Mitja Kovac* and Cristina Poncibò

Towards a Theory of Imprévision in the EU?

https://doi.org/10.1515/ercl-2018-1021

Abstract: The problem of excuse for non-performance of contracts caused by changed circumstances is, despite its long history in contract law scholarship, far from being resolved. This paper is based on the dialogue between two colleagues from different academic backgrounds and comparatively investigates German, French, Italian and English approaches and current developments in the field. First, the paper questions whether the doctrine of changed circumstances (or imprévision) remains a mere exception, or whether it is possible to argue that, by considering the latest developments, it may represent a model in European contract law. This issue has recently attracted the attention of the French legislature in its modernization of the Code Civil. Second, by examining the many different national doctrines, the paper aims to reconstruct and clarify, through comparative analysis performed, the conceptual framework of such a theory by discussing, in particular, issues of contract interpretation, presupposition, causation, good faith, fairness and solidarity.

Keywords: change of circumstances, unexpected circumstances, hardship, commercial impracticability, comparative contract law

Résumé: Le problème de l'imprévision est, en dépit de sa longue histoire doctrinale, loin d'être résolu. Cet article est basé sur un dialogue entre deux collègues provenant de cultures académiques différentes et mène une investigation comparative des approches allemande, française, italienne et anglaise et des développements contemporains en ce domaine. D'abord, il pose la question de savoir si l'imprévision demeure une exception ou si, à présent, elle ne représente le principe ou le modèle en droit européen des contrats. Pareille question a attiré l'attention du législateur français lors de la modernisation du Code civil. Ensuite,

Note: Cristina Poncibò is the author of sections 2, 4, 6, 7. Mitja Kovac is the author of sections 3 and 5. Sections 1 and 7 are co-authored. A preliminary draft of this article was presented at the 108th Annual Society of Legal Scholars Conference at University College Dublin, Ireland on 5–8 September 2017.

***Corresponding author: Mitja Kovac,** Professor of Law and Economics, University of Ljubljana, Slovenia, E-Mail: mitja.kovac@ef.uni-lj.si
Cristina Poncibò, Professor of Comparative Private Law, University of Turin, Italy, E-Mail: cristina.poncibo@unito.it

en analysant des positions nationales très variées, l'article vise à reconstruire et à clarifier, par l'analyse comparative, le cadre conceptuel d'une théorie, en discutant, en particulier, de divers problèmes d'interprétation, de causalité, de bonne foi, d'équité ou de solidarité.

Zusammenfassung: Die Frage danach, ob und inwieweit eine Nichterfüllung wegen Wegfall der Geschäftsgrundlage zulässig ist, ist – trotz der langen Geschichte der Diskussion hierzu – weiterhin ungelöst. Dieser Beitrag stellt zwei Stellungnahmen von Kollegen aus verschiedenen Rechtstraditionen einander gegenüber und fußt in einem Rechtsvergleich zwischen deutschem, französischem, italienischem und englischem Recht. Dabei werden die jüngsten Entwicklungen in diesem Bereich in den Blick genommen. Zunächst fragt der Beitrag danach, ob die Theorie vom Wegfall der Geschäftsgrundlage (französisch: der imprévision) als bloße Ausnahme zu sehen ist, oder ob sie nicht vielmehr im Lichte der jüngsten Entwicklungen inzwischen als der Mehrheitstrend im Europäischen Vertragsrecht verstanden werden kann. Im französischen Recht ist zunächst an die jüngste Vertragsrechtsreform im Code Civil zu denken. Sodann können auch die verschiedenen nationalen Dogmatiken in den Blick genommen werden und unter Heranziehung dieses Materials die konzeptionellen Grundlagen geklärt werden. Dies geschieht durch eine rechtsvergleichende Analyse, namentlich indem solche Figuren und Fragen diskutiert werden wie die Auslegungslehre, die Voraussetzungen, die Kausalität, guter Glaube, Fairness und Solidarität.

1 Introduction

The issue of whether contracts must be honoured despite changed circumstances has attracted the attention of the French legislature in its modernization of the Code Civil.[1] The French reform on this point has fuelled the interest of legal scholars on this traditional contract law subject.[2]

As a preliminary remark, we note that legal scholars in the domestic jurisdiction assessed here address this issue by adopting different legal concepts and terminology. French lawyers usually adopt the concept of imprévision; Germans refer to the term 'Geschäftsgrundlage'; Italians employ the concept of 'eccessiva

1 S. Rowan, 'The New French Law of Contract' (2017) 66 *International & Comparative Law Quarterly* 805, 831.

2 B. Başoğlu (ed), *The Effects of Financial Crises on the Binding Force of Contracts – Renegotiation, Rescission or Revision* (The Netherlands: Springer, 2016).

onerositá sopravvenuta'; the English rely on the doctrine of 'frustration of purpose', whereas American lawyers employ the theory of 'commercial impracticability'.[3] Moreover, the expression 'unexpected circumstances' is also commonly used in legal scholarship, while in international contract law, the most common term is hardship. As noted, the problem is not only one of designation, but also of concept: frustration is not the same as imprévision and neither is a change of circumstances the same as eccessiva onerositá sopravvenuta.

Our point here is that, over the last few years, the expression 'change of circumstances' has earned its place in the comparative and international study of the subject. For this reason, we deem it appropriate to generally adopt a neutral terminology and employ the domestic terminology when appropriate in the sections of the article. Consequently, in order to avoid ambiguities, we will conventionally use the expression 'change of circumstances' or the French word 'imprévision', with the following meaning: 'the situation in which, due to supervening and reasonably unforeseeable events, the performance of the obligation has become excessively onerous for the debtor or the counter-performance he receives has severely diminished its value'.[4] We would like to emphasize that this article focuses on the concept of 'change of circumstances' and does not discuss in detail related concepts of impossibility, impracticability and frustration. More precisely, it is limited to analysing, when necessary, our case from the above-mentioned situations. In addition, legal scholars often use the terms 'adaptation' and 'adjustment' interchangeably. In order to avoid any misunderstanding, the paper employs the term 'revision' as indicated by an author in the following sense: 'Revision is here understood to refer to any judicial intervention which modifies a contract directly or functionally (ie indirectly) with a view to enforcing it in its amended version'.[5]

3 J.M. Smits, *Contract Law: A Comparative Introduction* (Cheltenham: Edward Elgar, 2017) 202 *et seq*; J. Gordley and A.T. von Mehren, *An Introduction to the Comparative Study of Private Law: Readings, Cases and Materials* (Cambridge: Cambridge University Press, 2006) 1044; H. Beale, A. Hartkamp, H. Kötz and D. Tallon, *Contract Law: Cases, Materials and Text* (Oxford: Hart Publishing, 2002) 629; J. Gordley, 'Impossibility and Changed and Unforeseen Circumstances' (2004) 52 *The American Journal of Comparative Law* 513; and K. Zweigert and H. Kötz, *An Introduction to Comparative Law* (Oxford: Clarendon Press, 1998) 528.

4 The definition appears in the book of R. Momberg Uribe, *The Effect of a Change of Circumstances on the Binding Force of Contracts: Comparative Perspectives (Ius Commune Europaeum)* (Antwerp: Intersentia, 2011) 16.

5 P. Legrand, 'The Case for Judicial Revision of Contracts in French Law' (1989) 1 *McGill Law Journal / Revue de droit de McGill* 909, 951, 911. See also H. Collins, *The Law of Contract* (London: Weidenfeld & Nicolson, 1986) 151: '[J]udicial revision involves a termination of the existing

Having clarified these preliminaries the article analyses the case of a change of circumstances on contracts by focusing on the comparative analysis of certain domestic laws.[6] Contract law scholarship divides European legal systems into two categories with respect to the case of change of circumstances: 'closed' and 'open' regimes. Legal systems with an established general doctrine which can lead to an adjustment of contracts are referred to as 'open' (Germany, the Netherlands, Italy and Spain). Conversely, 'closed' regimes (Belgium, England, and France until the modernization of the Civil Code) do not provide for a general doctrine addressing unforeseen circumstances, so that contractual adaptation is not a rule.[7] We argue that such a doctrinal distinction is inaccurate because it underestimates the impact of international texts about change of circumstances, their influence over domestic laws, and some developments occurring in Europe (the French reform, for example). In particular, the article questions whether the picture has changed and whether it is now characterized by an increasing convergence of domestic legal systems in continental Europe in admitting an autonomous 'theory of imprévision' (or, in other words, a general doctrine).

