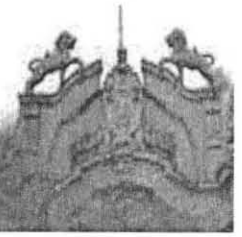

ADDIS ABABA UNIVERSITY
COLLEGE OF LAW AND GOVERNANCE STUDIES
SCHOOL OF LAW
BUSINESS LAW (LL.M PROGRAM)

THE LEGAL EFFECTS OF A CHANGE OF CIRCUMSTANCES ON THE BINDING FORCE OF CONTRACTS: COMPARATIVE SURVEY

BY

GETAHUN TSEGAYE

A thesis submitted to the Law Faculty of Addis Ababa University in the post graduate program in partial fulfilment of the Requirements of the Degree of Masters in Business Law (LL.M)

ADVISER: TILAHUN TESHOME (Prof.)

JANUARY, 2019

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Approved by the Board of Examiners:

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JANUARY, 2019

Declaration page

Declaration

I, the undersigned, declare that the thesis comprises my own work. In compliance with widely accepted practices, I have duly acknowledged and referenced all materials used in this work.

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Signature

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Name of Student

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Date

Acknowledgement

I owe this success to the Almighty God who has never ever deserted me- to the One who has always been the anchor and shelter of my life against all troubling winds. I praise His name for saving me from desperation, for giving me the courage to carry on and to hope, even in those times when all hope seemed to be lost. Thank you Lord for helping me to overcome the challenges that I faced in the course of undertaking this research!!

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Getahun Tsegaye

List of Acronyms

ALI	American Law Institute
BGB	/*Burgerliches Gesetzbuch*/ the German Civil Code
CISG	Convention on International Sale of Goods
DCFR	Draft Common Frame of Reference
PECL	Principles of European Contracts Law
PICC	the Unidroit Principles of International Commercial Contracts
UCC	the Uniform Commercial Code
UNCITRAL	the United Nations Commission on International Trade Law
ULIS	Uniform Law of International Sales
UNIDROIT	the International Institute for the Unification of Private Law
WWI	World War One
WWII	World War Two

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Abstract

The principle that contracts are made to be kept, articulated in the old maxim–*pacta sunt servanda*- perhaps comprises the bedrock of all contract law systems. The principle, however, has never been regarded absolute throughout its history: almost all legal systems traditionally recognised limitations on its application, particularly where unforeseen supervening events make performance of contracts absolutely and objectively impossible. However, such uniform position is lacking among legal systems when it comes to how the law should respond to the cases in which the supervening circumstances merely render performance of contracts extremely burdensome or the counter-performance to be received virtually worthless to one of the parties. These latter cases formed the main focus of this research: and the generic expressions 'the problem of change of circumstances' and 'the doctrine of change of circumstances', have been respectively employed to refer to the questions involved therein and the specific legal devices applied to address them.

The doctrine of change of circumstances found its original expression in another old maxim of contracts law- the *ribus sic stantibus* – which embraced the core idea that contracts stay the same only so far as the states of affairs present upon their conclusions remain constant. In its early application, the doctrine was viewed as an implied condition attached to all contractual promises. Due to this reason, its application was never perceived to contradict with the other paramount principle of contracts law- *pacta sunt servanda.* Thus it enjoyed wide-spread acceptance among legal systems, before the oppositions based on the 19th century classical theories of contracts later brought its demise. Application of the doctrine was deplored by the classical views to cause erosions to the core principle of binding force of contracts, and thereby threaten freedom of contracts and security of transactions. At least for some period, this led to its disappearance from the legal scene altogether. But it once again started to re-emerge in many jurisdictions, particularly due to the post-WWI and WWII huge economic disruptions caused in many parts of the world. This marked the final comeback of the doctrine and its continued acceptance both in the theories and applicable rules of the modern contracts law.

This study was thus commenced with the basic objective of identifying the justifications behind this modern comeback of the doctrine and how it may be related to ensuring

protection for the core principle of binding force of contracts. Specifically, the study aimed at identifying the doctrinal relationships between the binding nature of contracts and the approaches adopted to respond to the problem of change of circumstances. In pursuing its targets, the study first reviewed contending theoretical expositions relating to the problem of change of circumstances, and comparatively surveyed the approaches adopted towards the problem in some selected major domestic and international instruments of contract law. Important findings have emerged based on these presentations.

The first general insight is that concerns to preserve certain minimum standard of fairness and justice in contractual relations provide the underlying justification for the doctrine of change of circumstances. This is without denying the inherent conflicts that could arise between the applications of the doctrine and upholding the principle of binding force of contracts. The identification of this conflict further triggered the question as to its proper legal reaction. It was specifically enquired as to whether the identification of the conflict should be used to completely reject the need to introduce the doctrine of change of circumstances. The answer to this question appears to be in the negative, both from the theoretical and comparative data discussed in the study. The data nevertheless suggests that the legal devices formulated to address the problem of change of circumstances should openly recognise and strive to strike the proper balance between the conflicting values of the law in preserving justice and maintaining the binding nature of contracts.

Accordingly, the most preferred approach by the majority of the surveyed jurisdictions suggests that the problem of change of circumstances should be addressed by a specific doctrine that expressly introduces well-defined exceptions to the binding force of contracts and provides clear remedies for the problem. Accordingly, the specific doctrine should incorporate clear standards to decide at least two major aspects of its applications: firstly, it should lay down the legal standards for determining the cases in which change of circumstances may be said to exist and thus the binding nature of contracts should be suspended; secondly, it should clearly articulate the legal remedies to be granted in cases where a change of circumstances is found to exist. In relation to the first aspect, the unforseability of the supervening changes, the parties' actual or presumable ability to contractually provide for the risks arising due to such changes, and the degree of disruptions that the supervening changes have caused in the original equilibrium of the contracts are generally the major factors considered to determine. Regarding remedies, the most accepted

approach initially provides the duty to renegotiate for the parties. In cases where the renegotiations fail to result in mutually agreed remedies to address the effects of the change of circumstances, further authorisations is given to the courts either to adapt the terms of the contracts or declare their termination depending on the circumstances involved in each cases.

