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9 | Change of circumstances: the Trento project

Ewoud Hondius [▪]

1 INTRODUCTION

The financial crisis has raised a number of legal questions, one of which is whether or not contracts may be modified or abrogated¹ in case of a change of circumstances.² The issue is not wholly novel. It has been the subject of debate ever since medieval times.³ Do all contracts contain an implicit clause that they are only valid when the circumstances remain unchanged: the *clausula rebus sic stantibus*? European jurisdictions provide different solutions to this question. But do they in fact diverge where practical issues are concerned? That is the question which one of the Trento/Torino common core of European private law working groups has set out to answer. The group's report was published last year;⁴ its main findings are set out below in nrs. 3-9. Before doing so, this paper purports to give some insight into the group's methodology in nr. 2.

2 THE COMMON CORE OF EUROPEAN PRIVATE LAW PROJECT

The *Common core of European private law* project is based on the combined ideas of 'the two Rudi's': Rodolfo Sacco and Rudi Schlesinger. Sacco (1923-) is the godfather of Italian comparative law⁵ and the author who coined the idea of 'legal formants'.⁶ Having held a chair in Trieste and Pavia, since 1971 he has been associated with the University of Torino. Schlesinger (1909-1996) was

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1 A similar question is whether parties may be obliged to renegotiate the contract. This question is taken up by Rodrigo Momberg in his contribution to this volume.

2 This paper will use the words 'change of circumstances' interchangeably with 'unexpected circumstances'.

3 Famous cases include the French *Canal de Craponne* case (DP 76.1.195, *Grand arrêts* nr. 94) and the English coronation cases *Krell v Henry*, [1903] 2 KB 740 and *Herne Bay Steam Boat v Hutton*, [1903] 2 KB 683.

4 Ewoud Hondius, Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law*, Cambridge: University Press, 2011, 692 p.

5 Witness his *Introduzione al diritto comparato* (1979) and his *I Grandi sistemi giuridici* (1996).

6 Rodolfo Sacco, 'Legal formants: a dynamic approach to comparative law', 39 *American Journal of Comparative Law* 1-34 and 343-401 (1991).

an American of German extraction who taught in Cornell, where he came up with the theory of the common core of legal systems. According to this theory jurisdictions may have widely diverging points of departure, but in fact the outcome of litigation is often the same. Thus, even if specific performance is the prevailing remedy in continental law, in fact courts will often award damages, just like in common-law jurisdictions. Schlesinger set out to test his ideas in a celebrated research project on formation of contract.⁷ It was in Italy that the project was to be continued on a much larger scale. In 1993, two young (at the time) Professors at the University of Trento, Mauro Bussani and Ugo Mattei, founded the Common core of European private law project.⁸ There were to be three groups, on Contract, Property and Tort. All three are taken in a very wide sense, including for instance *Environmental liability and ecological damage*⁹ and *The enforcement of competition law in Europe*.¹⁰ The three groups have annually come together, first in Trento, and then – when the two convenors continued their careers elsewhere – in Torino. Apart from the meetings of the three working groups there are also plenary sessions, where not only general issues are discussed but outsiders are also invited to critically evaluate the group's methodology.¹¹ There is open access to the three groups, which provides a rare chance for young graduates to mingle with old diehards of comparative law.

It was the Contract group chaired by James Gordley which in 2000 invited the author of this paper to chair a working group on Change of circumstances. The group was to elaborate on the work of an earlier working group on Good faith, which had included one question on change of circumstances.¹² Ten years later, the work came to fruition. How come the elaboration lasted so long? Several arguments may be advanced. First, the common core project has no standardised procedure how to arrive at a questionnaire. Usually it is the general reporter who submits a draft to e.g. the Contract group. In other cases, such as in the present project, the questionnaire was arrived at in meetings of the working group, the members of which therefore first had to be

7 Rudi Schlesinger (ed.), *Formation of Contracts/A Study of the Common Core of Legal Systems*, Dobbs Ferry: Oceana, 1968, 2 vols., 1 727 p.

8 See among their various publications Mauro Bussani and Ugo Mattei (eds.), *Opening up European law*, Bern: Stämpfli, 2007, 283 p.

9 Monika Hinteregger (ed.), *Environmental liability and ecological damage*, Cambridge: University Press, 2008, 697 p.

10 Thomas Möllers and Andreas Heinemann (eds.), *The Enforcement of Competition Law in Europe*, Cambridge: University Press, 2008, 713 p.

11 See for instance Günter Frankenberg, How to do projects with comparative law – notes of an expedition to the common core, 6 *Global Jurist* 2006, issue 2 (this critical appraisal of the Trento group at the time highly annoyed some of the project's staunch supporters such as James Gordley).

12 Reinhard Zimmermann and Simon Whittaker (eds.), *Good Faith in European Contract Law*, Cambridge: University Press, 2000, pp. 557-577.

appointed.¹³ Also, a second general reporter, Hans Christoph Grigoleit, presently from the University of Munich, was proposed and accepted. All of this took time: democracy has its price. Second, the project itself provided no incentive to establish sharp deadlines; on the contrary, why finish a project which each year invites its participants to a conference in a wonderful Italian city, with a precious mix of old established comparative lawyers and fresh graduates, East and West, practitioners and academics. Third, within this working group policy-oriented issues – and more particularly the question whether they should be taken up at all – took up quite some discussion time. Should the group remain neutral vis-à-vis the aversion of some jurisdictions to at least providing for the opportunity to open up contracts? As opposed to most other projects, the Trento Common core of European private law team does not have any (outright) political programme, such as harmonisation of private law. Instead, it focuses on one central issue. This is the contention of Rudolf Schlesinger that much as the various jurisdictions may differ from one another when it comes to the starting point, the end results are often the same or at least very similar.