Specifically, we discuss two main research questions with the aim of considering recent developments in the field. First, we question whether the theory of 'imprévision' remains a mere exception, or whether is it possible to argue that, by considering the latest developments, it may represent a 'new paradigm', or in other words, 'an autonomous theory'. We argue that change of circumstances is an autonomous concept with respect to other concepts, such as, for example, impossibility in Germany, Italy and now in France. Second, we examine the conceptual framework of such a theory, by briefly reconstructing its 'shifting' foundations and clarifying the complex interference of different legal concepts that are applied to cases involving unexpected circumstances: contract interpretation, presupposition, good faith, fairness and solidarity.

Here the point is that the recognition of a theory providing for relief in cases of unexpected circumstances makes it easier to argue in favour of the 'duty' of contract renegotiation and, under specific circumstances, the possibility of admitting judicial intervention in cases of failure to renegotiate.

---

contract and, where appropriate, the formation of a new contractual relation between the parties on terms which are fair'.

6 T. Lutzi, 'Introducing Imprévision into French Contract Law A Paradigm Shift in Comparative Perspective', in S. Stijns and A. Jansen (eds), *The French Contract Law Reform: a Source of Inspiration?* (Antwerp: Intersentia, 2016) 89–112.

7 E. Hondius and H.C. Grigoleit, 'Introduction: An Approach to the Issues and Doctrines Relating to Unexpected Circumstances', in E. Hondius and H.C. Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (Cambridge: Cambridge University Press, 2011) 3, 11.

2 The German Approach

German courts have always considered it justifiable to distinguish cases of changed circumstances from other pathologies, or functional faults of the contract.[8] The first situation may be subject to *Anpassung* (ie adaptation of the contract), while the second situations to other remedies provided by law: nullity (*Nichtigkeit*), or termination of the contract *(Auflösung*). German courts have been envied for their discretion in identifying the most appropriate remedy for restoration of the contractual basis damaged by the change of circumstances, while favouring adjustment of the contract under the new circumstances to share the cost of the unexpected event between the parties. Discretion allowed judges to intervene to revise the contract using various instruments. The practice originated from an old case law granting courts the power to intervene, under certain conditions, in a contract, by enabling them to reconstruct the contractual balance.

The court's limited power to adapt the contract to the new circumstances has fuelled a strong debate in German contract law scholarship. German scholars, in line with part of the case law, argue that the court should have confined itself to accepting the parties' proposals, intervening only in the event of failure to reach an agreement. However, in the case law, the power of the court went so far as to impose on the parties a new contractual settlement resulting from the court's discretion.

Thus, the discretion of the courts allowed them to scrutinize prices and inflation, especially at times when public authorities were unable to control them. With the aim of putting a limit on this discretion, practitioners have introduced contract adaptation clauses. So, part of the doctrine found that the court was entitled to intervene in a discretionary manner in the absence of such clauses while, on the other hand, the court's conduct would not have been limited by the presence of these clauses but could even correct these clauses when they contradict the principle of good faith (§ 242 BGB).

The reform of the law of obligations in Germany, in 2012, was the occasion to codify the doctrine under the heading 'disturbance of foundation of transaction'. Thus, § 313 was introduced into the BGB and it stipulates three distinct requirements.[9] Firstly, circumstances forming the foundation of the contract must have

8 P. Ridder and M.P. Weller, 'Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law' (2014) 22 *European Review of Private Law* 371, 373.

9 § 313 BGB '(1) If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of

seriously altered since the conclusion of the contract. This criterion is usually called the 'factual element'. Alternatively, subsection 2 of section 313 states that the alteration in foundational circumstances can also consist of essential subjective preconceptions turning out to be wrong after conclusion of the contract. This is the case when the circumstances underlying the contract remain the same, but the parties erroneously thought the situation was different. Secondly, section 313 of the German Civil Code furthermore requires the parties to have concluded the contract with a different content if they had foreseen the alteration of the foundation. Thirdly (ie the normative element), the norm provides for a one-sided claim for adaptation only if adherence to the unaltered contract cannot be expected of one party, taking all the circumstances of the case into consideration.[10]

Section 313 must not undermine the general principle of pacta sunt servanda, so it can only have meaning for restoring equity in extreme cases. That is why disturbance of the foundation of transaction is strictly subsidiary, all other legal means taking precedence.

One may wonder whether the requirements of the right to adjust a contract changed when they became codified law in the year 2002, especially regarding the way courts handle the rule nowadays. However, the explanatory note to the Reform Bill already states that the legislator attempts to incorporate the existing and established requirements in codified law, as major parts of German general contract law were about to be reformed anyway.[11] By codifying the foundation of transaction doctrine in section 313, no material changes as to the requirements of the doctrine were intended by the German legislator. Recent case law also shows that jurisprudence adheres to the intended continuity of the classic foundation of transaction doctrine.[12]

---

the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration. (2) It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect. (3) If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke.'

10 Ridder and Weller, n 8 above, 385.

11 Civil Code Reform Bill (explanatory statement) Bundestag-Drucksache 14/6040 (year 2001) 175–176; Generally see S. Grundmann, *Germany and the Schuldrechtsmodernisierung 2002* (2005) 1 *European Review of Contract Law* 129–148.

12 *Ibid* 390. The following decisions of the German Federal Supreme Court (among many others; date of judgment in brackets): BGHZ 191, 139–150 (30 September 2011, nr V ZR 17/11 – estates trade-off involving common error); BGHZ 184, 190–209 (3 February 2010, nr XII ZR 189/06 – parents' gratuity to child-in-law, then divorce); BGHZ 177, 193–211 (9 July 2008, nr XII ZR 179/05 –

In light of the above, one may conclude that section 313 was only incorporated into the German Civil Code in 2002, but, as noted before, the underlying rationale had been developed by the courts since the early 1920[s] on the grounds of the principle of good faith (see Section 7.3). It is also worth noting that the German legal system has developed over time an autonomous concept based on the distinction between impossibility and the theory of change of circumstances. Indeed, the old clausula rebus sic stantibus doctrine (see Section 7.1) – dating from the 11[th] century – as well as Windscheid's doctrine of presupposition (see Section 7.2) are regarded as the predecessors of the doctrine of 'disturbance of foundation of transaction'.

3 The new French Approach

In French law the effect of unforeseen circumstances upon existing contractual relations has traditionally been handled through the doctrine of force majeure.[13] That traditional position of French civil law[14] was clear and it produced a clear division: it was all or nothing. French civil law did not allow discharge of, or adjustment to, a contract which becomes excessively onerous.[15] A contract had to be performed, however onerous its performance had become. Civil courts in France, as opposed to administrative, initially rejected the theory of imprévision;

extra-marital cohabitation and monetary compensation after separation); *Neue Juristische Wochenschrift* 2012, 523 *et seq*.

13 R. David, 'Frustration of Contract in French Law' (1946) 28 *Journal of Comparative Legislationand International Law* Pts III – IV, 11, 3[rd] ser.

14 Also Belgian law generally adheres to the traditional doctrine; *force majeure* is recognized as an excuse, but unforeseen hardship is neither an excuse nor grounds for revision of the contract. See M.J. Perrilo, 'Force Majeure and Hardship under The Unidroit Principles of International Commercial Contracts' (1997) 5 *Tulane Journal of International & Comparative Law* 5; M.D. Aubrey, 'Frustration Reconsidered – Some Comparative Aspects' (1963) 12 *International and Comparative Law Quarterly* 1164. However, it should be noted that the Belgian government has recently presented a bill to introduce imprévision in Belgian law. See Avant-projet de loi approuvé, le 30 mars 2018, par le Conseil des ministres, tel que préparé par la Commission de réforme du droit des obligations instituée par l'arrêté ministériel du 30 septembre 2017 et adapté, eu égard aux observations reçues depuis le début de la consultation publique lancée le 7 décembre 2017.

15 For a synthesis see I. de Lamberterie, 'The Effect of Changes in Circumstances – French Report', in D. Harris and D. Tallon (eds), *Contract Law Today, Anglo-French Comparisons* (Oxford: Oxford University Press, 1989).

they refused to give the judge the power to revise or discharge the contract even if it had become ruinous for one of the parties.[16]

However, under the pressure of the international success of provisions on change of circumstances, many French scholars and judges were calling for a substantive reform.[17] These attempts at reform began more than one hundred years ago and have intensified greatly in the last 15 years.[18] Finally, on 11 February 2016 the French law of obligations as reflected in the French Civil Code was after 200 years modernized and the revised section came into force on 1 October 2016.[19] French courts and scholars, while recognizing the obsolete principles and serious incompleteness of the Code, also offered a set of arguments supporting this long-awaited modernization of the French Civil Code. Namely, it is argued that the extensive judicial interpretation of its articles had resulted in a growing disconnect with the text of the Code, and that this extensive case law interpreting the Code also implies that the understanding of contract law became the preserve of lawyers.[20] Moreover, French contract law scholarship realized that the influence of the Code abroad had declined sharply.[21] In particular, French contract law was perceived to be less attractive than, for example, English common law as a governing law of choice in international commercial contracts.[22] It was perceived

16 B. Fauvarque-Cosson, H. Beale, J. Rutgers, D. Tallon and S. Vogenauer, *Cases, Materials and Text on Contract Law: Ius Commune Casebooks for the Common Law of Europe (Book 5)* (Oxford: Hart Publishing, 2010) 629.