The Ethiopian law, however, appears to stand in sharp contrast to the above more accepted doctrinal trend. Our law generally promotes the strictest legal policy that provides almost absolute enforcements to the principle of *pacta sunt servanda* and rejects the need to address the problem of change of circumstances. Thus, the law seems to take the position that the effects of change of circumstances on the original equilibrium of their contracts should be regulated by the parties themselves, and not by the courts. Presumably, this implies that the drafter of the Civil Code has given preference to the views expressed based on the classical theories of contracts. However, the oppositions held against recognition of the doctrine of change of circumstances based on the classical views have lost their initial vigour in the modern contracts law doctrine. As already indicated above, the majority of those surveyed in this study (and many other modern legal systems for that matter), have moved away from the conservative approach that still remains strongly held under our law in order to introduce more progressive and flexible approaches. Overall, the central finding of the study seems to disclose the fact that the doctrinal position adopted in the Ethiopian Civil Code has become obsolete and long begging for some revision. This core finding hopefully provides the milieu for initiating the further tasks that may be required to keep the current approach of our law up-to-date.

Chapter One: Proposal of the Study

1.1. Background of the Study

In today's society, it is hardly imaginable that one would be able to run a meaningful economic activity or even have a tolerable existence without engaging in some sort of agreements by which to exchange things. This is simply to state the bare fact that the presence of a contract is a necessary fact of life; and that it deserves to be recognized as such, if the continued survival and thriving of society is to be secured. Precisely testifying to the vitality of a contract, and the legal framework catering for the recognition and enforcement of the same, George krzeczunowich made the following observation:

> *As shown by common experience, a contract is an indispensable instrument for exchange of goods, services and money between persons (physical or corporate) in any developed or developing economy, whatever its political regime. Non-recognition and/or non-enforcement of contracts can only lead, in a free economy, to anarchy and, in a state-planned economy, to failure of the plans. Only primitive 'subsistence economy' communities, living in their own produce and hand-to-hand barter, can do without the kind of agreements we call 'contracts.*[1]

The above statement further reminds us the fact that encouraging the process of specialization and exchange of goods, services, and finance between persons is an essential precondition of achieving economic growth and development. And a legal regime that gives recognition and provides enforcements of contracts is a vital element in making that process work in reality.

The foregoing statements indicate the importance of providing recognition for the institution of contract and establishing the mechanisms of its enforcement as the necessary ingredient of the process that promotes economic efficiency and general welfare. The recognition and enforcement of contracts, basically, and most importantly, presupposes that the law provides recognition for the binding nature of promises. The foundation of any contractual promise characteristically arises from, and basically depends on, the binding and legally enforceable nature conferred to it by the law. If a promise is without that binding force and a party making that promise can freely renege on its terms without suffering any legal consequences, that promise could be anything but not a contractual promise. However, it is important to note

[1] G krzeczunowich, Formation and Effects of contracts in Ethiopia, (Faculty of Law, Addis Ababa University), (1983), p. 4.

at this point that all sorts of promises do not qualify as "contracts" and become binding; in fact, the law has its own criteria of conferring that binding nature and extending its protection. Those promises that fulfil the criteria of the law give birth to valid contracts whose terms are enforceable as "the law of the parties".

At this juncture, there are important questions that cannot be escaped - as regards to the nature of that binding force that the law confers to those agreements that fulfil its requirements and treated as contracts. What does that binding nature of a contract specifically entail for the parties and their relationship? Does the binding force of a contract imply that the obligations involved in it should always be fully and exactly performed? Does it imply that the door is closed once and for all, so that either of the parties cannot challenge the obligatory force of their agreement, for instance, in case of unforeseen supervening changes fundamentally affecting the content of their obligations? These are the initial thoughts that inspired the enquiries to be pursued in this research. This means defining and determining the scope of the principle of binding force of contracts is a crucial point of departure for dealing with issues relating to a change of circumstances.

The principle of binding force is usually expressed by the famous legal maxim *-pacta sunt servanda,* which generally suggests that contracts are made to be kept. The main diction of the principle requires that the parties perform all the obligations arising from their contract. But, generally stating, the principle is at the origin of all the rules which will deal with performance, non-performance and its remedies. Many (if not most) rules of contracts law, in one way or another, are either related or simply the specific applications of this basic principle. At the very heart of any contracts law regime, therefore, whether explicitly or implicitly stated, there is a strong recognition for this principle. Addressing the issue of change of circumstances involves certain implications that are necessarily connected with this fundamental principle of contract law.

Traditionally, exceptions have been admitted to the principle of binding force of a contract, particularly where performance of the obligation becomes impossible because of objective circumstances. This kind of exception seems less controversial as it has acquired almost universal acceptance among most legal systems. Thus, excuses from performance of a contract in case of objective impossibility based on traditional legal principles (such as, *force*

majeure) can be commonly found under the laws applicable in most jurisdictions. [2] But there are still ongoing debates and uniformity seems very far to achieve when it comes to dealing with the kind of treatments to be accorded to the situations where the unforeseen supervening change of circumstances only render the performance required from one of the parties more costly or cumbersome, without making it objectively impossible. [3] These are the situations that form the particular problem of this research and the expression "change of circumstances" has been adopted to describe them.

Resistance against the admission of the doctrine of change of circumstances (or giving recognition and expressly addressing the problem created by the above described situations) has usually been justified by the need of avoiding possible contradictions with the principle of binding force of contract. Arguments are made from the vantage of traditional legal theories and some practical considerations to disregard the problem in favour of upholding the absolute application of the principle of binding force of contract. The theoretical argument in favour of making the binding nature of contract absolute is said to be derived from the 19th century classical contract theory.[4] Accordingly, the concept of sanctity of contract has been intrinsically connected to the value of the law to give affirmation for the freedom and autonomy of the parties.[5] The principle of binding force of contracts is therefore aptly described as the expression of the contracting parties' freedom and autonomy of will.

