANN zu Art. 2 ZGB, 692; MERZ zu Art. 2 ZGB, 286; HAUSHEER/JAUN, 145. *For Swedish law,* RAMBERG/RAMBERG, 186; ADLERCREUTZ, 284. *For German Law*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117; LÖRCHER, DB 1996, 1269, 1269; BEALE, 1148.

[153] MAGNUS, RabelsZ 1995, 469, 480.

[154] Prop. 1975/76:81, 101 and 104; BERNITZ, 75; GOODE, The Concept of "Good Faith" in English law, 9; TREITEL, 343; Official Comment to Art. III. – 1:110 DCFR, 715; BISCHOFF, 175; LEU, Vertragstreue In Zeiten des Wandels, 107, 114; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117 (Rn. 3).

[155] GOODE, The Concept of "Good Faith" in English law, 9.

[156] Taylor v Caldwell [1863] 3 B.&S. 826, 122 Eng. Rep., 309.

[157] Tsakiroglou v Noblee Thorl GmbH [1962] A.C. 93, 113.

[158] LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 440.

[159] The preparatory works to §36 AvtL consist of the proposition Proposition 1975/76:81 med förslag om ändring i lagen (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättensområde m.m. and the investigation SOU 1974:83 Generalklausul i förmögenhetsrätten. The latter carried out by Professor Jan Hellner. (Hereinafter, collectively referred to as

1. §36 of the Swedish Contracts Act – An Unreasonable Term

§36 AvtL provides that a contract term may be revised or set aside, wholly or in part, if the contract term is unreasonable (*Sw.* "Oskälig")[160] taking into consideration the contents of the contract, circumstances prevailing at the time when the contract was concluded, change in circumstances after the contract was concluded and any other circumstances. The second sentence of §36 AvtL states that where a contract term is of such significance for the contract that it would be unreasonable to insist on the continued enforceability of the remainder of the contract on unchanged terms, the contract may be modified also in other aspects or be wholly set aside.[161] In the preparatory works, the legislator explains that a change in circumstances is a strong argument for carrying out an adaptation of the contract.[162] The legislator further notes that the requisite taking "changed circumstances" into consideration is different than the other requisites in the clause. It is not an issue of compensating one party because the counterparty had a superior or stronger position at the time when the contract was concluded. Instead, it is an adaptation of the contract on other grounds and can be carried out in favour of a stronger party.[163] Conclusively, §36 AvtL encompasses the hardship situation. **68**

§36 AvtL has been described as the most important clause in the Swedish Contracts Act.[164] It has opened up for a complete new technique for the courts to solve contractual issues by giving the judge the authority to adapt or "disregard" (i.e., the judge look at the contract as if the clause did not exist) one or more contract terms or to decide that the contract should be cancelled in its entirety. The General Clause is controversial in that sense as it tampers the fundamental views that previously dominated in the field of Swedish Contract Law.[165] Rather than focusing on the will of the parties, the General Clause refers to an "unreasonable" requisite where the judge may consider circumstances that took place before, during or after the contract was concluded.[166] The Nordic countries strive to maintain uniformity in the field of contract law and thus a general clause corresponding to §36 AvtL has been incorporated into the respective contracts acts in Denmark, Norway and Finland.[167] **69**

a) Structure

The General Clause consists of four sections. *Section one* describes the requisites for the applicability of the clause, the pre-requisites for the assessment of whether a contract term is unreasonable, and the remedies. *Section two* states that special attention shall be given to the fact that a party is a consumer or otherwise is in an inferior position. This section has been included for "educational purposes" to emphasize the difference in applying §36 AvtL to consumer contracts and business contracts.[168] *Section three* provides that the clause is applicable throughout the whole law of obligations. Lastly, *section four* refers to the Swedish Consumer **70**

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the preparatory works and cited as Prop. 1975/76:81 and SOU 1974:83 respectively).

[160] Other terms used in the legal doctrine are "unfair" and "unconscionable". The term "unreasonable" will be used in this work as the most appropriate translation to the requisite.

[161] §36 Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.

[162] Prop. 1975/76: 81, p. 127.

[163] Prop. 1975/76: 81, p. 126 f.

[164] GRÖNFORS, Avtalslagen, 218.

[165] Prop. 1975/76: 81, p. 101, 110, 116 f.; GRÖNFORS, Avtalslagen, 247.

[166] GRÖNFORS, Avtalslagen, 218; RAMBERG/RAMBERG, 175.

[167] VON POST, 48 f. The Danish general clause did not initially provide the courts with the authority to carry out an adaptation of the contract. Following a legislative change in 1994, the Danish clause corresponds with §36 AvtL also with respect to the legal remedies, *See hereto*, GRÖNFORS, Avtalslagen, p. 221; VON POST, 57 f.

[168] Prop. 1975/76:81 p. 109.

Contracts Act,[169] bringing together civil law rules and laws governing the practice of commercial parties in the market.

b) Applicability and Scope

71 §36 AvtL is mandatory and cannot be excluded by way of contracting.[170] Instead, transacting parties can address the issue of change in circumstances by way of including a carefully drafted renegotiation clause or hardship clause in the contract, which clause of course may become subject to scrutiny under §36 AvtL. The General Clause has a broad scope and covers the whole law of obligations.[171] It is applicable ex analogia to other fields of law such as family law, labour law and intellectual property law.[172] The scope covers real property, chattels, debenture agreements and service agreements.[173] It goes beyond mere contracts. It can be applied to any legal act e.g., power of attorneys, gifts, payment undertakings, invoices and receipts.[174] Moreover, §36 AvtL is equally applicable on standard terms as well as individually negotiated terms[175] and it applies to both written and oral agreements.[176] Although the clause is applicable to consumer contracts, commercial contracts as well as contracts between private individuals,[177] the legislator stresses a cautionary approach in relation to commercial contracts.[178] There is an important limitation to take note of. §36 AvtL targets individual contract terms. Hence, a claim for an adaptation must aim at a specific contract term as being unreasonable. Such an approach was decided on to promote stability and increased predictability for contracting parties.[179]

72 In the preparatory works the legislator provides some guidance to the court judges on how the legislator intended §36 AvtL to operate.[180] The legislator clearly states that the aim is to give the judge the main responsibility and control of the future development of the applicability of the General Clause.[181] In order to serve as precedence, the focus should lie on ascertaining a certain standard degree of fairness that a contract term cannot fall below rather than on how a specific term operates in an individual case. The legislator, however, acknowledges that the court has limited possibilities in providing such decisions. The circumstances in the individual case will in many instances have a great impact on the assessment of whether a contract term is unreasonable.[182] For the purpose of facilitating the work of the court, the legislator has provided some general guidance, however with the reservation that with time they may become obsolete as the values and attitudes with respect to the

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[169] Lag (1994:1512) om avtalsvillkor i konsumentförhållanden.
[170] Prop. 1975/76:81 p. 136.
[171] The general clauses in Denmark, Norway and Finland are also applicable over the whole law of obligations. In Finland however the general clause does not apply to consumer contracts where the subject matter already is regulated by the Finnish Consumer Protection Act. *See hereto,* VON POST, 54 ff.
[172] Prop. 1975/76:81 p. 112 f.
[173] Prop. 1975/76:81 p. 112 f and 135 f.
[174] SOU 1974:83, p.198.
[175] LEHRBERG, Unexpected Circumstances, 98, 103.
[176] SOU 1973: 83, p. 194.
[177] SOU 1974:83, p. 194.
[178] Prop. 1975/76:81 p. 105, 108. The same applies with respect to the general clause under Danish and Norwegian law. *See hereto,* GOMARD, 186; WOXHOLTH, Avtalerett, 395. The Finnish general clause is also primarily applicable to consumer contracts rather than to contracts where the parties are on an equal footing. *See hereto*, WILHELMSSON, 121 f.
[179] NJA II 1976, s. 249.
[180] Prop. 1975/76:81; SOU 1974:83.
[181] SOU: 1974:83, p. 20 ff.
[182] Prop. 1975/76:81, 111, 116, 133 and 137; SOU 1974:83, p. 131. It should also be noted that traditionally, in Sweden, court judges are reluctant to comment on other aspects than those that are relevant to the particular case. This may be one factor limiting the amount of case law providing more general guidance on the applicability of the General Clause.

subject matter are constantly changing.[183]

c) The Requisites

§36 AvtL gives the judge the authority to set aside or modify contract term(s) if the term(s) is considered unreasonable in light of: (i) The contents of the contract; (ii) circumstances at the time the contract was concluded; (iii) subsequent events, and (iv) other circumstances. Thus, one of the concrete requisites that the court shall take into consideration in its assessment of whether a contract term is "unreasonable" is the subsequent turn of events. The requisite is explicitly spelled out in the law text. Section one of §36 AvtL refers to "subsequent events" (*Sw*. "senare inträffade förhållanden"). A corresponding requisite can be found in the respective general clauses in the Nordic countries. In the doctrine this requisite is often referred to as "change in circumstances" (*Sw*. "ändrade förhållanden").[184] Hence, §36 is applicable to the issue of changed circumstances empowering the courts to set aside or adapt contract terms that become unfair due to a change in circumstances.[185] Case law is scarce especially in relation to commercial contracts. Furthermore, the Scandinavian countries, and especially Sweden, have probably suffered less from the consequences of the World Wars than their European neighbours which in general means that there is less case law available on the issue of hardship as many cases on the topic originate from times of crisis. As §36 AvtL substantially is identical to the general clauses codified in Denmark, Norway and Finland, case law from all Nordic countries will be examined.[186] **73**

The core of §36 AvtL is the "unreasonable" requisite. The judge shall primarily focus on whether a *specific* term in the contract is unreasonable. Strictly speaking, the judge does not have the authority to revise a contract where the unreasonableness consists of "an imbalance of the economic equilibrium" taking the contract as a whole into consideration.[187] In this aspect the Nordic solutions differ. [188] While the Finnish general clause, similar to the Swedish general clause, targets a specific contract term, the general clauses under Norwegian and Danish law assess the contract as a whole.[189] §36 AvtL in turn requires that an overall assessment of all relevant circumstances is carried out. The legislator explains that an overall assessment of the contract must be carried out in order to assess whether a specific term is unreasonable rather than being assessed in isolation, cut off from the contractual context.[190] Clearly, a contract term may come across as harsh if looked at in isolation, but not in the contractual context as the party may have been compensated elsewhere in the contract.[191] In the preparatory work, it has also been emphasized that it is not excluded for the court to also consider other parts of the contract in its assessment. Hence, the factual difference between the Nordic solutions is small if at all.[192] Thus, Danish and Norwegian case law remain relevant sources. **74**

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[183] Prop. 1975/76:81 p. 166.
[184] GRÖNFORS, Avtalslagen, 234.
[185] LEHRBERG, ERPL 1998, 265, 272.
[186] Due to language barriers, a complete examination of Finnish case law will not be carried out. It will be limited to case law available in Swedish.
[187] *See e.g.,* NJA 1989 s 614, p. 620 where a contract contained a term that could not be executed which, in the opinion of the court, did not by itself constitute an unreasonable term, excluding the applicability of the General Clause.
[188] *See hereto,* §36 of the Danish Contracts Act (*Da*. Lov om aftaler og andre retshandler på formuerettens område, Lovbkg. Nr. 781 af 26 august 1996) and §36 of the Norwegian Contracts Act (*No.* Lov om avslutning av avtaler, om fuldmagt og om ugyldige viljeserklæringer, LOV-1918-05-31-4). Finland applies the same method as Sweden (*Fi*. Lag om rättshandlingar på örmögenhetsrättens område, 13.6.1929/228). Thus, under Danish and Norwegian law there is no requirement to target a specific unreasonable term to achieve an adaptation of the contract.
[189] VON POST, 56.
[190] Prop. 1975/76:81 p. 106, 111.
[191] *Compare*, ADLERCREUTZ, 287.
[192] VON POST, 57 and 77; WILHELMSEN, Tfr 1995, 1, 13.

2. The Doctrine of Assumptions

75 The hardship issue has traditionally been dealt with by the doctrine of assumptions as developed in case law and academic writing.[193] It aims to restore the economic equilibrium of the contract when unknown or unforeseen facts in terms of erroneous assumptions render it unfair or unreasonable to uphold the contract on unchanged terms.[194] The general rule developed in case law is that a party bears the risk for its assumptions being erroneous or becoming erroneous due to a supervening event and only in a small number of special cases is it reasonable to give an assumption legal relevance and thereby pass on the risk for the erroneous assumption to the counterparty.[195] The doctrine is mainly based on its Danish equivalent developed by the Danish scholar Professor Ussing, which in turn is based the doctrine on the German legal scholar Windscheid's subjective doctrine of assumptions.[196] According to Windscheid, a party is not bound by its will as expressed in the contract if it deviates from the party's "actual" will, as it would have been expressed had the assumption not been at hand.[197] Ussing developed an objective doctrine of assumption where justice and fairness replaced the hypothetical will of the party.[198] The Swedish doctrine of assumptions resembles in several aspects the German doctrine on change in circumstances in §313 BGB. It should be noted that while the doctrine is well established in Swedish contract law,[199] the view is not uniform. Rather, the doctrine of assumptions has developed in different directions in the legal doctrine.[200] In this study the doctrine is described mainly on the basis of the works of the legal academic authorities Axel Adlercreutz, Bert Lehrberg as well as Jan and Christina Ramberg.[201]

a) Structure

76 The doctrine of assumptions deals with the problem of unknown and unforeseen facts in terms of failure of basic assumptions.[202] The starting point is that a party bears the risk for its assumptions being erroneous at the formation of the contract or becoming erroneous due to changed circumstances.[203] An erroneous assumption according to the doctrine of assumptions means that the contracting party entered into the contract (knowingly or unknowingly) based on a premise that did not correspond with reality as it was at the time when the contract was concluded, or as it later turned out due to the effect of an adverse turn of event.[204] Thus, the term "erroneous assumption" comprises both the legal problem of mistake and change in circumstances.[205] Consequently, the doctrine also covers the situation where the contract turned out to be less beneficial or more burdensome to perform than one party first expected.[206]

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[193] LEHRBERG, 57.
[194] LEHRBERG, Förutsättningsläran, 153.
[195] NJA 1981 p. 269, p. 271; NJA 1985 p. 178, p. 191 f.; NJA 1997 p. 5, p. 17; NJA; NJA 1999 p. 793, p. 808. *See also*, LEHRBERG, ERPL 1998, 265, 270.
[196] VON POST, 281 f.; LEHRBERG, 19. *See hereto*, Bernhard Windscheid who published his essay "Die Lehre des römischen Rechts von der Voraussetzung" in 1850 on the meaning of assumptions in contracts.
[197] *See hereto*, WINDSCHEID, Die Voraussetzungen, AcP 1892, 161, 166 f.
[198] LEHRBERG, SvJT 1990, 187, 191 ff.
[199] LEHRBERG, ERPL 1998, 265, 269.
[200] ADLERCREUTZ, 269.
[201] ADLERCREUTZ, 269 ff.; LEHRBERG, Förutsättningsläran, 19 ff.; RAMBERG/RAMBERG, 199 ff.
[202] LEHRBERG, Förutsättningsläran, 177 ff.
[203] NJA 1981 s. 269, p. 271; NJA 1985 s. 178, p. 191
[204] LEHRBERG, Förutsättningsläran, 79 f. and 177 ff.; ADLERCREUTZ, 284 f.
[205] LEHRBERG, ERPL 1998, 265, 269.
[206] LEHRBERG, SvJT 1990, 187, 188.

b) Applicability

The doctrine of assumptions is applicable when an assumption becomes erroneous due to a change in circumstances following the conclusion of the contract.[207] An assumption is an implied term that neither has been brought up for discussion between the contracting parties nor been included in the contract.[208] Similar to the §313 BGB, the doctrine of assumptions is not applicable to an assumption that is regulated in the contract. 77

Professor Lehrberg, an authority in the field, has introduced a typology of assumptions that can become legally relevant for applicability of the doctrine. He divides them into three different categories. A distinction is made between "*qualified assumptions*" i.e., assumptions related to the fulfilment of the contract, "*ordinary assumptions*", assumptions related to the fulfilment of quality or quantity and "*other assumptions*".[209] An example of an assumption from the third category is *that a contracting party's own promise under the contract is rendered unexpectedly burdensome*.[210] Lehrberg, however, notes that the third category is applicable only in rare cases. The latter category captures the situation where a change in circumstance has rendered the contract more costly. There is, however, no available case law. However, Lehrberg has argued that the outcome in *RH 1980:14* and *NJA 1979 p. 731*, where the Swedish Supreme Court interfered on the basis of §36 AvtL in the contractual relationship to address the issue of change and increased costs, would be the same had the doctrine of assumptions been applied.[211] 78

c) The Requisites

There are at least three requisites that must be fulfilled for the doctrine of assumptions to apply. The first requisite under the doctrine of assumptions is that the assumption must be "material" (Sw. *väsentlighetsrekvisitet*). The assumption must have been material for the party's decision to enter into the contract. The second requisite under the doctrine of assumptions is closely linked to the first requisite and states that the assumption must have been "visible" (Sw. *synbarhetsrekvisitet*) for the counterparty.[212] This means that the counterparty must have known or ought to have known that the conclusion of the contract was induced by the assumption. It must further have been visible for the counterparty that the assumption was *material* to the disadvantaged party so that he would not have entered into the contract but for that the assumption would stay the same.[213] The "material" requisite and the "visibility" requisite are closely linked and well established in case law.[214] The next requisite is more controversial. It is a test of whether there is a specific ground that can make the assumption legally relevant motivating that the risk for the erroneous assumption (i.e., supervening event) is thrown onto the counterparty. In other words, it must be "just and equitable" to place the risk for the change in circumstances on the counterparty. This "relevance test" is often referred to as the "risk" requisite and deals with the question of which party should bear the risk for a material and visible erroneous assumption.[215] The "risk" requisite is typically the requisite causing most problems making the outcome of a case based on the doctrine of assumptions unpredictable. 79

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[207] LEHRBERG, ERPL 1998, 265, 269.
[208] NJA 1996 s. 410, p. 417.
[209] LEHRBERG, SvJT 1990, 187, 206.
[210] LEHRBERG, Förutsättningsläran, 286 ff.; LEHRBERG, ERPL 1998, 265, 270.
[211] LEHRBERG, SvJT 1986, 249, 253 ff.
[212] LEHRBERG, Förutsättningsläran, 248; NJA 1936 s 368; NJA 1937 s 518; 1984 s 280.
[213] LEHRBERG, Förutsättningsläran, 247 ff.
[214] NJA 1936 s 368 and NJA 1910 s 648. Professor Lehrberg has carried out an extensive examination of case law with respect to the requisites. *See hereto,* LEHRBERG, Förutsättningsläran, 180 ff. and 252 ff.
[215] ADLERCREUTZ, 271; LEHRBERG, Förutsättningsläran, 21f.; LEHRBERG, ERPL 1998, 265, 269.

3. The Relationship Between §36 and the Doctrine of Assumptions

80 §36 AvtL and the doctrine of assumptions overlap when it comes to the issue of changed circumstances.[216] While the legislator explains that the doctrine of assumption is not being replaced by §36 AvtL, it is expected to play a more limited role going forward as the new General Clause is the better alternative to base a claim on *in certain situations*. [217] Similarly, in *NJA 1996 s. 410* the Swedish Supreme Court noted that the doctrine of assumptions is to be viewed as a complement to the rules in the Contracts Act.[218] There is also a preference for §36 AvtL in the legal doctrine to deal with the issue of change in circumstances.[219]

81 Over the years, the doctrine of assumptions has also been subject to heavy criticism in the legal doctrine[220] and its continued existence in Swedish contract law has even been questioned.[221] While the doctrine has been questioned, it has never entirely been abandoned.[222] Recent case law also demonstrates its survival.[223] Thus, the doctrine of assumptions remains good law. In *NJA 1989 s. 614* the Swedish Supreme Court explained that there is no reason to widen the scope of the doctrine of assumptions to also cover situations that fall within the scope of §36 AvtL.[224] While that view deserves support, as I gather, it could be argued that the doctrine of assumptions is more suitable to deal with a disruption of the contractual equilibrium caused by an adverse turn of event. A clear weakness of §36 AvtL is that a claim must target a specific unreasonable contract term. To illustrate, in *NJA 1989 s. 614*, the Supreme Court explained that a pre-condition for the applicability of §36 AvtL is that an unreasonable contract term can be identified in the contract. The contract contained a term that could not be executed, which in the opinion of the court did not by itself constitute an unreasonable contract term excluding the applicability of §36 AvtL.[225] Thus, when the change in circumstances relates to something that is unregulated in the contract, there is no resort for a party under §36 AvtL. In such a situation, a party's only choice is to base its arguments on the doctrine of assumption in order to achieve an adaptation of the contract.[226] While there is a preference for §36 AvtL in the legal doctrine, contemporary case law and the statements in the preparatory works indicate that the doctrine of assumptions is an established rule in Swedish contract law and remains good law. Lehrberg, a spokesman of the doctrine of assumptions, advocates that the two could be combined for a stronger position in a quest for renegotiation, as the current status of the laws are equally unclear with respect to the issue of changed circumstances.[227] It has also been argued elsewhere in the legal doctrine that the two could be used as alternative recourses when there is a change in circumstances depending on the situation.[228] That

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[216] The doctrine of assumptions is accepted as a general rule of law in Denmark and Norway while it has had very limited influence in Finland. *See hereto*, WILHELMSSON, 130.
[217] Prop. 1975/76:81, p. 128; SOU 1974:83, p. 157. *Along similar lines*, NJA 1996 s 410, p 417.
[218] NJA 1996 s 410, p. 417.
[219] *Compare hereto*, Prop. 1975/76:81 p. 128; GRÖNFORS, Avtalslagen, 210, 250 f.; DOTEVALL, SvJT 2002, 441, 449; ADLERCREUTZ, 284 f.; HELLNER, Förutsättningslärans Rediviva, 133, 141; LEHRBERG, Förutsättningsläran, 164; RAM BERG/RAMBERG, 201. Similarly, in Denmark and Norway the doctrine of assumptions is seen as an alternative to deal with the issue of changed circumstances, albeit with a limited application following the introduction of the general clauses. *See hereto*, ANDERSEN, 260 f.; WOXHOLTH, Avtalerett, 404 ff.; WILHELMSEN, Tfr 1995, 1, 141 f.
[220] VAHLÉN, TfR 1953, 394, 394 ff.; CHRISTENSEN, TfR 1973, 311, 339 f.
[221] RAMBERG/RAMBERG, 201; VAHLÉN, TfR 1953, 394, 394 ff.
[222] KLEINEMAN, JT 1989, 522, 522.
[223] NJA 1981 s 269; NJA 1985 s 178; NJA 1989 s 614; NJA 1996 s 410; NJA 1997 s 5.; NJA 1999 s 575; NJA 1999 s 793.
[224] NJA 1989 s 614, p. 619.
[225] NJA 1989 s 614, p. 620.
[226] HELLNER, Förutsättningsläran rediviva, 133, 145; VON POST, 288.
[227] LEHRBERG, 58 f.
[228] AGELL/MALMSTRÖM, 108; VON POST, 95. *See hereto also*, RAMBERG/RAMBERG, 201 explaining that there is no use for a party to also refer to the doctrine of assumptions as an alternative recourse if §36 AvtL is applicable. The authors, however,

view deserves support and it is clear that the doctrine of assumptions should not be ruled out. As I gather, §36 AvtL may be a less appropriate tool to apply in a hardship situation. The clause was drafted mainly having consumer protection concerns in mind.[229] There is a direct reference to consumer protection legislation in subsection 4 of §36 AvtL. Moreover, the clause primarily targets single "unreasonable" contract terms that a party agreed to as a result of being in an inferior position with limited economic means and experience.[230] A factor contributing to the reluctance towards the doctrine of assumptions is that it is regarded as one of the most difficult and uncertain areas in Swedish contract law.[231] Moreover, the last couple of cases have been decided in pleno, indicating that available case law on the doctrine of assumptions has been inconsistent.[232] Serious critic has also been expressed in the legal doctrine that the outcome of the doctrine's applicability is highly dependent on the Supreme Court judge judging the case![233] Another weakness of the doctrine of assumptions is that it contains subjective requisites while §36 AvtL aim to be purely objective. Nevertheless, §313 BGB and the doctrine of assumptions share features and the former is a provision primarily targeting hardship.

III. Exceptions to the General Rule under Swiss Law

Swiss law does not contain a statutory rule expressly regulating the legal problem of hardship caused by an adverse turn of event after the contract was concluded.[234] There are three statutory rules providing exceptions to the principle of pacta sunt servanda dealing with situations of changed circumstances. **82**

1. Art. 24(1) Subsection (4) of the Swiss Code of Obligations

Art. 24(1) subsection (4) of the Swiss Code of Obligations (hereinafter, "Art. 24 (1)(4) ZGB") is applicable to erroneous assumptions (*Ge*. Grundlagenirrtum). It is disputed whether Art. 24(1)(4) ZGB is applicable to assumptions becoming erroneous *after* the contract was concluded or if it is limited to assumptions that were erroneous at the time when the contract was concluded.[235] Support in favour of its applicability to changed circumstances can be found both in case law and the legal doctrine when it can be shown that the erroneous assumption relates to a specific predictable fact. I.e., the parties must have had concrete ideas about future developments, viewed as secure by both parties, at the time when the contract was concluded and which prognosis turned out to be wrong.[236] Or, a party took a certain future event as certain and the counterparty must have, in accordance with good faith and fair dealing, recognized that it was a precondition for the other party to enter into the contract.[237] However, mere hopes or speculations or exaggerated expectations with respect to e.g., future developments of prices for land or price developments in relation to securities and bonds are excluded.[238] While older case law[239] generally rejects the applicability of Art. 24 ZGB to erroneous assumptions caused by **83**

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note that a distinction is difficult to make.
[229] Prop. 1975/76:81 p. 101, 165; SOU 1974:83, p. 33.
[230] Prop. 1975/76:81 p. 101, 103 f.
[231] LEHRBERG, 57 f. *See hereto*, VAHLÉN, TfR 1953, 394, 394.
[232] WIBERG, SvJT 1943, 773, 799.
[233] WIBERG, SvJT 1943, 773, 799.
[234] MERZ zu Art. 2 ZGB, 278.
[235] BGE 118 II 297 p. 300; GUHL/KOLLER, 142; BSK-HONSELL zu Art. 2 ZGB, p. 45; BSK-SCHWENZER zu Art. 24 OR, 250; BK-KRAMER zu Art. 18 OR, 222.
[236] BGE 109 II 105, p. 109 and 111; BGE 117 II 218, p. 224; BSK-SCHWENZER zu Art. 24 OR, 250 f.; WIEGAND, Clausula rebus sic stantibus, 443, 448; BK-KRAMER zu Art. 18 OR, 127 ff.; MERZ zu Art. 2 ZGB, 279; GUHL/KOLLER, 142.
[237] BGE 118 II 297, p. 300; BGE 117 II 218, p. 224.
[238] BGE 109 II 105, p. 111.
[239] *See e,g*, BGE 59 II 372, p. 374.

changed circumstances occurring after the conclusion of the contract, newer decisions seem to open up for the possibility under certain conditions.[240] Consequently, it is not excluded that Art. 24(1)(4) ZGB is applicable when an assumption becomes erroneous after the contract was concluded although a majority seem to reject such a solution.[241] The legal remedy is termination of the contract.[242] Thus, Art. 24(1)(4) ZGB does not provide any assistance for a party that aims for an adaptation of the contract to reflect a new commercial reality and will therefore not be further explored in this study on renegotiation.

2. Art. 373 Subsection (2) of the Swiss Code of Obligations

84 Art. 373 of the Swiss Code of Obligations (*De*. "Obligationenrecht") (hereinafter, "Art. 373 OR or Art. 373(2) OR") also deals with the issue of changed circumstances. The scope of the provision is limited to service agreements (*Ge*. "Werkvertrag") where the price has been fixed.[243] It is commonly applied to construction contracts but is also, for instance, applicable to contracts for the fabrication of goods as well as cleaning or reparation contracts.[244] Art. 373(2) OR comprises the clausula rebus sic stantibus doctrine[245] protecting the contractor against increased costs (e.g., increased labour costs or larger expenditures) caused by *extraordinary circumstances* rendering the performance of the contractual obligation excessively more difficult to fulfil or hinder its fulfilment.[246] The cost increase must also have been unforeseeable for the contractor.[247] If these conditions have been met, the court has the right, in its discretion, to either increase the contract price or terminate the contract.[248] The counterparty acquiring the product is obliged to pay the fixed price also when the completion of the work required less work than originally contemplated.[249] Thus, Art. 373 OR only safeguards the interest of the contractor in the event of changed circumstances.[250] Art. 373(2) OR is said to be a specific legislated "Clausula case" applicable to service contracts only.[251] Given the limited scope it will not be further explored in this study.

3. Art. 2(2) of the Swiss Civil Code

85 The issue of changed circumstances is primarily settled by the two general clauses in Article 2 of the Swiss Civil Code (*De*. Schweizerisches Zivilgesetzbuch) (hereinafter, "Art. 2 ZGB").[252] Art. 2(1) ZGB states that contracting parties have a duty to exercise their rights and fulfil their duties in accordance with good faith. In Swiss law, the principle of pacta sunt servanda is limited by the higher principle of good faith and fair dealing (*Ge*. "Treu und Glauben") in Art. 2(1) ZGB.[253] Art. 2(1) ZGB does not provide assistance for a party that wishes to achieve

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[240] BGE 109 II 105, p. 109 ff.; BGE 118 II 297, p. 300.
[241] SCHMIEDLIN, 130 f.
[242] WIEGAND, Clausula rebus sic stantibus, 443, 452 f.; BK-KRAMER zu Art. 18 OR, 223.
[243] Art. 373 (1) OR.
[244] GUHL/KOLLER, 521.
[245] BGE 104 II 314, p. 315; BSK-ZINDEL/PULVER zu Art. 373 OR, 2358.
[246] Art. 373 (2) OR; BSK-ZINDEL/PULVER zu Art. 373 OR, 2358.
[247] BSK-ZINDEL/PULVER zu Art. 373 OR, 2360; GUHL/KOLLER, 530.
[248] Art. 373 (2) OR.
[249] Art. 373(3) OR.
[250] BSK-ZINDEL/PULVER zu Art. 373 OR, 2358.
[251] BGE 104 II 314, p. 315; BSK-ZINDEL/PULVER zu Art. 373 OR, 2358 ff.; ABAS, 162; GAUCH, Der Werkvertrag, Rn. 1071.
[252] Schweizerisches Zivilgesetzbuch from 1907, December 10.
[253] MERZ, Die Revision, 460; JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 235; ABAS, 156; DESCHENAUX, 200; VON THUR, 171; ZR 1936, 245, p. 245; HEDEMANN, SJZ 1921, 305, 308; WIDMER, 53. BGE 72 II 39, p. 41 f.; In, BGE 59 II 372, p. 377, the court explained: "dass auch der Grundsatz der Vertragstreue im höhern Prinzip von Treu und Glauben seine Schranken f inden muss." *Compare with*, OGHZ 1, 62, p. 68, under German law where the court explains that §242 BGB and the

an adaptation of the contract.[254] For that, the party has to turn to the general clause in Art. 2(2) ZGB. Art. 2(2) ZGB is a prohibition stating: "The manifest abuse of a right shall not be protected by law".[255] According to case law and academic writing, the doctrine of clausula rebus sic stantibus (hereinafter, the "Clausula" or the "Clausula doctrine") is entailed in Art. 2(2) ZGB[256] and is dependent on the principle of good faith and fair dealing in Art 2(1) ZGB.[257] Thus, in conjunction, the Swiss Civil Code opens up for judge-led intervention of the contract when it would be a manifest abuse of right for the counterparty to insist on the strict performance of the contractual obligation if a change in circumstances fundamentally alters the economic equilibrium. [258] The Clausula rebus sic stantibus, in turn, is based on the idea that the parties would not have entered into the contract on the same terms had they considered the occurrence of the supervening event.

a) Applicability and Scope

The scope of Art. 2(2) ZGB is broad and applicable to the entire field of Swiss Private Law.[259] In one court ruling, however, the Swiss Federal Tribunal limited the Clausula doctrine's applicability to cases where Art. 373(2) OR would be applicable by analogy.[260] That decision has, however, been criticised as being a too narrow application of the Clausula doctrine, which scope should extend to all contractual relations if the requisites have been met.[261] **86**

b) The Requisites

In order for Art. 2(2) ZGB and the Clausula doctrine to apply, an unforeseeable supervening event must have occurred *after* the conclusion of the contract and have caused a fundamental imbalance between the contractual obligations so that it would be a manifest abuse of right to insist on the strict performance of the contractual obligation according to the terms originally agreed on.[262]Additionally, three negative conditions must be fulfilled: (i) None of the parties have assumed the risk for the supervening event in accordance with the contract or applicable laws, (ii) the change in circumstances must have been unforeseeable, and (iii) outside the disadvantaged party's sphere of control.[263] **87**

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principle of good faith (*De*. "Treu und Glauben") limits the party autonomy.

[254] DESCHENAUX, 200.

[255] Translation provided by the Swiss-American Chamber of Commerce.

[256] BGE 100 II 345, p. 349; BGE 46 II 157, p. 162; BGE 45 II 351, p. 355; SJZ 1968, 360, 360; ABAS, 156; ZK-BAUMANN zu Art. 2 ZGB, 689; CARONI, 207; BSK-HONSELL zu Art. 2 ZGB, 45; BISCHOFF, p. 180; GUHL/KOLLER, 311; BSK-ZINDEL/PULVER zu Art. 373 OR, 2360 f. It has however been questioned in the legal doctrine by some commentators whether the Clausula doctrine is comprised in Art. 2(2) ZGB, *see hereto e.g.*, LEU, Vertragstreue In Zeiten des Wandels, 107, 114 f.; KRAMER, SJZ 2014, 273, p. 276; BISCHOFF, p. 177 ff.; SCHMIEDLIN, 89.

[257] BÜRGI, ASR 1939, 1, 138 and 143 where he states: „wenn das Missverhältnis wirklich derart ist, dass eine unveränderte Weiterdauer nach Treu und Glauben nicht mehr gefordert werden kann."

[258] *Compare hereto*, SCHWENZER, 271; LEU, Vertragstreue In Zeiten des Wandels, 107, 114 f.; WIEGAND, Clausula rebus sic stantibus, 443, 446; BGE 97 II 390, p. 398; BGE 107 II 343, p. 348; SJZ 1968, 360, 360; BÜRGI, ASR 1939, 1, 143.

[259] HÜRLIMANN-KAUP/SCHMID, 72.

[260] BGE 51 II 15, p. 21

[261] ZK-BAUMANN zu Art. 2 ZGB, 690 f.

[262] HAUSHEER/JAUN, 147; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 250 f.; BSK-WIEGAND zu Art. 18 OR, 176; BGE 97 II 390, 398; BGE 127 III 300, p. 306; BGE 59 II 372, p. 378; SJZ, 1968, 360, 360; ZR 1936, 245, 246; *Compare also*, BGE 101 II 17, p. 19; BGE 97 II 390, p. 396; *See also*, ICC Award No. 4145 of 1983, 1984 and 1986, YBCA 1987, 97, 109.

[263] BISCHOFF, 204 ff.; MERZ zu Art. 2 ZGB, 288 ff.; ZK-BAUMANN zu Art. 2 ZGB, 693; SCHMIEDLIN, 110 ff.; SCHWENZER, Schweizerisches Obligationenrecht, 272; BGE 135 III 1, p. 10; BGE 127 III 300, p. 305: BGE 101 II, 17, 19.

IV. Exceptions to the General Rule under German Law

88 There is a statutory exception to the principle of pacta sunt servanda in German law expressly dealing with the issue of changed circumstances. The exception can be found in §313 of the new German Civil Code (*Ge*. "Bürgerliches Gesetzbuch"). Another statutory exception can be found in the rules on mistake in §§119 ff. BGB. The rules on mistake will not be dealt with herein as the prevailing view is that they do not cover future developments but are restricted to one-sided errors in a statement of intent at the time when the contract was concluded.[264] Also, the sole remedial consequence in §119 BGB is termination of the contract.[265]

1. §313(1) BGB - A Disruption of the Basis of the Transaction

89 The hardship doctrine has only recently been codified[266] and can be found in §313 BGB (hereinafter, "§313 BGB") under the heading: "Disruption of the basis of the transaction" (*Ge*. "Störung der Geschäftsgrundlage"). The clause is placed under the section on "Contractual Obligations" in the Second Book of the Law of Obligations under the subchapter: Adaptation and termination of contracts. Subsection (1) of §313 deals with the issue of unforeseen and fundamental change in circumstances following the conclusion of the contract. It provides a solution for the situation when the contractual obligation becomes more burdensome for one party to perform due to an unforeseen change in circumstances.[267] Prior to the codification, hardship was dealt with by the legal doctrine: The "collapse of the basis of the transaction" (*Ge*. "Wegfall der Geschäftsgrundlage") as developed in case law and academic writing used in conjunction with the general rule of good faith in §242 BGB.[268] In the following, only the law presently in force will be dealt with although it should be noted that case law and legal doctrine developed in relation to §242 BGB and the collapse of the basis of the contract remains good law.[269]

90 Two categories of cases are specifically covered in §313(1) BGB. Those are cases where a supervening event has caused a fundamental change in the contractual equilibrium (*Ge*. Äquivalenzstörung) and cases where the performance becomes much more burdensome for one of the parties, i.e. economic hardship (*Ge*. Wirtschaftliche Erschwerung).[270] The two categories are closely connected and a case of economic hardship can also be a case of fundamental change in the contractual equilibrium when for example the cost to produce the goods has increased significantly so that it no longer corresponds to the cost to procure the goods to the price initially agreed on.[271] Cases of economic hardship were often referred to in earlier case law as cases of "economic impossibility" (*Ge*. "Wirtschaftliche Unmöglichkeit"). Situations of economic hardship are typically a case of a change in the so-called "large" basis of contract.[272]

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[264] HONDIUS/GRIGOLEIT, 55 f.; RÖSLER, ERPL 2007, 483, 492.
[265] HONDIUS/GRIGOLEIT, 55 f.
[266] The Act on the Modernization of the Law of Obligations (*De*. Gesetz zur Modernisierung des Schuldrechts), was published on 26 November 2001, effective since 1 January 2002.
[267] JANZEN, JCL 2006, 156, 166; RÖSLER, ERPL 2007, 483, 489.
[268] RGZ 103, 328 p. 333; FINKENAUER, MüKo zum BGB zu §313, 1890, (Rn. 23); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1128; ZIMMERMANN, Breach of Contract, 1, 13 f.
[269] Regeriungsbegründung BT-Ds. 14/6040, p. 176; DAUNER-LIEB/DÖTSCH, NJW 2003, 921, 921.
[270] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1142 and 1144; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 516 (Rn. 16 -17); CANARIS, 742 f.; RÖSLER, ERPL 2007, 483, 489.
[271] SCHLECHTRIEM/SCHMIDT-KESSEL, 65; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 528 f.; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1144 (Rn. 93).
[272] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 533 (Rn. 25); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 528 (Rn. 23).

a) The Basis of the Contract

The circumstances forming the foundation of the contract must *fundamentally* have changed after the contract was concluded in order for §313 BGB to apply. It must therefore first be decided what circumstances or assumptions constitute "the foundation of the contract". There is no exact definition. Instead, it is for the judge to define.[273] What is clear is that circumstances that are part of the actual content of the contract do not form part of the foundations of the contract.[274] **91**

A distinction is made in the legal doctrine between the objective and the subjective foundation of the contract. In brief, the *subjective foundation* of the contract consists of the mutual assumptions of the contracting parties at the time when the contract was concluded that were so important to the parties (or to one party as long as acknowledged and not rejected or contested by the counterparty) that the contract would not have been concluded otherwise, or at least only on different terms.[275] To the *objective foundation* of the contract belong circumstances which continuation objectively is required in order for the contract to remain a meaningful regulation of the subject matter having regard to the intention of both parties.[276] An exact line between the subjective and the objective foundations of the contract does not exist. Circumstances that fall under the latter category may at the same time form part of the subjective foundation if brought up during the contract negotiations, and thereby becoming part of the common intention of the parties but not the actual content of the contract.[277] **92**

Subsection (1) of §313 BGB deals with a change in the *objective circumstances* following the conclusion of the contract while subsection (2) deals with the initial absence of *subjective circumstances* that have become the foundation of the contract that turned out to be wrong.[278] Subsection (2) regulates one particular case of subjective circumstances (mutual mistake at the time of the conclusion of the contract) while all other situations occurring after the formation of the contract, irrespective of being a change in the objective or subjective foundation of the contract, fall under subsection (1).[279] I.e., the broad formulation in subsection (1) comprises **93**

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[273] RÖSLER, ERPL 2007, 483, 511.

[274] Regeriungsbegründung BT-Ds. 14/6040, p. 175; RGZ 168, 121, p. 127; BGH 89, 226 p. 231; NJW 2001, 1204, p. 1205; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 10); FINKENAUER, MÜKO zum BGB zu §313, 1901 (Rn. 57); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 523; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 514 (Rn. 4); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1128; CANARIS, 744.

[275] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1132; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 514 (Rn. 4); HONDIUS/GRIGOLEIT, 182; RGZ 103, 328 p. 332; RGZ 168, 121, p. 126 f.; NJW 2012, 1718 p. 1719; NJW 1991, 1478 p. 1479; NJW 2001, 1204, p. 1205; BGH 89, 226 p. 231 f.; BGH 25, 390 p. 392. The legislator did not intend to change the "old" law by focusing on objective circumstances in §313(1). Instead, it is explained, it reflects the current status of case law. The subjective formula introduced by Oertmann in 1921 thereby loose in importance. *See hereto*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 514 (Rn. 4); Regeriungsbegründung BT-Ds. 14/6040, p. 176.

[276] FINKENAUER, MüKo zum BGB zu §313, 1887, (Rn. 12); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1132; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 4); STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 514 (Rn. 4); LARENZ, 297 ff.; *See also*, RGZ 168, 121, p. 126 f.; BGH 61, 154, 161.

[277] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, p. 531 (Rn. 4).

[278] FINKENAUER, MüKo zum BGB zu §313, 1887, (Rn. 12); STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 514 (Rn. 3).

[279] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1132; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 4); STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 514 ff. (Rn. 4 and 14); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 523; RÖSLER, ERPL 2007, 483, 497; CANARIS, 745.

both fundamental changes in the subjective and the objective foundation of the contract. [280] It is, however, unnecessary to go the route over the subjective formula in cases where there has been a fundamental disruption of the contractual equilibrium or where the contractual duty becomes much more burdensome for one party to carry out as those situations count as a change in the objective foundation of the contract and are dealt with in §313 subsection 1 BGB.[281]

b) Structure

94 §313 BGB consists of three sections. Subsection (1) deals with a change in the foundation of the transaction after its formation and provides the disadvantaged party with the right to request an adaptation of the contract. Cases of hardship are covered in this section.[282] Subsection (2) deals with the issue of mutual mistake of the basic factual circumstances underlying the transaction at the time when the contract was concluded. Subsection (2) extends the principles in subsection (1) so that cases of mutual errors by the contracting parties are treated in the same way as a change in circumstances following the conclusion of the contract.[283] In short, subsection (1) deals with the subsequent failure or collapse of the basis of the contract while subsection (2) regulates the initial absence of the basis of the transaction i.e., cases of mutual errors by the parties at the time when the contract was concluded, which led both parties to enter into the contract. [284] Thus, subsection (1) focuses on the objective foundations of the contract and subsection (2) on subjective assumptions that have become the basis of the contract.[285] The legal remedies are dealt with in §313 subsection (3).

c) Applicability and Scope

95 §313 is primarily relevant with respect to contracts under the law of obligations.[286] It does not apply to one-sided legal acts such as last wills and testaments but it does apply to one-sided contracts such as gifts or personal guarantees.[287] §313(1) BGB is strictly subsidiary to the allocation of risk as provided in other statutory rules. Something must therefore be said about the potential overlap with §275(2) BGB in cases of so-called "economic impossibility" (*Ge*. wirtschaftliche Unmöglichkeit). §313 BGB is as a general rule not applicable if the contractual obligations on both sides already have been fulfilled[288] and with respect to contracts for the performance of continuing obligations the termination of the contract can only be done with ex nunc effect.[289]

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[280] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 4); *Compare,* MüKo zum BGB zu §313, 1886 (Rn. 16).
[281] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 4); BÖTTCHER, in Erman, BGB Handkommentar zu §313, 1413, (Rn. 8).
[282] RÖSLER, ERPL 2007, 483, 489; JANZEN, JCL 2006, 156, 165 f.
[283] RÖSLER, ERPL 2007, 483, 490.
[284] One-sided errors are dealt with by the rules of mistake (§§ 119 ff. BGB).
[285] BEALE, 1147; HUBER/FAUST, 231; RÖSLER, ERPL 2007, 483, 489 f.; JANZEN, JCL 2006, 156, 167.
[286] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 7); FINKENAUER, MüKo zum BGB zu §313, 1898 (Rn. 47); HAU, 249; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1128.
[287] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 7); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 524.
[288] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 24); FINKENAUER, MüKo zum BGB zu § 313, 1899 (Rn. 48); HAMMER, 100; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 519 (Rn. 27); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1129; *See however*, BGH 131, 209, p. 216; BGH 25, 390 p. 393 f.; BGH 74, 370 p. 373 not excluding the possibility that also contracts where the obligations have been fulfilled also can be subject to § 313 (1) BGB. *See hereto also*, FINKENAUER, MüKo zum BGB zu § 313, 1899 (Rn. 48).
[289] RÖSLER, ERPL 2007, 483, 490; SCHLECHTRIEM/SCHMIDT-KESSEL, 68.

d) The Requisites

For §313(1) BGB to apply, the supervening event must have occurred after the conclusion of the contract and have caused a fundamental change in the foundation of the contract. The supervening event must have been unforeseeable and so material that the disadvantaged party cannot reasonably be held to its contractual duty on unchanged terms. Furthermore, no party has assumed the risk for the supervening event.[290] Lastly, the supervening event must fall outside the disadvantaged party's sphere of control.[291] The requisites correspond to those developed in case law in relation to §242 BGB and the doctrine of the collapse of the foundations of the contract. §313 BGB simply codifies case law developed since the 1920s. The legislator stresses in the preparatory materials to §313 BGB that the stringent conditions applied with respect to the applicability of the doctrine of the collapse of the foundations of the contract should be upheld.[292] **96**

2. The Relation between §313(1) BGB and §275 (2) BGB

The general rule is that §313(1) BGB rather than §275(2) BGB is applicable to situations where a supervening event causes a disruption of the contractual equilibrium where the contractual obligation is rendered economically much more burdensome for one party to perform.[293] To illustrate, imagine that the prices to procure a certain amount of goods are rendered more expensive due to a sudden shortage of the raw material required tp produce the goods. In that situation, the obligor cannot, based on §275(2) BGB, refuse to perform its contractual duty since the steep increase in production cost has resulted in a corresponding economic gain for the counterparty in receiving the goods.[294] Instead, the disadvantaged party has to argue on the basis of §313 (1) BGB.[295] To be a case under §275(2) BGB, the efforts required to perform the contractual duty must be rendered exceptionally high for the obligor but more importantly grossly disproportionate to the counterparty's interest in receiving e.g., the agreed goods. [296] Thus, the focus in §275(2) BGB is on the counterparty (the obligee) and the burden to perform the contractual duty by the obligor must significantly exceed the utility of the performance for the obligee while in §313(1) BGB the focus is on the obligor and whether the price paid for performance is significantly lower than the cost of performance.[297] **97**

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[290] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 532 (Rn. 19); FINKENAUER, MüKo zum BGB ZU § 313, 1901 (Rn. 54-80); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 525 f.; HUBER/FAUST, 232. CANARIS, 744.
[291] FINKENAUER, MÜKO zum BGB zu §313, 1907 (Rn. 75); WOLF/LARENZ, 708; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 526; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1138; JANDA, NJ 2013, 1, 2.
[292] Regeriungsbegründung BT-Ds. 14/6040, p. 175 f.
[293] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §275, 367 und zu §313, 532 (Rn. 13); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1123; HONDIUS/GRIGOLEIT, 58; FINKENAUER, MüKo zum BGB zu §313, 1931, (Rn. 160); CANARIS, JZ 2001, 499, 501; Regeriungsbegründung BT-Ds. 14/6040, 130.
[294] FINKENAUER, MüKo zum BGB zu §313, 1930 (Rn. 161); RÖSLER, ERPL 2007, 483, 495; ZIMMERMANN, The New German Law of Obligations, 46.
[295] ZIMMERMANN, The New German Law of Obligations, 46.
[296] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1123; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 524 f.; HONDIUS/GRIGOLEIT, 58; FINKENAUER, MüKo zum BGB zu §313, 1930, (Rn. 160); CANARIS, JZ 2001, 499, 501; RÖSLER, ERPL 2007, 483, 494.
[297] FINKENAUER, MüKo zum BGB zu §313, 1930, (Rn. 160); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1123; HONDIUS/GRIGOLEIT, 58; Regeriungsbegründung BT-Ds. 14/6040, 130; RÖSLER, ERPL 2007, 483, 494 f. explaining that there is a macroeconomic idea behind §275(2) BGB where the requisite of whether it is reasonable to perform the contractual obligation is tested in a cost-utility-analysis in order to prevent extreme cases of waste of resources. *See hereto also*, FINKENAUER, MüKo zum BGB zu §313, 1930 (Rn. 161).

98 The conditions under the two paragraphs can be fulfilled at the same time when there is no disruption of the contractual equilibrium and but it merely becomes significantly more burdensome to perform the contractual duty for one of the parties.[298] Some authors suggest that the disadvantaged party in that situation is free to decide what remedy to pursue i.e, a renegotiation and adaptation under §313(1) BGB or termination under §275(2) BGB,[299] whilst others argue that once §275(2) BGB is applicable it excludes §313(1) BGB and the chance to adapt the contract.[300] In favour of the applicability of §313(1) BGB in those situations, it has been argued that the fact that it has become much more onerous for one party to perform its contractual obligation can by itself be used as a defence by the obligor under §313(1) BGB, but not under §275(2) BGB since the focus in the latter is on the obligee and not the obligor.[301]

V. Exceptions to the General Rule under English Law

99 British common law takes a conservative approach to the issue of changed circumstances and generally rejects relief on such ground. Despite a strict approach, there are exceptions to the general rule that contracts are to be kept. A potential ground for relief when a new circumstance creates a fundamentally different situation can be found in the doctrine of frustration of contracts created by case law and academic writing.

1. The Doctrine of Frustration of Contracts

100 England does not have a code for private law. Instead, English law is built up case by case. The doctrine of frustration of contracts originates from the case of *Taylor v Caldwell*, initially based on the implied contract theory.[302] In that case, a music hall was destroyed in a fire by no fault of the contracting parties only six days prior to the first concert taking place. The House of Lords concluded that the contract was discharged due to the supervening event.[303] It is a case of impossibility but a distinction was made in this case between events that make the contractual duty impossible to perform and those that merely make it more burdensome to perform, i.e., frustration of purpose.[304] The doctrine of frustration of *purpose* was finally created in the cases arising from the cancelation of the coronation of King Edward VII, where it was explained that if the commercial purpose of the contract is frustrated, the termination of the contract is possible.[305] Thus, the doctrine of frustration comprises both frustration through impossibility of performance under the contract and frustration of the common purpose as intended at the time of formation of the contract.[306]

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[298] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §275, 367; BEALE, 1148; RÖSLER, ERPL 2007, 483, 495; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1123; ERNST, MüKo zum BGB zu § 275, 750, (Rn. 22).
[299] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §275, 367; FINKENAUER, MüKo zum BGB zu §313, 1930 (Rn. 161); ERNST, MüKo zum BGB zu §275, 751, (Rn. 23).
[300] Regeriungsbegründung BT-Ds. 14/6040, 176; CANARIS, JZ 2001, 499, 501.
[301] SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 525; HONDIUS/GRIGOLEIT, 58. *See also,* in favour of§313(1) BGB, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1123; CANARIS, JZ 2001, 499, 501; RÖSLER, ERPL 2007, 483, 495. *Compare also*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 513 f., (Rn. 11 and 17).
[302] HONDIUS/GRIGOLEIT, 164 f.; Taylor v Caldwell [1863] 3 B.&S. 826, 122 Eng. Rep., 309 ff.
[303] Taylor v Caldwell [1863] 3 B.&S. 826, 122 Eng. Rep., 309, 315.
[304] PUELINCKX, J. of Int. Arbitration 1986, 47, 48.
[305] TREITEL, The Law of Contract, 867; BEATSON, 121, 122.
[306] ATIYAH/SMITH, 183 ff.; BEALE, 1635.

2. The Doctrine of Frustration of Purpose

The doctrine of frustration of purpose originates from the well-known "coronation" cases. The leading case is *Krell v Henry*.[307] The contract was terminated because the common purpose of the parties had been frustrated by a supervening event. In brief, the facts in the case were as follows: **101**

The defendant agreed to hire a flat for two days during daylight hours in order to view the Coronation parade of King Edward VII. The King fell ill and the coronation was postponed. The defendant refused to pay the agreed amount to the owner of the flat and the owner sued for payment. The owner's claim was rejected. The court held that the contract was frustrated as both parties regarded the taking place of the coronation of the King and the processions on those dates and along the specified route as the foundation and object of the contract. I.e., as explained by the court, it was not merely a contract for the hire of a flat.[308] **102**

Following *Krell v Henry*, the doctrine of frustration of contract was no longer only restricted to physical impossibility but also covered situations where performance of the contractual duty remained possible but no longer meaningful. In the case, the contract was discharged because the foundation of the contract *for both parties* had been frustrated, i.e. fundamentally and essentially different from what they initially contemplated.[309] The decision received criticism for opening up an escape route from transactions where a supervening event turned it into a bad bargain.[310] **103**

a) Applicability and Scope

Frustration of purpose targets situations where a supervening event renders the the contractual duty radically different from the transacting parties' common purpose for entering into the contract but where the contractual obligation theoretically still is possible to carry out e.g., to pay the money for the goods, service or facility.[311] Thus, frustration of purpose falls short of impossibility.[312] In that sense, the doctrine is similar to the hardship situation. While the relation between the concepts of hardship and frustration of purpose is close,[313] the position in English law is that mere hardship cannot frustrate a contract.[314] **104**
Also, it should be noted that the grounds to terminate the contract under the doctrine of frustration of purpose are that the performance under the contract is no longer of any use to the *recipient* for the purpose of which *both*

[307] Krell v Henry [1903] 2 KB 740.
[308] Krell v Henry [1903] 2 KB 740, 750 f. This case should be compared with Herne Bay Steamboat Co v Hutton [1903] 2 KB 683, one of the other coronation cases, where a boat was hired for the purpose of viewing the naval parade and for a day cruise around the fleet ships. The contract was not frustrated when the coronation was cancelled. It was, in the opinion of the court, a contract for the hire of a boat and only one of the purposes, i.e. to carry passengers at high prices to see the coronation festivities, was rendered impossible. It was still possible to see the fleet (without the parade). Furthermore, the court noted that the existence of the naval review formed the basis of the contract for the hirer only and not the owners of the ship and thereby it did not fall within the doctrine laid down in Taylor v Caldwell.
[309] PUELINCKX, J. of Int. Arbitration 1986, 47, 49.
[310] TREITEL, 318.
[311] Hirji Mulji v The Cheong Yue Steamship Company Ltd. [1926] A.C. All ER Rep 51, p. 57; TREITEL, 307; MCKENDRICK, Contract Law, 255.
[312] TREITEL, 307.
[313] TREITEL, 312.
[314] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 729; British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185; Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, 239; Thames Valley Power Ltd. v Total Power Gas Ltd. [2005] EWHC2208 (Comm), 1, 14 available at: http://www.bailii.org/ew/cases/EWHC/Comm/2005/2208.html. *See also*, ATIYAH/SMITH, 187; TREITEL, 283; BEATSON, 122; CHITTY, 1647 f.

parties had intended it to be used.[315] Thus, the doctrine of frustration of purpose operates as a defence for the buyer or, more broadly, the receiving party.[316] The hardship defence on the other hand operates in both directions. Nevertheless, case law relating to the doctrine of frustration of purpose is interesting for the purpose of this study as it sheds some light on the approach to the issue of hardship and the requisites shared with respect to the solutions provided on the issue in the other jurisdictions.

b) The Requisites

105 In a more recent and leading case on the issue, *Davis Contractors Ltd. v Fareham UDC,*[317] which will be dealt with in detail below, the modern definition of the doctrine of frustration of purpose was established. The requisites were spelled out by Lord Radcliff explaining that frustration is at hand when (i) a contractual obligation has become incapable of being performed; (ii) due to changed circumstances; (iii) which would render the performance a thing *radically different* from that which was undertaken by the contract.[318] In the case, the contractual economic equilibrium was disturbed by a change in circumstances but the House of Lords did not find sufficient grounds to apply the doctrine of frustration of purpose. The doctrine is further qualified by that frustration only can occur where the frustrating event was not self-inflicted.[319] Furthermore, partial failure of the contractual purpose will not frustrate a contract. The purpose of the contract must fail "in its entirety."[320]

VI. Exceptions to the General Rule under Lex Mercatoria

106 To meet the requirement for flexibility in international business transactions, several non-governmental and international organizations have published principles and rules dealing with the issue of changed circumstances. The UNIDROIT Principles, the PECL and the DCFR expressly regulate the issue of economic hardship while it is disputed whether the CISG covers cases of hardship. The issue is also dealt with in the model clause on hardship created in 2003 by the ICC Commission on Commercial Law and Practice (hereinafter, the "ICC Hardship Clause 2003") for the purpose of international contracts.[321] The drafting style of the UNIDROIT Principles and the PECL is similar. The PECL has followed the UNIDROIT Principles on many points. In turn, the UNIDROIT Principles are inspired by the CISG.[322] Hence, the four sets of rules are comparable in many aspects and the solutions to deal with hardship resemble each other on many points despite different terminology. Below, the approach of the non-legislative instruments (i.e., the UNIDROIT Principles, the PECL and the DCFR) will be dealt with together and any differences highlighted. The CISG will be dealt with separately.

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[315] TREITEL, 307.
[316] TREITEL, 307 ff and 311.
[317] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696.
[318] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 728 f.
[319] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 729; Bank Line Ltd. v Arthur Capel [1918], UKHL 1, 8, available at: http://www.bailii.org/uk/cases/UKHL/1918/1.html. *See also*, Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, 237 where the charterers sailed into the Suez Canal knowing it to be a dangerous zone and that it might close for traffic.
[320] TREITEL, 322 referring to North Shore Ventures Ltd v Anstead Holdings Inc and Others [2010] EWHC 1485 (Ch), 2 Lloyd's Rep 265, p. 312 and Herne Bay Steamboat Co v Hutton [1903] 2 KB 683, p. 692.
[321] ICC Rules on Adaptation of Contracts were issued in 1978 but withdrawn in 1994 as the rules were never applied. *See hereto,* FOUCHARD ET AL., 27.
[322] HESSELINK, 81.

1. Art. 6.2.1 UNIDROIT Principles, Art 6:111 PECL and Art. III. - 1:110 DCFR

All three instruments provide for exceptions to the principle of pacta sunt servanda in the event of a change in circumstances. Under the PECL and the DCFR, the situation of economic hardship is referred to as "changed circumstances" (Art. 6:111 PECL; Art. III. - 1:110 DCFR) and under the UNIDROIT Principles it is referred to as "hardship" (Art. 6.2.2 UNIDROIT Principles). 107

a) Applicability and Scope

Both the UNIDROIT Principles and the PECL are of a non-legislative nature (restatements of law) and operate as so called "soft laws". Hence, the rules are non-binding, unless the contracting parties have agreed to incorporate the rules into their contract, either expressly or by reference.[323] The parties' incorporation or reference to these instruments of soft law is normally seen by domestic courts to be an agreement that the rules represent a part of the contract. The law governing the contract will be determined on the basis of the private international law rules of the forum.[324] Also the DCFR is of a non-legislative nature and just as the PECL, it is an academic product and provides definitions and principles that do not have the force of law.[325] 108

b) The Requisites

Not every change in circumstance will lead to the applicability of the hardship exceptions. The required intensity is described in different terms. Art. 6:111(2) PECL requires that the occurrence of the supervening event render the performance of the contract "excessively onerous", Art. 6.2.2 of the UNIDROIT Principles requires that the event "fundamentally alters the equilibrium of the contract" and, Art. III. - 1:110 DCFR states that it should be "manifestly unjust" to hold the party to the contract. Hardship as mere fact does not automatically trigger the article.[326] Instead, the articles are further conditioned upon that the occurrence of the event having been (i) unforeseeable, (ii) outside the disadvantaged party's control (i.e. not self-induced) and (iii) the disadvantaged party has not assumed the risk for the consequences of the supervening event. The event shall also have occurred after the conclusion of the contract.[327] The DCFR adds an additional requisite. The obligor must have (in good faith) made attempts to renegotiate a reasonable and equitable adjustment of the contract terms.[328] 109

2. Art. 79(1) CISG

The CISG is an international convention with the aim to harmonize private commercial law and is binding for the countries that have incorporated the convention. The Convention that has been ratified by 90 States (April, 2019) primarily aims to create uniformity with respect to the contracts for the sale of goods.[329] The CISG does not expressly contain a provision dealing with changed circumstances and economic hardship. Art. 79(1) of the CISG contains a provision granting a party relief from paying damages under certain conditions. 110

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[323] Section 4 subsection (a) of the preamble of the UNIDROIT Principles; Art. 1:101 PECL.
[324] The UNIDROIT Principles, p. 3.
[325] VON BAR/CLIVE, 4.
[326] PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 22.
[327] Art 6.2.2 subsections (a) through (d) UNIDROIT Principles; Art. 6:111(2) subsections (a) through (c) PECL; Art. III. – 1:110 (3); Art. III. - 1:110 (3) (a) - (c) DCFR.
[328] Art. III. - 1:110 (3) (d).
[329] HONNOLD/FLECHTNER, 629 (See, footnote 39).

a) The Requisites

111 According to Art 79(1) of the CISG, a party is not liable for a failure to perform a contractual obligation if it can be proven that the failure was due to (i) an *impediment,* (ii) beyond its control, (iii) which was reasonably unexpected at the time of the conclusion of the contract or (iv) the impediment or its consequences could not reasonably have been avoided or overcome. Thus, the impediment must fall outside the risk sphere of the disadvantaged party, it must have been unforeseeable at the time of the conclusion of the contract and it or its consequences must have been unavoidable. These requisites are fairly standard for force majeure provisions in domestic laws and can also be found in the force majeure provisions under: Art. 7.1.7 of the UNIDROIT Principles, Art. 8:808(1) of the PECL, Art. III-3:104 of the DCFR as well as in the ICC Force Majeure Clause 2003. The question (and main issue) is whether transactions governed by the CISG cover situations of economic hardship. I.e. can a change of circumstance that renders the performance more onerous (costly) be considered an "impediment" under Art. 79(1)?

b) Applicability and Scope

112 The failure to perform under the contract must be due to an "impediment beyond the parties' control". "Impediment" is a vague term. The CISG does not use the term "hardship" as the aim is that Convention should stand independently and free from any references to national legal systems.[330] The question is whether an extreme increase in the cost of performance is covered by the term "impediment" under the Convention. It is partly argued in the legal doctrine that Art. 79(1) CISG intends to also cover situations of economic "unaffordability" or hardship or, at least, that the article does not expressly exclude the possibility of economic hardship as an "impediment". There is disagreement among commentators whether that is the case. Some authors argue that Art. 79(1) CISG only grants relief if performance is rendered completely impossible (force majeure) i.e. the CISG does not cover situations of hardship, while other scholars extend the provision to cases of *severe* hardship. The issue boils down to whether it is a deliberate rejection of hardship or a lacuna. The central arguments of that discussion are highlighted below.

aa) A Rejection or a Mere Gap?

113 It is generally acknowledged in the legal doctrine that the intention behind the creation of Art. 79(1) CISG was to ensure that transacting parties should not easily be able to escape its contractual obligations due to economic difficulties as a result of price fluctuations in the market.[331] Nevertheless, it has been argued in the legal doctrine that there must be a "last limit of sacrifice" beyond which, within very narrow confines and in very serious and exceptional cases, the term "impediment" in Art. 79(1) CISG can be interpreted so as to include economic "unreasonableness" or "unaffordability" (hardship).[332] The question is where that line should be drawn. That must be decided in each individual case taking all circumstances into consideration.[333] Another view is that

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[330] KESSEDJIAN, Int. Rev. of Law and Econ. 2005, 415, 417.
[331] BERGER, 540.
[332] BERGER, 548; BRUNNER, 213 and 216 f.; SCHWENZER, on Art 79, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 1088; SCHLECHTRIEM, 102.
[333] SCHWENZER, on Art 79, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 1088; TALLON, 572, 581, explaining that it is a question of degree whether there is economic impossibility or absolute impossibility and that the circumstances in the case are determinant. Using the example of an object lost at sea that can be saved at a large cost the author suggests that the conclusion will be different if the object is a highly valuable sculpture or a machine tool.

economic difficulties can be considered an "impediment" if the obstacle to perform is comparable with other types of exempting causes.[334]

According to certain interpretations, the fact that Art. 79(1) CISG states that the disadvantaged party must prove that he or she could not "*reasonably* be expected to *overcome* the impediment" indicates that the scope of the provision goes beyond physical impossibility and the traditional force majeure concept (where typically the impediment cannot be overcome), to also include circumstances below this threshold, in which performance can still be carried out, but has become considerably more difficult, e.g. due to a dramatic rise in the costs of performance.[335] Hence, the fact that the impediment is submitted to the requirement of reasonableness is being interpreted as if a physical impediment only excuses the obligor if it cannot be overcome at a reasonable cost. It is thereby difficult to draw an exact line between cases of physical (absolute) impossibility and economic impossibility as any physical impossibility has economic consequences and can be translated into money. If a party is excused where the factual impediment can only be overcome at an excessive (unreasonable) cost, it has been argued that it would be illogical if the solution would be different where the performance becomes excessively burdensome (costly) as a result of a change in market conditions for example.[336] That view deserves support. **114**

On the contrary, it is argued that both the functional and conceptual differences between force majeure and hardship situations, as well as the clear wording and purpose of Art. 79(1) CISG, speak against a broad interpretation of the article.[337] Another argument is that the drafting history of Art. 79(1) CISG suggests that the intention was to exclude situations of hardship.[338] An attempt was made to include a separate article that addressed hardship issues but was ultimately rejected by the Commission.[339] The Norwegian delegation suggested that a debtor would be released from their obligations if, after the cessation of a temporary impediment, there had been a radical change in the underlying circumstances.[340] Concerns were expressed that it could be interpreted as if the obligor would be released to perform as soon as performance was made materially more difficult. [341] The drafting history has been interpreted in some places in the legal doctrine as if there is no room for hardship.[342] It is argued that there is a gap in the CISG that excludes the concept of hardship that the drafters **115**

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[334] HONNOLD/FLECHTNER, 631.
[335] BERGER, 545.
[336] BRUNNER, 213; Compare with the Official Comment to Art. III. - 1:110 of the DCFR, 711, where it states that there is a very fine line between an event that causes the performance to be possible only with totally unreasonable efforts ("impossibility") and a performance which is only very difficult despite that it is so ruinous for the obligor that it would result in bankruptcy.
[337] RÖSLER, ERPL 2007, 483, 503; DRAETTA, 192; FRICK, 219; MASKOW, Am. J. Comp. L. 1992, 657, 658 f.; KESSEDJIAN, Int. Rev. of Law and Econ. 2005, 415, 419 f. arguing that Art. 79(1) *alone* is not applicable to the hardship situation but that Art.7(1) and (2) CISG may provide for a possibility to solve the issue under the CISG. It is noteworthy that the word "reasonably" is used in the same way in the force majeure clause in Art. 7.1.7 of the UNIDROIT Principles (which is highly inspired by Art. 79 CISG) and does not include cases of hardship. Hence, two texts with very similar formulation should be interpreted differently. *See hereto*, DRAETTA, IBLJ 2002, 347, 349 f. DRAETTA/NANDA/LAKE, 193, stating that "Art. 79 cannot logically be interpreted in a way to permit or require adaptation."
[338] *See also*, the drafting discussions in the Yearbook of the United Nations Commission on International Trade Law, 1974, Volume V, 39 f.
[339] WINSHIP, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, 495, 507.
[340] SCHWENZER, VUWLR 2008, 709, 712. *See also*, the drafting discussions in the Yearbook of the United Nations Commission on International Trade Law, 1974, Volume V, 39 f.
[341] BERGER, 546 f.; BRUNNER, 216. *See also*, the drafting discussions in the Yearbook of the United Nations Commission on International Trade Law, 1974, Volume V, 39 f.
[342] TALLON, 572, 594; FLECHTNER, 93; RIMKE, Force majeure and Hardship, 197, 219 f.

seem to have accepted.[343] The drafting history, and what actually can be concluded from it, is far from clear.[344] The opinion among legal scholars is also divided. It appears, however, from the discussion that a number (perhaps not a majority) of commentators in the legal doctrine take the view that the scope of Art. 79(1) CISG leaves room for economic hardship (if it is sufficiently extreme) even where performance of the contractual obligation fall short of absolute impossibility.[345] At least, it is not wholly ruled out in the legal doctrine that Art. 79(1) is also applicable to situations of (severe) economic hardship. One could presumably expect a higher threshold before the point of tolerance is met.

bb) The Position of the Courts and Arbitral Tribunals

116 There are a couple of hardship cases arguing for an exemption on the basis of Art. 79(1) CISG. The court or tribunals do not explicitly reject the applicability of Art. 79(1) CISG also covering situations of economic hardship; instead, the claims were rejected on other grounds.[346] Case law is too lean to draw any exact conclusions. It can only preliminarily be concluded that it is not excluded that Art. 79(1) CISG covers cases of severe hardship.[347] It should also be noted that the cited case law hardly represents cases of extreme economic hardship.[348]

c) Art. 7(2) CISG – Hardship via Gap-Filling

117 Another argument in support of the view that Art. 79(1) covers events of hardship is the gap-filling function of the CISG according to Art. 7(2), stating: "Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". Hence, the hardship situation *could* be viewed as a matter, which is not expressly resolved by the CISG and should therefore be settled by applying Art. 7(2) CISG.[349] Thus, a matter governed by the CISG, but not expressly regulated, is to be decided in conformity with the general principles on which the CISG are based, i.e. in accordance with principles derived from the text of the CISG itself. The general principles governing the law of international trade can also be used to fill gaps in the CISG. It is debated in the doctrine whether the UNIDROIT Principles are an adequate source to supplement the CISG in this regard. The details of that discussion are beyond the scope of this study. It is merely noted that a great deal of caution is required, especially with regard to economic hardship and judge-led adaptation of contracts.[350] Consequently, for the UNIDROIT

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[343] RÖSLER, ERPL 2007, 483, 502 f.; FLECHTNER, Legal Studies Research Paper Series, Working Paper No 2011-09, March 2011, University of Pittsburgh School of Law, Pennsylvania, 1, 8 f. and 13.
[344] WINSHIP, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, 495, 509; SCHLECHTRIEM, 102. *See also*, the drafting discussions in the Yearbook of the United Nations Commission on International Trade Law, 1974, Volume V, 39 f.
[345] LANDO, Udenrigshandelens kontrakter, 299; BRUNNER, 213; FLECHTNER, Belgrade Law Review 2011, 84, 91; BERGER, 547 f.; SCHWENZER, on Art 79, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 1088; SCHWENZER, VUWLR 2008, 709, 712 f. For other authors indicating that the scope of Art. 79 may also cover situations of hardship see, e.g., HONNOLD/FLECHTNER, 627 ff.; ENDERLEIN/MASKOW, 324. *Compare hereto also*, WINSHIP, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, 495, 507.
[346] *See e.g.,* Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997; China International Economic & Trade Arbitration Commission, decision of Agristo N.V. v Macces Agri B.V.; Arrondissementsrechtbank Maastricht, decision of 09.07.2008, Société Romay AG v SARL Behr France, Cour de cassation, decision of 30.06.2004.
[347] BRUNNER, 222.
[348] *Compare*, WINSHIP, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, 495, 510.
[349] *See hereto*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 236.
[350] According to Art. 1(4), the UNIDROIT Principles may be used to interpret international uniform law instruments. *See also* the preamble to the UNIDROIT Principles and BONELL, 229 f. For a discussion on the UNIDROIT Principles as an

Principles on hardship to be applicable (or any other external principals of international trade for that matter), a change of circumstances or hardship must first of all be considered "a matter governed but not expressly settled in the CISG" [351] (i.e. not rejected by it – which takes us back to the previous discussion). Ultimately, the UNIDROIT Principles on hardship as a gap-filling instrument are dependant on the discussion above and whether the scope of Art. 79(1) excludes hardship situations or not, which at present is not entirely clear. In a recent case before the Belgian Supreme Court, *Scafom International BV v Lorraine Tubes S.A.S*, the gap-filling function was dealt with. The circumstances were as follows:

A contract was entered into for the sale of warm-rolled steel tubes between a French based company (seller) and a Dutch company (buyer). The contract did not contain any price adjustment clause for the event of changed circumstances. The CISG was applicable. Following the conclusion of the contract but prior to delivery, there was an unforeseeable increase in the price of steel by approximately 70 per cent whereby the seller requested adjustment of the price. The buyer refused to accept any price change. The Belgian Supreme Court held that an unforeseen change of circumstances leading to a substantial alteration of the contractual equilibrium might, under specific circumstances, constitute an event amounting to an impediment under Art. 79(1) CISG. More specifically, the court held, on the basis of the principles expressed in Art. 7(1) and Art. 7(2) CISG, that when circumstances fundamentally alter the contractual equilibrium, parties are entitled to request renegotiations of the contract. The buyer's claim was rejected and the seller was granted the right to request renegotiations of the price. In its ruling, the Belgian Supreme Court pointed out that gaps should be filled in a uniform manner, having regard to the "general principles governing the law of international commerce" and that such principles are to be found, among others, in the UNIDROIT Principles of International Contracts.[352] Thus, the court took the view that economic hardship could constitute an impediment under Art. 79(1) and that there is a gap in the CISG with respect to the remedies available in the event of economic hardship. Art. 6.2.3 of the UNIDROIT Principles could fill that gap in accordance with Art. 7(2) CISG. **118**

The court decision is interesting (and controversial) for several reasons. Firstly, it clearly confirms the view that Art. 79(1) CISG can, under specific circumstances, be interpreted so as to go beyond the traditional force majeure situation. Secondly, the UNIDROIT Principles are used as a gap-filling instrument with respect to remedies available for hardship situations not referred to in the contract. This is controversial and has been criticised in the legal doctrine as the provisions on hardship in the UNIDROIT Principles do not necessarily represent internationally recognised principles especially with respect to the different approaches of civil and common law jurisdictions in relation to the legal remedies adopted in Art. 79 of the CISG and Art. 6.2.3 of the UNIDROIT Principles. To fill the gaps of the CISG in this matter would be a way to indirectly enforce the approaches of Civil Law on non-Civil Law states that never agreed to such solutions.[353] As an example, in *ICC Case No. 8873* where the parties already agreed on applicable law to govern the contract, the Arbitral Tribunal held that the provisions of the UNIDROIT Principles on hardship, in particular, do not correspond at present to **119**

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instrument to interpret and supplement the CISG, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 236 f. VENEZIANO, Unif. L. Rev. 2010, 137, 139 ff., GARRO, Tul. L. Rev. 1995, 1149, 1155 ff. *See heeto also,* FLECHTNER, Belgrad Law Review 2011, 84 ff., for a critical view on the UNIDROIT Principles as a gap-filling instrument with respect to hardship and renegotiation.