Fourth, as the readers of *Perlmanns Schweigen*¹⁴ will know, the obligation to render a manuscript can become problematic. What to do when an author ignores the deadline set by the group? This depends on the Chapter. It may well be conceivable to have a comparative study without Denmark or Finland, without the Netherlands or Portugal. Such jurisdictions may be left out without causing major problems to the project as a whole. But a project without England and France? That is precisely what threatened in the case of the change of circumstances project. When the original English and French reporters had to resign, it had to be decided to look for stand-ins. We were fortunate to get the help of Denis Philippe, who not only contributed the missing chapter on his native Belgium, but also that on French law (which actually is very close to Belgian law). English law also happens to be close to a jurisdiction for which we fortunately did have a report, namely Ireland. Like their Belgian counterpart, the Irish reporters undertook to write the national report on English law, which was familiar to them because it provided the foundation of Irish contract law.

The last element which caused some delay was the production process. First, the publisher had to decide whether or not to publish the work at all. We were quite unaware that at Cambridge University Press this decision is a collective one taken by ‘the Syndicates of the Press’, all, we understand,

13 In the end Odavia Bueno Diaz, Marta Cenini, Robert Clark, Júlio Gomes, Carsten Herresthal, Cliona Kelly, Bert Lehrberg, Barbara Luppi, Brigitta Lurger, Francesco Macario, Laura Macgregor, Luz Martínez Velencoso, Valentinas Mikelenas, Kim Oestergaard, Francesco Parisi, Denis Philippe, Antonio Pinto Monteiro, Andreas Thier, Raphael Thunhart, Luboš Tichý, Matjaž Tratnik, Anastassios Valtoudis and Willem Wiggers participated in the final text.

14 Pascal Mercier, *Perlmanns Schweigen*, München: Knaus, 1995.

academics affiliated with Cambridge University. Then, the manuscript had to be adapted to the publisher's guidelines. Finally the text was handed over to a copy editor, who – it must be said – did a splendid job, once again, however, at the cost of time.

Apart from the time element involved in team work, several other of the group's experiences could be analysed. The selection of cases for the questionnaire was of course of primary importance. The change of circumstances group, as opposed to some other groups, tried to be as concise as possible, which resulted in leaving out some specific contracts. This was also the reason why, unlike our original plans, we did not include chapters on American law, administrative law and (public) international law as some other volumes – we did, however, include chapters on legal history and law & economics. Other issues which had to be solved were to what extent the solutions to the cases should be preceded by general descriptions of the various national jurisdictions and the question which general notions, which may also provide relief, should be covered. Notions such as *abus de droit*, *force majeure*, good faith, impossibility, interpretation, mistake, unfair contract terms and unjust enrichment may indeed be of relevance.

3 'OPEN' VERSUS 'CLOSED' LEGAL SYSTEMS¹⁵

Now coming to the substance of the matter, during the research, the group drew a distinction between 'open' and 'closed' legal systems. The distinction is based on the criterion whether or not a jurisdiction recognizes a general rule under which the contract can be adjusted to unexpected circumstances by the courts. The distinction led to the following groups: as 'open' legal systems we qualified those of Austria, Germany, Greece, Italy, Lithuania, the Netherlands, Portugal and Sweden. We characterized as 'closed' jurisdictions those of Belgium, Denmark, England, France, Ireland, Scotland and Slovenia. To a certain extent this distinction goes along with the classic division into legal families. Not very surprisingly, the common law tradition and the French influence ('closed' jurisdictions) led to similarities in the doctrinal approach to cases on the one hand, as did the German tradition ('open' jurisdictions) on the other hand.¹⁶

However, the distinction between 'open' and 'closed' jurisdictions did not survive the test wholly unscathed as far as the outcome of our cases is concerned. Thus, the distinction between 'open' and 'closed' jurisdictions is a

15 The following is to a large extent based on the book *Unexpected circumstances in European contract law*, referred to above.

16 Rodrigo Momberg in his PhD thesis *The Effect of a Change of Circumstances on the Binding Force of Contracts* (PhD thesis Utrecht 2011, Antwerpen: Intersentia, 2011) arrives at a similar distinction between 'receptive' and 'non-receptive' systems.

rough doctrinal approach rather than a clear indication of differences with regard to the result of a certain case. It is fair to say that the recognition of a general and flexible rule providing for relief in cases of unexpected circumstances may make it easier for the courts to set aside a contract. Yet, the strict requirements for relief and the variety of other legal concepts dilute the effects of any particular doctrine. In a jurisdiction such as the Netherlands, for example, where a provision in the Civil Code allows adjustment of the contract in case of a change of circumstances, this provision is used so rarely that one may occasionally ask whether this is not rather a 'closed' system. Likewise, Slovenia, which we qualified as a 'closed' jurisdiction, seems to be on the borderline with the 'open' systems. The distinction was drawn based on doctrinal aspects and the differences between the two groups remain on a doctrinal level.