Yet there are others that differently employ the same theoretical formulation based on autonomy and freedom, in order to otherwise establish the virtues in admitting certain exceptions to the principle of biding force, particularly, in the case of unforeseen change of circumstances. Accordingly, it has been asserted that the consent that is given by the parties upon formation of the contract could be regarded as the manifestation of their true will, only and only when the circumstances that prevailed upon its formation remain unchanged. [6] This means, in case unforeseen supervening changes drastically affect the balance of the reciprocal obligations created between the parties, the contract should be equally subject to reasonable adjustments or other proper remedial actions as would be justified by the case. This position

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[2]E Baranauskas & P Zapolskis, "The Effect of Change in Circumstances on the Performance of Contract", Jurisprudence, Vol. 4, No. 118: (pp. 197–216), (2009), p. 198.
[3]Ibid.
[4] M Jude, "The Underpinnings of Contractual Relations- when can a promise be broken?" Arellano Law and Policy Review, Vol. 8, No. 2: (pp. 99-127), (2007), p.1.
[5] Ibid.
[6]I Kull, "About Grounds for Exemption from Performance under the Draft Estonian Law of Obligations Act," Juridica International, Vol.VI: (pp. 44-52), (2001), p.46.

has been sometimes pushed even further to imply absence of any contradiction between upholding the binding force of contract and admitting the doctrine of change of circumstances. Accordingly, the principle of binding force of contracts and the interventions that the law may introduce to address unforeseen change of circumstances have been asserted to derive their validity from one and the same source, i.e., the contractual promise itself; and, therefore, the principle of binding force of contracts and the doctrine of change of circumstance should not be regarded as opposites, but as complementary to one another.[7]

However, there are others who generally oppose to the whole emphasis in the above arguments implicitly placed on the concept of party freedom and autonomy in justifying the application of the principle of binding force. Accordingly, it has been asserted that freedom of contract was not absolute, as it was always subject to the requirements of the law from which the parties cannot derogate. That is to say, the law lends its binding force only to those agreements that are created by fulfilling all the requirements that are provided on account of safeguarding different public policy interests and applicable to the formation of contracts. This reasonably implies that the binding force of contracts in itself is a creation of the law, which may be further subjected to various limitations that the law may provide in the interest of public policy. Based on this line of argument, the doctrine of change of circumstance should be recognized, not merely because its application is treated as a complementary to the principle of binding force in giving effect to the true will of the parties', but because important values of the law relating to maintaining fairness and justice in contractual relationships justify its recognition.

The principle of binding force of contracts, more than being just the expression of the parties' autonomy and free will, is said to increase the security/certainty of legal relations, thereby enhancing economic efficiency and contributing to the improvement of the general welfare. On the other hand, however, there are others expressing the view which is exactly to the opposite. Accordingly, it was held that the value of the law relating to certainty would be better served when recognition is provided to the doctrine of change of circumstances and the parties are entitled to certain reliefs in the event of unforeseen fundamental change of circumstances. In this connection, a certain writer argued that, "*business matters could gain*

[7] P Walter, "Commercial impracticability in Contracts," St. John's Law Review, Vol.61, No 2: (pp. 225-260), (1987), p.281.

more certainty and security of transactions is more ensured if the parties were certain of being able to obtain equitable revision of the contract in the case of a really unforeseeable change of circumstance.''[8]

Therefore, the relationship between the issue of change of circumstances and the principle of binding force of contract is not merely about bringing theoretical reconciliation with regard to enforcing the parties' freedom of contract. From practical point of view, admitting the doctrine of change of circumstances necessarily entails putting certain limitations on the biding force of contract. Moreover, it further requires evaluating how introduction of the doctrine (whether justified by the need to enforce justice or avoid contradiction with the true will of the parties) would affect other practical utilities or public interests which the principle of binding force of contracts is said to serve.

The discussions provided above generally show that the effect of change of circumstances on the binding force of contacts is subject to different conflicting arguments that are formulated on the bases of different theoretical and practical considerations. In the face of these conflicting arguments, one cannot reasonably expect that the laws in different jurisdictions will adopt a uniform approach in addressing this common problem. The main aspiration of this research is therefore generally to find out and comparatively evaluate the varying approaches that our legal system and some selected foreign jurisdictions have adopted to address this controversial problem. Based on this basic consensus, the most important aspects of the problem that the researcher hopes to address will be further elaborated under the next section.

1.2. Statement of the Problem

Absolute application of the famous principle of *pacta sunt servanda* has been subject to serious questions based on the doctrine of change of circumstances that found expression in another equally well known maxim of contract law-the *ribus sic stantibus*. The doctrine of a change of circumstances or *ribus sic stantibus* embraces the core idea that a contract stays the same only so far as the states of affairs that were present upon its conclusion remain constant. The doctrine generally incorporates rules by which a contract may be subject to modifications or terminated where performance of the obligations assumed by one of the parties, without

[8] Guiding Principles of European Contracts Law , (2000), p.56.

being objectively and absolutely impossible, becomes more costly or burdensome due to unforeseen changes. [9]

The points raised so far, however, indicate the fact that providing recognition to this doctrine and regulating the effects of a change of circumstances on the binding nature of contracts invites different theoretical and practical considerations to come into the play. These considerations mainly relate to the protection of the parties' freedom of contracts, and ensuring efficiency and certainty of transactions. Some of the arguments made based on these considerations try to support the incorporation of the doctrine, while others attempt to justify its rejection.