17 See eg D.M. Philippe, *Changement de circonstances et bouleversement de l'economie contractuelle* (Bruxelles: Bruylant, 1986).

18 Due to the unimaginable, unforeseen circumstances' incident of WWI, a new doctrine, known as the theory of imprévision, has been offered by some French legal authors, and submitted by them to courts. For early judicial attempts see *Robellard* v *Dispot Merlin*, Cour d'appeal Rouen, 9 February 1844, D 1845; *Gruet, Alary, et Comp* v *Cusinberche*, Cour d'appeal of Bordeaux, 26 August 1852. Cases are reported by Philippe, n 17 above. Despite a few attempts, the doctrine of imprévision has not been openly admitted by the civil and commercial courts.

19 *Ordonance no 2016–131 portant reforme du droit des contracts, du regime general et de la preuve des obligations*, JORF no 0035 of February 2016. Generally, see G. Helleringer, 'The Anatomy of the New French Law of Contract' (2017) 13 *European Review of Contract Law* 355–375. M. Fabre-Magnan, 'What is a Modern Law of Contracts?' (2017) 13 *European Review of Contract Law* 376–388. B. Fauvarque-Cosson, 'The French Contract Law Reform and the Political Process' (2017) 13 *European Review of Contract Law* 337–354.

20 Moreover, this disconnect party was blamed for the loss of influence of the Code abroad; S. Rowan, 'The New French Law of Contract' 44 (2017) *International & Comparative Law Quarterly* 6 *et seq*.

21 *Ibid*.

22 S. van Loock, 'The Reform of the French Law of Obligations: How Long will the Belgians remain Napoleon's Most Loyal Subjects?', in Stijns and Jansen (eds), n 6 above.

as less business-friendly and it was compared unfavourably on measures such as pragmatism and the promotion of transactional certainty.[23]

In addition, traditional law and economics literature describes French contract law as an inefficient, anti-commercial, unpredictable institution that had also increased transaction costs.[24] Hence, recent modernization of the Civil Code was intended to make it more competitive in a globalizing world, to help it regain its influence and become as attractive to international businesses as the laws of some common law countries.

The new Code contains, among other ground-breaking changes, an innovation on change of circumstances that can be found in the new Article 1195 of the Civil Code. This article gives the court broad powers to adjust the contract when unforeseen circumstances have made the agreement unduly costly.[25]

This Article 1195 departs from the previous French approach and reverses the leading *Canal de Craponne* decision, stating:

> (1) If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.
>
> (2) In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.[26]

The change is fundamental, as the previous principle was the non-interference of a judge in the contract. As of 1 October 2016, a judge can intervene in the contract signed after this date. In fact, as of 1 October 2016, a contract might be revised or terminated due to unforeseen circumstances that make it too onerous for one party to meet its obligations. Parties which cannot agree on this can now ask a judge to adapt or terminate a contract. However, parties might also forbid, in their contract, hardship clauses to prevent such an eventuality from happening and thus to maintain the binding force of their contract in any circumstances. Com-

23 *Ibid*.

24 See eg M. Kovac, *Comparative Contract Law and Economics* (Cheltenham: Edward Elgar, 2011). See also World Bank, 'Doing Business in 2004: Understanding regulation' (World Bank 2003).

25 Rowan, n 20 above, 6.

26 New Code Civil, art 1195, ch IV, The Effects of Contracts, sec 1, The Effects of Contracts between the Parties, sub-sec 1.

mentators also note that the introduction of Article 1195 is intended to promote contractual justice.[27]

The introduction of an imprévision provision and empowerment of courts to discharge or adjust contracts in instances of changed circumstances is of enormous doctrinal importance, since it puts the sacrosanct principle of pacta sunt servanda to an end and finally provides an escape route for contractual exchanges that have been altered by changed circumstances. Moreover, the authority to allow the French courts to adjust the contract if the parties during renegotiations cannot reach an agreement is a novelty, and, as noted, has been for the first time specifically provided in the new Article 1195 of the French Civil Code. However, it should be noted that this new Article 1195 and the related articles of the French Code Civil also invoked a substantial amount of criticism for giving too much power to judges and leading to potential uncertainty in legal practice.[28]

This ground-breaking development in French contract law points towards an increasing convergence among EU Member States in embracing the theory of changed circumstances as an autonomous theory, where domestic contract laws are developing towards the acceptance of a fully-fledged principle. Moreover, the new French provision on changed circumstances is, as emphasized previously, with the exemption of the duty to renegotiate, conceptually very similar to the German law. We argue that the German approach might indeed have served as the initial inspiration for the new Article 1195 of the French Civil Code, yet the final version of this article, especially the requirement that 'in the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine, or by a common agreement ask the court to set about its adaptation',[29] shows that initial inspiration might also have come from another, even more significant, source.

A comparison with European instruments such as Draft Common Frame of Reference (hereinafter DCFR) and Principles of European Contract law (hereinafter PECL) reveal a surprising source of influence that has shaped the final version of Article 1195 of the French Civil Code. Namely, the DCFR III-1:110, which largely corresponds with PECL 6:111 (sub-section 2), which allows courts to change the contract if 'performance becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation'. In such instances courts may vary the obligation in order

27 It is argued that this contractual justice is achieved by enabling the parties to correct serious imbalances that arise during the life of their contract; Rowan, n 20 above, 13.

28 P. Stoffel-Munck, 'Les clauses abusives: on attendait Grouchy' (2014) *D&P* 56; Y.-M. Laithier, 'Les règles relatives à l'inexécution des obligations contractuelles' (2015) 221 *JCP* G Suppl 47, 52.

29 Art 1195 (2) Code Civil.

to provide a reasonable and equitable solution in the light of new circumstances. However, courts may under DCFR III-1:110 intervene only if 'a) the change of circumstances occurred after the time when the obligation was incurred; b) the debtor did not at the that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances; c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of those changed circumstances'. Obviously, the new French Article 1195 follows the DCFR III-1:110 provision.

Moreover, the most significant evidence for our argument that DCFR and PECL actually served as initial inspiration, and that those two instruments represent the main source of influence that has shaped the final version of said Article 1195, can be found in DCFR III-1:110 (3)(d) which holds that a court may change or terminate the contract only 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'. With this article DCFR clearly establishes a duty-to-renegotiate,[30] which is then employed also in the new Article 1195 French Civil Code and which is not expressly referred to in the German BGB.[31]

Furthermore, Article 6:111 (ex Article 2.117) paragraph (2) PECL on change of circumstances on which DCFR III-1:110 (3)(d) is based provides that 'If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it (...). In addition, Article 6:111 PECL 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".' This provision serves as another piece of evidence of the influence of European texts over domestic contract laws, since PECL in this provision clearly establishes the duty-to-negotiate which can then be found in the new Article 1195. Obviously, this article follows the cited provisions of PECL and DCFR. The new European-wide doctrine of imprévision has clearly emerged. It should also be emphasized that neither the CISG, nor the Unidroit Principles of International Commercial

30 On a duty to renegotiate in DCFR see R. Momberg Uribe, 'Change of Circumstances in International Instruments of Contract Law: The approach of the CISG, PICC, PECL and DCFR' (2011) 15 *Vindobona Journal of International Commercial Law and Arbitration* 233–266.

31 However, it should be noted that although art 6:258 of BGB does not expressly refer to a duty to renegotiate, some scholars argue that the normal legal consequence of the collapse of the foundation of the transaction was that the parties were initially obliged to attempt to renegotiate an adaptation of the contract in good faith.

See A. Karampatzos, 'Supervening hardship as subdivision of the general frustration rule: a comparative analysis with reference to Anglo American, German, French and Greek law' (2005) 13 *European Review of Private Law* 105, 134.