This rather diffuse picture with regard to results in the 'open' and 'closed' legal systems can be explained by the complex interference of different legal concepts that are applied to cases involving unexpected circumstances. Even if a jurisdiction does not recognise an 'exceptional' doctrine allowing for an adjustment of the contract, 'conventional' doctrines may be applied with similar results. In addition, in many jurisdictions specific legislation exists that is directed at dealing with the consequences of certain exceptional events on the contractual exchange. This complex interference of concepts complicates conclusions on a general level and makes a clear distinction between the groups difficult as far as the results are concerned.

Yet, it seems fair to say that the recognition of a general and flexible rule providing for relief in cases of unexpected circumstances may make it easier for the courts to set aside a contract. Across all the cases, the 'open' jurisdictions actually seem to be more open towards equitable relief than the 'closed' ones, while the latter systems express a higher esteem for the principle of *pacta sunt servanda*. It is also interesting to see that this division corresponds remarkably with the distinction between fault liability ('open' jurisdictions) and strict liability ('closed' jurisdictions¹⁷).

4 CONVERGENCE AS TO THE GENERAL ISSUE OF THE BINDING CHARACTER OF THE CONTRACT TERMS

Before I turn to a more systematic analysis of the doctrinal concepts, it is remarkable to observe that in most cases there is a clear tendency as far as the results are concerned, i.e. whether or not a certain unexpected event justifies suspending the binding character of the terms of contract and to limit the principle of *pacta sunt servanda*. It should be noted, however, that these

17 See case 14 below.

tendencies only relate to the suspensory effect as such while the legal consequences (adjustment or termination) may vary in detail. I shall examine these tendencies in the four different groups that we have established for our cases:

a) *Equivalence of exchange is substantially affected*

1) With regard to the first group of cases in which the ‘equivalence of the exchange has been affected’ we can conclude that under the law of all jurisdictions long-term agreements can lose their binding effect if, in the course of time, the initially fixed price grows out of proportion to the value of the object.¹⁸ In many jurisdictions, the right to terminate long-term contracts is an essential element of their contract law. Such a right is, in effect, based on the rationale that in the course of long-term agreements unexpected effects can occur that cannot be provided for by the parties in advance. This correspondence becomes evident under the German rules on unexpected circumstances which contain a separate section dealing with the effects of unexpected events on long-term contracts (§ 314 BGB) besides the general provision on *Störung der Geschäftsgrundlage* (§ 313 BGB).

2) There is generally much reservation as to the question whether extraordinary inflation can affect credit agreements. Only some of the ‘open’ jurisdictions mitigate the consequences for the burdened party while applying very strict standards.¹⁹ This reservation can be referred to the nominal value principle under which the amount of a monetary debt is based on its nominal and not on its ‘real’ value. Inflation is a ubiquitous phenomenon of the economy and distinctions between regular and excessive conditions are hard to draw.

18 Case 1 ‘Canal de Craponne’: *Long-term agreement – devaluation of the price agreement.*

Early in the 20th century, the farmers A and B entered into a contract under which A promised to build and maintain an irrigation channel; B was entitled to extract water at a fixed price. The contract was concluded for an unlimited period of time. Almost 100 years later, A’s successors ask for an increase in the price arguing that due to inflation and a rise in the cost of maintenance as well as labour the agreed price has become completely inadequate.

Is the claim by A’s successors justified? Are they, alternatively, entitled to terminate the contract?

19 Case 2 Extraordinary inflation: *Hardship due to extraordinary inflation; hardship resulting from a foreign currency agreement (Extraordinary inflation).*

A receives a loan from the B-Bank. Under the agreement, the interest rate is fixed at 10 percent for five years. In the last 20 years before the agreement, the rate of inflation had been relatively stable within a range of one to six percent. In the third year after the conclusion of the agreement, the economic situation begins to destabilize and inflation rises quickly to 50 percent.

Unsurprisingly, due to its speculative nature, the jurisdictions are even more reluctant to grant relief in the case of a foreign currency agreement.²⁰

3) We can observe a tendency towards relief in cases, in which government intervention has strongly affected the contractual equilibrium, even though the 'closed' jurisdictions are more reluctant to grant relief. This trend can be attributed to the consideration that government action is often elementary to the parties' interests and evidently beyond their control.

4) Under a majority of jurisdictions, unexpected benefits do not trigger any form of relief, even if the benefits are out of proportion with the consideration.²¹ It appears that one-sided windfall profits arising from the contract do not elicit the same inclination for equitable compensation as excessive losses.

b) Recipient's use of goods or services is substantially affected

1) In the cases from group B where the 'recipient's use of goods or services is substantially affected', government intervention seems to be, again, a clear example for judicial intervention: relief is predominantly granted if the lease of a petrol station becomes worthless to the lessee as petrol is no more available due to confiscation in wartime.²² However, in the majority of the jurisdictions an export ban that is already present at the time of contracting does not justify relief for the burdened party even if both parties expected that the

20 Case 2B: *B-Bank asks for an adjustment or for a termination of the contract (Variation: foreign currency agreement)*.

The loan agreement between A and the B-Bank provides for repayment and interest in a foreign currency. In the last 10 years before the agreement, the relevant exchange rate had been relatively stable within a range of 20 percent. Subsequently, the national currency is devaluated by 80 percent compared to the foreign currency.

A asks for an adjustment or for a termination of the contract.

21 Case 4 Unexpected benefit: *Long-term lease – extraordinary increase of the rental value*

B leases business premises from A for a fixed period of 15 years. Shortly after concluding the contract, the character of the area changes strongly and unexpectedly: A military airport located nearby is shut down and an enormous amount of public funds is invested in the area (infrastructure etc.). As a consequence, B's business soars and his profits are 500% of what he could reasonably have expected. By the same token, the rental value of comparable business premises in the same area rises to 500% of the amount A and B have agreed upon. A claims that the leasing price is to be adjusted accordingly or, alternatively, that the agreement is to be terminated.