In the face of these conflicting views, it seems very naive to expect a uniform approach to exist among legal systems in addressing the problem of a change of circumstances. In fact, three broader approaches may be identified along the spectrum of variations existing among different jurisdictions in the positions adopted towards the problem. [10] In those jurisdictions upholding the traditional approach providing absolute application for the principle of *pacta sunt servanda*, the problem of change of circumstances is subject to outright rejection and will not be addressed all in all. [11] The legal systems in this category seem to give strong endorsement to the fear that authorizing the judiciary to intervene in contractual relationships on account of unforeseen change of circumstances would lead to unduly and overarching interferences only serving to put enforcements of contracts in serious dangers. This seems to have counteracted against the willingness of their legislatures to admit the doctrine of a change of circumstances. Thus, the effect of change of circumstances is left to be regulated by the parties themselves, either through incorporation of contractual clauses dealing with the problem in their original agreement or by agreeing *ex-post* to balance its effects. In the absence of the parties' agreement, therefore, no matter how radical the disturbance caused to the original equilibrium of the contract from unforeseen change of circumstances, courts are not empowered to intervene.

Never the less, there are many legal systems that have deserted the above traditional approach and introduced certain limitations on the binding nature of contracts to provide specific

[9] A Kizilet, "Changed Circumstances as Grounds for Non-performance of Contracts (An Overview of Macedonian Law)," European Journal of Sustainable Development Research, Vol. 2, Issue 1: (pp. 22-25), (2017), p. 23.
[10] Guiding Principles of European Contracts Law, pp. 52-56.
[11] Id, p. 55.

solutions and express regulations applicable for addressing the problem of change of circumstances. [12] There are also still other jurisdictions that have adopted various approaches that are generally found at the middle of the two extreme approaches, which enforce outright rejection of the problem or provide express and specific solutions. [13] These are jurisdictions where attempts have been made to provide certain solutions for the problem on the bases of some general principles of the law, such as the good faith principle; or where solutions specifically addressing the problem are available, but only applicable to limited areas of contractual relations.[14]

Even where the doctrine of change of circumstances is recognized, whether justified by the need to avoid contradiction with justice or the common intention of the parties, there are important issues with respect to determining the manner and the scope of its incorporation into the law. This is mainly because the law needs to strike the appropriate balance between incorporation of the doctrine and eliminating the undesirable repercussions that its application might have on maintaining the binding force of contracts. Serious considerations should be admitted in order to determine how introducing interventions required for addressing the problem of change of circumstances might affect the values and social utilities that the principle of binding force of contract is said to promote.

Therefore, once decisions are made to admit the doctrine, there can still be variations among jurisdictions in the legal responses provided for some core questions pertaining to the manner and the scope of its incorporation. Different legal systems have different responses for some basic questions such as: whether the doctrine should be incorporated based on general principles of the law or through special provisions provided to that effect? What kind of contractual relationships should be subject to the application of the doctrine? What specific solutions should be provided by the law, once the "unforeseen changes" is said to exist? Should the solution be limited to stipulating a mandatory requirement for the parties to renegotiate, or should it go beyond that, and provide authorization for the judiciary either to revise or terminate the contractual relationship?

The above highlighted issues surrounding the doctrine of change of circumstances reasonably lead to wide variations in the approaches that can be expected among different jurisdictions.

[12] Guiding Principles of European Contracts Law, p. 52-53.
[13] Ibid.
[14] Ibid.

This generally shows the practical importance associated with this researcher's interests in identifying and comparatively evaluating the approach of our own legal system with those adopted in other jurisdictions to address the problem relating to the effects of a change of circumstances. To this effect, the major inquiries that will be pursued in this paper specifically include the following:

- How the jurisdictions selected for the survey of this paper try to address the problem of a change of circumstances and what legal devices are specifically in use to respond to the problem?
- Whether the Ethiopian law responds to the problem of change of circumstances and how such responses are to be compared and contrasted with solutions provided in other legal systems?
- What do the trends existing under the laws of foreign jurisdictions that are the subjects of the survey of this paper imply about the relationship between the doctrine of change of circumstances and enforcing the principle of binding force of contracts?
- What possible insights could be gained regarding the status of our law based on the comparative evaluation of competing approaches and specific solutions adopted in the surveyed legal systems?

1.3. Objective of the Study

The general objective of this study is to identify how the problem of a change of circumstances has been approached in the Ethiopian law of contracts and other national and international contracts law regimes selected for this study. In this endeavour, the study aspires to determine if a change of circumstances has certain legal effects on the binding nature of contracts in the laws of the surveyed jurisdictions. Specifically, efforts will be exerted to identify to what extent and in what manner, if any, the laws of the surveyed jurisdictions try to incorporate the doctrine of change of circumstances. In doing so, the study will further try to sort out and reflect on the possible economic, historical, and doctrinal underpinning that possibly influenced or served to justify the approaches adopted by the positive laws of each surveyed jurisdictions. This hopefully serves to provide a modest insight into the economic, historical and theoretical rationales existing behind the approaches and specific solutions that are employed by the surveyed jurisdictions in addressing the problem of change of circumstances. Such evaluation will hopefully serve to

further generate some useful insights that may serve as an invaluable resource in order to deepen our knowledge and constructively reflect both on the strength and the shortcomings of our law in addressing the problem.

In implementing the above stated general objectives of the research, the most important specific objectives to be targeted in this study include the following:

- Examining as to whether sufficient and express rules have been incorporated in our law to address the problem of change of circumstances
- Identifying how the same problem is addressed in the laws of the foreign jurisdictions selected for the survey of this study
- Identifying those jurisdictions whose laws contain specific solutions and express regulations applicable to address the problem of change of circumstances.
- Considering if the comparative survey of the jurisdictions selected to be examined in this study will possibly generate better perspectives that are generally useful for legal development and the improvement of our law.