[351] VENEZIANO, Unif. L. Rev. 2010, 137, 143.

[352] Scafom International BV v Lorraine Tubes S.A.S of 2009.06.19, available at: http://cisgw3.law.pace.edu/cases/090619b1.html

[353] FLECHTNER, Belgrad Law Review 2011, 84, 97 arguing that the UNIDROIT Principles often seem to favour the Civilian Law positions on controversial issues such as hardship. *See also*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 238.

the current practice in international trade.[354] Furthermore, the court's finding of a "gap" in the CISG with respect to adaptation of the contract for hardship is also criticised, as this very remedy was proposed and rejected or at least no agreement could be reached during the drafting of the CISG. Hence, it is argued that there is no gap to be filled in the first place.[355] The goal of creating a uniform sales law would also be jeopardized if courts and tribunals filled gaps in the CISG by national law approaches, of which the Belgian court ruling may be a practical example. The case is also interesting since it comes from the highest instance of a domestic court and not from an Arbitral Tribunal and at present seems to be the only contemporary case where a domestic court in Europe exempts a party from liability on the grounds of economic hardship based on lex mercatoria. Also, it deviates from other case law available on the subject matter. However, in a verdict by the OLG Hamburg involving a contract for the sale of iron-molybdenum, the seller was not exempted under Art. 79 CISG despite that the market price had tripled since the conclusion of the contract. The transaction was considered to be highly speculative and the price increase was thereby not found to be excessively onerous.[356] The grounds for rejecting the claim in the case implies that under certain circumstances, economic hardship may be regarded as an impediment exempting a party's performance under Art. 79 CISG. [357]

d) Conclusions on Hardship under the CISG

120 To sum up, courts and arbitral tribunals can either take the view that the word "impediment" in Art. 79(1) includes hardship situations or that hardship is a matter governed by the CISG, but not expressly regulated whereby by such gap in the Convention can be filled by way of applying Art. 7(2). They can also take the view that Art. 79(1) is exhaustive i.e., rejecting hardship situations and therefore gives no room for national laws or international private law by way of gapfilling.[358] The exact boundary is unclear. Since the term "impediment" is left unattended, at least in express terms, it is uncertain whether Art. 79(1) entails a more flexible standard than that of the unforgiving concept of force majeure.[359] The academic view is divided even though a great number appear to accept economic hardship as an impediment at least in very severe cases. In the majority of the cases cited it seems as if state courts and tribunals generally are reluctant to extend the scope to include economic hardship. It must, however, be recognized that the available decisions are too lean to draw more than preliminary conclusions.

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[354] ICC Case No. 8873 of 1997, JDI 1998, 1017, 1019. A Spanish and French company concluded a contract for the construction of work in a third country. Following several unforeseen difficulties that substantially increased the cost of the onstruction, the contractor requested the renegotiation of the contract invoking hardship.

[355] FLECHTNER, Belgrad Law Review 2011, 84, 98 ff.; SCHWENZER, VUWLR 2008, 709, 724; BERGER, 547; ZELLER, The UNIDROIT Principles and the Application of Article 79 CISG, 113, 126. To the contrary, BRUNNER, 218 f. suggesting that the courts also have the power to adapt the contract on the basis of Art. 7(1) CISG (the principle of good faith) and Art. 7(2) CISG (gap-filling function) incorporating Art. 6.2.3(4) of the UNIDROIT Principles. Another commentator argues that ruling by the Belgian Supreme Court would be more justifiable if the decision to grant the disadvantaged party the right to renegotiate the agreed upon price would be based on the principle of good faith in Art. 7(1) CISG. *See hereto,* VENEZIANO, Unif. L. Rev. 2010, 137, 145. It has also been advocated that Art. 79(5) read in conjunction with Art. 50 CISG on price reduction may be relied upon to open up for adaptation of the contract to reflect changed circumstances. *See hereto*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 242.

[356] Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997, available at: http://cisgw3.law.pace.edu/cases/970228g1.html.

[357] *Compare*, WINSHIP, Rabels Zeitschrift für ausländisches und internationales Privatrecht 2004, 495, 509.

[358] *Compare*, WINSHIP, RabelsZ 2004, 495, 508 ff. with reference to several national court rulings rejecting the possibility.

[359] *Compare*, ENDERLEIN/MASKOW, 325.

VII. Summary

The general rule and starting point in a situation of hardship under the jurisidctions and international unification works dealt with herein is that the principle of pacta sunt servanda should prevail. While the English courts certainly take the stricter view among the legal systems herein, the more pragmatic approach to hardship situations can be found in German law. The historical reluctance towards economic hardship and contract adaptation that other legal systems still struggle with was overthrown in Germany by the turbulent events at the beginning of the 20th century. The German economy was shaken to its foundations causing serious economic consequences in a large number of contractual relationships. Still, under all jurisdictions as well as the international unification instruments, the paramount rule remains that contracts are to be kept. There is generally no right for a contracting party to request judicial adaptation of the contract simply because the deal turned out to be a bad bargain following an unexpected adverse turn of events.[360] It is, however, possible, in certain narrow confined cases, in all jurisdictions herein, even in English law it could be argued, as well as in the three sets of non-legislative codifications, to obtain relief from the contract on the grounds of hardship. Whether the CISG is applicable to cases of hardship is disputed, but not ruled out. **121**

B. A Historical Perspective

I. Origins, Developments and the Current Position

To avoid any false conclusions the legal problem must also be viewed in the light of its early phases. This is particularly important with respect to a legal problem that is sensitive to economic cycles where the values and attitudes with respect to the subject matter are constantly changing. **122**

1. In Light of its Early Phases

a) A Rigid Attitude at the Turn of the Century

In 2015, the Swedish Contracts Act turned one hundred years old.[361] Unsurprisingly, other values dominated in 1915 when the Act was first enacted. The Contracts Act of 1915 was based on the legislator's belief that contracting parties could (or perhaps should?) look after their own interests.[362] Hence, the cornerstones of the 1915 Act were the principle of freedom of contract and the principle of *pacta sunt servanda.*[363] The courts were reluctant to admit exceptions to that principle.[364] The same attitude dominated in Swiss law. During the 19th century and prior to the First World War, the Clausula rebus sic stantibus and the issue of changed circumstanc- **123**

[360] *See e.g.,* BGE 100 II 345, p. 349; BGE 104 II 314, p. 315; BGE 107 II 343, p. 347 f.; SJZ 1968, 360, 360; *See hereto also*, in a verdict from the Swiss Commercial Court on 19.09.1964 – GVP 1964 p. 13; RAMBERG/RAMBERG, 186; ADLERCREUTZ, 284; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58); LANDO/BEALE, 115; MASKOW, Am. J. Comp. L. 1992, 657, 662; Art. III. – 1:110 (1) DCFR.
[361] Lag (1915:218) om avtal och andra rättshandlingar på förmögenhetsrättens område.
[362] Prop. 1975/76:81 p. 100; SOU 1974:83, p. 31.
[363] Prop. 1975/76:81 p. 10.
[364] *See e.g.*, NJA 1939 p. 241, where the court rejected an adaptation of a debenture note despite it preventing the owner of the properties from leveraging the properties efficiently; NJA 1946 s. 679, where the court rejected an adaptation in a case where a railway company agreed on fixed ticket prices for 38 residents despite the contract being unlimited in time and a strong and unexpected inflation; NJA 1956 s. 136, where a company undertook to provide wastewater sewerage at a fixed price and the court rejected an adaptation despite increased costs and inflation.

es were almost forgotten in the legal doctrine and the courts were generally reluctant to deal with the issue.[365] In the revised form of the Swiss Code of Obligations of 1911, the legislator also rejected a codification of the Clausula doctrine. In Sweden, in connection with the enactment of the 1915 Contracts Act, the legislator also left the issue unattended based on the consideration that it was premature to legislate on the issue.[366] The fact that France and Germany had just rejected legislating on the legal problem may have contributed to the Swedish legislators' decision.[367] As in many other civil law countries at the time, the primary focus was on party autonomy and the sanctity of contracts. The Clausula was viewed as inconsistent with promoting stability and certainty in business.[368] Similarly, the will-theories of contract law dominated in Germany during the 19th century. At the turn of the century, as just mentioned, the German legislator explicitly rejected a codification of the doctrine of Clausula rebus sic stantibus to be incorporated into the German Civil Code (*Ge*. "Bürgerliches Gesetzbuch") of 1896[369] to not jeopardize the sanctity of contracts.[370]

b) An Early Approach to Hardship

124 To a large extent, the rigorous and uncompromising attitude towards the issue of changed circumstances has gradually eased over the decades. Under Swedish law, it can even be argued that the principle of pacta sunt servanda never was strictly upheld. A number of statutory provisions allowed the court to adjust or set contract terms aside. For instance, prior to the introduction of §36 AvtL, §§36 through 38 of the Swedish Contracts Act allowed for the court to mitigate the applicability of penalty and forfeiture clauses and competition clauses. Also, §33 of the Contracts Act, still in force today, contains a general clause granting contractual relief of obligations if the counterparty acted against good faith and fair dealing at the time when the contract was concluded. §33 however does not give the court the authority to modify the contract terms but merely to cancel the contract in its entirety. With respect to changed circumstances, the Act on Factors, Commercial Agents and Commercial Travellers[371] allows for early termination of a contract under certain circumstances. The Swedish Land Code[372] also allows for early termination of contracts for re-assessment of contract terms in certain lease and rental cases. Admittedly, these statutory provisions and laws target very specific contracts and situations. Nevertheless, the legislator also did, prior to the introduction of §36 AvtL, recognize situations where exceptions to the principle of *pacta sunt servanda* could be motivated. The same could be argued for Swiss Law. In the beginning of the 20th century, the legislator, in different contexts, allowed the judge to intervene in the

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[365] BISCHOFF, 175; FICK, Die Clausula, ZSR 1925, 153, 155 and 170; DESCHENAUX, 196.
[366] NJA II 1915 p. 264.
[367] BÜHLER, Die clausula rebus sic stantibus als Mittel der Zukunftsbewältigung, 35, 36; The doctrine of assumptions was however codified in Art. 24(1) subsection (4).
[368] BISCHOFF, 175; LEU, Vertragstreue In Zeiten des Wandels, 107, 114.
[369] Motive, Vol. 2, p. 199 where the legislator expressly rejects the Clausula doctrine as a general principle of law applicable under German law. *See hereto also*, RGZ 50, 255 p. 257 and RGZ 99, 259 p. 259. *See however a later case*, RGZ 100, 129, p. 131 where the Clausula doctrine was applied to adapt the agreed contract price to reflect the new economic situation. In the new BGB, the legislator also rejected the Clausula doctrine as a general principle of law applicable under German law. *See hereto*, SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 523; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 11); *See however*, ROTH, MüKo zum BGB zu §313, 1801, (Rn. 42) arguing that while the Clausula doctrine has not been adopted as a general principle of law it has had an impact on the development of the doctrine of the "collapse of the basis of the contract" and thereby ultimately also on §313. *Similarly*, BGH 128, 320, p. 329 and STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 513 (Rn. 1).
[370] FINKENAUER, MüKo zum BGB zu §313, 1890, (Rn. 22); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117 (Rn. 5); JANDA, NJ 2013, 1, 1; SCHLECHTRIEM/SCHMIDT-KESSEL, 63; RÖSLER, ERPL 2007, 483, 487; HONDIUS/GRIGOLEIT, 61. *See also*, RGZ 50, 255, p. 257; RGZ 99, 259 where the German Supreme Court confirmed this view.
[371] Lag (1914:45) om kommission, handelsagentur och handelsresande.
[372] Jordabalken (1970:994).

contractual relationship under certain circumstances. Art. 373 OR, as mentioned above, allowed the judge to adapt the price or terminate the contract with respect to service agreements. Art. 287 of the Swiss Code of Obligations permitted the judge to reduce the rent for property and Art. 417 of the Swiss Code of Obligations gave the judge the authority to reduce disproportionately high brokerage fees.[373] Thus, statutory rules regulating specific situations also existed under Swiss law, giving the judge the authority to interfere in the contractual relationship by way of adaptation. Thus, the Swiss legislator did not rigidly apply the principle of pacta sunt servanda even if, as in Swedish law, exceptions were only allowed in relation to specific contracts and situations.[374]

2. Subsequent Evolution

a) A Different Tone

The legislators may regrettably have reject a codification on the issue of changed circumstances, since an urgent need to deal with the problem of economic hardship soon arose as a consequence of the outbreak of the First World War and the hyperinflation that followed in the 1920s, dramatically affecting numerous of contracts, as well as the subsequent severe worldwide economic recession in the 1930s inhibiting domestic business in a wide range of industries and, finally, the outbreak of the Second World War. The tone towards the issue of changed circumstances changed and the courts were struggling to find a solution. **125**

Under Swiss law, the solution was reasonably clear, these turbulent events resulted in the revival of the Clausula doctrine both in the legal doctrine and in case law.[375] The Swiss courts confronted with the issue of changed circumstances applied the Clausula, not, however, as an independent doctrine but in conjunction with statutory rules such as the principle of good faith and fair dealing in Art. 2 ZGB or by applying Art. 24 ZGB or Art. 273(2) OR.[376] As already mentioned, Art. 373(2) OR should rather be viewed as a specific "Clausula case" applicable to service contracts only.[377] **126**

From a Nordic perspective, these turbulent events in the first couple of decades of the 20th century triggered a discussion both by the Swedish legislator and by Nordic legal scholars and practitioners on the issue of changed circumstances.[378] The question of whether a general clause on the issue should be introduced into the Contracts Act arose for the first time in 1936 in connection with the establishment of the Promissory Notes Act (*Sw*. "Lag (1936:81) om skuldebrev."). The Nordic countries could not agree on the matter. It stayed at including a clause in the Promissory Notes Act applicable to debenture agreements.[379] §8 in the Promissory Notes Act allowed for a contract term in a debenture agreement to be modified or wholly set aside if it in an obvious manner would be **127**

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[373] OFTINGER, SJZ 1939, 229, 231.
[374] *Compare*, OFTINGER, SJZ 1939, 229, 231.
[375] MERZ zu Art. 2 ZGB, 276; MERZ, Die Revision, 394, 395 f.; BÜRGI, ASR 1939, 1, 137; WEBER, 7 ff; OFTINGER, SJZ 1939, 229, 229 f.; WIEGAND, Clausula rebus sic stantibus, 443, 446; BÜHLER, Die clausula rebus sic stantibus als Mittel der Zukunftsbewältigung, 35, 53. BGE 45 II 351; BGE 45 II 386; Zürich Handelsgericht, Abt. B., 03.02.1921, ZR 1922, 79 ff.; St. Gallen Handelsgericht SJZ 1968; Zürich, Obergericht, ZR 1967, 217 ff. *See however,* BGE 28 II 246, p. 252, where the Swiss Supreme Court rejected the Clausula as an implicit contract term.
[376] SCHMIEDLIN, 90 f.
[377] BGE 104 II 314, p. 315; BSK-ZINDEL/PULVER zu Art. 373 OR, 2358 ff.; ABAS, 162; GAUCH, Der Werkvertrag, Rn. 1071.
[378] NJA II 1936, 49 ff.; NJM 12, 1922, 113 ff.; NJM 1952, 209 ff.
[379] NJA II 1936 p. 52 f.

against fair dealing or otherwise unreasonable to demand the enforceability of the contract term.[380] §8 ultimately was an expression of the view that exceptions to the principle of *pacta sunt servanda* can be motivated when a strict application of the principle would lead to results that do not deserve the protection of the legal system.[381] The idea of introducing a general clause applicable to the whole area of obligations was already there and the intention was that §8 would be applicable *ex analogia* to contract terms in general and not limited to debenture agreements.[382] Despite such encouragement in the preparatory works, the courts did not seem to apply the clause in the way contemplated by the legislator but rather took a restrictive approach.[383] Furthermore, the old general clauses in §§36 and 37 of the Swedish Contracts Act were too narrow in scope and the conditions under which modification could take place were restrictive. They also never had any big impact on the judicial practice.[384] The courts, however, had other methods to set aside unfair contract terms. The Swedish courts primarily applied the doctrine of assumptions and, to a large extent, they also used contract interpretation to avoid unwanted results.[385] Such so-called "hidden" control by the Swedish courts sometimes resulted in forced interpretations of the contract terms in order to reach an acceptable result.[386] Thus, the courts "interpreted the way out of" unjust results.[387] The traditional way for the Swedish courts to deal with changed circumstances was to apply the doctrine of assumptions[388] developed in the legal doctrine and case law parallel to the invalidity rules in Ch. 3. The "predecessor" to the doctrine of assumptions is the clausula rebus sic stantibus principle and error in motivis as developed under Roman law.[389] It has been argued to be one of the reasons for the Contracts Act's survival with so few modifications, as the doctrine of assumptions accommodates the need for flexibility in contractual relationships.[390]

128 As no suitable provision existed to deal with the problem in the German Civil Code and the Clausula doctrine had been rejected by the legislator, the then German Supreme Court (*Ge*. "Reichsgericht") extended the doctrine of impossibility of performance in §275 of the BGB of 1896 to situations where the performance of the contractual obligation had become economically much more burdensome to carry out, but not impossible.[391] The German Supreme Court elaborated with a concept of so-called "economic impossibility."[392] The court was simply in a need of finding a solution in written law even though the interference in the contractual relationship ultimately was based on the considerations of the Clausula doctrine.[393] The solution initially applied by the court and promoted by some legal writers at that time received criticism as it endangered legal certainty with respect to the issue of impossibility of performance under §275 BGB, taking a normative element of "unreasonable-

[380] NJA II 1936 p. 52 f.
[381] NJA II 1936 p. 50 ff.
[382] NJA II 1936 p. 52; Prop. 1975/76:81 p. 19, 103; SOU 1974:83, p. 20; AGELL/MALMSTRÖM, 107 f.
[383] Prop. 1975/76:81 p. 101, 103; ADLERCREUTZ, 286; AHRNBORG, NJM 1952, 209, 210.
[384] LEHRBERG, 59.
[385] Prop. 1975/76:81 p. 101; SOU 1974:83 s. 32, 114; GRÖNFORS, Avtalslagen, 253; According to Hjalmar Karlgren (professor in civil law and active as judge in the Supreme Court of Sweden between 1946-1964) contract interpretation is in practice a common method used to avoid unfortunate results. *See*, KARLGREN, NJM 1952, 206, 207.
[386] Prop. 1975/76:81 p. 103; SOU 1974:83, p. 115.
[387] SOU 1974:83, p. 115.
[388] LEHRBERG, 57.
[389] LEHRBERG, Förutsättningsläran då och nu, 417, 420.
[390] FLODGREN, Förutsättningsläran. Ett viktigt komplement till avtalslagen, 385, 385.
[391] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117; RÖSLER, ERPL 2007, 483, 487 f.; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §275, 365 f.; PUELINCKX, J. of Int. Arbitration 1986, 47, 60; HONDIUS/GRIGOLEIT, 62.
[392] *See e.g*, RGZ 94, 45, p. 49 ff.; RGZ 100, 129, p. 131; RGZ 102, 272, p. 273.
[393] HAMMER, 86; JANDA, NJ 2013, 1, 2.

ness" into consideration.[394] The criticism that §275 BGB was ill-suited to deal with the issue of changed circumstances was acknowledged and as the court needed flexibility with respect to the legal remedies (i.e. revision rather than rescission of the contract) the court dealt with the issue of changed circumstances by way of applying the principle of good faith in §242 BGB, but also using the reasoning of the Clausula doctrine. For instance, in the well-known case *RGZ 100, 129*, the German Supreme Court applied §242 BGB and at the same time leaned its decision on the doctrine of the Clausula rebus sic stantibus to revise the contract price for the delivery of vapour due to price increases caused by the First World War.[395] Finally, in *RGZ 103, 328*, the German Supreme Court, for the first time, in the name of "good faith" applied §242 BGB as a basis to support the legal doctrine of "the collapse of the basis of the contract" (*Ge*. "Wegfall der Geschäftsgrundlage")[396] The court used the legal doctrine of "Geschäftsgrundlage" developed in academic writing and introduced by the legal scholar Oertmann in 1921[397] as the basis for the adjustment of the contractual obligation.[398] The doctrine enabled the judge to adapt contracts when a fundamental change in circumstances disrupted the contractual equilibrium by way of applying the concept of "reasonableness" having regard to the interests of both contracting parties.[399] Following these turbulent times, the same discussion that occurred among the Nordics legal scholars took place among German legal scholars during the negotiations on the 40. "Deutschen Juristentages" in Hamburg where a codification of the issue of changed circumstances was considered.[400] The same discussion topic was brought up on the 59th annual meeting of the Swiss Bar Association in 1924.[401] Thus, under all jurisdictions, a change in the attitude towards the hardship problem could be viewed as triggered by turbulent times. While the Scandinavian countries were fairly progressive in considering a codification of a general clause dealing with the issue of changed circumstances already in the first half of the 20th century (although ultimately rejected), the German courts, after some initial struggling in finding a suitable solution, came to develop a doctrine that would prove suitable decades ahead. The same could be said about the Swiss solution.

b) The 20th Century Approach and Attitude

The outbreak of the First World War and its aftermath was a clear turning point in the attitude towards the issue of changed circumstances. Under Swiss law, it was only after these turbulent times that a complete recognition of the Clausula doctrine by the courts occurred.[402] The "Clausula-cases", in the aftermath of the two World Wars, also triggered a discussion in the legal doctrine as to under what conditions the judge should be permitted to intervene in the contractual relationship by way of adjusting the contractual terms to the new circumstances.[403] The attitude towards the Clausula was generally negative[404] and the "post-war authors" consistently **129**

[394] PUELINCKX, J. of Int. Arbitration 1986, 47, 60.
[395] RGZ 100, 129, p. 131 f. The fact that judge-led adaptation of the contract was carried out resulted in heavy criticism in the legal doctrine. *See hereto e.g.,* REICHEL, 26. *To the contrary*, HEDEMANN, SJZ 1921, 305, 305. In, BGE 59 II 372, p. 375 the Swiss Federal Supreme Court explained that no such hesitation towards judge-led adaptation is valid under Swiss law. The court continued its reasoning that also the cancellation of a contract ex nunc could be viewed as an adaptation of the contract.
[396] RGZ 103, 328, p. 332 f.; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117; FINKENAUER, MüKo zum BGB zu §313, 1890, (Rn. 23); GRÜNEBERG, in Palandt, Kommentar zum BGB zu §275, 366; HAMMER, 86 ff; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 523; RÖSLER, ERPL 2007, 483, 487 f.
[397] *See hereto*, Oertmann, Die Geschäftsgrundlage. Ein neuer Rechtsbegriff. (1921).
[398] RGZ 103, 328, p. 332.
[399] HAMMER, 88; FINKENAUER, MüKo zum BGB zu §313, 1890, (Rn. 23). *See also*, RGZ 100, 129, p. 132.
[400] *See hereto*, KEGEL in: Verhandlungen des Vierzigsten Deutschen Juristentages 1953 Hamburg, 138 ff.
[401] Festgabe der Juristischen Fakultät der Unversität Freiburg(schweiz) Zur 59 Jahresversammlung des Schweizerischen Juristenvereins, 29/ 30 September 1924.
[402] ABAS, 159.
[403] *See for example*, OFTINGER, SJZ 1939, 229 ff.; MERZ, Die Revision, 394, 395 ff.; WEBER, 39 ff. and 65 ff.; SIEGWART, 77

stressed that an intervention by the judge on the basis of the Clausula should be carried out with the outmost caution and restrictiveness and be applied only in highly exceptional cases in order not to jeopardize the stability and certainty required in business.[405] While there is no doubt that the Clausula is recognized under Swiss law today, not as an independent doctrine but encompassed under Art. 2 ZGB, a strict application of the Clausula is still repeatedly encouraged and adherence to the principle of pacta sunt servanda is also stressed. [406] In a draft for a new revised general part of the Swiss Law of Obligations, carried out to reflect case law developed since the enactment of the OR in 1911, it is suggested to codify the basic requirement of the Clausula doctrine and thereby give the court the express authority to adapt or terminate the contract when the requirements have been met.[407] It is explained that the codification is not intended to change the requisites as developed in case law and the legal doctrine so far.[408] The idea of adding a general clause to deal with the issue of changed circumstances was brought up in Swedish law already in the second half of the last century. In an attempt to achieve legal uniformity in the Nordic countries, legal experts and authorities in the field of contract law met in Stockholm in 1951 to discuss current urgent legal matters, one being: "*The Modification of Contracts due to Changed Circumstances*".[409] The majority of the participants rejected the idea of a general clause, one of the grounds being that it would be inappropriate to have a clause covering a wide spectrum of contracts and a universe of adverse events when it would only be motivated making an exception to the principle of pacta sunt servanda in extremely few cases.[410] Moreover, similarly to the criticism provided by Swiss scholars in relation to the Clausula, a right to interfere in the contractual relationship by way of adaptation would create unpredictability, which could harm business life and ruin the moral undertaking in contractual relations.[411] The idea of introducing a general clause on the issue was simply too controversial for the majority of the participants. About one and a half decades later, another expert group of legal scholars, legal practitioners and other specialists from the Nordic countries met to revisit the question: *Are the Nordic Contract Laws in Need of a Revision?*[412] The attitude towards the issue on changed circumstances and the inclusion of a general clause had changed. It was advocated to abandon the "all or nothing" mentality characteristic of the Nordic contract acts. The participants were in favour of incorporating a clause similar to §8 in the Promissory Notes Act in the respective contract acts allowing the courts to adapt or invalidate unfair contract terms.[413] The preparatory work in Swedish law started in 1970.[414] Denmark, Norway and Finland followed shortly thereafter.[415] The General Clause was incorporated

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ff.; HEDEMANN, SJZ 1921, 305 ff; FICK, Die Clausula, ZSR 1925, 153 ff.; Obergericht Zürich, decision from 12.11.1982, ZR 1987, 2, 2.

[404] SCHMIEDLIN, 121.

[405] OFTINGER, SJZ 1939, 229, 236 and 248; SIEGWART, 189; WEBER, 82.

[406] BGE 101 II 17, p. 19; BGE 127 III 300, p. 307; BGE 104 II 314, p. 315; KRAMER, SJZ 2014, 273, 278; STAMMLER, ZBJV 1922, 49, 58; *See however*, WIEGAND, Clausula rebus sic stantibus, 443, 443 stating that the Clausula rebus sic stantibus is currently experiencing a boom ("Die Clausula rebus sic stantibus hat Hochkonjunktur").

[407] VOGT, in: Huguenin/ Hilty, Schweizer Obligationenrecht 2020. Entwurf für eine neuen allgemeinen Teil, zu Art. 19 OR 2020, 61 f.

[408] VOGT, in: Huguenin/ Hilty, Schweizer Obligationenrecht 2020. Entwurf für einen neuen allgemeinen Teil, zu Art. 19 OR 2020, 63.

[409] NJM 19. 1952, 181 ff.

[410] RODHE, NJM 19 1952, 181 ff.

[411] PALMGREN, NJM 19 1952, 193 ff, 209 ff.

[412] NJM 24, 1966, 182 ff.

[413] NJM 24 1966, 182, 186, 192, 195, 205, 209 f.

[414] The investigation was carried out by Prof. Dr. Jan Hellner and presented in 1974. In SOU 1974:83. Generalklausul i förmögenhetsrätten.

[415] The General Clause was incorporated 1975 in Denmark and in 1983 in both Norway and Finland. *See hereto,* VON POST 48 f. The clauses generally correspond to §36 AvtL except that the Danish courts do not have the authority to adapt the contract, *See hereto,* GRÖNFORS, Avtalslagen, p. 221.

in §36 of the Swedish Contracts Act in 1976. The old general clause in §36 was removed along with §8 in the Promissory Notes Act. The general clauses in §§37 and 38 on forfeiture and competition clauses were kept with some amendments.[416] What ultimately led to the inclusion of §36 AvtL in the Swedish Contracts Act was the legislator's view that there was an increased need to protect consumer rights.[417] Another contributing factor may also have been that more people and companies were involved in business, which also had become increasingly complex. Moreover, the legislator found the courts restrictive approach in applying the existing general clauses as unsatisfying. [418] A new attitude from the court was needed and encouraged by the legislator with the introduction of §36 AvtL by way of giving the courts increased powers[419] which would allow the courts to "openly" (rather than reverting to stretched contract interpretations) control contract terms.[420] The doctrine of assumptions was given little attention during the first couple of decades of the second half of the last century, to actually only revive following the introduction of §36 AvtL. [421] The German Supreme Court continued to adhere to the legal doctrine introduced by Oertmann also following the unstable times at the beginning of the last century.[422] A reluctance existed to the "new" approach also among German legal scholars.[423] The doctrine on "Geschäftsgrundlage," developed and established by the courts and in academic writing, was finally codified in §313 BGB (*Ge*. "Störung der Geschäftsgrundlage") and enacted into the new German Civil Code under the Law of Obligations in 2002.[424] The legislator did not intend to modify the doctrine as developed over decades in case law and in academic writing. Rather, the requisites have been transformed from case law to the new statutory provision without any substantial changes.[425] Hence, old case law and legal doctrine remain good law.

3. The Attitude Represented in the 21th Century:

a) The Clausula Rediviva

The historical outline above shows how the legislators, the courts and the general opinion among legal scholars have gone from a strict and uncompromising attitude towards the issue of changed circumstances and judicial-led adaptation to, although hesitant at first, the recognition of a problem of a too hardlined legislation. Due to the fear of opening the door to abusive requests to avoid bad bargains and to jeopardize the foreseeability in business, the courts and legal scholars only opened up for more flexible solutions with greatest caution, which ultimately resulted in domestic solutions where the issue of changed circumstances has been either codified or intended or suggested to be codified showing that the attitude today reflects times of a more (perhaps even excessive) liberal mind-set towards the issue of changed circumstances where judicial adaptation more than ever is in fashion. **130**

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[416] Prop. 1975/76:81 p. 37 f.
[417] Prop. 1975/76:81 p. 101, 165; SOU 1974:83, p. 33.
[418] Prop. 1975/76:81 p. 101.
[419] Prop. 1975/76:81 p. 102 f.
[420] SOU 1974:83, p. 115.
[421] FLODGREN, Förutsättningsläran. Ett viktigt komplement till avtalslagen, 385, 400; WIBERG, SvJT 1943, 773, 799.
[422] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, (Rn. 1) 530.
[423] *See e.g*, HEDEMANN in 1933 in: Die Flucht in die Generalklauseln. Eine Gefahr für Recht und Staat.
[424] FINKENAUER, MüKo zum BGB zu §313, 1890 f., (Rn. 24); ZIMMERMANN, Breach of Contract, 1, 13 f.; SCHWENZER, VUWLR 2008, 709, 711.
[425] Regeriungsbegründung BT-Ds. 14/6040, p. 175 f.; SCHLECHTRIEM/SCHMIDT-KESSEL, 64; FINKENAUER, MüKo zum BGB zu § 313, 1892 (Rn. 28); GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 530 (Rn. 1); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 523; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1118; RÖSLER, ZGS 2003, 283 p. 391.

b) General Trends in European and International Contract Law

131 The solutions adopted in international model rules and unification instruments also reflect and confirm the change in attitude towards the issue of hardship. All three instruments contain articles dealing with the issue of hardship. The solution adopted by the UNIDROIT Principles on hardship is an attempt to represent the practice of international trade and to find universally acceptable solutions to legal issues and to overcome issues that arise when a cross-border transaction is subject to domestic laws rather than reflecting a common core among the various national systems.[426] The UNIDROIT Principles are designed for worldwide use and are also widely used in practice.[427] The PECL on the other hand is first of all an academic product, which was created with the intention of providing a basis for a future harmonization of contract law within the European Community. The PECL also aims to be progressive and provide solutions to issues such as change of circumstances where national laws are silent.[428] It could, however, be argued that both the UNIDROIT Principles and the PECL aspire to find the best solution with respect to specific legal issues rather than merely finding a minimum standard or common core of national laws.[429] The DCFR is a substantial academic work prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law. The DCFR contains principles, definitions and model rules in important areas of private law and aims to contribute to a European private law. The DCFR is a product carried out by European Scholars and is not mandated by any politically legitimated body.[430] Unlike the UNIDROIT Principles, the rules are not based on commercial trade practice and they do not strive to apply a progressive approach on controversial areas of law. The hardship rule is to some extent based on the PECL and, share some features with the hardship rule in the UNIDROIT Principles.[431] The DCFR is a purely academic product of a comprehensive research project where comparative studies have been carried out to analyse private law in the jurisdictions of the European Union in order to show how a European private law could possibly look like. Thus, the DCFR goes further than the PECL in formulating a European contract law.[432] Interesting to note is that the DCFR contains a requisite that cannot be found in the other instruments. The obligor must have made attempts to renegotiate (in good faith) a reasonable and equitable adjustment of the contract terms prior to resorting to court.[433] It should, however, be noted that both the PECL and the DCFR have been referred to as having the status of an academic ground work for a future a uniform European contract law system while the UNIDROIT Principles are considered to be well-known to the international business community and thereby have been argued to play a more important role than PECL[434] and presumably also the DCFR.

The CISG on the other hand is an international convention aiming to harmonize private commercial law and is binding for the countries that have incorporated the convention. The origins of the CISG differ. The current Convention is a revision of the Uniform Law on International Sale of Goods and the Uniform Law on the Formation of Contract created in 1964. The outcome differs as the harmonization work reflects domestic approaches such as e.g. British common law taking a restrictive approach to the issue of hardship and rejecting judge-led adaptation. Nevertheless, while the CISG does not expressly contain a provision dealing with changed circumstances and economic hardship it is heavily debated and not completely ruled out that Art. 79(1) of the

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[426] FARNSWORTH, Am. J. Comp. L. 1992, 699, 701; BONELL, 11 ff. and 31; The UNIDROIT Principles, Introduction, XV.
[427] BONELL, The UNIDROIT Principles and Transnational Law, 24.
[428] LANDO/BEALE, xv ff.
[429] RÖSLER, ERPL 2007, 483, 503.
[430] VON BAR/CLIVE, 1 ff.
[431] Official Comment to Art. III. – 1:110.
[432] HERRE, SvJT 2012, 933, 933.
[433] Art. III. - 1:110 (3) (d).
[434] BONELL, 355; LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 439.

CISG is applicable to situations of severe economic hardship, which would be in line with a more liberal view. That will be dealt with in detail below.

II. The Different Approach of the British Common Law

The same tendencies reflecting a more liberal approach to the issue of hardship in the 21th century cannot be found under English law. Despite unstable times in the first half of the 20th century, the British common law firmly stood their ground, as it still does today. For centuries English courts took the view that a supervening event was not regarded as an excuse for a party not to carry out its contractual obligations. Party autonomy prevailed. The general rule of absolute liability was set out in *Paradine v Jane,* a case from 1646. The rational was that the parties could have contracted for the supervening event.[435] In the famous coronation cases, at the turn of the century, the English court developed the doctrine of frustration of contracts applicable under certain circumstances to situations of adverse turn of events but with no chance to let a party escape its contractual obligations due to mere hardship and not allowing judge-led adaptation of contractual terms to reflect new circumstances.[436] **132**

III. Summary

Modern laws and legal doctrine show a revival of what could be argued to be modern versions of the Clausula rebus sic stantibus.[437] A rigid attitude, however, prevailed at the turn of the century. The freedom of contract and the principle of pacta sunt servanda dominated. A codification of the Clausula doctrine had also been rejected in the revised forms of the Swedish Contracts Act of 1915, the Swiss Code of Obligations of 1911 and the German Civil Code of 1896. Perhaps regrettably since no suitable provision existed to deal with the issue of changed circumstances caused by the unstable times that were to follow. The turbulent events in the first couple of decades of the 20th century triggered a discussion among legal scholars and practitioners on the issue of changed circumstances. These discussions ultimately resulted in domestic solutions where the issue of changed circumstances have been either codified or intended or suggested to be codified generally reflecting a more relaxed attitude towards the legal problem. The same tendencies reflecting a more liberal approach to the issue of hardship in the 21th century cannot be found under English law that firmly has stood their ground that hardship is not a ground for relief. **133**

[435] Paradine v Jane [1646] Aleyn 26, 82 Eng. Rep. KB 897; MCKENDRICK, Frustration of Contract, 42.
[436] TREITEL, 313 ff.; BEALE, 1679; ATIYAH/SMITH, 192; MCKENDRICK, Frustration of Contract, 44; TREITEL, The Law of Contract, 868.
[437] *For a small selection of contemporary legal doctrine see e.g*, KRAMER, SJZ 2014, 273 ff; WIEGAND, Clausula rebus sic stantibus, 443 ff.; RÖSLER, ERPL 2007, 483 ff.; JANZEN, JCL 2006, 156 ff.; DOTEVALL, SvJT 2002, 441 ff.; DRAETTA, IBLJ 2002, 347 ff; GOTANDA, VJTL 2003, 1461 ff.; HAU, Vertragsanpassung und Anpassungsvertrag; JANDA, NJ 2013, 1 ff.; LINDMARK, Om jämkning av kommersiella avtal.

C. General Observations on Scope and Applicability of Statutory Adaptation Instruments

I. Hardship – A Cautionary Note

134 The legal systems dealt with herein all admit that exceptions to the principle of pacta sunt servanda can be motivated in certain legitimate cases. Common to all jurisdictions as well as the mercantile laws is that a restrictive approach is taken. It is clear that exceptions to the general rule should be allowed only in highly exceptional cases. In fact, it is hardly possible to find a case or a discussion in the doctrine on the topic without a cautionary note is being added. Thus, the exceptions to the sanctity of contract as outlined above all operate under narrow confines and at present date, judge-led adaptation of contracts to reflect changed economic realities is used sparingly, in exceptional cases only and encouraged to be applied with great caution.[438] In German Law, the same restrictive approach was also applied prior to the codification in §313(1) BGB under the doctrine of the collapse of the basis of the contract.[439] Similarly, in Swedish law, the courts were generally reluctant to interfere in contractual relations on the base of a change in circumstances prior to the introduction of §36 AvtL.[440] The lack of formal support in law to modify or set aside contract terms may have contributed to a restrictive approach. With the introduction of §36 AvtL, the legislator encouraged a new attitude, however, emphasizing that not every change in circumstances could lead to the applicability of the new provision.[441] During the drafting of the clause it was decided to omit the word "clearly" from the "unreasonable" requisite, the core of the clause, in order to stress the courts' new expanded powers to set aside and modify contract terms.[442] In the preparatory works it was also mentioned that there is no urge to stress that the courts should be using a restrictive approach in applying §36 AvtL, as the aim is a new and less restrictive attitude from the courts.[443] Nevertheless, not every contract where there is an imbalance between the parties' benefits or performances can be modified with the support of §36 AvtL. [444] The omission of "clearly" could rather be viewed as a statement from the Swedish legislator to assure that the same would not occur as with the prior general clause in §8 of the Promissory Notes Act where the courts did not apply the clause in the way as was contemplated by the

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[438] *For Swedish law,* Prop. 1975/76: 81, p. 127; VON POST, 258 ff. and with respect to the doctrine of assumptions see e.g., LEHRBERG, 50 f. NJA 1981 p. 269, p. 271; NJA 1985 p. 178, p. 191 f.; NJA 1997 p. 5, p. 17; NJA; NJA 1999 p. 793, p. 808. *For Swiss Law*, BSK-HONSELL zu Art. 2 ZGB, 46; BSK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 562; CARONI, 207; BÜRGI, ASR 1939, 1, 116 and 143 f.; BGE 101 II 17, p. 19; BGE 48 II 443, p. 451; Obergericht Zürich, decision from 12.11.1982, ZR 1987, 2, 3. *Compare hereto also*, BGE 54 II 257, p. 277 where the starting point in a case for adaptation is that the role of the judge is not to remedy but to respect the contract as concluded by the parties. *For German Law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 530 (Rn. 1); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1117; RÖSLER, ERPL 2007, 483, 511; HORN, Gutachten und Vorschläge, 636; BEALE, 1148. *For the position under the Mercantile laws*, MASKOW, Am. J. Comp. L. 1992, 657, 661; LANDO/BEALE, 113; BONELL; MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 247. *See hereto also*, ICC Case No. 8486 of 1996, Collection of ICC Awards I, 321, 326 where the tribunal stressed the exceptional character of the hardship provision of the UNDROIT Principles in relation to a sales contract.

[439] LÖRCHER, DB 1996, 1269, 1269; RGZ 47, 42 p. 56; BGH 47, 48 p. 52; BGH 135, 333 p. 339; BGH 131, 209 p. 216; NJW 1974, 1186 f.; NJW 1958, p. 1772, 1773; NJW 1977, 2262, 2263; BGH DB 1958, 1325; BGH WM 1965, 843, p. 845 f.

[440] *See e.g.*, NJA 1939 p. 241; NJA 1946 s. 679, NJA 1956 s. 136.

[441] Prop. 1975/76: 81, p. 127.

[442] Prop. 1975/76:81 p. 106 ff.; The investigation however recommended to use the requisite "improper" for continuity reasons and correspondence with the terminology used in the old general clauses. Similar to the legislator's view, the investigation was of the opinion to omit "clearly" from the core requisite. *See hereto*, SOU 1974:83 p. 117 ff.

[443] Prop. 1975/76:81 p. 117; SOU 1974:83 p. 128.

[444] ADLERCREUTZ, 288; Prop. 1975/76: 81, p. 127.

legislator, but rather took a (perhaps too) restrictive approach.[445] Swedish courts have nevertheless generally showed a reluctance to interfere by way of adapting contract terms based on §36 AvtL to not endanger the principle of pacta sunt servanda.[446] §36 AvtL has mainly been used in consumer contracts and so far has only been used with great caution in business contracts.[447] Similarly, with respect to the doctrine of assumptions, only in a small number of special cases is it reasonable to give an assumption legal relevance and thereby pass on the risk for the erroneous assumption to the counterparty.[448] In English law, where judge-led adaptation of contracts is excluded, it is stressed both in case law and the legal doctrine that the doctrine of frustration should not be lightly invoked[449] and that the scope of the doctrine of frustration of contracts is narrow.[450] To invoke hardship under Art. 6.2.2 of the UNIDROIT Principles is similarly possible in exceptional cases only.[451]

Certain contract specifics e.g., the contractual duration, the speculative nature of the transaction and whether the contracting parties act in the course of a business are factors that in some jurisdictions motivate a stricter assessment. **135**

II. Factors Motivating a Restrictive Approach

1. Commercial Contracts

A stricter approach is generally taken with respect to commercial contracts where the parties are on equal footing. A party to a contract where both contracting parties act in the course of a business may only exceptionally be granted relief under §313 BGB.[452] The same applies in relation to §36 AvtL. While an adaptation of the contract can be relevant in purely commercial contracts it is considered that professionals have better possibilities to foresee the consequences of a contract term than for example a consumer or private individuals.[453] Therefore, a stricter approach is taken. Among practitioners (rather than scholars), *NJA 1979 s. 483*[454] is considered to express that contracting parties shall safeguard their own interests and that interference in commercial contracts shall be avoided as far as possible.[455] In *Rt. 200 s. 806* the Norwegian Supreme Court similarly **136**

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[445] Prop. 1975/76:81 p. 101, 103; ADLERCREUTZ, 286; AHRNBORG, NJM 1952, 209, 210.
[446] GRÖNFORS, 45.
[447] VON POST, 258 ff.
[448] NJA 1981 p. 269, p. 271; NJA 1985 p. 178, p. 191 f.; NJA 1997 p. 5, p. 17; NJA; NJA 1999 p. 793, p. 808. *See also*, LEHRBERG, ERPL 1998, 265, 270.
[449] Pioneer Shipping Ltd. v B.T.P. Tioxide Ltd. (*The Nema*), [1982] A.C. 724, 752; Davis Contractors Ltd v Fareham UDC [1956] AC 696, 727; Tsakiroglou v Noblee Thorl GmbH [1962] A.C. 93, 115; Bank Line Ltd. v Arthur Capel [1918], UKHL 1, 12, available at: http://www.bailii.org/uk/cases/UKHL/1918/1.html
[450] Tsakiroglou v Noblee Thorl GmbH [1962] AC 93, 115. *See also*, Viscount Simonds in: Davis Contractors Ltd v Fareham UDC [1956] A.C. 696, 715 f.
[451] In an arbitral award involving a sales contract, the tribunal stressed the exceptional character of the hardship provision of the UNIDROIT Principles. *See*, ICC Case No. 8486 of 1996, Collection of ICC Awards I, 321, 326; MASKOW, Am. J. Comp. L. 1992, 657, 661; LANDO/BEALE, 113; MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 247.
[452] BGH DB 1958, 1325; BGH 131, 209 p. 216. *See hereto also*, VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 113
[453] Prop. 1975/76: 81, p. 105, 127.; SOU 1974:83, p. 164.
[454] In the case, a producer of price calculators for petrol pumps included an exemption clause in the contract excluding responsibility for indirect or consequential damages caused by any error with the machines. It turned out that the machines miscalculated the price for petrol resulting in the petrol being sold too cheaply.
[455] *See e.g.*, HEDWALL, 178; LUNDMARK, 114. *To the contrary*, LINDMARK, 281, 283 ff and 292; HELLNER, Festskrift til Sjur Braekhus, 213, 218. The reasoning by the court shows that the court weighted different elements of the contract making an overall assessment of the contract in order to decide whether the disputed exemption clause was unreasonable. Thus, it cannot be argued that the case closed the gate for the applicability on commercial contracts. *See*, NJA 1979 s. 483. p. 505.

explained that a restrictive approach should be taken in relation to commercial contracts.[456] The cases narrow down the applicability of §36 AvtL considerably. The Swedish legislator also encourages a restrictive application of §36 AvtL with respect to commercial contracts.[457] It is assumed that in commercial contracts there is symmetry with respect to the contracting parties' knowledge, experience and bargaining position while in a consumer contract one party typically has limited economic means and experience. It is assumed that individuals acting in the course of a business can to a larger extent than otherwise influence the contract terms while consumers often have little chance to safeguard their interests.[458] In Subsection 2 of §36 AvtL it is explicitly spelled out that special attention shall be given to the fact that a party is a consumer or otherwise in an inferior position.[459] According to the legislator, it is not conclusive that a party belongs to a certain category. The actual relationship between the parties must be assessed in each case. [460] As an example, in *NJA 1979 s. 666*, the Swedish Supreme Court came to the conclusion that the dispute resolution clause was unreasonable as it gave the seller the sole discretion to decide the dispute resolution method and the buyer had limited economic means and little experience with respect to the type of transaction. Additionally, the buyer was dependant on the seller as the only company in Sweden delivering the product. The seller on the other hand was a well-established company with substantial experience in the field. The Swedish Supreme Court concluded that the buyer was in an inferior position.[461] It is important to note that the fact that a contracting party is in an inferior position is by itself enough to invoke §36 AvtL. Something more is required to modify or set aside a contract term with the support of §36 AvtL.[462] While not explicitly pointed out in Swiss law, one can assume that a stricter approach generally is taken in commercial contracts[463] although the view is that the Clausula doctrine generally should be applied with great caution irrespective of the type of contract as it conflicts with the principle of pacta sunt servanda.[464]

2. Speculative Contracts

137 Many contracts, especially commercial contracts, involve a certain degree of risk taking and speculation on one or both parties' side. For example, there may, at the time when the contract is concluded, exist an uncertainty as to how a certain event will play out in the future. Generally, an adaptation of the contract to reflect a change in circumstances is not applicable to speculative contracts where the risk associated with the contract in question materialises.[465] Simply, a party that enters into a contract of a speculative nature calculates on making a high

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[456] Rt. 2000 p. 806, p. 816.
[457] Prop. 1975/76:81 p. 104 f.
[458] Prop. 1975/76:81 p. 103 f.
[459] *See also*, Prop. 1975/76:81 p. 103, 109, 117. The general clauses in Denmark, Norway and Finland do not provide for such a requisite in the law text. A party's inferior position or a party's superior position should however be taken into consideration. *See hereto*, Von Post, 67 f.
[460] Prop. 1975/76:81 p. 103, 109, 117.
[461] NJA 1979 s. 666, p. 669 f. It should however be noted that the legislator's view is that arbitration clauses should not, as a general rule, be modified or set aside with respect to commercial contract where the parties are on equal footing. *See hereto*, Prop. 1975/76:81 p. 147.
[462] VON POST, 111.
[463] *Compare hereto*, HEDEMANN, 309; OFTINGER, SJZ 1939, 229, 235 with reference to BGE 54 II 256 p. 277.
[464] ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 239; BK-KRAMER zu Art. 18 OR, 138 f.; OFTINGER, SJZ 1939, 229, 236 and 248; ZK-BAUMANN zu Art. 2 ZGB, 698; SCHWENZER, 271; HAUSHEER/JAUN, 145; MERZ, Die Revision, 508; SIEGWART, 189; KRAMER, SJZ 2014, 273, 278; BSK-WIEGAND zu Art. 18 OR, 174 and 180; SCHMIEDLIN, 112;WEBER, 84. *See also,* BGE 101 II 17, p. 19; BGE 127 III 300, p. 307; BGE 104 II 314, p. 315.
[465] *For Swiss law*, BK-WIEGAND zu Art. 18 OR, 176; MERZ zu Art. 2 ZGB, 289; OFTINGER, SJZ 1939, 229, 235; BISCHOFF, 114 and 213; ZR 1936, 245, 248; BGE 59 II 372, p. 380; BJM 1980, 75, 80 f.; SJZ 1968, 360, 360; ZR, 1936, 245, 245; *For Swedish Law*, SOU 1975:83, p. 157; DOTEVALL, SvJT 2002, 442, 451 f.; *For German Law*, GRÜNEBERG, in Palandt,

profit or on a beneficial development of the future and must reasonably also stand the risk that it goes the other way. While all contracts to some extent can be argued to contain speculative elements, contracts that expressly are speculative (e.g. security and commodity trading transactions) or contracts that mainly are of a speculative nature will generally exclude judge-led adaptation.[466] For example, a purchase of securities contains a speculative element with respect to the future value of the securities. The value may increase or decrease depending on subsequent events. The purchaser is deemed to consider such risks when acquiring the securities and has thereby assumed the risk for the event that the securities decrease in value.[467] Other transactions that typically are considered to be of a speculative nature are transactions involving commodities.[468] With respect to contracts where the risk itself is the object of the contract such as hedging contracts or interest exchange contracts, the hardship exemption is generally excluded.[469] Not all contracts are of such a purely speculative character but may still contain elements of speculation. In each case, it must be considered in what regard the contract is speculative and to what extent the contracting party has assumed the risk of the supervening event (e.g., by way of being compensated elsewhere in the contract).[470] Naturally, the courts are reluctant to shift over the burden of a supervening event on the counter party in cases where one party has speculated on making a certain profit if the developments would have gone in the other direction.[471]

3. A Subsidiary Function

The courts must be careful not to interfere in a contract where the parties already bargained for the supervening event as an inherent risk associated with the transaction. The hardship exceptions are strictly subsidiary to the allocation of risk as provided in the contract or that follows from the nature of the transaction.[472] Thus, hardship is ruled out when a party expressly or implicitly assumed the risk for the adverse turn of event in the contract. **138**

Kommentar zum BGB zu §313, 532 (Rn. 20); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 526; WOLF/LARENZ, 707 (Rn. 37); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1137; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 517 (Rn. 21); FINKENAUER, MüKo zum BGB zu §313, 1905 (Rn. 70); *See hereto e.g.*, RGZ 92, 322 p. 324; RGZ 88, 172, p. 175ff.; NJW 1958, 906, p. 906. *See also*, BRUNNER, 424 with respect to the UNIDROIT Principle and the PECL and with respect to Art. 79(1) CISG, ENDER LEIN/MASKOW, 324.

[466] *For Swiss law*, BISCHOFF, 114 and 213 f.; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569 f.; BSK- WIEGAND zu Art. 18 OR, 176; BRUNNER, 438; WEBER, 60. For Swedish Law, RAMBERG/RAMBERG, 189 f. *For Mercantile Laws*, *see,* BRUNNER, 424, with respect to Art. 6:111 PECL and Art. 6.2.2 UNIDROIT and ENDELEIN/MASKOW, 324, with respect to Art. 79(1) CISG stating that the threshold for triggering hardship must be set significantly higher in contracts of a speculative character.

[467] BRUNNER, 424; RAMBERG/RAMBERG, 189.

[468] BRUNNER, 424; RAMBERG/RAMBERG, 190.

[469] BRUNNER, 425; DRAETTA, IBLJ 2002, 347, 397.

[470] *For Swiss law*, SCHMIEDLIN, 163; BISCHOFF, 114; *Swedish Law*, SOU 1975:83, p. 157; DOTEVALL, SvJT 2002, 442, 451 f. *For German Law,* KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1136; FINKENAUER, MüKo zum BGB zu §313, 1902 f. (Rn. 59 and 61). *For International Law*, BRUNNER, 425, explaining that a high profit margin may indicate that the seller assumed a proportionately higher risk.

[471] *See hereto e.g.*, RG 1976 p. 650; ND 1959 s 333; BGE 59 II 372, p. 380; BGH JZ 1978, 235, 235 f.

[472] *For Swedish law*, Prop. 1975/76: 81, p. 119, 127; RAMBERG/RAMBERG, 189 f.; *For Swiss law*, ZK-BAUMANN zu Art. 2 ZGB, 692; HAUSHEER/JAUN, 145; SCHMIEDLIN, 157; OFTINGER, SJZ 1939, 229, 233; BISCHOFF, 17. *For German law*, §313 Subsection (1); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1120 ff.; HONDIUS/GRIGOLEIT, 55; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 61); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 526; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1136; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 20 – 21); NJW- RR 93, 881, p. 881; BGH 58, 355 p. 363; BGH 74, 370 p. 373; NJW 2006, 899, p. 901. *For Mercantile Laws,* Art. 6:111(d) PECL and Art. 6.2.2.(d) of the UNIDROIT Principles as well as Art. III. – 1:110(3)(c) DCFR. *See hereto also*, BRUNNER, 424; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 24.

In Swiss law, in the absence of mandatory statutory rules or contractual provisions settling the matter, guidance on how the risk should be allocated among the parties should first be sought among non-mandatory statutory rules. Only when no statutory rule, directly or by analogy, is applicable to the situation will the judge have the power to intervene in the contract by way of gapfilling in accordance with the hypothetical will of the parties and the requirement of good faith.[473] Thus, the Clausula doctrine has a secondary function to the allocation of risk as provided in the contract, in statutory rules[474] and the contracting parties "hypothetical bargain". For instance, in *BGE 43 II 214*, a contract was entered into for the purchase of thirty, respectively twenty tons of copper wire. Due to the ongoing war, it became more burdensome (costly) for the seller to perform its contractual obligations as its suppliers, due to export restrictions, were unable to deliver copper. The Swiss Federal Tribunal explained that the seller had taken on the risk for the increased copper prices as the seller explicitly had declared that he was in possession of the copper wire prior to the contract being concluded. §313 BGB is similarly subsidiary to the statutory distribution of risk as well as a risk allocation that can be deducted from the purpose of the contract.[475] Under German law, statutory provisions are resorted to only when the allocation of risk cannot be deducted from the contract and there are no applicable mandatory statutory rules.[476] In the absence of contractual provisions or more specific legal rules, the judge may, if there is an unintentional gap in the contract, by way of supplementary contract construction, (*Ge.* Ergänzende Vertragsauslegung) fill the gap with the parties' intentions in order to decide how the change in circumstances should be dealt with.[477] §313 BGB only comes into play when the contract is silent and there is no unintentional gap in the contract that can be filled with the parties' intentions[478] or when the intention of the contracting parties cannot be identified.[479] Thus, contract interpretation and supplementary contract construction has priority over §313 BGB.[480]

4. The Contract Term

139 The duration of the contract will have an impact on the assessment of whether the hardship exceptions are applicable. A contract term extending over a long period of time could be viewed as if the party implicitly has agreed to bear the risk of a change in circumstances. This position is often taken if the price has been fixed without addressing the issue of change in circumstances in the contract.[481] While transacting parties cannot exclude the possibility of a change in circumstances when entering into a long-term contract, it is difficult, if not

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[473] BGE 127 III 300, p. 307 f.; BGE 47 II 314, p. 318; BK-WIEGAND zu Art. 18 OR, 180; LEU, Vertragstreue In Zeiten des Wandels, 107, 115; GAUCH, Auslegung, Ergänzung und Anpasung, 209, 213.
[474] BGE 93 II 97, p. 109; BGE 127 III 300, p. 307; ZK-BAUMANN zu Art. 2 ZGB, 692; BISCHOFF, 180; HAUSHEER/JAUN, 142; WIEGAND zu Art. 18 OR, 180; SCHMIEDLIN, p. 109; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 227; SULZER, AJP 2003, 987, 990.
[475] SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 526; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 532 (Rn. 20); WOLF/LARENZ, 707 (Rn. 35); FINKENAUER, MüKo zum BGB zu §313, 1902 (Rn. 59 and Rn. 68 f.); BGH 74, 370 p. 373; NJW 2000, 3432, p. 3433.
[476] WOLF/LARENZ, 707 (Rn. 36); RÖSLER, ERPL 2007, 483, 490.
[477] FINKENAUER, MüKo zum BGB zu §313, 1902 (Rn. 61); BGH 74, 370 p. 373; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1121; GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 10); RÖSLER, ERPL 2007, 483, 490; NJW-RR 1988, 312 p. 312 ("Die ergänzende Auslegung darf nicht im Widerspruch zum tatsächlichen Parteiwillen stehen."); *See also,* BGH 81, 135 p. 138; BGH 90, 74; NJW 2012, 526 p. 527, where the contract contained an escalation clause that no longer fulfilled its purpose.
[478] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 10); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1121 f.
[479] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 10); BGH NJW 2017, 2191, p. 2192.
[480] *See hereto*, NJW-RR 1990, 601, p. 602; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 524; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 515 (Rn. 8.); FINKENAUER, MüKo zum BGB zu §313, 1926 (Rn. 143).
[481] *See e.g.*, BGE 59 II 372*;* RG 1976 s. 650; RGZ 99, 259; NJW 1976, 142. *See hereto also the discussion on the hardship exception in*, Art. 6.2.2 UNIDROIT Principles, DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 500 f.

impossible, to draft a long-term contract that considers all possible future situations in a just and equitable manner. Thus, the fact that the contract is entered into on a long-term could work as an argument against or in favour of a contract adaptation.[482] The standpoint differs. On the one hand, it is argued that the exceptions primarily becomes relevant with respect to long-term contracts as the chances of a supervening event occuring are simply higher when the contract term extends over several years or even decades.[483] For instance, the view in the preparatory works to §36 is that an adaptation becomes relevant in contracts with a long-duration as it is difficult for transacting parties to assess and overview potential future adverse turn of events.[484] Cost increases are for example regarded to primarily be relevant in long-term contracts.[485] On the other hand, it is argued that contracting parties cannot reasonably expect that the contractual economic equilibrium remains the same throughout the contract term when entering into a contract extending over a longer-term.[486] In Swiss law, if the parties do not address the issue in the contract it is also generally seen as if the contract must be fulfilled as agreed and the disadvantaged party must bear the risk for any change in circumstances.[487] The same view is expressed in German law where an adaptation is only motivated under exceptionally special circumstances in a long-term contract not addressing the issue of change.[488] It is simply part of the normal business risk that future events may develop in a way disadvantageous to one of the parties.[489] The same point of view has been expressed in the Swedish legal doctrine.[490] Similarly, English case law provides that a long-term contract is more difficult to frustrate than a contract with a short term.[491] One author argues (in relation to Art 6.2.2 of the UNIDROIT Principles) that the hardship exception generally is applicable on long-term contracts with a fixed price without addressing the issue of change in the contract only that the threshold for triggering hardship is set higher.[492] The same idea has been expressed in the Official Comment to the DCFR Art. III. – 1:110 where it is

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[482] *Along similar lines see*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 254; DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 500 f.; MERZ zu Art. 2 ZGB, 289.

[483] *For Swiss law*, BISCHOFF, 208; Oftinger, SJZ 1968, 229, 234; SIEGWART, 82; MERZ zu Art. 2 ZGB, 289; FRICK, 205; SCHMIEDLIN, 105; BSK-HONSELL zu Art. 2 ZGB, 46; VON THUR, 170, footnote 70a; DESCHENAUX, 202; BGE 48 II 443, p. 451; BGE 45 II 351, p. 355; BGE 62 II 42, p. 45; BGE 69 II 139, p. 144 f. *For Swedish law*, DOTEVALL, SvJT 2002, 442, 443; SOU 1974:83, p. 110 f.; SOU 1974:83, p. 164. Same position is taken o in the Danish and Norwegian legal doctrine. *See hereto*, ANDERSEN, 244; GOMARD, 186 f. WOXHOLTH, Avtalerett, 396; *For German law*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1129. *For International Law*, Comment No. 5 on Art. 6.2.2 of the UNIDROIT Principles (2010 edition); MCKENDRICK, 810 f.

[484] Prop. 1975/76: 81, p. 127; SOU 1974:83, p. 156. The same view can be found in the Nordic doctrine. *See, e.g.,* ANDERSEN, 244: WILHELMSEN, 131; WOXHOLTH, Avtalerett, 400. It is also considered that professionals generally have better possibilities to foresee the consequences of a contract term than, for example, a consumer or private individual. *See hereto*, Prop. 1975/76: 81, p. 105, 127; SOU 1974:83, p. 164.

[485] SOU 1974:83, p. 164. *See also*, Prop. 1975/76: 81, p. 127 where it states that §36 AvtL can be applied to adapt contracts that are entered into for an indefinite period of time.

[486] *For Swiss law*, WIEGAND zu Art. 18 OR, 175.BGE 100 II 345, p. 348 f.; BGE 47 II 440, p. 459; *For German law*, BGH 86, 167, p. 169; BGH 77, 194 p. 198; BGH 90, 227 p. 228; NJW 1991, 1478, p. 1479; NJW 1974, 1186 f.; HAMMER, 89. *For Mercantile laws*, BRUNNER, 439. *See hereto also*, ICC Case 1512 stating that an even stricter approach should be taken in relation to long-term *international* business contracts.

[487] BGH 107 II p. 347 ff.; BISCHOFF, 16 ff. where the Swiss Federal Tribunal explained that in long-term contracts without a clause regulating changed circumstance one must assume that the parties intended that the agreed price would remain unchanged throughout the contract term so that foreseeable changes in the production costs cannot not lead to an adaptation of the price.

[488] NJW 1991, 1478, p. 1479; RGZ 106, 7 p. 8 f.; HAMMER, 89.

[489] BGH 86, 167, p. 169; BGH 77, 194 p. 198; BGH 90, 227 p. 228; NJW 1991, 1478, p. 1479; NJW 1974, 1186 f.; HAMMER, 89.

[490] RAMBERG/RAMBERG, 192.

[491] Lord Strathcona Steamship Co. Ltd. v Dominion Coal Company Ltd., [1926] 134 LT 227, 228 (a potentially 18-year long term); National Carriers Ltd. v Panalpina (Northern) Ltd. [1980] UKHL 8, 7 (a lease for a duration of 999 years).

[492] DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 500 f. *See hereto also e.g.*, Comment No. 5 on Art. 6.2.2 of the UNIDROIT Principles (2010 edition); MCKENDRICK, 810 f, explaining that hardship normally will become relevant in long-

explained that while a party reasonably may expect price fluctuations in contracts with a long contract term, the same line of argument does not necessarily apply to exceptional and sudden fluctuations of a kind which no reasonable person could expect.[493] In BGE 59 II 372, the Swiss Federal Court held that a termination or adaptation of the contract can not *easily* be invoked as parties to long-term contracts must, to a larger extent than otherwise, take market fluctuations into account.[494] This view balances both arguments and deserves support. I.e., hardship can be invoked in long-term contracts as those contracts to a larger extent are exposed to adverse turns of events, but since parties cannot expect things to remain the same, the threshold for triggering an exception must be set higher. Thus, the length of the contract term is not a prerequisite for applying the hardship exception[495] but it also does not exclude the applicability.

5. The Trigger Events

140 Case law on hardship typically stems from times of crisis caused by social catastrophes such as war, severe cases of inflation, economic crises, natural catastrophes and other fundamental changes in the political, economic or social general conditions affecting a large number of contracts without being directly related to the subject matter of the contract. [496] Concrete examples are the World Wars, the German hyperinflation of the 1920s, the Great Depression of 1929-1933, the oil crisis of 1973, the closure of the Suez Canal in 1956 and, one author argues, the financial crises of 2007/2008.[497] In German law, these type of events form part of the "large" basis of the contract, as the risk for the event to occur cannot be contributed to the contracting parties themselves.[498] The "large" basis of the contract is part of the *objective* basis of the contract and cases typically falling under this category are: (i) disruption of the contractual equilibrium and (ii) economic hardship.[499] In the legal commentaries to §313 BGB, a distinction is made between the so-called "large" basis of the contract and the "small" basis of the contract. There is no requirement that the supervening event must affect a certain number of contractual relationships to be relevant. §313(1) BGB also applies when the supervening event only affects a limited number of contractual relations or even a single contractual relationship, sometimes referred to as a change in the "small" basis of the contract, which entails all other kind of disruptions.[500] The Clausula doctrine

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term contracts.