Is A's claim justified?

22 Case 6 Confiscation of petrol: *Government intervention makes the use of a rented petrol station impossible*

A leases a petrol station from B. Due to the outbreak of war, the government confiscates all petrol in that area and it is impossible for A to obtain petrol from any source. As a result, A can make no use of the petrol station. He stops the payment on the lease.

Is A's refusal to pay the rent justified?

ban would be suspended.²³ The reason for upholding the contract in this case is that the parties knew about the risk of the ban and the misjudgement of an identified risk is held not to justify a relief.

2) When a promised work of construction (in our case: a cellar) becomes useless to the client due to a natural disaster (destruction of the rest of the building), all legal systems give him the right to cancel the completion of the work because it has become useless. With regard to the question of compensation, the jurisdictions are basically divided into two groups: according to one approach, the contractor remains entitled to the full contract price less the expenses he saves by not having to carry out the work, e.g. wages, material etc (Belgium, Czech Republic, Denmark, France and Slovenia). Thereby the contractor is awarded his contractual profits and the risk that the contract has become useless is allocated to the client. The argument for this is that the house is in his sphere of risk and control. In other jurisdictions, the contractor's claim for his contractual profits is reduced by some form of equitable adjustment and therefore the risk is distributed between both parties (e.g. Germany, the Netherlands, Portugal, England and Ireland). This solution is based upon the notion that the risk in question is not rooted in the house itself but in the natural disaster which is beyond either party's control.²⁴

23 Case 10 Export ban: *Purchaser of technical equipment is affected by export ban*

Firm A purchases technical equipment which is to be produced by firm B. The parties know that firm A plans to resell the equipment to Iraq. At the time of contracting, exports to Iraq are illegal but the parties expect that the status quo will change before the time of delivery. The parties are aware that the equipment can only be sold to Iraq at a reasonable price. When firm B has completed production and offers delivery, exports to Iraq are still illegal and no change is in sight. Firm A refuses acceptance and payment.

Is A's refusal to accept and pay justified?

24 Case 5 Destruction of cellar: *Renovation of cellar becomes useless due to the destruction of the building by a natural disaster*

A agrees to refurbish B's cellar into a wine cellar. The work is scheduled to start one month after the agreement. Before the work has started, B's house is completely destroyed during a violent summer storm. However, the cellar of the house remains fully intact. B immediately informs A and asks him not to perform. A insists on the agreement. He argues that B's cellar is still intact, that he has reserved two weeks to carry out the work and that he has already purchased the necessary materials.

Is B obliged to pay the contract price or, alternatively, to compensate A for his losses?

3) In the hotel reservation case the four events presented²⁵ display different tendencies: there is broad correspondence with regard to the conclusion that the frustration of individual purposes (exhibition cancelled²⁶) and disturbances in transport (strike²⁷) do not relieve the customer from his contractual obligations as these risks fall in the sphere of the customer. There is a certain tendency towards relief in the case involving terrorist threats,²⁸ however, much seems to depend on the facts (e.g. the probability and the foreseeability of the attacks). A clear tendency for relief can be stated in the coronation case: the fact that the price reflects the procession leads most reports to conclude that the hotel owner has to bear the risk.²⁹

4) With regard to the shop rental case, a clear majority of the jurisdictions denies relief to the shop owner who claims that the business environment has developed unfavourably. This risk is considered not to be unusual and therefore the shop owner could and should have provided for it by implementing a protective term.³⁰ The jurisdictions under scrutiny are more likely to grant relief, however, if the owner of a bar is bound under a long-term supply agreement to sell only one kind of beer and this beer turns out to be unpopular among the guests.³¹ Here, the long-term character of the contract may

25 Case 7 Hotel reservation: *Individual purpose of the visit frustrated; strike by airport personnel; general safety endangered; coronation case*

A booked a room at B's hotel, but:

a) The exhibition he wants to visit is cancelled at the very last moment.

b) A terrorist movement declares that it is to launch a campaign against tourists in that town.

c) An unforeseeable strike by airport personnel prevents A from travelling to the city where the hotel is located at the specified time.

d) The coronation procession scheduled on the respective date is cancelled. The room has a view of the street where the procession was supposed to take place. Due to the extraordinary event, the agreed price is ten times higher than the regular price.

Is A entitled to cancel the reservation?

26 Case 7 (a).

27 Case 7 (c).

28 Case 7 (b).

29 Case 7 (d).

30 Case 8 Shop rental: *Renting a retail outlet; unexpected business environment at a shopping centre*

A is the owner of a bookshop. He contracts with B to rent business accommodation in B's shopping centre. The fixed period of the lease is 5 years. The shopping centre has just been built and a large part of the accommodation is still unoccupied. Both parties expect at the time of contracting that a variety of shops (the hotel and catering trade, retail sales) will be located there. One year later almost all the accommodation is rented, but $\frac{3}{4}$ of the shopping centre consists of restaurants and cafes. For that reason most potential customers visit the shopping centre after A closes the doors of his bookshop.

Is A entitled to an adjustment or to a termination of the contract?