1.4. Significance of the Study

This study aims to comparatively examine how the issue of change of circumstances has been addressed in various domestic and international jurisdictions on contract law. This will hopefully make unique contributions both for strengthening the academic study of the law in this particular area and improving its practical utilities. The merits of this study for the academics is in that it broadens the horizons for critical thinking by presenting the multiple approaches and solutions that different jurisdictions adopt in addressing essentially similar issues relating to a change of circumstances. This study will hopefully serve as an impetus to stimulate further critical and useful inquiries into the approach of our law in addressing the problem of change of circumstances, by presenting to our students and legal educators a host of different approaches and solutions that are adopted in other jurisdictions to address the same problem.

The growing volume of international trade and cross border transactions obviously suggests that our judiciary should be acquainted not only with the domestic laws, but also with the core aspects of international instruments that might be applied to disputes involving various international transactions. This study, therefore, hopefully will provide useful and readily

accessible data that discloses the positions adopted in some of the most important international instruments towards the issues of a change of circumstances- which is one of the most controversial topics discussed in relation to the applications of these instruments. Finally, though this study has been designed to fulfil a very modest ambition that does not directly target to make definite legislative reform proposals in this particular area of the law, it nevertheless provides the benchmark information that might be useful to our legislature should the latter be convinced to take measures aimed in that direction.

1.5. Scope of the Study

The primary focus of this research is on doctrines that directly address the effect of change of circumstances on the obligation of the parties. In some legal systems, solutions may be sought for the problem of a change of circumstances based on general rules that assign a hypothetical construction to the consents of the parties upon determining validity of the contract or interpreting its contents. In some legal systems, solutions that partly address the problem of change of circumstances may be found in some traditional doctrines basically dealing with the case of objective impossibility.[15] What is more, even where clear legal solution is provided, distinction should be made between situations that are subject to the traditional excuses based on impossibility and those which should be dealt with under the doctrine of change of circumstances as the remedies available in each case may not be exactly the same.[16] Due to these reasons, legal devises dealing with impossibility may be fairly treated in this paper whenever sought relevant and necessary.

The other important point that should be raised in relation to the scope of this paper is the fact that some modern theories look at the issue of change of circumstances as a problem that arises only in the context of relational or long-term contracts. [17] However, although the fact that long term contracts are more sensitive to changes cannot be denied, this paper has opted to give treatment to the issue as a problem that confronts contract law in general and not limited to specific type of contractual relations. [18] This is in fact justified since an overview of modern laws seems to disclose a general treatment accorded to the issue

[15] Baranauskas & Zapolskis, supra note 2, p. 203: For instance, under English law limited solution may be found for issues relating to change of circumstances under the doctrine of frustration that basically applied to impossibility.
[16] Kull, supra note 6, p.47.
[17] Id, p. 45.
[18] See Id, p.45-46.

without limiting it to particular types of contracts. In this research, therefore, the issue of change of circumstances will be taken from its broader context, encompassing all cases in which supervening and unforeseen circumstances impose/create severe burdens in the pending performance of contractual obligations.

Another last consideration worth mentioning here in relation to the scope of this study, relates to the role of express clauses dealing with a change of circumstances. Such clauses are said to be common in contractual practices, especially in those involving international transactions. However, evaluation of the situations where the parties exert efforts to anticipate and address the effects of future fundamental change of circumstances through their contract does not as such fall within the focal target of this study. This study advances from the underlying view that the issue of change of circumstances by its nature cannot be fully anticipated and effectively regulated by the parties' agreement. It proceeds based on the underlying assumption that the essence of the doctrine of changed circumstances is in serving as a legal device for dealing with those events (or events whose consequences) are by definition unforeseeable, or, in other words, unpredictable. [19] Therefore, the uncertainties with which the doctrine concerns itself, normally speaking, cannot be appraised rationally and would not occur naturally to the parties' to be regulated through their agreements. This implies that an appropriate legal rule is necessary for the ex-post allocation of losses, including the possibility of revising the agreement. Thus the legal default rule providing incorporation of the doctrine and operating in the vast majority of cases is the main concern of this study.

1.6. Hypothesis of the Study

The need of avoiding contradictions with the fundamental principle of contract law- the principle of binding force- seems to be the main reason used to justify the position of those jurisdictions adopting outright rejection of the doctrine of change of circumstances. Despite the fact that the principle of *pacta sunt servanda* or binding force is still regarded as the most important and core principle of contract law, absolute adherence to the principle, through outright rejection of the doctrine of a change of circumstances, seems to be losing its traditional favour among legislators of many jurisdictions. A cursory look at the current trends adopted in the domestic and international body of rules applicable to contract seems to

[19]See Walter, Supra note 7, p. 226-227.

disclose that the need to address unforeseen change of circumstances is generally being recognized. Thus, the more dominant position currently being promoted at the level of both national and international model codifications seems to support the position that leads to admission of certain limitations on the application of the principle of binding force of contract on account of unforeseen change of circumstances.

In contrast to the current trends being observed both at the level of national and international systems of contract law, the Ethiopian Civil Code seems to promote the traditional approach that leads to the outright rejection of the doctrine of change of circumstances. This may be seen from the general rule it has adopted on variation of contracts that clearly deny the courts the power to undertake variation of a contract even if its terms have become more burdensome for one of the parties as a result of unforeseen change in the circumstances. The strict definition it has assigned to the traditional defence of *force majeure* may also be taken as further substantiating evidence on the fact that the approach of the law is generally tilted towards the outright rejection of the doctrine of a change of circumstances.

Though the current moves towards the recognition and incorporation of the doctrine of change of circumstances do not equally imply any standardized solutions that the practical application of the doctrine necessarily entails, some suggestions based on tentative observations could be stated here. Accordingly, the first hypotheses of this study holds the approach providing express solutions and specific regulations for the problem of change of circumstances to be more acceptable than the approaches of the laws that completely reject or try to address the problem based on some general principles. In particular, the law should first provide mandatory requirements for the parties to renegotiate in order to regulate the effects of unforeseen fundamental change of circumstances. Additionally, the law should incorporate rules that provide authorization to the judiciary either to adapt or extinguish the contract in case the mandatory renegotiation between the parties fail to produce in mutually agreed terms to regulate the effects of the unforeseen change of circumstances. And, more importantly, the authorization to be given to the judiciary either to adapt or terminate the contract should be subject to elaborate and strict regulations to insure the legitimate interests of the parties and the public in general.