[493] Official Comments Art. III. – 1:110.

[494] BGE 59 II 372, p. 380.

[495] *For Swiss law*, OFTINGER, SJZ 1939, 229, 235; JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 253 f.; BSK-WIEGAND zu Art. 18 OR, 175; WIEGAND, Clausula rebus sic stantibus, 443, 453; SIEGWART, 82: ZK-BAUMANN zu Art. 2 ZGB, 693 f. *For German law*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu §313, 1129 merely stating that §313 primarily is applicable on long-term contracts. *In Swedish Law*, NJA 1994 p. 359 the Swedish Supreme Court held that the fact that the contract term gave a property owner certain rights for an indefinite period of time was not a reason for adaptation of the contract per se.[495] Also in NJA 1979 s. 731, p. 734 the Supreme Court considered whether the long duration of the contract (49 years) motivated a price increase. The court explained that the long contract duration by itself did not motivate an increase.

[496] HAUSHEER/JAUN, 145; SCHWENZER, Schweizerisches Obligationenrecht, 272. As per Lord Diplock in the English case *The Nema* (Pioneer Shipping Ltd. v. B.T.P. Tioxide Ltd. [1982] UDC 724, 744) relating to the closure of the Suez Canal affecting the transactions of many persons; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, 514 (Rn. 5); FINKENAUER, MüKo zum BGB zu §313, 1888 f. and 1972 (Rn. 17 and 304); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 531 (Rn. 5); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 523; CANARIS, 741 f.

[497] *See hereto a Swiss commentator*, WIEGAND, 176; WIEGAND, Jusletter 9.2. 2009, p. 1 ff. *To the contrary*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu §313, (Rn. 5); KG NJW 2013, 478.

[498] FINKENAUER, MüKo zum BGB zu §313, 1972, (Rn. 304).

[499] GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531 (Rn. 5); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 528 (Rn. 23).

[500] Regeriungsbegründung BT-Ds. 14/6040, p. 174; CANARIS, 741; FINKENAUER, MüKo zum BGB zu §313, 1888 f., (Rn. 17); GRÜNEBERG, in Palandt, Kommentar zum BGB zu §313, 531(Rn. 5); STADLER, in Jauernig/Stürner, Kommentar zum

similarly applies when only a single transaction is affected by the change in circumstances.[501] It is the contractual obligation that should be radically changed while there is no requirement that the supervening event *itself* must be radical.[502] In Swedish law, it is merely stated in the preparatory works that §36 AvtL can be triggered when the economic equilibrium is disrupted by a supervening event. Classic examples are general price developments (fluctuations) as well as cost increases in a single case. [503]

III. Summary

Common to all jurisdictions as well as the mercantile laws is that a restrictive approach is taken in allowing exceptions to the principle of pacta sunt servanda. It is generally encouraged to apply the hardship exceptions sparingly, with great caution and in exceptional cases only. Certain factors also motivate a stricter approach. A stricter approach is generally taken with respect to commercial contracts where the parties are on an equal footing or contracts involving speculation on one or both parties' side. Furthermore, the hardship exceptions are strictly subsidiary to the allocation of risk as provided in the contract or that follows from the nature of the transaction. The duration of the contract will also have an impact on the assessment of whether the hardship exceptions are applicable. The fact that a contract is entered into on a long term could, however, work as an argument against or in favour of a contract adaptation. On the one hand, it is argued that the hardship exceptions primarily becomes relevant with respect to long-term contracts as the chances of a supervening event occuring simply are higher when the contract term extends over several years or even decades. On the other hand, it is argued that contracting parties cannot reasonably expect that the contractual economic equilibrium remains the same throughout the contract term when entering into a contract extending over a longer-term. **141**

D. The Conditions for Adaptation

The point of departure is the same in all four jurisdictions and in the international unification works and codifications: Agreements are to be kept! Then, the legal solution to hardship differs, both in large and in small. While the approaches differ, the theories shade into one another on several points. Common denominators can be identified providing helpful points of consideration to the transactional lawyer drafting a long-term contract and confronted by the issue of change in circumstances. It is mainly difficult to arrange the Nordic solution with the other rules on hardship. §36 AvtL is primarily targeting protection of consumers' right and single "unfair" contract terms. The provision was not tailored addressing the issue of change in circumstances specifically such as e.g. §313(1) BGB or the Clausula entailed in Art. 2(2). The Swedish doctrine of assumptions, however, shares more features with the other rules on hardship. However, all hardship exceptions heavily rely on judicial interpretation for the content of the single requisites. While the rules differ, judges and arbitrators are often in line in their conclusion merely applying different methods and reasoning in how to get there. As the Swedish **142**

BGB zu §313, 531 (Rn. 5).

[501] WEBER, 52 f.; SCHMIEDLIN, 156.

[502] SCHMIEDLIN, 156. Compare with DESCHENAUX, 195 and 202 footnote 202 mentioning war, a local fire destroying a factory or a change in family constellation with respect to a contract containing personal elements as relevant events; *See however* BISCHOFF, 181, 184 arguing that the Clausula should be limited to cases of force majeure character ("Sozialkatastrophen") affecting the population at large. To the contrary, ZK JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 239 and SCHMIEDLIN, 181, stating that such limitation of the Clausula's applicability is too strict. *See hereto also*, BRUNNER, 406 footnote 2035.

[503] Prop. 1975/76:81, p. 137 ff; SOU 1974:83, p. 164 ff.

Professor Jan Hellner rightfully pointed out with respect to §36 AvtL: "*A general clause is not so much what the legislator prescribes as what the judges and others make out of it.*"[504]

143 It is tempting to carry out the analysis with the aim to translate the point of tolerance for when the rules are triggered into a percentage. Rather than fixating on a percentage as guidance, the crux of the matter is to find the answer to the following question: At what point is the adverse turn of event of such intensity and scope that the parties never would have addressed or even contemplated to have addressed the issue in the contract? [505] In answering the question, the strong link between the foreseeability, risk and materiality requisites is revealed.

I. A Fundamental Change

144 Not every cost increase caused by a supervening event motivates interference in the contractual relationship. Art. III. – 1:110 DCFR, refers to an "exceptional" change in circumstances or "excessively onerous" so that the entire basis of the contractual relationship is completely overturned by events.[506] Art. 6.2.2 UNIDROIT Principles refers to a change in circumstances that "fundamentally alters the equilibrium of the contract". That entails that the supervening event is "so severe and fundamental that the promisor cannot be held to its promise despite the possibility of performance".[507] The term "excessively onerous"[508] can again be found in Art. 6:111(2) PECL. According to the commentary, the supervening event must have brought about a "major imbalance in the contract" (resembling the requisite in the UNIDROIT Principles) and have gone to the root of the contract, ("contract completely overturned by events"), so that *completely exorbitant costs* arises for one of the parties.[509] Similarly, in Swiss law the change in circumstance is described as an event resulting in an "obvious", "grave" or "fundamental" imbalance.[510] Or, the supervening event must have caused an "unquestionable massive disruption" or a "complete ruinous disturbance" of the contractual equilibrium.[511] Swiss case law describes it as a requirement that the contractual equilibrium must be overthrown in a "significant, striking and obvious" manner.[512] Sometimes the requisite is described as an event that renders the contractual obligation so "completely different" from what the parties intended when they entered into the contract.[513] The latter resembles the "fundamentally" requisite under the doctrine of frustration of purpose in English law where a supervening event must render the contractual duty "fundamentally" or "radically" different in a commercial sense from what the parties contemplated when concluding the contract.[514] I.e., the parties made their bargain believing that a state of

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[504] HELLNER, TfR 1976, 145, 167. *See hereto also,* ANDRÉ, SvJT 1986, 526, 547 stating that §36 AvtL is giving the courts, ultimately the Swedish Supreme Court, the freedom to relatively freely develop the rules of law. *Similarly*, MERZ, Die Revision, 508.
[505] *Along similar lines*, DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 501.
[506] Offical Comment to Art. III. – 1:110 DCFR, 713.
[507] JENKINS, Tul. L. Rev. 1998, 2015, 2027.
[508] This is in conformity with the phrase used by the Italian Civil Code, Art. 1467, *see* LANDO/BEALE, 114; The ICC Hardship Clause 2003 (see para. 2(a)) also uses the expression "excessively onerous".
[509] LANDO/BEALE, 114 f.
[510] BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 570; BSK-WIEGAND zu Art. 18 OR, 176; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 250; BK-KRAMER zu Art. 18 OR, 142; BÜRGI, ASR 1939, 1, 138; *See also e.g.*, BGE 101 II 17, p. 19; BGE 100 II 345, p. 349; BGE 97 II 390, p. 398; BGE 127 III 300, p. 306.
[511] KRAMER, SJZ 2014, 273, 278.
[512] BGE 59 II 372, p. 378; BGE 127 II 300, p. 305, 306; BGE 135 III 1, p. 10; BGE 127 III 300, p. 305; BGE 68 II 169, p. 173; BJM 1980, 75, p. 78.
[513] WEBER, 48; BGE 48 II 249, p. 252; BGE 47 II 391, p. 399; BGer from 10.7.1919 (1920) ZR, 70, 74.
[514] Davis Contractors Ltd v Fareham UDC [1956] AC 696, 723; *See also*, Pioneer Shipping Ltd. v B.T.P. Tioxide Ltd. (*The Nema*), [1982] A.C., 724, 744; British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185 MCKENDRICK,

things would continue to exist and they never agreed to be bound in a fundamentally different situation since the contract, on its true construction, does not apply to that situation. [515] A similar description on the materiality standard can be found in both §313 BGB and the Swedish doctrine of assumptions. In the former, the supervening event is described as to have caused a "fundamental", "grave" or "material" change of the foundations of the contract so that the party would not have entered into the contract or only on different terms.[516] Indirectly it is stating that the party did not contemplate that the contract would cover the new and materially different situation. In *RGZ 100, 129* the German Supreme Court explained that in a case where the cost to deliver vapour became nearly five times as expensive as the annual rent, the contract was rendered *something so economically completely different from what was contemplated by the parties*.[517] A frustrating event in English law has also been described as a supervening event, which struck away the foundations of the contract,[518]which correlates with §313 BGB comprising the doctrine of "the collapse of the foundation of the contract". In the Swedish doctrine of assumptions the "materiality" requisite is similarly fulfilled if it is clear that the party would not have entered into the contract on the same terms save for that a certain assumption remained (substantially) the same throughout the contract term.[519] §36 AvtL is different. There is no requirement that the change in circumstances goes to the root of the contract or overthrows the foundations of the contract. It is simply stated that a contract term can become unreasonable due to subsequent events (i.e. change in circumstances). In the legal doctrine it is however described, similar to the other hardship exceptions, that the change in circumstance must render the contractual obligation "significantly", "extraordinarily" or "substantially" more burdensome to perform.[520] Thus, the requisite primarily corresponds with the standard in Art. 6.2.2 in the UNIDROIT Principles. Another author states that an "unusual" inflation or price development is enough.[521] Prior to the Second World War and prior to the introduction of §36 AvtL, the stronger term "exorbitant" was used in Swedish legal doctrine to describe the required intensity.[522] That may indicate a more relaxed approach in §36 AvtL. In an early case, *NJA 1923 s. 20*, prior to the existence of both §36 AvtL and the doctrine of assumptions, the Swedish Supreme Court adjusted damages to be paid for non-delivery of the agreed goods in order to reflect cost increases caused by the First World War. The cost increase was considered by the court to be an economic sacrifice on the seller's side of "such dimension that it fell entirely outside the contemplated scope of the contract."[523] This early reasoning by the Swedish Supreme Court resembles the English doctrine of frustration: The contract does not cover an event that is a commercially different thing from that contracted for.

Contract Law, 255; BEATSON, 123; CHITTY, 1635.

[515] British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185.

[516] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18); FINKENAER, MüKo zum BGB zu § 313, 1902 (Rn. 58); LARENZ, Schuldrechts AT, 300; NJW 2000, 3432, p. 3433. *See also*, BGH WM 1965, 843, p. 845 where the court describes the materiality of the change in circumstances as an event that disrupts the contractual equilibrium in a way that it: "völlig aus den Angeln hebt."

[517] RGZ 100, 129, 131.

[518] British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 182.

[519] LEHRBERG, 54.

[520] Prop. 1988/89:76, p. 99; NJA 1930 s. 507, 511; DOTEVALL, SvJT 2002, 442, 454 ff; BERNITZ, 89; HELLNER, Kontrakts rätt, 45; RAMBERG/RAMBERG, 9 ed., 187 f. *See however*, RUNESSON, 404, taking a critical view against the requirement that the imbalance must be "major" or "extreme" in order for the contract to be adapted but rather that adaptation can be motivated as a tool for value-maximizing risk allocation. *See hereto also*, NRt 1988. 295 where the term "significantly upset" (*Nor*. radikalt forrykket") was used.

[521] VON POST, 165.

[522] *See hereto*, RODHE, NJM 1951, 181, 188. *See also*, Rt. 1919 s. 167.

[523] NJA 1923 s. 20, 26.

145 There are many attempts, both in case law and in legal doctrine, to describe the required intensity of the supervening event required to invoke hardship. Merely by looking at the different terms, it cannot be distinguished whether one is deemed to set a higher threshold. One author argues that "excessively onerous" entails a stringer requirement than for example that of "fundamentally".[524] As per the discussion in the well-known English case *the Superior Overseas*, where the closer meaning of "substantial hardship" was analysed, it was expressed that it is deemed to mean an event that has "*a real impact and not a mere transient effect*".[525] Or as L.J. Donaldson expressed it: "*I think that the parties must have chosen the word "substantial" in the sense of weighty or serious, rather than merely something more than minimal*".[526] That is probably as far as one can go in retrieving a closer meaning of the term. Supposedly, the same can be argued in relation to the terms "fundamental" and "excessive onerous" and with respect to all the other variations used to describe the seriousness of the event under the respective hardship rules. It is not possible, merely by looking at the terms, to distinguish a degree of seriousness. State courts, arbitral tribunals and legal scholars are also using these terms in an interchangeable manner. The assessment of the standard is not unproblematic. Case law shows that it often will be a question of degree whether the threshold is met.

1. Normative or Concrete Concepts as Guidance

146 The materiality requisites are linked to abstract or concrete standards to assess whether the change in circumstance is "fundamental" enough. Only the materiality requisites under the UNIDROIT and the PECL are freed from such concepts.

147 With respect to §313(1) BGB, one must argue on the basis that the contractual terms initially agreed on would be *unreasonable* to insist on.[527] The concept of "unreasonableness" is a vague concept linked to a strict normative standard.[528] The performance of the contractual duty must in an obvious way come across as unreasonable.[529] That entails that it must lead to intolerable results, in contrary to law and justice, (*De*. "Recht und Gerechtigkeit")[530] and thereby be in contrary to the principle of good faith in §242 BGB to hold the party to the contract on unchanged terms.[531] The concepts of law and justice and good faith have not been directly translated

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[524] LEHRBERG, 282.
[525] Superior Overseas Development Corporation v British Gas Corporation, [1982] 1 Lloyd's Law Report 262, 266.
[526] *Ibid*, 266.
[527] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 32); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1144; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 528; FINKENAUER, MüKo zum BGB zu § 313, 1944 (Rn. 208); Compare, KOLLER, NJW 1996, 300, 301. *See also e.g.*, RGZ 57, 116, p. 118; BGH BB 1956, 254.
[528] *Compare*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1135; FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 76.); LARENZ, 124. *See e.g.*, OGHZ 1, 62, p. 68; NJW 1991, 1478, p. 1479; NJW 1985, 313, p. 314; NJW 2012, 1718 p. 1719; BGH BB 1958, 131 p. 131.
[529] *Compare*, BGH 2, 176 p. 190.
[530] SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 515 (Rn. 23); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 24); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1135; FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 76); KOLLER, NJW 1977, 2262 p. 2263; NJW 1996, 300, 301; *See e.g.*, BGH 84, 9 p. 9; BGH 131, 209 p. 216; BGH 133, 316, p. 321; NJW 1995, 47 p. 48; NJW 1984, 1746 p. 1747; NJW 1991, 1478, p. 1479; NJW 2012, 1718; FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 76); NJW 2001, 1204, p. 1205; RGZ 102, 272 p. 273; NJW 1986, 2054, p. 2055; NJW 1982, 2184 p. 2186; BGH BB 1956, 254, p. 254; BGH BB 1958, 131 p. 131; OGHZ 1, 62 p. 68; BGH 129, 297 p. 309; NJW 1985, 313 p. 314; BGH NJW 1997, 320, p. 323.
[531] FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 76); *See e.g.*, NJW 2001, 1204, p. 1205; RGZ 102, 272 p. 273; NJW 1986, 2054, p. 2055; NJW 1982, 2184 p. 2186;BGH BB 1956, 254, p. 254; BGH BB 1958, 131 p. 131; OGHZ 1, 62 p. 68; BGH 109, 224 p. 229; BGH 129, 297 p. 309.

into the new provision but the requirements under the "old law" continue to apply.[532] Furthermore, §313(1) BGB requires concrete factors to be considered in the assessment. The type and purpose of the contract,[533] the kind of disruption that have occurred and its scope,[534] as well as the circumstances in the individual case must be considered.[535] Moreover, not only the kind of disruption but also its duration, if not permanent, must be taken into account.[536]

Art. 2(2) ZGB provides: "The manifest abuse of a right shall not be protected by law."[537] Thus, one must argue on the basis of whether insisting on performance on unchanged terms would be *a manifest abuse of right* (*De*. "Rechtsmissbrauch") and, by the virtue of good faith, performance is absolutely not to be expected.[538] In the legal doctrine, the fundamental requisite is sometimes discussed in terms of whether it would be against the principle of "good faith and fair dealing" to insist on performance.[539] Art. III. – 1:110 DCFR, similarly refers to that the change in circumstance is so extreme that it would be *manifestly unjust* to hold the debtor to the contractual obligation.[540] **148**

§36 AvtL is different. The "unreasonable" requisite is the core of the clause and the basic norm according to which the assessment should be carried out. The assessment can be abstract or concrete.[541] As a general rule, the assessment should be carried out taking into account only concrete criteria.[542] §36 AvtL strive to ensure a fair outcome in the concrete case rather than enforcing established norms.[543] Relevant is the content of the contract, subsequent events (i.e. a change in circumstances) and other circumstances. An abstract assessment can be carried out in exceptional cases by way of arguing on the basis of "*good faith and fair dealing"* (*Sw*. "God affärssed") or that the contract term is in contrary to "*law and good custom or moral"* (*Lat*. Contra leges et bonos mores).[544] When arguing on the basis of such abstract standards a term may be declared "unreasonable" per say.[545] For instance, in *NJA 1983 s. 332*, a term in a letter of credit gave the bank the sole discretion to decide on whether or not to set aside a specific term in the contract.[546] The Swedish Supreme Court found that **149**

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[532] Regeriungsbegründung BT-Ds. 14/6040, p. 176; *See also*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1135 (Rn. 63);
[533] WOLF/LARENZ, 706; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1134; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58).
[534] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1134; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18).
[535] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18).
[536] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1134 ff.; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58) NJW 1977, 2262 p. 2263.
[537] Translation from the Swiss Civil Code I, provided by the Swiss-American Chamber of Commerce.
[538] Compare, SCHWENZER, 271; LEU, Vertragstreue In Zeiten des Wandels, 107, 114 f.; WIEGAND, Clausula rebus sic stantibus, 443, 446; BGE 97 II 390, p. 398; BGE 107 II 343, p. 348; SJZ 1968, 360, 360; BÜRGI, ASR 1939, 1, 143; BGE 97 II 390, p. 398; BGE 101 II 17, p. 19; BGE 122 III 97, p. 98; BGE 100 II 345, p. 349; BGE 107 II 343, p. 348; Zivilgericht in Sachen from 12.2.1980, in BJM 1980, 75, 78; BGE 68 II 169, p. 173; BGE 59 II 372, p. 378 f.; BGE 107 II 343, p. 348.
[539] SJZ 1968, 360, 360; BÜRGI, ASR 1939, 1, 143; MIDDENDORF/GROB, in: Breitschmid/Jungo, zu Art. 2 ZGB, 2016 (Rn. 15).
[540] Offical Comment to Art. III. – 1:110 DCFR, 713.
[541] GRÖNFORS, Avtalslagen, 223.
[542] GRÖNFORS, Avtalslagen, 225.
[543] *Compare*, GRÖNFORS, Avtalslagen, 225.
[544] Prop. 1975/76:8, 119 ff.; GRÖNFORS, Avtalslagen, 224 f.
[545] GRÖNFORS, Avtalslagen, 224.
[546] In the case, the disadvantaged party was in an inferior position and the bank provided the contract, which most likely contributed to the outcome of the case. *See hereto,* BERNITZ, 77; VON POST, 173 f. *Compare also the Norwegian case*, Rt.

the term was contrary to good business practices. The term was set aside with the support of §36 AvtL.[547] It must be pointed out that if there is no intention by the party to circumvent a mandatory rule by a certain contract term and the motives otherwise are loyal, the contract term cannot be considered unreasonable per say.[548] It clearly reveals how §36 AvtL primarily is tailored to target single "unreasonable" contract terms to protect a weak party against disloyal terms having primarily consumers in mind. In the process of drafting the general clause, the legislator also considered two different terms: "Improper" (*Sw*. "Otillbörlig") and "unreasonable" (*Sw*. "Oskälig").[549] The legislator decided for the latter as that would correspond to the terminology used in the Consumer Contracts Act.[550] With respect to the doctrine of assumptions, the requisite is fulfilled if the conclusion is that the disadvantaged party never would have entered into the contract or only on *materially* different terms,[551] *and* that it was visible to the counterparty.[552] The visibility requisite is fulfilled if the assumption is typical for the specific transaction and if the assumptions typically are considered to be material.[553] To illustrate, in connection with the purchase of a house, a buyer agreed to become member in an association for collective washing facilities. The price for the membership would not materially exceed SEK 200-300 p.a. The membership was later set at SEK 1000 p.a. The Swedish Supreme Court declared the clause invalid. The price was considered a typical material assumption.[554]

150 To better understand the required standard of the "fundamental" requisite it can be reformulated into questions. The question to be answered in relation to §36 AvtL is: In comparison with what is the contract term unreasonable?[555] A contracting party's reluctance to follow its normal business practice or the market value for similar goods can be used as concrete comparison material. [556] A concrete yardstick is not always available and one must instead turn to look at e.g., the production costs and turnover. In relation to the doctrine of assumptions it should be asked: Did the disadvantaged party act on the assumption so that he would not have entered into the contract or only on *materially* different terms[557] and, was that clear to the counterparty as well?[558] The radically different test in English law can be reformulated into: "Is the contract applicable on the new situation?"[559]

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[547] The fact that a contract term is in contrary to good business practices (*Sw*. "god affärssed") is considered a strong ground for the court to adapt the contract. *See hereto*, Prop. 1975/76:81 p. 119 f.

[548] NJA 1994 s. 130, p. 140. *See hereto also*, RH 1991:62, p. 179 where the Swedish Court of Appeal explained that the lease taker had to provide evidence that the term in the contract was unreasonable as the term per se was not considered unreasonable.

[549] The requisite in the Scandinavian countries generally correspond to the "unreasonable" requisite in §36 AvtL. In Finland, the requisite is equivalent to the Swedish term while in both Denmark and Norway the requisite is "unfair or in contrary to fair dealing" (*Da*."urimeligt eller i strid med redelig handlemåde") and (*No*. "urimelig eller vaere i strid med god forettningsskik"). In practice, the "fair dealing" concept has had little significance in Danish case law. *See*, GOMARD, 172 f.; VON POST, 59 ff. In Norway, however, it has an independent meaning. If a contract term is in contrary to what is a clear understanding of fair dealing in a certain industry the term may be modified or set aside irrespective of whether the term itself is "unfair". *See hereto*, HOV, 281; VON POST, 60.

[550] Lag (1994:1512) om särskilda avtalsvillkor i konsumentförhållanden. As to the chosen terminology, the legislator wanted to emphasis the courts authority to modify contract terms but at the same time strive to keep the terminology consistent with existing legal rules.

[551] ADLERCREUTZ, 271; LEHRBERG, Förutsättningsläran, 19 f. and 177 ff.

[552] LEHRBERG, Förutsättningsläran, 247 ff.

[553] LEHRBERG, Förutsättningsläran, 275.

[554] NJA 1966 s. 555, p. 560; *See hereto also*, NJA 1970 s. 72.

[555] GRÖNFORS, Avtalslagen, 223.

[556] Prop. 1975/76:81 p.125 ff.; GRÖNFORS, Avtalslagen, 223 f.; DOTEVALL, SvJT 2002, 442, 451.

[557] ADLERCREUTZ, 271; LEHRBERG, Förutsättningsläran, 19 f. and 177 ff.

[558] LEHRBERG, Förutsättningsläran, 247 ff.

[559] *Compare*, Davis Contractors Ltd v Fareham UDC [1956] A.C. 696, 723.

Differently expressed: Was it this I promised to do?[560] Thus, the new situation must be compared with the situation for which they did provide in the contract to assess whether it is radically different.[561] The hardship exceptions under Swiss and German law as well as the DCFR take the route via abstract concepts of "good faith", "good faith and fair dealing", the "abuse of a right" or concepts such as "contrary to law and justice". In relation to these rules, the question could be formulated as: Does the insistence on the contractual obligation on unchanged terms endanger not only the contractual relation in question but also a functioning legal system (*De*."Rechtsverkehr") in general?[562] I.e., would the strict application of the principle of pacta sunt servanda lead to results that do not deserve the protection of the legal system in general?

2. Same Terms, Different Notions

There is a general trend in promoting objective rules to replace subjective rules as "measurement tools".[563] **151**
While objective methods generally are favourable, especially from the perspective of creating precedents, such methods are not unproblematic. The courts are clearly struggling in ascertaining the closer meaning of the "fundamental" standard and revert to different methods of both subjective and objective art in order to decide whether the required intensity to trigger hardship has been met.

a) Subjective Methods

aa) The "Financial Ruin"

The courts have been using the subjective financial liquidity as a measurement to decide whether the threshold has been met. In the past, both the Swiss Federal Tribunal and the German Supreme Court considered whether it would be "ruinously expensive" for the disadvantaged party to carry out its contractual obligation. [564] I.e., whether the fulfilment of the contractual obligation as originally agreed would drive the disadvantaged party to bankruptcy or insolvency. In *RGZ 88, 172* the German Supreme Court generally rejected subjective inability as a ground for excuse.[565] However, in couple of cases following that case, related to the First World War and its aftermaths, the German Supreme Court considered the fact that the party had entered into multiple similar contracts and that it would not be feasible for the seller to continue to operate business if held to the contracts on unchanged terms.[566] The arguments used by the German Supreme Court to motivate relief were highly dependent on the context surrounding the cases. Following the First World War, Germany struggled to get back on its feet and to build up business both domestically and internationally, which presumably contributed to the outcome of the cases. For instance, in *RGZ 101, 79*, a contract was concluded in 1915 for the delivery of a Limousine once the war came to an end. In the meantime the production costs rose by 1400 per cent. The German Supreme Court granted relief on the ground that it would be ruinously expensive to require the seller to deliver to the initially agreed price. The court also took into consideration that the seller had entered into several **152**

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[560] *Compare with the famous statement by* Lord Radcliff in Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 729: "Non haec in foedera veni. It was not this that I promised to do".
[561] Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, 239.
[562] *Compare hereto*, ZK-BAUMANN zu Art. 2 ZGB, 697 f.; ZK-BAUMANN/DÜRR/MARTI zu ART. 1-10 ZGB, 464.
[563] LEHRBERG, ERPL 1998, 265, 278 f.
[564] *For Swiss law see e.g.,* BGE 45 II 386, p. 398; BGE 50 II 256, p. 266; BGE 46 II 157, p. 162; BGE 59 II 264, p. 304; BGE 47 II 440, p. 459; BGE 48 II 443, p. 451 f; BGE 48 II 242, p. 247. *For German law see e.g.*, RGZ 99, 259 p. 259 f.; RGZ 100, 134 p. 137; BGH 97, 171 p. 174; BGH 97, 172, p. 174; NJW 1991, 1478, 1479.
[565] RGZ 88, 172, 174.
[566] RGZ 94, 45 p. 49; RGZ 101, 79 p. 81; RGZ 100, 134 p. 137; RGZ 102, 272 p. 273 f.

similar contracts and that it would be of crucial importance for the continued operation of the business whether the seller would to be held to the agreed price.[567] Similarly, in *RGZ 100, 134* a contract was concluded in 1919 for the purchase of a car. The seller refused to deliver the car to the agreed price as the initially agreed price was far under what it would cost for the seller to acquire the car from the fabric. The German Supreme Court took into its consideration the fact that the seller had entered into several similar contracts, which would lead to the liquidation or insolvency if the seller would be held to the contract on unchanged terms.[568] It is however not unreasonable that a 1400 per cent increase by itself could lead to an excuse to take up delivery. However the reasoning by the German Supreme Court shows that rather other factors were important for the outcome. It was considered that business women and men in Germany at that time were struggling to get back on their feet and to built up business again, domestically and internationally, and the fact that the seller had entered into *several similar contracts* would lead to, if held to the contract on unchanged terms, that the sellers would not be able continue to operate business.[569] Thus, the outcome of these cases appears to be highly dependent on the fact that Germany at that time suffered from the imposed post war-restrictions rather than that the increase itself was so significant that it motivated relief. It should however be noted that with respect to §313 BGB the financial strength of the disadvantaged party is generally rejected in the legal doctrine as a ground for relief.[570]

153 Also under Swiss law is the so-called "financial ruin theory" obsolete. Such subjective assessment has been rejected both in the legal doctrine and by the Swiss Federal Tribunal in favour of an objective assessment of the imbalance between the contractual obligations.[571] The consideration of the financial strength of the disadvantaged party is criticized for creating legal uncertainty, as it provides little guidance for business people.[572] Additionally, it would require an analysis of the financial strength of the disadvantaged party.[573] While no longer operating as an independent criteria under Swiss law it can still become relevant in the context of an assessment of all relevant circumstances of the individual case.[574] It should however be noted that the "financial ruin theory" has never been applied by the Swiss Federal Tribunal to interfere in a contractual relation but rather used as an argument not to.[575]

While there are many arguments in favour of objective rules, hardship is ultimately a situation of economic unaffordability. Thus, as I gather, it still remains an adequate question to ask to what extent a party can demand an adjustment of the contract terms without pleading that it would be ruinously expensive to perform on

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[567] RGZ 101, 79 p. 81.
[568] RGZ 100, 134, p. 136. *See also*, RGZ 102, 272 p. 273 and 275 f. where the costs to produce the goods increased by between 72-108 per cent. It was also taken into account that the seller had entered into several similar contracts.
[569] RGZ 101, 79 p. 81. *See hereto similarly also*, RGZ 94, 45 p. 49; RGZ 101, 79 p. 81; RGZ 100, 134 p. 137; RGZ 102, 272 p. 273 f.
[570] FINKENAUER, MüKo zum BGB zu § 313, 1947 (Rn. 223); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1136 (Rn. 68); *See hereto also*, LARENZ, 124 f.
[571] BGE 59 II 372, p. 377 f.; SCHMIEDLIN, 114 and 165; OFTINGER, SJZ 1939, 229, 236; BK-KRAMER zu Art. 18 OR, 143; 205 f.; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 251; BSK-WIEGAND zu Art. 18 OR, 176; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 570 f.; LEU, Vertragstreue In Zeiten des Wandels, 107, 121; WEBER, 47 ff.; STAMMLER, ZBJV 1922, 49, 53; ZK-BAUMANN zu Art. 2 ZGB, 696. *See however* BGE 59 II 379, p. 380 where the Swiss Federal Tribunal first rejects the argument (p. 377) but seems to open up for such subjective considerations when the court takes into account that the disadvantaged party due to the change in circumstances was put in a situation of distress that the counterparty then could exploit ("eine Notlage vorhanden ist").
[572] *Compare hereto*, WEBER, 47 f.; BÜRGI, ASR 1939, 1, 139.
[573] FRICK, 205.
[574] BURKHARDT, 260; *See*, BGE 61 II 259, p. 263, with respect to the assessment of the compensation for damages.
[575] FRICK, 205; SCHMIEDLIN, 114; *See e.g.,* BGE 45 II 386, p. 397 ff.; BGE 47 II 440, p. 459; BGE 46 II 157, p.162; BGE 48 II 443, 451 f.; BGE 50 II 256, p. 266; BGE 59 II 264, p. 304; BGE 48 II 242, p. 246/247.

unchanged terms. In Art. III. – 1:110 DCFR relevance is given to whether the insistence on the contractual obligation would be ruinous for the obligor.[576] With respect to §36 AvtL, the Swedish Court of Appeal considered in its overall assessment, that the loss caused by increased costs was considerable in relation to the company's turnover.[577]

bb) "The Last Limit of Sacrifice"

When no objective yardstick is available the "last limit of sacrifice" is used in Swedish law to decide whether the equilibrium between the contractual obligations have been altered to an extent that the term can be declared unreasonable with the support of §36 AvtL. The "last limit of sacrifice" is different from the "financial ruin theory". It does not entail a requirement that it would be financially "ruinous" for the disadvantage party to perform the contractual duty or lead to its insolvency or bankruptcy. Rather, as I gather, it is the identification of a point of tolerance i.e., a sacrifice (economic or non-economic) that falls outside the scope of the contract.[578] The imbalance between the contractual obligations must be so fundamental that the limit of what the disadvantaged party reasonably can be required to sacrifice to fulfil its contractual obligations has passed. [579] In the assessment, the opposing interests of the parties are balanced so that the difficulties to perform the contractual duty are weighted against the interest of the counterparty in receiving the benefits under the contract.[580] The point of "tolerance" will vary depending on the individual case but will generally be set lower with respect to long-term contracts or contracts where there is a strong common interest in achieving the contractual goal as the loyalty between the parties generally is regarded as stronger in such contracts.[581] The Swedish Supreme Court has, at least implicitly, applied the "last limit of sacrifice" to carry out an adaptation of the initially agreed price in order to reflect increased costs.[582] Similar reasoning can be found with respect to §313(1) BGB. The relation between the efforts required by the obligor to perform the contractual duty and the impact of a successful performance is an important factor in the assessment of all circumstances in the individual case.[583] It has been questioned in the legal doctrine whether the "unreasonable" requisite in §36 AvtL entails a requirement that the "last limit of sacrifice" has passed. [584] While that critic deserves support, there is a need of an alternative method when no objective yardstick is available or, as often may be the case, it simply is a too simplistic view of the issue. **154**

b) An Objective Method

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aa) "An Obvious Imbalance"

A similar concept to the "last limit of sacrifice" can be found in Swiss law. The Swiss Federal Tribunal has explained that the judge has the authority to interfere in the contractual relationship when the change in circumstances has caused a fundamental and obvious imbalance between performance and counter-performance in the

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[576] Offical Comment on Art. III. – 1:110 DCFR, 711.
[577] RH 1980:14.
[578] *Compare hereto*, NJA 1923 s. 20.1923.
[579] DOTEVALL, SvJT 2002, 442, 454; *See hereto also*, Prop. 1988/89:76, 99.
[580] Prop. 1988/89:76, 100 f.; DOTEVALL, SvJT 2002, 442, 454 f.
[581] DOTEVALL, SvJT 2002, 442, 456.
[582] RUNESSON, 407. *See also*, DOTEVALL, SvJT 2002, 442, 454 in relation to NJA 1994 s. 359 and the Norwegian case, RG 1985 s. 507.
[583] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1136 (Rn. 67); BÖTTCHER, in Erman, BGB Handkommentar zu § 313, 1413, (Rn. 27).
[584] *See hereto*, RUNESSON, 404 and 407.

contract.[585] When the Swiss Federal Tribunal refers to an "obvious imbalance" between the contractual obligations, it is, however, the *objective value* that is of relevance in deciding whether the imbalance caused by the supervening event is so fundamental that an intervention by the court is motivated.[586] There is however not one fictive objective value universally applicable to all contractual obligations. Instead, the judge shall on a case-by-case basis, in its discretion, assess the objective value in light of all circumstances surrounding the case compared with the value of the service or obligation as expressed in the contract. Thus, the objective value is specific to the individual case and is simply an expression of the value between the contractual obligations at the time when the contract was concluded. [587] In a recent case, the Swiss Federal Tribunal explained that Art. 2(2) is applicable when there has been a change in circumstances that is so significant that the risk allocation in the contract "no longer is bearable" for the disadvantaged party.[588] Rather than to be viewed upon as a relapse to an assessment of subjective inability on the disadvantaged party's side it is probably to be viewed upon as an expression by the court to emphasize the significance of the required manifest abuse of right required under Art. 2(2).[589] That view is in line with the legal doctrine where it has been suggested that for the Clausula to apply, the imbalance between the contractual obligations must go beyond what *the average reasonable person* would find bearable.[590] Thus, it must come across as disproportionate (unbearable) to *any* person.[591]

bb) A Hypothetical Test

156 It has been explained in the legal doctrine to §313(1) BGB that the change in circumstances is fundamental when it is entirely clear, *from the perspective of a rational observer*, that the parties (or at least one of them) would not have entered into the contract, or only on different terms, had the parties taken the change in circumstances in to account at the time when the contract was concluded.[592] Thus, an objective but hypothetical test is carried out. The Swedish doctrine of assumptions applies a similar test. It is assessed what the parties would have agreed on had the issue been brought up at the time of conclusion of the contract. Thus, the test is entirely subjective.[593] The requisite is fulfilled if it can be concluded that the disadvantage party never would have entered into the contract or only on materially different terms had the party taken the change in circumstance into account when the contract was entered into.[594]

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[585] BGE 135 III 1, p. 9 f.; *See also*, BGE 100 II 345, p. 349; BGE 104 II 314, p. 317; BSK-ZINDEL/PULVER zu Art. 373 OR, with respect to Art. 373 (2) OR. The cost increase must have resulted in a significant imbalance between the performance of the contractual obligations and the agreed price, rendering the performance unreasonable to insist on without an adaptation of the price. *See hereto also*, BGE 58 II 421, p. 423.
[586] BGE 59 II 372, p. 378; Zivilgericht in Sachen of 12.2.1980, in BJM 1980, 75, 77. *See also*, BGE 53 II 483, p. 488 with respect to the "obvious imbalance" requisite in Art. 21 of the Swiss Code of Obligations. *See also*, BISCHOFF, 193; DESCHENAUX, 202 f.; LEU, Vertragstreue In Zeiten des Wandels, 107, 120; BK-KRAMER zu Art. 18 OR, 142 f; SCHMIEDLIN, 165.
[587] MERZ, Die Revision, 393, 451.
[588] BGE 100 II 345, 349.
[589] *Compare*, BISCHOFF, 196.
[590] WEBER, 44.
[591] BSK-HUGUENIN zu Art. 21 OR, 215; BGE 53 II 483, p. 488; AppH Bern, ZBJV 1941, 283, 284.
[592] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1133 f.; SCHLECH TRIEM/SCHMIDT-KESSEL, 64; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18).
[593] LEHRBERG, 47; DOTEVALL, SvJT 2002, 442, 449.
[594] ADLERCREUTZ, 271; LEHRBERG, Förutsättningsläran, 19 f. and 177 ff.

c) An Objective or Subjective Rule?

The "materiality" requisites are linked to different standards to give guidance on the intensity required to trigger the hardship exceptions. But the courts are struggling in their assessment and they turn to different methods to assess whether the threshold has been met. Both the legal doctrine and national courts have a clear preference for an objective rule to assess the materiality of the supervening event. Despite such preference, an objective rule that consistently is being applied has not developed in case law under any jurisdiction. Perhaps, while the standard simply cannot be translated into an objective rule. It can also be questioned whether an objective rule is better than a subjective rule. The objective rules in the UNIDROIT Principles and the PECL fail as the terms can be filled with a content of great variety and provides no secure prospects. The "unreasonable" requisite in §36 AvtL is equally problematic. A contract term can become unreasonable due to subsequent events if the change is "significant" or "substantial". But the question remains, when is a cost increase "significant" or "substantial"? §36 AvtL is dependent on finding an objective yardstick to compare the new situation with, which in many cases will fail, and the intended objective rule will ultimately be an assessment of whether the point of tolerance of what is bearable for the disadvantaged party has been reached. The Swiss solution provides for a pragmatic solution where the imbalance between the contractual duties is linked to a standard of what "*the average reasonable person"* would find bearable. A sensible solution is in my view also provided in German law where the hypothetical test, while being fictive, is linked to an objective standard of a *"rational observer"* which is preferable to en entirely subjective rule as the one applied in the Swedish Doctrine of Assumptions. The subjective rule is a weakness of the doctrine of assumptions especially with respect to long-term contracts where long time elapsed since the contract was concluded. It is difficult to decide how the disadvantaged party would have acted had he known the true state of affairs.[595] It is not only an illogical solution it is also impossible to answer such hypothetical question. Also, the subjective method entails certain difficulties as the parties typically have conflicting interests and it could be difficult to ascertain how the parties would have acted if long time elapsed since the contract was concluded or there generally is a lack of material to make the assessment. The parties would most likely have differed about what was to happen. **157**

3. The Circumstances of the Individual Case

While there is a tendency in the legal doctrine to promote "objective" rules to decide whether a supervening event is fundamental enough, such assessment can never be entirely objective or carried out in a schematic manner. Rather than applying a strict objective threshold it will ultimately be a question dependent on the circumstances of the individual case, with all the uncertainty that it brings along. As aptly described by the German Supreme Court: "Das, was nach ihnen einem Erfüllungspflichtigen noch zugemutet werden kann, läßt sich eben nicht nach einer gleichmäßigen Schablone, sondern nur nach der Lage des Einzelfalls unter Berücksichtigung der Einwirkung der Erfüllung oder Nicht Erfüllung auf die Subjektiven Verhältnisse beider Teile bestimmen."[596] Thus, an overall assessment is generally required. **158**

[595] *Compare*, LEHRBERG, Förutsättningsläran, 164; DOTEVALL, SvJT 2002, 442, 449; FLODGREN, Förutsättningsläran. Ett viktigt komplement till avtalslagen, 385, 399; BRUNNER, 395.
[596] RGZ 102, 272, 274.

159 The judge shall, in its discretion, assess whether the change is fundamental enough in light of all (relevant) circumstances of the individual case.[597] Art. 6.2.2. of the UNIDROIT Principles similarly require an overall assessment of whether the change in circumstance is fundamental enough,[598] thus, making the objective rule subject to circumstances of the individual case. Although no such requirement is spelled out in the PECL or the DCFR a case-by-case evaluation of the entire transaction, and not only the obligation of the party affected by the adverse turn of event, is implicitly required.[599]

160 §36 AvtL and §313(1) BGB explicitly spells out in the law text that an overall assessment should be carried out.[600] The meaning of "other circumstances" under §36 AvtL is intended to be broadly understood and to include all relevant circumstances.[601] For example, in a Danish case, the fact that the contract was closely linked to another contract, which had been duly terminated, was given importance to decide whether the party could be held to the first contract despite that the period of termination had passed.[602] As mentioned above, a contract term may under certain circumstances be considered unreasonable per se without an assessment of the contract as a whole.[603] As a general rule, an assessment of the contract in its entirety is required.[604] To carry out an over all assessment is particularly relevant with respect to §36 AvtL as the clause targets single contract terms. If an overall assessment is not undertaken it could be overlooked that the party may benefit from the potentially "unreasonable" term by giving up something else in the contract in return for the provision that is under scrutiny. Or, the disadvantaged party is compensated elsewhere in the contract. [605] Hence, a term may come across as harsh for the counterparty looked at alone, but not if the contract is looked at as a whole. Contracting parties simply bargain for different terms and an overall assessment of the contract is therefore crucial. The outcome in *NJA 1994 s. 359* is in contrast to such view. In the case, a company sold its water sewers to the municipality for a low purchase price in exchange for exempting 12 specified properties from paying service fees for wastewater sewerage for all future times. With the support of §36 AvtL, the municipality claimed that due to legislative changes, requiring users to pay "fair and reasonable" service fees, the contract term exempting the owners of the 12 properties from paying fees was considered unreasonable due to the increased costs and price developments as well as the long contract term. The court held that neither the new legislation nor the duration of the contract by itself was a reason for rendering the contract term unreasonable. The Swedish Supreme Court, however, adapted the contract so that only the current owners would be relieved from paying

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[597] *For Swiss Law*, MERZ, Die Revision, 393, 451; MIDDENDORF/GROB, in: Breitschmid/Jungo, zu Art. 2 ZGB, 2016 (Rn. 15); *For Swedish Law,* Prop. 1975/76:81 pp. 106 and 110 ff; NJA 1988 s. 230, p. 236. *For German law,* BGH 94, 257 and BGH 96, 371 where the German Federal Court of Justice noted that an inflation rate amounting to more than 60 per cent alone is not enough, as also the concrete circumstances in the individual case must be considered. *See also e.g.*, RGZ 141, 212 p. 219; RGZ 107, 78 p. 87; RGZ 272, 273 p. 274; RGZ 107, 78 p. 87; NJW 1989, 289 p. 290.

[598] Comment No. 2 on Art. 6.2.2 the UNIDROIT Principles (2016 edition); MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 250; LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 440; MCKENDRICK, 816; SCHWENZER, VUWLR 2008, 709, 716; BERGER, 551.

[599] *Compare*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 250; LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 440; RODNER, Hardship under the UNIDROIT Principles of International Commercial Contracts, 677, 689.

[600] The Danish general clause does not contain a similar requisite but similar circumstances as under Swedish law are considered within the requisite of the "content of the contract". *See hereto,* VON POST, 66 f. The Norwegian general clause contains the requisite "other circumstances", which indicates that any other circumstance that is relevant shall be considered. *See hereto,* WOXHOLTH, Avtalerett, 409; HOV, 296. The same applies in Finland. *See hereto,* WILHELMSSON, 137 f.

[601] SOU: 1974:83, p. 195 f.

[602] Danish Western High Court of Appeal V.L.D. 15. April 2004 i anke 13 afd. B-1822-03, Ugeskrift for retsvesende, 2004, 1969, 1973.

[603] NJA 1983 s. 332; Prop. 1975/76:81, 111.

[604] Prop. 1975/76:81 p. 118; SOU 1974:83, p. 148 ff.

[605] *Compare*, Prop. 1975/76:81 p. 118 f.

fees as long as they stayed in the properties. [606] The outcome is questionable. It was undisputed between the parties that the purchase price only was a symbolic amount. The exemption from paying service fees should be seen as a significant part of the purchase price. It is specifically explained in the preparatory works that an overall assessment of the contract must be carried out in order to assess whether a specific term is unreasonable rather than being assessed in isolation.[607] The case has also been criticised in legal doctrine as the cost increase was foreseeable and the risk for such increases should be borne by the municipality.[608] A contributing factor for the courts willingness to adapt the contract may have been the counterparty's acknowledgement of the adaptation of the contract as reasonable. The case can be compared with, *BGH WM 1978, 1354*, where a contract for the supply of water was entered into on a fixed tariff and on a non-cancellable term. The supplier requested an adaptation of the agreed price to reflect that the demand for water of a certain quality as well as the consumption had increased significantly in the preceding 75 years. In the case, it was clear that the agreed upon and already low price reflected a compensation for that the company, due to mining activities, had dried out the well on the ground of the counterparty. The German Federal Court of Justice did not adjust the tariff to reflect the new circumstances.[609] As I gather, the outcome in the German case rightly reflects the concessions made by the counterparty at the time when the contract was concluded. An overall assessment under §36 AvtL entails that not only the time after the change in circumstance occurred is of relevance. It is also important to consider the time before the supervening event occurred. The contract may have been very beneficial for one party prior to the change in circumstances.[610] In relation to §36 of the Norwegian Contracts Act, the Norwegian Supreme Court explained that an overall assessment should be carried out where both the burdens and benefits of the contract for the disadvantaged party are considered.[611] Similarly, the overall assessment in §313(1) BGB comprises not only that the negative effects of a supervening event should be considered but also any beneficial effects on the side of the disadvantaged party.[612] The assessment under §313(1) BGB does not only focus on whether it would be unreasonable for the disadvantaged party to perform the contractual obligation under the new circumstances.[613] Instead, *all* circumstances in the individual case must be considered[614] and the interests of *both* parties must be balanced in the assessment.[615] An important factor in the assessment is the relation between the efforts required by the obligor to perform and the impact of a successful performance.[616] The German Federal Court of Justice explained in *BGH 94, 257* and *BGH 96, 371* that not only the circumstances on the disadvantaged party's side should be considered. In both cases, the circumstances on the lessee's side were taken into consideration. Thus, the impact of the fulfilment or non-fulfilment of the contractual duty for both parties are of importance to decide whether it is unreasonable to hold the party to the contractual on unchanged

[606] NJA 1994 p. 359, p. 364 f.
[607] Prop. 1975/76:81 p. 106, 111. *See also*, ADLERCREUTZ, 287.
[608] RUNESSON, 407. *Compare*, WILHELMSEN, Tfr 1995, 1, 198.
[609] BGH WM 1978, 1354.
[610] SOU 1975:83, p. 157.
[611] Rt. 2000 p. 806, p. 816.
[612] BGH NJW 95, 47, p. 48; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 f. (Rn. 24); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1136 (Rn. 67); BGH 128, 230 p. 238.
[613] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1135.
[614] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 f. (Rn. 24); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526 (Rn. 15); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1135 f. (Rn. 64); JANDA, NJ 2013, 1, 3. *See also e.g.*, RGZ 102, 272, 274; NJW 95, 47, p. 48; BGH NJW 1997, 320, p. 323; NJW 2017, 2193.
[615] FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 77); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526 (Rn. 15); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1135 f. (Rn. 64); BGH 128, 230 p. 238; RGZ 107, 78, 87.
[616] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1136 (Rn. 67); BÖTTCHER, in Erman, BGB Handkommentar zu § 313, 1413, (Rn. 27).

terms.[617] The Swiss Federal Tribunal, on a general note, explained that it would lead to unreasonable results to only consider how the change in circumstances have affected the contractual obligations of the disadvantaged party.[618] The same point of view can be found in the legal doctrine.[619] The Swiss Federal Tribunal continued and explained that it should be considered how the change in circumstances has affected the contractual obligations of the parties as a whole.[620]

II. A Disruption in the Contractual Equilibrium

161 There are two "classic" categories of change in circumstances where the courts have been willing to interfere in the contractual relation by way of adapting the contract term(s). Those are cases where the contractual equilibrium has been disrupted by (i) cost increases caused by depreciation or devaluation of a currency and cases of inflation, and (ii) cases where there is an excessive burden for one party to perform the duty under the contract, e.g. due to increased costs to procure the agreed goods as a result of rising raw material prices.[621] The former category can to a large extent be arranged under the latter but will be treated separately below as the event causing the disruption in the contractual equilibrium is different. There is no doubt that a moderate cost increase would be insufficient to trigger the hardship exceptions. The disruption must *fundamentally have altered the contractual equilibrium* to motivate an intervention by the court. [622] Thus, it is not enough that the supervening event caused the contract to be a bad bargain or being less lucrative than expected.[623] Something more than merely a shift in the value between the contractual obligations is required.[624] The threshold must not be set too low as that could undermine transacting parties trust in the contract as an effective instrument to conduct business if the legal consequences of the contract can not be foreseen.[625] The cost increase must be "grave,"

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[617] RGZ 102, 272, p. 274.
[618] BGE 59 II 372, p. 378 f.
[619] BISCHOFF, 196; OFTINGER, SJZ 1939, 229, 236.
[620] BGE 59 II 372, p. 378 f.
[621] *For German law,* KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1142 ff.; CANARIS, 742; SCHLECHTRIEM/SCHMIDT-KESSEL, 65 f.; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 528 f.; FINKENAUER, MüKo zum BGB zu § 313 1938 ff. *For Swedish Law,* Prop. 1975/76:81, p. 137 ff; SOU 1974:83, p. 164 ff. *For Swiss Law*, HAUSHEER/JAUN, 145; BGE 47 II 314 and BGE 48 II 249. *For Mercantile Laws*, LANDO/BEALE, 115 f.; Official Comment to Art. III. – 1:110 DCFR, 713; MASKOW, Am. J. Comp. L. 1992, 657, 662.
[622] *For Swiss law,* BGE 135 III 1, p. 9 f.; BGE 100 II 345, p. 349; BGE 104 II 314, p. 317; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 570; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 250; KRAMER, SJZ 2014, 273, p. 278; Ad hoc 6. Juli 1983 YCA XII, p. 63, 67. *For Swedish law,* Prop. 1975/76: 81, p. 127 referring to that the term must be unreasonable; BERNITZ, 89; GRÖNFORS, Avtalslagen, 246; HELLNER, Kontraktsrätt, 45; VON POST, 164 f.; RAMBERG/RAMBERG, 199; *For German law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1133; SCHLECHTRIEM/SCHMIDT-KESSEL, 64; *For English law*, Davis Contractors Ltd v Fareham UDC [1956] AC 696, 723; Pioneer Shipping Ltd. v B.T.P. Tioxide Ltd. (*The Nema*), [1982] A.C., 724, 744; Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, 173 where it was explained that a trivial intervention is insufficient. The events relied on must strike at the root of the contract. British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185 where Viscount Simon notes that the contract is terminated if the circumstances at the time when the contract was made shows that the parties never agreed to be bound in a fundamentally different situation since "on its true construction it does not apply in that situation. MCKENDRICK, Contract Law, 255; BEATSON, 123; CHITTY, 1635.
[623] *See e.g,* BGE 100 II 345, p. 349; BGE 59 II 264, p. 304; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 570; SJZ, 1968, 360, 360; BISCHOFF, 194; OFTINGER, SJZ 1939, 229, 235; LANDO/BEALE, 115; MASKOW, Am. J. Comp. L. 1992, 657, 662; Art. III. – 1:110 (1) DCFR.
[624] WEBER, 38; *Compare also*, BGE 104 II 314, p. 315. Compare also, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1142.
[625] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1133; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58). *See also e.g*, NJW 1976, 142 p. 142; WM 1969, 1323 p. 1324. *For Swedish Law*,

"fundamental," "substantial", "significant" or "striking". To give content to the various terms one must revert to case law.

1. The Subjective Contractual Equilibrium

The point of departure is the original subjective contractual equilibrium.[626] Art 6.2.2 of the UNIDROIT Principles similarly require that the supervening event must "fundamentally alter the equilibrium of the contract". The same is implied in the PECL and the DCFR by the fact that the supervening event must have brought about a "major imbalance in the contract or in the parties' respective obligations."[627] Thus, an already existing imbalance in the contractual equilibrium is irrelevant, unless the *"original agreed imbalance"* is rendered significantly worse as a consequence of the change in circumstances.[628] With respect to §36 AvtL, an initially unreasonably low contract price, may itself be a ground for adaptation.[629] That is a consequence of §36 AvtL targeting single "unfair" contract terms. The Clausula can similarly be applicable on e.g., a contractual rule allocating the risk between the parties.[630] **162**

2. Cost Increases

For a cost increase to become relevant it needs to *fundamentally* alter the contractual equilibrium. Where the line is drawn will vary depending on circumstances in the individual case. Neither in case law, nor in the legal doctrine has a threshold in percentage developed. Thus, there is no general rule of thumb to be applied to decide whether the cost increase is considered "fundamental". The burden to define a threshold is put on the shoulders of the judge who in its discretion shall decide whether the unexpected turn of event has disturbed the contractual equilibrium to such an extent that an adaptation of the contract is motivated.[631] Case law is fairly lean and scattered as to cases where a court or arbitral tribunal intervened by way of revising the contract terms. There are, however, several cases dealing with the issue of cost increases that are of value to understand what increase must be at hand to trigger the hardship exceptions. With respect to §36 AvtL, targeting single contract terms, it should be mentioned that the clause is applicable on contract terms directly regulating the price as well as on contract terms having an effect on the price e.g., terms that give one party the sole discretion to raise the price in **163**

GRÖNFORS, 28; Prop. 1975/76:81, p. 165.

[626] *For German law*, FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58) referring to the „subjective equilibrium" as agreed initially; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1142. *See also,*KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1142; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 25) explaining that the balance between the contractual obligations as initially agreed forms part of the foundations of the contract; CANARIS, 742; NJW 1962, 250 p. 251. *For Swiss law*, KRAMER, SJZ 2014, 273, p. 278; MEDICUS, BGB AT, 342 (Rn. 866); NJW-RR 1999, 237 p. 238; BGH 86, 167, p. 168; BGH 77, 195 p. 198 f. and 202; BGH 90, 227, p. 231; BGH 119, 220 p. 224; BGE 97 II 390, p. 398; BISCHOFF, 191. *For Swedish law,* RUNESSON, 382 and 401; DOTEVALL, SvJT 2002, 442, 451 ff.; NJA 1979 s. 731.

[627] Art. III. – 1:110 DCFR, 713; LANDO/BEALE, 114 f.

[628] *For German law,* FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58); *For Swiss law*, BGE 97 II 390, p. 398 f.; BISCHOFF, 191; SIEGWART, 148; BGE 60 II 205, p. 214; *For Swedish law see e.g.,* NJA 1979 p. 731, where the court limited the adaptation of the price to SEK 150 p.a while the market price for similar properties was SEK 400 p.a and in NJA 1983 p. 385 the court stayed at SEK 265 p.a. while the market price for similar properties was SEK 600. *Similarly see also,* the verdict from the Swiss *Civil Court in Sachen from 12.2.1980*, where the court took into consideration the fact that the initially agreed rent already was 22 per cent higher than the average rent for similar properties.

[629] In *NJA 1979 s. 731,* the price initially agreed upon was already low but not unreasonably low so the Swedish Supreme Court upheld the economic relation between price and performance.

[630] ZK-BAUMANN zu Art. 2 ZGB, 697.

[631] *Compare hereto e.g*. in Swedish law, Prop. 1975/76:81 p. 111, 116, 133; SOU 1974:83, p. 131, where the legislator intentionally left out guidelines for the court in order to give the courts the main responsibility and control of the application and of the further legal development of § 36 AvtL.

the event of a change in circumstances or terms that link the price to an index (e.g. consumer price index, automobile transport index, whole-sale price index etc.).[632] The English doctrine of frustration generally rejects increased costs as a ground for relief. [633] The same position is taken with respect to cases of inflation.[634]

a) Frustration in Cases of Cost Increases: British Common Law

164 In the well-known case, *British Movietonews Ltd. v London District Cinemas,*[635] the House of Lords explained that a mere "uncontemplated turn of events" is not a ground for frustration and held the parties to the agreed upon price as long as the wartime measures were in force. The case concerned a contract where one party undertook to supply news reels for a price made dependant on wartime conditions which, unexpected by both parties, continued to be in force to conserve dollars also after the war came to an end. In the case, Lord Simon explained that "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to the execution, or the like. Yet this does not in itself affect the bargain which they have made." [636] The case and the statement by Lord Simon clearly show the position taken that hardship is not a ground for relief.[637] A more contemporary and leading case confirming the same is *Davis Contractors Ltd v Fareham UDC.*[638] The facts were as follows:

165 A construction company agreed to build a certain amount of houses within a certain time frame to a fixed price. Due to labour shortages caused by the Second World War the work took 22 months and the costs increased by approx. 22 per cent of the agreed upon price. Claiming that the contract was frustrated, entitling to additional compensation, the House of Lords held that labour shortage was "*within the ordinary range of commercial probability"* and that the event had not brought about a fundamental change of circumstances.

166 In the case, Lord Radcliff explained: *"it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. 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."*[639] The price increase resulted in a hardship for the construction company, but the job itself never became radically different from that contracted for. One could, however, imagine a situation where the supervening event causes such spectacular additional costs that the contractual duty is rendered radically different or, as Lord Radcliff famously described

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[632] Prop. 1975/76:81, p. 137 ff; SOU 1974:83, p. 164 ff.
[633] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 729; British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185; Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, 239; Thames Valley Power Ltd. v Total Power Gas Ltd. [2005] EWHC2208 (Comm), 1, 14 available at: http://www.bailii.org/ew/cases/EWHC/Comm/2005/2208.html *See also*, ATIYAH/SMITH, 187; TREITEL, 283; BEATSON, 122; CHITTY, 1647 f.
[634] BEALE, 1141. *See, however,* National Carriers Ltd v Panalpina Northern Ltd [1981] A.C. 675, 712, based on which it cannot be entirely ruled out that extreme inflation may frustrate a contract.
[635] British Movietonenews Ltd. v London District Cinemas [1952] A.C. 166.
[636] British Movietonews Ltd. v London District Cinemas [1952] A.C. 166, 185.
[637] *See also*, Thames Valley Power Ltd. v Total Power Gas Ltd. [2005] EWHC2208 (Comm), 1, 14 available at: http://www.bailii.org/ew/cases/EWHC/Comm/2005/2208.html, where it was stated that: "the fact that a contract has become expensive to perform, even dramatically more expensive, is not a ground to relieve a party on the grounds of force majeure or frustration." *See also in* Tsakiroglou v Noblee Thorl GmbH [1962] A.C. 93, 115, where Viscount Simonds explained that: "An increase of expense is not a ground of frustration".
[638] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696; TREITEL, 280.
[639] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 729.

it: "Non haec in foedera veni. It was not this that I promised to do."[640] A cost increase of 23 per cent would hardly amount to hardship in a jurisdiction that have introduced a mechanism to deal with hardship into their law or, under the international unification works.

b) A Thing "Radically Different"

In *Instone & Co Ltd. v Speeding Marshall & Co Ltd*., a case from 1916, it was explained that a rice in price as an excuse is a question of degree. In the case the price of coal rose by 88 per cent and the seller argued that delivery of the remaining coal was suspended. The House of Lords held that the 88 per cent increase was insufficient to relieve the seller from the contractual duty.[641] As mentioned in the case, when the supervening event takes the form of a cost increase it will be a question of degree whether such increase rendered the contractual duty something "fundamentally different."[642] Hence, one could imagine a hardship situation where the supervening event caused additional costs, of such dimension that it renders the contractual duty radically different so that the contract is frustrated. Support for such view can, however, only be found in obiter dictum statements.[643] In the *Tsakiroglou*, Lord Reid indicated, with respect to increase in freight costs that "an increase which reached an astronomical figure" would need to be considered whether it would frustrate a contract.[644] The other members did not make similar reservations. In *Brauer & Co (G.B) Ltd v James Clark (Brush Materials Ltd)* it was stated by Lord Denning, by way of referring to the principle laid down in the *British Movietonews Ltd v London & District Cinemas Ltd,* that if the price to be paid for the necessary export license would amount to one hundred times the contract price, it would be a "fundamentally different situation". The fact that the seller had to pay the *current (increased) market price* was not: "*After all, any person who sells goods forward must be ready himself to bear any increase in the market price".*[645] In *Staffordshire Area Health Authority v South Staffordshire Waterworks Co,* Lord Denning argued that the contract was frustrated due to a 18 times increase of the fixed price over a fifty-year period. The other members of the court did not accept his reasoning. As Professor Treitel noted, the dictum could be questioned, as it is based on his judgement in the Court of Appeal in the *British Movietonews*-case, which was overruled by the House of Lords.[646] It could, however, be suggested by these statements that there may be a route, extremely narrow though, for an English court to recognize also a cost increase as a ground for relief. It has also been suggested in the legal doctrine that the strict position of the English courts may not be absolute.[647] As I gather, the "obiter" statements in the above cases narrow the doctrine of frustration down additionally rather than opening up for hardship as an excuse. As already mentioned above in *Instone & Co Ltd v Speeding Marschall & Co Ltd*, "Rice in price as an excuse is a question of degree."[648] It seems to me that the "degree" when a cost increase would be in any way considered an excuse to perform the contractual obligation under English law is, according to the extra judicially statements, when there has been a "one hundredfold increase" (i.e. 10.000 per cent) or a price increase reaching "an astronomical

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[640] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 729.
[641] Instone & Co Ltd. v Speeding, Marshall & Co Ltd. [1916] 32 TLR 202, 203.
[642] Pioneer Shipping Ltd. v B.T.P. Tioxide Ltd. (*The Nema*), [1982] A.C. 724, 744; Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, 239.
[643] BEATSON, 123; TREITEL, 276.
[644] Tsakiroglou v Noblee Thorl GmbH [1962] A.C. 93, 118.
[645] Brauer & Co (G.B) Ltd v James Clark (Brusch Materials Ltd) [1952], 1952 Vol. 2 Lloyd's List Law Reports 147, p. 155. Lord Denning continued: "It would be a strange thing if a seller could insist on the contract if the price fell, and could escape his own obligations if it rose."
[646] TREITEL, The Law of Contract, 883. *See hereto,* British Movietonews Ltd. v London and District Cinemas Ltd. [1952] AC 166, 184 f. and 188.
[647] *See hereto also*, BEATSON, 122, 129 ff.
[648] Instone & Co Ltd. v Speeding, Marshall & Co Ltd. [1916] 32 TLR. 202, 203.

figure." In my opinion that refers to situations likely to occur only in times of extraordinary contingencies such as war or the aftermaths of war (e.g., hyperinflation), which most likely will be resolved by special legislative interventions by the government. While a line of cases on frustration show that English courts take the position not to recognize hardship or financial loss as a ground for relief, they may achieve just the same result merely by taking a different route.[649] *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*[650] is an example of how the House of Lords dealt with a situation of hardship through contract construction. The court terminated the contract. Thus, the outcome was the same as if the court had applied the doctrine of frustration of purpose and placed the burden of the cost increase on the buyer.[651] Lord Denning argued in his dictum that the contract was frustrated by the change of circumstances.[652]

3. The Position in Case Law

168 The hardship rules heavily rely on judicial interpretation, which opens up for equity considerations, making it problematic for the practicing lawyer to give advice on the issue of change in circumstances. Can one with any safety make a quest for contractual change based on leverage found in the applicable laws, or start litigation? Or, is it rather advisable to omit to do so? Case law will be examined to better understand the point of tolerance triggering hardship. To establish a threshold in percentage may, however, not be desirable as any threshold will be subject to the individual circumstances of the case. A threshold test could nevertheless be helpful as a starting point for the legal analysis and, arguably, some kind of benchmark is needed to promote legal certainty.

a) Fluctuating Market Prices

169 Only in few cases have increased costs motivated an adaptation of the agreed price. To procure the agreed goods also when an adverse turn of event has rendered it more costly is generally regarded to be normal entrepreneurial risk.[653] Transacting parties must generally carry the burden of cost increases or price developments related to the industry or sector in which they operate.[654] Increased costs to procure goods can be the result of e.g., rising raw material prices, fluctuating commodity prices, increased labour costs or increased transportation costs.