31 Case 9 Beer supply agreement: *Long-term supply of beer; beer sales are far below expectations*
A, the owner of a bar, enters into an exclusive supply agreement with beer brewery B for a fixed period of 15 years. Pursuant to the contract, A is obliged to accept and pay for a specific quantity of beer on a monthly basis, while he is allowed to use technical equipment

strengthen the case for relief as well as the fact that the risk in question (the popularity of the beer) might be qualified as falling within the sphere of the brewery.

c) *Failure of a specified purpose (other than a) and b))*

Both of the cases that were dealt with under the heading ‘specified purposes’ show a tendency in favour of relief:

1) The assumption that the sold property will be used for cultural purposes will suffice for setting aside the agreement if it is used for other purposes because this assumption is – similarly to the coronation case – reflected in the price.³² Here, the requirements of equity can quite easily be reconciled with the principle of *pacta sunt servanda* on the basis of ‘conventional’ doctrines (especially constructive interpretation).

2) In the case of divorce, the investment of one spouse in the property of the other one can give rise to a claim for compensation in most jurisdictions if divorce law does not provide for just results.³³ This solution can be based on the consideration that the reliance on the durability of the marriage should be legally protected.

and furnishings owned by B. The consumption of beer, however, remains far below expectations. The bar is well attended but the ‘B beer’ is unpopular amongst customers at A’s bar. A requests an adjustment or the termination of the agreement. Is A’s claim justified?

32 Case 11 Sale of real estate involving expectation of cultural use: *Use of real estate by transferee does not comply with expectations of the transferor*

A sells his family home to B at a price far below its market value. Both parties assume that B would dedicate the house to cultural purposes only. However, this assumption was not inserted in the contract as an explicit condition. B changes his mind and gives it to one of his daughters instead.

Is A entitled to ask for the difference between the agreed price and the market value or, alternatively, to reclaim the house?

33 Case 12 Investment in spouse’s house is frustrated by divorce: *Equitable compensation if divorce laws lack a basis for compensation*. Before A and B marry, they enter into a prenuptial agreement, in which they agree on the separation of property. During the marriage A buys a house and A and B use the house as their family home. The price of the house is €500,000.

A is the sole proprietor of the house, but B has contributed €100,000 to the purchase price. In addition, B carries out extensive renovation work before they move in. The renovation would have cost €50,000 if professional services had been employed. After A and B have lived together in the house for one year, they separate and then divorce. Divorce law does not provide a basis for compensation.

Is B entitled to compensation for his contributions to the family home?

d) *Mutual mistake and miscellaneous issues*

1) A clear tendency can be stated in the case in which the parties of a share deal were mutually mistaken concerning the market value of shares.³⁴ Here, the burdened party is generally entitled to set aside the agreement on the fixed price, as both parties share the responsibility for the mistake. Another tendency is that the party burdened by the false price fixing is not entitled to enforce a price agreement that reflects the 'true value' because the other party's reliance on the written price agreement must equally be taken into account. Notable exceptions are the common-law jurisdictions of England and Ireland where no remedy is granted and thereby the risk of the mutual mistake is allocated only to the party burdened by the 'false' price calculation in the written contract.

2) In Case 14,³⁵ the effect of unexpected circumstances on the respective rules on breach of contract was analysed. The question here is whether the seller would be excused from his liability in damages due to the unexpected nature of the impediment. Even though many jurisdictions tend to solve this case on the basis of their ('conventional') doctrines on breach of contract, a clear distinction between the 'open' and 'closed' jurisdictions can be observed. The main reason for this is that the distinction between the 'open' and the 'closed' jurisdictions is in line with the division between systems that apply a fault liability regime with regard to contractual damages and those jurisdictions that provide for strict liability. On the basis of their strict liability regime, there is a clear tendency to holding A liable for damages among the 'closed' jurisdictions. The findings of the 'open' jurisdictions remain somewhat vague due to the limited factual basis of the given case. However, it becomes quite clear that, subject to the factual details of the case, A has strong arguments to challenge his liability in many of the 'open' jurisdictions. The lack of a clear

34 Case 13 Share deal – mutual mistake: *False determination of the market value in a share deal*. A holds shares of X corporation. He agrees to sell the shares to B at the current price as listed by the stock exchange on the day of contracting. In the written contract, the parties set a price of €10 per share. However, the actual price per share on the day of contracting is €12. The Internet service from which the parties derived the price had displayed an incorrect number. When A discovers the correct price, he demands that the purchase price be increased to €12. Can A ask for a price of €12 per share? Can he, alternatively, terminate the contract?

35 Case 14 Impediments of production beyond seller's control: *Production of contractual goods is inhibited by a strike/restriction of electricity supplies*
A agrees to deliver some goods to B on a certain date, but:
a) The workers of a subcontractor go on strike.
b) Due to problems with the State energy production and distribution system the Government decides to cut the electricity supply at night thereby making it impossible to work at night.
As a result, A cannot deliver the goods for an uncertain period of time.
Is B entitled to terminate the contract and to ask for damages?

tendency reflects the division as to the liability regime, but also the ambivalence of the risks in question. While neither strikes nor the energy supply are under the complete control of the seller, one may argue that he is closer to these sources of risk than the purchaser.

3) With regard to Case 15,³⁶ it is remarkable to note that a general disclaimer will predominantly be regarded as invalid in both the ‘open’ and in the ‘closed’ jurisdictions. There are, however, some exceptions (Belgium and France from the group of the ‘closed’ and Germany, Portugal and Spain from the group of the ‘open’ jurisdictions). The rationale for the majority perspective is that unexpected events are beyond the parties’ imagination and thus beyond their dispositions. One may also draw the conclusion that the equity principles from which the doctrines governing unexpected circumstances are derived are qualified as *ius cogens*.