1.7. Research Methodology

1.7.1. The Comparative Method

To search answers for the research questions of this study and achieve its stated objectives, the researcher plans to rely mainly on the comparative legal research methodology. Based on the underlying assumption that the issue of change of circumstances is a common problem facing and equally requiring solutions among all modern legal systems, the study proceeds to examine how this common problem is treated in each of the jurisdictions selected. The functional comparative method will be specifically employed to assess the approaches and specific solutions provided to address the problem in the selected jurisdictions. Thus, beyond descriptive reporting of the solutions adopted under the applicable positive laws of the selected jurisdictions, the underlying doctrinal, economic, and other relevant considerations that help to explain the functional merits of those solutions may be occasionally brought into the discussions. In doing this, both primary and secondary sources of data may be employed. From the primary sources of data relevant legislations and authoritative decisions of courts will be analysed by the researcher. The secondary sources of data including books, journal articles and other scholarly productions, accessible in printed or electronic form, and providing explanations or critical views on areas of the law relevant for the research problems will also be additionally consulted.

1.7.2. Jurisdictions Selected

For the purpose of the comparative survey in this study, the selection of jurisdictions is not limited to national legal systems, rather some of the most important international instruments of contract law are further included. From the domestic jurisdictions, two of the most representative legal systems are selected both from the civil law and common law legal families. In addition to their wider international influence and availability of relatively better amounts of data regarding the status of their laws, the domestic jurisdictions have also been appraised based on the diversity of solutions they are supposed to offer for the study. Accordingly, from the common law jurisdictions: the legal systems of England and the United States have been selected. From the civil law jurisdictions, the legal systems of France and Germany have been selected.

In addition to the above specified domestic jurisdictions, some of the modern model codifications or restatements of international contract law are also surveyed in this study. Accordingly, the United Nations Convention on Contracts for the International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (PICC), the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR), are included in the comparative survey made in this study. The inclusion of these international bodies of rules may be primarily justified by the need of staying responsive to the current global emphasis on achieving the unification of contract law (or the whole area of private law). Secondly, and more importantly, most of the international instruments are said to have been drafted after an extensive comparative research into several jurisdictions, which makes them a valuable source for the study.

1.7.3. Terminology and Concepts

In the various legal systems included in this study, different terminologies are employed essentially to refer to the subject matter of this research. Various terms are used in the domestic jurisdictions included in this study to describe the legal doctrine of change of circumstances: *Wegfall der Geschäftsgrundlage* in Germany, change of circumstances in France, *frustration of contract* in England, and *impracticability and frustration of purpose* in the US. [20] The legal terminology used at the international level to designate the subject matter of this study is also said to be equally non-uniform, ambiguous and unclear.[21] However, during the last few years the expression *change of circumstances* is said to have earned its place. [22]

Furthermore, it is important to note at this point that the problem pertaining to the main subject of this study is not only one of designation, but it is also conceptual: *frustration* is not the same as *imprévision* and neither is a change of circumstances the same as *impracticability.* The same problems are present concerning other relevant legal concepts which are frequently used in this study, such as *adaptation* or *termination*, which may have completely different meanings in the different jurisdictions covered. For instance, the term *termination* is used in some foreign jurisdictions to signify a concept that is more

[20] Baranauskas & Zapolskis, supra note 2, p.198.
[21] V Živković, "Hardship in French, English and German Law", Institute for Comparative Law in Belgrade Review, 2013, p. 2. (Available at: http://ssrn.com/abstract=2158583), last accessed March 26, 2017.
[22] Ibid.

similar to that of *cancellation,* but different from what it represents under the Ethiopian law.

In view of the above problems relating to conceptual and terminological differences existing across different jurisdictions, the needs to provide some neutral definitions for some core legal concepts covered in this study cannot be ignored at this stage in the interest of avoiding ambiguities. Nevertheless, in the comparative reports on the various jurisdictions included in this study, the local expressions used in those concerned jurisdictions will be maintained with possible explanations provided for them. In other cases, unless the context requires otherwise or a different meaning is expressly provided, the following core terms have the definitions assigned to them below:

- Change of circumstances: 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 in its value.
- Adaptation of contracts: The modification of the obligations of one or both parties, with the aim of restoring the equilibrium between such obligations that has been severely disrupted by unexpected events, and to the extent that the performance of the contract by the affected party is possible or bearable.
- Termination: The situation in which a contract ceases to have effect before the period originally agreed by the parties; without regard to the entitlement of the parties to claim restitution where appropriate.

1.8. Organization of the Study

This paper has six chapters. This first chapter provides the overall blueprint of this study, the major issues that inspired its conduct and the contextual framework in which it is to be understood. Accordingly, among other things, discussions relating to the background, statement of the problem, objective, significance, scope, methodology, and limitations of this study have been incorporated in this chapter. The second chapter dwells on introducing the doctrine of change of circumstances and the principle of binding force of contract, and further highlights the major views existing in the literatures regarding the relationship existing between the two theories. The discussions in this chapter are hoped to formulate the

conceptual basis for pursuing the discussions provided under the remaining chapters of the paper.

The third and the fourth chapters dwell on reporting the general approaches and the specific solutions that the jurisdictions selected for the survey of this study have adopted in addressing the issues of change of circumstances. Accordingly, the third chapter first horizontally reports the position of each selected national jurisdiction towards the problem of the study and finally provides their vertical assessment in the form of comparative conclusions. The fourth chapter also follows a similar structure: a horizontal reports on the approach adopted under each of the selected international instruments of contract law is first provided and followed by their comparative assessments presented by way of conclusions.