Contracts (hereinafter UPICC),[32] include an explicit duty to renegotiate in the respective articles,[33] but since the parties may only resort to the courts after renegotiation has failed it follows that UPICC enables renegotiation.[34] Article 6.2.3 UPICC actually expressly entitles the disadvantaged party to request renegotiations and consequently the advantaged party then has a duty to renegotiate.[35]

Such solutions confirm the prevailing influence of the European texts PECL and DCFR[36] as well as, to a lesser extent, CISG and UPICC.[37] Namely, all these European and international instruments contain provisions which require or enable renegotiation, and they all also enable courts to (either by discharge or by

32 One should note that legal doctrine is still divided on the question of whether art 79 of the CISG is also applicable to situations of changed circumstances. For an excellent synthesis of arguments see L. Di Matteo, 'Contractual excuse under CISG: Impediment, hardship and the excuse doctrines' (2015) 27 *Pace International Law Review* 1. For an excellent treatise on arguments that art 79 CISG is also applicable to change of circumstances see J. Honnold and H.M. Flechtner, *Uniform law for international sales under the 1980 United Nations Convention* (The Hague: Kluwer Law International, 2009) 628.

Moreover, the Belgian Hof van Cassatie held in the Scafom case, concerning an international sales contract governed by the CISG stated that unforeseen circumstances which result in a serious disturbance of the contractual equilibrium can amount to an impediment in the context of art 79 of the CISG; *Scafom International BV* v *Lorraine Tubes S A S*; Hof van Cassatie, 19 June 2009, NC 07.0289 N. For a comprehensive annotation of this case see J. Dewez *et al*, 'The Duty to Renegotiate an International Sales Contract under CISG in Case of Hardship and the Use of the UNIDROIT Principles' (2011) 19 *European Review of Private Law* 101–154.

33 E. McKendrick, 'Hardship', in S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford: Oxford University Press, 2009) 716.

34 Arbitral decisions have indeed recognized the existence of the duty to renegotiate under art 6.2.3 of the UPICC. See eg 2000 Arbitral award ICC International Court of Arbitration (No 10021); and December 2001 Arbitral Award ICC International Court of Arbitration (no 9994) cited in J.M. Bonell, *An international restatement of contract law* (Ardsley: Transnational Publisher, 2005) 118 *et seq*.

35 Bonell, n 34 above.

36 See, Momberg Uribe, n 30 above, 233–266. Precisely: art 79 Convention on Contracts for the International Sale of Goods 1980 (CISG). Arts 6.2.1 to 6.2.3 the UNIDROIT Principles of International Commercial Contracts 2010 (PICC). Art 6:111 Principles of European Contract Law 1999 (PECL). Arts 6:111 and III-1:110 of the Draft Common Frame of Reference 2009 (DCFR).

37 Schwentzer argues that CISG's mechanisms of remedies combined with the duty to mitigate (if considered as a general principle) and with the duty of good faith lead in practice to flexible results to be adopted by the courts and may actually enable a duty to renegotiate the terms of the contract in order to restore the balance between the performance. I. Schwentzer, 'Force majeure and hardship in international sales contracts' (2008) 39 *University of Wellington Law Review* 709, 724. See also S. Kruisinga, *(Non-) conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* (Antwerp: Intersentia, 2004) 125.

adaptation) rebalance the contractual arrangement in the light of changed circumstances. However, it should be emphasized that whether French judges are up to the adjustment task, and whether they will indeed want to adjust contracts and correct materialized disequilibrium rather than simply discharge them, remains to be seen.

4 The Italian Approach

The doctrine of the 'eccessiva onerositá sopravvenuta' has been regulated within the Civil Code (1942) in the section dealing with termination of contracts and, more specifically, by Articles 1467, 1468 and 1469 of the Italian Civil Code. The introduction of such a concept is an absolute novelty with respect to the previous civil code, which did not contain any provision for this case, besides the classic causes of contract termination. Indeed, the Italian concept (Article 1467) has had a significant influence in the contract laws of some Latin America countries.[38]

The Civil Code provides a precise concept of eccessiva onerosità, outlining both the essential features and the scope of its application. The Italian provision is a modern one and, although adopted in 1942, is in line with the relevant rules of the UPICC.[39] Specifically, Article 1467 of the Italian Civil Code consists in the definitive consecration of the sic stantibus clause (see at section 6.2). Italian courts were employing the doctrine merely to deal with events that were exceptional and unpredictable occurring after the conclusion of the contract.[40]

Indeed, according to Article 1467 of the Italian Civil Code '(...) if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand dissolution of the contract'. The provision does not apply when the change of circumstance is part of the normal area of risk of the contract. Furthermore, 'the party against whom dissolution is demanded can avoid it by offering to modify equitably the conditions of the contract' (reductio ad equitatem).

On this basis, Italian Courts have not defined this concept for the last time, as normal risk depends on the type of agreement made by the parties. Indeed, each

38 A. Calderale, 'Mutamento delle circostanze ed eccessiva onerosità sopravvenuta nel diritto luso-brasiliano' (2012) 6 *I Contratti* 527, 539.

39 D. Corapi, 'L'equilibrio delle posizioni contrattuali nei principi Unidroit' (2002) 1 *Europa e diritto privato* 35.

40 F. Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine* (Napoli: Jovene Editore, 1996) 284.

type of contract, together with its clauses, expresses a particular allocation of the risks agreed on between the parties.

As for remedies, Article 1467 of the Italian Civil Code provides for a premature termination of the contract if the disadvantaged party advanced this request in court. This effect does not operate automatically, as the judge must establish whether performance of the contract is truly excessively onerous. However, the party who would benefit from the situation is granted the power to avoid termination of the contract by offering an equitable renegotiation (reductio ad equitatem), such as raising the price, for instance. The disadvantaged party cannot advance the offer (even if it is in his/her interest to ensure continuation of the contractual relationship), as it is a request expressly reserved to 'the party against whom dissolution is demanded'. The said process of equitable renegotiation aims to eliminate the disproportion exceeding that of the normal area of risk inherent in the contract. Thus, if the offer is accepted, the disadvantaged party will in any case suffer the negative consequences of the changed circumstances, within the limits of normal tolerability. The Italian Court of Cassation has confirmed since 1992 that:

> '[A]n offer of adaptation can be considered equitable if it brings the contract to a situation that had it existed at the time of the conclusion of the contract, the disadvantaged party would not have had the right to ask for termination.'[41]

Furthermore, the offer should be presented in clear and precise terms, as the judge must limit his/her assessment to whether it is a reasonable offer, but in many cases cannot change it. However, the Italian Court of Cassation has allowed the judge's intervention in the adaptation process by stating that if the offer is inadequate, the judge may determine an equitable revision of the contract.[42] According to the court, this decision ensures a better safeguard of the disadvantaged party, while respecting the principle that only the party who would benefit from the changed circumstances can propose an equitable renegotiation of the contract.

Interestingly, Italian courts also rely on the concept of presupposition.[43] Leading Italian legal scholars have contributed in transplanting the German concept and adapting it to Italian contract law.[44] The Italian Court of Cassation clarifies that 'presupposition is legitimately configurable at all times when it is

41 Italian Supreme Court (Corte di Cassazione) 11 January 1992 no 247 (1993) I (1) *Foro italiano* 2018.

42 Italian Supreme Court (Corte di Cassazione) 18 July 1989 no 3347 (1990) I (1) *Foro italiano* 565.

43 Momberg Uribe, n 4 above, chapter about Italy, 69–88.

44 C.M. Bianca, *Diritto civile, III, Il Contratto* (Milano: Giuffré, 2000) 467.

apparent from the content of the contract that the parties intended to conclude it subject to the existence of a given factual situation considered to be an indispensable condition of the negotiating will, the lack of which, in effect, entails the rejection of the contract itself, even though, in the negotiating act, no reference has been made to this situation, common to both contractors and independently of their will.'[45] Thus, under Italian contract law, this is an autonomous concept with respect to eccessiva onerositá sopravvenuta (change of circumstances). Accordingly, the court has identified in the right to withdraw (recess) and not in nullity or resolution, the remedy in the face of a case of presupposition. As a result, Italian courts are still using the theory of presupposition as a complement to the rules on eccessiva onerositá sopravvenuta.

Some legal scholars argue that the disadvantaged party should be allowed to preserve continuation of the contractual relationship. Indeed, the interest in keeping the contract has led part of contract law scholarship to suggest that a situation of 'eccessiva onerositá sopravvenuta' places both parties under a duty to adapt the contract to the changed circumstances. Once again, the basis of this duty is the principle of good faith, as stated in Articles 1366 and 1375 of the Italian Civil Code.[46]

Interestingly, since 2013, the courts have referred to the constitutional principle of solidarity in arguing in favour of a duty to renegotiate the contractual terms in the case at issue.[47] In particular, the argument has been advanced in cases concerning excessive interest rates related to mortgage contracts (in Italian 'usura sopravvenuta'). Usury occurs when the agreement on the rate of interest exceeds the quarterly threshold rate legally fixed – thus becoming excessive – at a later point in time to the implementation of the same, and above all as a result totally independent of the will and the behaviour of the parties. It is evident that because of such an occurrence independent of the will of the parties, the creditor abstractly has the right to claim interest, but if he acts in this way he would satisfy his own interest in a manner contrary to the solidarity obligations laid down in the obligation of good faith.[48] In such situations, on the contrary, according to the case-law, the debtor is entitled to claim against that part of interest that has become excessive (ie higher than the threshold fixed). In particular, Italian courts have admitted that the (excessive) interest may be altered downwards. The argu-

45 Italian Supreme Court (Corte di Cassazione) III Chamber, 24 March 2006 no 6631 and 11 March 2006 no 5390 (2006) 12 *I Contratti*, 1085 *et seq*.