5 THE PREFERENCE FOR OPENLY ADDRESSING THE ISSUE

Let us now turn to the doctrinal distinction between ‘conventional’ and ‘exceptional’ concepts. The doctrines that specifically address the issue of unexpected circumstances and identify the unexpected event as the source for relief (e.g. *Wegfall der Geschäftsgrundlage*, doctrine of assumptions, *clausula rebus sic stantibus*) have been referred to as ‘exceptional’ doctrines. ‘Conventional’ doctrines, on the other hand, are the traditional doctrines of contract law, which are based on the parties’ (hypothetical) intentions or on flaws in the mechanism of contracting. Such doctrines can address unexpected events with reference to the contractual agreement (e.g. interpretation, mistake, impossibility of performance and *laesio enormis*;

In favour of the ‘conventional’ concepts one may argue that they are in harmony with the principle of *pacta sunt servanda*: if the parties’ (hypothetical) intentions can be referred to as the basis of relief or if flaws can be identified in the contracting process, there is no conflict between the contract and an equitable allocation of risks. The harmonising character of the ‘conventional’ concepts may make it easier for the courts to set the contract aside.

36 Case 15 Disclaimer: *Disclaimer concerning the rights arising from unexpected circumstances; other clauses related to unexpected circumstances*

The construction company A agrees to build a double-floor building on B’s land for the price of €2,000,000. In the contract the parties stipulate a disclaimer which excludes ‘all the rights of both parties arising from unexpected circumstances’. Two weeks after the construction work has begun a granite rock, which could not have been detected by the parties before the conclusion of the contract, is revealed on B’s land. As a result the costs of the construction increase by 300 %.

Can A ask for an adjustment of the contract or can he terminate the contract in spite of the disclaimer?

However, quite often the ‘conventional’ concepts provide no precise and persuasive rationale for relief in cases of unexpected circumstances – even if they are referred to by the courts. If the contract does not address the unexpected event explicitly or by clear implication, relief cannot be based on the parties’ actual intentions. Hence, ‘conventional’ concepts are always dealing with hypothetical assumptions as to what the parties would have agreed upon if they had foreseen the event. This reconstruction of the parties’ hypothetical intentions will often be fictional. If the parties have not foreseen the risk in question, it is equally fictional to qualify their non-perception as a mistake. Therefore, in many cases of unexpected circumstances the application of a ‘conventional’ doctrine amounts to concealing the essential equitable conflict between the (flawless but silent) contract and the extrinsic effect caused by the unexpected event in question.

The ‘exceptional’ doctrines, on the other hand, openly address the conflict between the contract and the requirements of equity in the light of the unexpected event in question. These doctrines and their application reveal that in most cases the problem of unexpected circumstances cannot be solved with reference to the intention of the parties and that an external standard of law is to be applied in the assessment of the event and its consequences for the contract. This becomes evident in the ‘open’ jurisdictions, where on the basis of a general ‘exceptional’ doctrine the contractual agreement itself can be adjusted to match the requirements of equity.

The European model rules on contract law presented so far all propose to recognize such a general ‘exceptional’ doctrine. The conflict between the principle of *pacta sunt servanda* and the requirements of equity is particularly evident in the rules of the DCFR (Draft Common Frame of Reference), which are based on the PECL (Principles of European Contract Law). In Art. III.-1:110 DCFR and Art. 6.111 PECL the principle of sanctity of the contract is confirmed as the general rule. However, at the same time, it is confronted with the relevant exceptions in the case of a change of circumstances.

6 MINIMUM REQUIREMENTS FOR SETTING ASIDE THE CONTRACT

As I have already mentioned and as the national reports illustrate there are various ‘exceptional’ doctrines, i.e. concepts specifically addressing the issue of unexpected circumstances both in the ‘open’ and in the ‘closed’ jurisdictions. In the ‘open’ jurisdictions, these doctrines will allow for termination as well as adjustment of the contract, while in the ‘closed’ jurisdictions termination is generally the only remedy available.

Even though the different concepts vary strongly in detail, we can identify three basic prerequisites for the application of such ‘exceptional’ doctrines, as far as their doctrinal justification is concerned:

- 1) The transaction must have been affected *fundamentally* by a certain event. This requirement expresses the general idea that the principle of *pacta sunt servanda* and the stability of the contract may only be disregarded in exceptional cases.
- 2) The event affecting the transaction *must not have been provided for in the contract or foreseen by both parties* at the time of the conclusion of the contract. This requirement reflects the prevalence of the parties' specific dispositions within the scope of their foresight.
- 3) The burden resulting from the event may *not be attributed to one party by any particular legal rule*. This postulate accounts for the principle of *lex specialis derogat legi generali*: the law provides rules for certain unexpected events and these rules demand priority over a general doctrine on unexpected circumstances.

These requirements can be characterized as 'minimum conditions': even though further restrictions may (and often do) apply under the law of the individual jurisdictions, these requirements must be met in any case if the contract is to be challenged successfully.

Evidently, the 'minimum conditions' are phrased in general and ambiguous terms and they cannot guarantee convergence with regard to the findings in a certain case, as the complementary rules vary throughout the jurisdictions. But this ambiguity and divergence often reflect the ambiguous and manifold character of the problem of unexpected circumstances rather than diverging concepts in the different legal systems which admittedly exist as well. Even if the complementary rules were identical, the question of what amounts to a 'fundamental effect' or which contractual risks are provided for in the agreement or by a particular rule of law is largely based on the individual appreciation of the event in question. The fundamental conflict between legal security and the binding force of contract on the one hand and equity on the other hand will always leave room for diverging judgements.