The comparative assessments made in the third and fourth chapters are taken to their next level to formulate some working perspectives on how the issue of change of circumstances should be addressed by the law under the fifth chapter. Particularly, attempts will be made to identify: situations that should be considered to recognize "unforeseen change of circumstances", the legal effects or remedies that should be provided to deal with them, and how those legal effects are to be related with or affect the binding nature of contracts. As already noted under the hypothesis of this research, the problem of change of circumstances seems to be subject to outright rejection under the Ethiopian legal system. This position of the law will be critically examined in light of the current legal developments identified based on the assessment of the approaches adopted in other surveyed jurisdictions. The sixth chapter marks the final destination of the paper by formulating some conclusions and recommendations based on the major findings of the study.

1.9. Limitations of the Study

The first limitation of this research relate to the types of data that may be used. Due to language barriers and the costs involved in accessing original data, the researcher may be forced to rely on documents that are translated or made available by third parties in discussing the laws of some of the selected jurisdictions. Secondly, the analysis of the research is also limited in terms of taking into account the actual social, economic and political contexts in which the laws of the selected jurisdictions operate. Thus, the effort to evaluate the possible societal impacts of the approaches in the jurisdictions largely relies on

theoretical discussions of certain accepted considerations that are generally relevant for the modern regulation of the problem of change of circumstances.

Chapter Two: Change of Circumstances and the Principle of Binding Force: Overview of Historical and Theoretical Backgrounds

2.1. Introduction

The origin of the doctrine change of circumstances or *clausula rebus sic stantibus* could be traced to the early Roman writers. However, its full fledged development as a legal doctrine was realised by the later writers of the sixteenth and seventeenth centuries. In its early introduction into the civil law, the doctrine applied as an implied condition. [23] Since it was treated as an implied term complementing the express terms of contracts, no contradictions were apparently perceived between the doctrine and the other paramount principle of contracts law-*pacta sunt servanda* (that generally provides agreements must be upheld). In fact, in their medieval applications, the two theories were seen as co-extensive moral principles that formed part and parcel of every promise.[24]

Despite its earlier popularity as an implied condition, the doctrine lost its importance upon the rise of the classical theories of contracts towards the late eighteenth century and the nineteenth century. The classical theories placed absolute values on the promotion of freedom of contract and security of transactions through strict adherence to the principle of *pacta sunt servanda*. The theories treated the doctrine of *rebus sic stantibus* as antithesis to the principle of *pacta sunt servanda* and generally opposed to its application. Despite the oppositions based on the classical theories, however, the doctrine has made its come back and has continued to garner increasing acceptance in the modern legal scene. Currently, there are theories known by numerous names that provide recognition to the core idea of the doctrine. Despite their subtle complexity and legal differences, however, the theories have in common the will to provide legal reliefs to address the cases where unforeseen supervening changes render the performance of the obligations exceptionally burdensome or the counter-performance to be received under the contracts virtually worthless to one of the parties. Accordingly, the aim of this chapter is to portray the common conceptual origins and the theoretical debates pertaining to the application of these theories.

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[23] C Tabor, "Dusting Off the Code: Using History to Find Equity in Louisiana Contract Law," Louisiana Law Review, Vol. 28, No. 2 (2008), pp.555-556. As an implied term, the doctrine embraced the idea that, upon entering into a contract, parties bound themselves to perform, *provided the circumstances existing at the moment of conclusion remained the same.*

[24] See Kull, supra note 6, pp. 45-46.

2.2. Origin and Development of Pacta Sunt Servanda and Clausula Rebus Sic Stantibus

2.2.1. Pacta Sunt Servanda

The word *pactum* (which may be translated to mean an agreement or convention) is one of the oldest words in the Latin language. In its original use, however, the term merely signified a formal redemption from liability for personal injury.[25] This is not surprising as early Roman law did not have a comprehensive body of contract law, and merely embodied various classifications of liability without recognising a comprehensive system of contractual responsibility.[26] A mere *pactum* (agreement) outside the recognized situations was not actionable and the term *nuda pacta* ("bare pacts") initially represented this array of unsanctioned agreements that were common, but not enforceable at law.[27] They were unenforceable for want of an action at law to make them binding, and were simply thought to be "natural obligations".[28] The word *pactum* was later generalized to provide defence against any action. Thus the *pacta sunt servanda* principle, as known today, was never recognized as such in Roman law. [29]

Canon law and natural law played critical roles to bring the principle of *pacta sunt servanda* as it is known today. [30] The canon law supported the binding force of any kind of agreement mainly based on religious and moral considerations. [31] For the canonist lawyers of the early medieval period, violation of a promise became a moral sin, regardless of whether the promise had been made under the strict legal formalities of secular law. Thus, the church based canon law doctrine held that a breach of an oral promise was no less sinful than a breach of an oath or contract. The authority for this doctrine was said to be derived from the scriptures.

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[25] Kull, supra note 6, p. 23.
[26] P Mazzacano, "Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG" Nordic Journal of Commercial Law, Vol. 2 (2011), p. 2.
[27] Id, p. 3.
[28] Ibid.
[29] Id, p. 5.
[30] Id, p. 9.
[31] Ibid.

The natural lawyers and philosophers provided the final and the most important analytical leap necessary to formulate the present conception of *pacta sunt servanda.* For instance, one of the most prominent natural law philosophers, Hugo Grotius (1583-1645), wrote that: *"good faith was the foundation of justice and that God Himself would act contrary to His nature if He did not make good on His promises".*[32] Pursuant to his view, the obligation to perform promises arises from the nature of immutable justice. Following Grotius' perspective, the German jurist Samuel von Pufendorf (1632-1694), held that the sanctity of a promise was one of the inviolable rules of natural law. [33]

Today, the principle of *pacta sunt servanda* can be seen as one of the world's most important legal norms. The principle reflects not only natural justice, but also an economic necessity- since commerce would be unthinkable in the absence of reliable promises. The adherence to contractual terms required by the principle, however, was not without qualifications from its very origin. Particularly speaking, another equally old doctrine of the law -the *rebus sics stantibus*- stipulated that strict adherence to contracts should be required subject to the implied condition that circumstances remained unchanged.