46 R. Sacco and G. De Nova, *Il Contratto* (Torino: Utet, 1993) 685, 686.

47 Italian Supreme Court 9 January 2013 no 350 (2014) I *Foro italiano* 128, commented by A. Palmieri.

48 Before at 47. See also P. Gallo, *Eccessiva onerosità sopravvenuta* (Torino: Utet, 1990) 30.

ment is the duty to respect the general principle of solidarity as stated by Article 2 of the Italian Constitution. It is interesting to note the effects of applying such a principle in contact law, namely the adaptation of interest rates of mortgages.

5 The English Approach

Neither imprévision nor the doctrine of change of circumstances are terms known to English Common Law as formulated and used in contractual practice. In the conceptualization of common law, 'changed circumstances' has no legal meaning, it merely describes a fact. As commentators report, England firmly claims to stand on the traditional rule: 'a contract will only be discharged if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed.'[49] In English legal theory this is known as the doctrine of frustration of purpose.[50] In other words, an excuse may be granted as a general rule only in cases of impossibility or frustration of purpose; mere change of circumstances cannot frustrate the contract.[51] Moreover, the question of the power of English courts in adapting the contract, at the level of principle, does not occur.[52] The existence of such a power has never been accepted, even in situations which undoubtedly constitute cases of imprévision, nor does the principle of pacta sunt servanda appear to be called into question in academic writings in cases of change of circumstances. The fuzzy concept then becomes even more controversial due to terminological differences, since for example the French doctrine of force majeure[53] is somewhat narrower in its relieving effects than the English common law concept of frustration of contract.[54] English common law, however, operates with the concept of frustration of purpose, which occurs when

49 See eg A. Burrows, *A Casebook on Contract* (Oxford: Hart Publishing, 2016) 731; E. McKendrick (ed), *Force Majeure and Frustration of Contract* (Abingdon-on-Thames: Routledge, 2014) 7; J. Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 2002) 236 and Perrilo, n 14 above, 5.

50 For a synthesis see H.G. Treitel, *Frustration and Force Majeure* (London: Thomson Sweet & Maxwell, 2004). See generally H.M. Whincup, *Contract Law and Practice* (The Hague: Kluwer Law International, 1996).

51 A.S. Smith, *Atiyah's Introduction to the Law of Contract* (Oxford: Clarendon Press, 2005) 187.

52 See eg, Smits n 3 above, 203.

53 Above 167 *et seq*.

54 B. Nicholas, 'Force Majeure and Frustration' (1979) 27 *The American Journal of Comparative Law* 231. Moreover, many force majeure clauses in English contracts actually use the French words and reference is sometimes made to their meaning in French law; see eg *Matsoukis* v *Priestman & Co* (1915) 1 K B 681, 685.

contractual obligations can no longer be performed as a result of unforeseen, changed circumstances which are beyond the control of either party.[55] English doctrine thus generally operates to discharge a contract where, after the formation of the contract, an event renders performance of the contract impossible,[56] illegal, or radically different from that which was contemplated by the parties at the time of entry into the contract.[57]

In early days the common law of England thus took the view that contractual obligations were absolute.[58] The rationale for such a rigid rule was given by the Court of King's Bench as long ago as 1647 in the famous case of *Paradine* v *Jane*,[59] where it was held that a party to a contract can always guard against unforeseen contingencies by express stipulation, but if he voluntarily undertakes an unconditional obligation he cannot put forward any excuses merely because events turn out to his disadvantage.[60] But, as Simpson points out, the law already at that time did not take such an absolute approach in all cases.[61]

Commentators agree that the legal theory upon which the doctrine is based and the scope of it have been the subject of much debate.[62] Although the exact doctrinal discussion is beyond the scope of this paper, one should note that the essential question is whether the courts strive to give effect to the supposed

55 P.A. McDermott, *Contract Law* (Dublin: Butterworths, 2001) 1003.

56 English common law under impossible encompass instances where 'the subject-matter is destroyed; becomes unavailable; where something which is essential for the purpose of performance is destroyed or becomes unavailable; where a contract cannot be performed because of the death or unavailability of a particular person; where this person becomes unavailable, where the impossibility affects only the method of performance; and where performance after the conclusion of contract becomes illegal; Treitel, n 50 above, 63 *et seq*.

57 A. Burrows, *A Restatement of the English Law of Contract* (Oxford: Oxford University Press, 2016) 164; E. McKendrick, *Contract Law: Text, Cases and Materials* (Oxford: Oxford University Press, 2016) 849. See also R. Upex and G. Bennett, *Davies on Contract* (London: Sweet & Maxwell, 2004) 256; J. Beatson, *Anson's Law of Contract* (Oxford: Oxford University Press, 2006) 530.

58 See eg Upex and Bennett, n 57 above, 256.

59 In this case a tenant of the farm was dispossessed for a period of two years as a result of an act of the King's enemies. He claimed that he was not liable to pay the rent for the period for which he had been dispossessed. It was held that he was liable (1647, Avelyn 26): McKendrick, n 57 above, 850.

60 'When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract,' (1647) Aleyn 26, 82 ER 897.

61 A.W.B. Simpson, 'Innovation in Nineteenth Century Contract Law' (1975) 91 *Law Quarterly Review* 247, 270. See also J.D. Wladis, 'Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law' (1987) 75 *Georgetown Law Journal* 1575.

62 See eg Zweigert and Kötz, n 3 above, 529 and McDermott, n 55 above, 1005.

intention of the parties, or whether they act independently and impose the solution that seems reasonable and just. As it seems now, the more generally accepted view is that the court imposes upon parties the just and reasonable solution demanded by a new situation.[63] Moreover, as scholars point out, to speculate on the arrangements that parties would have made at the time of the contract if they had contemplated the event that has occurred, is to attempt the impossible.[64] Thus, the courts will not apply the doctrine of frustration unless they consider that holding the parties to further performance would alter the fundamental nature of the contract.[65]

The effects of frustrating events are governed by the common law and the provisions of the law reform commission (Frustrated Contracts Act, LR, FC A, 1943) and the objective of relief is clearly achieved by the automatic termination of the contract and a limited right to relief. The adaptation is simply not possible and frustration in English law is an all-or-nothing doctrine. In addition, frustration is not a doctrine that allows a party to escape from a contract merely on the grounds that the bargain is a bad one for that party.[66] Precisely, frustration terminates the contract automatically from the date of the frustration.[67]

However, an analytical examination of recent case law reveals that contemporary trends show an ever-growing, yet conscious, expansion of the concept of the impossibility and of frustration of purpose doctrine to cover also the instances of changed circumstances. As Beatson points out, the doctrine of frustration of purpose has now been extended to cover all cases where an agreement has been terminated by supervening events beyond the control of either party.[68] Namely, English courts do not always distinguish sharply between impracticability (ie change of circumstances) and impossibility.[69] One can occasionally find statements in cases, as for example in *Horlock* v *Beal*, where Lord Loreburn said that

63 In words of Lord Wright: 'Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand the terms and construction of the contract, and on the other hand, the events which have occurred. It is the court which has to decide what is the true position between parties,' in *Denny, Mott and Dickson Ltd* v *James Fraser & Co Ltd* (1944) AC 265, 274 per Lord Wright.

64 See eg McDermott, n 55 above, 1006.

65 J. Burrows, J. Finn and S. Todd, *The Law of Contract of New Zealand* (Wellington: Butterworths, 2007) 669.

66 Burrows, n 57 above, 165.

67 Burrows, n 57 above, 176.

68 Beatson, n 49 above, 530.

69 Treitel, n 50 above, 257.

'the performance of this contract became impossible, which means impracticable in a commercial sense.'[70] Stone et al. point out that impossible performance also encompasses the notion of 'commercial impossibility'.[71] Treitel further points to judicial statements which formulate excuses for non-performance in terms of 'commercial impossibility.'[72]

Yet, the scope and the doctrinal impact of this enlargement remains vague and inconclusive. The doctrine and the case law on the problem of whether contracts can be discharged due to changed circumstances that render performance excessively onerous has not been settled. Moreover, the adaptation of a contract falls outside the scope of such an enlargement, and despite its numerous positive effects[73] and economic desirability[74] remains 'taboo'. That being said, it should be emphasized that the convergence path is still a long and uncertain one, the gap between the island and the continent will be challenged by comparatists and legal academia in the near future.