170 "Pure" commodity contracts i.e., to purchase or sell a commodity for a fixed price on a certain date, are typically regarded as speculative excluding hardship as ground for relief. Consequently, if a contract is entered into for the sale of a commodity or goods or a service heavily dependent on raw material prices, the risk for fluctuating market prices must generally be expected and bargained for in the contract. But the market price has no upper limit so it must reasonably exist a point at which the price becomes so high that it is commercially unsound for

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[649] ATIYAH/SMITH, 182.
[650] Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387.
[651] ATIYAH/SMITH, 182.
[652] Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387, 1395 ff.
[653] *For Swiss Law see e.g*, WEBER, 59; BISCHOFF, 214; *For Swedish Law*, BERNITZ, 89; GRÖNFORS, Avtalslagen, 246; HELLNER, Kontraktsrätt, 45; VON POST, 164 f.; RAMBERG/RAMBERG, 198; NJA 1999 s. 575; NJA 1999 s. 793. *For German law*, FINKENAUER, MüKo zum BGB zu § 313, 1943 (Rn. 207); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 528 (Rn. 23); *For Mercantile law*, MASKOW, Am. J. Comp. L. 1992, 657, 662; RODNER, Hardship under the UNIDROIT Principles of International Commercial Contracts, 677, 689.
[654] *Compare e.g.*, Arbitration Court of the Japan Shipping Exchange, award of 1975.09.25, Y.B. Com. Arb. 1983, 153, 155 where the speculative character of the type of contract (a contract for the construction of a ship) was the ground for rejecting an adaptation of the contract price; *Similarly in the Norwegian case*, NDS 1959 s. 333, 360 f. a party wanted to be released from a shipbuilding contract due to rapidly sinking prices as a result of the Suez-crisis in the 1950s. The buyer was held to the contract and the Norwegian Supreme Court noted that shipbuilding contracts always have a speculative character since it is common knowledge that prices may fall or rise rapidly.

the seller to bear the entire risk of the change in circumstances. Case law where a court or arbitral tribunal have granted relief by adapting the contract terms unrelated to the First World War, the Great Depression, the Oil crisis in the 1970s or the like is sparse. However, one Scandinavian case can be mentioned. In a case before the Finnish Supreme Court, *HD 1982 II 141,* where raw material prices to produce powdered milk rose by 130 per cent, due to an unexpected and sudden intervention by the Finnish government, the seller ceased to deliver the goods. The buyer sued for damages for non-delivery. The Finnish Supreme Court adjusted the damages to reflect that the price agreed in the contract clearly was unreasonable having regard to the change in circumstances.[655] While the cost increase amounted to 130 per cent, the actual loss per kg was 16 per cent instead of the seller making a profit of 93 per cent. The outcome is questionable. A 16 per cent loss per kg could be argued to be a risk that a seller selling goods forward is deemed to bear in a contract where the seller calculated on making a high profit. A contemporary and highly controversial case that must be mentioned in the context of fluctuating commodity prices is: *Scafom International BV v Lorraine Tubes S.A.S*, a ruling by the Belgian Supreme Court. The circumstances in brief:

A seller requested adjustment of the purchase price in a contract for sale of warm-rolled steel tubes due to increased price for steel by approx. 70 per cent. The buyer, refusing to pay more, sued the seller for non-delivery. The Belgian Supreme Court, applying the CISG, explained that an unforeseen change of circumstances leading to a substantial alteration of the contractual equilibrium might, under specific circumstances, constitute an impediment under Art. 79(1) CISG. The 70 per cent cost increase was enough for the Belgian Supreme Court to require the buyer to renegotiate the contract price.[656] **171**

The ruling is questionable for several reasons. The Belgian Supreme Court sets a low threshold for triggering hardship, especially for a contract involving a commodity exposed to price fluctuations sometimes of a sudden and rapid kind.[657] The ruling deviates from other decisions and is the only court ruling exempting a seller from liability under the CISG due to economic hardship. In *Vital Berry Marketing NV v Dira-Frost NV*, a significant drop in the world market price of the goods (frozen raspberries) did not qualify as a case under Art. 79 CISG. It was stated that: "*fluctuations of prices are foreseeable events in international trade and far from rendering the performance impossible and any economic loss that may follow must be deemed to be included in the normal risk of commercial activities*".[658] It has been suggested that there is a risk that Art. 79 will be interpreted differently in national courts and tribunals as domestic law may unconsciously influence the outcome,[659] which the **172**

Belgian verdict may be a practical example of. Considering the caution applied by courts and arbitral tribunals in recognizing hardship as ground for excuse, it is likely that the outcome in the Belgian case would be different if the case would come before the national courts in the jurisdictions examined herein. To illustrate, in a case decided by the *OLG Hamburg,* no relief was granted under Art. 79(1) CISG when the market price for iron-molybdenum increased by 200 per cent. Such cost increase had not exceeded a "sacrificial level" in the opinion **173**

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[655] *See hereto,* WILHELMSSON, 133 f. To deliver to the price initially agreed upon (FIM 3,50 per kilo), would result in a loss of 16 per cent per kilo instead of a profit of 93 per cent per kilo.
[656] *Scafom International BV v Lorraine Tubes S.A.S,* available at, > http://cisgw3.law.pace.edu/cases/090619b1.html
[657] As an example, future price for hot rolled steel rose by 150 per cent between December 2015 and June 2018. Between January 2016 and June 2016 i.e., in less than 6 Months, prices for hot rolled steel rose by more than 60 per cent.
[658] Rechtbank van Koophandel, Hasselt, Decision of 02.05.1995, available at, > http://www.unilex.info/case.cfm?id=263; *See also*, LOOKOFSKY, stating that the fact that a party is unable to make a profit on a particular sales transaction does not trigger a liability exemption since even drastic price increases typically are foreseeable.
[659] TREITEL, 302; HONNOLD/FLECHTNER, 429 f. *Compare hereto also*, RIMKE, Force majeure and Hardship, 197, 211.

of the court. The court further noted that a higher threshold must be applied with respect to speculative contracts.[660] Contracts involving the sale and purchase of commodities, at fixed prices, are typically speculative and the threshold for triggering hardship must generally be set higher.[661] No relief was granted in a case where the world market price for iron alloy increased, between the formation of the contract and the time for shipment of the goods, by 32 per cent under a first contract, and 188 per cent in a second contract.[662]

174 According to the UNIDROIT Principles a cost increase is fundamental if a "substantial increase" in the cost occurred, e.g. due to a *dramatic rise* in the price of raw materials. [663] Thus, the cost increase must go beyond normal economic developments to trigger the hardship clause.[664] In the past, it has been suggested that a cost increase must amount to at least 50 per cent in order to trigger Art. 6.2.2 of the UNIDROIT Principles.[665] The suggested threshold corresponds with the Official Commentary to the UNIDROIT Principles (version of 1994) which went further in its definition of the "fundamental" requisite explicitly stating that if the performances are capable of precise measurement in monetary terms, an alteration amounting to 50 per cent or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration.[666] The suggested threshold received critic for being too low and arbitrary[667] and was excluded for that reason in the succeeding versions of the commentary. The Official Commentary to Art. III. – 1:110 DCFR exemplifies the required intensity by stating that a 100 per cent decrease in the market price of a certain crop due to an unexpected flood of the specific crop due to import is not an exceptional change of circumstances.[668] The mentioned thresholds could be compared with one commentator to Art. 79 CISG suggesting that when the alteration amount to 100 per cent, the extent of efforts that reasonably can be required has passed.[669] It has also generally been suggested that, in standard situations, (I take that to be understood as a domestic contract of non-speculative character concluded during stable times), when the alteration amount to 100 per cent, the extent of efforts that is required to overcome the impediment has passed.[670] It has been suggested that a 100 per cent threshold is appropriate for domestic markets rather than international markets where price fluctuations are frequent and higher.[671] On the international market (in non-speculative contracts, I assume), a 150-200 per cent margin is suggested.[672] The same commentator states, in relation to Art. 79(1) CISG, that a 70 per cent, 100 per cent or even 300 per cent cost increase is insufficient to grant relief in a contract of speculative nature.[673] Although that view deserves

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[660] Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997, (CISG-online No. 261, Pace Database); Tribunale Civile di Monza, decision of 14.01.1993, available at: http://cisgw3.law.pace.edu/cases/930114i3.html.
[661] BRUNNER, 424. *See also,* ENDERLEIN/MASKOW, 325, stating that Art. 79(1) CISG hardly provides protection for specula tive transactions.
[662] China International Economic & Trade Arbitration Commission, decision of 02.05.1996, available at, >: http://cisgw3.law.pace.edu/cases/960502c1.html.
[663] Comment No. 2 on Art. 6.2.2 the UNIDROIT Principles (2016 edition); MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 250. LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 440; MCKENDRICK, 816; SCHWENZER, VUWLR 2008, 709, 716.
[664] MASKOW, Am. J. Comp. L. 1992, 657, 662; RODNER, Hardship under the UNIDROIT Principles of International Commercial Contracts, 677, 689.
[665] MASKOW, Am. J. Comp. L. 1992, 657, 662.
[666] Comment No. 2 on Art. 6.2.2 the UNIDROIT Principles.
[667] BONELL, 42 and 117; LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 440; MCKENDRIC, 816.
[668] Offical Comment to Art. III. – 1:110 DCFR, 713.
[669] ENDERLEIN/MASKOW, 325. *To the contrary*, SCHWENZER, on Art 79, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 1088.
[670] BRUNNER, 428-435.
[671] SCHWENZER, VUWLR 2008, 709, 716.
[672] SCHWENZER, VUWLR 2008, 709, 717.
[673] SCHWENZER, on Art 79, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 1088. See also,

support, other arguments may become relevant in international business transactions. Such factor can, as I gather, motivate a lower or a higher threshold. A 50 per cent threshold could arguably be a reasonable alteration to trigger hardship in international business transactions where large sums are at stake and where for example even a small currency change could have a draconian effect.[674]

One conclusion that can be drawn on the present body of case law and the discussion in the legal doctrine, is that if Art. 79(1) CISG cover economic hardship, the standard is at least as strict, and presumably even stricter, than the standard under the international unification instruments.[675] With respect to the UNIDROIT Principles, at the present date, there is no published arbitral award where it has been established that the threshold to trigger hardship has been met merely because the costs to perform the contractual duty increased by 50 per cent.[676] It is clear that an alteration amounting to *less* than 50 per cent of the cost of the performance is unlikely to trigger the hardship exception and reasonably clear that a cost increase must go beyond 200-300 per cent to become relevant in relation to contracts with speculative features. Arbitral awards also clearly show that price increases on the lower end, 13.6 per cent, 44 per cent, and 25-50 per cent are insufficient to grant relief.[677] Once the UNIDROIT Principles are more widely applied future case law may show differently. At present date, a 70 per cent cost increase as ground for relief is in contrary to both case law and the general view in the legal doctrine to the UNIDROIT Principles and thus, the Belgian court ruling should be viewed up on with caution. **175**

aa) Fluctuating Prices in Times of Crisis

In cases related to fluctuating raw material prices, the threshold for triggering hardship has generally been met in transactions of non-speculative character concluded during economically and politically stable times. National courts have granted relief in contracts where the price is set to cover costs and where the upside is limited. For instance, the Swiss Federal Tribunal increased the rent by approx. 17 per cent p.a. to reflect increased costs for heating in a rental contract concluded in 1913 on a nine-year term. Due to wartime contingencies, the price for coal rose, resulting in increased costs of heating of approx. 250- 370 per cent.[678] Similarly, the German Supreme Court increased the rent when the delivery of vapour, being an integral part of the rental contract, became nearly five times as expensive as the rent paid by the tenant for the same period due to shortage of coal and increased labour costs as a result of the First World War.[679] The court explained that the cost to provide vapour unexpectedly changed to a level, which was rendered economically completely different from what the parties contemplated at the time when the contract was concluded. [680] The fact that the two cases concerned rental contracts, of non-speculative character, presumably contributed to the courts' willingness to carry out an adaptation of the contract.[681] Additionally, both contracts were concluded prior to the First World War. Similar factors were decisive for the outcome in *BGE 48 II 249* where the Swiss Federal Tribunal adapted **176**

MASKOW/ENDERLEIN, 325 stating that Art. 79(1) does hardly provide protection with respect to speculative contracts.

[674] DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 496.

[675] BERGER, 549; *Similarly*, TALLON, 572, 592, stating that in the case the Convention cover situations short of impossibility, it is without any hesitation stricter than that of frustration or impracticability.

[676] VAN HOUTTE, The UNIDROIT Principles and Their Reciprocal Relevance, 181, 190.

[677] ICC Case No. 6281 of 1989, Y.B. Com. Arb. 1990, 96, 99 f.; Arbitration court of the Japan Shipping Exchange, award of 1975.09.25, Y.B. Com. Arb. 1983, 153, 155; ICC Case No. 2508 of 1976, Collection of ICC Awards I, 292, 294.

[678] BGE 47 II 314, p. 317 ff. Approx. 25 - 33 per cent of the yearly rent was used for heating between 1918-1920 in comparison with 7 per cent of the yearly rent prior to 1918.

[679] The rent p.a. amounted to approx. 9000 RM and the additional cost for the deliver of vapour, for that period, amounted to approx. 45 000 RM p.a.

[680] RGZ 100, 129 p. 131 f.

[681] *Compare*, HEDEMANN, SJZ 1921, 305, 309; *See hereto also*, RGZ 88, 172 p. 177; RGZ 101, 79 p. 82; RGZ 106, 7, p. 10.

the leasing fee for a restaurant on board a steamship in a contract entered into in 1911. The First World War caused a loss in turnover of 52 per cent, which the court considered to be an *obvious and fundamental* change of the contractual equilibrium.

177 Couple of war-related cases where the contracts were entered into during politically stable times, show the impact of the contractual duration and the courts willingness to interfere. In a claim for increased rates for the supply of electricity to reflect rising fuel prices caused by the First World War, the Swiss Federal Court explained that good and bad years must be expected in a contract extending over several decades. The company requested an increase of the yearly rates by 16 - 40 per cent to cover increased costs. While the cost increase could be translated into large amounts of money, it was not of such scope that it rendered the contract something commercially completely different. The crucial point for the outcome of the case was the contractual duration.[682] The German Federal Court of Justice similarly explained that rising raw material prices, in a contract with a long duration, is foreseeable and within the normal business risks.[683] The case concerned a contract for the supply of district heating and warm water where rising oil prices resulted in increased costs. A contributing factor in the case may have been that the outbreak of the Israeli-Egypt war was a known fact at the time when the parties concluded the contract. In line with several other cases, courts and arbitral tribunals have generally been reluctant to interfere if the contract is entered into during turbulent times without making reservations for change in circumstances. As a further example, in the so-called Iranian-case, the German Federal Court of Justice found that the commercial risk of increased oil prices could not be cast on to the buyer since the seller was aware of the war-like hostilities in the region.[684] The steep and sudden rise, going from 11 DM per 100 litre up to a maximum of 613 DM per 100 litre equalling a 5400 per cent increase of the contract price, did not motivate an adaptation of the contract price. The contract for the delivery of the oil from Iran to Germany was entered into in December 1972 only a year prior to the price explosion and the so-called "first oil-chock". The court explained that the seller following the first jump in price in the summer of 1973, should have purchased more oil in order to minimize damages in the event of further cost increases. The German Federal Court of Justice held the seller to the contract on unchanged terms.[685] Similarly, in an Arbitral Award, where Swiss Law was applicable, a company, deemed to transport a certain amount of crude oil through pipelines put into operation by the counterparty, could not be released from its obligation to provide the agreed quantity when the "second oil chock" caused rising oil prices. The contract extended over two decades without any reservation for change in circumstances despite that the "first oil chock" was a well-known fact.[686] In line with the above cases

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[682] BGE 47 II 440, p. 457 ff. *Compare with*, BGH BB 1958, 131 p. 131, where a contract for the supply of water was entered into on a term indefinite in time. The German Supreme Court rejected an adaptation of the initially agreed tariff for the supply of water explaining that the increased production costs did not render the contractual performance for the supply of water under the new circumstances unreasonable. In the case, only the first 1000 cubic meter of water was fixed to a lower price. The outcome may have been different had the initially agreed price covered not only a part, but the whole amount of the water supply.

[683] NJW 1977, 2262, p. 2263.

[684] BGH JZ 1978, 235, 235. *Compare with*, NJW 1984, 1746, concerning a long-term contract for the delivery of beer between a German brewery and an Iranian importer. The German Federal Court of Justice explained that while the future political develop ment was foreseeable to both parties the complete prohibition to import alcohol was not amounting to a fundamental change in circumstances. *See also*, SG 126/90, WR 1993, 375, 376, where it was noted that a misjudgement of the market situation and future developments generally is not a ground for relief.

[685] BGH JZ 1978, 235, 235 f.

[686] Ad hoc Award of July 6, 1983, YCA IX (1983), 69, 70. *See hereto also,* ICC Case No. 2508 of 1976, Collection of ICC Awards I, 292, 294, where Swiss law was applicable and the seller requested that the contract price for delivery of petroleum to be adjusted to reflect cost increases of 25 - 50 per cent as a result of the rising prices on the world market price for oil. The tribunal held that such cost increase was not significant enough to justify the application of the doctrine of change of

is the "Esso-verdict" where the arbitral tribunal increased the contract price by 100 per cent. The contract price for the delivery of crude oil was adapted to reflect rising oil prices of 300-400 per cent as a direct consequence of the "First oil chock". Applying Norwegian law, the arbitral tribunal explained that the entire cost increase could not be reflected having regard to the long contract term (a ten-year term) and that the politically unstable situation was known by the parties at the time when the contract was concluded.[687] The same position was taken in *ICC Case No.* 8486 where national law in light of the UNIDROIT Principles was applied. The buyer could not be released from the contract on the grounds of hardship when a dramatic drop in the price of lump sugar occurred on the Turkish market. The buyer had been aware of the commercially unstable situation in Turkey at the time of entering into the contract.[688] Similarly, in *BGE 59 II 372*, the Swiss Federal Tribunal explained that parties to long-term contracts must take market fluctuations also of a greater scope into account and rejected a claim for reduced rent. A loss in turnover of 27 per cent was insufficient to grant relief. The contract was entered into during a worldwide economic downturn (1930s) and for a period of fifteen years, which gave it a speculative character.[689]

To ascertain whether the change is fundamental enough to motivate an adaptation of the contract price, the courts are balancing the contractual duration, the surrounding context upon formation of the contract and speculative features. Case law indicates that if the contract is entered into on a long term it may be viewed as if it contains speculative elements, especially if concluded during turbulent times without addressing the issue of change in circumstances. It is reasonably clear that courts and arbitral tribunals will be reluctant to interfere in such cases. Still, an adaptation is not excluded in such situations. The Swiss Federal Tribunal considered a 60 per cent cost increase caused by increased labour costs for the construction of houses enough to adapt the contract price despite that the contract was concluded during an on going world war. The fact that the total cost increase for labour and material equalled approx. 6 per cent in total since the outbreak of the war, made the 60 per cent cost increase, just a couple of months following the conclusion of the contract, something so completely outside what the parties could have foreseen.[690] On similar grounds and reasoning, the German Supreme Court intervened in a contractual relation to reflect cost increases for the delivery of vapour despite that the parties had agreed to extend the contract term for another five years during the on going world war. The fact that the extension was agreed on only one year into the war when nobody yet could foresee the full scope of the war presumably had an impact on the outcome.[691] A similar ground for excuse can be found in *BGE 60 II 205*. The Swiss federal tribunal first rejected a claim for relief in *BGE 59 II 372* where the loss in turnover between 1932 **178**

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circumstances in Swiss law.

[687] RG 1976 s 650. Being a case prior to the introduction of §36 in the Norwegian Contracts Act, the arbitral tribunal generally reasoned around §24 of the Norwegian Commercial Code and economic force majeure.

[688] ICC Case No. 8486 of September 00.09.1996, Collection of ICC Awards I, 321, 326 f. Available at, http://www.unilex.info/case.cfm?pid=2&do=case&id=630&step=FullText

[689] BGE 59 II 372.

[690] BGE 50 II 158, p. 165 f.

[691] RGZ 100, 129. *See hereto also,* BGE 46 II 429 where the Swiss Federal Tribunal similarly discharged a seller from paying damages for non-delivery when the cost for cotton increased by approx. 200 per cent as a consequence of the First World War. *Similarly*, in BGer from 10.7.1919 (1920) ZR contractual relief was granted as the market price for cotton fabric increased by more than 100 per cent, which no party could have foreseen at the time when the contract was concluded in 1915. In BGE 45 II 454 a seller of yarn had the right to suspend delivery until the commercial situation stabilized. The court held that the buyer's claim to resume delivery too premature as the price for yarn still was three times as high as in 1915 when the contract was concluded. *See however to the contrary*, BGE 48 II 126 where a contract was entered into for the printing of a newspaper prior to the outbreak of the First World War. During the war, in 1916, the contract term was xtended for a period of three years without making any reservations for changed circumstances. The Swiss Federal Court held the seller to the contract.

and 1933 amounted to 27 per cent. When the case once more came up for trial, the Swiss Federal Tribunal took a different position. The court explained that a loss in turnover of 46 per cent between 1931 and 1933 could not merely be seen as an economic fluctuation. The loss in turnover was not only sudden and sharp but could be attributed to the Great Depression *which full scope could not have been foreseeable by the parties* in 1929 when the contract was concluded. The court terminated the contract. [692]

bb) The Sale of Goods

179 A higher threshold can generally be expected in contracts for the sale of goods. As Lord Denning expressed it in *Brauer & Co (G.B) Ltd v James Clark (Brusc Materials Ltd)* in relation to the fact that the seller had to pay the current (increased) market price: "*After all, any person who sells goods forward must be ready himself to bear any increase in the market price."*[693] The German Supreme Court similarly explained that a seller is entitled to sell goods not yet in his possession and to speculate on falling prices but the risk that it goes in the other direction cannot be cast over to the buyer.[694] A stricter approach is also generally encouraged with respect to wholesale contracts due to their speculative character. [695] In a contract for the sale of 5000 kg of tin alloy where the price rose by more than 100 per cent in a short time, the German Supreme Court explained that the seller must take necessary measures to perform its contractual obligations either by acquiring the raw material to market price or to keep and deliver the required amount out of its own stocks. [696] The German Supreme Court similarly rejected an adaptation of a contract for the delivery of tin alloy concluded in 1914 where increased raw material prices disrupted the contractual equilibrium.[697] In contracts for the sale of goods, national courts have granted relief in cases stemming from the First World War. The German Supreme Court exempted a seller from the delivery of 10.000 kilos of cooper thread. Only a small part had been delivered at the time when the First World War broke out. The parties agreed to take up delivery once the war was over. At that time, however, there was a worldwide shortage of cooper, the seller's stock had been confiscated and, large amounts of cooper ceased to be imported to Germany. This rendered the contractual duty, in the opinion of the court, something completely different from what initially was agreed on.[698] The Swiss Federal Tribunal similarly discharged a seller from paying damages for non-delivery of the agreed amount of cotton yarn when the cost for cotton increased by approx. 200 per cent as a consequence of the First World War. The higher price that the buyer was willing to pay would still result in a price increase of nearly 100 per cent for the seller which, in the opinion of the court, still was "much more severe than the parties reasonably could have expected" having regard to the initially

[692] BGE 60 II 205, 214 ff.
[693] Brauer & Co (G.B) Ltd v James Clark (Brusch Materials Ltd) [1952], 1952 Vol. 2 Lloyd's List Law Reports 147, p. 155. Lord Denning continued: "It would be a strange thing if a seller could insist on the contract if the price fell, and could escape his own obligations if it rose."
[694] RGZ 88, 172 p. 177. To be compared with RGZ 57, 116, p. 119 where a contract for the delivery of cottonseed of a specific brand was concluded and where the fabric of the producer of the specific goods was destroyed in a fire after the conclusion of the contract. The seller was not considered required to hold stock of the goods, as the seller could not have expected such unusual difficulties in acquiring the goods.
[695] *For German law*, RGZ 88, 172, 174 f.; RGZ 101, 79 p. 82; *See also*, HEDEMANN, SJZ 1921, 305, 309; *See also e.g.*, RGZ 95, 41 p. 44; RGZ 272, p. 273; RGZ 92, 322 p. 324 where the court explains that the risk for price fluctuations in whole sale contracts of generic goods falls on the seller and is not a ground for relief. *For Swiss law*, WEBER, 57 ff.; OFTINGER, SJZ 1939, 229, 235; MERZ, Die Revision, 498a footnote 196; BISCHOFF, 214. *For Swedish law*, RAMBERG/RAMBERG, 202 stating that a seller can protect himself against price fluctuations and secure its obligation under the contract by way of acquiring the required quantity in advance.
[696] RGZ 88, 172 p. 174 f; *See also*, RGZ 102, 272, p. 273. *Compare also*, WM 1964, 1253, where a contractor placed a bid for a building project calculating on making a profit of 70.000 DM but where, due to increased labour costs, it resulted in an 80 000 DM loss. The German Supreme Court rejected an adaptation of the contract price.
[697] RGZ 95, 41.
[698] RGZ 94, 45.

agreed price. Furthermore, the Swiss Federal Tribunal explained that the seller was under no obligation to deliver out of its stocks since wartime restrictions required any yarn in stock to be sold solely for the purpose of national consumption. [699] Specific wartime restrictions hindered the sellers to deliver the goods on their on terms and, as I gather, this was a contributing factor for the court granting relief in both cases. The German case could, however, be viewed as a case of impossibility rather than hardship as not only was there a general shortage of cooper world wide but the sellers own stock had been confiscated and the chances to obtain new cooper elsewhere in Germany could almost be viewed as impossible as the inflow of cooper in the country diminished by 90 per cent when the USA joined the war. In two other war-related cases, one before the Swiss Federal Tribunal and, one before the Swedish Supreme Court, the burden of change in circumstances was apportioned among, the seller and the buyer. The circumstances in brief:

In BGE 47 II 391 a seller undertook to deliver 10.000 kilos of yarn by the end of 1915. Due to import re- **180**
strictions caused by the First World War the seller could not deliver the goods. Nevertheless, the parties concluded a second contract for an additional 20,000 kilos of yarn to be delivered in 1916. When the seller finally could take up delivery, the market price for yarn had increased by 200 per cent. The court apportioned the burden of the cost increase between the parties by adjusting the damages so that the seller had to pay damages equalling fifty per cent of the difference between market price at the time of non-delivery of the goods and the higher price the seller had been willing to deliver to.[700]

A complete relief was not possible since circumstances in the case showed that the intention of the parties' **181**
throughout the term had been to continue the contract. Despite difficulties to deliver the first batch of yarn the parties concluded a second contract for an additional 20,000 kilos. Furthermore, the fact that the seller was ready to deliver to a higher price (where he still would make a loss) was a main argument for the court to allocate the risk of the increased prices between the parties. In the case before the Swedish Supreme Court, *NJA 1923 s. 20*, the circumstances were similar:

A seller agreed to deliver cardboard paper in instalments to a fixed price. As a consequence of the First World **182**
War the costs to produce the goods rose by 168 per cent in less than two years due to rising raw material prices. The Swedish Supreme Court ruled that the damages for non-delivery should amount to the difference between the price the buyer had declared to be ready to accept during renegotiation talks (SEK 33 per 100 kilo) and the market price at the time for refusal to deliver the goods (SEK 52 per 100 kilo). To sell the goods to a price equalling SEK 33, as the court found reasonable, in comparison with the initially agreed price of (SEK 15.75) equalled a cost increase for the seller of approximately 110 per cent. [701]

The fact that one side is willing to make concessions in order to fulfil the general purpose of the contract **183**
appears to have great impact on the courts willingness to apportion the risk of adverse consequences between contracting parties.[702] Both the Swiss Federal Tribunal and the Swedish Supreme Court adjusted the damages

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[699] BGE 46 II 429.
[700] BGE 47 II 391, p. 400 ff.
[701] NJA 1923 s. 20, p. 26 f. *Compare with the Swiss case*, BGE 48 II 126 where the contract term was extended for a period of three years without making any reservations for changed circumstance. The court held the seller to the contract on unchanged terms.
[702] *See hereto also contemporary Swedish case law*, NJA 1979 s. 731; NJA 1983 s. 385; NJA 1994 s. 359, where the fact that the counterparty acknowledged some increase in price as reasonable probably had an impact on the Swedish Supreme Court's willingness to adjust the leasing fees.

for non-delivery leaving the seller with a loss but not of a dimension motivating the right to be released from its obligations under the contract (i.e., the sellers were not freed from paying damages).

b) Cases Related to Currency Crisis

184 Cases of decrease in currency value and cases of inflation are classic examples of hardship. The former category entails both cases of depreciation (i.e. a drop in value caused by market forces with respect to a currency that "float" on the open international money market) and cases of devaluation (i.e. in a country where the exchange rate is fixed and where the government decides to lower the worth or value of the currency). Inflation on the other hand is the increase in the prices of goods and services over time reducing the purchase power of each unit of the currency.

185 Unsurprisingly, due to the aftermaths of the two World Wars, Germany is dominating with available case law in this category. The German post-war hyperinflation, with large impact and scope, gave rise to the first case law on the legal issue of change in circumstances. In the landmark case, *RGZ 103, 328*, the German Supreme Court noted that a drop in monetary value could result in such serious economic consequences that it alone could motivate an adaptation of the contract. That case opened the floodgate and the German Supreme Court was confronted with an immense amount of cases in the years to come. Eventually, in 1924, to handle the monetary consequences of the First World War the legislator addressed the issue.[703] However, the courts continued to allow adjustment of contracts in cases not covered by the legislation. In *RGZ 107, 78*, the German Supreme Court required the debtor to pay a just amount between the former and the actual value rather than the nominal value of the monetary obligation.[704] The case is not a "clean case of inflation" as it partly is a case of adaptation of the currency legislation in force at that time. Nevertheless, the German Supreme Court re-valued monetary obligations so that they would represent its actual real value and not the nominal value. The Swedish Supreme Court followed departing from the principle of nominal value, in *NJA 1930 s 507,* with reference to the position taken by the German Supreme Court in *RGZ 107, 78*. The Swedish Supreme Court, referring to "general principles of civil law," re-valued the monetary obligation to represent a reasonable price reducing the payment by half. [705] In contrast to that case, in the past, the Swedish Supreme Court has been careful allowing adaptation without direct support in law. [706]

186 A distinction is made in case law between cases of rapid and steep inflation and cases of regular inflation. The general rule is that the risk for a gradual progressing inflation falls on the creditor, landowner, landlord etc. The risk allocation is based, firstly, on that the principle of nominal value applies[707] and, secondly, on the fact that the issue of inflation is a well-known risk in international trade.[708] Hence, regular price developments are

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[703] NUSSBAUM, 206.
[704] RGZ 107, 78, p. 86 ff.
[705] NJA 1930 s. 507, 508 and 512.
[706] *See hereto,* NJA 1946 s 679 and NJA 1956 s. 136 related to the time after the hyperinflation in Germany but prior to the introduction of §36 AvtL.
[707] *For German law*, HONDIUS/GRIGOLEIT, 183; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 529; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1143 (Rn. 90); FINKENAUER, MüKo zum BGB zu § 313, 1906 and 1908 (Rn. 79); BGH 61, 31 p. 38; BGH 79, 187 p. 194; WM 1969, 1323, p. 1324. *For Swiss law*, MERZ, Die Revision, 472a; BISCHOFF, 187. *See also,* BGE 57 II 596, p. 599. *For Scandinavian law*, ADLERCREUTZ, 142; RAMBERG/RAMBERG, 9 ed.,192.WILHELMSSON, 134; Rt 1958 s 529; Rt 1988, 276, 278.
[708] RAMBERG, 53 f.; DRAETTA, 175 f.; BISCHOFF, 187 f.; HONDIUS/GRIGOLEIT, 183.

typically regarded to be foreseeable,[709] and contracting parties ought to protect themselves by including a currency value clause or escalating clause in the contract. Such clauses, however, are difficult to construct, often contain stiff parameters (e.g., linked to indexes) and must in an exact manner describe how the contract price should be affected given a certain development. Many times, it may simply be a too narrow method to address the issue of a change in circumstances.[710]

aa) A Steep and Rapid Deterioration

The inflation must go beyond what the contracting party normally could have expected upon conclusion of the contract for the courts to consider inflation as a valid ground for adaptation. Thus, a steep and sudden inflation may become relevant.[711] It is however repeatedly emphasized that parties to long-term contracts specifically must take inflation into account, that it is at one's own risk, and it cannot be assumed that the situation (i.e. the equivalence between the contractual obligations) will remain the same throughout the contract term.[712] Reasonably, as in the cases of rising raw material or commodity prices, the contractual duration has an impact on the assessment so that market fluctuations also of a greater proportion is not be a ground for relief if the term of the contract stretches over several decades. **187**

Only in radical and exceptional cases is an adaptation to reflect inflation motivated.[713] Case law indicates that the event causing the inflation is of importance, thus, providing a direct link to the foreseeability requisite. The German Supreme Court explained that a steep and rapid deterioration of a currency could lead to the collapse of **188**

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[709] *For Swiss Law*, BISCHOFF, 210; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569; BK-KRAMER zu Art. 18 OR, 141; BSK-WIEGAND zu Art. 18 OR, 176; OFTINGER, SJZ 1939, 229, 235; SCHWENZER, Schweizerisches Obligationenrecht, 272; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 247; BGE 59 II 372, p. 380; BGE 127 II 300, p. 305; BGE 101 II 17, p. 21; Market fluctuations of a temporal nature is not enough to trigger the Clausula, *see hereto*, Zürich Obergericht, ZR 1967, 217, 218. Events typically regarded as unforeseeable are "acts of God" as well as social and natural disasters (i.e., typical force majeure situations), *See hereto,* BISCHOFF, 184 ff. and FRICK, 205; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 247. *For German law,* SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 529; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1142 f.; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 26); FINKENAUER, MüKo zum BGB zu § 313, 1906 and 1938 (Rn. 74 and 186); STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 520, (Rn. 31); BGH 86, 168 f.; NJW 1981, 1668 f.; NJW 1976, 142, p. 142 f.

[710] *Compare*, RAMBERG, 53 f.; DRAETTA, 175 f.

[711] *Compare hereto*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1137; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 f. (Rn. 19 f. and Rn. 26 f.); WOLF/LARENZ, 707 (Rn. 36). *See also*, NJW 1977, 2262, p. 2262, where the price fluctuations between coal and oil was considered to fall within the normal business risks of the disadvantaged party. *See e.g.,* RGZ 106, 7, 9; BGE 51 II 303, p. 309; BISCHOFF, 198; Comment No. 3(b) on Art. 6.2.2(b) illustration 3 the UNIDROIT Principles (2010) explaining that the hardship exemption is available in a situation where the dramatic acceleration of the loss of value of the currency was not foreseeable, unless other circumstances would indicate the contrary. *Compare hereto also*, RUNESSON, 402; WILHELMSSON, 134; RAMBERG/RAMBERG, 9 ed. 192.

[712] *For Swiss law*, JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 254; BISCHOFF, 186 f. and 198; BGE 59 II 372, 380; ZR 1936, 245, 246. *For German law*, HONDIUS/GRIGOLEIT, 183; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerli chen Gesetzbuch zu § 313, 1142; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 26); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 529; FINKENAUER, MüKo zum BGB zu § 313, 1939 (Rn. 191); *See also e.g.*, BGH 86, 167 p. 169; BGH 77, 195 p. 195 f. and 198 f.; BGH 90, 227, p. 228; NJW 1981, 1668 f.; NJW 1983, 1309 p. 1310. *For Swedish law*, RG 1993 s 106, 107; RAMBERG/RAMBERG, 9 ed.,192.

[713] *For Swiss law*, BISCHOFF, 187 and 210; *For German law*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1143; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 94); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 529; FINKENAUER, MüKo zum BGB zu § 313, 1906 (Rn. 74); NJW 1959, 2203, p. 2203; NJW 1981, 1668; NJW 1989, 289, p. 289; NJW 1983, 1309, p. 1310; BGH 77, 194, p. 198; BGHZ 90, 227 p. 227 f.; § 313 can also be applicable when the contract contains an adaptation clause but where the escalation clause no longer fulfilled its purpose, *see hereto* NJW 2012, 526 p. 528 and BGH 81, 135 p. 137 f. *For Swedish law*, WILHELMSSON, 134; SÉVON, NJM 1978, 412 ff. *Compare also*, RUNESSON, 402.

the basis of the contract.[714] In the case, a landowner refused to sell a piece of land on the terms agreed on due to the fact that the land was worth three times the price since the conclusion of the contract due to forces of inflation. The German Supreme Court held that while the parties had priced in a potential increase in value of the land, *"the total collapse of the German Mark and the scale of this event could not have been foreseen by anyone."*[715] Two Swiss cases are equally illustrative to that point. In *BGE 51 II 303* involving a loan agreement concluded between a German and a Swiss company towards the end of the First World War, the Swiss Federal Tribunal explained that at the time when the contract was concluded (in 1918) *nobody could have foreseen a complete devaluation of the German paper marks*.[716] Similarly, the Swiss Federal Tribunal held that while regular inflation is foreseeable, a complete devaluation of the German paper marks is not.[717] A continued willingness to adjust contract terms in cases of monetary depreciation can be found in cases related to the Great Depression in the 1930s. In a contract for the sale of 4000 kg of cotton yarn, the parties, expressed the purchase price in British Pound. When the gold standard was abandoned in 1931 it lead to devaluation by approx. 20 – 30 per cent of the British Pound. The German Supreme Court held that the legislative change relating to the British Pound was unforeseeable by the parties. The fact that the parties specifically chose a currency linked to the gold standard as a precaution against currency risks motivated an adaptation of the contract price.[718] It is therefore not a "clean" inflation case where the outcome only was based on the intensity of the depreciation of the British Pound.

bb) Gradual Inflation in Contracts with a Long Duration

189 It is reasonably clear that a sharp and jumping inflation causing the equivalence of exchange distorted on a large scale may lead to an adaptation of the contract, especially if linked to an event of exceptional character such as the hyperinflation in Germany, the Great Depression or the abandonment of the gold standard by the English. The requirement is, however, not necessarily always that of a jumping inflation similar to the one in Germany in the 1920s.

190 In German law, case law indicates that gradual inflation may become relevant even though one can expect a stricter approach. An adaptation is only motivated in exceptional situations where the equivalence between the contractual obligations as initially agreed upon has been so gravely effected by the adverse turn of events that the risk assumed by the disadvantaged party has exceeded and the contract is entirely against the interest of the disadvantaged party, or if the equivalence of exchange is rendered completely inadequate for the disadvantaged party to carry out.[719] To illustrate, in *NJW 1976, 142,* concerning a long-term rental contract for the purpose of carrying out business, the property owner, 14 years after entering into the contract, required the rent to be increased to reflect inflation. The inflation rate amounted to 66,2 per cent between 1956 and 1973. The German Supreme Court stated that a strict approach should be applied with respect to inflation developing gradually over time as the sole reason for revising the contract. An adaptation of the initially agreed upon rent could come in question if the rent no longer even remotely corresponded to the consideration received. In the opinion of the

[714] RGZ 106, 7 p. 9.
[715] RGZ 106, 7 p. 9 ff.
[716] BGE 51 II 303, p. 309.
[717] BGE 54 II 314, 317 f.
[718] RGZ 141, 212 p. 216 ff.
[719] HAMMER, 90; HONDIUS/GRIGOLEIT, 183; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1143 (Rn. 90); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 27); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1143 (Rn. 90); BGH 77, 194, p. 198 f.; BGH 90, 227 p. 228; NJW 1991, 1478, p. 1479; BGH 91, 32 p. 36.

German Supreme Court, an inflation rate of 66,2 per cent did not meet such threshold as the risk typically is assumed in long-term rental contracts. Similarly, in a long-term contract for the rent of factory facilities including supply of electricity and vapour, the German Supreme Court concluded that the increased cost was of exceptional nature (without providing any detail of the actual increase), but that such increase, by itself, was not a ground for relief.[720] The fact that the landlord made a quest for termination rather than an adaptation of the rent and, the fact that the contracts would come to an end in the near future, may, however, have influenced the courts unwillingness to grant relief.

To the contrary, in *OLGZ 1990, 65*, a contract was entered into in 1953 for the rent of a piece of land to establish a business. The contract expanded over a period of 25 years automatically prolonged for five years at the time. 33 years after the conclusion of the contract, the landowner required an adaptation of the rent to reflect an inflation of 64,3 per cent. The court held that it amounted to a fundamental change of circumstances and increased the rent to be paid. The court, however, considered the contract to be comparable to a leasehold estate contract rather than a rental contract and thereby applied the principles laid down in case law related to ground rents.[721] **191**

In Swiss law, an adaptation of the contract is generally excluded in cases of gradual inflation.[722] And, while there is no case law generally allowing that under Swedish law, gradual inflation has been ground for relief in case law related to leasehold estate contracts. In what follows, case law related to such contracts will briefly be examined. **192**

cc) Gradual Inflation in Contracts Creating an Estate in Land

There is a considerable amount of case law relating to leasehold estate contracts. The price is often fixed with a term extending over decades or running indefinite in time. Thus, leasehold estate contracts are automatically vunerable to gradual inflation. Case law related to this type of contract reveals a link between the contractual duration, lack of speculative features, the experience in addressing change in circumstances through contract clauses and the willingness of the court to adapt the contract. **193**

In *NJA 1983 s 385,* the Swedish Supreme Court adapted the ground rate to reflect inflation and linked the leasing fee to the consumer price index for the remaining contractual term. Due to the general lack of knowledge of index clauses in 1950, when the contract was entered into, the court held that the landowner could not have foreseen that linking the leasing fee to the index for autumn wheat would be insufficient to maintain the real value. Similarly, in *Rt 1988 s. 276*, the Norwegian Supreme Court explained that the lack of an index clause could not be interpreted as if the risk for inflation should be passed on to the landowner, as it was unusual to use index clauses in 1955 when the contract was concluded. In the case, a landowner required, close to hundred years after the conclusion of the contract, that the leasehold fee agreed upon in 1899 should be increased from NOK 200 p.a. to NOK 54.000 p.a., to reflect current market price for agricultural land. The Norwegian Supreme Court, with the support of §36 of the Norwegian Contracts Act, acknowledged an extreme imbalance between the contractual duties adjusting the fee to NOK 5000 p.a. and linked the contract to the consumer price index for future adjustments. In another case, the Norwegian Supreme Court similarly concluded that the risk for inflation could not be cast on to the landowner since it was uncommon to use index clauses in the 1950s when the **194**

[720] RGZ 99, 259 p. 260.
[721] OLGZ 1990, 65 p. 68 ff.
[722] BISCHOFF, 187 and 210; SCHWENZER, Schweizerisches Obligationenrecht, 272.

contract was concluded, despite the common knowledge that unusual inflation recently occurred in Norway.[723] The initially agreed leasehold fee reflected only 1/7 of the market value for similar properties. The Norwegian Supreme Court explained that the change in the contractual equilibrium was significant. With the support of §36 of the Norwegian Contracts Act, the court increased the leasing fee and linked it to the consumer price index for future adjustments. A contributing factor for the outcome was that further inflation was expected, which would result in an even greater disruption of the contractual equilibrium. The fact that the contract terms, in both cases, ran indefinite in time with a one-sided right of termination may have had an impact on the courts willingness to revise the leasehold fees.

195 The Norwegian Court of Appeal took a stricter approach in, *RG 1993 s 106,* by rejecting an adaptation with the support of §36 despite that the agreed leasehold fee reflected only 1/6 – 1/10 of the market value. The court explained that the fact that the leasehold contracts were entered into for a fixed term, that no further value decrease was expected as well as that the risk for inflation was a well-known fact at the time when the contract was concluded and the landowner was an experienced person, commercially and politically, excluded the applicability of §36.

196 The German Supreme Court takes a similar position. Adaptation has generally been rejected in cases where the inflation rate falls below 60 per cent. [724] The court's strict adherence to a 60 per cent threshold could be explained by the fact that several contracts were entered into in close connection to the two currency reforms that took place in Germany in the first half of the 20th century, without including an escalation clause or the like in the contract.[725] Consistent with that view, an inflation rate just above 60 per cent in 30 years,[726] 61,37 per cent in less than two decades,[727] 68,95 per cent in 39 years[728] and an inflation rate of more than 60 per cent in 58 years[729] motivated an adaptation of the ground rate according to the German Federal Court of Justice.

197 In line with those cases, the German Federal Court of Justice confirmed in *BGH 94, 257* and *BGH 96, 371* that an inflation rate of more than 60 per cent as necessary to grant relief. The German Federal Court of Justice, however, explained that an inflation rate of 60 per cent alone is not sufficient and that the circumstances in the individual case as well as the interest of both parties must be considered. [730] In *BGH 97, 172* the Court of Appeal explained that inflation above 60 per cent does not automatically exceed the risk assumed in such contracts. The German Federal Court of Justice, however, expressed it differently and noted that an inflation rate below 60 per cent generally does not motivate an adaptation of the contract, unless other circumstances in the case motivate judicial interference.[731] In contemporary case law, the German Federal Court of Justice similarly rejected an adaptation of the ground rent in a leasehold estate contract where the inflation rate amounted to 59,7 per cent during a period of 26 years.[732] Thus, the German Supreme Court strictly adheres to a 60 per cent

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[723] Rt 1988 p. 295, p. 300 ff.
[724] *See e.g.*, BGH 86, 167, p. 169 where an inflation rate of 57 per cent in 25 years was not fundamental enough. BGH 97, 172 p. 175 where an inflation rate of just below 60 per cent in 30 years excluded an adaptation of the ground rate; NJW 1981, 1168 where the inflation rate amounted to less than 60 per cent in 24 year.
[725] *Compare,* FINKENAUER, MüKo zum BGB zu § 313, 1906 and 1938 f. (Rn. 186 and 191).
[726] BGH 90, 227 p. 228 f.
[727] BGH 91, 32 p. 34 ff.
[728] BGH 77, 194, p. 198 f.
[729] BGH 119, 220.
[730] BGH 94, 257 p. 260 f.; BGH 96, 371 p. 375 and 378 f.
[731] BGH 97, 172 p. 175.
[732] NJW 2012, 526. *See hereto also,* OLGZ 1990, 65, 67.

threshold as point of tolerance. A majority of the cases were entered into in the 1950s when it was uncommon to use index clauses or escalating clauses in leasehold estate contracts. Thus, the same threshold may, however, not be applicable on leasehold estate contracts concluded today.

While a long contract term generally is an argument against an adaptation or, at least, the threshold is raised for triggering hardship, the contractual duration in leasehold estate contracts rather contributes to the courts willingness to interfere in the contractual relation. The explanation may be that such contracts historically were fixed at relatively modest price levels, sometimes creating a permanent legal right, and most of all it was uncommon to include escalation clauses or link the price to an index in order to maintain the real value of the leasehold fee i.e. to address future change.[733] As one of the main arguments against an adaptation in cases of inflation is that the issue is a well-known risk in *international trade*. Leasehold contracts are often concluded among private individuals i.e., acting outside the course of a business. Thus, the springing point in these cases appears to be whether it was common practice to include an index clause or the like at the point in time when the contract was concluded, or if the surrounding context motivates that the parties should have addressed the issue of change in the contract. Furthermore, the up side in leasehold contracts is typically limited and there is no speculation on the side of the landowner. Those may be the explanations to why excuse was granted in cases of gradual inflation that typically is rejected as ground for relief. **198**

Furthermore, the fact that these type of contracts typically run *indefinite* in time or on *non-cancellable* terms may have an impact on the courts willingness to interfere in the contractual relationship. The same willingness can be found in cases with similar features and where a permanent legal right is created by the contract. For example, in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co,*[734] the House of Lords dealt with a similar situation. A hospital had contracted to give up its right to take water from a well under the condition that the buyer would supply the hospital with water at a fixed price unlimited in time. Over a period of 56 years the cost to supply the hospital with water became 18 times as expensive as the initially agreed price. The House of Lords explained that the notice of termination was valid as it is often implied in commercial contracts with an indefinite contractual duration that either party is entitled to terminate the contract by reasonable notice.[735] Thus, the House of Lords addressed the issue of change in circumstances and granted the disadvantaged party relief through contract construction.

[733] *See e.g.,* NJA 1983 s. 385 where the Swedish Supreme Court adapted the ground rate to the general price developments and linked the leasing fee to the consumer price index for the remaining contractual term. Due to the general lack of knowledge of index clauses in 1950 when the contract was entered into, the court held that the landowner could not have foreseen that linking the leasing fee to the index for autumn wheat would be an inappropriate index to maintain the real value of the leasing fee. RT 1988 s. 276, the Norwegian Supreme Court explained that the lack of such clause in the contract could not be interpreted as if the risk for inflation should be passed on to the landowner as it was unusual to use index clauses regulating the price in 1955 when the contract was concluded. *See hereto also contemporary German case law*, NJW 2012, 526 and OLGZ 1990, 65, 67 rejecting an adaptation in relation to contracts containing an escalation clause no longer fulfilling its purpose.

[734] Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387.

[735] Staffordshire Area Health Authority v South Staffordshire Waterworks Co [1978] 1 W.L.R. 1387, 1404 ff.

III. Concluding Remarks

1. A Trigger in Percentage?

199 The question as to when a change in circumstance is fundamental enough to motivate an adaptation of the originally agreed terms is of central meaning, but impossible to give a complete satisfactorily answer to. A threshold in percentage has neither developed in case law, nor in the legal doctrine and is generally considered undesirable or even inappropriate.[736] There is consensus among legal writers that whether a change in circumstance is fundamental is subject to the circumstances in the individual case. Looking at the jurisdictions in isolation, case law gives a scattered view of the intensity required to trigger hardship. Comparative observations, however, provide some points of consideration for the legal analysis. Although, one must bear in mind, any threshold expressed in percentage is conditional upon the circumstances surrounding the case.

200 A comparative review of the present body of case law reveals, perhaps not unexpectedly, that courts and arbitral tribunals generally are unwilling to grant relief in cases related to contracts for the sale of generic goods or commodities and in contracts to procure goods dependent on the market price of a raw material. For instance, a 130 per cent cost increase caused by fluctuating commodity prices for powdered milk,[737] a 168 per cent increase for the production of cardboard paper,[738] a 200 per cent increase in the price for cotton required to produce yarn,[739] a 200 per cent increase in the market price for yarn,[740] a 300-400 per cent increase in oil prices,[741] the delivery of vapour rendered five times as expensive as the rent[742] and, finally, a 1400 per cent cost increase to produce a Limousine are all cases where the court found hardship to be at hand.[743] The percentage range is wide, but does not fall below 100 per cent. A lower threshold as ground for interfering in the contractual relation can, however, be found in the Belgian court ruling, *Scafom International BV v Lorraine Tubes S.A.S,* where a 70 per cent increase in the price for steel was enough for the court to intervene in the contractual relation. The court ruling sets a low threshold for triggering hardship, especially for a contract involving a commodity sometimes exposed to rapid price fluctuations. As a direct comparison, no relief was granted in a case when the market price for iron-molybdenum increased by 200 per cent.[744] A higher threshold for triggering hardship can general-

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[736] *Swiss legal doctrine*, ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 250; BK-KRAMER zu Art. 18 OR, 143; BURKHARDT, 259; BISCHOFF, 190; WEBER, 46 and 50; MERZ zu Art. 2, 291; LEU, Vertragstreue In Zeiten des Wandels, 107, 121. BÜRGI, ASR 1939, 1, 138. *Compare also*, WIDMER, 53. The desire to identify a threshold expressed in percentage is rejected in the legal doctrine. *See hereto e.g.*, BÜRGI, ASR 1939, 1, 138. Or, for that matter, a general rule that can be applied to decide whether the situation requires an interference in the contract by the court, *see hereto*, WIDMER, 53. *German legal doctrine*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1134; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58). *See also*, Comment No. 2 on Art. 6.2.2 the UNIDROIT Principles (2016 edition); MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 250; LOOKOFSKY, Int. Rev. of Law and Econ. 2005, 434, 440. With respect to long-term contracts where a change in circumstances has not already been priced in, it has been argued that a change in the contractual balance of about 50 per cent or more is sufficient to adapt the contract. *See hereto*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1145 (Rn. 94); *Compare*, TEICHMANN, in Soergel, BGB, zu § 313, 251 f. (Rn. 90).
[737] HD 1982 II 141.
[738] NJA 1923 s 20.
[739] BGE 46 II 429.
[740] BGE 47 II 391.
[741] RG 1976 s 650.
[742] The rent p.a. amounted to approx. 9000 RM and the additional cost for the deliver of vapour, for that period, amounted to approx. 45 000 RM p.a.
[743] RGZ 101, 79.
[744] OLG Hamburg, Decision of 28.02.1997.

ly also be expected with respect to contracts of international character.[745] Thus, the court ruling must be looked upon with caution and a 70 per cent cost increase would with reasonable certainty be insufficient to trigger hardship under the hardship rules.

The courts have generally also been willing to adapt contracts where the intention is not one of speculating on making a high profit, but rather to cover costs or retaining a certain profit margin, and where the upside is limited. For instance, hardship has been found in long-term contracts for supply of electricity, heating and vapour in rental contracts. An adaptation has been carried out when the cost to deliver vapour became nearly five times as expensive as the annual rent[746] and when the costs of heating increased by 250- 370 per cent increased.[747] **201**

Based on the same rationale, as I gather, a gradual increasing inflation, as ground for relief, has been accepted in leasehold estate contracts. One of the main arguments against an adaptation in cases of inflation is that the issue is a well-known risk in trade. Leasehold estate contracts are often concluded between people acting outside the course of a business, run indefinite in time, lack speculative elements and with a limited upside for the landowner. In such cases, an inflation rate of just above 60 per cent has been enough to grant relief in a line of German cases in the past.[748] The low threshold is, however, specific for this type of contract. For instance, an inflation rate of 66 per cent did not suffice to grant relief in a long-term rental contract,[749] while an inflation rate of 64,3 per cent was enough for the court to adapt the rent in another long-term rental contract, motivated by that the contract contained features of a leasehold estate contract.[750] The same (low) threshold and willingness of the court to adapt leasehold contracts to reflect gradual inflation may, however, not be applicable on leasehold estate contracts concluded today as parties are expected to include contract clauses to adjust the price. Thus, the springing point in the cited case law on gradual inflation in leasehold contracts appears to be that it was uncommon to include index clauses or the like at the point in time (1950s) when several of the contracts were concluded. In the Norwegian case, where §36 could not be applied, the court based the rejection on the fact that the landowner was an experienced person both commercially and politically. Thus, the landowner was experienced enough to address the issue in the contract. **202**

Case law is too lean and the percentages are too widely spread to draw any safe conclusions. Case law shows rather that the fundamental requisite refuses to be constrained into a fixed formula. Cost increases expressed in percentage cannot be looked at in isolation. Whether the intensity of the supervening event is enough to motivate an adaptation of the contract terms is a balance between many contract specific factors e.g., price, contractual duration, international features, type of contract (i.e. degree of risk taking and upside), and ultimately a question of degree being highly dependent on the circumstances surrounding the individual case such as the time and context in which the contract was concluded. The comparative review rather indicates that courts and arbitral tribunals are willing to interfere in contractual relations almost exclusively in war-related cases, or cases related to events of exceptional character, but where the contract was entered into during economically and **203**

[745] *See hereto e.g.,* OLG Hamburg where a 200 per cent increase in the market price for iron-molybdenum was insufficient to grant relief. *See hereto also e.g.*, ICC Case 1512 of 1971, Collection of Arbitral Awards I, 3, 4 and Vital Berry Marketing NV v Dira-frost NV Rechtbank van Koophandel, Hasselt, Decision of 02.05.1995 fluctuating market prices are foreseeable in international trade.
[746] RGZ 100, 129.
[747] BGE 47 II 314.
[748] *See e.g.,* BGH 90, 227; BGH 91, 32; BGH 119, 220; BGH 77, 194.
[749] NJW 1976, 142. *Compare hereto,* RGZ 99, 259.
[750] OLGZ 1990, 65.

politically stable times.[751] Thus, clearly linking the materiality standard to the foreseeability requisite. The comparative review show that the courts' willingness to adapt the contract terms relate to historical turbulent periods such as the World Wars, the Great depression in the 1930s, England abandoning the gold standard, the hyperinflation in Germany in the 1920s as well as war-like hostilities such as the oil crisis in the 1970s.

2. A Better Measurement?

204 The triggers in the hardship rules are broadly formulated in order to capture the universe of adverse events that can upset the contractual equilibrium. Hence, it is difficult to translate the fundamental requisite into a percentage. The crux of the matter is that the threshold must remain broad in order to operate in a pragmatic manner rather than forced into a fixed formula. Hence, case law captures cost increases of great span. While it is common to focus on the materiality requisite, as a first "hurdle" to overcome in a claim based on hardship, it is in the remaining, much stricter requisites that one will be able to judge if the case will bear or burst. Thus, rather than trying to identify a threshold translated into a percentage, the focus should lie on the allocation of risk as the fundamentally requisite ultimately turns out to be a question of who should bear the risk of the supervening event. Hence, to determine whether an event is fundamental enough to trigger hardship, the better measurement is whether the change in circumstances is so grave, exorbitant, drastic or fundamental etc. that the risk for such event to occur was so farfetched that the contracting parties in no way would have considered it as a risk to address in the contract. I.e., was the change in circumstance foreseeable by the contracting parties when they entered into the contract?[752] An extreme or radical change in circumstances is generally considered unforeseeable. Hence, the fundamental requisite is closely linked to both the foreseeability requisite and the allocation of risk[753] and will be dealt with next where also some of the cases cited above will be revisited.

IV. Outside the Realm of the Parties Expectations

1. The Allocation of Risk

205 Allocating the risk of the supervening event among contracting parties is the crux of the matter. Who should bear the risk for the adverse turn of event having regard to the content of the contract? It must be decided whether the disadvantaged party shall bear the risk for the supervening event, if it should be shifted over to the counterparty, or if the risk shall be apportioned among the parties by way of adapting the contract terms. The starting point and general rule is that the obligor *carries the risk* for an unexpected adverse turn of events.[754]

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[751] *See e.g.,* BGE 47 II 314; BGE 51 II 303; BGE 54 II 314; BGE 60 II 205; RGZ 100, 129; RG 196 s 650; RGZ 94, 45; RGZ 101, 81; RGZ 106, 7; RGZ 141m 212; BGE 47 II 391; BGE 46 II 429; NJA 1923 s. 20; NJA 1930 s 507; *See also*, BGE 48 II 249 (a loss in turnover of 57 per cent caused by the First World War was an "obvious and fundamental change").

[752] *Similarly*, BSK-WIEGAND zu Art. 18 OR, p. 177; WIEGAND, Clausula rebus sic stantibus, 443, 454; FINKENAUER, MüKo zum BGB zu § 313, 1939, fn. 648 (Rn. 191); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1139 (Rn. 78).

[753] WIEGAND, Clausula rebus sic stantibus, 443, 454; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 518 (Rn. 24); FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 77). *See also e.g.*, BGH 97, 172 p, 173 f. and NJW 2012, 2733, p. 2734.

[754] *For German Law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 30); FINKENAUER, MüKo zum BGB zu § 313, 1943 f. (Rn. 207); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1142 ff.; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu §313, 528; RGZ 99, 259 p. 259 f.; BGH WM 1979, 582, p. 582; NJW 1977, 2262, p. 2263; WM 1964, 1253, p. 1254. KOLLER, NJW 1996, 300, 301; WM 1969, 1323, p. 1324. *For Swiss Law,* BISCHOFF, 17; ZK-BAUMANN zu Art. 2 ZGB, 692; KRAMER, SJZ 2014, 273, 278; HAUSHEER/JAUN, 147. *See also,* BGE 127 III 300, p. 307; BGE 104 II 314, p. 315. *For Swedish Law,* NJA 1999 s 575; NJA 1999 s. 793; DOTEVALL, SvJT

That also follows from strict adherence to the principle of pacta sunt servanda. Only when the balance between the contractual obligations, as struck between the parties, has changed in a way that the disadvantaged party is not deemed to bear the risk for, is the risk requisite fulfilled.

2. Defining the "Risk Sphere"

The risk requisite is spelled out in the unification instruments. According to the UNIDROIT Principles, it is required that "the risk of the event was not assumed by the disadvantaged party."[755] The DCFR similarly states that: "there will be no relief if the obligor assumed or can reasonably be regarded to have assumed the risk of the supervening event."[756] The requisite is expressed slightly differently in the PECL and perhaps with more clarity: "The risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear."[757] Thus, according to the PECL, contrary to the DCFR and the UNIDROIT Principles, the event must fall outside the allocation of risk that can be deducted from the contract. Similarly, in the so-called *Vine Wax Case*, the German Federal Court of Justice held that the exemption under Art. 79 CISG does not alter the allocation of risk as provided in the contract.[758] §313 BGB is only applicable when the supervening event exceeds the allocated risk as provided in contractual or statutory provisions.[759] If the supervening event falls within the "risk-sphere" of the disadvantaged party, it is not *unreasonable* for the counterparty to insist on the contractual duty on unchanged terms according to §313 BGB.[760] It is important to note that the allocation of risk as provided in the contract never can be set aside by way of arguing on the basis of general considerations of reasonableness.[761] In Swiss law, the judge must decide whether the disadvantaged party has assumed the risk of the supervening event according to the terms in the contract or by applicable laws.[762] The judge has no authority to intervene if the contract contains a provision settling the matter, unless such a provision would be in contrast to a mandatory statutory rule or the provision itself would be against good faith and fair dealing to insist on by the counterparty.[763] Similarly, the Swedish legislator states that the judge shall not interfere in a contract on the

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2002, 442, 451. RAMBERG/RAMBERG, 198. *For the doctrine of assumptions see,* LEHRBERG, Förutsättningsläran, 27; NJA 1981 s 269, p. 271. *For International Law,* Art. 6:111(1) PECL; Art. 6.2.2(d) UNIDROIT Principles; Art. III.-1:110 subsection (c) DCFR. *See also*, BRUNNER, 423.

[755] Art. 6.2.2(d).

[756] Art. III. – 1:110 (3) (c).

[757] Art. 6:111(d).

[758] Bundesgerichtshof, Decision of 24.03.1999, available at: http://cisgw3.law.pace.edu/cases/990324g1.html

[759] BGH 77, 194, p. 198 f; BGH 86, 167, p. 169; NJW 1991, 1478, p. 1479; NJW- RR 93, 880, p. 881. WOLF/LARENZ, 707 (Rn. 35) referring to the "limit of sacrifice". *See hereto also*, FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 73); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 f. (Rn. 19 f.); CANARIS, 742; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 25 and 27); LARENZ, 300.

[760] SCHLECHTRIEM/SCHMIDT-KESSEL, 64; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526 (Rn. 16); STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 20); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 19); LARENZ, Schuldrechts AT, 300; ULMER, AcP 1974, 167, 183; JANDA, NJ 2013, 1, 3; *See also e.g.*, BGH BB 1956, 254, p. 254; BGH 74, 370, p. 373; BGH 129, 236 p. 253; NJW 2000, 1714 p. 1716; BGH 101, 143, p. 151 f.; NJW 2000, 3432, p. 3433; NJW 2006, 899, p. 901; NJW 2010, 1874, p. 1875. *See however*, NJW 1977, 2262, p. 2263, where the court stated that the applicability of §313(1) BGB is more likely to apply in cases where the occurring circumstances, according to the purpose of the contract, are identifiable as falling within the risk sphere of only one of the contracting parties.

[761] FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 77); LARENZ, p. 165; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526 (Rn. 16).

[762] ZR, 1936. p. 245, 245.

[763] LEU, Vertragstreue In Zeiten des Wandels, 107, 117; ZK-BAUMANN zu Art. 2 ZGB, 692. *See also*, BGE 93 II 185, p. 189 where the Swiss Federal Tribunal held that the Clausula could not be applied since the contract contained an agreement on how the contract should be adapted.

basis of §36 AvtL where the allocation of the risk of a change in circumstances already has been agreed on.[764] For instance, a seller charging a price too low to bear the risk of a certain event cannot later, if the risk materialises causing a bigger loss than calculated, argue with the support of §36 AvtL that there is an imbalance in the contractual equilibrium merely because the seller added an insignificant value to the consequences of the event.[765] For the doctrine of assumptions to apply, the assumption must be "legally relevant". This requisite is often referred to as the "risk" requisite and is regarded in Swedish legal doctrine to cause most issues with respect to the applicability of the doctrine. It is a test of whether there is a specific ground to make the assumption legally relevant by casting the risk of the supervening event on the counterparty.[766] Ultimately, it is a question of which party should bear the risk of an erroneous assumption.[767] The "risk" requisite divides the doctrine into a subjective school and an objective school. According to the subjective method, it is of relevance how the parties *hypothetically* would have dealt with the issue at the formation of the contract.[768] According to the objective method, the court shall find a "just and equitable" allocation of risk between the parties. I.e., it should be reasonable for the counterparty to bear the risk for the erroneous assumption. [769] In a recent case, *NJA 1997 s 5*, the Swedish Supreme Court stated that an objective assessment should be carried out in order to decide whether it is reasonable and appropriate for the counterparty to bear the risk for the erroneous assumption.[770] The Swedish Supreme Court did not go into any details about what circumstances typically should be considered in such objective assessment. As a matter of fact, the Swedish Supreme Court has not provided any detailed assessment of the "risk" requisite in their verdicts so far. Legal considerations mentioned in the legal doctrine that are relevant are the nature of the assumption (i.e., is it general or individual), the type of transaction, the possibility for the party to overview the risk of the contract, what party is typically closest to bear the risk, and, finally, the behaviour of the contracting parties in connection with the formation of the contract.[771] The Swedish scholar and authority in the field, Professor Lehrberg, has developed a method to deal with the "risk" requisite and the assessment of whether an assumption can be given legal relevance. He lays down six principles of avoidance that can be identified on the basis of case law and analogies from existing legal provisions. One of these principles that may have an effect on the assessment of the "risk" requisite is the consideration of *the values at stake for the contracting parties*. I.e., the contract shall not lead to one party suffering undue hardship because of the erroneous assumption.[772]

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[764] Prop. 1975/76: 81, p. 119, 127.
[765] RUNESSON, 382; DOTEVALL, SvJT 2002, 442, 452. *See hereto also*, PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 24; Comment No. 3(d) on Art. 6.2.2(d) illustration 4 the UNIDROIT Principles (2016 edition).
[766] ADLERCREUTZ, 271; LEHRBERG, Förutsättningsläran, 21f.
[767] LEHRBERG, Förutsättningsläran, 27.
[768] ADLERCREUTZ, 272.
[769] ADLERCREUTZ, 272.
[770] NJA 1997 p. 5, p. 17. *See hereto also,* FLODGREN, Förutsättningsläran. Ett viktigt komplement till avtalslagen, 385, 392 f.; GRÖNFORS, Avtalslagen, 250; HELLNER, JT 1997, 201, 201 ff. arguing that the method has become more objective and clearer due to recent case law.
[771] ADLERCREUTZ, 272; LEHRBERG, Förutsättningsläran, 276.
[772] LEHRBERG, SvJT 1990, 187, 203 ff.; LEHRBERG, Förutsättningsläran, 277 ff. Existing legal provisions expressing this principle can be found in Section 31 of the Contracts Act dealing with the issue of usury. For Section 31 to be applicable there should be an "obvious disproportion between the parties' obligations under the contract".

What is clear, under all hardship exceptions, however, is that there is no hardship unless the disruption of the contractual equilibrium goes beyond the assumed contractual business risks. [773] The scope and limit of the disadvantage party's risk sphere must therefore be defined. It is a question of contract interpretation to ascertain whether the disadvantaged party assumed the risk for the supervening event.[774] Depending on the type of transaction and trade sector the risk for a certain event can be assumed implicitly. To illustrate: **207**

In ICC Case No. 1149, a vegetable grower undertook growing and delivering a certain quantity of crop. Due to metrological events destroying the crop the defendant invoked hardship under Art. 6.2.2. of the UNIDROIT Principles. The Arbitral Tribunal explained that while the event had substantially increased the costs to deliver the goods, the vegetable grower had assumed the risk of the event excluding the hardship exception in Art. 6.2.2 of the UNIDROIT Principles. The Arbitral Tribunal further noted that, it is the seller that typically abides the risk for that a metrological event destroys the crop, especially in a contract for the delivery of a specific quantity of goods.[775] **208**

The destruction of the crop was regarded as an inherent risk in a transaction of that kind and should be borne by the seller. Wholesale trade contracts with a long duration are generally regarded to be of speculative nature entailing an inherent risk for price fluctuations.[776] Another illustrative case where the disadvantaged party implicitly assumed the risk for the supervening event and thereby lost the opportunity to invoke hardship is *ICC Case No. 8486*: **209**

The case involved a contract between a Dutch seller and a Turkish buyer for the sale and purchase of a plant for manufacturing lump sugar specific suitable for the Turkish market. The arbitral tribunal found that the buyer was aware of the unstable commercial situation in Turkey at the time when the contract was concluded and that the rise of a private manufacturing sector and the connected fall in the price of lump sugar as well as the general trade situation in Turkey thereby fell *within the risk sphere of the buyer*. [777] **210**

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[773] *For Swiss Law,* BISCHOFF, 17; ZK-BAUMANN zu Art. 2 ZGB, 692; HAUSHEER/JAUN,147; OFTINGER, SJZ 1939, 229, 233. *For Swedish Law,* RAMBERG/RAMBERG, 201 ff.; BERNITZ, 89; GRÖNFORS, Avtalslagen, 246; HELLNER, Kontraktsrätt, 45; VON POST, 164 f. GRÖNFORS, 28; Prop. 1975/76:81, p. 119. *For German Law*, LARENZ, 300; BGH 86, 167 p. 169; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 61); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 31, 1136 and 1142; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 20 – 21); NJW- RR 93, 881, p. 881. *For International Law*, BRUNNER, 423; The Official Comment to DCFR Art. III. – 1:110 (3)(c), 714 f.

[774] BRUNNER, 424; LEHRBERG, 76 f.

[775] ICC Case No. 1149 of 30.11.2006, available at:
>http://www.unilex.info/case.cfm?pid=1&do=case&id=832&step=FullText

[776] *For Swiss Law*, WEBER, 57 ff.; HEDEMANN, SJZ 1921, 305, 309; OFTINGER, SJZ 1968, 229, 235; MERZ, Die Revision, 498a footnote 196; BISCHOFF, 214. *For German Law,* RGZ 88, 172, 174 f.; RGZ 101, 79 p. 82; *See hereto also*, FINKENAUER, MüKo zum BGB zu § 313, 1905 (Rn. 70) RGZ 99, 259 p. 259 f.; RGZ 95, 41 p. 44; RGZ 92, 322 p. 324 where the court explains that the risk for price fluctuations in whole sale contracts of generic goods falls on the seller and is not grounds for relief. *For Swedish law*, RAMBERG/RAMBERG, 202 stating that a seller can protect itself against price fluctuations and secure its obligation under the contract by way of acquiring the required quantity in advance.

[777] ICC Case No. 8486 of 1996, Collection of ICC Awards I, 321, 326 f. Available at, http://www.unilex.info/case.cfm?pid=2&do=case&id=630&step=FullText.

211 Thus, in both cases, the supervening event fell within the "risk-sphere" of the disadvantaged party excluding hardship. The word "assume" in the hardship exceptions is deemed to be understood as if the risk has been undertaken either expressly in the contract or that it follows from the nature of the contract.[778] For example, a party that enters into a contract that is speculative in nature or contains a speculative element also accepts a certain degree of risk.[779] A party similarly assume the risk for a certain event if the party was aware of the risk but did not address the issue in the contract thus linking the assessment to the foreseeability requisite.[780] In *ICC Case No. 8486* the court explained that it would not be suitable to shift the commercial risk of the supervening event on to the seller when the buyer had been aware of the unstable situation in Turkey. Hence, the buyer had to bear the economic risk when the price fell. To further illustrate this point, in *Rt. 2000 s 806* regarding a price clause in a contract for the supply of energy, the Norwegian Supreme Court concluded that §36 was not applicable to the situation since the negotiations in connection with the formation of the contract showed that the company had been aware of the risk of the implementation of a new fee rendering the delivery of energy more costly. In the opinion of the court it was reasonable for the company to bear the risk for the change in circumstances. [781] Similarly, in two cases before the Swedish Supreme Court dealing with the doctrine of assumptions, the court explained that the counterparty had the better capacity of foreseeing future developments and therefore would be closest to bearing the risk for the assumption becoming erroneous due to a change in circumstances.[782] Legal relevance is given not only to which party typically is closest to bearing the risk but also the behaviour of the contracting parties in connection with the conclusion of the contract.[783]

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[778] *Compare*, ZK-BAUMANN zu Art. 2 ZGB, 692; HAUSHEER/JAUN, 145; SCHMIEDLIN, 157; OFTINGER, SJZ 1939, 229, 233; BISCHOFF, 17; *For Swedish Law*, RAMBERG/RAMBERG, 201 f. *For German Law*, FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 61); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 31, 1136; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 20 – 21); NJW- RR 93, 881, p. 881. See hereto also, CANARIS, 742; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 (Rn. 25 and 27); LARENZ, 300.

[779] *For international law*, Comment No. 3(d) on Art. 6.2.2(d) of the UNIDROIT Principles (2016 edition); The Offical Comment to DCFR Art. III. – 1:110 (3)(c), 714 f. *With respect to the PECL see*, LANDO/BEALE, 116. *For Swiss law*, OFTINGER, SJZ 1939, 229, 234; ZR 1936, 245, 247; MERZ zu Art. 2 ZGB, 289. *For German law,* GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 20); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; WOLF/LARENZ, 707 (Rn. 37); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1137; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 21); FINKENAUER, MüKo zum BGB zu § 313, 1905 (Rn. 70); *See e.g.*, RGZ 92, 322 p. 324; RGZ 88, 172, p. 175 ff.; NJW 1958, 906, p. 906. *For Swedish law,* SOU 1975:83, p. 157; DOTEVALL, SvJT 2002, 442, 451 f. In relation to the doctrine of assumptions see, ADLERCREUTZ, 272; LEHRBERG, Förutsättningsläran, 276, stating that the type of transaction should be taken into account in the assessment.