7 DISTINCTION BETWEEN ISSUES OF INITIAL MISTAKE AND OF UNEXPECTED EVENTS ARISING AFTER THE CONCLUSION OF THE CONTRACT

A mistake of one party or a mutual mistake of both parties with regard to factors that were already present before or at the time the contract was concluded differs significantly from the occurrence of unexpected events arising after the conclusion of the contract. A clear distinction between pre-existing and supervening factors is meaningful for the doctrinal treatment of unexpected circumstances, because it is generally easier for the parties to recognize and control pre-existing factors than future developments. Furthermore,

by submitting themselves to a contractual agreement, the parties are aware that they generally assume the risk of future changes and they may only be relieved from this risk under exceptional circumstances. A lack of information about pre-existing factors, on the other hand, will in most jurisdictions allow parties to terminate a contract even if they are not heavily burdened by the contract. The absence of a relevant mistake is a precondition for the binding effect of the contract and the assumption of risks provided therein. Hence, if a party is mistaken about certain factors that were present at the time of contracting, the case should only be treated according to the respective rules on mistake.

If some jurisdictions tend to apply their 'exceptional' doctrines on unexpected circumstances in cases of mistakes as to pre-existing factors, this can mainly be explained with certain deficiencies in their respective law of mistake. Germany, where the rules on *Geschäftsgrundlage* are applied in cases of mutual mistakes, may serve as an example because the rules on mistake in the BGB were only designed for cases of one-sided responsibility for the mistake and the principles on *Geschäftsgrundlage* offer a more flexible instrument that is necessary in cases of mutual mistake. From a doctrinal point of view, these problems can be solved more adequately by refining the rules on mistake.

However, the fact that the problem of initial mistake and the issue of supervening unexpected circumstances both tend to be approached on the same doctrinal basis shows that they are in fact similar with regard to the issue of remedies. In both types of cases, the binding force of the agreement is disregarded because one or both parties have failed to take into account certain factors that were of relevance for the contract. And both cases can essentially be solved with two remedies: the contract can either be discharged or it can be adjusted to take into account the relevant aspect. A legal system therefore has to answer this question with regard to both constellations discussed. It is suggested that, in a rational legal system with a systematic approach, both problems should be addressed in the same way.

8 LEGAL CONSEQUENCES – THE UNSOLVED MYSTERY OF 'ADJUSTMENT'

The convergences of the court findings (see under 2) and the similarities in the doctrinal approach (see under 4) only concern the primary issue whether or not the contract is suspended due to unexpected circumstances. With regard to the secondary issue, i.e. the precise definition of the legal consequences, it is very hard to identify convergence between the different jurisdictions. Upon a closer look, this obscurity is not due to the comparative perspective; rather, the cause for this can be traced back to the legal systems themselves, neither of which presents a clear, systematic, complete and convincing concept with regard to the legal consequences that apply once an unexpected event suspends

the binding effect of the contract terms. The same holds true for the various European model codes of contract law.

The remedy of termination is quite simple and does not involve much judicial discretion. It is not surprising that this remedy is widely available in cases of unexpected circumstances in all jurisdictions. However, in a large number of cases termination does not achieve fair results, as it may distribute the losses arising from the unexpected event arbitrarily to one party. Therefore, it can be said that the recognition of a mechanism of adjustment is a postulate of equity if the contract is set aside due to unexpected circumstances.

This conclusion is explicitly drawn in the ‘open’ jurisdictions and in the model codes (e.g. Art. III. – 1:110 DCFR; Art. 6:111 PECL, Art. 92 Feasibility study), as there are established sets of rules under which the burdened party may seek adjustment of the contract in cases of unexpected circumstances. Even in the ‘closed’ jurisdictions, where there are no such mechanisms established as a general rule, the reports show that the courts may find a way to reach results that amount to adjustment of the contractual terms, e.g. on the basis of constructive interpretation or by granting ad-hoc compensation based on the standards of equity and good faith. Also, the development of the doctrine of frustration in England shows that the all-or-nothing approach of termination (or discharge) is inadequate for dealing with all the issues of unexpected circumstances. In England, the strict effects of the common-law doctrine of frustration leading to a discharge of the contract had to be amended by an obligation to compensate in the Law Reform (Frustrated Contracts) Act 1943, granting the judge a great extent of discretion in order to achieve just results.

The details of adjustment, however, involve a number of difficult issues:

- 1) The *relation between termination and adjustment* (i.e. the conditions under which termination or adjustment is the appropriate remedy): this aspect also includes the question whether the party that is not burdened by the unexpected circumstance in question is entitled to object to the adjustment and can thereby compel termination.
- 2) The *form of adjustment*: it must be determined whether the adjustment may interfere with the contractual obligations in kind or whether there is only monetary compensation available.
- 3) The *standard for determining the extent of adjustment*: this issue raises the difficult question of whether the burdened party has to bear the losses from the unexpected circumstances up to a reasonable extent or whether – alternatively – the losses are to be divided equally among both parties.
- 4) The *technical implementation of adjustment*: it must be determined whether adjustment comes into force by operation of law (determined by the court)

or whether the burdened party has a right to claim adjustment by specifying the contents of the adjustment. In addition, it must be decided whether adjustment must be preceded by a renegotiation process and whether and how such a renegotiation process can be governed by rules of law.