6 Conceptual Framework of the Doctrine

In light of the ongoing legal developments with respect to cases involving a change of circumstances, one may conclude that in the examined European countries the contemporary principle of the binding character of contracts is a relative concept. The French jurist Alfred Fouillée coined a well-known expression: 'all justice is contractual; who says 'contractual says just'.[75] Today, such a reflection may seem anachronistic. The comparative analysis confirms that do-

70 *Horlock* v *Beal* (1916) 1 A C 486, 499.

71 R. Stone, J. Devenney and R. Cunnington, *Text, Cases and Materials on Contract Law* (Abingdon-on-Thames: Routledge Press, 2011) 486.

72 Or of what is commercially impracticable or which tentatively leaves open the possibility that serious impediments may be ground of discharge: Treitel, n 50 above, 257.

73 For example, the Dutch and German provisions on adjustment offer a great advantage since they do allow courts to adjust the contract in exceptional circumstances, whereas English law as stated automatically ends the contract. Of course such an adjustment should not be unconditional and should be employed as an exceptional instrument applicable only in cases of *imprévision*.

74 See eg P. Trimarchi, 'Commercial Impracticability in Contract Law: An Economic Analysis' (1992) 11 *International Review of Law and Economics* 63; M. Kovac, 'Unforeseen contingencies in English and French Law' (2013) 8 *The Journal of Comparative Law* 1; V. Goldberg, 'Impossibility and Related Excuses' (1988) *Journal of Institutional and Theoretical Economics* 14; and R.A. Posner and A. Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) *Journal of Legal Studies* 88.

75 Quoted by G. Ripert, *The moral rule in civil obligations* (Paris: LGDJ, 1935) 40.

mestic contract laws are addressing the case of unexpected circumstances by (a) developing an autonomous concept (Germany, Italy, and finally France), or (b) enlarging the boundaries of the impossibility theory (England).

First, it is possible to observe that the German approach in admitting this autonomous concept has inspired similar approaches in a number of other European legal systems, where the concept has been subject to a first wave of codification. More recently, the concept has also found its way into most harmonization projects and international instruments on contract law, and is now inspiring a second wave of codification.

Second, previously advanced developments prompt us to question whether there is now an increasing convergence in Continental Europe in embracing the idea of change of circumstances not as a mere and occasional exception to the binding force of contracts, but as a fully-fledged autonomous theory.

Indeed, given the increasing importance of the issue, it would be unrealistic to relegate it to the obscure status of an exception to an allegedly dominant norm such as sanctity of contract. We suggest it is more honest to acknowledge the 'development of a contradictory paradigm' (in the words of Legrand[76]) to the traditional rule of sanctity. After so much discussion, domestic contract laws in the EU are moving towards the acceptance of a fully-fledged, generally applicable, theory of imprévision. A model that seems to have fewer opponents than in the past. As an example, consider Belgian Contract Law, which has tried to maintain the sanctity of contracts as a pillar of contract law, by including the theory of change of circumstances in the controversial domain of legal exceptions strictly related to exceptional economic crisis.[77] As a non-European illustration, one should note the case of Quebec, where 'the theory of unpredictability or revision based on a rebus sic stantibus clause has failed to upset the traditional principles of Civil Law, such as the principle of the immutability of contractual obligations'.[78]

Thus the trend, exemplified by the French reform, is to recognize the established doctrines of impossibility of performance and frustration of venture, and to add to them an autonomous theory of 'imprévision'. Where, because of changed circumstances, a contract has become excessively burdensome on one of the parties, the party subjected to that burden may request a discharge of the contract, or, alternatively, its modification to reflect an exchange of values in accordance with market values at the time of the changed circumstances.

76 Legrand, n 5 above, 908–951.

77 A. Veneziano, 'The Unidroit Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court' (2010) 15 *Uniform Law Review* 137, 149.

78 Jude Marcel Nichols in *Grand Mills Lts* v *Universal Pipeline* [1975] C A 501.

More important, the comparative overview points out that the doctrine of change of circumstances now represents an autonomous concept under the contract laws of Germany, France and Italy. Differently, English Contract Law generally approaches the case in a different way by enlarging the concept of force majeure without developing an autonomous concept.

On this basis, our article aims, in the following sections, to contribute by clarifying the framework of the theory with its overlapping and conceptually complex foundations. It is worth noting that such a theory may find not one, but a number of different legal grounds in contract law. A brief description of the said conceptual framework requires mentioning, for example: contract interpretation and the rebus sic stantibus clause, presupposition, good faith, fairness and solidarity in contract law. All of these are briefly discussed in the following sections. Our analysis confirms that some early and more recent arguments underpin the recognition of an autonomous theory of imprévision.

6.1 Contract Interpretation: the Rebus sic stantibus Clause

An early argument supporting the theory of change of circumstance arises implicitly from the interpretation of contracts. A brief historical excursus confirms that the idea of the 'implicit condition' has had changing fortunes, while among scholars its attraction has never been lost.

According to an early thesis, the parties conclude any contract by including an 'implicit rebus sic stantibus clause'. As Zimmermann notes: 'One of the most interesting, and potentially most dangerous, inroads into pacta sunt servanda has, however, been the so-called clausula rebus sic stantibus: a contract is binding only as long and as far as matters remain the same as they were at the time of conclusion of the contract'.[79]

Medieval canon lawyers discussed the effects of a change of circumstances and the rebus sic stantibus clause in Contract Law, based not on Roman law, but on Roman philosophy. Cicero was among the first authors to raise the question of the legitimacy of refusing to perform a contract if the circumstances had sufficiently changed. To justify situations in which the course of time may turn something initially honourable into dishonourable conduct, Cicero gave the example of a person who breaks a promise to return a sword to another, the former being excused if the latter has become insane. After Cicero, Seneca stated that 'all

79 R. Zimmermann, *The Law of Obligations. Roman Foundations of the Civilian Tradition* (Oxford: Clarendon Press, 1996). In particular, the Chapter on Contract Formation 542 and 549.

conditions must be the same as they were when I made the promise if you mean to hold me bound in honour to perform it.'[80]

Curiously, St Augustine used the example of the sword given by Cicero with no legal implications, but it received legal authority when it was included in the *Decretum Gratiani*. Later in the 13th century, a gloss was added to explain that 'this condition is always understood: if matters remain in the same state'. The formulation of the condition was quoted from the Digest, where the phrase was used in an entirely different context. According to legal historians, the gloss 'inspired' later medieval authors.[81]

In particular, St Thomas Aquinas developed the subject from a theological point of view, when discussing whether every lie is a sin. He concluded that in the case of a *promissio* (which in this context does not exclusively designate promises that are legally binding) the promisor may be excused (ie is not committing a sin) in two situations: a) when the promise is illegal or immoral, or b) 'if the circumstances relating to his person or the transaction should have changed'.[82] Until this point, the clausula concept was only mentioned by canon law in connection with the taking of an oath, and by St Thomas, but without legal implications. Bartolus seems to have been the first civilian author to introduce the idea of the clausula as an implied condition (rebus sic habentibus) in civil law, but limited to the specific legal act of *renuntatio*. Baldus extended the idea to all *promissiones* (in the sense of legally binding promises). Following the doctrine of the tacit condition, Baldus stated that it was a 'rule that every promise is to be understood with the circumstances being the same.'[83]

Indeed, the conception of the clausula as an implied condition is in accordance with the medieval doctrine, which based the binding force of a promise on the will of the parties. Therefore, the exceptions to such a binding force have to be found in the promise itself, in the form of an implied or tacit condition. In this sense, the doctrine was a natural complement – and not an opposite – of the then developing principle of pacta sunt servanda. Hence, it is not odd that the same authors who supported the binding force of all kinds of promises were also admitting the rebus sic stantibus clause.