[780] *For German law,* Regeriungsbegründung BT-Ds. 14/6040, p. 175 f.; LARENZ, Schuldrechts AT, 300; JANZEN, JCL 2006, 156, 166; CANARIS, 745; WOLF/LARENZ, 707; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1137 f.; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 23); NJW 1991, 1478, p. 1479; BGH 86, 167, p. 169. *See also*, BGH 74, 370 p. 374; BGH 77, 194, p. 198. *For Swedish Law,* DOTEVALL, SvJT 2002, 442, 451; RAMBERG/RAMBERG, 200. *For Swiss Law*, BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569; SCHWENZER, Schweizerisches Obligationenrecht, 272; BGE 120 II 155, p. 166; BGE 119 II 347, p. 351.BISCHOFF, 205.; MERZ zu Art. 2 ZGB, 288; SIEGWART, 107 f.; BGE II 300, p. 305; BGE 107 II 343, p. 347 f. *For International Law*, LANDO/BEALE, 115; PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 23.

[781] Rt. 2000 s. 806, p. 816.

[782] NJA 1981 s. 269, p. 271; NJA 1985 s. 178, p. 192. In *NJA 1981 s. 269*, the municipality was considered to have a specifically good chance of foreseeing how the development of the land would be utilised in the future as land planning is part of the municipality's general tasks. In *NJA 1985 s. 187*, the counterparty was the one that was supposed to enter into the reconstruction agreement with the government and therefore obviously had a better possibility to assess whether the contract with the government was definite.

[783] ADLERCREUTZ, 272; LEHRBERG, Förutsättningsläran, 276.

Conclusively, in order for the risk requisite to be fulfilled, it must relate to such circumstances that, following a reasonable interpretation of the contract and the nature of the transaction, go beyond the agreed or implied allocation of risk in the contract. Thus, it is only when the balance between the contractual obligations as struck between the parties is altered in a way that the disadvantaged party is not deemed to bear the risk that the hardship exceptions come into play. As the cited case law shows, whether a party assumed the risk for a certain adverse turn of event overlaps to some extent with the foreseeability requisite. 212

a) The Lack of Renegotiation Clauses in the Contract

The fact that the contract does not contain a clause dealing with future change can be a sign that the party assumed the risk or that the parties did not intend to adapt the contract in case of an adverse turn of events.[784] That is the view taken with respect to §313 BGB if the price has been fixed and no adaptation clause has been included in the contract.[785] A fixed price is typically viewed under German law as if the party implicitly assumed the risk for a supervening event affecting the contractual price.[786] That view could be questioned. It may just be the result of unsophisticated business partners overlooking addressing the issue of change in circumstances rather than an active choice to carry the risk for supervening events. However, if it is customary to include clauses dealing with change in circumstances in the specific business sector, the risk for a cost increase is more likely to be regarded as if it falls within the risk sphere of the disadvantaged party. [787] With respect to §36 AvtL, the Norwegian Supreme Court held in relation to a dispute about an increase of a leasehold fee that it was unusual to use index clauses regulating the price in 1955 and the lack of such clause in the contract could not be interpreted as if the risk for inflation should be passed on to the landowner.[788] 213

b) Speculative Contracts

The willingness of the judge to interfere in the contractual relationship and adapt the contract price is highly dependent on whether the contract is speculative in nature or contains speculative elements.[789] While all contracts to some extent can be argued to have speculative features the degree of speculation can differ. As a rule, hardship is excluded in contracts where the risk is the object of the contract (e.g., security and commodity trading transactions, hedging contracts and interest exchange contracts) or contracts that mainly are of a speculative nature.[790] For example, a purchase of securities is speculative with respect to its future value. The 214

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[784] *For International Law*, BEALE, 1127; DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 500 f.; MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 254. *For Swiss Law*, BGE 100 II 345, p. 348 f.; BGH 107 II p. 347 ff.; BISCHOFF, 16 ff.

[785] FINKENAUER, MüKo zum BGB zu § 313, 1904 (Rn. 67). *See also e.g.,* WM 1964 p. 1253 p. 1254.

[786] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 20); BGH JZ 1978, 235, p. 236; BGH 129, 236 p. 253.

[787] FINKENAUER, MüKo zum BGB zu § 313, 1943 f. (Rn. 207); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1144 (Rn. 93).

[788] Rt 1988 p. 295, p. 300 ff.

[789] *See hereto*, HEDEMANN, SJZ 1921, 305, 309; RGZ 88, 172 p. 177; RGZ 101, 79 p. 82; RGZ 106, 7, p. 10 where the lack of speculative element worked in favour of granting a relief. *Compare also e.g,* Award of 1975.09.20, Y.B. Com. Arb. 1983, 153, 155; Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997, available at: http://cisgw3.law.pace.edu/cases/970228g1.html; ND 1959 p. 333, 360 f.

[790] *For Swiss Law*, BISCHOFF, 114 and 213 f.; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569 f.; BSK- WIEGAND zu Art. 18 OR, 176; BRUNNER, 438. *For Swedish Law*, Prop. 1975/76:81 p. 104, 107 ff.; BERNITZ, 75; RAMBERG/RAMBERG, 202. *Compare also*, DOTEVALL, SvJT 2002, 442, 452. *For German law,* GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 20); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; WOLF/LARENZ, 707 (Rn. 37); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1137; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 21); FINKENAUER, MüKo zum BGB zu § 313, 1905 (Rn. 70); *See also e.g.*, RGZ 92, 322 p. 324; RGZ 88, 172, p. 175 ff.; NJW 1958, 906, p. 906. *For International Law*, BRUNNER, 424 f.; DRAETTA, IBLJ 2002,

value may increase or decrease depending on subsequent events. The purchaser is deemed to consider such risks when acquiring securities and has thereby assumed the risk for a decrease in value. Similarly, if the contract is aleatory in nature i.e., a contract whose execution or performance depends on a contingency or an uncertain (random) event such as insurance contracts, the obligor cannot complain that the risk has occurred even if the occurrence far exceeded what was foreseen.[791] Thus, in contracts where the parties clearly are playing the market, even a substantial price increase excludes judicial interference.[792]

215 In other transactions, where the risk is not the main object of the contract but the contract is of speculative character or contains speculative elements, the disadvantaged party has similarly assumed the risk for a change in circumstances and the hardship exceptions are as a general rule excluded or a restrictive application is promoted.[793] In *BGE 63 II 79* the Swiss Federal Tribunal explained that the parties have no grounds to have the contract adapted to reflect the new commercial realities if expectations or speculations fail to materialise.[794] In the case a tenant requested to be released from a three-year long rental contract due to loss of employment. The court held the tenant to the contract, as the tenant had been aware that his employer was a newly founded company being financially unstable and the tenant still insisted on a short period of notice. An illustrative example of failed expectations is a case before the *Civil Court in Sachen from 12.2.1980*. The court found that the fact that the initially agreed upon rent was already 22 per cent higher than the average rent at the time the contract was concluded - in a time of strong economic growth. This indicated that the tenant was betting on a certain minimum turnover giving the contract a speculative character, excluding the applicability of Art. 2(2) ZGB and the Clausula.[795] Thus, a party entering into a speculative contract is typically calculating on making a high profit or on a beneficial development in the future and must reasonably also abide the risk of a negative outcome.[796] The following two cases also illustrate that point and reveal the strong link to the foreseeability requisite:

216 Despite a 44 per cent increase of the contract price, the Arbitration Court of the Japan Shipping Exchange refused to grant relief because the contract was speculative. The arbitrators, based on the content of the contract, explained: “In shipbuilding contracts such as the present one, of a commercial base, where the cost may be set

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347, 397.

[791] PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 24; Comment No. 3(d) on Art. 6.2.2(d) illustration 4 the UNIDROIT Principles (2016 edition).

[792] *Compare*, PÉDAMON/CHUAH, 99.

[793] *For Swiss Law*, BGE 54 II 256 p. 277; OFTINGER, SJZ 1939, 229, 234; ZR 1936, 245, 247; MERZ zu Art. 2 ZGB, 289; BK-WIEGAND zu Art. 18 OR, 176; MERZ zu Art. 2 ZGB, 289; OFTINGER, SJZ 1939, 229, 235; BGE 59 II 372, p. 380; BJM 1980, 75, 80 f.; SJZ 1968, 360, 360; ZR, 1936, 245, 245. *For Swedish Law,* Prop. 1975/76: 81, p. 119; RAMBERG/RAMBERG, 202; Compare also, BERNITZ, 75. *For German Law,* BGH JZ 1978, 235; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 20); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; WOLF/LARENZ, 707 (Rn. 37); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1137; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 517 (Rn. 21); FINKENAUER, MüKo zum BGB zu § 313, 1905 (Rn. 70); *See e.g.*, RGZ 92, 322 p. 324; RGZ 88, 172, p. 175 ff.; NJW 1958, 906, p. 906. *For International Law*, BRUNNER, 424; *See also*, ENDERLEIN/MASKOW, 324, stating the same with respect to Art. 79(1) CISG.

[794] BGE 63 II 79, 82.

[795] Civil Court in Sachen from 12.2.1980, in BJM 1980, 75, 79 f.

[796] *For Swiss Law*, BGE 54 II 256 p. 276; BISCHOFF, 114 and 213; MERZ zu Art. 2 ZGB, 289 f.; ZR 1936, 245, 248. *For Swedish Law*, RG 1976 p. 650; SOU 1975:83, p. 157; DOTEVALL, SvJT 2002, 442, 451 f. *For German Law*, in WM 1964, 1253 the German Supreme Court reject an adaptation of the contract where a contractor placed a bid for a building project calculating on making a profit of 70.000 DM but where, due to increased labour costs, it instead resulted in an 80 000 DM loss.

arbitrarily and which has a speculative nature to a degree, it is not possible to decide that there existed a situation to which so-called change in situation principle could be applied."[797] Similarly, in a Norwegian arbitration case concerning a shipbuilding case, the buyer wanted to get out of the contract claiming economic force majeure as it became highly unfavourable due to rapidly decreasing prices for ships following the Suez crises in 1956. The arbitrators held the buyer to the contract, as it generally is known that the market conditions in the shipping industry changes rapidly and shipbuilding contracts thereby have an inherent speculative character, especially considering the long duration of such contracts.[798] In a verdict by the Hanseatisches Oberlandesgericht Hamburg, the court noted that the threshold should be raised with respect to a trade sector where the business operations are of highly speculative nature.[799]

It should not be concluded that all contracts of speculative nature where high risk is involved exclude the applicability of the hardship exceptions. There may be situations where the cost increase goes beyond the speculative intention of the party so that relief may be granted. In each case it must be considered in what regard the contract is speculative and to what extent the contracting party has assumed the risk. For instance, a speculative contract may also have a higher profit margin, which in turn indicates that the disadvantaged party also assumed a proportionately higher risk.[800] In a court ruling by the **217**

OLG Hamburg involving a contract for the sale of iron-molybdenum, the seller was not exempted under Art. 79 CISG despite the market price having tripled since the conclusion of the contract. The market price for iron-molybdenum had increased to an amount tripling the initially agreed upon price in thecontract. The court held that the threshold should be raised with respect to a trade sector where the business operations are of highly speculative nature. [801] **218**

Contracting parties are simply required to accept a change in circumstances, also of a significant intensity in contracts where the parties also speculated on making a high profit. The speculative nature of a contract is presumably also greater if the counterparty has taken on far-reaching contractual obligations and risks.[802] To illustrate:

Company A undertook in relation to Company B to *not* export specific goods to certain countries in Europe. Due to new increased competition on the market, Company B claimed that there was a significant disproportion between the price paid to Company A for not exporting and the benefit received by Company B. In the opinion **219**

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[797] Award of 1975.09.20, Y.B. Com. Arb. 1983, 153, 155.
[798] ND 1959 p. 333, 360 f.
[799] *See hereto also*, Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997, available at: http://cisgw3.law.pace.edu/cases/970228g1.html.
[800] *For Swiss Law,* Zivilgericht in Sachen from 12.2.1980, in BJM 1980, 75, 79 f. where the court held that the tenant must have understood that they assumed a considerably high risk when entering into a rental contract with an index clause where the price was already set high (approx. 22 per cent higher than the average rent in 1970) *in a time of strong economic growth*. *For German law*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1136; FINKENAUER, MüKo zum BGB zu § 313, 1902 f. (Rn. 59 and 61); *Compare also*, WM 1964, 1253; Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997. *For International Law,* BRUNNER, 424 f.; *See also*, ENDERLEIN/MASKOW, 324, with respect to Art. 79(1) CISG.
[801] Hanseatisches Oberlandesgericht Hamburg, Decision of 28.02.1997. *See also*, *Nuova Fucinati S.p.A. v. Fondmetal International AB*, Tribunale Civile di Monza, decision of 14.01.1993, available at: http://cisgw3.law.pace.edu/cases/930114i3.html.
[802] *Compare e.g.*, ZR 1936, 245, 247 ff.; ADLERCREUTZ, 287; Prop. 1975/76:81 p. 118 f. FINKENAUER, MüKo zum BGB zu § 313, 1902; BGH 58, 355 p. 363.

of the court the disadvantaged party had speculated on a beneficial development of the market conditions and that a clearly speculative transaction of that kind is also connected with the risk that it goes the other way.[803]

In the case, the counterparty had agreed not to export specific products to certain countries for a period of ten years, to a fixed price without the inclusion of a currency risk clause in the contract.[804]

220 The fact that a change in circumstances renders the performance of the contractual obligation very unfavourable for one party is not enough to motivate an adaptation in a contract with a well-considered and acceptable distribution of risk. Instead, case law and academic writing show that the focus should rather lie on whether the consequences of the supervening event, having regard to the allocation of risk in the contract, should be borne by the disadvantaged party, apportioned among the parties by way of adaptation or, shifted over to the counter-party by way of granting relief from the contractual obligation. Thus, the intensity of the supervening event required to trigger the hardship exception is correlated to the speculative intentions of the parties.

c) The Duration of the Contract

221 The contractual duration can affect the assessment of whether the contract is considered to be speculative in nature. In *BGH 59 II 372* the Swiss Federal Tribunal held that the fact that the duration of the contract was fifteen years and was entered into in 1929, i.e. during a time of economic downturn, gave the contract a speculative character. A long-term contract without an adaptation clause or hardship clause creates a presumption of implied acceptance for the risk of changed market conditions. It cannot simply be assumed that things will remain unchanged but that change, rather, is part of the normal business risks.[805] That must also reasonably be the conclusion. The danger would otherwise be that long-term contracts are viewed as if they contain a silent adaptation clause that parties would need to exclude by way of contracting.[806] Contracting parties thereby take on a different risk in long-term contracts. They are required to consider the risk of a change in circumstances to a larger extent and address the issue in the contract. That is why a long-term contract could indicate that the contracting parties are speculating on the future developments.[807] On the other hand, the longer the term, the less the chances the contracting parties have to foresee the universe of all potential adverse events that may occur during the life of the contract. As discussed in Part 2, subsection C it is often argued that hardship normally will be of relevance to long-term contracts, which is an argument against the duration of the contract itself creating a presumption that the party implicitly has given its consent to bear the risk of changed circumstances. Instead, it will boil down to what the parties could (reasonably) have foreseen. Thus, the risk requisite is closely linked to the foreseeability requisite.

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[803] Handelsgericht, Abt. B, from 08.02.1935, ZR 1936, 245, 247 ff. The verdict was confirmed by the Swiss Federal Tribunal on March 24 1936.
[804] Handelsgericht, Abt. B, from 08.02.1935, ZR 1936, 245, 247 ff.
[805] BGE 100 II 345, p. 348 f.; BGH 107 II p. 347 ff.; BGE 127 II 300, p. 305, BGE 45 II 386, p. 397 f.; BGE 47 II 440, p. 459; BGE 59 II 372; BISCHOFF, 16 ff.; RAMBERG/RAMBERG, 205; DOTEVALL, SvJT 2002, 442, 451; DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 500 f. BGH 86, 167, p. 169; BGH 77, 194 p. 198; BGH 90, 227 p. 228; NJW 1991, 1478, p. 1479; NJW 1974, 1186 f.; HAMMER, 89. *Compare also*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 254.
[806] *Compare hereto*, NJW 1974, 1186 p. 1186; WM 1969, 1323, p. 1324. *See also*, RGZ 95, 41 p. 44.
[807] *Compare hereto*, ZK-BAUMANN zu Art. 2 ZGB, 693 f.; BISCHOFF, 208 and 214; DESCHENAUX, 202 f.; ZK JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 254; BK-KRAMER zu Art. 18 OR, 139; OFTINGER, SJZ 1968, 229, 235; MERZ zu Art. 2 ZGB, 289; SCHMIEDLIN, 163. *Compare also*, BGE 59 II 372, p. 380. *See hereto also*, TREITEL, 272.

3. An Unforeseeable Event

Contracting parties cannot use an event that was foreseeable upon conclusion of the contract, calculating that it will not occur, to escape its contractual obligations if the event later on materialises.[808] The foreseeability requisite can be found under all jurisdictions and the international unification works save for British common law. As per Lord Denning in *The Eugenia*, the fact that the very fear was that the Suez Canal would close and yet the contracting parties did not address the issue in the contract, did not excluded the doctrine of frustration on those grounds when the Canal later closed. [809] According to that ruling, it is not essential for the applicability of the doctrine of frustration, whether or not the new situation was unforeseen by the disadvantaged party. Under the other hardship exceptions, the change in circumstances must have been unforeseeable by the obligor. 222

According to §313 BGB it is not unreasonable for the counterparty to insist on the contractual obligation according to the originally agreed upon terms if a contractual risk that was foreseeable or ought to have been foreseen by the disadvantaged party materialises sometime during the life of the contract.[810] Contractual risks that are foreseeable do not form part of the foundation of the contract, excluding the applicability of §313 BGB.[811] The Clausula rebus sic stantibus doctrine is based on the idea that the contracting parties silently assume that certain circumstances will stay the same as when the promise was made throughout the contract term as when the promise was given.[812] This assumption, and thereby also the applicability of the Clausula, is excluded if it was foreseeable by the parties at the time when the promise was given, that the existing circumstances could change. Art. 2(2) ZGB is only applicable when the change in circumstances was unforeseeable by the disadvantaged party at the time when the contract was concluded.[813] It is not enough that the disadvantaged party did not foresee the supervening event. Actual unforeseeability is required.[814] It should be noted that the fact that the occurrence of a certain event is unforeseeable by the contracting parties does not automatically justify an adaptation of the contract. Instead, the foreseeability requisite is a negative requisite that must be fulfilled for §313 BGB and Art. 2(2) ZGB and the Clausula to apply.[815] The outcome of the assessment may, however, be different under Swiss and German law if both parties counted on the objectively foreseeable supervening event being excluded.[816] There is no foreseeability requisite spelled out in §36 AvtL as a result of that the clause not primarily dealing with the issue of changed circumstances. The Swedish legislator explains 223

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[808] *For Swiss Law,* BISCHOFF, 204*;* MERZ zu Art. 2 ZGB, 288. *For Swedish Law*, Prop. 1975/76: 81, p. 127. *For German Law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 23); FINKENAUER, MüKo zum BGB zu § 313, 1906 (Rn. 74); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1138 (Rn. 74). LARENZ/WOLF, 707 (Rn. 38); LARENZ, 107 f. *See however*, BGH WM 1965, 843, p. 845 f. where the German Supreme Court seems to suggest that an adaptation can come in question also when the event was foreseeable (the disadvan taged party in the case new that a DM devaluation was up for discussion) but that the threshold should be set higher in such situation.

[809] Ocean Tramp Tankers Corp. v V/O Sovfracht (*The Eugenia*) [1964] 2 QB 226, p. 239.

[810] CANARIS, 745; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 23); NJW 1991, 1478, p. 1479; BGH 86, 167, p. 169.

[811] STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 518 (Rn. 24); NJW 2007, 1884, p. 1886.

[812] *See hereto*, BGE 45 II 351, p. 355.

[813] BGE 127 III 300, p. 305; BGE 59 II 372, p. 380; BGE 47 II 314, p. 319; BGE 60 II 205, p. 211; BGE 97 II 390, p. 398; BGE 101 II 17, p. 21; BGE 135 III 1, p. 10; ZBJV, 1959, 229, 236 f. *See also*, BISCHOFF, 204 f.; BURKHARDT, 262; MERZ zu Art. 2 ZGB, 288 f.; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569; SIEGWART, 107 f.; WEBER, 53 and 55; OFTINGER, SJZ 1939, 229, 233; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 245 f.; BSK-WIEGAND zu Art. 18 OR, 175.

[814] BGE 54 II 314 p. 317; SCHMIEDLIN, 111; BISCHOFF, 205; MERZ zu Art. 2 ZGB, 288.

[815] *For Swiss Law*, MERZ zu Art. 2 ZGB, 289; ZK-BAUMANN zu Art. 2 ZGB, 693; BISCHOFF, 204. *For German Law*, RGZ 147, 42 p. 56; FINKENAUER, MüKo zum BGB zu § 313, 1906 (Rn. 74).

[816] *For Swiss Law*, WEBER, 57. *For German Law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 23); FINKENAUER, MüKo zum BGB zu § 313, 1906 (Rn. 74).

that whether a contract term is considered unreasonable under §36 AvtL is linked to whether the contracting parties had the possibility to overview and foresee the future consequences of the contract at the time when the contract was concluded.[817] Under the doctrine of assumptions, the foreseeability requisite is described in terms of good faith. The disadvantaged party must have been in good faith i.e. not known or ought to have known that the assumption was erroneous.[818]

224 Under all four hardship exceptions (§36 AvtL, the doctrine of assumptions, §313 BGB and Art. 2(2) ZGB) if the change in circumstances was foreseeable or ought to have been foreseeable at the time when the parties entered into the contract (i.e. the courts are making an assessment ex ante), and the parties did not make a provision in the contract, the disadvantaged party is deemed to have understood and assumed the risk for the supervening event and will have to bear the consequences.[819] The Swiss Federal Tribunal explained in *BGE 100 II 345* that in a situation where future adverse change was foreseeable it is generally to be understood as if the parties intended the contract to be fulfilled according to its terms.[820] The foreseeability requisite under the unification works differs from the other hardship exceptions as they are subject to a standard of "reasonableness". According to the UNIDROIT Principles, hardship requires that "the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract."[821] PECL contains almost an identical requisite: "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."[822] Subsection (3)(b) Art III. – 1:110 DCFR states that "the obligor did not take into account and could not reasonably be expected to have taken into account," the possibility or the scale of the change of circumstances. A provision should be made in the contract with respect to events that are foreseeable. Thus, the analysis that the contracting parties must undertake at the time when the contract is concluded requires the parties to foresee a vast number of events. That is a difficult task. The "reasonably foreseeable" standard under the UNIDROIT Principles, the PECL, and the DCFR could be argued to be equivalent to the "ought to have been foreseeable" under Swiss, Swedish and German law as both concepts limit the universe of adverse events that the parties should have taken into consideration. Moreover, it has sometimes been expressed in the legal doctrine that the foreseeability standard shall not be driven too far and be too strictly applied.[823] As well-captured by Lord Denning in *The British Movietonenews*: "We no longer credit a party with the foresight of a prophet or his lawyer with the draftsmanship of Chalmers". We realise that they have their limitations and make allowances accordingly."[824]

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[817] Prop. 1975/76: 81, p. 127; SOU 1974:83, p. 156.
[818] LEHRBERG, ERPL 1998, 265, 270.
[819] *For Swiss Law*, BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569; SCHWENZER, Schweizerisches Obligationenrecht, 272; BGE 120 II 155, p. 166; BGE 119 II 347, p. 351.BISCHOFF, 205; MERZ zu Art. 2 ZGB, 288; BGE II 300, p. 305; BGE 107 II 343, p. 347 f. *For Swedish Law*, RUNESSON, 382; DOTEVALL, SvJT 2002, 442, 452; RAMBERG/RAMBERG, 200; LEHRBERG, 53; LEHRBERG, ERPL 1998, 265, 270. *For German law*, LARENZ/WOLF, 707 (Rn. 38); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1138 (Rn. 74); STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 518 (Rn. 24); FINKENAUER, MüKo zum BGB zu §313, 1906 (Rn. 74); NJW-RR 1993, 881, p. 881; NJW 2002, 3695 p. 3698; BGH 74, 370 p. 374; Regeriungsbegründung BT-Ds. 14/6040, p. 175 f.; LARENZ, Schuldrechts AT, 300; JANZEN, JCL 2006, 156, 166; CANARIS, 745; WOLF/LARENZ, 707; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1137 f. *See hereto also*, BGH 74, 370 p. 374; BGH 77, 194, p. 198.
[820] BGE 100 II 345, p. 349.
[821] Art. 6.2.2 subsection (b).
[822] Art 6:111 (subsection (b).
[823] *For Swiss Law*, BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 569; BK-KRAMER zu Art. 18 OR, 339; *See hereto also*, BÜRGI, ASR 1939, 1, 141, stating; "(---)*denn letzten Endes ist alles voraussehbar." For Swedish Law*, RAMBERG/RAMBERG, 188.
[824] British Movietonenews Ltd. v London District Cinemas [1952] A.C. 166, 168, 182 f.

a) A Perspective Ex Ante

The difficulty lies in ascertaining what was foreseeable by the contracting parties at the time when the contract was concluded. Thus, the foreseeability requisite forces the courts into an assessment ex ante. There are no general criteria to be applied. Instead, the judge must assess the situation retrospectively and decide whether the parties *could, ought to or reasonably* have foreseen the change in circumstances. To its help, national courts are using different methods. **225**

aa) The Hypothetical Bargain

A hypothetical test is applied under the doctrine of assumptions under Swedish law. It is inquired whether the contract would have been concluded had the disadvantaged party had knowledge of the erroneous assumption at the time when the contract was concluded.[825] The requisite is fulfilled if the conclusion is that the contract never would have been entered into (or only on materially different terms).[826] Similarly, in German law, to assess whether an adverse turn of events was foreseeable by the disadvantaged party, a test is applied where the hypothetical "bargain" of the parties must be ascertained.[827] It must be clear that the parties would not have entered into the contract or only on different terms had they foreseen the supervening event.[828] In the British case *Hirji Mulji v The Cheong Yue Steamship Company Ltd.*, the idea of asking what the parties themselves would have agreed on was rejected as an impossible task, and was also considered a decision that has to be freed from "the individuals concerned, their temperaments and failings, their interests and circumstances."[829] In German legal doctrine, the "hypothetical" test takes an objective form and it is argued that the foreseeability requisite is fulfilled when it is entirely clear, *from the perspective of a rational observer*, that the parties (or at least one of them) would not have entered into the contract, or only on different terms, had the parties taken the change in circumstances into account at the time when the contract was concluded.[830] That approach deserves support, as it is impossible to ascertain what contracting parties, with conflicting interests, would have agreed on. As per Lord Radcliff in *Davis Contractors Ltd. v Fareham UDC*: "By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place rises the figure of the fair and reasonable man".[831] The hypothetical test applied under the doctrine of assumptions in Swedish law has also been criticised in the legal doctrine for being speculative.[832] The test suggested by German legal scholars, however, corresponds to the objective test under Swiss law. The "rational observer" under German law is equivalent to the "reasonable and prudent person" under Swiss law. **226**

bb) An Objective Test: *The Fair and Reasonable Person*

It is difficult, time consuming, and expensive to draft a contract that considers the universe of all potential adverse events. The intention is not to encourage such behaviour. To avoid that, an objective evaluation of whether a certain event was foreseeable is encouraged. An objective approach, as suggested by German legal **227**

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[825] NJA 1936 p. 368, p. 372; NJA 1910 p. 648, p. 650.
[826] ADLERCREUTZ, 271; LEHRBERG, Förutsättningsläran, 19 f. and 177 ff.
[827] Compare, SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526 (Rn. 14); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1133 (Rn.58 and 60).
[828] Regeriungsbegründung BT-Ds. 14/6040, p. 175 f.
[829] Hirji Mulji v The Cheong Yue Steamship Company Ltd. [1926] A.C. 497, 510.
[830] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1133 f.; SCHLECH TRIEM/SCHMIDT-KESSEL, 64; FINKENAUER, MüKo zum BGB zu § 313, 1902 (Rn. 58); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 532 (Rn. 18).
[831] Davis Contractors Ltd. v Fareham UDC [1956] A.C. 696, 728.
[832] DOTEVALL, SvJT 2002, 442, 449.

doctrine, is taken both under the international unification instruments and Swiss Law. While not being discussed in terms of a foreseeability requisite under English law, (but rather the implied term theory), a test of what fair and reasonable people, presumably would have agreed upon is applied.[833] Under the PECL and the UNIDROIT Principles, an event is foreseeable if the event could have been foreseen by *a reasonable person* at the time when the contract was concluded having regard to the information available at that point in time,[834] or as one author expresses it: "so outside the bounds of probability that reasonable parties would not provide for it."[835] According to subsection (3)(b) Art III. – 1:110 DCFR, the supervening event must have been *objectively unforeseeable* by the obligor similarly applying the "reasonable person" standard.[836]

228 Under Swiss law, to retrospectively assess whether the parties could or ought to have foreseen the change in circumstances,[837] the test of the "reasonable person" is applied. It is an objective test[838] and is construed so that if the probability of the changed in circumstances occurring sometime during the term of the contract is so small that *the reasonable and prudent person* would not contract for it, then the test is met.[839] Or, differently expressed, the probability of a supervening event is so obvious that the parties, in the ordinary course of things, reasonably must have taken the event into consideration upon conclusion of the contract.[840] Thus, the yardstick is the carefulness of the reasonable and prudent businessperson. I.e, nobody can rely on its carelessness.[841] The "reasonable person" is described in the doctrine as the average opinion of a person with the necessary expertise with respect to the business and industry in question and who possesses the right level of education to carefully assess matters of the kind.[842] Especially the routines and the possibility to acquire information required in the specific business sector should be taken into account. Thus, the test is only fulfilled when the supervening event was unforeseeable by the wider circle of the industry in which the disadvantaged person operates.[843] For instance, in a case from the Canton Appellate Court of Zürich, involving a leasehold contract for a plot of land, the court held that it must have been clear for a company in the real estate industry that the economic growth during the preceding decade would not continue and that an economic down-turn also could also occur within a short time span, especially as it was known that during the preceding decade, only half of the amount of houses had been built.[844] The Swiss Federal Tribunal similarly held in another case that it was doubtful that the changing market fluctuations had been unforeseeable since fluctuations in the market prices existed with respect to the disputed yarn before the critical point in time. The disadvantaged party must have been aware as a member of

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[833] Dahl v Nelson [1881] 6 App. Cas. 38, p. 59 per Lord Watson.
[834] LANDO/BEALE, 116; RODNER, Hardship under the UNIDROIT Principles of International Commercial Contracts, 677, 686.
[835] PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 23.
[836] Official Comment to the DCFR Art. III. – 1:110, 714.
[837] BSK-WIEGAND zu Art. 18 OR, 175.
[838] BISCHOFF, 206 f.; SIEGWART, 109.
[839] BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 570. *Compare hereto also*, LEU, Vertragstreue In Zeiten des Wandels, 107, 119; WEBER, 54 f.
[840] ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 246; BISCHOFF, 207.
[841] WEBER, 56 f.
[842] BISCHOFF, 206 f; OFTINGER, SJZ 1939, 229, 234; WEBER, 54. *Compare hereto*, BSK-ZINDEL/PULVER zu Art. 373 OR, 2360,) stating in relation to Art. 373(2 that the foreseeability of a change in circumstances shall be objectively measured from the standpoint of an experienced and diligent entrepreneur.
[843] BISCHOFF, 206 f; OFTINGER, SJZ 1939, 229, 234; BGE 52 II 437, p. 443 with respect to Art. 373(2) OR, where the Swiss Federal Tribunal held that the difficulties encountered by the contractor were unforeseeable as, according to experts, a professional skilled in the field would not have taken such extreme changes into account. *Compare hereto also*, BGE 49 II 77, p. 88.
[844] Obergericht Zürich, decision from 12.11.1982, ZR 1987, 2, 4 ff.

the cotton spinning association. [845] These cases can be compared with the following case showing that the same approach is taken with respect to the CISG:

In *Société Romay AG v SARL Behr France*, a ruling by the French Supreme Court, a buyer entered into a contract for the purchase of crankcases to be incorporated into automobile air conditioners, which in turn were to be sold to a truck manufacturer. Due to a collapse in the automobile market, the truck manufacturer changed the terms radically by imposing a price for the product, which was 50 per cent lower than the price of the components. The Supreme Court, agreeing with the view of the Court of Appeal, ruled that the exemption in Art. 79 CISG was not applicable to the situation, as the buyer of the crankcases could have foreseen the possibility that the car manufacturer might not purchase all the finished air conditioners. The Supreme Court also noted that the buyer, being a professional and well acquainted with international commercial practice, ought to have negotiated to include a guarantee or review mechanism in the contract. Failing to do that, the buyer assumed the risk of non-performance and Art. 79 CISG was not applicable.[846]

In *BGE 47 II 314*, where radical changes in the prices of coal resulted in that approx. 25 – 33 per cent of the yearly rent was used for heating between 1918-1920 in comparison with 7 per cent of the yearly rent prior to 1918, the Swiss Federal Tribunal held that the development was unforeseeable by the disadvantaged party as such a change in circumstances went beyond *the general knowledge of any person*.[847] It is stressed that the assessment in Swiss law must not be simplified and carried out in a schematic manner. Instead, the circumstances of the individual case must always be taken into consideration as well as the circumstances surrounding the contract in question. For instance, the disadvantaged party may possess information that the counterparty (or the wider circle of a specific industry) does not have and the supervening event may therefore have been foreseeable and reservations should have been included in the contract.[848] Along those lines, in *RG 1993 s 106*, the Norwegian Court of Appeal did not adapt the leasing fee for a plot of land in a contract with a duration of 49 years as the price development was considered to be foreseeable by the property owner who had considerable knowledge and experience with respect to the subject matter. Thus, the assessment of the foreseeability requisite is not entirely objective under Swedish law. **229**

The concept of the "reasonable person" boils down to an assessment of whether, in the spirit of justice, the parties (reasonably) should have provided for the event in the contract. A similar concept cannot be found in §36 AvtL and there is no straight answer as to whether an objective assessment is intended. The legal doctrine is scarce on this point. Whether a party had the opportunity to foresee an event will, according to one commentator, be a question of assessing how likely it was that the event would occur. The probability of the event occurring must have been at least high enough that it was *reasonable* for the party to take it into consideration at the time when the contract was concluded.[849] *NJA 1983 s 383* is an example of an objective evaluation of what a party ought to have foreseen at the time when the contract was concluded. In the case the parties linked the price for the property lease to the index for autumn wheat, which turned out to be an insufficient reflection of actual cost increases and price developments. The Swedish Supreme Court held that there was a general lack of **230**

[845] BGE 49 II 77, p. 88.
[846] Cour de cassation, decision of 30.06.2004, available at: http://cisgw3.law.pace.edu/cases/040630f1.html
[847] BGE 47 II 314, p. 317. *Compare hereto also*, BSK-ZINDEL/PULVER zu Art. 373 OR, 2360 explaining with respect to the unforeseeability requisite in Art. 273(2) OR, the cost increasing factor must be so deeply rooted that *every other contractor* in the same or similar situation would have been affected.
[848] BISCHOFF, 206 f. and 212; SIEGWART, 109: MERZ, Die Revision, 499.
[849] DOTEVALL, SvJT 2002, 442, 451.

knowledge regarding index clauses at the time when the contract was concluded and therefore the landowner could not have foreseen that the index for autumn wheat would be an inappropriate index and should not bear the risk for the cost increases and price developments.[850]

cc) Nature, Scope and Impact

231 A supervening event can be foreseeable by the disadvantaged party but the scope and impact of the event may be difficult to foresee. The DCFR Art. III. – 1:110 subsection (b) is the only hardship rule that specifically consider that side of the foreseeability requisite by way of spelling it out. It is required that the debtor could not have taken into account the possibility *or scale* of the change in circumstances. An adaptation of the contract is not excluded in such a situation under the other hardship exceptions,[851] but one can generally expect that the deviation must be major in order to grant relief. This is where the materiality requisite and the foreseeability requisite come together. *ICC Case No. 6281* is illustrative to that point:

232 A seller agreed to deliver 160,000 metric tons of steel bars to a fixed price for a relatively long period. The arbitral tribunal explained that the drop in steel price by 13.6 per cent was not material enough and such an increase was also deemed foreseeable by the seller: "A reasonable seller must expect that steel prices might go up further, perhaps even more dramatically than in actual fact".[852]

233 Case law also confirms that the materiality of the adverse turn of event can render the change in circumstances unforeseeable despite the event having been foreseeable per se. Disruptions caused by legislative changes attributable to war, revolution and other catastrophes have motivated judicial interference. In a case concerning a long-term contract for the delivery of beer between a German brewery and an Iranian importer, the German Federal Court of Justice explained that while the future political development were foreseeable to both parties, the complete prohibition of importing alcohol as a result of a new reigning government was not.[853] In another case, the legislative change relating to the British abandoning the gold standard was considered unforeseeable by the contracting parties at the time when the contract was concluded.[854] Similarly, the Swiss Federal Tribunal granted a party relief from a leasehold estate contract entered into for a period of 100 years for the construction of a shopping mall when legislative changes resulted in the piece of land only being used for agricultural purposes. According to the reasoning of the court legislative changes are foreseeable but the nature and scope (in this case the change in the use of land) was unforeseeable.[855] In another case, the Swiss Federal Tribunal held that the increase in prices for coal as a result of the First World War was unforeseeable by the contracting parties as the scope of the price increase was drastic. The court explained that the change in circumstance was unforeseeable as such radical change in fuel prices was not in any way to be taken into account by the parties at the time when the contract was concluded.[856] Similarly, in a case concerning a leasehold estate contract, the

[850] NJA 1983 s 383, 385. *See hereto* RUNESSON, 422 critical to the objective approach in the case.
[851] *For Swiss Law*, BISCHOFF, 203; BURKHARDT, 266; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 570; BK-KRAMER zu art. 18 OR, 141; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 247; BGE 127 III 300, p. 305 f. *For Swedish Law*, DOTEVALL, SvJT 2002, 442, 453. *For German law,* RGZ 107, 78; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerli chen Gesetzbuch zu § 313, 1138 (Rn. 74 and 75); FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 74).
[852] ICC Case No. 6281 of 1989, Y.B. Com. Arb. 1990, 96, 99 f. Available at:
> http://www.cisg.law.pace.edu/cases/896281i1.html#ct.
[853] NJW 1984, 1746. *See hereto also*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1138 (Rn. 74 and Rn. 75).
[854] RGZ 141, 212, 216.
[855] BGE 127 III 300, p. 306.
[856] BGE 47 II 314, p. 317 and 319.

Norwegian Supreme Court held that general price developments were foreseeable by the disadvantaged party, but not the scope. The landowner had not assumed the risk for the price developments since it was unusual to use index clauses at the time when the contract was concluded. The imbalance between the originally agreed upon price and the price developments was so extreme that the price should be adapted.[857]

Another factor that may have an impact on the assessment is whether the change in circumstances occurs rapidly. For instance, in the Official Comment to the DCFR Art. III. – 1:110 it states that while a party may reasonably expect price fluctuations in contracts with a long contract term, it does not necessarily apply to exceptional and sudden fluctuations of a kind which no reasonable person could expect.[858] The UNIDROIT Principles provide the following example: The price in a contract is set in the currency of country X, a currency already was slowly depreciating upon formation of the contract. One month later the currency depreciates by 80 per cent following a political crisis in country X. The hardship exemption is available in this situation since the dramatic acceleration of the loss of value of the currency was unforeseeable, unless other circumstances would indicate the contrary.[859] The Swiss Federal Tribunal equally explained in *BGE 50 II 158* the fact that the total cost increase for labour and material equalled approx. 6 per cent in total since the outbreak of the war made the 60 per cent cost increase, just a couple of months following the conclusion of the contract, something so completely outside what the parties could have foreseen.[860] German case law, described under the materiality requisite, shows that while a gradual inflation is considered foreseeable, hyperinflation is typically not foreseeable by the contracting parties.[861] Similarly, in Swiss law the event of war has been given as an example of an event that typically is regarded to be foreseeable. However, the First World War is regarded to have been an unforeseeable event as the impact of the war was devastating and profoundly different from any prior war.[862] **234**

b) The Political, Social and Economic Context

Case law also shows that the political, social, and economic context surrounding the contract at the time of its conclusion is of relevance. In times of crisis or during unstable times contracting parties are expected to take such factors into consideration and make reservations in the contract. The same degree of caution is not required during stable and calm periods. The UNIDROIT Principles provide an example: If a seller agrees to supply a buyer with crude oil from a certain country at a fixed price for a period of five years, *notwithstanding the acute political tensions in the region,* the seller cannot rely on the hardship exemption if two years later there is a drastic increase in the price of crude oil following the outbreak of war between neighbouring countries resulting in a world energy crisis.[863] *ICC Case No.* 8486 reflects that understanding, the arbitral tribunal, applying Dutch law in light of the UNIDROIT Principles, found that the circumstances for discharge from payment due to unforeseen circumstances were neither met nor under Dutch law nor under the UNIDROIT Principles. The buyer was, at the time of the contract's conclusion, aware of the commercial risks as well as the unstable **235**

[857] Rt 1988 s 295.
[858] Official Comments Art. III. – 1:110.
[859] Comment No. 3(b) on Art. 6.2.2(b) illustration 3 the UNIDROIT Principles (2016 edition).
[860] BGE 50 II 158, p. 165 f. *Compare also*, BGE 57 II 532, p. 535 where a legislative change was considered unforeseeable as it was enacted unexpectedly quickly in the specific canton while several other cantons still had not enforced the legislative change.
[861] *See hereto also*, KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1138 (Rn. 74 and 75); FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 74).
[862] WEBER, 55.
[863] Comment No. 3(b) on Art. 6.2.2(b) illustration 2 the UNIDROIT Principles (2016 edition). *Compare hereto,* BGH JZ 1978, 235.

commercial situation in Turkey. The tribunal held that it would not be suitable to shift the commercial risk of the supervening event on to the seller in such situation. Hence, the buyer had to bear the economic risk. [864] This corresponds with the view taken under German and Swiss law. For instance, in *BGH JZ 1978, 235,* a jumping rise in oil prices was considered foreseeable by the seller due to the war-like hostilities in the region at the time when the contract was concluded. The same conclusion was drawn in *NJW 2010, 1528* related to an increase in monetary value. The rise was considered foreseeable as, already at the time when the contract was concluded, there was uncertainty with respect to the development of the monetary value of the Iranian Rial.[865] In an arbitral award, where Swiss Law was applicable, the increased oil prices were considered foreseeable by the parties as the outbreak of the Israeli-Egypt war in 1973/74 was known at the time when the parties entered into the contract extending over a period of 20 years without any reservations for adverse turns of events.[866] In a verdict from the *Civil Court in Sachen*, the Swiss court found that the fact that the initially agreed upon rent was already 22 per cent higher than the average rent as well as the contract being concluded during a time of strong economic growth, excluded the applicability of Art 2(2) and the Clausula as it gave the contract a speculative character.[867] In another case, a contract was entered into prior to the outbreak of the First World War for the printing of two magazines. During the war, the contract term was extended for a period of three years without making any reservations for changed circumstances. Wartime exigencies resulted in shortage of paper rendering the performance more burdensome for the printing company. The Swiss Federal Tribunal held the company to the contract, as the change in circumstance was foreseeable at the time when the parties agreed to an extension of the contract term without making reservations for adverse changes and thereby took on the full risk for the change in circumstances.[868] In another case the Swiss Federal Tribunal explained that it was doubtful that the changing market fluctuations had been unforeseeable by the disadvantaged party as already before the critical point in time fluctuations in the market price existed.[869] The Commercial Court of Zürich came to the same conclusion in another case:[870]

236 A contract was concluded in 1914 for the delivery of 10,000 kilos of cooper wire. In 1915 it was declared by the seller that the delivery of the cooper was suspended until the end of the war. In 1917 the seller declared the contract cancelled due to non-delivery of cooper from its suppliers caused by the on-going war. The buyer rejected the cancellation insisting that the seller would take up delivery once the war came to an end. In 1920, the buyer sued the seller for non-delivery. At that point in time, the market price to obtain cooper had increased by 78 per cent in comparison with the initially agreed price. The Commercial Court explained that merely the increase in the price of cooper was not a ground for relief as the seller, during the war, had agreed to deliver the agreed quantity of cooper once the war was over, without making any further reservations for changed circumstances. According to the court, the seller had thereby taken on the risk for potential changes in the price for cooper as the seller must have realised the uncertainty around the the price for cooper following the war, which at that point in time, had no end in sight. Under such circumstances, the price increase of 78 per cent was considered foreseeable.[871]

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[864] ICC Case No. 8486 of September 00.09.1996, Collection of ICC Awards I, 321, 326 f. Available at, > http://www.unilex.info/case.cfm?pid=2&do=case&id=630&step=FullText
[865] NJW 2010, 1528, p. 1531.
[866] Ad hoc Award of July 6, 1983, YCA IX (1983), 69, 70.
[867] Civil Court in Sachen from 12.2.1980, in BJM 1980, 75, 79 f.
[868] BGE 48 II 119, p. 125 f.
[869] BGE 49 II 77, p. 88.
[870] Zürich Handelsgericht, Abt. B., 03.02.1921, ZR 1922, 79, 85 ff.
[871] ZR 1922, 85, 84. *Compare hereto also*, the verdict from the Civil Court in Sachen from 12.2.1980, in BJM 1980, 75, 79 f.

c) Other Contractual Features

Other factors can also affect the assessment of whether the supervening event was foreseeable. Caution is generally called for in international transactions and long-term contracts. In *ICC Case 1512,* the arbitral tribunal explained that to invoke the *doctrine of rebus sic stantibus* (hardship, frustration or imprévision etc.), compelling arguments are required and in international transactions as it is typically more likely that the contracting parties can foresee the risks also of remote events.[872] The Swiss commercial court rejected an adaptation of the contract on similar grounds explaining that parties to contracts, where almost the entire world market comes into consideration and where unpredictable factors are so many that it is impossible to foresee future developments with any certainty, cannot assume that the market conditions will remain the same throughout a long contract duration.[873] It is also considered that professionals generally have a better possibility to foresee the consequences of a contract term that is within the area of their expertise than for example a consumers or private individuals.[874] **237**

The time factor is generally also a parameter that the courts have taken into consideration in their assessment of whether the hardship situation was foreseeable or not. Contracting parties cannot reasonably expect that the contractual economic equilibrium remains the same when the contract term extends over a longer term.[875] Several court rulings by the Swiss Federal Tribunal show that contractual duration has an impact on whether the change in circumstances was foreseeable by the disadvantaged party. In *BGE 47 II 440*, the court held that the disadvantaged party must have taken worsening market conditions into consideration when entering into a contract for the supply of electricity with a term extending over several decades.[876] In an Arbitral Award, where Swiss Law was applicable, the increased oil prices were considered foreseeable having regard to the long contractual duration of over 20 years where no measure had been taken to avoid any future adverse turn of events.[877] While the contractual duration is a factor to consider in the assessment of the foreseeability requisite under Swiss law it is not conclusive.[878] In a contract for the delivery of beer entered into for a period of 10 years, the Swiss Federal Tribunal recognised that the event causing the price increase was unforeseeable despite the long contract duration.[879] In legal doctrine it is sometimes stressed that the longer the contract term the more difficult it is for the contracting parties to foresee all potential adverse events that may occur during the life of the contract.[880] Thus, the contractual duration can be a factor that can lower or rise the threshold for what ought to have been foreseeable by the contracting parties. **238**

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[872] ICC Case 1512 of 1971, Collection of Arbitral Awards I, 3, 4; *See hereto also*, FOUCHARD/GAILLARD/GOLDMAN, 25.
[873] Handelsgericht, Abt. B, from 08.02.1935, ZR 1936, 245, 247 ff. The verdict was confirmed by the Swiss Federal Court on March 24 1936.
[874] *See e.g.,* Société Romay AG v S.A.R.L Behr France Cour de cassation, decision of 30.06.2004; RG 1993 s 106; Prop. 1975/76: 81, p. 105, 127.; SOU 1974:83, p. 164; Offical Comment on Art. III. – 1:110 DCFR, 715.
[875] BGE 47 II; 440, p. 459; BGH 86, 167, p. 169; RG 1976 s 650 where the entire cost increase could not be reflected having regard to the long contract term. *Compare hereto also*, DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 500 f.; MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 254.
[876] BGE 47 II 400, p. 457. *See hereto also e.g.*, BGE 59 II 372, p. 380; BGE 127 II 300, p. 305, BGE 100 II 345, p. 348 f.; BGE 107 II 343, p. 347; BGE 45 II 386, p. 397 f.; Obergericht Zürich, decision from 12.11.1982, ZR 1987, 2, 3 f.
[877] Ad hoc Award of July 6, 1983, YCA IX (1983), 69, 70.
[878] BISCHOFF, 208; ZK-BAUMANN zu Art. 2 ZGB, 693 f.
[879] BGE 45 II 351, p. 355.
[880] *For Swiss Law,* BISCHOFF, 208; OFTINGER, SJZ 1968, 229, 234. *For Swedish Law*, Prop. 1975/76: 81, p. 127; SOU 1974:83, p. 156. The same view can be found in the Nordic legal doctrine. *See, e.g.,* ANDERSEN, 244: WILHELMSEN, 131;

V. Concluding Remarks

239 Hardship has nothing to do with risks normally connected with business operations. Such risks are foreseeable excluding a case based on hardship. The foreseeability requisite is of central meaning, overlapping with both the risk requisite and the materiality requisite. While normal entrepreneurial risks are foreseeable, the intensity of the change in circumstances can reach a level that the contracting parties could not reasonably have taken into consideration at the time when the contract was concluded rendering the hardship exceptions applicable. Case law show that the foreseeability requisite is highly context-dependant and circumstances particular to the individual case are often decisive factors for the outcome.

VI. An Unavoidable Event

240 The act and behaviour of the disadvantaged party is relevant. The adverse turn of event cannot be a result of an act or an omission to act by the party seeking to rely on the event as grounds for relief. The adverse turn of event and its consequences must fall entirely outside the control sphere of the disadvantaged party and it must be shown that the party could not have prevented the event or its consequences. The standard for "beyond the control" can be found in traditional force majeure clauses and this requisite will only be dealt with in brief since the requisite is fairly straightforward and is not the requisite causing problem in the assessment of whether grounds for hardship are at hand.

1. Beyond the Control of the Disadvantaged Party

241 In order to invoke the hardship exceptions the adverse turn of event must be outside the "control sphere" of the disadvantaged party. If the supervening event was self-inflicted, i.e., not external to the disadvantaged party's own activities, it is typically considered to fall within the "control sphere", excluding the applicability of the hardship exceptions.[881] A classic example is the breakdown of a machine, which even if unforeseeable and unpreventable it is regarded as being within the control of the disadvantaged party,[882] or if the event fell within the control of persons that the disadvantaged party had put in charge of performance of the contractual duty or of a subcontractor that the disadvantaged party hired.[883] The international unification instruments contain the same requisite. According to Art. 6.2.2(c) of the UNIDROIT Principles, the party that claims hardship must

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WOXHOLTH, Avtalerett, 400.

[881] *For Swiss Law,* BISCHOFF, 216; BURKHARDT, 275; BÜRGI, ASR 1939, 1, 141; DESCHENAUX, 202; GUHL/KOLLER, 311; HAUSHEER/JAUN, 148; JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 248; MERZ zu Art. 2 ZGB, 290; OFTINGER, SJZ 1939, 229, 233; SIEGWART, 113 ff; SCHMIEDLIN, 161; WEBER, 60; BGE 47 II 440, p. 457 and 460. In BGE 59 II 372, p. 379 the Swiss Federal Tribunal stated that no contractual relief can be granted if the disadvantaged party brought about the change in circumstance; BGE 45 II 317, p. 321; *Compare hereto*, BGE 49 II 77, 86 f.; BGE 48 II 119, p. 126. *For Swedish Law*, LEHRBERG, 76; RAMBERG/RAMBERG, 188 f. *With respect to the doctrine of assumptions*, LEHRBERG, ERPL 1998, 265, 270. The same applies with respect to frustration of contracts under English law, North Shore Ventures Ltd v Anstead Holdings Inc and Others [2010] EWHC 1485 (Ch), 2 Lloyd's Rep 265, p. 313. *For German Law*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 533 f. (Rn. 32); FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 75); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1138: SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526; LARENZ/WOLF, 708 (Rn. 39); *See e.g*, RGZ 88, 172 p. 177; NJW-RR 1993, 880, p. 881; NJW 2005, 359 p. 362; NJW 1995, 2028 p. 2031; BGH 129, 297 p. 310 f.; BGH BB 1956, 254, p. 254; BGH BB 1956, 254, p. 254; OGHZ 1, 62 p. 68. *See hereto also*, North Shore Ventures Ltd v Anstead Holdings Inc and Others [2010] EWHC 1485 (Ch), 2 Lloyd's Rep 265, p. 313.

[882] RODNER, Hardship under the UNIDROIT Principles of International Commercial Contracts, 677, 686; LANDO/BEALE, 142.

[883] *See hereto e.g.*, LANDO/BEALE, p. 142; RAMBERG/RAMBERG, 189.

show that the supervening event was not within its sphere of control. The requisite is not spelled out in the PECL, but it is implied.[884] Under the DCFR III. – 1:110 the obligor assumes the risk for the change in circumstances if the supervening event is in control of the obligor.[885] Thus, in order to rely on the hardship exceptions, the disadvantaged party cannot have brought about the change in circumstances or otherwise have caused the event due to its behaviour or influence. For example, the fact that a wine merchant required the buyer to pay for the first batch of wine prior to agreeing to deliver the second batch (a dispute which had to be settled in court) and the price for the second batch rose in the meantime, excluded an adaptation of the contract based on Art. 2(2) ZGB.[886] Another illustrative example is *BGE 47 II 440*, where the cost increase for the supply of electricity was not only a result of the outbreak of the First World War but also the fact that the electricity company underwent a restructuring of its business. In the opinion of the Swiss Federal Tribunal, the adverse consequences were not only a result of external events but also associated with the disadvantaged party's own acts and the cost increase could not be borne by the counterparty.[887] In a crystal clear case before the German Federal Court of Justice, the court rejected an adjustment of the price due to increased production costs for a TV series since it was caused by the fact that the TV-producer, in contrast to the parties understanding, produced an eight-hour series instead of a six-hour series.[888] It is noted in the legal doctrine that even the smallest influence by the disadvantaged party on the supervening event leading to adverse consequences excludes the applicability of §313 BGB.[889]

2. Damage Control - Take Necessary Measures to Perform

If the disadvantaged party could have prevented the event by taking reasonable steps to overcome the event or its consequences, it is typically considered to fall within the obligor's sphere of control.[890] For instance, the Swiss Federal Tribunal considered price increases for the production of beer caused by the outbreak of the First World War to fall outside the control sphere of the obligor but not the adverse consequences caused by the event. Despite the buyer's rejection of a price increase, the brewery continued the delivery of beer. The fact that the prices continued to rise was not a ground for relief under the Clausula as the brewery could have ceased delivery and thereby have minimised the impact of the supervening event.[891] If a seller neglects to keep the required goods in stock in a timely manner or makes the necessary arrangements so as to be able to perform its contractual obligations, and it thereafter becomes more expensive or even impossible for the seller to acquire the goods, the Clausula is not applicable.[892] The German Federal Court of Justice has taken the same view in the so- **242**

[884] BRUNNER, 398.
[885] Offical Comment on Art. III. – 1:110 DCFR, 714 f.
[886] BGE 45 II 317, p. 321.
[887] BGE 47 II 440, p. 460 f.
[888] NJW-RR 1993 880, p. 881.
[889] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1138 (Rn. 77). *See hereto also similar under Swiss Law*, JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 248; SIEGWART, 113.
[890] *For Swedish Law*, RAMBERG/RAMBERG, 189. The force majeure clause in Art. 7.1.7 of the UNIDROIT Principles states that if an impediment could have been reasonably avoided or if the party could have overcome the event or its consequences, it is not beyond the obligor's control. Similarly expressed in Art. 8:108 of the PECL. *For Swiss Law*, BURKHARDT, 275 f.; BGE 135 III 1, p. 10; BGE 127 III 300, p. 305; BGE 47 II 440, 457, p. 460 f.; BGE 43 II 170, p. 177. *For German Law*, FINKENAUER, MüKo zum BGB zu § 313, 1907 (Rn. 75). *See hereto also,* BGE 48 II 366, p. 373 f., where the Swiss Federal Tribunal considered whether a buyer of electricity had a duty to rebuild the factory (the factory had been destroyed in a fire) in order to take up delivery of electricity which, by then, in the opinion of the court, was of no use for the buyer. The court concluded that the buyer had no such duty.
[891] BGE 50 II 256, p. 264 f.
[892] *For Swiss Law*, BISCHOFF, 217; WEBER, 61; OFTINGER, SJZ 1939, 229, 233; SIEGWART, 115 f.; BURKHARDT, 275. *See hereto also for §313 BGB*, RGZ 88, 172 p. 174 f.; RGZ 272, p. 273. RGZ 95, 418. *For Swedish law*, RAMBERG/RAMBERG,

called Iranian-case. The commercial risk of increased oil prices could not be shifted on to the buyer since the seller following the first jump in price in the summer of 1973, should have purchased more oil in order to minimise damages in the event of further cost increases.[893] The Swiss Federal Tribunal similarly held a seller, who undertook delivering steel chips during the First World War, responsible for not being able to deliver the goods due to shortage of steel. The Swiss Federal Tribunal explained that it is not possible for a seller, under such circumstances, to wait until the last minute to obtain the material required for producing the goods.[894]

VII. Summary

243 While the solutions to deal with hardship differ under the jurisdictions and the international unification instruments, common denominators in terms of the requisites that need to be fulfilled can be identified. To invoke the hardship exceptions the change in circumstances must be of a fundamental character. The question as to when a change in circumstance is fundamental is of central meaning, but impossible to give a complete satisfactorily answer to. To assess whether the change in circumstances is fundamental, the requisite is linked to abstract or concrete standards. Only the hardship exceptions under the UNIDROIT Principles and the PECL are freed from such concepts. The courts are clearly struggling in ascertaining the closer meaning of the "fundamental" standard and revert to different methods of both subjective and objective art to decide whether the required intensity to trigger hardship has been met. There is a general trend in promoting objective rules to replace subjective rules as "measurement tools". While objective methods generally are favourable, especially from the perspective of creating precedents, such methods are not unproblematic. A threshold in percentage has neither developed in case law, nor in the legal doctrine. Looking at the jurisdictions in isolation, case law gives a scattered view of the intensity required to trigger hardship. Comparative observations, however, provide some points of consideration for the legal analysis. Whether the intensity of the change in circumstances is enough to motivate an adaptation of the contract terms is a balance between many contract specific factors e.g., price, contractual duration, international features, type of contract (i.e. degree of risk taking and upside), and ultimately a question of degree being subject to the circumstances in the individual case such as the time and context in which the contract was concluded and ultimately an overall assessment of the contract. Thus, the fundamental requisite is strongly linked to the foreseeability requisite. In order to trigger hardship, the adverse turn of event must have been unforeseeable upon conclusion of the contract. I.e., contracting parties cannot use an event that was foreseeable at the time when the contract was entered into, calculating that it will not occur to escape its contractual obligations if the event later on materialises. Case law shows that the context and surrounding circumstances at the time when the contract was concluded are of great importance. The foreseeability requisite, in turn, overlaps with the risk requisite. To trigger hardship, the risk of the event must not be one which the disadvantaged party is required to bear i.e., the disadvantaged party did not assume the risk for the supervening event explicitly or implicitly. Only when the balance between the contractual obligations, as struck between the parties, has changed in a way that the disadvantaged party is not deemed to bear the risk for, is the risk requisite fulfilled. Furthermore, the adverse turn of event and its consequences must fall entirely outside the control sphere of the disadvantaged party and it must be shown that the party could not have prevented the event or its consequences. If the disadvantaged party could have prevented the event or its consequences, it is typically considered to fall within the disadvantaged party's sphere of control. The position taken in British common law

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202 stating that a seller can protect himself against price fluctuations and secure its obligation under the contract by way of acquiring the required quantity in advance.

[893] BGH JZ 1978, 235, 235 f.

[894] BGE 44 II 510, p. 514.

differs. Hardship is not considered a ground for relief under the doctrine of frustration. A cost increase can result in hardship for one party but in order to be granted relief the subject matter of the contract must radically have been different from that contracted for. One could, however, imagine a situation where the supervening event causes such spectacular additional costs that the contractual duty is rendered radically different. Support for such view can, however, only be found in obiter dictum statements. While a line of cases on frustration show that English courts do not recognize hardship as ground for relief, they have, however, received the same results through contract construction.

E. The Legal Remedies

Two legal sanctions are available if the requirements for hardship are met and the parties were unable to find an amicable solution through renegotiations. The judge has the discretion to adapt the contract to reflect the new commercial reality or enforce an early termination of the contract.[895] The fact that renegotiations inter partes have taken place can be a prerequisite for the judge to intervene in the contractual relationship. **244**

I. Renegotiation Inter Partes – A Right to Request Renegotiations, or a Duty?

There is no duty for the parties to first have made attempts to resolve the issue through renegotiations inter partes under Swedish and Swiss law. In that sense, a perhaps more pragmatic approach is taken under the international unification instruments and in German law. It is debated among legal writers whether §313 BGB comprises a duty to renegotiate inter partes before turning to litigation.[896] §313 BGB does not expressly impose such duty. Neither does it exclude it. In the preparatory materials, the intention of the German legislator, although vaguely formulated, is that there is a duty to renegotiate: "Insbesondere sollen die Parteien zunächst selbst über die Anpassung verhandeln"[897] i.e., one can assume, prior to resorting to court. It could, however, be understood as though the legislator merely intended to promote the ideal solution where the parties first would enter into renegotiations to find an amicable solution to the new situation rather than to enforce a duty to carry out renegotiation talks.[898] The German legislator does not give a definite answer to the question. In line with the statement is the recent case, *BGH 191, 139*. The German Federal Supreme Court explained that the requirement for the disadvantage party to make a claim for a specific adaptation of the contract under §313 (1) corresponds with a duty on the counterparty to cooperate (i.e. enter into renegotiations).[899] Following the verdict, the view that §313 BGB comprises a duty to cooperate by way of entering into renegotiations pre-trial has been adopted **245**

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[895] *For Swiss Law*, GUHL/KOLLER, 311; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 572; MERZ zu Art. 2 ZGB, 294, BK-KRAMER zu Art. 18 OR, 145; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 209; OFTINGER, SJZ 1939/40, 245, 247, BSK-WIEGAND zu Art. 18 OR, 180; SIEGWART, 167; WEBER, 81; BGE 127 III 300, p. 304 and 307; BGE 47 II 314, p. 319; BGE 59 II 372, p. 375 f.; BGE 97 II 390, p. 398. *For Swedish Law*, §36 Subsection 1 AvtL. *For German Law*, §313 subsection (3) BGB. *For Mercantile Laws*, Art. III. – 1:110 subsection 2 (a)(b) DCFR; Art. 6.2.3(4) the UNIDROIT Principles and Art. 6:111(3) the PECL.

[896] Some authors argued already before the decision in BGHZ 191, 139, that § 313 comprised a duty to renegotiate inter partes prior to resorting to court. *See e.g.,* BAYREUTHER, 26; LARENZ/WOLF, 709; RIESENHUBER, BB 2004, 2697, 2698 f.; while other authors did not recognize such a duty, *See e.g.*, HONDIUS/GRIGOLEIT, 221; DAUNER-LIEB/DÖTSCH, NJW 2003, 921, 925; KREBS/LJUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1152 (Rn. 121 f.); ROTH in MüKo zum BGB zu § 313, 1813 (Rn. 93) stating that it is wished for but not entailed in § 313; *Also*, FINKENAUER, MüKo zum BGB zu § 313, 1921 (Rn. 122).

[897] Regeriungsbegründung BT-Ds. 14/6040, p. 176.

[898] *See hereto*, RÖSLER, ZGS 2003, 383, 391; KREBS, in Dauner-Lieb/Langen, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 883 (Rn. 80).

[899] BGH 191, 139, 149 f.

also by some of its prior opponents,[900] while others do not recognize such a duty or take a critical view.[901] The question remains unsettled. The court does not elaborate on whether the parties must reach an agreement. However, the general view is that such duty is *not* comprised therein.[902] It has also been suggested in the legal doctrine that §313 subsection (3) BGB e contrario entitles the counterparty to request renegotiations of the contractual terms. [903] In that way the counterparty can proactively suggest a favourable adaptation of the contract reflecting the new situation in order to ensure the continuation of the contract and thereby exclude the termination of the contract.[904] It could be in contrast to the principle of good faith and fair dealing in §242 BGB for the disadvantaged party to reject such an offer.[905] While the counterparty has the right to initiate renegotiations, the right to withdraw from the contract is exclusively available for the disadvantaged party.[906]

246 Under the international unification works, although using different techniques to get there, all three instruments aim for the contracting parties to find a settlement by renegotiating the terms.[907] Failed renegotiations may ultimately lead to a decision by a state court or arbitral tribunal. The idea however under all three instruments is that the judge should intervene only as a last resort. The core remedy is renegotiation and transacting parties are primarily allocated the responsibility to address the issue of the supervening event. While the aim is the same, how to promote such a solution has been expressed differently. The question is whether there is any real material difference. According to Art. 6.2.3(1) of the UNIDROIT Principles: "In case of hardship the disadvantaged party is *entitled* to request renegotiations." Art. 6:111(2) PECL imposes an obligation on both parties to enter into renegotiations: "The parties are *bound to* enter into negotiations with a view to adapting the contract or terminating it." The DCFR places the burden on the obligor and makes the whole provision subject to the duty to renegotiate. Art. III. – 1:110(3) (d) provides that the hardship provision only applies if: "the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation." While the UNIDROIT Principles provide the party with a right to request renegotiations, the PECL and the DCFR make it an obligation. The PECL puts the burden on both parties while the DCFR makes it a duty of the disadvantaged party only. Also, the DCFR makes the applicability of the hardship exception conditional upon an assessment by the court of whether the obligor has made enough efforts to renegotiate a reasonable and equitable solution. That may be disadvantageous for the obligor as it may affect the bargaining power in a renegotiation situation. To not jeopardize the applicability of the clause, it may incentivize the obligor to provide the counterparty with its best possible "offer". A similar requirement can be regarded as implied in the two other instruments. Under both the UNIDROIT Principles and the PECL, the

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[900] *See e.g.*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 f. (Rn. 41), stating that the parties first shall enter into renegotiations and only when such efforts fail or if the counterparty simply refuses to participate in such negotiations can the disadvantaged party turn to the court.

[901] SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 530; FINKENAUER, MüKo zum BGB zu § 313, 1921 (Rn. 122); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1152 f. (Rn. 123) continuing to take a critical view. *See also*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 519 (Rn. 27), stating that the right for the disadvantaged party to request an adaptation of the contract should be viewed as a way to encourage the parties to solve the issue inter partes. *See also*, DAUNER-LIEB/DÖTSCH, NJW 2003, 921, p. 925.

[902] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1152; LÜTTRINGHAUS, AcP 2013, 267 p. 283 f.; JANDA, NJ 2013, 1 p. 7. RIESENHUBER, BB 2004, 2697, 2699.

[903] SCHMIDT-KESSEL/BALDUS, NJW 2002, 2076, 2076; JANDA, NJ 2013, 1, 3 f.; DAUNER-LIEB/DÖTSCH, NJW 2003, 921, 922; BÖTTCHER, in Erman, BGB Handkommentar zu § 313, 1413, (Rn. 40); SCHLECHTRIEM/SCHMIDT-KESSEL, 67.

[904] SCHLECHTRIEM/SCHMIDT-KESSEL, 67; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1155; LÜTTRINGHAUS, AcP 2013, 267, 276; FINKENAUER, MüKo zum BGB zu § 313, 1910 (Rn. 85).

[905] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1155.

[906] JANDA, NJ 2013, 1, 3 f.; SCHMIDT-KESSEL/BALDUS, NJW 2002, 2076, 2076;

[907] Art. 6.2.3(1) the UNIDROIT Principles, (Art. 6:111 (2) the PECL, and Art. III. – 1:110 (3) DFCR.

parties are required to carry out the renegotiations in good faith. Generally it could be said that this shall be deemed to mean that the renegotiations must be carried out in a constructive manner, not be unnecessarily lengthy, but also not broken off too early. However, while such bad faith negotiations may result in damages, it does not exclude an adaptation of the contract.