The reports show that these issues have not yet been fully resolved in any one of the jurisdictions explored in this volume. Hence, it is unsurprising that convergent and convincing solutions cannot be identified from the comparative perspective. It appears that the conditions for adjusting the contract are the unsolved mystery of the legal rules on unexpected circumstances. This unresolved issue is of great influence for the entire problem as the willingness to grant relief depends very much on reliable consequences of the remedy available.

In order to provide fair solutions it is unavoidable to recognise a legal regime for the adjustment of a contract that is affected by relevant unexpected circumstances. One may resort to judicial discretion which is relied upon by all of the 'open' as well as the 'closed' jurisdictions to a certain extent. However, if more precise guidelines are required, the material is inconclusive. Thus, the conditions of adjustment appear to be the most important topic for further research in the field of unexpected circumstances.

9 BY WAY OF CONCLUSION: UNCERTAINTY, THE LACK OF PRECEDENTS AND HARMONISATION BY ADVANCING THE LEGAL DISCOURSE

As was mentioned above, the uncertainty of judgements on unexpected circumstances is an unavoidable characteristic of the conflict between legal security and the binding force of contract on the one hand and the requirements of equity on the other. There are possibilities for strengthening certainty on the comparative level by further harmonisation with regard to the doctrinal background in general and the mechanism of adjustment in particular. Yet, there is another structural source of uncertainty that is particularly important in cases of unexpected circumstances. That is the lack of reliable precedents in many jurisdictions.

Many cases in which relief on the basis of unexpected circumstances is discussed are quite eccentric and rare. Some national reporters have had difficulties identifying precedents similar to our cases at hand and some may have had to go back several decades. Especially in continental countries, the question may be raised whether 'old' precedents still have – persuasive – value as they reflect an antiquated legal and social background and could arguably be overruled if they were submitted to the respective Supreme Court today.³⁷

³⁷ Ewoud Hondius (ed.), *Precedent and the law/Les précédents et le droit*, Bruxelles: Bruylant, 2007, p. 19.

Further harmonisation of the law in Europe may enlarge the basis of precedents. It would mean that instead of a meagre trickle of cases, every member state would fully profit from the case-law of the other member states of the European Union. However, the harmonisation on the basis of precedents does not necessarily depend on a common Civil Code.³⁸ The American example shows that the various states of the Union refer to the case law of other states. The process of harmonisation by precedents may be enhanced by a restatement of European contract law without binding effect. In fact, in Europe several such restatements are available such as the DCFR, the PECL, the Principles of the *Association Henri Capitant des Amis de la Culture Juridique Française* and the *Société de Législation Comparée*, the *Acquis-Principles*, the *Gandolfi Code*, the Feasibility study of the European group of experts (art. 92),³⁹ the Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law (art. 89),⁴⁰ as well as other international instruments, such as the UNIDROIT Principles for International Commercial Contracts.

We have already seen that there is a considerable amount of similarity between the different European legal systems both in terms of the results achieved as well as in terms of their doctrinal approach (cf. 2 and 4). Hence, even without a uniform mandatory European rule on unexpected circumstances, courts and practitioners may profit from an analysis of cases from other European legal systems. Such an exchange is particularly important in cases of unexpected circumstances as, due to the variety of the potentially relevant factors, the legal doctrines applied and their requirements are necessarily vague and as it may always be argued that the solution will greatly depend on the facts of the individual case. Furthermore, it should be stressed again that, as far as precise doctrinal guidelines are concerned, no legal systems seem to have presented an comprehensively convincing approach to the problem of unexpected circumstances so far. Therefore, the volume *Unexpected circumstances in European contract law* is intended to serve as a guide that may help to improve the understanding between the different European legal systems and to refine the rules on unexpected circumstances, either on the level of the national jurisdiction or with regard to harmonisation projects.

Of course, the process of harmonisation on the basis of precedents involves the problem of languages. An Estonian case on change of circumstances will have little impact in Portugal if it is not available in a language which is accessible to Portuguese lawyers. A database in the present European *lingua*

38 See Ilka Klöckner, *Grenzüberschreitende Bindung an zivilgerichtliche Präjudizien*, PhD thesis Freiburg 2005, Tübingen: Mohr, 2006, 254 p.

39 A European contract law for consumers and businesses: publication of the results of the feasibility study carried out by the Expert Group on European contract law for stakeholders' and Legal practitioners' feedback, May 2011. See Reiner Schulze and Jules Stuyck (eds.), *Towards a European Contract Law – An Introduction*, München: Sellier, 2011.

40 COM(2011) 635 final.

franca – and ideally in more than just one language – would therefore be necessary. This need not necessarily be a database in the formal sense, such as the former CLAB.⁴¹ A more user-friendly option is ECTIL's Yearbook of Tort Law, which is discussed at annual meetings in Vienna.⁴² Likewise, Torino could be the platform, long after the Common Core project has finished, for annual updates as to national case law on the various topics, such as unexpected circumstances. An alternative would be Vienna, the newly selected site of the European Law Institute, founded in 2011. But then, why not remain in Torino?

41 DG SANCO's one time database on unfair contract terms (*clauses abusives*) – see Thomas Wilhelmsson, in: Torbjörn Andersson, Bengt Lindell (eds.), *Festschrift till Per Henrik Lindblom*, Stockholm: Iustus, 2004, pp. 781-800.

42 This year's 10th annual conference was held in Vienna from 28-30 April 2011.