The 16th century marked the beginning of the decline of the influence of moral law on contracts when Grotius in his book De Jure Belli established the premise of an essentially consensual vision of the contract. In particular, the author 'glor-

80 *Ibidem* 550 *et seq*.
81 Zimmermann, n 79 above, quoted the Decretum 580.
82 Zimmermann, n 79 above, 579.
83 *Ibid* 580.

ified' in his work the binding force of the conventions (ie treaties) as the central node of his intellectual system.[84]

Therefore, in the 17th century, the clausula doctrine was of great relevance, becoming part of the emerging doctrine of the *usus modernus pandectarum*. The acceptance of the clausula doctrine survived during the 18th century, though limited to essential changes of circumstances, and some early codifications of the 18th century codified it.[85]

However, during the 19th century the doctrine of the rebus sic stantibus clause lost its relevance in legal scholarship. Enlightenment philosophers made a significant contribution in contract law to the 'sacralization' of individual will. For example, Rousseau noted that the contract is the cornerstone of social organization, given that no man has a natural authority over his fellow man, and authority descends from conventions among men. The dogmatization of individual freedom in contract law found its apogee with the philosopher Kant.[86]

Consequently, the French Civil Code has marked the legal consecration of the binding force of contract. The 19th century economic liberalism exacerbated the principle of the binding force of contracts and individual liberty.[87] Although thrown out of the door in the 19th century, it has reappeared under new guises (see at section 6.2).

6.2 Theory of Presupposition

The theory of presupposition elaborates on the previously mentioned clausula doctrine of the 19th century. The latter found a supporter in the German jurist Bernhard Windscheid, who developed the theory of the 'doctrine of the contractual assumption', or 'tacit presupposition' ('*Lehre von der Voraussetzung*').

84 G. Augé, 'Le contrat et l'évolution du consensualisme chez Grotius' (1968) *Archives de Philosophie du droit* 99, 108. This principle has found a modern expression in art 62 of the Vienna Convention on the Law of Treaties of 1968–1969 that deals with 'Fundamental Change of Circumstances'. The legal effect of such a fundamental change of circumstances is the 'termination and withdrawing the treaty', subject to a procedure prescribed by art 65 (notification of the claim to the other parties). The Vienna Convention is applicable only to treaties between sovereign states. Art 62 is a strong argument for the existence of a general legal principle that might also be relevant to transnational contracts with or between private parties.

85 Codex Maximilianeus Bavaricus Civilis, IV, c 15 Åò12, cited by P. Gallo n 48 above, 30.

86 I. Kant is quoted by J. Zankas, *La transformation du contrat* (Paris: Sirey, 1939) 102.

87 J. Carbonnier, *Civil Law, Les obligations vol 4* (Paris: Presses Universitaires de France, 1967) 223.

Windscheid defined 'presupposition' in terms of an undeveloped condition: one party wishes the effects of a transaction to be dependent on a certain state of affairs without, however, elevating such a presupposition, by way of an express declaration, to the status of a term of the transaction. This party may refuse to render performance, if his contractual opponent was in a position to gauge, from the circumstances of the transaction, that the presupposition in fact formed an element of his intention.[88]

However, this assumption that a certain state of affairs will prevail was not elevated to the status of an express 'condition' of the transaction. Promises are not, strictly speaking, conditional, and the contract remains (formally) valid even if the assumption is falsified, but since this is not in accordance with the real intention of the parties, the contract, though valid and effective from a formal point of view, ceases to have any justification. In this case, because the fulfilment of the parties' original expectations is the focus of Windscheid's theory, it is not fair or reasonable to insist on the fulfilment of a contractual promise, always provided, however, that the promisee was in a position to realize that the 'presupposition' had a determining influence on the will of the promisor.

The similarity of the presupposition with a true condition led the author to designate the (tacit) assumption as an 'inchoate condition' (*unentwickelte Bedingung*) lying between a mere motive and a true condition. The 'doctrine of the contractual assumption' was criticized by some German scholars mainly by arguing that the 'assumption' was a kind of intermediate thing halfway between a unilateral motive and a mutually agreed condition. Both legal certainty and the security of commercial dealings would be in great danger if one party were allowed to pass on his contractual risk to the other party.[89]

Although the first draft of the BGB included a provision that was in accordance with Windscheid's ideas, the Second Commission excluded such a provision. According to the members of the Commission, such a doctrine would endanger the security of commercial transactions and the term 'presupposition' was not a useful legal concept, which was clearly recognizable merely from the unilateral motives of a contracting party. Accordingly, the drafters of the BGB initially refused to include a general rebus sic stantibus provision and instead 'intended that the Code provisions governing impossibility be construed narrowly and limited to cases in which the performance was literally 'impossible' rather than extremely onerous'.

88 B. Windscheid, *Die Lehre des römischen Rechts von der Voraussetzung* (1850).

89 Ridder and Weller, n 8 above, 371, 373.

Indeed, it is worth noting that Windscheid's theory influenced the work of Paul Oertmann, who developed '*Wegfall der Geschäftsgrundlage*', namely the doctrine of the disappearance of the foundations of the contract.[90] The point here is to show that Windshield's doctrine of tacit presupposition has survived due to the success of Oertmann's idea in Germany. Just to quote an example, the codification of the concept of eccessiva onerosità sopravvenuta in the Italian Civil Code has not prevented Italian legal scholars and courts from applying the theory of tacit presupposition (see section 4 about Italy). Insightfully, in the words of the Italian Supreme Court, the idea of presupposition represents an autonomous doctrine of Italian contract law.[91]

6.3 Causation: the Doctrine of the Disturbance of Foundation of Transaction

The BGB did not originally incorporate a general provision dealing with changing circumstances. Indeed, the authors of the BGB were well aware of the doctrine of the rebus sic stantibus clause.[92] Nevertheless, they decided not to undermine the principle of the binding nature of contracts.

Only after a number of years, German courts believed the moment had arrived of having to follow Oertmann's theory of *Wegfall der Geschäftsgrundlage*, or the doctrine of disturbance of foundation of contracts.[93] Thus they gave final relevance to those circumstances that, after the conclusion of the contract, have altered contractual equilibrium.[94] With a subsequent and decisive ruling of 1923, German courts admitted the termination of a contract because of a change of circumstances. It was a fair reform and, finally, intervention was only admissible in cases of exceptional change of circumstances.[95]

90 J.P. Dawson, 'Judicial Revision of Frustrated Contracts: Germany' (1983) 63 *Boston University Law Review* 1039, 1045–1046 citing to P. Oertmann.

91 Italian Supreme Court (Corte di Cassazione), III Chamber, 24 March 2006 no 6631 and 11 March 2006 no 5390 (2006) 12 *I Contratti*, 1085 *et seq*.

92 Ridder and Weller, n 8 above, 371, 373. W. Fikentscher and A. Heinemann, *Schuldrecht* (Berlin: De Gruyter, 2006) 320.

93 Quoted by Lutzi, n 6 above, 10.

94 Supreme Court of the German Reich (Reichsgericht), in *RGZ* 106, 7 (2 March 1922).

95 Supreme Court of the German Reich (Reichsgericht), in *RGZ* 103, 328 *et seq* (3 February 1922) (*Vigogne-Spinnerei*). The sale took place in May 1919; ownership was to be transferred in January 1920. The devaluation of 80 % occurred just between these dates. Supreme Court of the German Reich (Reichsgericht), in *RGZ* 106, 11 (6 January 1923).

Subsequently, the *Bundesgerichtshof (BGH)* has had numerous opportunities to uphold and develop the doctrine, and clarify the doctrine of the basis of the transaction. Some of these decisions had to deal with very substantial changes of circumstances similar to the hyperinflation of the 1920s, such as the end of the Third Reich, the 1948 Berlin blockade and German reunification, while others addressed relatively trivial situations. Later, cases concerned the contracts for goods rendered unusable because of the Iranian revolution, the Gulf War and the fall of the Berlin wall. By examining the case law, it is possible to note that the main types of cases were inflation, devaluation of the corresponding obligation,[96] unreasonableness of performance (which is sometimes called economic impossibility),[97] frustration of the purpose of the contractual obligation,[98] and common errors of motivation.[99]

Therefore, the doctrine of the disappearance of the foundations of the contract has been the brilliant creation of German courts. Indeed, an analogous solution has, rather, found its legal basis in the broad interpretation of § 242 BGB accepting the theory of presupposition, as noted before, or in the simple reference to the principle of good faith. Thus, the long evolution of the doctrine and the case law led to the inclusion of a new provision on a change of fundamental circumstances (§ 313 BGB) in the context of the reform of the law of obligations in 2002 which modified the BGB.

6.4 The Concept of Good Faith

Even though the theory of presupposition has not been recognized in all modern private law orders, there has been a consensus that under special circumstances equity (see section 6.5) or good faith requires deviation from the initial contractual duties.

As noted before, section 313 was only incorporated into the German Civil Code in 2002, but the underlying rationale had been developed by the courts since the early 1920s on the grounds of the principle of good faith.[100] According to

96 German Federal Supreme Court (Bundesgerichtshof – BGH) 13 October 1959, (1960) *Neue Juristische Wochenschrift* 1.

97 German Federal Supreme Court (Bundesgerichtshof – BGH) 2 February 1995, (1995) *Neue Juristische Wochenschrift – Rechtsprechungs Report* 1117.