It has been suggested that Art. 6.2.3 of the UNIDROIT Principles also entails a duty to request renegotiations prior to resorting to court and that the court otherwise should suspend the proceedings for a reasonable period of time in order for the parties to enter into renegotiations.[908] Such a "duty" to renegotiate has been confirmed in arbitral awards. A party cannot declare the contract terminated prior to renegotiation efforts having taken place.[909] On the basis of Art 1.7 of the UNIDROIT Principles (general duty of good faith) and Art. 5.1.3 of the UNIDROIT Principles (duty of cooperation), the counterparty is obliged to participate in the negotiations.[910] Reading these articles together, the solution under the UNIDROIT Principles is equivalent to the solution in the PECL where the obligation to negotiate a solution is placed on both parties. **247**

With respect to the timing, the PECL places the duty to initiate renegotiations on the disadvantaged party, which shall be requested within a reasonable time frame. The disadvantaged party is also obliged to describe the changed circumstances effects upon the contract.[911] Similarly, according to Art. 6.2.3 of the UNIDROIT Principles the request for renegotiation "must be made as quickly as possible" after the event has occurred[912] and such a request shall indicate the grounds on which it is based.[913] The obligation to renegotiate in the PECL is linked to its own sanction in the last sentence of Art. 6:111. A party may be compensated for loss suffered through the counterparty's refusal to negotiate or for negotiations broken off in bad faith.[914] In contrast to the PECL, there is no express sanction in the UNIDROIT principles. In Art. 2.15(2), however, it states that a party who negotiates or breaks off negotiations in bad faith is liable for the losses suffered by the other party. The solution under the PECL providing the judge with the right to award damages directly in the clause makes it clear to all parties involved that there is a direct consequence of bad faith renegotiations. **248**

In the event the parties do not reach an agreement within a reasonable period of time, despite renegotiations between the parties having been carried out in good faith, *either party* can bring the dispute before the court.[915] According to the commentary on Art. 6.2.3(3) of the UNIDROIT Principles, how long a party has to wait before resorting to the court largely depends on the circumstances in the individual case and on the complexity of the case.[916] The fact that both parties have the right to resort to court may incentivize the parties to use their best efforts in finding a solution.[917] In accordance with the same line of thought, an interesting approach is provided in the ICC Hardship Clause 2003 (hereinafter, the "Clause"). The Clause similarly requires renegotiations inter **249**

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[908] BRUNNER, 488 f.
[909] *See hereto e.g.,* ICC Case No. 10021 of 00.00.2000, available at: http://www.unilex.info/case.cfm??id=832; ICC Case No. 9994 of 00.12.2001, available at: http://www.unilex.info/case.cfm?id=1062. ICC Case No. 1149 of 30.11.2006, available at >http://www.unilex.info/case.cfm?pid=1&do=case&id=832&step=FullText
[910] *Compare*, PERILLO, Tul. J. Int'l & Comp. L. 1997, 5, 26.
[911] LANDO/BEALE, 116.
[912] Comment No. 2 on Art. 6.2.3 the UNIDROIT Principles (2016 edition).
[913] Comment No. 3 on Art. 6.2.3 the UNIDROIT Principles (2016 edition).
[914] LANDO/BEALE, 116.
[915] Art. 6.2.3(3) of the UNIDROIT Principles; Art. 6:111(3) of the PECL; LANDO/BEALE, 116; Comment No. 6 on Art. 6.2.3 the UNIDROIT Principles (2016 edition); Offical Comment to Art. III. – 1:110, 715.
[916] Comment No. 6 on Art. 6.2.3 the UNIDROIT Principles (2016 edition).
[917] *Compare*, TALLON, Hardship, 504.

partes as a first step. It is required that such renegotiations occur "within a reasonable time of the invocation of this Clause."[918] However, and this is where it deviates from the other sets of rules, the Clause states that the contract shall be terminated if the parties cannot come to an agreement and it is the disadvantaged party that is entitled to terminate the contract.[919] Thus, the incentive for the disadvantage party to renegotiate the terms of the contract may obviously be reduced knowing that the contract will be cancelled, which of course may or may not be beneficial. On the other hand, it could encourage the other party to use its best efforts to renegotiate the terms knowing that it might need to initiate a claim for wrongful termination of the contract if they do not settle on the issue.

II. Adaptation or Termination?

250 There are two legal remedies available under the hardship exceptions: Adaptation and termination. An additional option is available under both the PECL and the UNIDROIT Principles. If the court finds it unreasonable to interfere by way of adapting or terminating the contract, the judge may direct the parties to resume renegotiations as a last effort to reach an understanding, or, alternatively, confirm the contract terms as they are.[920] The latter option would let the loss lie with the party adversely affected by the change in circumstances. While the aim under the hardship rules is to keep the contract alive by way of adapting the contract terms to the new situation, only §313 BGB provides a clear hierarchy between the legal remedies.

251 Subsection (3) of §313 BGB provides that termination of the contract is only possible if an adaptation of the contract to the new circumstances according to subsection (1) is not possible or would be unreasonable. An adaptation of the contract is considered impossible when e.g. an adaptation is forbidden by law, unenforceable or otherwise would be senseless or cannot reasonably be imposed on one party.[921] Thus, the contemplated adaptation of the contract must be reasonable to both parties.[922] Adaptation as the primary remedy is thereby subject to where the court set the threshold for what is considered "unreasonable."[923] An adaptation of the contractual terms is considered unreasonable if, having regard to the hypothetical will of the parties, it is clear that both parties would rather have agreed on the termination of the contract had they foreseen the change in circumstances.[924] It should be noted that the mere fact that the counterparty pre-trial refuses to cooperate or refuses an adaptation of the contract is not a ground for termination of the contract under §313 BGB, [925] unless the counterparty is purposefully is delaying the process or is trying to hinder the renegotiations from taking place.[926] It could, however, lead to damages.[927] If the counterparty rejects a legitimate request for adaptation and

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[918] The ICC Hardship Clause 2003, subsection 2.
[919] The ICC Hardship Clause 2003 para. 2(b) and para. 3.
[920] LANDO/BEALE, 116; Comment No. 7 on Art. 6.2.3 the UNIDROIT Principles (2016 edition); PÉDAMON/CHUAH, 65 f.
[921] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 536 (Rn. 42); NJW 2000, 1714 p. 1716; BAYREUTHER, p. 29.
[922] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1150; *Compare with*, SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 526 (Rn. 20) merely mentioning whether it is reasonable for the disadvantaged party.
[923] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1149 (Rn. 111); FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 88).
[924] FINKENAUER, MüKo zum BGB zu § 313, 1916 (Rn. 105); HEDEMANN, SJZ 1921, 305, p. 309; LARENZ/WOLF, 710.
[925] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 f. (Rn. 41 and 42); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1153; JANDA, NJ 2013, 1, 3; BAYREUTHER, p. 29; BGH 191 139, p. 146.
[926] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1153; FINKENAUER, MüKo zum BGB zu § 313, 1919 (Rn. 119). *See also*, LARENZ/WOLF, 709 stating that if the counterparty refuses every effort

the continued strict adherence to the originally agreed terms would lead to further disadvantages, then, exceptionally, it could be unreasonable to hold the party to the contract, and an immediate termination of the contract is motivated.[928] Consistent with a line of case law under the old and new law, it is clear, that the preferred and primary remedy in the situations targeted by §313(1) BGB is the more flexible concept of adaptation.[929]

Under the unification instruments and Swedish law, it is entirely within the discretion of the judge to choose the remedial consequences, but a strong preference for the survival of the contract surrounds the clauses. §36 AvtL gives the judge broad powers. According to the Swedish legislator, the judge shall have full freedom in deciding what solution is most suitable and practical with respect to a party's claim, but that adaptation of the contract term is the central sanction under §36 AvtL.[930] §36 AvtL allows the court to set aside a contract term in its entirety or revise the terms. In the second sentence of §36 AvtL, the legal sanctions are expanded so that if the term is of particular importance, other parts of the contract can be modified or set aside as well. The option to set a contract term aside can result in unwanted results as an optional law rule may become applicable instead. Therefore, the most attractive recourse for the court is considered to be contract adaptation.[931] In the opinion of the legislator the adaptation of one or more terms provides for a more flexible solution and the court will find it natural to first try to modify the contract when this option is available.[932] It also seems likely that the court would rather modify contract terms than resorting to contract interpretation and construction against clear wordings in the contract. With respect to change in circumstances, the legislator believes that adaptation is also likely to be the preferred sanction.[933] The same view has been expressed in the legal doctrine.[934] With respect to the doctrine of assumptions under Swedish law, a party may be released partly or wholly from the obligation under the contract. In a situation where the contractual duty becomes more costly to perform, the disadvantaged

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to enter into renegotiations, without a valid reason, termination of the contract can become available; On the same line, HAMMER, 101.

927 BGH 191, 139, p. 146 ff.

928 NJW 2012, 373, p. 375 where the German Federal Court of Justice states that there is no general right to termination if the counterparty rejects a legitimate demand of adaptation but only exceptionally when it would be unreasonable otherwise to hold the party to the contract on unchanged terms. *See however hereto an earlier verdict,* NJW 1969, 233 p. 234, where it is stated that the disadvantaged party generally is entitled to the termination of the contract if the counterparty refuses a legitimate request of adaptation of the contract. *Similarly and in line with the latter case,* RGZ 103, 328 where the German Supreme Court stated that the disadvantaged party does not have to go the route over an adaptation of the contract if the counterparty made it undoubtedly clear that an adaptation of the terms will be rejected.[928] Also in RGZ 106, 7 where the parties were ordered to enter into renegotiations for an adjustment of the purchase price, the German Supreme Court stated that only if the tenant rejected an adaptation of the initially agreed purchase price could the owner refuse to sell the land and thereby get out of the contractual obligation.

929 *See e.g.*, BGH 47, 48 p. 51 f.; BGH 83, 251 p. 254 f.; BGH 109, 224 p. 229; BGH 135, 333 p. 339; BGH 89, 226 p. 238 f.; NJW 2000, 1714 p. 1716; WM 1969, 335, p. 337;WM 1985, 32 p. 33 f.; The German Supreme Court confirmed the priority of contract adaptation already in 1922 in RGZ 103, 328, p. 333; BGH 89, 226 p. 238 f.; *See also*, NJW 2000, 1714 p. 1716 and BGH WM 1985, 32 p. 33 f. where it is stated that only *exceptionally* should the termination of the contract come in question. *See also e.g.,* RÖSLER, ZGS 2003, 383, 391; *See however,* HONDIUS p. 1139; Regeriungsbegründung BT-Ds. 14/6040, p. 175 f.; *See also*, GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 (Rn. 40); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1148; HAMMER, 100 f.; BAYREUTHER, 14: HORN, AcP 1981, 255, 277 f.; FINKENAUER, MüKo zum BGB zu § 313, 1915 f. (Rn. 101-105) with further references being critical to such assessment of the two remedies.

930 Prop. 1975/76:81 p.110; SOU 1974:83, 120; GRÖNFORS, Avtalslagen, 245.

931 Prop. 1975/76:81 p. 110. *Compare hereto also*, RAMBERG/RAMBERG, 9 ed., 181.

932 Prop. 1975/76:81 p.109 f.; To set a single term in the contract aside is the sanction most frequently used by the courts while setting the entire contract a side has never been used at the present date. *See hereto also*, VON POST, 253, 258.

933 Prop. 1975/76:81 p.110; SOU 1974:83, p. 22.

934 ADLERCREUTZ, 284.

party can request an adaptation of the contract terms or the cancellation of the contract.[935] The most commonly applied remedy is, however, termination of the contract.[936]

253 The unification instruments similarly give the judge broad powers to terminate or adapt the contract to the new situation.[937] No remedy has priority over the other. There is, however, a preference for adaptation. The aim under the PECL is to keep the contract alive by way of adaptation.[938] While the rules on hardship in the UNIDROIT Principles do not express a preference for adaptation, it is regarded in the legal doctrine to be a fundamental purpose and the cornerstone remedy of the provision.[939] It should also be noted that the rules on hardship have been placed under the general heading of chapter 6, "Performance" rather than "Non-performance" thus aiming at the performance of the contract.[940] It could be viewed as an indication of the purpose being to keep the contract alive and the preferred remedy under the UNIDROIT Principles also being adaptation. The DCFR also follows this approach when the commentary states: "in some cases the only option open to the court would be to terminate the contract."[941] Thus, under the UNIDROIT Principles, the PECL and the DCFR, as well as §36 AvtL, it is in the judge's discretion to choose remedy. While no remedy has officially been given priority over the other, there is a strong preference for adaptation.[942]

254 The approach under Swiss law differs from the other hardship exceptions. While no remedy has priority over the other,[943] there is also no strong preference for adaptation. Rather, the choice between adaptation and termination is subject to an assessment of which remedy is most appropriate in the individual case. Thus, no general rule or preference is provided beforehand. In the legal doctrine the opinions are divided as to which remedy is most suitable and if one should have priority over the other. The termination of the contract is viewed as the normal or even the primary legal remedy of the Clausula by some authors.[944] One author argues that adaptation of the contract should only be applied when it provides a better solution than the termination of the contract.[945] It has even been argued that termination of the contract generally is the preferred remedy if the change in circumstances has caused an exceptionally fundamental alteration of the contractual equilibrium.[946] Such an approach would overthrow the risk of the supervening event on the counterparty. The opposite view has also been expressed where the contract primarily shall be adapted to the new circumstances and that termination of the contract is the last resort.[947] Thus, it is in the judge's discretion to decide between termination and adaptation of the contract.[948]

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[935] NJA 1989 s 614, p. 618 f; Prop. 1975/76:81, p. 138. *Compare hereto also,* NJA 1924 s 372; NJA 1937 s 518; NJA 1942 p. 163.
[936] LEHRBERG, 50; NJA 1989 s 614, p. 618.
[937] Art. 6.2.3(4) the UNIDROIT Principles and Art. 6:111(3) the PECL, Art. III. – 1:110 (2)(b) DCFR).
[938] LANDO/BEALE, 116.
[939] DOUDKO, Hardship in Contract, Unif. L. Rev. 2001, 483, 504; PÉDAMON/CHUAH, 65.
[940] *Compare*, BRUNNER, 400; DRAETTA, IBLJ 2002, 347, 348 f.
[941] Official Comment to Art. III. – 1:110, 715; *Compare hereto*, SCHWENZER, VUWLR 2008, 709, 723.
[942] *See however*, SCHWENZER, VUWLR 2008, 709, 723 stating that the same approach as under §313 BGB is taken with respect to the unification instruments where cancellation of the obligations is only a remedy of last resort.
[943] JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 238.
[944] *Compare,* BISCHOFF, 230; MERZ zu Art. 2 ZGB, 295; MERZ, Die Revision, 476; SIEGWART, 172; OFTINGER, SJZ 1939/40, 245, 247.
[945] OFTINGER, SJZ 1939/40, 245, 248.
[946] BK-KRAMER zu Art. 18 OR, 147.
[947] *Compare hereto*, BSK-HONSELL zu Art. 2 ZGB, 45.
[948] BK-KRAMER zu Art. 18 OR, 146; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 238; BGE 127 III 300, p. 307; BGE 47 II 314, p. 319.

In deciding the remedial consequence, the principle of good faith and fair dealing in Art. 2(1) ZGB should guide the judge.[949] The judge must decide what remedy is appropriate.[950] In its assessment only circumstances that are related to the specific contractual relation may be taken into consideration.[951] There are, however, a couple of considerations limiting the judge's power to freely elect the remedial consequence. The judge's choice between termination and adaptation of the contract shall, if possible, be decided by ascertaining the will of the parties. If the contracting parties show a preference for one remedy it must respected by the judge.[952] For instance, in *BGE 47 II 314*, the termination of the contract was excluded since the circumstances in the case showed that both parties wished for the continuation of the contract.[953] Likewise, the judge is restricted to termination of the contract when it is clear that none of the parties have a desire to continue the contract on changed terms or when it is not possible to ascertain how the parties principally want the contract to be continued on changed terms.[954] Termination of the contract can also become relevant when the party that wishes for the continuation of the contract is unwilling to take on any of the risks connected with the supervening event.[955] In the same way, the court cannot decide to terminate the contract if the counterparty is willing to bear the consequences of the supervening event. It would be contrary to the principle of good faith and fair dealing for the disadvantaged party to reject such an offer.[956] With that said, a party aiming for an adaptation of the contractual terms must always consider the risk that the court decides to terminate the contract.[957] With respect to the issue of increased costs, that is less problematic, as the disadvantaged party would technically benefit more from a termination of the contract placing the entire burden of the supervening event on the counterparty. An interesting comparison with the hardship exceptions is the ICC Hardship Clause 2003. The Clause does not give the court or arbitral tribunal the authority to intervene by way of adaptation.[958] It takes an entirely different approach and simply entitles the disadvantaged party to terminate the contract if the renegotiations break down. **255**

III. Judicial Adaptation Powers

Judge-led adaptation is controversial. The CISG is proof of that. A workable solution acceptable to both civil law jurisdictions and common law jurisdictions had to be achieved. Art. 79(5) CISG contemplates the termination of the contract[959] and leaves no room for contract adaptation.[960] A judicial adaptation of the contract by way of gap filling has also been rejected due to the Conventions' drafting history.[961] However, the opposite view has been suggested. According to some commentators, the CISG leaves room for judge-made revision of the contract to reflect the new circumstances or to terminate the contract on the date and terms set by the court. The **256**

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[949] BISCHOFF, 178; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 235.
[950] BGE 127 III 300, p. 307; BGE 47 II 314, p. 319.
[951] ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 252.
[952] BK-KRAMER zu Art. 18 OR, 147; BISCHOFF, 230 f.; SCHMIEDLIN, p. 119; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 238; LEU, Vertragstreue In Zeiten des Wandels, 107, 123.
[953] BGE 47 II 314, p. 319. *See also,* BGE 47 II 391, p. 401.
[954] DESCHENAUX, 205; BISCHOFF, 231 f. and 234.
[955] BISCHOFF, 231 f. and 234.
[956] BK-KRAMER zu Art. 18 OR, 147; MERZ zu Art. 2 ZGB, 296; BISCHOFF, 230 f.; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 237. *Compare hereto also,* ICC Case No. 2508 of 1976, Collection of ICC Awards I, 292, 294 where a supplier of fuel ceased delivery when the world market price for oil rose despite that the buyer offered to pay a 25 per cent higher price. *Similarly*, ICC 2478/1974 102, YCA III 1978, 222, p. 223.
[957] WIEGAND, Clausula rebus sic stantibus, 443, 453.
[958] The ICC Hardship Clause 2003 para. 3.
[959] HONNOLD/FLECHTNER, 629.
[960] FRICK, 219; BERGER, 550; Tallon, 572, 592.
[961] HONNOLD/FLECHTNER, 629.

flexibility with respect to legal remedies available is argued on the basis of Art. 7(1) CISG (the principle of good faith in international trade) or Art. 7(2) CISG (the gap-filling function).[962] In the Belgian *Scafom-case*, the court's finding of a "gap" in the CISG with respect to adaptation of the contract for hardship has also been heavily criticised.[963] It has also been advocated that Art. 79(5) CISG read in conjunction with Art. 50 CISG on price reduction may be relied upon to open up for adaptation of the contract to the changed circumstances.[964] This approach seems stretched. Firstly, adaptation was explicitly rejected during the drafting of the Convention. Secondly, the Convention was created in order to provide conformity among several countries with respect to sale of goods. It could be argued that the commentators on the above-mentioned solutions have the civil law solution before their eyes where hardship doctrines are frequent and less controversial in contrast to common law countries.[965] In the *Scafom case*, the court held, on the basis of the principles expressed in Art. 7(1) and Art. 7(2) CISG, that where circumstances fundamentally alter the contractual equilibrium, parties are entitled to request renegotiation of the contract. Thus, the buyer's claim was rejected and the seller was granted the right to request renegotiations of the price. In its ruling, the Belgian Supreme Court pointed out that gaps should be filled in a uniform manner, having regard to the "general principles governing the law of international commerce" and that such principles are to be found, among other sources, in the UNIDROIT Principles of International Contracts.[966] Thus, the court took the view that there is a gap in the CISG with respect to the remedies available in the event of economic hardship. Art. 6.2.3 of the UNIDROIT Principles could fill that gap in accordance with Art. 7(2) CISG. The CISG strongly reflects the common law approach to the issue of hardship and adaptation. The British common law does not provide their judges with the authority to adapt the contract to new changed circumstances.[967] The *British Movietonews-case* makes it clear that the function of the court is not to create a contract for the parties, but to interpret the contract made by them as a question of construction.[968] That can obviously result in forced contract interpretations. Thus, the judge does not have the power to restore the contractual equilibrium by way of revising the contractual terms in a hardship situation. Instead, the legal effect of frustration is the automatic termination in effect from the time of the frustrating event.[969] This applies also when the contracting parties wish differently.[970] That follows from that the transacting parties' common object of the contract is frustrated and the view is that the parties would, if not terminated, be bound to a contract, which they did not actually enter into.[971] The other unification instruments opted for the solution to allow judge-led adaptation. Art. 6.2.3(4)(b) of the UNIDROIT Principles provides that the court may, "if

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[962] BRUNNER, 218 f.; KESSEDJIAN, Int. Rev. of Law and Econ. 2005, 415, 418; VENEZIANO, Unif. L. Rev. 2010, 137, 145.
[963] HONNOLD/FLECHTNER, 629; FLECHTNER, Belgrad Law Review 2011, 84, 98 ff.; SCHWENZER, VUWLR 2008, 709, 724.; ZELLER, The UNIDROIT Principles and the Application of Article 79 CISG, 113, 127; See also, SCHWENZER, on Art 79, in: Schlechtriem/Schwenzer, Kommentar zum Einheitlichen UN-Kaufrecht, 1088, stating that the adaptation of contracts by way of incorporating Art 6.2.3 UNIDROIT Principles by way of gap-filling through Art. 7(2) CISG or Art. 9(2) CISG is not recommendable. See also, VAN HOUTTE, Changed Circumstances and Pacta Sunt Servanda, in: Gaillard (ed.), Transnational Rules in International Commercial Arbitration, Paris 1993, 105, 107.
[964] MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 242.
[965] *Compare*, HONNOLD/FLECHTNER, 629 footnote 39.
[966] Scafom International BV v. Lorraine Tubes S.A.S of 2009.06.19, available at: http://cisgw3.law.pace.edu/cases/090619b1.html
[967] BEALE, 1679; ATIYAH/SMITH, 192; MCKENDRICK, Frustration of Contract, 44; TREITEL, The Law of Contract, 868; British Movietonenews Ltd. v London District Cinemas [1952] A.C. 166, 168.
[968] British Movietonews Ltd. v London and District Cinemas Ltd. [1952] A.C. 166, 183 f.; *See also*, Liverpool City Council v Irwin [1976] UKHL 1, 9, available at: http://www.bailii.org/uk/cases/UKHL/1976/1.html
[969] Hirji Mulji v The Cheong Yue Steamship Company Ltd. [1926] A.C. 1, 7; *See also*, Jackson v The Union Marine, (1874) L.R. 10 C.P. 125, 145; Bank Line Ltd. v Arthur Capel [1918], UKHL 1, 10, available at: http://www.bailii.org/uk/cases/UKHL/1918/1.html; BEALE, 2004, p. 482.
[970] MCKENDRICK, Frustration of Contract, 44; Hirji Mulji v The Cheong Yue Steamship Company Ltd. [1926] A.C. 1, 7 f.
[971] Hirji Mulji v The Cheong Yue Steamship Company, Ltd. [1926] A.C. 1, 7.

reasonable, adapt the contract with a view to restoring its equilibrium". The PECL similarly provides in Art. 6:111(3)(b) that the court may: "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". Art. III. – 1:110 (2)(b) DCFR states that the court may: "vary the obligation in order to make it reasonable and equitable in the new circumstances". Judge-led adaptation is a power also given to the judges under Swiss, Swedish and German law.

Similar to the PECL, the UNDROIT Principles and the DCFR, both §36 AvtL and §313 BGB have crystal clear rules providing the judge with the power to adapt contracts to reflect new circumstances. The broadest power is given under Swedish law. §36 AvtL allows the judge to modify the contract or set aside a contract term. The legal sanctions are expanded in the second sentence of the general clause so that if the term is of particular importance, other parts of the contract can be modified or set aside.[972] It is in the judge's sole discretion to decide how the contract should be modified. The opinion in the doctrine is divided as to whether the doctrine of assumptions similarly allows for an adaptation of the contract. The general view, as I gather, is that adaptation of the contract is possible.[973] In *NJA 1989 s 614*, the Supreme Court also stated that a contract may be adapted with the support of the doctrine of assumptions but that it is not possible to establish a new obligation or to adapt an obligation so that it becomes stricter.[974] Hence, a contract may not be adapted so that an obligation under the contract is increased. It is only possible to adapt the contract to decrease an obligation. For example, the agreed upon price in a contract can be reduced but not increased following a changed circumstance.[975] However, as it is possible to be partly released from an obligation to perform under the contract, this would in many situations lead to similar results. It has been argued in the doctrine that the fact that a contract term can be adjusted so that an obligation under the contract becomes stricter by way of applying §36 AvtL is an argument for the doctrine of assumptions also being applied in the same way.[976] There is, however, no case law supporting that view. In *NJA 1989 s 614*, the Swedish Supreme Court also noted that there is no reason to widen the scope of the doctrine of assumptions to also be applicable to make an obligation stricter, as §36 AvtL can be applied to achieve such results.[977] **257**

§313(1) BGB probably provides the most constructive solution. Prior to the introduction of the general clause, it was in the judge's discretion to decide how and to what extent the contract should be adapted.[978] In contrast to the "old law", the judge's authority to interfere in the contract by way of adjusting the terms does no longer follows "automatically" by operation of law (i.e. §242 BGB).[979] Instead, §313 BGB requires the disadvantaged

[972] Initially, §36 of the Danish Contracts Act did not give the judge the authority to modify the contract. A legislative change was carried out whereby §36 was amended so that the words >>can be set aside<< was replaced by >>can be modified or set a side<< *See hereto*, ANDERSEN, 229. Since then, the Danish courts have had the possibility to carry out substantive changes such as prolonging or shortening the duration of a contract, and modifying legal sanctions following breach of contract etc. *See hereto*, GOMARD, 180. The sanctions available in the four Nordic countries are now generally harmonized. *See hereto,* VON POST, 58.

[973] *Compare* e.g., LEHRBERG, Förutsättningsläran, 566 ff; HELLNER, Förutsättningsläran rediviva, 133, 145; BENGTSSON, 110; ADLERCREUTZ, Avtalsrätt II, 131; FLODGREN, Förutsättningsläran. Ett viktigt komplement till avtalslagen, 385, 391.

[974] NJA 1989 s 614, p. 618 f; Prop. 1975/76:81, p. 138. *Compare,* NJA 1924 s 372; NJA 1937 s 518; NJA 1942 s 163.

[975] LEHRBERG, ERPL 1998, 265, 272.

[976] LEHRBERG, SvJT 1986, 249, 259.

[977] NJA 1989 s 614, 619.

[978] NJW 1972, 152, p. 153; JANDA, NJ 2013, 1, 3; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 520. Rn. 30.

[979] NJW 1972, 152, p. 153; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 520. Rn. 30; STÜRNER, 265; GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 (Rn. 41); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 527 and 530; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313,

party to make a specific adaptation request (e.g., a reduced price) that the court, in turn, must grant or deny following discussions with the contracting parties. [980] Other than that, no new procedural treatment is intended by the new provision.[981] In comparison with the Swedish solution under §36 AvtL, where the judge is completely free to adapt the contract, the German court is limited by the disadvantaged party's adaptation request.

258 Under Swiss law, the judge is also given the discretion to adapt the contract to the new circumstances.[982] Such authority is based on Art. 2(2) ZGB.[983] An application of Art. 373(2) OR ex analogia has sometimes been applied to carry out an adaptation.[984] Under Art. 373(2) OR the judge has the authority to increase the contract price. Under Art. 2(2) ZGB the judge can go beyond a mere increase in price when adapting the contract.[985] Judge-led adaptation of the contract as a remedial consequence of the Clausula has been questioned and criticized in the past[986] while in more recent legal doctrine, and since the decision in *BGE 47 II 314*, it also finds support in the legal doctrine and has been confirmed in several court rulings since.[987] The judge's interference in the contractual relation is subject to certain limitations. Firstly, the judge only has the authority to adapt the contract in the absence of applicable contractual or statutory rules (directly applicable or applicable by analogy) settling the matter.[988] Secondly, the judge may only interfere with respect to contractual obligations that have not yet been performed. I.e., the judge is not permitted to retroactively adapt the contract with respect to contractual obligations that already have been performed.[989] Lastly, the judge has no authority to adapt the contract when both parties wish for the early termination of the contract.[990] In older legal doctrine, some authors argue that the judge only has the authority to adapt the contract when *both* parties agree in principle for the continuation of the contract on changed terms. It does not need to be explicitly expressed by the parties; it is

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1151; SCHMIDT-KESSEL/BALDUS, NJW 2002, 2076, 2077; RIESENHUBER, BB 2004, 2697, 2698; JANDA, NJ 2013, 1, 3; CANARIS, 745; HUBER/FAUST, 232; RÖSLER, ZGS 2003, 383, 391.

[980] SCHLECHTRIEM/SCHMIDT-KESSEL, 67; LARENZ/WOLF, 709; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1151; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 520. Rn. 30.

[981] Regeriungsbegründung BT-Ds. 14/6040, p. 176.

[982] FRICK, 208; GUHL/KOLLER, 311; FRICK, 207; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 572; LEU, Vertragstreue In Zeiten des Wandels, 107, 122; MERZ zu Art. 2 ZGB, 294, SCHMIEDLIN, 118; BK-KRAMER zu Art. 18 OR, 145; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 209; OFTINGER, SJZ 1939/40, 245, 247, BSK-WIEGAND zu Art. 18 OR, 180; SIEGWART, 167; WEBER, 81; BGE 127 III 300, p. 304 and 307; BGE 47 II 314, p. 319; BGE 59 II 372, p. 375 f.; BGE 97 II 390, p. 398.

[983] BGE 97 II 390, p. 398; BGE 100 II 345, p. 349; WEBER, 81.

[984] WEBER, 74; WIEGAND, Jusletter 9.2.2009, 1, 2; BGE 97 II 390, p. 398; BGE 47 II 314, p. 318; BGE 47 II 314, p. 318; BGE 59 II 372, p. 376.

[985] *See e.g.*, WEBER, 78 ff.; BISCHOFF, 235 f; OFTINGER, SJZ 1939/40, 245, 249; SIEGWART, 181; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 209.

[986] FRICK, 207 f. with further references in footnote 947; BISCHOFF, 233.

[987] BGE 47 II 314, p. 319, where the Swiss Federal Tribunal for the first time adapted a contract by way of increasing the rent by 17 per cent due to unexpected increased heating costs in the aftermath of the First World War by applying Art. 373(2) OR ex analogia. *See also*, BGE 48 II 249, p. 252; BGE 59 II 372, p. 375; BGE 97 II 390, p. 398; BGE 135 III 1, p. 10; BGE 100 II 345, p. 349; BGE 127 III 300, p. 304 and 307; SJZ 1939/40, 245, 248; BISCHOFF, 233 f.; FRICK, 207 f.; BÜRGI, ASR 1939, 1, 142 f.; KÄLLIN, Recht 2004, 246, 251 f.; OFTINGER, SJZ 1939/40, 245, 248; DESCHENAUX, 204; SCHMIEDLIN, 173; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 237; VON THUR, 172; *See however*, STAMMLER, ZBJV 1958, 49, 56 f. strongly rejecting judge-led adaptation and, from more recent literature, MERZ zu Art. 2 ZGB, 296 also critical to judge-led adaptation.

[988] ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 227.; GAUCH, Auslegung, Ergänzung und Anpasung, 209, 222; KÄLLIN, Recht 2004, 246, 252.

[989] OFTINGER, SJZ 1939/40, 245, 247; WEBER, 14; Compare hereto also, BISCHOFF, 231; MERZ, Die Revision, 477; STAMM LER, ZBJV 1922, 49, 49.

[990] JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 238.

enough that it is indicated by the circumstances in the case.[991] On the contrary, in contemporary legal doctrine, an adaptation of the contract is possible despite that the counterparty has a preference for the contract to be terminated.[992] It has also been argued with reference to the analogous application of Art. 373(2) OR, that it is not an absolute requirement that both parties wish for the continuance of the contract but rather that the fair balance must be the focus and not the will of the parties and that it should be left to the judge's discretion to decide whether an adaptation or termination of the contract is appropriate.[993] That view deserves support as the counterparty otherwise could refuse an adaptation of the contract leaving the disadvantaged party with the expenses already incurred or, alternatively, the disadvantaged party refuses an adaptation of the contract which may place the entire burden of the supervening event on the counterparty while the disadvantaged party is released from its contractual obligations in the event the court would decide to terminate the contract.[994]

1. Adaptation – How and to What Extent?

An interesting question arising in connection with judge-led adaptation is how far the judge should take the adaptation? Should the court adapt the contract until complete fairness is achieved? Or, is least possible interference in the contract the aim? **259**

a) The Hypothetical Bargain

One method used to decide how the adaptation should be carried out is the identification of the hypothetical bargain. Thus, the change in circumstances is seen as a problem of constructive contract interpretation.[995] That method is used under both Swiss and German law. In Swiss law, the power to adapt is based on the authority to fill gaps in the contract in accordance with Art. 2(2).[996] In the absence of contractual or statutory non-mandatory rules settling the matter, the court can seek guidance on how to adapt the contract by reverting to the *hypothetical will of the parties*.[997] If the actual will of the parties can be identified, the contractual gap should be filled with such common will.[998] In identifying the hypothetical will, the judge shall assess what the parties, in accordance with good faith and fair dealing, would have agreed on had they taken the supervening event into account at the time when the contract was concluded.[999] The judge shall have the reasonable and honest contract partner in mind and consider the nature and purpose of the contract.[1000] All relevant circumstances in the case **260**

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[991] HEDEMANN, SJZ 1921, 305, 309; MERZ zu Art. 2 ZGB, 296; SIEGWART, 174 f.; OFTINGER, SJZ 1939/40, 245, 248; MERZ, Die Revision, 479 f.
[992] JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 237.
[993] WEBER, 82.
[994] *Compare hereto*, BÜRGI, ASR 1939, 1, 142 stating that a cancelation of the contract must be assessed having regard to the consequences for both parties.
[995] *Compare*, BRUNNER, 400. See also, WIEGAND, Clausula rebus sic stantibus, 443, p. 447.
[996] FICK, ZSR 1925, 153, 168 f.; FRICK, 208; SCHMIEDLIN, 175 ff.; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 228 and 235; BÜRGI, ASR 1939, 1, 116; BISCHOFF, 55 and 178; BGE 100 II 345, 349; BGE 97 II 390, p. 398.
[997] ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 241; BK-WIEGAND zu Art. 18 OR, 180; BGE 127 III 300, p. 307; BGE 59 II 372, p. 376; BGE 47 II 314, p. 318.
[998] GAUCH, Auslegung, Ergänzung und Anpasung, 209, 211.
[999] BGE 127 III 300, p. 307 f.; *See hereto also*, BGE 54 II 314, p. 317; BGE 51 II 303, p. 309. BK-HONSELL zu Art. 2 ZGB, 46; KRAMER, SJZ 2014, 273, 276 f.; BURKHARDT, 300; *Compare also*, ABAS, 158; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 235 and 241. *See also*, BGE 48 II 366, p. 372 f., where the Swiss Federal Tribunal noted that the continued delivery of electricity had no value for the buyer (the factory had been destroyed in a fire) and that the parties, had they taken such event into account when the contract was concluded, according to loyal and fair dealing (*Ge*. "nach loyaler Verkhersauffasung"), would have made reservations so that at least the buyer's obligation to take delivery of electricity would be suspended until the factory had been rebuilt.
[1000] BGE 127 III 300, p. 307; BGE 115 II 484, p. 488. GAUCH, Auslegung, Ergänzung und Anpassung, 209, 213 f. and 224.

shall be taken into consideration and especially the interests and the behaviour of the contracting parties.[1001] It is, however, not a question of what would be the just and equitable solution. I.e., it is not for the judge to put himself in the position of the parties and in their discretion decide from an equitable point of view what the parties would have done at the time when the contract was concluded. [1002] Instead, the method is subjective and aims to identify a hypothetical bargain that the parties would have struck had they considered the supervening event at the time when the contract was entered into. If the hypothetical will cannot be ascertained, the judge shall, having regard to all circumstances and the interest of both parties, adapt the contract in a just and equitable manner in accordance with Art. 4 ZGB.[1003] The method of the hypothetical bargain has encountered criticism for being fictional. To decide what the parties would have agreed on is obviously a difficult task, especially if a long time has passed. It is merely a reconstruction of the contracting parties' hypothetical intentions. It has instead been suggested that an objective method should be applied whereby the judge should adapt the contract by way of determining how the average, reasonable person, in accordance with good faith and fair dealing, would have acted in the same situation and what would be an equitable solution.[1004] While an objective method is advocated for in some places in the legal doctrine, case law constructs the principle of good faith and fair dealing in accordance with the subjective hypothetical will of the parties. The hypothetical will of the parties is a method applied also in German law. While the court shall strive to minimize the interference in the contractual relationship,[1005] it is at the same time argued that the aim should be to adapt the contract so that an optimal balance between the contractual interests is achieved[1006] having regard to the hypothetical bargain had the contracting parties taken the new circumstances into account upon conclusion of the contract.[1007] It is the hypothetical bargain of what two honest-thinking parties reasonably would have agreed upon.[1008] Thus, it is an objective and not a subjective method.[1009] Although §36 AvtL does not specifically refer to such methods to ascertain how the contract should be adapted, the issue of a change in circumstances could also be understood as a problem of contract interpretation under Swedish law. Contract interpretation under Swedish law could lead to that the contract being interpreted in accordance with the common will of the parties if the party claiming that the contract should be understood in a way contrary to content of the contract can prove that the counterparty shared the same view of how the contract should be understood in the new upcoming situation.[1010] It is, however, noted that arguments based on the parties' common will are difficult to prove and is generally not the base of a strong case. [1011] As a second step, the court can intervene in the contract by way of gap filling. In the first instance,

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[1001] BURKHARDT, 300; SCHMIEDLIN, 119.
[1002] SCHMIEDLIN, 119.
[1003] BGE 127 III 300, p. 307; BGE 59 II 372, p. 376; BGE 47 II 314, p. 318; BGE 51 II 303, p. 309; BK-KRAMER zu Art. 18 OR, 147; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 572; JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 242; WIEGAND zu Art. 18 OR, 180.
[1004] OFTINGER, SJZ 1939/40, 245, 249; BISCHOFF, 235; WIDMER, 49.
[1005] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1150 (Rn. 115); FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 89); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 527 (Rn. 19); BGH 135, 333 p. 337.
[1006] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1150 (Rn. 115); GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 (Rn. 40); BAYREUTHER, p. 17.
[1007] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1150 (Rn. 115); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 527 (Rn. 19); FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 95); STÜRNER, in Prütting, zu § 313, 611 (Rn. 25); BAYREUTHER, p. 16 ff.
[1008] *See also*, LARENZ, 170 and in BGH 40, 334 p. 337 f.; BGH 120, 10 p. 26, referring to the hypothetical bargain of what two honest-thinking parties reasonably would have agreed on.
[1009] *See hereto,* TEICHMANN, in Soergel, BGB, zu §313, 267 (Rn. 135) taking a critical view to that the subjective hypothetical will of the parties is of relevance.
[1010] LEHRBERG, 39.
[1011] LEHRBERG, 39.

mandatory statutory rules are used. In the absence of such rules, non-mandatory statutory rules applied directly or ex analogia are used. Often, customs and trade practises become relevant. As a last resort, the court can fill the gap with current applicable customs having regard to a solution that best promotes the interests of both parties.[1012] §36 AvtL however stands free and separate from the gap-filling methods in Swedish contract law. I.e., it is not a route that the court is obliged to take under §36 AvtL.

b) Different Adaptation Objectives

The judges have been provided with the authority to intervene in the contractual relationship if a supervening event upsets the contractual equilibrium. The approach to how the imbalance should be addressed differs. One can imagine at least three adaptation objectives when the hardship consists of increased costs: (i) The hardship is removed in its entirety i.e., a loss free deal; (ii) adaptation to the highest reasonable price i.e., only the "excessive burden" is removed or, (iii) the original contractual equilibrium is restored i.e., reflecting the bargaining power at the time when the contract was concluded (which may or may not have been a good deal for one of the parties). **261**

One approach is to offset the hardship to the extent that the adverse consequences fall just below the threshold of what is considered "unfair," "unreasonable" or "against good faith." Some legal commentators argue that it is reasonable for the disadvantaged party to bear the adverse consequences of the supervening event up to the last limit of sacrifice.[1013] That view can also be found in the legal doctrine to the Clausula, §36 AvtL and §313 BGB, although a completely settled view on the preferred way to carry out the adaptation does not, as I gather, exist at present date. Some authors argue in relation to §313 BGB that the aim is to adapt the contract only to such an extent that the threshold for what is considered unreasonable is no longer met, i.e., with respect to disruptions in the contractual equilibrium, until the contractual equilibrium is within the sphere of what is considered reasonable again.[1014] The same view can be found in the legal doctrine to §36 AvtL. Although it should be noted that it is explicitly stated in the preparatory work that how the contract should be adapted is for the judge to decide.[1015] One view, however, is that the price only should be modified up until that the price ceases to be "unfairly burdensome" for one party while the other party is making a more and more splendid deal.[1016] A well-known statement among Swedish lawyers with respect to the applicability of §36 AvtL is: "A good deal should still be a good deal but not an unreasonably good deal."[1017] Thus, the excessive burden must be removed but a completely fair deal where the business risk is split equal between the parties is not the aim.[1018] The outcome in *NJA 1923 s 20* reflects that view. In the opinion of the Swedish Supreme Court, to sell the goods at a price equalling SEK 33 per 100 kilo, as the court found reasonable, in comparison with the initially agreed upon price of (SEK 15.75 per 100 kilo) equalled a cost increase for the seller of approximately 110 per cent.[1019] The Supreme Court explained that while the seller still would make a loss, the loss would not be of such dimension that the seller **262**

[1012] LEHRBERG, 42.
[1013] BRUNNER, 499; MOMBERG, 253.
[1014] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1150 (Rn. 115); FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 89 and 94); Similarly, CHIOTELLIS, 91, stating that the aim should be to re-establish one for both parties reasonable contractual equilibrium.
[1015] Prop. 1975/76:81 p.138 f.
[1016] GRÖNFORS, Avtalslagen, 246.
[1017] GRÖNFORS, Avtalslagen, 246.
[1018] GRÖNFORS, 28.
[1019] NJA 1923 s 20, p. 26 f. *Compare with the Swiss case*, BGE 48 II 119, p. 126 where the contract was entered into during peace time but extended for three years in 1916 without adding an adaptation clause or otherwise addressing the issue that the supply of paper may cause problems. The court held the seller to the contract on unchanged terms.

would have the right to be released from its obligations under the contract. [1020] With respect to the Clausula, if and how the contract should be adapted is for the judge to decide.[1021] It has been argued that the purpose of adapting the contract is not to revise the contract terms to such an extent that they would result in a contract that is completely fair and where no party suffers any loss.[1022] Instead, the aim is to adapt the contract so that the impact of the supervening event on the contractual equilibrium is addressed.[1023] That view is in line with the outcome in *ICC Case No. 2508* where the arbitral tribunal did not consider it to be an abuse of right under Art. 2(2) ZGB to insist on performance under the contract to a price equalling a 25 per cent increase, which would still leave the provider of fuel with a loss, but not of a dimension amounting to granting relief.[1024] It is a question of finding a balance between, on the one hand, the disadvantaged party's interest in being relieved from the *excessively* burdensome contractual obligation and, on the other hand, simultaneously respecting and preserving the counterparty's legitimate expectations of the contract.[1025] In other words, the Clausula similarly aims at adapting the contract so that at least the excessive burden, i.e. what amounts to hardship, is removed. This corresponds with the approach taken in relation to Art. 373 OR. The court has the right to increase the price, but not to the extent that it becomes a loss free deal, but rather only to address the excessive burden caused by the supervening event.[1026] Against this adaptation approach it can be argued that rather than leaving the counterparty on the borderline to hardship with the risk that the renegotiation clause will soon be triggered anew, if the situation slightly changes and falls over the edge, it may make more sense to remove the "hardship situation" in its entirety.[1027] Moreover, to merely remove the excessive burden does not necessarily reflect the same balance as can be found in the initially agreed bargain.

263 One can only concluded in relation to all three jurisdictions that there is no real consensus on how the adaptation should be carried out. With respect to §313 BGB it is, for example, also explained in the legal doctrine that, the court shall be guided by the concept of "reasonableness"[1028] as well as the purpose and meaning of the contract.[1029] That being said, it must be considered not only if it is unreasonable to hold the disadvantaged party to the contract but also whether it is reasonable for the counterparty to depart from what was initially agreed upon. It must specifically be taken into account that the counterparty may have made concessions elsewhere in the contract.[1030] In *BGH WM 1978, 1354* it was clear that the already low price for the supply of water was supposed to reflect a compensation for the company, due to mining activities, having dried out a well on the ground belonging to the counterparty. In *NJW 1975, 1557*, the German Supreme Court explained that the parties understanding of the value and equivalence between the contractual obligations when concluding the contract should be considered.[1031] Such approach could be argued to be in line with the view that the contract should be adapted to reflect the original contractual equilibrium. Contemporary Swedish case law, in contrast to the view described above, similarly takes the approach that the original economic equilibrium should be respected. To

[1020] NJA 1923 s 20, p. 26 f.
[1021] KÄLLIN, Recht 2004, 246, 252.
[1022] KRAMER, SJZ 2014, 273, p. 279.
[1023] LEU, Vertragstreue In Zeiten des Wandels, 107, 123.
[1024] Award of 1976, Collection of ICC Awards I, 292, 294 f.
[1025] BISCHOFF, 235.
[1026] GUHL/KOLLER, 531 in relation to Art. 373 OR.
[1027] *Compare,* L.J. Waller in Superior Overseas Development Corporation v British Gas Corporation*,* [1982] 1 Lloyd's Law Report 262, 266.
[1028] GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 (Rn. 41); FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 89).
[1029] HAMMER, 101; BGH 40, 334 p. 337.
[1030] BGH 58, 356 p. 363.
[1031] NJW 1975, 1557 p. 1557.

illustrate, in two cases, the Swedish Supreme Court recognized that there had been cost increases and price developments that motivated an adaptation of the contract price, but determined that the revised price should reflect the economic deal as originally contemplated by the parties.[1032] In *NJA 1979 s 731* the court increased the leasehold fee but stayed at SEK 150 p.a while the market value was SEK 400 p.a. The court held that the original leasing fee was already set low at that time when the contract was concluded. Similarly, in *NJA 1983 s 385*, the court increased the leasehold fee but stayed at SEK 265 p.a. while the market value was SEK 600 p.a.[1033] It appears as if contemporary case law both under German and Swedish law aim to uphold the contractual equilibrium as originally agreed upon by the parties, while another adaptation objective is promoted in the legal doctrine. Thus, as I gather, a clear objective or method to carry out the adaptation with respect to the Clausula, §36 AvtL and §313 BGB does not exist. The only thing that is clear is that caution generally is called for when intervening in the contractual relation and interference should be kept to a minimum when possible.[1034]

The unification instruments spell out the adaptation objective in the provisions. The PECL provides that the court may: "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."[1035] The DCFR gives the court the right to "vary the obligation in order to make it reasonable and equitable in the new circumstances." Such standards do not provide much more guidance or clarity. They are too broad and abstract. The UNIDROIT Principles probably provide the clearest rule. The aim is to "adapt the contract with a view to restoring its equilibrium"[1036] Thus, the *original* economic equilibrium is the aim. If the adaptation involves a modification of the price, the loss caused by the supervening event may not be reflected in full as the court will have to consider both the agreed risk allocation in the contract as well as the extent to which the party entitled to receive a performance may still benefit from the performance.[1037] From the commentary to the DCFR it is clear that the aim is that the initial contractual balance shall be re-established to make sure that any extra costs caused by the supervening event are borne by the parties in a fair manner. The increased cost cannot be placed on only one of the contracting parties. It is instead expressly stated that the risks of unforeseen events are to be shared.[1038] An adaptation under the PECL should also be understood to be carried out with the view to restore the economic equilibrium of the contract.[1039] In that way, although worded differently, the adaptation objective under the unification instruments aims to restore the contractual equilibrium. That does not entail that the court shall determine an objectively reasonable balance between price and performance and then split the business risks equally between the parties. Instead, the adaptation must reflect the allocation of risk as originally agreed and the bargain once struck. **264**

[1032] *Compare hereto*, RUNESSON, 401; VON POST, 166; GRÖNFORS, Avtalslagen, 246; DOTEVALL, SvJT 2002, 442, 451 ff.
[1033] NJA 1983 s 385 has however been criticized for not striking the economic balance as was first contemplated by the parties as the original contract for calculating the leasing fee consisted of one fixed part and one part linked to the autumn wheat index. It could be argued that the parties' intention was to only let the price fluctuations have an impact on 50 per cent of the leasing fee. The Supreme Court, however, adapted the price by way of applying 100 per cent of the changes in the consumer price index. *See hereto*, RUNNESSON, 422.
[1034] *For Swedish Law*, NJA 1979 s 731; NJA 1983 s 385. These two cases are consumer cases. It is argued that the reasoning by court is applicable to business contracts. *See*, VON POST, 254. *For Swiss Law*, JÄGGI/GAUCH/HARTMANN zu Art. 18, 239; BGE 54 II 257, 277. *For German Law,* GRÜNEBERG, in Palandt, Kommentar zum BGB zu § 313, 535 (Rn. 40); FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 89); SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 527 (Rn. 19); BGH 135, 333 p. 337; BGH 47, 48 p. 52.
[1035] Art. 6:111(3)(b).
[1036] Art. 6.2.3(b).
[1037] Comment No. 7 on Art. 6.2.3 the UNIDROIT Principles (2016 edition).
[1038] Official Comment to Art. III. – 1:110, 715.
[1039] *Compare*, BRUNNER, 400.

c) The Risk of Creating New Hardship

265 The risk of creating a new hardship situation must also be avoided and considered in the adaptation process. The court must ensure that the adaptation does not create a new disruption of the contractual equilibrium i.e., shifting the burden of the supervening event over to the counterparty.[1040] Instead, both parties' interests must be taken into consideration, balanced and reflected in the solution.[1041] The Swedish legislator explains that if the court decides in favour of the claimant with respect to a specific contract term, the contract may have to be adapted in other parts in order to avoid unreasonable results. This must, however, be done with caution so that the party primarily being entitled to justification is not worse off than if the contract would have remained unchanged.[1042] An overall assessment of the contract is necessary and the contract term cannot be assessed in isolation.[1043] Similarly, Art. 6:111(3) of the PECL allows the court to reject the claim for adaptation if the court believes that the remedy would be worse than the harm of the supervening event. For example, if the remedy (i.e. the adaptation of the contract by the court) would create a new hardship for the counterparty.[1044]

2. A Large Span of Adaptation Options

266 In Swiss law, judges have several adaptation options at their disposal and may revise the contractual obligations of both parties.[1045] For example, an adaptation of the contract can take the form of a reduction of the disadvantaged party's contractual obligation (e.g. in *BGE 48 II 249* where the Swiss Federal Tribunal adapted the initially agreed upon price by approx. 42,5 per cent) or an increase of the counter performance (e.g. in *BGE 47 II 314* where the Swiss Federal Tribunal increased the rent by approx. 17 per cent p.a. due to increased cost for heating).[1046] The adaptation of the contract can also take the form of a shortened or extended contract term.[1047] Furthermore, the judge may adapt the contract in relation to quantity, place of performance, the time for performance or decide for partial performance. [1048] Adaptation can however not take the form of lowering the quality of the goods.[1049] In several "Clausula cases" the adaptation request takes the form of a claim for non-fulfilment of the contractual obligation and thereby a request for liability for damages. The judge may then, instead of revising the content of the contract (which no longer is possible) apportion the burden of the super-

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[1040] *For Swiss Law*, BGE 59 II 372, p. 378; *Compare hereto also*, BÜRGI, ASR 1939, 1, 141 f.; OFTINGER, SJZ 1939, 229, 236; WEBER, 82 f; JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 238; DESCHENAUX, 204; BÜRGI, ASR 1939, 1, 142 f. *See also*, Ad hoc 6. Juli 1983 YCA XII, 69, p. 70 where it was stated that: "the meaning of the rebus-sic-stantibus clause cannot possibly be to let only one contracting party feel the consequences of changed circumstances." *For German Law*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, (Rn. 28); RGZ 100, 129, p. 133.

[1041] *For Swiss Law*, BGE 59 II 372, p. 378; *Compare hereto*, BÜRGI, ASR 1939, 1, 141 f.; OFTINGER, SJZ 1939, 229, 236; WEBER, 82 f; JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 238; DESCHENAUX, 204; BÜRGI, ASR 1939, 1, 142 f. *See also*, Ad hoc 6. Juli 1983 YCA XII, 69, p. 70 where it was stated that: "the meaning of the rebus-sic-stantibus clause cannot possibly be to let only one contracting party feel the consequences of changed circumstances." *For German Law*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 519 f. (Rn. 28); HAMMER, 100 f.; *See also e.g.,* RGZ 100, 129, p. 133; RGZ 104, 394 p. 397; BGH 47, 48 p. 51 f.; BGH 89, 226 p. 238 f.; BGH 120, 10, p. 26; BGH 135, 333 p. 339; BGH 133, 281 p. 297; BGH 58, 356 p. 363.

[1042] Prop. 1975/76:81 p. 136.

[1043] Prop. 1975/76:81 p. 106.

[1044] LANDO/BEALE, 117.

[1045] DESCHENAUX, 205.

[1046] BISCHOFF, 235; DESCHENAUX, 205; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 572; BK-KRAMER zu Art. 18 OR, 145; SIEGWART, 179; OFTINGER, SJZ 1939, 229, 235; WEBER, 78 f.; VON THUR, 172.

[1047] BISCHOFF, 236; KÄLLIN, Recht 2004, 246, 253; LEU, Vertragstreue In Zeiten des Wandels, 107, 123; BK-KRAMER zu Art. 18 OR, 145 f.; BSK-WIEGAND zu Art. 18 OR, 180.

[1048] BISCHOFF, 235 f; OFTINGER, SJZ 1939/40, 245, 249; SIEGWART, 181; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 209.

[1049] BISCHOFF, 236.

vening event between the parties by way of reducing the damages to be paid by the disadvantaged party.[1050] The judge may, however, only interfere with respect to contractual obligations that have not yet been performed. I.e., the judge is not permitted to terminate the contract ex tunc or retroactively adapt the contract with respect to contractual obligations that already have been performed.[1051] The same applies with respect to §313 BGB. The adaptation of the contractual terms is only possible with respect to the contractual obligations that have not yet been performed.[1052] There is also a wide span of adaptation possibilities available under §313 BGB,[1053] which should not be too narrowly defined. The obligor may be allowed to pay less, later or differently.[1054] It can take the form of a reduction of the disadvantaged party's contractual obligation or an increase in the counter performance.[1055] An important limitation is that an adaptation of the contractual terms with the support of §313 BGB can never go further than what is motivated by the impact of the supervening event on the contract.[1056] The court has a large span of sanctions to choose from also under §36 AvtL. The judge may e.g., extend a deadline in the contract, modify damages to be paid or add additional preconditions before a breach of contract is considered to have occurred.[1057] The variety of sanctions that may be imposed by the court accommodate the need to choose a sanction suitable for the circumstances in the individual case.[1058] The modification of a contract term may be used in both mitigating and aggravating directions.[1059] The court may modify a specific contract term that is unfair so that the content differs from what was originally intended. Once the court finds that a contract term is unfair, the court may also modify other parts of the contract.[1060] The precondition for such an action is that the term that is found unfair is of such significance for the contract as a whole that it would be unreasonable to insist on the continued enforceability of the remainder of the contract on unchanged terms.[1061] The legislator stresses that modification of the contract beyond the unfair contract term shall be used with great care by the courts as it is important for contracting parties to be able to foresee and rely on the legal consequences of the contract.[1062] Also, two separate contract terms may be considered reasonable when looked at in isolation but may be considered unfair when occurring together. The court may then choose to adapt one or both terms or even cancel the contract in its entirety.[1063] The adaptation options under the DCFR are numerous but limited by the aim of the clause that the contractual balance should be re-established. The judge can react e.g., by way of extending the period for performance, increasing or reducing the price or the product that is supposed to be supplied or

[1050] VON THUR, 172; SIEGWART, 182; MERZ zu Art. 2 ZGB, 296; BURKHARDT, 281. *See e.g.*, BGE 44 II 510, p. 518, where the Swiss Federal Tribunal, while leaving the content of the contract untouched, reduced the liability for damages by approx. 50 per cent.
[1051] OFTINGER, SJZ 1939/40, 245, 247; WEBER, 14; BISCHOFF, 231; MERZ, Die Revision, 477; STAMMLER, ZBJV 1922, 49, 49.
[1052] FINKENAUER, MÜKO zum BGB zu § 313, 1899 (Rn. 48); HAMMER, 100; KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1129 and 1154. STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 519 f. Rn. 28; *See e.g.,* NJW 1983, 2143 p. 2144; BGH 58, 356 p. 363.
[1053] *See e.g.*, STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 519 f. (Rn. 28); KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1151; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 527; LÜTTRINGHAUS, AcP 2013, 267, 276; FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 90).
[1054] TEICHMANN, in Soergel, BGB, zu §313, 268 (Rn. 136).
[1055] KREBS/JUNG, in Dauner-Lieb/Heidel/Ring, Kommentar zum Bürgerlichen Gesetzbuch zu § 313, 1151; SCHULZE, in Schulze/Dörner, Kommentar zum BGB zu § 313, 527; STADLER, in Jauernig/Stürner, Kommentar zum BGB zu § 313, 519 (Rn. 28); LÜTTRINGHAUS, AcP 2013, 267, 276; FINKENAUER, MüKo zum BGB zu § 313, 1911 (Rn. 90).
[1056] NJW 03, 3005, p. 3006.
[1057] Prop. 1975/76:81 p. 110.
[1058] Prop. 1975/76:81 p. 110.
[1059] LEHRBERG, 50; Prop. 1975/76:81 p. 138 ff.
[1060] Prop. 1975/76:81 p. 111 f.
[1061] §36 AvtL.
[1062] Prop. 1975/76:81 p.110.
[1063] Prop. 1975/76:81 p.136.

provided.[1064] The adaptation options under the unification instruments are presumably equally broad but find their limit in the re-establishment of the contractual equilibrium.

IV. Summary

267 Two legal sanctions are available if the requirements for hardship are met and the parties were unable to find an amicable solution through renegotiations. The judge has the discretion to adapt the contract to reflect the new commercial reality or enforce an early termination of the contract.[1065] The fact that renegotiations inter partes have taken place can, however, be a prerequisite for the judge to intervene in the contractual relationship. That is the case under the PECL, the UNIDROIT Principles and the DCFR. The idea is that the judge should intervene only as a last resort. A duty for the parties to have made attempts to resolve the issue through renegotiations inter partes does not exist under Swedish and Swiss law. The question remains unsettled under German law.

268 In choosing between termination and adaptation of the contract, there is a clear preference for adaptation under both the international unification works and German and Swedish law. There is no clear view under Swiss law that adaptation is the preferred remedy when addressing the issue of change in circumstances although it is a well-established remedial consequence applied to address the issue of change in circumstances. While the unification instruments as well as all jurisdictions herein save for British common law have accepted judge-led adaptation, or even promoted it as the most suitable remedial consequence, the controversial aspect is which guidelines or adaptation objectives the judges should follow. Should the court adapt the contract until complete fairness is achieved? Or, is least possible interference in the contract the aim? Different methods are applied and advocated for in the legal doctrine and one can only conclude in relation to the hardship exceptions under German, Swiss and Swedish law that there is no consensus on how the adaptation should be carried out. While the international unification instruments spell out the adaptation objective in the provisions such standards do not provide much more guidance or clarity. They are too broad and abstract. The UNIDROIT Principles provide the clearest rule. The aim is to "adapt the contract with a view to restoring its equilibrium"[1066] Thus, the *original* economic equilibrium is the aim. From the commentary to the DCFR and the legal doctrine in relation to the PECL it is to be understood that, although differently worded than the UNIDROIT Principles, the objective of the adaptation is to restore the contractual equilibrium.

V. Concluding Remarks

269 Keeping the contract alive is the main aim under the unification instruments as well as Swedish and German laws. The position in Swiss law is not entirely settled and there is no clear view that adaptation is the preferred remedy when addressing the issue of change in circumstances. Swiss case law, however, shows that it is a well-established remedial consequence applied to address the issue of an adverse turn of events. An assessment of what is the most suitable remedy in the individual case deserves support. However, the approach taken under German law where adaptation has precedence, and only when it is not possible or reasonable will the termina-

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[1064] DCFR Official Comment to Art. III. – 1:110, 715.
[1065] *For Swiss Law*, GUHL/KOLLER, 311; BK-HAUSHEER/AEBI-MÜLLER zu Art. 2 ZGB, 572; MERZ zu Art. 2 ZGB, 294, BK-KRAMER zu Art. 18 OR, 145; ZK-JÄGGI/GAUCH/HARTMANN zu Art. 18 OR, 209; OFTINGER, SJZ 1939/40, 245, 247, BSK-WIEGAND zu Art. 18 OR, 180; SIEGWART, 167; WEBER, 81; BGE 127 III 300, p. 304 and 307; BGE 47 II 314, p. 319; BGE 59 II 372, p. 375 f.; BGE 97 II 390, p. 398. *For Swedish Law*, §36 Subsection 1 AvtL. *For German Law*, §313 subsection (3) BGB. *For Mercantile Laws*, Art. III. – 1:110 subsection 2 (a)(b) DCFR; Art. 6.2.3(4) the UNIDROIT Principles and Art. 6:111(3) the PECL.
[1066] Art. 6.2.3(b).

tion of the contract become relevant also deserves support. The termination of the contract would place the burden of the supervening event on the counterparty, while an adaptation allows the court to apportion the adverse consequences between the parties. As I gather, in the majority of cases, that will be the most suitable way to deal with the issue of a change in circumstances. While all jurisdictions as well as the unification instruments have accepted judge-led adaptation, or even promoted it as the most suitable remedial consequence, the controversial aspect is which guidelines or adaptation objectives the judges should follow. On this point, with respect to §36 AvtL, the Clausula and §313 BGB, there is not one unanimous view, neither in the legal doctrine nor, in case law. With respect to the unification instruments, it is clear that the adaptation objective is to establish the original contractual equilibrium with all the difficulties that that entails. From a comparative perspective, the solution opted for under §313 BGB offers the most pragmatic solution. It not only forces the disadvantaged party to make a reasonable quest for change of the terms, but it also at the same time addresses the fact that only the contracting parties are suited to find the most adequate solution to adapt the contract to new circumstances. The solution is also efficient, as the judge is not forced into lengthy considerations of a suitable adjustment of the contract, which is especially of importance with respect to complex international long-term contracts. It also opens up for a settlement outside of court if the "best possible" offer, one must assume, is provided up front by the disadvantaged party as part of the legal procedure.

F. Conclusions

I. Times of Crisis Generate Pragmatic Solutions

Case law shows that hardship is a legal problem sensitive to cycles. It is a legal concept that results from times of crisis. For instance, legal writings and case law on hardship are fairly lean in Swedish law in comparison with the other jurisdictions examined herein. The two World Wars and their aftermaths also did not hit Sweden as hard as its European neighbours.[1067] Thus, Sweden did not experience change in circumstances to the same extent as in the other jurisidctions. Presumably, therefore, relief from contractual obligations in situations of hardship has not occupied legal scholars or the Swedish legislator to the same degree as, for example, in Germany. Germany is also the only jurisdiction dealt with herein that has legislated on the issue by way of reserving an entire provision solely addressing the issue of change in circumstances in their Civil Code. Times of crisis simply motivate pragmatic solutions to the issue of hardship, of which §313 BGB is a good example. **270**

There are few Swedish verdicts stemming from the two wars and their aftermaths. §36 AvtL also reflects the Swedish approach to hardship. The clause is not designed to directly deal with the issue of change in circumstances like the Clausula or §313 BGB. The focus of §36 AvtL is on fairness in contractual relations in general and on setting aside or modifying unreasonable contract terms, primarily targeting consumer contracts. The increased need to protect consumers' rights is what ultimately led the legislator to include §36 AvtL in the Swedish Contracts Act.[1068] With the risk of directing too strong criticism, §36 AvtL was, as I gather, created with different aims and situations in mind and is an unsatisfactory tool for dealing with the issue of change in circumstances. The opposite has, however, been expressed in the legal doctrine where the General Clause is seen as creating an incentive for contracting parties to enter into renegotiations.[1069] In my opinion, §36 AvtL, is **271**

[1067] Also in comparison with its direct Nordic neighbours, Finland fought two wars against the Soviet Union and one against Germany and Norway and Denmark were both invaded and occupied by Germany.
[1068] Prop. 1975/76:81 p. 101, 165; SOU 1974:83, p. 33.
[1069] ADLERCREUTZ, 292; LEHRBERG, 51, 58 f.; VON POST, 171.

a reflection of there never having existed a necessity for the Swedish legislator to address the issue of hardship more "clearly" or more "intentionally" as history shows that the Swedish courts have never been confronted with the same amount of hardship cases as in Germany or Switzerland. In my view, more attention should be given to develope the Swedish doctrine of assumptions sharing features with both §313 BGB and the Clausula.

272 The British common law has stood their ground also through times of crisis. Mere hardship is not sufficient to discharge a party of its duties under the contract. The drastic consequences that follow from a contract having been frustrated may be one of the reasons. As explained by Vaughan Williams LJ in *North Shore Ventures Ltd v Anstead Holdings Inc and Others*: "Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended."[1070] Termination as the only remedy may be considered a shortcoming of the doctrine in that sense.[1071] The court's power to adapt the contract terms to the new situation could be a valuable alternative and perhaps ease up the restrictive approach to hardship. However, while the law may be unforgiving, it is also clear and contracting parties can foresee the legal outcome of a supervening event and plan their business accordingly.[1072] This again has been argued to attract business to the United Kingdom as foreigners choose to litigate there, which, as argued, may be more important than a completely fair outcome in a single case.[1073] That argument is not in line with the fact that, as argued in the legal doctrine, frustration of purpose is the mirror image of the hardship situation. It is unclear why the courts are willing to make exceptions when the value of performance received has dropped dramatically but not in the reversed situation.[1074] That view is, in my opinion, clearly right, given that the buyer's loss normally is limited to the agreed price while the seller's loss in case of hardship theoretically could continue to rise without limit.[1075] It would be reasonable that the two situations are treated in the same way. However, as Treitel notes, this paradox is resolved by the fact that there are no English cases in which a party has been relieved from performance by "pure" frustration of purpose since the coronation cases.[1076] Ultimately, frustration of purpose operates within very narrow confines and remains a rare occurrence in practice.[1077] Nevertheless, as stated both in legal writing and case law, the doctrine of frustration is not an uncompromising definite measure incapable of development, but its applicability is dependent on the facts and circumstances in the single case; whether the doctrine will be triggered is a question of degree.[1078] As stated by Lord Wright in the *Cricklewood*-case (in relation to whether the doctrine could be applied on leases): "The doctrine of frustration is modern and flexible and is not subject to being constricted by

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[1070] 2010 Lloyd's Rep 265, p. 312.
[1071] *Compare hereto*, TREITEL, The Law of Contract, 868; ATIYAH/SMITH, 192; MCKENDRICK, Frustration of Contract, 44.
[1072] *See hereto*, Bank Line Ltd. v Arthur Capel [1918], UKHL 1, 9 f., available at: http://www.bailii.org/uk/cases/UKHL/1918/1.html where Lord Sumner states that: "The contract binds or it does not bind, and the law ought to be that the parties can gather their faith then and there." He further notes that the doctrine of frustration operates to decide the fate of the contract and the fate is "dissolution or continuance" and if terminated "it cannot be revived without a new contract".
[1073] GOODE, The Concept of "Good faith" in English Law, 9.
[1074] ATIYAH/SMITH, 187; TREITEL, The Law of Contract, 885 f.
[1075] BRUNNER, 412.
[1076] TREITEL, 343 f. This is further emphasised by the fact that since the Suez cases of 1967 there was no attempt to rely on frustration following the oil crises in the Middle East in 1973 where the price of oil had risen from USD 3 per barrel to n nearly USD 12. *See*, Treitel, The Law of Contract, 868.
[1077] CHITTY, 1636.
[1078] Lord Strathcona Steamship Co. Ltd. v Dominion Coal Company Ltd., [1926] LT Vol. 134, 227, 228; *See also*, National Carriers Ltd. v Panalpina (Northern) Ltd. [1980] UKHL,1, 4; Pioneer Shipping Ltd. v B.T.P. Tioxide Ltd. (*The Nema*), [1982] A.C. 724, 752; Bank Line Ltd. v Arthur Capel [1918], UKHL 1, 6, available at: http://www.bailii.org/uk/cases/UKHL/1918/1.html; MCKENDRICK, Contract Law, 258.

an arbitrary formula".[1079] Similarly, in *National Carriers Ltd. v Panalpina Ltd.* also related to whether the doctrine is applicable to leases, it was stated that the doctrine ought to be flexible and capable of new applications.[1080] But hardship and judge-led adaptation is and continues to be controversial under the British Common Law.

Art. 79(1) CISG is also an example of that adaptation of contracts is a controversial theme. It is unsettled whether the Article covers situations of hardship and also what remedies are available. So far, the *Scafom-case* ruled by the Belgian Supreme Court clearly deviates from earlier case law and is the only verdict exempting a seller from liability under the CISG due to economic hardship. The case does not only extend the applicability of Art. 79(1) to economic hardship but also incorporates the remedy of adaptation of the contract for hardship via gap-filling. The court decision is regarded as controversial and strong doubts have been expressed in the legal doctrine as to whether the Belgian decision would be followed by common law states. As one author states, it is as if the court assumes that the CISG's failure to include the continental law approach with respect to hardship must constitute a "gap" that should be filled with familiar doctrines found in sources outside the CISG.[1081] The *Scafom-case* should be viewed with great caution. It is also likely that the outcome in the Belgian case would have a different outcome also in other civil law jurisdictions.[1082] 273

Thus, the turbulent times during the last century have not softened the view on hardship under English law. Instead, hardship is entirely left to the parties to address in the contract. With respect to the CISG, considering the uncertainty and dispute regarding the scope of the article, it is recommendable for parties to include mechanisms in their contract to deal with the issue of hardship in order not to face the issue of a dispute regarding its scope. 274

II. A Step Ahead?

The provisions on hardship in the UNIDROIT Principles and the PECL come across as the most developed approach to a hardship regulation. At least it is perceived as that in legal doctrine. That may, however, not be entirely accurate. Perhaps not unsurprisingly, due to its history of two World Wars having devastating impact on the German economy, German law plays an innovative role in this field. The solution in §313 BGB is, in my view, dominant with an even further developed and satisfactory solution to hardship than the one opted for in the UNIDROIT Principles and the PECL. §313 BGB convinces not only by addressing the issue of hardship as a legal issue that deserves its own statutory provision, but also encourages renegotiation inter partes pre-trial. The provision gives adaptation priority over termination and at the same time addresses the concerns of judge-led adaptation by way of requesting that the disadvantaged party make a quest for revision that the court shall deny or grant. The latter is not unimportant in complex international transactions, which in turn does not only speed up the legal process, but also presumably opens up for a settlement outside of court. 275

[1079] Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd. [1945] 1 All E.R, 252, p. 263.
[1080] National Carriers Ltd. v Panalpina (Northern) Ltd. [1980] UKHL 8, 7 (A lease for 999 years), available at: http://www.bailii.org/uk/cases/UKHL/1980/8.html.
[1081] FLECHTNER, Belgrade Law Review 2011, 84, 98 f. *Compare hereo*, RIMKE, Force majeure and Hardship, 197, 211.
[1082] PÉDAMON/CHUAH, 17. *Compare hereto also*, TREITEL, 302; HONNOLD/FLECHTNER, 429 f.

III. Similar Notions, Remaining Differences and the Controversy of Adaptation

276 In the legal doctrine it is mentioned that there has been a general trend in giving judges the authority to adapt contracts to address hardship in order to keep the contract alive, especially in relation to complex long-term contracts.[1083] While that holds true with respect to the jurisdictions examined herein, save for British law, where the idea of judges re-writing contracts is strongly rejected, it can be questioned whether the granting of such powers really achieves the intended goal.

277 At the outset, the hardship solutions may come across as if they vary greatly, but they share several features, and most of all, in many instances the judges often reach the same conclusions.

1. Creating an Incentive to Renegotiate

278 It has been said that the court's power to adapt a contract to reflect changed circumstances is the most efficient remedy to achieve successful renegotiations.[1084] That may especially hold true with respect to long-term contracts where the need for flexibility is greater and where the contractual relationships are typically of a complex nature and of economic importance. To convince the counterparty to enter into renegotiations there must, however, be reasonable prospects for the parties to predict the outcome of a case under applicable laws as the ultimate leverage relies on initiating litigation to carry out the suggested adaptation. Uncertainty of the outcome may, of course, also be argued to work in favour of a request for renegotiation as nobody wants to be dragged into a potentially lengthy legal process, where the outcome is uncertain, risking ending up paying the costs of such proceedings. Whether the hardship rules under Swedish, Swiss, and German law as well as the unification instruments create an incentive to renegotiate the terms is dependent on a clear understanding of what is required for the requisites to be fulfilled.

2. A High Standard

279 The difficulty with the hardship rules is to fixate the degree (the threshold) for when an increase in the burden of performance has satisfied the required standard. The present body of case law, the discussion in the legal doctrine and the comparative examination show that there is no general yardstick to be applied. It is left for the judges to closely define the required standard.

280 Despite terminological variety under the national laws and the unification instruments, no difference in attitude towards the intensity that triggers hardship can be revealed. The terms "fundamentally" or "radically" different and a "significant", "striking" or "grave" change could be better described as legal jargon rather than trying to point out a precise difference between the different levels of difficulty of performance that will lead to relief under the hardship rules. Moreover, abstract concepts such as "excessively onerous", "a disruption of the contractual equilibrium" and "the restoration of the contractual equilibrium" are problematic from the point of view of providing any certain prospects for contracting parties as they imply a large measure of judicial discretion. Abstract concepts may, however, be a necessary "evil" to capture the large scope of events that can occur, as well as, provide flexibility with respect to the adaptation options. The comparative examination shows that in most cases it boils down to an assessment of who should carry the risk for the adverse consequences of the

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[1083] *Compare hereto e.g.*, FRICK, 221 and 223; LANDO/BEALE, 113; GAYMER, ICC Publ. No. 490, 96.
[1084] *Compare*, LEHRBERG, 59; DOUDKO, Hardship in Contract, 503; TALLON, Hardship, 400, 504.

supervening event, which in turn is a question of foreseeability. These additional conditions for hardship to arise, the foreseeability and risk requisites, are first of all strongly linked to the materiality requisite and are equally restrictive conditions. The examination shows that the success of a case is rather dependent on these requisites. A change in circumstances may be foreseeable despite that it having reached a level that is considered material.

The hardship clauses in the UNIDROIT Principles and the PECL may come across as the more straightforward alternative than the domestic hardship solutions as they clearly address hardship and provide clear requisites, at least at the outset and, moreover, almost take the shape of a renegotiation clause. In that way they may appear to create a stronger incentive to enter into renegotiations in comparison with the solutions under the national laws. In reality, they do not. The comparative examination clearly show that once the requisites under the PECL or the UNIDROIT Principles have been met, there are usually also ways out under the domestic hardship rules.[1085] Thus, the same high standard for admitting hardship can be found under the international unification instruments. With respect to Art. 79(1) CISG, if the clause is deemed to cover situations of hardship, in all likelihood, the standard is at least as strict as the standards under the DCFR, the PECL and the UNIDROIT Principles. [1086] **281**

There do, however, exist differences in attitudes under the hardship rules towards the possibility to renegotiate inter partes. Instead of the cancellation of the contract or judge-led adaptation of a contract term, the party adversely affected by the supervening event is providing the right or even a duty to initiate renegotiations. That is the case under the PECL, the UNIDROIT Principles, the DCFR and the §313 BGB. A similar right or duty to resolve the issue through renegotiations inter partes does not exist under Swedish and Swiss law. Such pre-trial renegotiations create an incentive for the counterparty to not reject a quest for renegotiation (even if the attempts turn out to be fruitless), as that would make little sense if applicable laws in any case would force them to do carry out renegotitaions. As I gather, the possibility for a court or arbitral tribunal to order renegotiation is an important solution as it forces the parties to reflection prior to turning down a renegotiation request, which is a first step in finding a solution to the new upcoming situation. **282**

3. An Unpredictable Outcome

Thus, not only does the comparative review show that the hardship rules apply only in small number of very exceptional cases and that the standard is set high but, also that it is left for the judiciary to establish the closer content and limitations of the requisites. That creates uncertainty. Case law is still too lean to draw more than preliminary conclusions. Moreover, it is clear from the comparative examination that the applicability is dependent on an assessment of the circumstances in the individual case. Thus, the hardship rules are highly dependent on the particular facts of the case and the nature of the alleged unforeseeable event. That makes it difficult for the parties to know what circumstances are of importance and should be the focus of their argumentation. Furthermore, when the court decides that the conditions have been met, there is uncertainty with respect to how the court will adapt the contract. It may result in an adaptation of the contract that does not reflect the **283**

[1085] *Of the same opinion*, LEHRBERG, ERPL 1998, 265, 281 f.; MELIS, J. of Int. Arbitration 1984, 213, 221. *See hereto also*, BRUNNER, 406 with respect to §313 BGB and RAMBERG/RAMBERG, 199 with respect to §36 AvtL and WIEGAND, Clausula rebus sic stantibus, 443, p. 455 that the requisites essentially correspond to the requisites for admitting hardship under Art. 6.2.2. of the UNIDROIT Principles which could be used as guidance.

[1086] *Along those lines*, MOMBERG, Vindobona Journal of Int'L Comm L & Arb 2011, 233, 243; BERGER, 549; VAN HOUTTE, The UNIDROIT Principles and Their Reciprocal Relevance, 181, 190. TALLON, 572, 592, stating that in the case the CISG cover situations short of impossibility, it is without any hesitation stricter than that of frustration or impracticability.

parties' common interests. An adaptation may require knowledge of the customs specific, not only to the industry, but also to the specific transaction in question. Thus, in order not to endanger the contractual relationship, the outcome must reflect actual business practice rather than the construction of such practice by a judge. This may be even more difficult with respect to long-term contracts where the parties' practices have developed over many years.

4. A Stringent Approach

284 While it might be too early to draw final conclusions, it appears, despite legislative efforts to give the courts extended powers to modify contracts in hardship situations and even sometimes encouragement from the legislator (e.g. under Swedish law) to adopt a new more relaxed approach, that national courts show a reluctance to interfere in contractual relations by way of adaptation. In no jurisdiction is there a trend to grant exemptions readily. Judges are prudent, especially when receiving large powers.[1087] The concept of hardship is similarly accepted with reluctance by international arbitral tribunals.[1088] Thus, they are at least as strict in making exceptions to the principle of pacta sunt servanda as domestic courts. Adaptation of the contract simply remains controversial despite being given the power to address a legitimate need in business.

5. Safe Prospects to Successfully Initiate Renegotiation?

285 One can only conclude that the legal systems as well as the unification instruments in reality hardly offer any certain prospects to adapt the contract. There are no reliable forecasts whether the party will have success in invoking hardship as the preconditions are unclear and highly subject to the circumstances in the particular case and there is a general reluctance to interfere in contractual relations in situations of hardship. The prospects of successfully invoking the hardship clauses are simply too uncertain. Thus, the available hardship rules under Swedish, Swiss and German law as well as the unification instruments do not provide a strong basis for convincing the counterparty to enter into renegotiations. The adaptation of the contract rather than termination is a perfectly legitimate commercial need that the law simply fails to meet by providing conditions that are too strict for a party to be able to foresee the outcome with any reasonable certainty, as they are highly context-dependent. While such built-in vagueness in the requisites and the reluctance to grant relief, at the same time can be argued to be necessary, the uncertainty and restrictive approach can be eliminated, to a large extent, by including a renegotiation clause in the contract to handle the effects of a change in circumstances. Parties to long-term contracts can in that way achieve a contract that provides enough flexibility throughout the contractual duration. The parties can choose to include a renegotiation clause with less stringent criteria than under the national hardship rules and thereby exclude the applicability of the solutions provided by governing law, unless of course the events giving rise to hardship is not covered by the renegotitaion clause. That, however, calls for careful and detailed contract drafting.

[1087] TALLON, Hardship, 400, 504.

[1088] *See e.g.*, DRAETTA, 351; FOUCHARD/GAILLARD/GOLDMAN, 25; ICC Case 1512 of 1971, Collection of Arbitral Awards I, 3, 4; ICC Case No. 8873 of 1997, JDI 1998, 1017, 1019.

Part 3: A Contractual Solution to Avoid Failed Renegotiations

A. Adaptation by Operation of a Renegotiation Clause

A high standard is set to establish hardship under the national laws examined herein. The foregoing comparative analysis has shown that domestic legal solutions only allow contracts to be adapted to reflect new commercial realities in few and exceptional cases. By including a renegotiation clause in the contract the parties can circumvent the current issues of uncertainty and conservative application that domestic solutions on hardship suffer from. **286**

I. The Importance of a Proactive Solution

One of the main reasons for transacting parties to enter into renegotiations is that a change in circumstances has occurred.[1089] In many long-term contracts the need for a renegotiation of the contract terms simply is inevitable. The inclusion of a renegotiation clause becomes particularly relevant with respect to long-term contracts. To reflect the need for flexibility in long-term contracts, a new departure of thinking is encouraged. One should (in particular lawyers) get rid of the rigid idea that contracts should stay in the same shape throughout their entire lifespan. A renegotiation clause provides the parties with important flexibility. It could of course be questioned whether it makes sense to sign a contract with the mental reservation that it entails a clause that can be invoked so that a party can be released from the strict letter of the contract.[1090] On the other hand, should a contract be performed whatever the cost? As one author points out: "*The most difficult, stressful, and emotional renegotiations are those undertaken in apparent violation of the contract or at least in the absence of a specific clause authorizing a renegotiation*."[1091] Thus, one should not underestimate the impact on the contractual relationship of renegotiations that occur outside the contractual framework. Therefore, it is probably of much greater importance than one may think to provide for flexibility in the contract from the beginning by way of including e.g. a renegotiation clause. Supposedly, a relatively "simple" renegotiation clause can also have that effect. A positive outcome of a well-drafted renegotiation clause could be that it enables the seller to offer a better price if there is an opportunity to renegotiate the price, the time for delivery etc. should an adverse turn of events occur.[1092] However, for a renegotiation clause to provide a solution and not be a source of dispute, careful drafting is required. A renegotiation clause only provide for a pro-active solution to the issue of changed circumstances if tailored to meet the specific needs and objectives of the transaction. In this chapter, the attempt is made to provide some general guidance on how to best draft a renegotiation clause to deal with the issue of change in circumstances. Attention will also be given to the renegotiation procedure so that the clause can be successfully invoked and a solution can be provided in a timely manner. **287**

[1089] SALACUSE, FILJ 2000, 1319, 1338.
[1090] *Compare*, REICHEL, 3. "Vollends würdelos ist es, einen Vertrag zu unterschreiben, den man von vornherein nicht zu halten gewillt ist."
[1091] SALACUSE, FILJ 2000, 1319, 1321.
[1092] LEHRBERG, ERPL 1998, 265, 282.

II. Understanding Renegotiation Clauses

288 Renegotiation is a *common effort* between the contracting parties to achieve contractual change to the original agreed upon terms in order to reflect a new commercial situation.[1093] The aim is to continue the contractual relationship on changed terms. The fact that the parties choose to include a renegotiation clause in the contract shows that they favour a fair distribution of the contractual duties under the contract rather than complete legal certainty.[1094] Renegotiation primarily becomes relevant in situations where a change in circumstances has occurred but termination is not an option. This is often the case when both parties already invested a great deal of money in implementing the agreement, making both parties dependent on continued cooperation.[1095] Presumably, many times, renegotiations are carried out on an ad hoc basis between the parties. That probably works out well in many cases where both parties have a lot to gain from continued cooperation and where there is hope for future deals. There are, however, less straightforward situations, where the renegotiation clause can become a useful tool.

289 The renegotiation clause has primarily two purposes. Firstly, to make sure that the main purpose of the transaction can be carried out despite a disruption by a change in circumstances. Secondly, to get to a revised contract without jeopardising the social capital already invested i.e., to reach an agreement in consensus. The latter entails not only avoiding the dispute finding its way to state court or arbitral tribunal, but also assuring that the renegotiation process itself does not bring about bad-feelings. Thus, the goal of the renegotiation clause is to result in a consensual adaptation of the contract to the new situation avoiding frictions in the business relationship. The renegotiation clause fulfills an important task in how to get there. The very basic idea, as I gather, of a renegotiation clause is to make the parties return to the bargaining table in a problem-solving mode free of issues of prestige and in the spirit of finding a constructive solution in potentially sensitive situations.[1096] The inclusion of a renegotiation clause also makes it clear from the beginning how the contractual relationship is intended to operate in times of "crisis" when flexibility is needed.[1097] The inclusion of a renegotiation clause also offers the advantage of making executives more familiar with the concept and perhaps less opposed to making a change to a term in the contract that was once heavily negotiated between the parties. [1098] It has also been suggested by one author that a renegotiation clause can solve the issue of differing cultural views among contracting parties with respect to the importance of the strict letter of the contract where one looks at the contract as set in stone and to be used as an "instruction book" for the contractual relationship until the end, while the other party focuses rather on the business relationship and keeping it alive, thereby placing less emphasis on the actual content of the contract.[1099] In such a situation the renegotiation clause operates as a compromise between contractual rigidity and complete flexibility[1100] and it accommodates both points of view. It is important to note in this context that a renegotiation clause is a tool to meet a crisis and to deal with the problem of change. The idea is not to shift the commercial risk of a supervening event over to the other party. Despite the loss-sharing idea behind the renegotiation clause, such clauses are intended to achieve that the main

[1093] HORN, The Concepts of Adaptation and Renegotiation, 9.
[1094] BAUER, Wirtschaftsklauseln, 509, 512.
[1095] *Compare*, SCHMITTHOFF, Zur praktischen Anwendung der Hardship-Klausul, 99, 100 f.
[1096] *Compare*, SALACUSE, FILJ 2000, 1319, 1321 and 1367; LEHRBERG, ERPL 1998, 265, 282.
[1097] LEHRBERG, ERPL 1998, 265, 274.
[1098] LEHRBERG, 80.
[1099] SALACUSE, FILJ 2000, 1319, 1329 f.
[1100] SALACUSE, FILJ 2000, 1319, 1330.

aim of the contract is carried out.[1101] Thus, it is not a clause to be invoked to redistribute reasonable entrepreneurial risk.

III. Contrast in Renegotiation Clauses

1. The Renegotiation Clause and its Variants

290 Strictly speaking a renegotiation clause is a contractual provision granting one or both transacting parties the right to request to renegotiate one or more contract terms in case of a change in circumstances. Not only the terminology varies with respect to these clauses[1102] they also take different shapes. Such clauses can be triggered as soon as there is a supervening event disrupting the economic equilibrium of the contract or it can be limited to certain defined events. The duty to renegotiate may be sanctioned or left unattended. What is common to all renegotiation clauses is a requirement of a common effort of both parties to find a solution to issues of change in circumstances.[1103] Depending on the wording of the renegotiation clause it could, from a legal perspective, be more or less useful.

291 A renegotiation clause in its simplest form merely imposes a duty to participate in renegotiations and a right to request renegotiations if a certain event occurs but without providing for any legal consequences if they turn out to be unsuccessful. Thus, it obliges the parties to renegotiate, but not to agree. Such renegotiation clauses are toothless and mean little else than that one party is given the right to bring up the issue for discussion in an attempt to alter the terms and not instantly be rejected by the counterparty.[1104] Such "weak" clauses are often criticised by legal commentators as being worthless.[1105] However, such toothless clauses may also put a moral pressure on the counterparty[1106] to agree to an adaptation of the contract terms. Also, it clearly shows that the parties did not see the contract as static. Other renegotiation clauses may be provided with teeth and state that the contract will be adjusted according to a certain standard if the parties cannot agree or ultimately be adapted by a conciliator,[1107] mediator, state court or an international arbitral tribunal. Renegotiation clauses can also be different degrees of precise; they can trigger a right to renegotiate the contract in general or be linked to specified terms in the contract e.g. commodity prices or construction costs.[1108] The variations are many.

292 For a renegotiation clause to fully serve its purpose i.e., to provide a robust solution that can be successfully invoked without causing too many disruptions on the way to fulfilling the contractual goal it must at a minimum contain (i) clearly defined trigger event(s) to avoid disputes about whether the clause has been legitimately invoked: (ii) a clear framework for the renegotiation process to avoid friction and bad will and, (iii) remedial consequences in the event of unsuccessful renegotiations to make it effective. To provide guidelines for the drafting of a flawless renegotiation clause is simply not possible due to the subject matter of these clauses. They contain an inherent insecurity as they deal with events in the future. The aim of this chapter is merely to point to

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[1101] LEHRBERG, ERPL 1998, 265, 274.
[1102] E.g., review, revision, adaptation, adjustment, restructuring, rescheduling or variation clause. *See hereto*, PETER, J. of Int. Arbitration 1986, 29, 31.
[1103] PETER, J. of Int. Arbitration 1986, 29, 31.
[1104] RAMBERG/RAMBERG, 9 ed., 196; GRÖNFORS, 13.
[1105] SCHMITTHOFF, Zur praktischen Anwendung der Hardship-Klausul, 99, 107 f.
[1106] LEHRBERG, ERPL 1998, 265, 273.
[1107] LEHRBERG, ERPL 1998, 265, 273.
[1108] SALACUSE, FILJ 2000, 1319, 1321 and 1333.

some important drafting considerations in order to avoid pit-falls and unexpected results in the event of litigation or arbitration.

2. General Observations: "Model" Clauses

293 Both Art. 6.2.1 in the UNIDROIT Principles and Art 6:111 in the PECL addressing the issue of hardship could be viewed as generally formulated standardised renegotiation clauses aimed for long-term contracts. The ICC Hardship Clause 2003 is intended to be included in contracts either expressly or by reference. All three clauses have a wide scope with respect to triggering events, but they otherwise operate within narrow confines applying restrictive conditions for a claim for adaptation of the contract.[1109] Following the analysis in Part II of this study, one could conclude that if the requirements have been met under one of the model clauses, the party most likely also has a claim under national law (other than under the doctrine of frustration).[1110] Thus, as I gather, the inclusion of one of these provisions does not put the disadvantaged party in a better position than it would under domestic laws (except for under English law). It would be more useful if the scope of the renegotiation clause would be restricted to the fundamentals of the contract and the transactional risks rather than for the other prerequisites to provide requirements that are too restrictive for its applicability.[1111] One could however include these clauses so as to add the additional step of renegotiation.[1112] It is sometimes suggested that, similar to the ICC Hardship Clause 2003, the two hardship clauses in the UNIDROIT Principles and the PECL are to be considered model clauses that can be incorporated in contracts to deal with the issue of changed circumstances.[1113] It can be questioned whether such standardised clauses should be used at all. It can only be concluded that solely a well-drafted clause tailored to the transaction in question is of real value. However, the three hardship clauses are valuable sources for the contract drafter as a point of departure with respect to structure and terminology to be used and as to what elements a renegotiation clause generally could contain.[1114] And, these clauses are also valuable to look at since they provide a comparative solution the the practical problem of change in circumstances. Also, the drafters of the UNIDROIT Principles did not intend for it to be incorporated into contracts, but rather to be used as a source of inspiration or even a checklist for the contract drafter.[1115] Just as the model hardship clauses in the PECL and the UNIDROIT Principles, hardship clauses often provide for renegotiation. Therefore, hardship clauses and renegotiation clauses are often identical. [1116] It is, however, important to point out that a renegotiation clause operates much more freely and is wider in scope than the hardship clause.[1117] A renegotiation clause can be drafted to meet the specific needs of the transaction with respect to trigger events and their impact.

IV. The Drafting of a Renegotiation Clause

294 There is a tendency to include renegotiation clauses in contracts when one or both parties feel insecure with respect to certain points in the future at the time when the contract is concluded rather than to acknowledge that also in situations when things appear clear upon formation of the contract problems may arise down the road.

[1109] LEHRBERG, ERPL 1998, 265, 280.
[1110] *Compare*, LEHRBERG, ERPL 1998, 265, 280 that is of the same opinion.
[1111] LEHRBERG, ERPL 1998, 265, 283.
[1112] LEHRBERG, ERPL 1998, 265, 280.
[1113] HOUTTE, Unif. L. Rev. 2014, 550, 550 and 560.
[1114] FARNSWORTH, ICC Publ. No. 490, 85, 88.
[1115] FARNSWORTH, ICC Publ. No. 490, 85, 88.
[1116] *Compare,* BRUNNER, 514.
[1117] PETER, J. of Int. Arbitration 1986, 29, 46.

For a renegotiation clause to really fulfil its purpose, it must be robust. To be robust, it must be specifically tailored to suit the specific transaction in question and so clearly drafted that the clause itself does not lead to dispute. I.e., it must operate smoothly and be able to be invoked successfully. Thus, careful considerations and drafting are required. The prime consideration must be to draft a clause that by itself does not become a source of dispute. The renegotiation clause should be divided into two parts, a substantial part where the trigger and requisites are laid out and another part where the procedural aspects are laid out. The wording of the clause will, of course, determine the ease with which it is invoked, as well as its efficiency. Given the different circumstances in each contractual relation and deal specifics, it is only possible to give general guidelines and points of consideration rather than concrete formulations on how the renegotiation clause should be drafted.

1. Requisites, Scope and Limitations

A renegotiation clause targeting change in circumstances can provide more precise contents and define less stringent requisites than what is offered in the hardship exceptions under national law.[1118] Or the other way around if preferred. It is simply up to the contracting parties to decide the appropriate level of flexibility to be included in the contractual relationship. **295**

a) The Trigger Event

The contracting parties must first of all identify a point of tolerance for when the clause should be triggered. The parties are free to decide on what events should trigger the clause but they should typically correspond to situations that both parties consider to exceed the acceptable level of risk associated with the transaction.[1119] The wording must be crystal clear to avoid disputes about whether the clause has been rightfully invoked by the counterparty. A clearly defined trigger event is simply key for initiating a consensual procedure, which in turn is important for the renegotiation clause to function in practice.[1120] It should be noted that renegotiation clauses, especially with respect to trigger events, are often, vaguely formulated.[1121] The terms frequently included in such clauses by the parties are comparable to the triggers in the doctrinal or legislative unification instruments.[1122] That may, however, be in the interest or even the strategy of one of the contracting parties.[1123] Preferably, the trigger event(s) should be narrowed down and reflect the specific risks of the transaction. However, to foresee the universe of all adverse events is difficult, time consuming and, not to forget, costly to negotiate and agree upon. It may therefore be tempting to use open-ended vague phrases such as "radically different", "fundamentally changed" or "a substantial alteration of the contractual equilibrium" etc. even if it provides for greater certainty to provide an exhaustive list of trigger events.[1124] The former has a wide scope of application but as shown by the examination of the national hardship exceptions, it is very difficult to assess such standards. Thus, it is advisable, rather than using open-ended and vague terms, to boil down the trigger of the clause to pre-identified events relevant for the transaction. In this way, a wide scope of application of the **296**

[1118] LEHRBERG, ERPL 1998, 265, 274.
[1119] *Compare*, BERNARDINI, JWELB 2008, 98, 98.
[1120] *Compare*, BERGER, VJTL 2003, 1347, 1362; HORN, 111, 129 f.; FLETCHER/MISTELIS/CREMONA, 276.
[1121] BURKHARDT, 101; HORN, Neuverhandlungspflicht, Acp 1981, 255, 261.
[1122] *See hereto,* The hardship clauses in Art 6:111(2) PECL and the ICC Hardship Clause 2003 (2)(b) using the term "excessively onerous", Art. III. – 1:110 (2) DCFR using "manifestly unjust" and Art. 6.2.2 the UNIDROIT Principles using the term "fundamental alteration"
[1123] HORN, Die Anpassung Langfristiger Verträge, 9.
[1124] *Compare*, LEHRBERG, ERPL 1998, 265, 273 f.; The UNCITRAL Legal Guide, 244; SALACUSE, FILJ 2000. 1319 p. 1321, 1362.

clause is avoided and generally less stringent criteria for its application can be applied. It is argued that such a narrowly drafted clause takes the form of a specific risk clause rather than the form of a hardship clause.[1125] The disadvantage of including an exhaustive list of trigger events is that an event may occur down the road of great relevance that is not covered in the clause and thus must be assessed on the basis of the laws governing the contract. For instance in *ICC Case No. 2478* the contract contained a renegotiation clause for the event of a devaluation or revaluation of the French franc or the dollar but could not be applied on the movement of prices on the world oil market as alleged by one of the parties.[1126] Furthermore, the risk of having a list of risks in the clause is that an extension to cover other risks not spelled out may be interpreted as if in contradiction with the common intention of the parties.[1127] Thus, it is often argued that the renegotiation clause should be "open" in style or stated "loosely" in order to capture the vast amount of potential future adverse events.[1128] However, it may be a better choice that the list of trigger events is combined with wording such as "and other similar events," "events of the same kind or nature" or a general description of other events that also should be regarded as trigger events (hardship events). Thus, the list would then merely be examples of events that amount to trigger hardship.[1129] Such a non-exhaustive list or so-called "catch-all" category adds uncertainty as to whether a specific event falls under the clause or not,[1130] which may result in disagreement between the parties and ultimately be subject to extensive interpretation by a local court or arbitral tribunal.[1131] It may still be the preferred way to go to include a concluding general description, as the very essence and subject matter of the renegotiation clause is to address the issue of future unforeseeable change.[1132] Also, to negotiate and consider every possible adverse turn of events that theoretically can occur is simply too costly and time-consuming as mentioned above.[1133] Depending on the transaction it may also be difficult to define the trigger event in a concrete manner. A vaguely formulated trigger event could, of course, be provided with a carve-out where a list of events not constituting a trigger event (even if severely affecting the contractual duties) is provided in order to restrict its applicability. On the other hand, contracting parties and drafters may have to face the fact that it simply is not possible to contract for the universe of adverse events[1134] in a clear and precise manner that is required for the clause to run smoothly. Therefore, a boiled down list of the most crucial events that may affect the transaction in an adverse manner is still preferred to a vaguely formulated trigger that may ultimately be exposed to the interpretation of a third party. Examples of a trigger event are reduction in the size of the purchaser's anticipated market with x per cent, an increase in the cost of raw materials, new or changed governmental regulations or a decrease in the revenues of x per cent. The international character of the contract should be taken into account as a factor requiring more protection against an adverse turn of events, thus, extending the list of events.[1135]

[1125] *Compare*, SCHMITTHOFF, Zur praktischen Anwendung der Hardship-Klausul, 99, 101 f.
[1126] ICC Case No. 2478 of 1974, Y.B. Com. Arb 1978, 222, p. 222.
[1127] *Compare*, BERGER, VJTL 2003, 1347, 1363.
[1128] BERGER, VJTL 2003, 1347, 1361; SORNARAJAH, , J. of Int. Arbitration 1988, 97, 108. *Compare also*, SCHMITTHOFF, Zur praktischen Anwendung der Hardship-Klausul, 99, 102.
[1129] HORN, 111, 133.
[1130] The UNCITRAL Legal Guide, 244.
[1131] BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 166. *Compare also*, PETER, J. of Int. Arbitration 1986, 29, 33.
[1132] *Compare*, SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419; SORNARAJAH, J. of Int. Arbitration 1988, 97, 108.
[1133] KOLO/WALDE, JWI 2000, 5, 21.
[1134] *Compare*, BERGER, VJTL 2003, 1347, 1362.
[1135] *Compare*, BUND, J. L. & Com 1998, 381, 407.

There are pros and cons with both methods. A broader scope opens up for ambiguity and may ultimately result in a dispute that need to be settled in court while a more narrowly drafted trigger event may not provide the necessary protection as it is difficult to foresee all possible future adverse events, and court and tribunals would most likely be unwilling to interpret the renegotiation liberally. However, as I gather, clearly defined trigger events where the focus is on the issues particular for the transaction are the better choice to avoid so that the renegotiation clause becomes the problem rather than the solution.[1136] It is also important in order to avoid *unexpected* results in a potential court proceeding where the court will have to decide the closer meaning of the terms of the clause. **297**

b) Further Qualifications: Features of Hardship

A renegotiation clause does not require that hardship is present. By including the typical requisites of a hardship clause it is important to point out that the much wider scope of the renegotiation clause is narrowed down. That may be desirable in order to limit the possibilities for the parties to initiate renegotiation of the contract. A hardship clause is simply a renegotiation clause with certain qualifiers added so that it only becomes applicable in exceptional situations.[1137] **298**

aa) The Effect on the Contractual Duty

If it is established that the clause has been triggered, the next hurdle to overcome is to decide whether it actually has resulted in hardship for the party invoking the clause. I.e., it is not enough that the event occurred, the degree of harshness must also be ascertained.[1138] Thus, a point of tolerance as to how the trigger event has affected the contractual duties or equilibrium must be provided in the clause that is to be read together with the trigger event(s).[1139] It is for the parties to decide the required intensity of the consequence of the trigger event. Beneath the point of tolerance, no relief should be obtained. Thus, depending on where the threshold is set, the parties can assure that the renegotiation clause only applies in exceptional circumstances. To assure that the contract is also generally performed when small interruptions occur, it could make sense to provide a higher threshold. At this stage, it is important to prevent a disadvantaged party from trying to shift over normal or reasonable entrepreneurial risks on the counterparty.[1140] If the performance is capable of precise measurement in monetary terms it is preferable to avoid vague terms. For instance, if the disadvantaged party must show that it would be "ruinously expensive" to perform on unchanged terms, then the standard has been set high. That, however, would require an analysis of the financial strength of the disadvantaged party, which may not be desirable. A trigger event can instead be so defined that there is no need to decide whether the change has also resulted in hardship for the counterparty, as that follows from the event. E.g., the clause provides that if a certain price increase expressed in percentage occurs on the world market for the cost of raw materials, then the clause is triggered. More commonly, however, the defined trigger event is linked to an objective standard so that the event must result in "serious adverse economic consequences", "substantial economic imbalance", or "substantial hardship" in order for the party to be able to invoke the clause.[1141] To reduce uncertainty with respect to the applicability of the clause, and to not rely on judicial determination for the outcome, the meaning should be **299**

[1136] BERGER, VJTL 2003, 1347, 1362; *See hereto also*, HORN, 111, 129 f. arguing that general formulations should be avoided if possible.
[1137] PETER, J. of Int. Arbitration 1986, 29, 34.
[1138] *Compare*, BRUNNER, 514; PETER, J. of Int. Arbitration 1986, 29, 34.
[1139] *Compare*, The UNCITRAL Legal Guide, 244.
[1140] The UNCITRAL Legal Guide, 244 f.
[1141] The UNCITRAL Legal Guide, 245; BRUNNER, 514.

closely defined and preferably deal-specific. A better approach would be to have the change exceeding a certain percentage of the cost or the value of the performance as the point of tolerance.[1142] Or, the parties could link it to the event being required to result in a financial burden expressed as a decrease in percentage in the profitability of the disadvantaged party, e.g., revenues dropped by x per cent.

300 While the ambition should be to use an objective rule to decide whether hardship is present, it is not always possible. It may also open up for heavy negotiations on where to set such a threshold. If it is not possible to quantify the term in a more exact manner, subjective normative terms can be used. Sometimes reference is made to the fact that supervening event has caused the party "inequity" or "unfairness".[1143] To the extent possible such normative terms should be avoided in order to prevent uncertainty as to the applicability of the clause.[1144] A completely different route to go is to provide that a third party should decide whether a given event amounts to hardship. That may, however, only be possible in larger projects where there are enough resources and where large values are at stake. Lastly, it may make sense that the clause provides that the impact of the trigger event must be more than temporary, i.e. not only have a short-term effect on the contractual duties.[1145]

bb) Additional Requisites

301 Further qualifiers can be added in order to reduce the applicability of the renegotiation clause. It can be provided that the trigger event must be unforeseeable, have occurred after the formation of the contract, and have been unavoidable and not within the control sphere of the disadvantaged party. In that way, the renegotiation clause borrows features from the typical hardship clause (or force majeure clause) narrowing down its applicability.[1146] And, as Part II of the research demonstrates, the domestic hardship solutions contain similar requisites. Hence, in a renegotiation clause where an open-ended term as trigger event is used, it is appropriate to add further prerequisites. With respect to the unforeseeable requisite, it is sometimes argued not to use the term "unforeseen" as it significantly broadens the scope of the clause, and a party that is careless in not anticipating events actually likely to happen could benefit from such a wording.[1147] On the other hand, as Professor Ole Lando rightly points out, in our changeable times many disrupting events are foreseeable, and parties cannot be required to provide for all of them in their contracts.[1148] Generally, however, if the trigger event and its impact are narrowed down to reflect the fundamental risks of the transaction, then it is less crucial to otherwise provide for restrictive requirements for the applicability of the clause.[1149]

cc) The Objectives of the Renegotiations

302 The renegotiation clause primarily aims to apportion the burden of an adverse change in circumstances between the parties. It could be argued that the criteria for adapting the contract should be defined after the wishes of the parties and their legitimate interest in receiving the benefits of the bargain initially agreed upon. The approaches

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[1142] The UNCITRAL Legal Guide, 244 f.
[1143] DRAETTA/LAKE/NANDA, 196.
[1144] DRAETTA/LAKE/NANDA, 196.
[1145] *Compare,* Superior Overseas Development Corporation v British Gas Corporation, [1982] 1 Lloyd's Law Report 262, 266.
[1146] PETER, J. of Int. Arbitration 1986, 29, 33; *Compare also*, HORN, 111, 134 f.
[1147] DRAETTA/LAKE/NANDA, 195; FRICK, 179.
[1148] LANDO, Renegotiation and Revision of International Contracts, 37, 56.
[1149] *Compare*, LEHRBERG, ERPL 1998, 265, 283.

differ as to what the outcome of the renegotiations should result in, and are not often linked to the trigger event.[1150]

A renegotiation of the contract should not as a general rule result in a commercial advantage for one party[1151] or place the burden of the event on only one of the parties.[1152] Some renegotiation clauses are "open" in style or "generic" in this aspect and merely state that the aim of the renegotiations is to adapt the contract to the new situation[1153] or they are supposed to address the "unfairness".[1154] There are several downsides in choosing such loose wordings. It will be entirely up to the parties to decide the extent of the contract change without any guidelines defining or limiting the objectives of the renegotiations, risking that one party may try to alter other key terms in the contract to its advantage.[1155] Thus, in this phase, opportunistic behaviour on behalf of a party may become an issue. It has been argued that since the purpose of the clause is to solve the issue of changed circumstances, there is no right to reconstruct the contract in other aspects aside from directly solving the problem.[1156] While this view deserves support, it can also be an advantage that the parties can also amend the contract in other aspects during renegotiations so that it works better in the future and not solely to solve the current problem.[1157] Providing concrete criteria for the adaptation standard is a better choice for several reasons. Firstly, it may avoid disputes among the parties. Secondly, it will enable a state court or an international arbitral tribunal to more readily enforce the renegotiation clause. Moreover, and more importantly, the parties do not expose the contract to "uncontrolled" revisions not envisaged by the parties if the dispute ultimately is settled in court or by arbitral tribunal. Lastly, close guidance can make the contracting parties more comfortable with the fact that a third party that may or may not possess the necessary competencies beyond the field of law will be responsible for carrying out the adaptation.[1158] However, the need for flexibility and sufficient room to operate within in order for a third party to revise the contract in an appropriate manner must also be considered.[1159] **303**

Alternatively, the parties can choose to apply an objective or subjective standard on how the contract may be revised.[1160] However, as rightly pointed out in the doctrine, at the time of the renegotiations, the bargaining positions may have changed since the conclusion of the contract, which may have an effect on what terms are up for renegotiation.[1161] Thus, the contract as a whole may ultimately be questioned. An objective standard typically aims to re-establish the original (economic) equilibrium of the transaction (protecting both parties) whereas a subjective standard aims to revise the contract to remove "unfairness" or to result in an equitable revision or the like.[1162] The use of vague standards of fairness and equity is commonly provided for in renegotia- **304**

[1150] PETER, J. of Int. Arbitration 1986, 29, 35; BERNARDINI, JWELB 2008, 98, 105.
[1151] BERGER, VJTL 2003, 1347, 1365.
[1152] BERNARDINI, JWELB 2008, 98,105. *See hereto also*, Ad hoc Award of July 6, 1983, YBCA 1984, 69, 70 where the arbitrators applying Swiss law explained: "*The meaning of the rebus-sic-stantibus clause cannot possibly be to let only one contracting party feel the consequences of changed circumstances."*
[1153] DRAETTA/LAKE/NANDA, 172; BERNARDINI, JWELB 2008, 98, 105.
[1154] BARTELS, 63.
[1155] *Compare*, BAUER, 516; BURKHARDT, 65; BARTELS, 63.
[1156] BERGER, VJTL 2003, 1347, 1365; BURKHARDT, 66.
[1157] LEHRBERG, ERPL 1998, 265, 281.
[1158] FLETCHER/MISTELIS/CREMONA, 281.
[1159] *Compare*, FLETCHER/MISTELIS/CREMONA, 281.
[1160] BERNARDINI, JWELB 2008, 98, 105; HORN, 111, 139.*Compare also*, DRAETTA/LAKE/NANDA, 197; BURKHARDT, 69 f.
[1161] BARTELS, 63.
[1162] BERNARDINI, JWELB 2008, 98, 105; PETER, J. of Int. Arbitration 1986, 29, 36. DRAETTA/LAKE/NANDA, 197. *Also,* SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419 referring to Fountains work on hardship clauses in French.

tion clauses.[1163] As an example, in *ICC Case No. 2478*, the renegotiation clause provided: "(…) the parties shall (…) agree on the measures to be taken in order to re-establish the contractual equilibrium as intended by and in the initial spirit of the contract".[1164] To remove unfairness is not only difficult to assess but also vague in terms of whether that entails offsetting hardship to the extent that it falls just below the threshold of what is considered "unfair" or "bearable" or whether the aim is that it should result in a situation without "hardship". Some legal commentators argue that it is reasonable for the disadvantaged party to bear the burden up to the last limit of sacrifice.[1165] However, rather than leaving the counterparty on the borderline with the risk that the renegotiation clause will soon be triggered anew when the situation slightly change and falls over the edge to hardship, it may make more sense to remove the "hardship situation" in its entirety.[1166] One author argues that the subjective approach is preferred to an objective standard requiring the original contractual equilibrium to be re-established because such a standard is ill-equipped as the negotiators have to look back at the past and use the old equilibrium for guidance when their aim is to actually find a situation fair and equitable to both parties in a new and changed commercial reality.[1167] Another author similarly argues that re-establishing the contractual equilibrium is not only a fiction, as the facts have changed, but also, in many cases, may be too simplistic.[1168] The advantage of an objective standard, however, is that it is less volatile and an easier route to take if the obligations can be appropriately quantified.[1169] Perhaps it is more appropriate to argue that a standard should be adopted where the *legitimate* expectations of the initial bargain are respected but with some deviation so that part of the extra costs are borne by the disadvantaged party. Or, one could imagine, the original equilibrium being modified in favour of a new one that is deemed equally equitable.[1170] A clearer and perhaps better way to go about such an endeavour would be to refer to a more specific standard such as trade practices or typical contracts of the same kind used in international transactions[1171] or some other adjustment formula. This would also reduce the risk of unexpected surprises if the contract ultimately ended up being revised by a third party. Most of the time, the concerns of the parties cannot be addressed in such a clear way, but it should still be attempted when possible. An additional attempt to steer and help the court or arbitral tribunal in their revision of the contract, especially where less concrete standards are used, is to describe the main aim or goal of the contract in broad terms in the recitals.[1172] In that way the primary objectives of the contractual relationship are spelled out which also reflects the purpose of the renegotiation clause i.e., to assure that the main goal of the contract is fulfilled despite the occurrence of a supervening event.

[1163] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419; DRAETTA/LAKE/NANDA, 197; FLETCHER/MISTELIS/CREMONA, 281.
[1164] ICC Case No. 2478 of 1974, Y.B. Com. Arb 1978, 222, p. 222.
[1165] BRUNNER, 499; MOMBERG, 253.
[1166] *Compare,* As per L.J. Waller in *Superior Overseas Development Corporation v British Gas Corporation,* [1982] 1 Lloyd's Law Report 262, 266.
[1167] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419. *See also*, SCHMITTHOFF, Zur praktischen Anwendung der Hardship-Klausul, 99, 101 arguing that „the original contractual equilibrium" is an unneccessary limitation on the adaptation possibilities in a new situation where a new solution also is needed.
[1168] PÉDAMON/CHUAH, 99. *See hereto also*, BURKHARDT, 69.
[1169] PETER, J. of Int. Arbitration 1986, 29, 36 f.
[1170] *Compare*, NASSAR, 182.
[1171] HORN, 111, 139.
[1172] *Compare*, LEHRBERG, 87; SOHLBERG, JT 1996, 972, 976. NJA 1993 s. 436.

2. Other Possible Limitations

A renegotiation clause can be limited in many ways. For example, it can provide that only certain specified terms will be renegotiated.[1173] Or, the clause could be drafted so that the renegotiations are predetermined to occur at certain point in time in the future making the revision of certain terms a fact.[1174] Such a solution limits the scope of the renegotiation clause but makes the renegotiation inevitable. Depending on the type of transaction, such built-in automatic mechanisms for renegotiation can make sense. A renegotiation clause can also be limited so that renegotiation only can be initiated after a certain number of years have lapsed from the formation of the contract.[1175] **305**

3. Procedures, Sanctions and Enforceability

To assure that the renegotiation clause can be successfully invoked and enforced, the renegotiation procedure and method for dispute resolution in case the renegotiations break down should be carefully considered and provided for in detail. It should also be decided up front what party is to bear the costs or how they should be apportioned among the parties. This will be dealt with separately below. The importance of giving enough attention at the drafting stage to the procedural part in the clause is not to be underestimated as the context surrounding the renegotiation phase is typically that of disappointed expectations and a reluctance from one party to revisit an already heavily negotiated contract.[1176] **306**

V. The Renegotiation Phase

1. The Procedure

The renegotiation clause could provide how the contract is to be amended, but it is more likely that the clause would be designed so that the flexibility would be kept on this point, providing instead for a mechanism that results in an adaptation. The crucial phase is the time preceding the dispute. It is therefore of great importance that the renegotiation procedure is well thought through to avoid unnecessary interruptions and bumps in the road in finding an amicable solution. Once all the requirements for triggering the renegotiation clause have been met, and the parties have entered into the renegotiation phase, it is important for the parties' respective duties to be defined in detail.[1177] An unclear procedure can be a source of misunderstanding and difference of opinion on how it should be conducted, creating unnecessary irritation or bad will between the parties in an already tense and sensitive situation. Thus, the clearer the process, the better. The aim should be for the process to be so well thought out that in the best possible ways, it provides an indirect additional support for the parties to reach an amicable solution.[1178] Ideally it should operate so smoothly that it prevents the issue from finding its way to third party intervention. To achieve that goal, the renegotiation process must be clearly outlined. The key is simply to leave nothing undecided! This part of the clause is probably often overlooked as the focus rather lies on the events triggering the clause or the actual duty to renegotiate. It is worth spending time on this part as the last prospects for finding an amicable solution are typically spoiled once the dispute escalates to the point of **307**

[1173] *Compare*, BARTELS, 65.
[1174] SALACUSE, FILJ 2000. 1319 p. 1321, 1333 and 1362; PETER, J. of Int. Arbitration 1986, 29, 34 f. *Compare also*, BERNARDINI, JWELB 2008, 98, 103.
[1175] PETER, J. of Int. Arbitration 1986, 29, 34: BRUNNER, 513.
[1176] *Compare*, SALACUSE, FILJ 2000, 1319, 1321 and 1335.
[1177] BERNARDINI, JWELB 2008, 98, 105.
[1178] Similarly, BURKHARDT, 64.

being solved by a third party. Moreover, a detailed description of how the renegotiation is supposed to be carried out is also important, as it makes the clause easier to enforce.

2. Creating an Effective Procedure

a) Consequences of the Trigger Event

308 Firstly, the party adversely affected by the change in circumstances should be required to give prompt written notice to the counterparty of the occurrence of the trigger event and be required to formally request renegotiation of the contract. If the party fails to do so within a certain defined period of time after the trigger event occurred, the party should be excluded from relying on the clause.[1179] Secondly, the clause can provide for a legal effect with respect to the contractual obligations during the renegotiations are in process or until the adaptation of the contract is completed. The clause can provide for automatic suspension of any further activities between the parties until the renegotiations have been carried out or, alternatively, for a certain defined period of time (with the risk for delays).[1180] If the clause does not address the issue, the contract will continue in full force and effect during the renegotiation phase.[1181] Depending on the type of transaction, suspension may not be suitable. While suspension is a good way to put pressure on both parties to renegotiate a solution in a timely manner, it is not a good solution if only one party suffers adverse consequences. That would increase the bargaining power of a counterparty that do not suffer any disadvantageous by a suspension. Alternatively, to make suspension less drastic and to avoid the problem that the parties cannot honour outstanding contractual commitments related to the contract, the parties can add carve out for so-called "pre-trigger-event investments". In that way, activities that were subject to an existing binding letter of intent or contractual or other legally binding commitment at the time when the clause was triggered can still be honoured.

309 The initial effort to agree on an adaptation of the contract terms should be left to the transacting parties.[1182] Therefore, and preferably with or without a suspension of the contractual activities, the renegotiation clause should contain an obligation for the disadvantaged party to provide an initial written proposal for the continuance of the contract on changed terms. Here it should be considered whether such a proposal should be provided in the form of a non-binding letter of intent or if it should take the form of a binding offer.[1183] That should be done within a certain defined period of time after the occurrence of the trigger event and should serve as the starting point for the renegotiations. If the proposal is not provided within the defined time frame, then the suspension should be terminated and the parties should resume their obligations and duties under the contract. In the event that such proposal is not accepted by the counterparty as a suitable solution, within a certain time frame, it can make sense for the clause to provide that the counterparty should provide a written counter-proposal on how the contract should be adapted prior to entering into the first negotiation talks. This would force both parties to reflect and a chance to overcome any potential temporary anger towards the fact that the bargain agreed upon must be revisited.[1184] After a certain lapse of time from when the counterproposal was provided, the clause should state that the parties are bound to enter into the actual renegotiations. It is important that a defined period of time is linked to each and every step described above. One problem with the outlined

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[1179] *Compar*e, DRAETTA/LAKE/NANDA, 196.
[1180] *Compare*, MEKKI/KLOEPER-PELÈSE, 677.
[1181] BERGER, VJTL 2003, 1347, 1369; DRAETTA/LAKE/NANDA, 198.
[1182] DRAETTA/LAKE/NANDA, 196.
[1183] *Compare*, HOUTTE, Unif. L. Rev. 2014, 550, 552 and 556.
[1184] *Compare,* SOHLBERG, JT 1996, 972, 974. *See hereto also*, SALACUSE, FILJ 2000, 1319, 1335.

process above is that it requires more considerations during the drafting of the contract, and that it will most likely require negotiations, which may not be the focus of the parties and is simply also a question of cost.

b) Time Limits, Place and Conditions for the Renegotiations

It is usually vital for the parties to find a solution in a timely manner in order not to dilute the contractual benefits. Thus, the clause should preferably include details on timing, the place for renegotiation and conditions for the renegotiation process.[1185] A time limit should not only be set for the renegotiation phase; a time frame within which the adaptation of the contract must be completed should also be provided.[1186] The prescribed time frame must be set to suit the nature and complexity of the transaction or project. Specified time limitations also prevent the abuse of a party that wants to delay the process.[1187] It also avoids the issue of having to decide whether and which party walked away from the negotiation table and is thus to "blame" for the unsuccessful renegotiations. If no agreement has been reached within the stipulated time frame, the renegotiations should be regarded as failed. It can be provided in the clause that the sanctions take effect automatically or that either party is entitled to invoke sanctions. It is important to include appropriate time limits not only for the renegotiation phase, but also for potential conciliation, mediation or arbitration procedures to prevent one party from trying to delay a final resolution.[1188] The clause should be structured so that it takes the shape of a road map with time frames and objectives for each stage. **310**

3. General Obligations During the Renegotiations

It is frequently asked whether the duty to renegotiate includes a duty to agree. To set out the contractual obligations during the renegotiation phase is of importance for the efficiency of the clause and for its enforceability.[1189] However, the obligations of the parties during this intricate phase cannot easily be defined, and would also not be appropriate, as the aim is for the parties to have the freedom to negotiate and find the best possible solution with respect to the interests of both parties. **311**

a) A Duty to Renegotiate

The goal of the clause is for the parties to, through renegotiations, find an amicable solution on how the contract should be adapted to reflect the change in circumstances. If the counterparty refuses to enter into renegotiations, it is a breach of contract.[1190] It is not sufficient to formally enter into negotiation talks. The parties are also obliged to pursue the renegotiations as far as possible with the view to reach a solution.[1191] Generally, the view is that the duty to renegotiate implies that the negotiations should be carried out in good faith.[1192] Such require- **312**

[1185] SALACUSE, FILJ 2000. 1319 p. 1321, 1328.
[1186] DRAETTA/LAKE/NANDA, 198; *See also*, HORN, 111, 133.
[1187] BERGER, VJTL 2003, 1347, 1369; PETER, 247.
[1188] RAMBERG, Intern. Transactions, 75.
[1189] BERGER, VJTL 2003, 1347, 1363.
[1190] PETER, J. of Int. Arbitration 1986, 29, 37; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419; GRÖNFORS, 78; SOHLBERG, JT 1996, 972, 974 f.; HORN, 111, 138.
[1191] NASSAR, 179 f.; See also the advisory opinion of the P.C.I.J. in *Railway Traffic between Lithuania and Poland,* Series A/B, No. 42, 109, 166 (Section 31) where it was explained that the parties are obliged not only to enter into renegotiation but also to carry them out as far as possible with a view to reach an agreement.
[1192] PETER, J. of Int. Arbitration 1986, 29, 37 f. DRAETTA/LAKE/NANDA, 198; *See also*, BERGER, VJTL 2003, 1347, 1363. 1369; MEKKI/KLOEPER-PELÈSE, 678. *Compare also*, SALACUSE, FILJ 2000. 1319 p. 1321, 1334; PÉDAMON/CHUAH, 89. *Compare also*, Art. 2.1.15 of the UNIDROIT Principles (2016).GAUCH, in: Gauch/Schmied, Die Rechtsentwicklung an der Schwelle zum 21. Jahrhundert, Zürich 2001, 209, 235 explaining that the duty to renegotiate entail a requirement of "loyal

ments can also be expressly spelled-out in the clause. The standard of "good faith" differs between jurisdictions. For instance, to act in accordance with good faith is not a general principle of English contract law.[1193] What the standard entails is not within the scope of this study. It will merely be noted that meaningful renegotiations with the exchange of rational arguments are required,[1194] as well as a duty to cooperate and act reasonable in the negotiations, and a duty not to refuse or abruptly breakoff renegotiations.[1195] Thus, it must be deemed to entail that the negotiations are carried out in a constructive manner, not be unnecessarily lengthy but also not broken off too early. Furthermore, good faith in renegotiations has been described as an effort to participate in the creation of a successful solution in an efficient manner aiming at a successful solution, taking the negotiations seriously, showing earnest efforts, flexibility and a willingness to consider the needs and interests of the counterparty are other important considerations.[1196] Thus, the duty to renegotiate can generally be seen as satisfied if rejections for adaptation are based on "normal commercial judgement."[1197] Signs of bad faith could be that the counterparty on purpose is delaying the process or is trying to prevent the renegotiations from taking place [1198] The willingness by a party to give up some of its demands in order to reach a solution is a strong indicator that the counterparty has fulfilled its duty of renegotiating in good faith.[1199] In the famous AMINOIL arbitral award, the duty to renegotiate in good faith was described to be understood as: *"Sustained upkeep of the negotiations over a period appropriate to the circumstances; awareness of the interest of the other party; and a persevering quest for an acceptable compromise."*[1200] Conclusively, the duty to renegotiate requires, at least, earnest and serious efforts to negotiate with the intent to reach an agreement.

313 This area is hardly judicable. It will be difficult for a party to argue and prove that the counterparty did not carry out the renegotiations in good faith and was thus the reason for the failed renegotiations.[1201] And, even if it could be proven, it is unlikely that it would entitle a party to any damages, as the renegotiation clause typically does not include an obligation to reach an agreement.[1202] A claim for non-performance would require the court or arbitral tribunal to compare the situation with a successful outcome, which indirectly means that the court is

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and honest" negotiations on the side of each parties.

[1193] Walford and others v Miles and others [1992] 2 AC 128, 138 per Lord Ackner stating: "A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party."

[1194] SOHLBERG, JT 1996, 972, 974.

[1195] PÉDAMON/CHUAH, 89; Comment No. 3 on Art. 2.1.15 of the UNIDROIT Principles (2016). *Compare*, the Official Comment to DCFR III. – 1:110, 715 explaining that it implies that the parties shall have made enough time available for the renegotiation process. *See also*, LANDO/BEALE, 116; Comment No. 5 on Art. 6.2.3 the UNIDROIT Principles (2016 edition), with respect to the PECL and the UNDIROIT Principles, stating that the parties must provide all necessary information and every point of dispute should have been discussed during the renegotiation talks.

[1196] BERGER, VJTL 2003, 1347, 1363. 1364; *Compare*, NASSAR, 180 f.; *The Government of the State of Kuwait v The American Independent Oil Company (Aminoil)* reprinted in I.L.M. 1982, 976, 1014 (Section 70). *See hereto*, Art. Art. 2.1.15 subsection 3 of the UNIDROIT Principles (2016) explaining that it is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

[1197] BERGER, VJTL 2003, 1347, 1369; SOHLBERG, JT 1996, 972, 974.

[1198] BERGER, VJTL 2003, 1347, 1363. 1369.

[1199] NASSAR, 180. *See hereto also*, the International Court of Justice in: *North Sea Continental Shelf: I.C.J Reports 1969, p. 48*. The duty is not fulfilled when either of the parties rigidly insists upon its own position without considering any modification of it. *See hereto also in Swiss law*, BURKHARDT, 274 with reference to BGE 61 II 259, 263 f. where the court reduced the damages to be paid by one party due to the other party's refusal to consider any adaptation of the contract.

[1200] *The Government of the State of Kuwait v The American Independent Oil Company (Aminoil)* reprinted in I.L.M. 1982, 976, 1014 (Sec. 70). *See also*, Art. 2.1.15 subsection 3 of the UNIDROIT Principles (2016).

[1201] BERGER, VJTL 2003, 1347, 1363. 1369; HORN, 111, 138.

[1202] GOUTANDA, VJTL 2003, 1461, 1465; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419 f.; PETER, 247.

assessing the case and thereby "revising" the contract, which is not a workable solution.[1203] It is disputed whether "bad faith" renegotiations entitle the counterparty to a claim for damages.[1204] One author argues that it would only be available in the most extreme cases.[1205] In the PECL, the duty to renegotiate is linked to its own sanction in the last paragraph of Art. 6:111 where it states that "*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*". Compensation will typically consist of damages for the harm caused by a refusal to negotiate, the breaking off the negotiations in bad faith[1206] or damages for delay.[1207] Loss suffered by the counterparty due to bad faith renegotiations, e.g., where one party did not reveal certain facts or it otherwise is clear that they never intended to reach a solution, compensation can presumably be claimed for negotiation expenses and its preparations (feasibility studies undertaken etc.).[1208] To work around the problem, the parties could agree on liquidated damages in the clause for the refusal to participate in the renegotiations.[1209] Also, the duty to renegotiate and the lack of good faith by a party may have an influence on the court or arbitral tribunal that ultimately is carrying out the adaptation of the contract.[1210] The refusal by one party to consider an adaptation may influence the court in awarding potential damages as it can be viewed as a failure to mitigate.[1211]

b) A Duty to Agree or a Duty to Use Best Efforts to Agree?

The general view is that the duty to renegotiate (in good faith) does not include an obligation to reach an agreement on how the contract should be adapted.[1212] Thus, the failure to agree is not a breach of contract. While there is no obligation for the parties to agree it has been suggested that there is a duty to use "best efforts" to reach an agreement.[1213] Does such a standard oblige the parties to do everything possible to renegotiate a solution in order to overcome the obstacle created by the supervening event? "Best efforts" is a vague concept **314**

[1203] BERGER, VJTL 2003, 1347, 1369.
[1204] HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 188; HORN, 111, 138. *See also*, Art. 2.117(3) PECL where the court is entitled to award damages in case of refusal to negotiate or if the negotiations are broken off in bad faith.
[1205] HORN, Neuverhandlungspflicht, AcP 1981, 255, 287.
[1206] LANDO/BEALE, 116.
[1207] BERGER, VJTL 2003, 1347, 1369.
[1208] *Compare*, HOUTTE, Unif. L. Rev. 2014, 550, 554 f.; BERGER, VJTL 2003, 1347, 1369.
[1209] BERGER, VJTL 2003, 1347, 1369; HORN, Neuverhandlungspflicht, AcP 1981, 255,287.
[1210] HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 190; BERNARDINI, JWELB 2008, 98, 105; FRICK, 186.
[1211] *See e.g.,* BGE 61 II 259, 263 f. where the Swiss federal Tribunal reduced the damages awarded due to, among other reasons, the claimants failure to mitigate damage by rigidly adhering to the contract and the refusal to in any way accommo date the quest for a reasonable adjustment to reflect the new circumstances. *See also*, RGZ 106, 7 p. 9 ff. where the German Supreme Court explained that only if the tenant refused an adaptation of the initially agreed purchase price for the option to buy a certain piece of land could the owner refuse to sell the land. *Compare hereto*, NJA 1923 s 20; NJA 1925 s 624.
[1212] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419; KOLO/WALDE, JWI 2000, 5, 46; NASSAR, 180 and 182; PETER, J. of Int. Arbitration 1986, 29, 38; GAUCH, in: Gauch/Schmied, Die Rechtsentwicklung an der Schwelle zum 21. Jahrhundert, Zürich 2001, 209, 235 SALACUSE, FILJ 2000. 1319 p. 1321, 1334; DRAETTA/LAKE/NANDA, 197. *See also*, *The Government of the State of Kuwait v The American Independent Oil Company (Aminoil)* reprinted in I.L.M. 1982, 976, 1004 (Sec. 24) where the arbitrators explained that: "an obligation to negotiate is not an obligation to agree". Same view in the advisory opinion of the P.C.I.J. in *Railway Traffic between Lithuania and Poland,* Series A/B, No. 42, 109, 166 (Section 31). *Compare also*, ICC Case No. 2478 of 1974, YBCA 1978, 222, 222. *To the contrary see*, OPPETIT, (1974) 794 and 807; MOMBERG, 76 being of the opinion that there is a duty to agree if the counterparty presented a fair and reasonable proposal for adaptation.
[1213] BERGER, VJTL 2003, 1347, 1367 f.; PÉDAMON/CHUAH, 86; NASSAR, 182; FLETCHER/MISTELIS/CREMONA, 281. *See also*, KOLO/WALDE, JWI 2000, 5, 46 suggesting that the requirement to use „best endeavours" follows from the obligation to negotiate in good faith.

but often perceived as a very stringent standard.[1214] However, while being a stringent standard it does not imply an obligation to agree on an adaptation of the contract.[1215] Sometimes, the "best effort" standard is understood by practitioners as an obligation to make efforts that may even be disproportionate to the benefits the party receive under the contract.[1216] It could be questioned whether such standard should be implied in the duty to renegotiate. On the other hand, arguably, in a renegotiation situation, it is not unreasonable to require that a party makes concessions that are not necessarily beneficial to it and that the right to safeguard its own interests is not absolute. As the standard is vague, the careful drafter could add a carve-out to avoid results that are completely disproportionate to their own interests.[1217] That follows indirectly from the fact that a duty to renegotiate cannot be deemed to mean that the renegotiated result creates hardship for the other party. It is however a question of degree. In order to motivate the parties to do their utmost to reach an agreement during the renegotiation phase, and to avoid the issue of "bad faith" renegotiations or even the refusal to engage in renegotiations, the failure to reach an agreement should be linked to legal sanctions.[1218] In that way the parties have an understanding that if they are unwilling to make any concessions, the arbitrator or judge will do it for them. The link to legal sanctions is probably the most efficient way to create an incentive to take the renegotiations seriously.

VI. Summary

315 Contracting parties must get rid of the idea that contracts should stay in the same shape throughout the entire contract term. A renegotiation clause provides the contract with important flexibility, which often is needed in long-term contracts exposed to the issue of change in circumstances. The value of proactively providing a solution in the contract by way of including a renegotiation clause should not be underestimated. The renegotiation clause has primarily two purposes. Firstly, to make sure that the main purpose of the transaction can be carried out despite a disruption by a change in circumstances. Secondly, to get to a revised contract without jeopardising the social capital already invested i.e., to reach an agreement in consensus. Thus, for a renegotiation clause to provide a solution and not be a source of dispute, careful drafting is required. As far as possible, the renegotiation clause should be tailored to meet the specific needs and objectives of the transaction. Attention must also be given to the renegotiation procedure so that the clause can be successfully invoked and a solution can be provided in a timely manner. A renegotiation clause must at a minimum contain clearly defined trigger event(s) to avoid disputes about whether the clause has been legitimately invoked, a clear framework for the renegotiation process to avoid friction and bad will and, remedial consequences in the event of unsuccessful renegotiations.

B. Unsuccessful Renegotiations

316 In the event that the renegotiation talks *do* break down, it is of great importance that the renegotiation clause provides for a smooth transition from failed renegotiations to third party intervention to not to kill the last pinch of hope in finding an amicable solution preventing the social capital from being destroyed.[1219]

[1214] ADAMS,12 f.
[1215] BERNARDINI, JWELB 2008, 98, 105.
[1216] ADAMS, 12 f.
[1217] *Compare*, ADAMS, 18 f.
[1218] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 420; PETER, J. of Int. Arbitration 1986, 29, 38. *Compare*, BRUNNER, 515; HORN, 111, 138.
[1219] SOHLBERG, JT 1996, 972, 974.

I. Legal Sanctions

If the renegotiations prove to be unsuccessful, then the contract should continue in full force with the same effect on its original terms,[1220] unless the contract states otherwise. To be meaningful, the renegotiation clause should be provided with "teeth" not only in the event that the renegotiations break down but also for the situation that a party refuses to engage in renegotiations.[1221] A link to appropriate legal consequences creates an understanding for how it would go if the parties were unwilling to make any concessions to find a solution.[1222] There are mainly three sanctions available: Termination, suspension or intervention by third party, state court or arbitral tribunal. The clause could for instance, provide that the issue *automatically* is referred to a local court, arbitral tribunal or that it leads to the termination (or suspension) of the contract.[1223] It is probably fairly common that failed renegotiations are left unsanctioned or formulated vaguely.[1224] One reason for that could be that remedies such as termination or suspension simply are too harsh and do not correspond to the needs of flexibility in long-term international business contracts where the parties already invested a great deal of social capital and made considerable investments.[1225] Nevertheless, the parties can choose to build in a mechanism so that either the contract automatically terminates or the contractual duties are suspended for a certain time if the renegotiations prove to be unsuccessful.[1226] This may be a very efficient way to assure that the parties take the renegotiations seriously but it is generally counterproductive to the desired effect of a renegotiation clause aiming to keep the contract alive.[1227] Alternatively, the renegotiation clause provides that the adaptation problem will be resolved through third party intervention or by a state judge or arbitrator.[1228] **317**

II. Dispute Resolution Methods

A less drastic and perhaps more pragmatic solution than providing for the suspension or termination of the contract that also gives effect to the actual purpose of the renegotiation clause is to provide for an adaptation of the contract by an external party. There are two categories of dispute resolution methods to consider. An adjudicative process, whereby a judge or arbitrator reviews evidence and argumentation and determines the outcome, or a consensual process, whereby the parties attempt to reach agreement through mediation, conciliation, or negotiation. With respect to the adjudicative process, arbitration is preferred for several reasons. Firstly, there are generally limited grounds for challenging a decision,[1229] which is of particular value in projects where time is of the essence. Secondly, arbitration provides a neutral forum, which can be of great value in a dispute where the parties come from different jurisdictions and cultural backgrounds.[1230] The parties could also decide **318**

[1220] BERGER, VJTL 2003, 1347, 1369; DRAETTA/LAKE/NANDA, 198.
[1221] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 419 f.
[1222] *Compare*, SOHLBERG, JT 1996, 972, 975; BRUNNER, 515.
[1223] SCHMITTHOFF, Hardship and Intervener Clauses, 415, 420; PETER, J. of Int. Arbitration 1986, 29, 38. *See hereto also*, the "ICC Hardship Clause 2003" which clearly provides that the consequences of the clause are negotiation or termination.
[1224] KRÖLL, 154.
[1225] *Compare*, PETER, J. of Int. Arbitration 1986, 29, 38; SOHLBERG, JT 1996, 972, 977 f.
[1226] DRAETTA/LAKE/NANDA, 197. *See hereto e.g.*, the "ICC Hardship Clause 2003" where the party invoking the clause is entitled to terminate the contract if the renegotiations fail.
[1227] *Compare*, PETER, 239.
[1228] PETER, J. of Int. Arbitration 1986, 29, 39; DRAETTA/LAKE/NANDA, 197; SCHMITTHOFF, Hardship and Intervener Clauses, 415, 420.
[1229] RAMBERG, Intern. Transactions, 76.
[1230] RAMBERG, Intern. Transactions, 75.

on the language(s) of the proceedings.[1231] The two latter points are relevant from a bargaining position point of view. A party that is required to submit a case for resolution in the country of the counterparty most likely needs to instruct local lawyers and thereby incurs additional expenses. Depending on the financial situation of the parties that may obviously affect the bargaining position during the renegotiations and give one party an advantage.[1232] Another advantage with arbitration is that the parties could provide for a certain limited time to be spent on each stage of arbitration with extensions if appropriate or required in the opinion of the arbitrators.[1233] Arbitration is frequently provided for in hardship clauses[1234] and in international contracts.[1235] Arbitration also has the advantage of the parties being able to decide on an arbitrator with a certain expertise in the field, certain technical skills or a certain number of years of experience in handling disputes of the same kind. A contributing factor is also that arbitral proceedings can be kept confidential.[1236] Lastly, arbitration may come across as less disruptive and hostile than proceedings before a state court.

III. Elements of a Two-Tiered Dispute Resolution Clause

319 As argued above, if possible, an abrupt transition from failed renegotiations to arbitration should be avoided as that could destroy any remaining good will between the parties and thus ruin the last chances to work out a solution.[1237] As rightly pointed out in the legal doctrine, adaptation and renegotiation are consensual procedures.[1238] Thus, the preferred method, at least in the first instance following failed renegotiations, is mediation/conciliation.[1239] It provides an additional buffer for continued negotiations in the presence of a third party. The parties can provide for a smoother transition by using a two-tiered dispute resolution clause. The renegotiation clause could provide that prior to any party spring to arbitration to settle the dispute, the parties must first resort to mediation, conciliation, or negotiation with the help of a neutral advisor, referee, board or the like.[1240] Arbitration can only be initiated after the expiration of a certain period of time after submitting the issue to the mediator or until a settlement proposal is delivered (also to be done within a certain prescribed period of time). The idea behind a two-tiered clause is simply to provide an additional attempt to reach a solution with the help of a neutral party but without initiating a process that makes the parties prepare and gather arguments for claiming and pleading against each other in a potentially long-lasting fight before a court or international arbitral tribunal. Thus, mediation provides a less "hostile" forum than that of litigation or arbitration so there may be a better chance of maintaining a good business relationship.[1241]

[1231] UNCITRAL Legal Guide, Section 22.
[1232] RAMBERG, Intern. Transactions, 75 f.
[1233] RAMBERG, Intern. Transactions, 75 f. Whether it is possible to provide such limitation must be verified in the national arbitration rules.
[1234] HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 189;
[1235] RAMBERG, Intern. Transactions, 75.
[1236] *Compare*, RAMBERG, Intern. Transactions, 76.
[1237] SOHLBERG, JT 1996, 972, 974.
[1238] BERGER, VJTL 2003, 1347, 1380.
[1239] SOHLBERG, JT 1996, 972, 974; HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 188, explaining that third party interveners may have an important role in assisting the parties. *Compare also*, SUND-NORRGÅRD, 14; *See also*, Section 12, the UNCITRAL Legal Guide.
[1240] *Compare*, SALACUSE, FILJ 2000, 1319, 1363; BERGER, VJTL 2003, 1347, 1379; SOHLBERG, JT 1996, 972, 974; MEKKI/KLOEPER-PELÈSE, 676; BURKHARDT, 60.
[1241] *Compare*, Section 13, The UNCITRAL Legal Guide.