98 German Federal Supreme Court (Bundesgerichtshof – BGH) 13 November 1975, (1976) *Neue Juristische Wochenschrift* 565.

99 German Federal Supreme Court (Bundesgerichtshof – BGH) 8 June 1988, (1988) *Neue Juristische Wochenschrift* 2597.

100 RGZ 103, 177 (29 November 1921, nr II 247/21) translated in Gordley and von Mehren, n 3 above, 515 *et seq*.

an author, 'Section 313 embodies a specific aspect of the principle of good faith'.[101] In addition, with respect to the French reform, legal scholars underline '(…) the development of the good faith principle from a limited device of contract execution to an overarching principle in contract law as a whole'.[102]

In its modern version, the principle of good faith has also been used to establish an obligation to cooperate in the adjustment of the contract, and, after, to grant courts the power to modify the contract by interpreting the intention of the parties in the light of the aforementioned principle. In this sense, Article 6.2.3. of the UPICC expressly states: 'Although nothing is said in this Article to that effect, both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith and fair dealing (see Article 1.7) and to the duty of co-operation (see Article 5.1.3) (…).'

This especially holds true with respect to long-term contractual agreements, unless legal scholars stress the relevance of the 'subjective opinions of judges or arbitrators about what is fair and what best accords with the contract and the rules of law of the jurisdiction in question'.[103] In this regard, the High Court of England and Wales clearly described the particular nature of such agreements in its 2013 landmark Yam Seng judgment. The court noted that: '(…) Such 'relational' contracts, as they are sometimes called, may require a high degree of communication, cooperation and predictable performance based on mutual trust and confidence and involve expectations of loyalty, which are not legislated for in the express terms of the contract but are implicit in the parties' understanding and necessary to give business efficacy to the arrangements. Examples of such relational contracts might include some joint venture agreements, franchise agreements and long-term distributorship agreements'.[104]

It is worth noting that, in cases of unexpected circumstances, the courts have relied on the principle of good faith to admit contract adaptation in legal systems where the doctrine of imprévision or change of circumstances is not expressly recognized under the law. An example that comes to mind is the landmark case *Churchill Falls (Labrador) Corporation Limited* v *Hydro-Québec* rendered in 2016.[105]

101 Ridder and Weller, n 8 above, 384.

102 S. Grundmann and M. Schäfer, *The French and the German Reforms of Contract Law* (2017) 13 *European Review of Contract Law* 459–490, 471.

103 H. Edlund, 'Imbalance in Long-Term Commercial Contracts' (2009) 5 *European Review of Contract Law* 427–445, 427.

104 *Yam Seng PTE Ltd* v *International Trade Corporation Ltd* [2013] EWHC 111 (QB) (1 February 2013) para 142.

105 *Churchill Falls (Labrador) Corporation Limited* v *Hydro-Québec* (2016 QCCA 1229).

The Court of Appeal of Québec examined how the duty of good faith might apply in cases of hardship, where unforeseeable events fundamentally alter the equilibrium of a contract, either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.[106] Thus, the refusal to include in the Civil Code of Québec a provision expressly allowing courts to revise or terminate contracts in cases of hardship, does not in principle prevent a party from invoking the duty of good faith to resolve a contractual imbalance in cases of hardship. It is worth noting that the court has clarified that this duty has two components. The first component of the duty of good faith is a duty of cooperation, which requires a party to safeguard the interests of the other party. However, the duty of cooperation does not oblige a party to sacrifice his or her entitlements during the performance of the contract in order to serve the best interests of the other party. The second component of the duty of good faith analysed by the Court is a bundle of prohibitive rules regrouped under the notion of a duty of loyalty distinct from the fiduciary duties recognized by common law. At issue was the prohibition to engage in excessive and unreasonable conduct, including by taking advantage of a situation to gain an unfair advantage. The Court of Appeal held that, in circumstances of hardship, this prohibition on excessive and unreasonable conduct only prohibits the advantaged party from refusing an objectively reasonable and non-prejudicial concession to the disadvantaged party. Indeed, the approach of the Court of Appeal closely resembles an application of the theory of imprévision, without being identical or identically named. The 'label' in this case was the duty of good faith between the parties.

6.5 Fairness and Solidarity in Contract Law

The concepts of fairness and solidarity in contract law may represent autonomous arguments (ie arguments not referring to other theories) in designing the proposed conceptual framework.

Evidently, in relation to the fairness concept a theory of change of circumstances also has moral implications. In other words, one may question whether it

106 The dispute related to a power contract signed in 1969 between Hydro-Québec and the Churchill Falls (Labrador) Corporation Limited ('CFLCo') whereby CFLCo agreed to supply, and Hydro-Québec agreed to purchase, substantially all of the power produced by the Churchill Falls Generating Station for a total term of 65 years. Following the execution of the contract, the price paid by Hydro-Québec turned out to be markedly lower than the commercial value of the power generated, because of increases in energy prices and the emergence of competitive energy markets in North America, although the contract remained marginally profitable for CFLCo.

is fair that one of the parties requires the performance of a contract where the economic value of the agreement has been shattered by the advent of circumstances unforeseen at the beginning. In particular, this question arises when a party would require the other party to perform its obligations to its own benefit.

Coming to the second concept, the argument about solidarity in contract law appears in Italian case law, where the theory of eccessiva onerosità sopravvenuta has been codified since 1942. Interestingly, the duty to renegotiate and, in case of failure, the subsequent judicial revision of contractual terms may be 'justified' by referring to the solidarity clause provided for by Article 2 of the Italian Constitution.[107] Article 2 is not considered as a general provision in contract law, but as requiring the parties of an agreement to act in reciprocal solidarity when occurrences have changed the original contractual balance.

Just to provide an example, Italian courts have referred to such an idea of solidarity in arguing in favour of a duty to renegotiate a loan that has become usurious through rising rates of interest. According to legal scholars, such an approach represents a 'safety valve' to maintain a contractual relationship by 'adjusting' its terms in order to rebalance the economic obligations of the parties.[108]

7 Conclusion

Time sometimes has surprising effects. The instability of the 20th century and contemporary economic and socials troubles are undermining the strength of the principle of binding contracts. This process is going to accelerate in the new century characterized by increasing uncertainty and instability in Western Society.[109]

The rejection of the theory of changed circumstances still seemed defensible at the beginning of the 20th Century. Nevertheless, the First World War was supposed to be the last and a great era of stability and economic prosperity was announced. History was less peaceful. The Great War was not the last. The most stable economic institutions failed in the 1930s. The franc, the pound, the dollar

107 Art 2 of the Italian Constitution: 'The Republic recognizes and guarantees the inviolable rights of the person, both as an individual and in the social groups where human personality is expressed. The Republic expects that the fundamental duties of political, economic and social solidarity be fulfilled'.

108 Momberg Uribe, n 4 above, chapter about Italy, 69–88.

109 A.B. Menezes Cordeiro, 'Brexit as an Exceptional Change of Circumstance?', in N. da Costa Cabral, J.R. Gonçalves and N. Cunha Rodrigues (eds), *After Brexit. Consequences for the European Union* (The Netherlands: Springer, 2017) 147, 163.

and many other currencies experienced – and are still experiencing – dramatic swings of fortune.

In the 21st Century, instability in economic development has become chronic. The latest developments here briefly analysed in some European countries, and particularly in the French legal system, seem to confirm that imprévision should no longer be deemed an occasional exception to the binding force of contracts, but as an autonomous theory. We argue that the legal construction of the theory of imprévision is possible by considering the experiences of certain EU domestic contract laws, such as German, Italian and French contract law. The extension of the concept of impossibility will remain a peculiarity of English Contract Law, especially after Brexit. Therefore, one may wonder whether, in the near future, international and EU texts, for example the aforementioned PICC, might also have some influence on the English approach in making it converge with other domestic jurisdictions in developing an autonomous concept.

In addition, the underlying rationale of the theory emerges from our comparative analysis of the German, Italian and French approaches, and the rationale appears to be varied and flourishing. The conceptual framework that has emerged in the comparative analysis includes, for example: contract interpretation, presupposition, the notions of causation and good faith, fairness, and solidarity in contract law.

Finally, we observe that, through these means, attempts are being made to reconsider the issue of contractual ethics in the sense of promoting equity between the obligations of the parties. This old idea (equity) is surely coming back to life in our times. The admission of a theory of imprévision also makes it possible to reintegrate the contract in its functional environment, which is not exclusively legal, but social as well.[110]

Acknowledgment: We are grateful to the scholars who gave us comments. All errors and omissions remain ours.

110 J. Carbonnier, *Flexible droit* (6th ed, Paris: LGDJ, 1988) 271.