1. The First-Tier: Mediation

The benefit of mediation is that it is a voluntary non-binding process where an external impartial third party, be it named a mediator, conciliator, referee or intervener,[1242] (hereinafter collectively referred to as, "mediation" or "mediator") trained to catch the last bit of willingness to cooperate, assists the parties in exploring a potential solution that is mutually acceptable.[1243] The mediator can provide a proposal for settlement.[1244] It would be wise to provide in the renegotiation clause that the mediator should deliver a proposal for settlement as it should not be underestimated that a lot of prestige is involved, making it easier to accept a proposal coming from a third party versus an offer from the counterparty.[1245] To fulfil its purpose of being speedy and inexpensive, it is recommended that a single mediator is agreed upon, to provide for simple procedures.[1246] This phase should be kept informal and amicable.[1247] Moreover, this kind of alternative dispute resolution process generally benefits from not being limited to applicable law considerations and procedural rules, which are beneficial to the issue of the adaptation of long-term contracts.[1248] An alternative pre-arbitral solution, in projects where there are resources for such, is that the parties appoint a committee, advisory board or panel of independent experts that need to be consulted prior to resorting to arbitration.[1249] **320**

To be considered is whether the parties should be given the right to redraw from the conciliation attempts. The UNCITRAL Conciliation Rules provide that each party has the freedom to participate or to redraw from the mediation attempts at any time in order to avoid adverse consequences e.g., delays in resorting to arbitration or court proceedings. Such "no-fault" termination is argued to reduce potential adverse effects that conciliation may have if, for example, one party is unwilling to make any concessions in an obvious manner[1250] It is a fair point that an obligation to enter into a phase of mediation may cause unnecessary delays. The renegotiation clause can instead provide for a limited time frame within which the mediation efforts must be carried out. The crux of the matter is rather to find a mediator with the right insights, good tactics, integrity, commercial sense and experience in the specific field of law.[1251] That should preferably be done up front so that the mediator is named in the contract.[1252] Instead of a two-tiered clause, the parties could agree in advance that the mediator will formulate a compulsory rule that binds the parties.[1253] The decision by the mediator would however only be binding in the sense of having the effect of a contract and not an award.[1254] However, a careful choice of a neutral person with the correct qualifications and expertise may make the parties comfortable going that route.[1255] I believe such a solution is not advisable as it is important to have a decision that is enforceable and that can be challenged on formal grounds, providing better ground for a careful and impartial procedure. **321**

[1242] DRAETTA/LAKE/NANDA, 197; PETER, J. of Int. Arbitration 1986, 29, 39.
[1243] *Compare*, SALACUSE, FILJ 2000. 1319 p. 1321, 1363 and 1369 f.; SOHLBERG, JT 1996, 972, 974.
[1244] Section 12, The UNCITRAL Legal Guide.
[1245] *Compare*, HERRMANN, 217, 226.
[1246] HERRMANN, 217, 227 f.
[1247] HERRMANN, 217, 230.
[1248] BERGER, VJTL 2003, 1347, 1379 f.
[1249] SOHLBERG, JT 1996, 972, 976; *See also*, SALACUSE, FILJ 2000. 1319 p. 1321, 1368; PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 111.
[1250] UNCITRAL Conciliation Rules, Art. 15 subsection (d); HERRMANN, 217, 224.
[1251] *Compare*, HERRMANN, 217, 226 also stating that it would be helpful to assist parties by providing lists of panels or of qualified and experienced conciliators. *See also*, SOHLBERG, JT 1996, 972, 975.
[1252] *Compare*, Section 17, UNCITRAL Legal Guides.
[1253] *Compare*, SALACUSE, FILJ 2000. 1319 p. 1321, 1334; BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 164.
[1254] HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 177 f.
[1255] *Compare*, HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 176.

Alternatively, it could be provided that the mediator makes a binding decision that can be appealed by either party to an arbitral tribunal.[1256] The next step, if the mediation attempts fail, should be to resort to arbitration.

2. The Second Tier: Arbitration

322 Arbitration or litigation is a necessary threat to be included in the clause in the event the renegotiations fail. Arbitration is the preferred method to use as a means of achieving an adaptation of the contract. [1257] If the parties wish for arbitration rather than state court proceedings, they should expressly provide for that in the contract and link it to the renegotiation clause.[1258] Preferably the renegotiation clause itself contains the arbitration clause. The focus herein is on the renegotiation clause and the practical problems that the parties may encounter if they wish for the arbitrator to ultimately adapt the contract to the new circumstances. Thus, the many consequences and potential pitfalls in drafting the arbitration agreement itself are generally beyond the scope of this study. It will only briefly be mentioned that, in order to avoid disruptions, the parties may want to agree on the number of arbitrators (typically uneven) and how the appointment of arbitrators should be carried out, as well as the selection of an arbitral institution or ad hoc rules, place of arbitration and the language of the proceeding.

a) Practical Problems with Renegotiation Clauses and Arbitration

323 In the individual case there are basically three hurdles to overcome in order to decide whether the arbitrator has the power to adapt the contract. The contract drafter needs to pay attention to the arbitration agreement, the law applicable to the arbitration (i.e. the national arbitration law) and the substantive laws applicable to the issue of changed circumstances. Thus, three different legal sources must be considered where a potential clash between the substantive laws and procedural laws can hinder the renegotiation clause from being invoked with success.[1259]

aa) The Appointment of the Arbitrator

324 The clause may set forth how the arbitrators should be selected. The contracting parties can steer who is to carry out the actual adaptation of the contract and provide a solution if the renegotiation efforts are unsuccessful. The parties may wish to require that the arbitrators have specific qualifications or expertise[1260] e.g., at least 10 years of experience with technology-related disputes. The challenge may, however, be to find an arbitrator that is working towards the parties' common interest in continuing to cooperate as the main goal of the proceedings[1261] and, at the same time, uphold the legitimate expectations of the bargain first struck.

bb) Empowering the Arbitrator

325 Arbitrators are generally reluctant to revise contracts to reflect change in circumstances without that such authority being provided for in the contract.[1262] However, if the parties have expressed such intentions in the contract, arbitrators, on the basis of the principle of pacta sunt servanda, have been willing to carry out such

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[1256] *Compare*, FRICK, 188.
[1257] HORN, The Concepts of Adaptation and Renegotiation, 11.
[1258] Section 25, The UNCITRAL Legal Guidelines.
[1259] FLETCHER/MISTELIS/CREMONA, 276.
[1260] Section 40, The UNCITRAL Legal Guidelines.
[1261] SOHLBERG, JT 1996, 972, 975.
[1262] BERGER, VJTL 2003, 1347, 1354 f.; FLETCHER/MISTELIS/CREMONA, 277. *See hereto e.g.*, ICC Case No. 1512 of 1971, Collection of Arbitral Awards I, 3, 4; Ad hoc UNCITRAL Award of May 4, 1999, YBCA 2000, 13, 61.

adaptations.[1263] To avoid the uncertainty of going the route around an interpretation of the common intentions of the parties, the parties should grant such power directly in the contract.[1264] In the well-known, and often quoted in this context, AMINOIL decision, the arbitral tribunal explained that: "*there can be no doubt that, speaking generally, a tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations - or to modify a contract - unless that right is conferred upon it by law, or by the express consent of the parties*."[1265] Thus, if law or contract expressly provide the right to adapt, then it is possible for the arbitrator to modify the contract. It must be clear from the arbitration agreement that the parties intend to provide the arbitrator with competencies going beyond normal dispute adjudication. Thus, subject to applicable law aspects, which will be dealt with below, it is advisable for the contracting parties to expressly empower the arbitrator with the authority to adapt the contract to reflect the change in circumstances, the manner and also its limitations.[1266] A mere reference to arbitration in case of failed renegotiations is not sufficient as arbitrators normally lack the power to modify contracts.[1267] The arbitration clause should expressly grant the arbitrator with the right to adapt the contract and should preferably be clearly linked to or included in the renegotiation clause.[1268] If the parties spell out in the renegotiation clause and arbitration agreement that the arbitrator is empowered to adapt the contract to reflect the new commercial situation, and the applicable substantive law permits such adjustment by an arbitrator, then the question still remains whether the task to adapt the contract, falls within the judicial function i.e., whether they are procedurally authorised to exercise such a right.[1269] Thus, the renegotiation clause may encounter some practical problems to function in the way contemplated by the parties.

cc) The Power to Adapt

Firstly, the arbitrator has to turn to the laws of the seat of arbitration to decide whether the national arbitration act rejects, is silent on this point or expressly provides the arbitrator with the power to carry out an adaptation of the contract. Secondly, the arbitrator must turn to the contract to see if he/she is empowered to adapt the contract and to what extent. As a general rule, if the judge can adapt the contract, the arbitrator is empowered with such **326**

[1263] DRAETTA/LAKE/NANDA, 202. *See hereto also*, FLETCHER/MISTELIS/CREMONA, 273 and that in such cases the principle of pacta sunt servanda speaks for such authority of rather than against. *See also e.g.*, NJW 1981, 2241 where the rent to be paid was linked to the market price of rye. Due to annual inflation the price for rye did not follow the general price increase of almost 100 per cent. The German Federal Court of Justice held that there was an implied term giving the parties the right to request adaptation at certain intervals during the term of the contract as the intention of the parties in linking the rent to the index for rye was to protect the owner against inflation. The same outcome is found in *NJA 1983 s. 385* where the parties linked the rent to the index for autumn wheat where the price rose from SEK 31 to SEK 85 while the consumer price index rose from 100 to 601 units. *Also*, interestingly, in *NDS 1985 s. 234* a Norwegian arbitration case concerning two long-term charter agreements between two shipping companies, the arbitrators carried out an adjustment of a fairly technical and complicated currency clause linked to the dollar. Due to an unexpected and not temporary rise in the dollar, the shipping company suffered severe financial difficulties. The arbitral tribunal basing its decision on §36 of the Norwegian Contracts Act motivated the adaptation by explaining that a reasonable economic exchange for both parties was a necessary prerequi site for the continued cooperation in a contract with a long duration as that clearly was the common intention of the parties. The parties had linked the currency clause to the dollar to ensure that the shipping company would receive sufficient revenues in NOK, since the expenses were paid in this currency. In all three cases it was clear that the common intention of the parties was to link the rent to an index in order to reflect cost developments.

[1264] FOUCHARD/GAILLARD/GOLDMAN, 28.

[1265] Government of the State of Kuweit v American Independent Oil Company (AMINOIL) in: International Legal Materials 21 (1982), Section 74, 976, 1015 f.

[1266] BERNARDINI, JWELB 2008, 98, 107; FLETCHER/MISTELIS/CREMONA, 276.

[1267] BERNARDINI, JWELB 2008, 98, 107; BERGER, VJTL 2003, 1347, 1379.

[1268] FLETCHER/MISTELIS/CREMONA, 276; BERNARDINI, JWELB 2008, 98, 107; BERGER, VJTL 2003, 1347, 1378 f.

[1269] BERGER, VJTL 2003, 1347, 1373; FLETCHER/MISTELIS/CREMONA, 276.

authority as well.[1270] Thus, the laws governing the contract may expressly provide for the right to adapt contracts to reflect changed circumstances giving the arbitrators the same authority.[1271] In such instances however, it should be noted that it may not be sufficient to rely on a potential hardship exception in the laws governing the contract as they may operate within more narrow confines than the hardship situation described in the renegotiation clause and thus the arbitrator cannot rely on the law for its right to adapt the contract.[1272] It is therefore important to explicitly empower the arbitrator in the renegotiation clause. Also, if domestic arbitration law confers the arbitrator with the right to adapt the contract, the validity of the renegotiation clause and the standards provided for in the clause by the parties and the methods for adaptation, are still subject to the substantive laws governing the contract.[1273]

dd) The Procedural Problem: "An Indisputable Dispute"

327 A requirement for initiating arbitration is that a dispute exists.[1274] Here a practical problem arises with respect to failed renegotiations. In assessing whether the requirements for triggering the renegotiation clause have been met, the arbitrator does not face any problems, as there is a dispute to resolve as to the interpretation of the applicability of the clause. Thus, the arbitrator clearly acts within their authority. [1275] Problems only arise when the parties refer the task to adapt the contract to reflect the new circumstances to the arbitral tribunal. Whether a "dispute" or "legal dispute" exists in such a situation is heavily debated and still pending, indirectly questioning whether contract adaptation is arbitration.[1276] Thus, on a procedural level, it must be decided whether the adaptation of a contract constitutes arbitration in the eyes of the applicable law. The recognition and enforcement of the arbitral award (i.e., the revised contract) is dependent on this question.[1277] Grounds for excluding the jurisdiction of the arbitral tribunal is that revision of the contract is seen as a creative act rather than a legal decision,[1278] and that it only is a "mere" difference of opinion and not a dispute to grant a "yes" or a "no".[1279] An expansion on this issue is outside the scope of this study. It is merely noted that a practical problem exists, that it goes in the direction of giving the arbitrator such power,[1280] and that some newer national arbitration rules give signs of reflecting the need to provide the arbitrators with such authority,[1281] which should be welcomed. Scholarly writings also seem to be in favour of extending the arbitrator's power.[1282]

328 A broad understanding of the arbitrators' competencies should be promoted. In my view, as long as the arbitration act does not expressly forbid it and the parties have expressly empowered the arbitrator in the arbitration agreement linking it to the renegotiation clause there is no reason to reject the arbitrator with the procedural

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[1270] BERNARDINI, JWELB 2008, 98, 107 f.; HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce, 173, 180; FLETCHER/MISTELIS/CREMONA, 279; NICKLISCH, RIW 1989, 15, 18.
[1271] HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce, 173, 179.
[1272] PETER, J. of Int. Arbitration 1986, 29, 40.
[1273] FLETCHER/MISTELIS/CREMONA, 280; HORN, Die Anpassung langfristiger Verträge, 9, 37.
[1274] BERGER, VJTL 2003, 1347, 1371.
[1275] BERGER, VJTL 2003, 1347, 1371; PETER, J. of Int. Arbitration 1986, 29, 40.
[1276] BERGER, VJTL 2003, 1347, 1372; BONELL, Italian National Reports 1978, 221, 227.
[1277] PETER, J. of Int. Arbitration 1986, 29, 42.
[1278] BERGER, VJTL 2003, 1347, 1373.
[1279] BRUNNER, 496.
[1280] BERGER, VJTL 2003, 1347, 1375 f.; KRÖLL, 305; FLETCHER/MISTELIS/CREMONA, 284 f.; KRÖLL, 305.
[1281] *See e.g.,* Sec. 1(2) of the Swedish Arbitration Act of 1999; Art. 1020(4) of the Dutch Arbitration Act of 1986 if the parties expressly provided the arbitrator with such powers.
[1282] BERGER, VJTL 2003, 1347, 1375; FLETCHER/MISTELIS/CREMONA, 284 f.; BRUNNER, 496; FRICK, 194 f. arguing that if the substantive requisites for contract adaptation are met, the arbitrator should be given the same power as long as the lex arbitri does not prohibit such right, i.e., when it is silent on this point.

authority in such situations. The issue of change in circumstances is an overriding risk in long-term contracts of international character and since arbitration is the natural dispute resolution method they should also be able to deal with the problem.[1283] However, at present date, in order to provide the best possible chance of an effective allocation of jurisdiction, the parties should provide a clear link between the arbitral tribunals authority to adapt the contract, the renegotiation clause as well as the specific areas or terms that should be adapted.[1284] The parties must also choose the seat of arbitration wisely. One legal commentator on the issue advocates that if the set of rules neither empower the arbitrator nor reject the arbitrator with the power, then the arbitrator should reasonably be provided with the same adaptation power as the national courts have, in cases where the substantive conditions of the applicable laws for a contract adaptation are met.[1285] However, since there is no clear position, the risk is that if only substantive law or the contract allows for adaptation of the contract, but the arbitration rules reject such power (or are silent), then it will not result in an enforceable arbitral award but will have a mere contractual effect.[1286]

b) Circumventing the Procedural Problem

A potential way to circumvent the problem, which may be a pragmatic way to go about also for other reasons, is to provide in the renegotiation clause (similar to the hardship exception in §313 BGB, that following failed renegotiations) the disadvantaged party must, within a certain period of time, make a specific request for adaptation (e.g., reduction of price) that the court, in turn, must grant or deny following discussion with the parties. This may, in my view, provide a more suitable solution, not only from the perspective that it solves the issue of whether the arbitral tribunal is procedurally authorised to carry out a modification, but also from the perspective that the parties obviously are most suitable in finding the best solution to the change in circumstances as only they have the full picture of the transaction. It also speeds up the process, as the arbitrator does not need to spend time on drafting a proposal on how the contract should be adapted, but needs to grant or deny a proposal for adaptation. And, it most likely motivates the party adversely affected by the event, to provide its "best possible" and reasonable final proposal with the risk that it otherwise may be rejected. One question to consider is whether the renegotiation clause should provide the arbitrator not only with the right to restate the terms for the event such that a final adaptation proposal is rejected, but also whether the arbitrator should be given the right to terminate the contract. Such a solution may, however, open up for strategies on the side of a contracting party that wishes for the contract to be terminate rather than to have it adapted to the new commercial situation. Another potential solution is that the parties can free the arbitrator from the constraints of applicable substantive laws by way of having the arbitrator decide as an "amiable compositeur".[1287] That is, however, a more uncertain route to go. Even when arbitrators act in that role they are generally reluctant to interpret their powers broadly so as to also extend to gap filling and adaptation, although some take that view.[1288] A downside is that it opens up for a less controlled adaptation of the contract. **329**

[1283] *Compare*, FLETCHER/MISTELIS/CREMONA, 270.
[1284] *Compare*, BERGER, VJTL 2003, 1347, 1379; PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 81 f.; CRAIG/PARK/PAULSSON, 115.
[1285] FRICK, 194 f. and 197.
[1286] FRICK, 193.
[1287] FLETCHER/MISTELIS/CREMONA, 271.
[1288] FOUCHARD/GAILLARD/GOLDMAN, 26.

3. Applicable Law Considerations

330 For the renegotiation clause to be invoked successfully it is advisable that the parties make an active choice both with respect to the substantive law governing the contract as well as the law governing the arbitration agreement. The law governing the contract does not need to be the same law governing the arbitration agreement.[1289] In the following, some applicable law considerations with respect to the jurisdictions covered herein will be considered with the sole aim of promoting the effectiveness of the renegotiation clause acknowledging that it is unlikely to be the only or even the main factor in these decisions.

a) The Choice of Law Clause

331 The choice of law is important for several reasons. With respect to the issue of change in circumstances, the party must assess what law is "favourable" in a potential litigation or arbitral proceeding. That requires a fairly thorough analysis. Unless the contract expressly provides for the right to adapt the contract in case of changed circumstances, the arbitrator must turn to the laws governing the contract to decide whether the substantive laws allow for judicial contract adaptation. The comparative analysis in Part II shows that the hardship exceptions in Sweden, Switzerland and Germany as well as the UNIDROIT Principles all provide for a solution to the issue of change in circumstances and allow for judge-led adaptation. English common law neither allows judicial contractual adaptation nor recognises the doctrine of change in circumstances or hardship as a matter of substantive law. Thus, depending on how well the renegotiation clause is drafted and whether it provides for arbitration or not, the parties may want to avoid litigation in England. However, also with respect to Sweden, Switzerland and Germany, the parties may encounter problems. It must be considered whether the hardship situation contemplated in the renegotiation clause corresponds with the hardship exception provided in the chosen jurisdiction. If the definition of hardship in the clause is broader in scope than the domestic hardship exception in e.g., §36 AvtL, Art. 2(2) ZGB or §313 BGB, then contract adaptation may be excluded in more liberal jurisdictions as well.[1290] Thus, a clearly worded renegotiation clause conferring the arbitrator or court with the right to adapt the contract to the new commercial realities is therefore key to showing that the common intention of the parties is the wish for contract adaptation also in situations when hardship is more broadly defined than under the laws governing the contract. Furthermore, the validity of the adaptation clause, the adaptation standards provided for in the clause by the parties and the methods of adaptation, are all subject to the assessment of the substantive laws governing the contract.[1291] Also a well-drafted clause may lead to a disagreement exposing the renegotiation clause to interpretation by state court or arbitral tribunal applying the substantive law in the interpretation and contract construction. Moreover, the choice of law can have an impact on the bargaining powers. A party that is in a weak financial position may be more reluctant to initiate arbitration or court proceedings if that entails to getting a legal opinion of local lawyers probably at considerable costs.[1292] Thus, while being a fairly technical question, it may have an impact on the parties bargaining positions. To avoid the problem, the parties may chose the UNIDROIT Principles as the law governing the contract or decide for a third neutral country.

[1289] CRAIG/PARK/PAULSSON, 107.
[1290] *Compare*, PETER, J. of Int. Arbitration 1986, 29, 40.
[1291] FLETCHER/MISTELIS/CREMONA, 280.
[1292] RAMBERG, Intern. Transactions, 79.

b) The Place of Arbitration

The parties should indicate the seat of arbitration and thereby where the arbitral award will be issued. The legal place (seat) will in most cases decide the lex arbitri i.e. the arbitration law governing the arbitral proceedings, and the courts of that jurisdiction will have a supervisory function.[1293] Whether the arbitrators are procedurally authorised to revise the contract will be decided by the lex arbitri. In order for the arbitrators to be able to issue an enforceable award, it must be assured that the set of applicable arbitration rules provides the arbitrators with the power to adapt contracts. Thus, the parties should wisely consider the seat of arbitration to find a legal environment that suits their transaction and that meets the need for modification of the contract. The many other important consequences of the choice of the seat of arbitration are beyond the scope of this research. For example, in some jurisdictions it is required that the arbitrators are of local nationality or admitted to the local bar association.[1294] Herein, it will be limited to potential issues regarding the arbitrators' right to modify the contract in order to provide an enforceable award. It is only noted that the venues of Sweden, Switzerland and the UK are considered arbitration-friendly states.[1295] **332**

aa) Arbitral Adaptation According to the Laws of England, Germany, Sweden and Switzerland

The recognition and enforcement of the arbitral award is dependent on whether the arbitrators are procedurally authorised to carry out the adaptation of a contract. It must be decided whether in the eyes of the applicable law the activity is considered arbitration. Some national arbitral acts provide for that right, if expressly agreed on by the parties, while others reject such power or are silent on the point. If the applicable set of arbitration rules is silent on this point, it is argued by some legal scholars that the arbitrator reasonably should be provided with the same adaptation power as the national courts have, in cases where the substantive conditions of the applicable laws for a contract adaptation are met.[1296] That view is not firmly settled. In what follows, the position of the arbitration laws of England, Germany, Sweden, Switzerland will be considered. **333**

The English Arbitration Act of 1996 section 1(a) provides that "the objective of arbitration is to obtain the fair resolution of disputes...". Section 82(1) defines "dispute" in a broad manner. It provides that "dispute" also includes "any difference". By that, the arbitrator has the right to settle "mere differences of opinion" if the parties have provided for an arbitration agreement to settle disputes.[1297] It is also argued that where there are clear unresolved disagreements following the completion of negotiations inter partes the matter is generally regarded to have reached the stage of a "dispute".[1298] It thus follows that, if the arbitration agreement is clearly worded, the parties can then empower the arbitrator with the jurisdiction to adapt the terms of the contract.[1299] Case law indicates that a liberal interpretation of arbitration agreements is taken in order to provide for the continuance of the contract if that is the intention of the parties and it promotes business efficiency.[1300] **334**

[1293] PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 11 f.
[1294] PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 27.
[1295] PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 29.
[1296] FRICK, 194 ff. *See also*, BRUNNER, 494; BERGER, VJTL 2003, 1347, 1375 ff.
[1297] TWEEDDALE, 510; BERGER, VJTL 2003, 1347, 1376.
[1298] MERKIN/FLANNERY, 40.
[1299] BERGER, VJTL 2003, 1347, 1376; MUSTILL/BOYD, 151. *See hereto also*, The Queensland Electricity Generating Board v New Hope Collieries Pty Ltd. [1989] 1 Lloyd's Rep., 205, 208 and 210 where the court explained that if an arbitration clause is drafted with appropriate clarity it could entail a complete re-writing of the price formula in the contract by the arbitrator.
[1300] *Compare,* Vosper Thornycroft Ltd. v Ministry of Defence [1976] QB 1 Lloyd's Rep., 58, 61, where Mr. Justice Ackner explained that the arbitration clause referring to

335 The Swedish Arbitration Act of 1999 (*Sw.* Lag 1999:116 om skiljeförfarande) provides in Sec. 1(2) that "the filling of gaps in contracts can also be referred to arbitrators". In some places in the legal literature this is viewed as a right to supplement or adapt contracts. In my opinion it could be questioned whether "the filling of gaps" Sec. 1(2) is to be understood as if this entails a "supplementary opinion" by the arbitrator (i.e., where the contract is incomplete from the beginning) or if it also is intended to cover opinions by the arbitrator which adjust the legal rights and duties of the parties in the contract when the terms of the contract actually regulated every contingency contemplated by the parties at the time of conclusion of the contract. In my view that can only be gathered from reverting to the preparatory works where it states that the "filling of gaps" should be understood as the right for the arbitrators, if empowered by the parties, to fill out a contract when the meaning is unclear and other methods of interpretation provide no solution and it is deemed to include the right of supplementation of contracts.[1301] In the preparatory works the legislator suggests the wording to provide the arbitrator with wider powers than the local courts have i.e., going beyond mere customary contractual interpretation.[1302] It includes the right for the parties to empower the arbitrator with the right to ascertain contract terms and conditions, including the price and other terms in a long-term contract.[1303] Such a right flows from the principle of freedom of contract.[1304] If no such power is conferred upon the arbitrator in the arbitration agreement, the parties may also agree to provide the arbitrator with such power after the dispute arose.[1305] If the arbitrator carries out such supplementation without the right to do so according to the contract (or as decided by the parties afterwards), the award can be challenged on formal grounds in local court.[1306] To sum up, the arbitrator has the right to adapt contracts beyond what follows from customary contract interpretation, if the parties expressly have given the arbitrators the power to do so.

336 International arbitration having seat in Switzerland are governed by the Swiss Federal Statute on Private International Law (hereinafter, the "PILS").[1307] According to Art. 177(1) PILS "any dispute of a financial interest may be the subject of an arbitration". This is to be understood as all claims, which, for at least one of the parties, represent a direct or indirect interest (right or liability) that can be translated into monetary terms.[1308] It is not entirely clear whether the definition in Art. 177(1) PILS encompasses the power to adapt contracts following failed renegotiations.[1309] The notion of "arbitrability" under Art. 177(1) PILS should however be understood in its widest sense[1310] and be interpreted in a "very liberal" manner.[1311] Scholarly writings suggest that if the parties, up front in the contract, clearly refer to "their difference" following failed renegotiations to be

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"disputes" and "differences" implies a term that the failure to agree should be settled by arbitration. *Similarly also*, F&G Sykes (Wessex) Ltd. v Fine Fare Ltd. [1967] 1 Lloyd's Rep., 53, 58 the Court of Appeal interpreted the arbitration clause liberally to imply a term so that in case of default of agreement between the parties, the arbitrator could determine reasonable figures.

[1301] Prop. 1998/99:35, 1, 60 f.; MADSEN, 67.
[1302] Prop. 1998/99:35, 1, 60 ff. and 210.
[1303] Prop. 1998/99:35, 1, 61; MADSEN, 67.
[1304] Prop. 1998/99:35, 1, 61.
[1305] Prop. 1998/99:35, 1, 211.
[1306] Prop. 1998/99:35, 1, 62.
[1307] The domestic or international character of arbitration decides which statute is applicable but the parties may opt-in or opt-out and choose whether the SPILA or the SCCP should apply. *See hereto*, GIRSBERGER/VOSER, 36.
[1308] BGE 118 II 353, 356; MÜLLER, Swiss Arbitration Case Law, 27.
[1309] CRAIG/PARK/PAULSSON, 114 f. footnote 19.
[1310] MÜLLER, 20; BERGER/KELLERHALS, 71; GIRSBERGER/VOSER, 105.
[1311] KAUFMANN-KOHLER/RIGOZZO, 101.

settled by arbitration, the arbitrator has the power to amend the contract.[1312] This view deserves support and is in line with the intention of the Swiss legislator to make international arbitration widely available.[1313] It is argued in the legal doctrine that Swiss Arbitration law also provides the arbitrator with the authority to adapt contracts without such express provision in the contract on the basis that Swiss substantial law allow contract adaptation to reflect change in circumstances.[1314] That is however undecided.

The New German Arbitration Act of 1998 integrated in the German Code of Civil Procedure[1315] does not explicitly confer the arbitrator with the right to adapt contracts to reflect change in circumstances. It is reasonably clear that the arbitrator can be granted the right to adapt contracts not only in cases falling under §313 BGB, but also with respect to renegotiation situations if there is a renegotiation clause in the contract and an arbitration agreement empowering the arbitrator to such an extent.[1316] Such a right follows from §315 Subsection 3(2) BGB and §319 Subsection 1(2) BGB.[1317] However, it is argued that in order for the arbitrator to have the right to revise the contract in such situation where the renegotiation efforts fail, the renegotiation clause must contain not only a duty to renegotiate, but also a claim for adaptation.[1318] Whether that is a prerequisite for the arbitrator to amend the terms is disputed.[1319] **337**

Furthermore, while it is beyond the scope of this study, it should briefly be mentioned that the parties probably want to choose a venue where the local courts do not interfere unduly and where the final award only can be challenged on limited procedural grounds.[1320] Another factor to consider is that the parties should choose a set of rules allowing the parties to tailor the procedure to suit their transaction. For instance, so that certain stages of the arbitration procedure can be limited in time. **338**

bb) A New York Convention Award

A final step in choosing the seat of arbitration is for the parties to consider the enforcement of the award. The possibility of enforcing the award is dependent on its nationality.[1321] Thus, to ensure enforceability the parties should select a seat that is signatory to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (159 States as of January 2019).[1322] Additionally, the parties probably want to make sure that the award is enforceable in the country where they have their places of business or substantial as- **339**

[1312] BUCHER, 27 f.; *See also*, ORELLI, zum Art. 177 PILS, 51 (Rn. 16) stating that the parties may refer any dispute concerning the revision of the contract (duties to renegotiate, adaptation clauses etc.) to arbitration. *See also*, BRUNNER, 494 stating that Swiss law recognize the power of arbitral tribunals to adapt contracts.
[1313] KAUFMANN-KOHLER/RIGOZZO, 101.
[1314] BRUNNER, 495 f. referring to N.V. Belgische Scheepaartmaatschpij Compagnie Maritime Belge v N.V. Distri Gas ASA Bull (2002, 493 ff. *Similarly*, FRICK, 194 ff.
[1315] The Act is based on the UNCITRAL Model Law on International Commercial Arbitration.
[1316] BAUMBACH, Zivilprozessordnung zum §1029, 2739 (Rn. 13a); KRÖLL, 140. *See hereto also*, NICKLISCH, RIW 1989, 15, 17; SCHLOSSER, J. of Int. Arbitration 1987, 27, 30 f.; BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 164. *See also*, BGH WM 1976, 910, 911; NJW 1959, 1493, 1494.
[1317] KRÖLL, 140. *See also*, NJW 1995, 1360, 1360 where the German Federal Court of Justice, based on §§315(3) and 319(1)(2), provides state courts with the right to carry out contract adaptation in case of failed renegotiations and where the contract contains a renegotiation clause but no arbitration clause.
[1318] KRÖLL, 153 f.
[1319] KRÖLL, 154 *with further references*.
[1320] PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 26.
[1321] PAULSSON/RAWDING/REED, The Freshfields Guide to Arbitration, 29; RAMBERG, Intern. Transactions, 81.
[1322] RAMBERG, Intern. Transactions, 80.

sets.[1323] The jurisdictions investigated hereunder are all signatories to the convention. It should, however, be noted that if the arbitrator is not procedurally authorised to adapt the contract under the domestic arbitration laws, then the award is also not enforceable under the New York Convention.[1324]

4. The Costs of the Proceedings

340 Given that in a renegotiation situation it is difficult to ascertain what party lost, it could be impracticable to let the costs follow the event so that the party bears the costs of the arbitration to the extent it lost. Thus, the clause could instead be drafted so that it is decided up-front how the costs should be apportioned. E.g., costs are shared (jointly and severally) on an equal basis between the parties or, alternatively, the arbitrator is given the power to decide the allocation of costs of arbitration and arbitrators' fees.[1325]

IV. The Legal Assessment of a Renegotiation Clause

341 The renegotiation clause is included in the contract to solve the issue of change in circumstances. However, if not appropriately drafted such a clause could also lead to problems. The drafting is not an easy task with respect to the subject matter considering that case law is lean and different sources of law must be considered at the same time. Nevertheless, the contract drafter must consider how the renegotiation clause would come to be assessed under laws applicable to the contract. It must be considered whether the renegotiation clause is against mandatory law, how the clause would be interpreted in a dispute about whether it legitimately has been invoked, or otherwise the closer meaning of the terms and if the clause itself is considered unfair and may be set aside or modified (e.g. under §36 AvtL in Swedish law, the clause itself may be adapted or wholly set aside if considered unreasonable).[1326] With respect to the interpretation of renegotiation clauses it can only be assumed that the courts and arbitral tribunals will take a conservative approach.

1. Drafting Renegotiation Clauses in Light of Case Law

342 If broad terms are used without being closer defined in an objective manner, then the parties will have to rely on judicial determination in the event of disagreement. Thus, if the parties disagree on whether the clause has been legitimately invoked and the dispute ends up before a court or arbitral tribunal then the wording of the clause will be exposed to contract interpretation by the state court or arbitral tribunal. In what follows, some case law will be discussed to illustrate some points of consideration to bear in mind when drafting a renegotiation clause. However, whether the chosen wording of the renegotiation clause will hold is difficult to assess since this is an area without well-developed case law. For guidance, some other types of clauses imposing a duty to revise or renegotiate the terms will also be examined.

a) A Strict Interpretation

343 Naturally, as already mentioned above, without an express contractual provision authorizing the arbitrator to revise the contract terms in the event of a change in circumstances, arbitrators are generally reluctant to carry out such demands. Moreover, arbitral tribunals are generally careful to interpret clauses for revision or the like

[1323] Section 42, The UNCITRAL Legal Guidelines.
[1324] FLETCHER/MISTELIS/CREMONA, 278.
[1325] CRAIG/PARK/PAULSSON, 118 f.
[1326] *See also e.g.,* the Norwegian arbitration case N.D.S. 1985 s 234 where a currency clause was modified to reflect the fact that a long-lasting rise of the dollar with the support of § 36 f the Norwegian Contracts Act.

as extending to situations and purposes other than as specifically provided for. For instance, in *ICC Case No. 2478*, a contract for the supply of oil contained a clause obliging the party to renegotiate the terms of the contract in the event of devaluation or revaluation of the contract currencies in order to re-establish the contractual equilibrium. The arbitrators concluded that the scope of the clause did not capture price movements on the world oil market.[1327] It should be noted that this was not a case for adaptation, but a claim for damages due to refusal to deliver the agreed oil. Similarly, in *ICC Case No. 5277* a clause for adjustment of the agreed upon price upwards in case of an event of "major economic dislocation caused by currency restrictions imposed by government or currency devaluation" did not capture situations of severe inflation. The arbitrators explained that cost increases caused by internal inflation fell outside the scope of the clause as the word devaluation is deemed to mean the external value of the currency. [1328] However, in *ICC Case Nos. 3099 and 3100,* the tribunal interpreted the revision clause broadly by way of providing that devaluation included depreciation. One author suggests that this liberal interpretation is rather a result of confusion with respect to the closer meaning of the terms "devaluation" and "depreciation".[1329] One could generally presume that a strict interpretation of the clause will be taken, unless the common intention of the parties clearly indicates that the clause was intended to cover other situations.

b) Case Law Interpreting Renegotiation Clauses or Hardship Clauses

In practice, as mentioned above, renegotiation clauses are frequently vaguely and broadly formulated. One typical example of such a broadly drafted clause causing disagreement between the parties can be found in the well-known British case *Superior Overseas Development Corporation v British Gas Corporation.*[1330] The case involved a long-term contract for the supply of gas. In the case, both the wording chosen in the trigger event and the adjustment mechanism caused the Court of Appeal to scrutinise the closer meaning of the terms used. The clause would be triggered: "*if at any time there has been any substantial change in the economic circumstances relating to this Agreement*" *and* "*either party feels that such change is causing it to suffer substantial economic hardship*".[1331] The first issue the court had to deal with was to construe the meaning of "substantial hardship". It was discussed that "substantial" must be deemed to mean an event that has "*a real impact and not a mere transient effect*".[1332] Or as L.J. Donaldson expressed it: "*I think that the parties must have chosen the word "substantial" in the sense of weighty or serious, rather than merely something more than minimal*". Further adding, "*but more than that cannot be said without being guilty of redrafting the parties' agreement…*"[1333] Secondly, with respect to the adjustment mechanism, the court had to assess whether the clause stating "*to offset or alleviate the said hardship*" was deemed to be understood as if it entailed an adjustment that completely removed all hardship or merely adjusting it so that the hardship fell just below what was considered substantial hardship. Here the judges differed in opinion but the majority held that it should be understood as if the whole of the substantial hardship should be removed.[1334] While the case show that also broadly drafted clauses may not be void on the grounds of ambiguity, such broadly chosen terms become subject to some very delicate issues of interpretation and construction by the court.[1335] And, as per L.J. Donaldson: "*No doubt in the border area, one*

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[1327] ICC Case No. 2478 of 1974, YBCA 1978, 222, 222.
[1328] ICC Case No. 5277 of 1987, YBCA 1988, 80, 88 f.
[1329] NASSAR, 178.
[1330] Superior Overseas Development Corporation v British Gas Corporation, [1982] 1 Lloyd's Law Report 262.
[1331] Superior Overseas Development Corporation v British Gas Corporation 262, 264 f.
[1332] *Ibid*, 266.
[1333] *Ibid*, 269.
[1334] *Ibid*, 266.
[1335] MCKENDRICK, Frustration of Contract, 113.

panel might reach one conclusion and another a different one, but that is always true when judgment and, particularly economic judgement, is involved".[1336]

2. Some Relevant Case Law

345 Case law related to so-called material adverse change clauses (hereinafter, "MAC Clauses") is a valuable source for illustrating some issues in drafting clauses dealing with the issue of change in circumstances. While the MAC clause not only targets a completely different situation but also a different solution to the issue of change it still shares some important features with the renegotiation clause.

346 MAC clauses are frequently used in the M&A context. The clear aim of a MAC clause is for one party to be able to walk away from the deal if there is a change in circumstances affecting the bargain in a material manner between the signing of the contract and the closing of the deal. The renegotiation clause instead aims at finding a commercial and pragmatic solution to the change in circumstances in order to continue the relationship but still respect the contracting parties legitimate expectations. Despite these obvious differences, some of the terms in the MAC clause recur in the renegotiation clause. One can only assume that the MAC clause many times serves as the starting point for renegotiating the deal if the clause is triggered. Two leading cases will be looked at.

347 In the M&A context, *IBP Inc. v Tyson Foods, Inc. (789 A2d 14 8 Del. Ch. 2001)* is a leading case from the Delaware Chancery Court on the interpretation of a broadly drafted MAC clause. In the case, Tyson Food argued that there had been a material adverse effect with respect to the target company, IBP Inc., as there was a decline in performance and the earnings had decreased by 64 per cent compared to the same period in the previous year. The Delaware Chancery Court concluded that for a *material* adverse effect to have occurred under the broadly drafted MAC clause it would require "*unknown events that substantially threaten the overall earnings potential of the target in a durationally significant manner. A short-term hiccup in earnings should not suffice*…"[1337] It should be noted that in the case, the purchasers were aware of the cyclical earnings of the target company and the industry in general and should probably rather have provided specific language to define the meaning of material e.g. as a "decrease in revenues of more than X per cent from the date of the signing until the closing of the transaction". Also, it is not unusual, at least in my experience and the MAC clauses I have encountered, that such clauses provide that the supervening event must be material to the long-term valuation of the interests of the target. Another case, highlighting the importance of exact drafting to suit the specifics of the transaction is *Grupo Hotelero Urvasco v Carey Value Added SL and another*, where the English High Court interpreted a MAC clause narrowly so that an adverse change, in the context of loan agreement, would be viewed as "material" only if it "significantly affects the obligor's ability to perform its obligations". In that case that meant the obligor's ability to repay the loan.[1338]

[1336] Superior Overseas Development Corporation v British Gas Corporation 262, 270.
[1337] IBP Inc. v Tyson Foods, Inc.789 A2d 14 8 (Del. Ch. 2001), 65.
[1338] Grupo Hotelero Urvasco v Carey Value Added SL and another (2013) EWHC 1039 (Comm*),* Sec 357.

V. Summary

348 The renegotiation clause should be provided with "teeth" in the event that the renegotiations break down or a party refuses to engage in renegotiations. A link to appropriate legal consequences creates an understanding for how it would go if the parties were unwilling to make any concessions to find a solution. There are mainly three sanctions available: Termination, suspension or intervention by third party, state court or arbitral tribunal. It is, however, of importance that the renegotiation clause provides for a smooth transition from failed renegotiations to third party intervention. Instead of providing for the suspension or termination of the contract, an adaptation of the contract by a third party can be provided for. There are two categories of dispute resolution methods to consider. An adjudicative process, whereby a judge or arbitrator reviews evidence and argumentation and determines the outcome, or a consensual process, whereby the parties attempt to reach agreement through mediation, conciliation, or negotiation. The preferred method, at least in the first instance, is mediation/conciliation. It provides an additional buffer for continued negotiations in the presence of a third party. Thus, the parties can provide for a smoother transition by using a two-tiered dispute resolution clause. For example, the renegotiation clause could provide that prior to any party spring to arbitration to settle the dispute, the parties must first resort to mediation, conciliation, or negotiation with the help of a neutral advisor, referee, board or the like. While the natural dispute resolution method is arbitration, a practical problem exists at present date as to whether, on a procedural level, adaptation of a contract constitutes arbitration in the eyes of the applicable law. The recognition and enforcement is dependent on this question. Thus, for the renegotiation clause to be invoked successfully it is advisable that the parties make an active choice both with respect to the substantive law governing the contract as well as the law governing the arbitration agreement.

C. Drafting Recommendations and Potential Drawbacks

1. Top Strategic Considerations

349 In contradistinction to, for example, force majeure clauses, renegotiation clauses appear in contracts in a variety of forms and there is not one standard renegotiation clause that can be recommended to be included in an international investment contract. It is recommended not to use model clauses included in a routine manner. As the subject matter of a renegotiation clause relates to future changes, some of which are hard to predict, it is unavoidable that the drafting of these clause will contain a certain degree of speculation and uncertainty. Thus, due to the nature of the issue these clauses are targeting, the perfect renegotiation clause does not exist.[1339] Therefore, rather than providing a standardised wording, some strategic points of considerations, that can be adapted to the specific needs of the transaction will be provided in the following.

a) Clear Wording and Solid Procedures

350 Due to many factors such as the background of the transaction, bargaining positions etc., only the parties can find the best possible solution to the new commercial situation. The key is not to leave anything to chance and to make the clause as complete as possible in order to avoid an unexpected or unwanted adaptation by an arbitral tribunal (or state court) especially in more complex contracts where the future cooperation and business are at stake. The best advice to the drafter is to not include a renegotiation clause by routine but to tailor it to suit the specific needs of the transaction. That is easier said than done as renegotiation clauses are not easily translated

[1339] *Compare*, BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 161.

into money; thus, it can be difficult to insist on heavy negotiations. However, it is better for the parties to include a simple renegotiation clause merely requiring the parties to sit and talk, and to talk in good faith, without a link to legal sanctions rather than one that is vaguely formulated causing disagreements and turning the clause into a source for dispute.

351 Firstly, the clause must be drafted with precision. The goal should be to provide crystal clear language as to the trigger events, the impact of such events (i.e., the point of tolerance) and the objectives of the revision (if possible, clear criteria to guide the third party in the adaptation). The clause should be deal-specific and as comprehensive as possible. Vague terms should be avoided to the extent possible as they open up for disagreement as to whether the clause has been adequately triggered and may lead to unwanted results if the wording ends up being left to the interpretation of a court or arbitral tribunal. The cautious drafter should carefully consider the trigger events and if possible provide for an exhaustive list of events rather than a broad "catch-all" category. Here the parties may of course have different interests in negotiating for broad or narrowly defined trigger event(s) and one side may insist on including a catchall category. As I understand it, both parties benefit from a clearly defined clause (not only with respect to the trigger event) as it avoids disputes among the parties about whether the clause has been legitimately invoked or not and it avoids the issue of construction by the court or arbitral tribunal as to the closer meaning of the terms used in the clause. (e.g., the standard of "substantial change", "remove unfairness" etc.). Moreover, court and arbitral tribunals are generally likely to take a restrictive view and interpret the clause narrowly.[1340] I would even argue that it is preferable to include a simple version merely stating that the parties have the right to request renegotiations at any time during the contract term rather than to include a clause where vague wordings are used that opens up for dispute between the parties. Secondly, the drafter should spend time on providing for properly established procedures for the renegotiation phase and for the event the renegotiations fail. It is advisable to spend time on the procedural aspects of the clause as once the clause is triggered any possible source for friction between the parties must be avoided. The procedure should be drafted so that it encourages and provides the parties with support to reach a solution in consensus. If it provides for clear steps from the renegotiation phase up until litigation, then each party can clearly overview the process and there are no unnecessary delays. Part of an efficient procedure is also to provide precisely defined time spans for each step of the renegotiation to ensure that the issue is solved in a timely manner and to avoid, one party forestalling the proceedings. Conclusively, to fulfil the purpose of the renegotiation clause, the focus should lie on clearly defined terms and a solid procedure that leaves nothing to chance.

b) An Express Allocation of Competence

352 Subject to the choice of law and the seat of arbitration, the contract drafter should link the renegotiation clause to the arbitration agreement and expressly empower the arbitrator with the right to adapt the contract. That provides for the best possible chances for successfully invoking the renegotiation clause. In order to allocate such rights as clear as possible, as well as and enable the arbitrator to produce an enforceable award, there

[1340] *See hereto e.g.,* ICC Case No. 2478 of 1974, YBCA 1978, 222, 222; where the obligation to negotiate in the event of variation of the exchange rate of the currency could not be deemed to also cover movements of the prices on the world oil market. Only in few cases have arbitral tribunals interpreted clauses broadly.

should be a clear a link between the areas or terms that may be adapted if the clause is triggered and the arbitrators right to carry out such revisions.[1341]

c) Add "Teeth" to the Clause

Renegotiation clauses or hardship clauses without a link to remedial consequences in case the renegotiations break down are often criticised as being worthless or viewed as a mere "consultation clause".[1342] To link the clause to legal sanctions is probably the most efficient way to motivate the parties to take the renegotiation talks seriously. A toothless clause can, however, make sense if the contracting parties wish for the revision to remain within the sole control of the parties. However, assuming that the clause otherwise has been adequately drafted, it is advisable to link failed renegotiations to legal sanctions. If the parties also provided for third party intervention such as mediation/conciliation prior to resorting to court or arbitral tribunal in a two-tiered dispute resolution clause, then the parties have done all that they possibly could in order to provide for a process that promotes successful renegotiation. **353**

d) An Active Choice of Law and the Seat of Arbitration

Depending on the transaction, if there is an imminent risk that the renegotiation clause will be triggered sometime during the term of the contract and large values are at stake, then this may be a reason for the parties to consider making an active choice with respect to applicable laws so that the renegotiation clause can be successfully invoked. The parties should make an active choice both with respect to the substantive laws governing the contract as well as the place of arbitration and to use a combination that will provide the best support to invoke the clause. A comparative analysis of both national arbitration acts and substantive law is required. **354**

2. Practical Problems and Potential Drawbacks

a) Lack of Precedent

There is no standard form on how the renegotiation clause should look. The clause must entirely reflect the needs and dynamics of the transaction. Therefore, there is no precedence on how well the clause will operate if it ends up before a court or arbitral tribunal. The interpretation of such clauses has yet to be tested. One could imagine that arbitrators and judges might take a restrictive approach and interpret such clauses narrowly at least if the criteria have been vaguely formulated. **355**

b) Extensive Know-How and Tactical Sense

As has rightly been pointed out in the legal doctrine, only the contracting parties are suited to find the most adequate solution to adapt the contract to new circumstances.[1343] In that sense, the renegotiation clause contains a potential drawback as the revision of the terms ultimately is conferred to a state court or arbitral tribunal. Whether the court or the arbitral tribunal has the necessary competence, know-how and expertise to revise the terms of the contract in a satisfactory manner, especially with respect to complex international long-term **356**

[1341] BERNARDINI, JWELB 2008, 98, 107; BERGER, VJTL 2003, 1347, 1378 f.
[1342] *See hereto e.g.,* RAMBERG/RAMBERG, 9 ed., 196; FINKENAUER, MüKo zum BGB zu § 313, 1904 (Rn. 65), referring to such incomplete adaptation clauses as "Sprechklauseln". *See also,* SCHMITTHOFF, Hardship and Intervener Clauses, 415, 420 considering such toothless clause as useless.
[1343] LEHRBERG, ERPL 1998, 265, 281; HORN, Die Anpassung langfristiger Verträge, 9, 71.

contracts, must be considered.[1344] The judge or arbitrator must not only be competent in the legal field of law, they must also be able to consider technical, financial and economic aspects.[1345] Furthermore, court judges are typically not trained in contract drafting which is another factor to consider in complex long-term international contracts where skilled contract drafters often carry out such duties, most likely subject to heavy negotiations. However, contracting parties should probably get rid of that fear, especially in contracts providing for arbitration. By now there are arbitral tribunals with extensive knowledge in the field of commercial disputes in international long-term contracts. Also, this potential drawback should not be exaggerated as both judges and arbitrators are skilled and trained to deal with complex and intricate legal questions, and the issue of contract adaptation, presumably isn't not causing more problems than in other fields of law.[1346] However, in light of the case law described in Part II, domestic courts have been willing to adapt prices, rents and make adjustments for inflation, but there is no case where a court has carried out a more extensive revision of the contract terms in order for a contractual relationship to continue on changed terms following a change in circumstances. The real issues lie elsewhere. The fact that commercial realties underlying the transaction can neither be documented nor quantified[1347] make it difficult for a judge or arbitral tribunal (and very few lawyers for that matter without the close collaboration with executives and business people) to make a commercial assessment of the situation and the many different options to adapt the contract. Another, in my view, much more important point to consider is that the judge or arbitrator does not have the same flexibility as they would normally have should the parties renegotiate a solution among themselves or with the help of a mediator. Arbitrators generally need to formulate a decision on the basis of law or fairness and equity while the parties operate without such boundaries.[1348] Also, the bargaining position of the parties is something that the judge or arbitrator can never reflect in an award. It is only clear that the judge or arbitrator must possess extensive practical know-how,[1349]which may or may not be the case. On the other hand, these points create incentives for the parties to come to an agreement before it reaches third-party intervention as it may ultimately result in an adjustment of the terms in a way not contemplated by the parties. The parties can of course draft around this potential drawback by avoiding vague terms in the clause and instead provide for as clear criteria as possible to guide the arbitrator in the revision of the terms. Given the issue that is being addressed, however, this may not be possible, as the arbitrator must be left with some room to reshape the contract. However, as one author rightly points out: "*This creative quality of the arbitrator's task finds its counterpart in the parties' duty to renegotiate*".[1350] Lastly, another potential issue is whether the arbitrator in this creative phase, where many options are at hand, has the interest in working towards the continued cooperation on amicable terms rather than focusing on finding a solution to the legal problem. Thus, a certain degree of tactical sense, talent to judge the atmosphere between the parties and the ability to overview the consequences for the parties would be favourable qualities to have in mind when electing the arbitrator(s) as the very idea of the clause is to continue the contract on changed terms with continued good spirits between the parties.[1351]

[1344] *Compare*, FLETCHER/MISTELIS/CREMONA, 281; HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce, 173, 182.
[1345] FLETCHER/MISTELIS/CREMONA, 281.
[1346] *Compare*, FRICK, 194; MOMBERG, 248.
[1347] *Compare*, SACKLÉN, JT 1996, 380, 388.
[1348] HORN, Procedures of Contract Adaptation and Renegotiation in International Commerce 173, 189.
[1349] FLETCHER/MISTELIS/CREMONA, 281.
[1350] FLETCHER/MISTELIS/CREMONA, 281. *Similarly*, SACKLÉN, JT 1996, 380, 389.
[1351] *Compare*, FLETCHER/MISTELIS/CREMONA, 282; 974 f. *Along similar lines*, SOHLBERG, JT 1996, 972, 974.

II. Summary

The best drafting advice is to not include a renegotiation clause by routine, but to make it deal-specific to suit the transaction. The key is not to leave anything to chance and to make the clause as complete as possible. The goal should be to provide crystal clear language as to the trigger events, the impact of such events (i.e., the point of tolerance) and the objectives of the revision. Vague terms should be avoided to the extent possible as they open up for disagreement as to whether the clause has been adequately triggered and may lead to unwanted results if the wording ends up being left to the interpretation of a court or arbitral tribunal. The cautious drafter should also spend time on providing for properly established procedures for the renegotiation phase and for the event the renegotiations fail. The procedure should be drafted so that it encourages and provides the parties with support to reach a solution in consensus. If it provides for clear steps from the renegotiation phase up until litigation, then each party can clearly overview the process and there are no unnecessary delays. Lastly, the parties should make an active choice both with respect to the substantive laws governing the contract as well as the place of arbitration and to use a combination that will provide the best support to invoke the clause. **357**

D. Conclusions

The renegotiation clause can, if well-drafted, be an instrument for preventive legal management and at the same time ensure that the legitimate expectations of the bargain are achieved. It should not be underestimated how the good will between the parties can be protected by addressing the issue pro-actively by way of including a renegotiation clause in the contract rather than dealing with the issue for the first time following the conclusion of the contract. **358**

Renegotiation clauses should however be used wisely. The clause is included in a contract to solve an issue but can easily be a source for dispute if not appropriately worded. Vague terms should be avoided and, as I believe, it is less appropriate to include standard clauses such as the hardship clause in the UNIDROIT Principles or the "ICC Hardship Clause 2003" without considering whether they actually suit the specific needs of the transaction. It may be tempting to do so, but these clauses are not only very restrictive as to their applicability; they also cover a wide scope by containing so-called soft criteria, which should, if possible, be avoided. As I gather, the parties are better off including a renegotiation clause in its simplest form (perhaps more suitably referred to as a "consultation clause")[1352] rather than a renegotiation clause not tailored to the transaction. The simplest form of a renegotiation clause will at least make it less controversial to bring up the topic of revising the terms in case a change in circumstances occurs, it creates a moral pressure to alter the terms and a base for a party to propose mediation to the counterparty. All versions in between, may however easily become the source for a dispute as to whether the clause is legitimately invoked and the intended meaning of the terms used etc. However, a carefully drafted renegotiation clause involve both costs and time, which the parties may not be willing to spend on such issues and therefore more open or vague terms are used to capture eventualities.[1353] If possible, that should be avoided. **359**

Also, a clause with the aim of dealing with the issue of future change will always contain a certain degree of uncertainty or even speculation. It is simply impossible to draft a clause that covers all potential future developments with complete confidence and precision. Thus, the perfect renegotiation clause does not exist and one **360**

[1352] BURKHARDT, 63.
[1353] *Compare*, PÉDAMON/CHUAH, 78.

must always consider that questions may arise that will make the contract subject to the national laws governing the contract.[1354] Thus, the lawyer drafting the contract must have a solid understanding of potential hardship exceptions available under the applicable laws. In large projects where great values may be at stake, and there are enough resources, it is advisable to spend enough time negotiating and drafting these clauses in order to provide a clause that is as complete and detailed clause as possible. Nothing should be left to chance. It should instead be drafted to discourage feelings of bad will among the parties, which would spoil the chances of working efficiently towards a consensual solution. By negotiating the clauses together at the outset, the parties may avoid disputes later as both parties know where they stand in case the clause is triggered.[1355] It is simply better to engage lawyers in the beginning of the process in order to avoid them in the end. Furthermore, it should not be underestimated that outside counsel is generally obliged to act in the interest of the party by whom they are retained and far from all lawyers understand the commercial pragmatism needed in a renegotiation situation. One of the driving forces behind renegotiation is the bargaining power and the hope for future business.[1356] Arguably, legal arguments play a less important role.[1357] To conclude, only if the renegotiation clause operates smoothly, without causing friction between the parties, can it truly fulfil its purpose. Thus, it is important to have the duties of the parties, as well as the process and the goal of the renegotiations, spelled out in a clear and precise manner. The contract drafter should also carefully consider the choice of law and seat of arbitration considering the practical problems still pending with respect to the procedural competencies of arbitrators.

Part 4: A Final Word on Renegotiation

A. Different Routes to Achieve Renegotiation of the Contract

361 This study has explored the routes available to a party that wishes to motivate the counterparty to renegotiate the contract terms following an unexpected change in circumstances that has fundamentally altered the economic equilibrium of the contract. A Party can choose to rely on the law governing the contract in order to achieve a renegotiation inter partes. The applicable laws in Sweden, Switzerland and Germany as well as the PECL, UNIDROIT Principles and the DCFR all provide for contractual adaptation in situations of hardship. The doctrine of frustration under English law and Art 79(1) of the CISG do not, however, recognize hardship as a ground for relief and thus do not provide a starting point for renegotiations inter partes.

362 The domestic legal solutions on hardship, however, only allow contracts to be adapted to reflect new commercial realities in few and exceptional cases. The court judges and arbitrators are generally careful in granting exemption and the present body of case law is still too lean to draw more than preliminary conclusions as to the intensity required for a change in circumstance to become relevant and motivate an adaptation of the contract terms. Furthermore, the hardship rules in §36 AvtL and Art. 2(2) ZGB do not impose a duty to renegotiate and it is unsettled whether §313 BGB comprise such duty. Art. 6:111(2) PECL imposes an obligation on both parties to enter into renegotiations: "The parties are *bound to* enter into negotiations with a view to adapting the contract or terminating it." According to Art. 6.2.3(1) of the UNIDROIT Principles: "*In case of hardship the disadvantaged party is entitled to request renegotiations*". Unlike the PECL, the article does not provide for a

[1354] BÖCKSTIEGEL, Hardship, Force Majeure and Special Risk Clauses in International Contracts, 159, 166.
[1355] *Compare*, BUND, J. L. & Com 1998, 381, 407.
[1356] PETER, 203; BURKHARDT, 67.
[1357] *Compare*, PETER, 203.

duty to enter into renegotiations but the disadvantaged party is given a right to request such renegotiations. The DCFR, however, places the burden on the obligor and makes the whole provision subject to the duty to renegotiate. Art. III. – 1:110(3) (d) provides that the hardship provision only applies if: "the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation." Thus, Art. III. – 1:110(3) of the DCFR and §313 BGB, in the way it has been constructed, are the only hardship provisions that promote renegotiations inter partes.

Instead of relying on the law governing the contract to address the issue of renegotiation of the contract terms following a change in circumstances, the contracting parties can choose to include a renegotiation clause in the contract imposing a duty on the parties to renegotiate relevant terms. Such contractual solution must be well drafted in order to fulfil its task. The renegotiation clause must be deal-specific and as comprehensive as possible. It must be so clearly drafted that the clause itself does not lead to dispute. Thus, careful drafting is required. It is of great importance to narrow down the trigger events, to avoid vague terms and to link the clause to legal remedies. To assure that the renegotiation clause can be successfully invoked, the procedures for the renegotiation phase should be carefully considered and provided for in detail. The parties must also decide for a dispute resolution method for the event the renegotiations break down. The natural dispute resolution method is arbitration. A practical problem exists at present date as to whether, on a procedural level, adaptation of a contract constitutes arbitration in the eyes of the applicable law. The recognition and enforcement is dependent on this question. Therefore, subject to carefully consider the choice of law and the seat of arbitration, the contract drafter should link the renegotiation clause to the arbitration agreement and expressly empower the arbitrator with the righ to adapt the contract. **363**

B. Renegotiation – A Compromise between Two Extremes

In legal doctrine, from the end of the last century and the 21th century, it is said that the legal problem of changed circumstances and adaptation of long-term contracts are in fashion. While one cannot with certainty distinguish tendencies in a development in which one is currently in, the adopted hardship rules in the jurisdictions herein, save for English law, provides a clear indication that the static contractual model that prevailed in the beginning of the last century has been abandoned for a more flexible contractual model where judges have the power to carry out adaptation of contracts in cases of hardship. **364**

The adopted hardship rules entail one of the most delicate questions in contract law. Hardship threatens the grand principle of honouring the obligations of the contract. It is the eternal dilemma between pacta sunt servanda and the clausula rebus sic stantibus. What should prevail, the honouring of a promise or legal pragmatism? There is a tendency, engraved by ones legal education, towards a particular pattern of thought with respect to this legal problem. As for myself, schooled in law in Sweden, there may be a need to reconsider the idea of a strict adherence to the letter of the contract repeatedly stressed without attempts to balance the principle against the rationales underlying the concept of the clausula rebus sic stantibus. Thus, there may be a struggle with ones' legal background that must be acknowledged with respect to this question. **365**

It is, however, troublesome to enter into a contract with the mental reservation that there is the possibility to get out of the deliberate meaning of the words if the bargain does not turn out as contemplated. In my view, in the field of contract law, nothing can be more important than to honour a promise. Allowing exceptions to the principle of pacta sunt servanda create insecurity and distrust in contractual relationships encouraging incautious contracting. Case law, legal doctrine and the intention of the legislator show, however, that only in few and truly exceptional cases, is a relief from the contractual obligations motivated based on the hardship rules. In my opinion, based on comparative observations, such situations are likely to occur only in times of extraordinary **366**

contingencies and could instead be resolved by special legislative interventions by the government. Thus, the legal value of the hardship rules may be questioned.

367 Rather than aiming for a fair outcome in the individual case, strict adherence to the principle of pacta sunt servanda creates incentive for contracting parties to introduce clauses in their contract to deal with changed circumstances. That argument may, however, not hold true. The majority of transacting parties are not undertaken by large corporations with enough means to obtain appropriate legal advice, but rather of small or mid-sized enterprises with limited resources.[1358] Generally, transacting parties, and not only consumers, may be ignorant, careless or unduly optimistic with respect to the issue of changed circumstances.[1359] However, to provide "escape routes" may encourage wrong behaviour in commercial trade. Thus, while a too liberal attitude may lead to dissolving contractual morality, a strict adherence to the principle of pacta sunt servanda promotes cautious contracting when making long-term commitment. But there appears to be a trend to rather achieve fairness, whatever that means, in these situations. For instance, the DCFR states that the fact that the contracting parties did not address the issue of change in circumstances does not always lead to the assumption that the disadvantaged party assumed the risk for the event since there may be cases where the parties simply overlooked the need for a hardship clause to address the circumstances which in fact arose.[1360] Such approach is, in my view, troublesome and the law should not address carelessness. Instead, as one author rightly points out: "Wer frei gestalten kann, hat grundsätzlich auch die sich daraus ergebenden Folgen zu trage."[1361] That is, in my opinion, a fair approach!

368 Despite believing in the strict adherence to the principle of pacta sunt servanda as an economic necessity it may not be a reasonable conclusion to completely reject the need of hardship rules. First of all, it is difficult, if not impossible, to foresee and contract for every eventuality that may occur during the lifespan of a long-term contract. Secondly, the practice in German law developed under the impact of severe economic and national crisis also has proven to be an invaluable tool to deal with the issue of changed circumstances in times of crisis. One may also need to get rid of the fear that domestic legal hardship rules may dissolve contractual morality. One must only turn to available case law under the jurisdictions herein to see that the fear of an increased amount of frivolous litigation and the granting of too many exceptions to the principle of pacta sunt servanda is unwarranted.[1362] That is, however, not an argument to legitimise a departure from pacta sunt servanda. Thus, it remains to answer whether the hardship rules have a legitimate legal purpose.

369 The hardship rules are products of turbulent times, sensitive to cycles and influenced by what attracts political appeal. There has certainly been a shift away from a conservative approach of letting the loss lie where it falls in favour of fairness. Thus, while the rule of strict performance may be slightly out of date,[1363] the pendulum might swing back and it may not be worth risking the solid base of the principle of pacta sunt servanda for what might be a transient need. However, not only times of crisis require the need of flexibility in contractual relations. There has been a general structural change in how to conduct business in the last couple of decades. Business is characterised by increased internationalisation and rapid change (e.g., products markets, technology and the like as well as geological, commercial and political changes) requiring flexibility in contractual rela-

[1358] *Compare*, LANDO/BEALE, 113.
[1359] *Compare hereto*, LANDO, A European Uniform Commercial Code, 267, 268.
[1360] Official Comment to Art. III. – 1:110 DCFR, 711.
[1361] ZK-BAUMANN zu Art. 2 ZGB, 697.
[1362] *Compare*, BONELL, The UNIDROIT Principles in Practice, xix in the introduction; MEKKI/KLOEPER-PELÈSE, 651, 655.
[1363] LANDO, Renegotiation and Revision of International Contracts, 37, 52.

tions. The 20th century laws and doctrines, opening up for judge-led adaptation, do not necessarily solve 21st century problems as they, while providing appropriate solutions in times of crisis, operate within too narrow confines to address a general need of flexibility in international commerce. As concluded in Part 2 of this thesis, the hardship rules do not provide strong ground for a party aiming for renegotiation of the contractual terms due to the generally unclear and strict applicability of the hardship rules in the individual case. Instead, the principle of pacta sunt servanda should continue to prevail and the need for flexibility should be addressed through a renegotiation clause in the contract.[1364] Thus, the renegotiation clause provides a compromise between two extremes.

I. An Approach For the Future

1. Acknowledging a Need of International Commerce

As mentioned above, how to conduct business has changed over the last couple of decades requiring new methods to coupe with change. An instant sale does not require "an approach for the future". However, every contract that is not carried out directly contains an element of speculation with respect to future events. Thus, there is an inherent weakness in long-term contracts due to the time factor. It becomes even more relevant to include a mechanism in the contract to deal with future change in an international, complex, long-term contract of significant economic value. Legal writings are not fully acknowledging the problem that international commerce is faced with and the need of flexibility in contractual relations. **370**

2. A Comparative Solution to a Practical Problem

From comparative observations in Part 2 of this thesis, the most suitable way to deal with future change is through the inclusion of a renegotiation clause in the contract. Several factors lead to this conclusion. Firstly, it preserves the principle of pacta sunt servanda since the parties themselves agree to adapt the contract under certain identified circumstances. Secondly, the domestic hardship rules only provide a ground for relief in very exceptional cases and, while the rules differ in the jurisdictions examined herein, the judges have generally taken a conservative approach in granting relief.[1365] Moreover, there is general reluctance to adapt long-term commercial contracts with international features. The view is that such contracts are concluded between experienced professionals being able to protect their interests. Sometimes an even stricter approach is encouraged in such cases, thus, completely failing to understand and meet the need of flexibility in international commerce. The impact of the underlying legal framework on the renegotiation situation may however be overestimated. As concluded in Part 2, only tentative conclusions can be drawn based on current available case law. It is therefore extremely difficult in practice to understand how a contract will be interpreted in such situation and therefore how the contract should be drafted from the beginning. Thus, to be sure of the outcome, the parties must contract for future change. One method is lengthy contracts attempting to address the universe of adverse events. Another route is to include flexibility in the contract. Lastly, contractual practices show that transacting parties more and more are including renegotiation clauses and similar clauses in the contract to coupe with the issue of changed circumstances. That confirms that contracting parties are not prepared to take the risk that the problem is resolved by a third party applying domestic legal concepts and doctrines of hardship. Thus, there is a need for a renegotiation mechanism where the solution remains in the control of the contracting **371**

[1364] *Of the same opinion*, FRICK, 38.
[1365] *Compare*, LANDO, Good Faith and Fair dealing, 345, 360.

parties'. The renegotiation clause meets this requirement and the required need for flexibility in long-term international contracts. While renegotiation clauses are becoming more frequent, there may still exist hesitations towards the idea of including a duty to renegotiate terms that once were agreed upon. Presumably, the resistance stems from the deeply routed view that agreements are to be kept. Contracting parties in international long-term contract must overcome that initial potential hurdle and accept renegotiation clauses in the same way as they have accepted force majeure clauses, that results in all or nothing, arguably having a more severe outcome, but appears to be less controversial than to revisit and adapt the contract to the new circumstances in order to achieve the main common goal of the contract. The promotion of renegotiation clauses is fairly uncommon in the legal doctrine and may need to get more attention than they received so far.

II. The Renegotiation Clause - A Tool to Handle the New and Unexpected

1. A Drafting Challange

372 The renegotiation clause is a good tool and pragmatic solution to deal with the need of flexibility in long-term contracts. It is costly, time consuming and inefficient to try to foresee and address every possible calamity that may occur during the lifespan of the contract. The renegotiation clause solves this problem, but requires some careful drafting.

2. Potential Drawbacks

373 Renegotitaion clauses need to be tailored to the transaction and its specific risks to fulfil their purpose. A renegotiation clause cannot be included in a routine manner as may be the case, to some extent, with respect to force majeure clauses. As long as the renegotiation clause has not received appropriate attention in the legal doctrine as a legal means to address the issue of changed circumstances, parties wishing to include such clause in the contract are faced with drafting challenges as the wordings of these clauses are yet to be tested in court. The need of careful drafting and negotiation increase the transaction costs and it may therefore be a solution that only is suitable for parties that have enough resources to obtain legal advice. However, if the renegotiation clauses would receive more attention by legal writers it may result in standardized clauses where only the wording need to be tweaked to take account of the particular transactional risks.

III. Considerations de lege Ferenda

374 Contractual practice is presumably ahead of the legal doctrine in this field of contract law. The increased amount of complex long-term contracts of international character requires new attitudes to traditional legal concepts. The business community do not accept the allocation of risk entailed in the principle of pacta sunt servanda. In focus stands cooperation and pragmatism. The hardship rules do not provide the required level of flexibility and must be counted out as an appropriate source to address the issue. The traditional concepts must, however, in my view remain untouched as a solid base for a functioning business life. Instead, contracting parties must be aware of the fact that the hardship rules are products of the 20th century and do not solve the issues that today's business community is confronted with and must, thus, turn to other legal means to meet change in circumstances rather than compromising the principle of pacta sunt servanda to assure the continued adherence to the doctrine of freedom of contract.

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