2.2.2. Clausula Rebus Sic Stantibus

The origin of the doctrine *rebus sics stantibus* can be traced back to Plato during the time of Roman Republic. The first crucial expression that provided the basis for the current idea of the doctrine was said to be found in Plato's example that, *"a sword does not have to be returned to a depositor who has become insane ".*[34] St. Augustine included this example in his teachings; and, after its affirmation by St. Thomas Aquinas, other natural lawyers also picked up the idea and began to expand it. [35] This expansion resulted in the Romanist writers seeing *rebus –sic stantibus* as an implied condition in every contract.[36] Accordingly, Bartolus first introduced the doctrine into the civil law as an implied condition, but limited to only the

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[32] Mazzacano, supra note 26, p. 10.
[33] Ibid.
[34] Tabor, supra note 23, p. 555. *"Though there are some contemporary writers that assert this "example of a sword" can only be traced back to Cicero in the first century B.C, it was also found in the much earlier work of Plato's Republic. Thus, the foundations for rebus sic stantibus can be found as far back as the fourth century B.C."*
[35]Ibid. St. Thomas Aquinas gives a very clear explanation of the Church's view in his Summa Theologica, stating: A man does not lie, so long as he has a mind to do what he promises, because he does not speak contrary to what he has in mind: but if he does not act to keep his promise, he seems to act without faith in changing his mind. He may, however, be excused ... if circumstances have changed with regard to persons or the business at hand.
[36] Id, p. 556.

act of *renuntiatio.*[37] The idea was taken up by Baldus, who enlarged it to cover all obligations.[38] The doctrine gained the highest acceptance during the seventeenth century, making further inroads into the private law to become "part and parcel of the *usus modernus"* (modem use).

The growing popularity of the doctrine, however, was cut short by the rise of the classical economic and political theories of capitalism and liberalism, both of which were particularly hostile to this equitable notion. [39] Efficiency and certainty became the celebrated values of the late eighteenth and nineteenth century classical contracts law. The doctrine was considered inimical to these values, and this eventually led to its disappearance from the legal scene altogether.[40] However, as we have already noted, the doctrine has made its modern reappearance following the catastrophic incidents caused by the World War I. Despite the oppositions based on the classical views of contracts that are still subsisting, the doctrine currently continues to attract more and more acceptance in many jurisdictions. This practical return of the doctrine, however, cannot be sufficiently explained by the mainstream normative theories of contracts that basically draw on the classical views. As it shall be explored in the next section, the contemporary justifications of the doctrine present an interesting contrast between the classical and the newly evolving modern views of contracts.

2.3. Contract Theory and the Modern Justifications for *Rebus Sic Stantibus*

Much contract theory, in one way or another, is occupied with the relationship between contracts, which create legal obligations, and promises, which create moral ones.[41] Contract law itself uses the language of promising, and often defines contracts as legally binding promises. Any attempt at a general theory of contract, therefore, cannot escape the questions as to why, and subject to what limitations, private choices or promises are to be enforced by the law. In pursuing these enquiries, contract theories use variety of methods and analytical tools.[42] The theories also supply divergent explanations in supporting the contents and

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[37] Tabor, supra note 23, p.556
[38] Ibid.
[39] S Litvinoff, "Force Majeure, Failure of Cause and Théorie de l'Imprévision: Louisiana Law and Beyond," Louisiana Law Review, Vol. 46, N0. 1(1985), p. 46.
[40] Tabor, supra note 23, p. 557.
[41] G.Klass, Introduction to the Philosophical Foundations of contracts Law, (http://scholarship.law.georgetown.edu/facpub/1326), P. 2.
[42] Id, p. 1. At a general level, there are different conceptions of the tasks that a theory of contracts may discharge. Theories concerned with the substantive rules of contract may assume the task of explaining what the

enforceability of contractual promises. These divergent theoretical accounts pertaining to the enforceability of promises or private choices underpin much of the historical and ongoing debates on the relevance of the doctrine of change of circumstances.

According to earlier writers, private choices matter for the law mainly due to their contents.[43] The substantive contents of the parties' obligations and the purposes in view of which they oblige themselves were treated as legally relevant considerations for determining the contents and enforceability of contracts. In this view, the justice of contracts does not solely arise from the presence of genuine agreements; particularly, in the case of unforeseen change of circumstances affecting the balance of the parties' obligations, the substantive contents of contract was treated to be relevant for the law. This conception of contractual justice generally fits with the historical application of *rebus sic stantibus* as an implied condition of contracts during its early introduction to the civil law.[44]

The nineteenth century classical theories of contract and their modern progenies, however, later rendered the objects of human choices almost irrelevant for contracts law. [45] These theories placed exclusive value on choice, independent of the value of what is chosen. For the classical theorists and modern writers subscribing to their view, the mere presence of choice was all that mattered for the purpose of determining both the content and obligatory nature of contracts. Accordingly, it was held that choices/promises were content independent- the reason promises bind did not depend on the act promised.[46] To this effect, the nineteenth-century will theorists simply assumed that choices mattered without explaining why.[47] As

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(Cont.) content of contract law is, or what that content should be. Varieties of analytical tools, including moral and political theory, conceptual analysis, sociological theory, interpretation, neoclassical economic analysis and empirical psychology may be employed by the theories in searching possible answers for their queries.

[43] J Gordley, "Contract Law in the Aristotelian Tradition," in Peter Benson (ed.), The theory of contract law: new essays, (2007), p. 266.

[44] As noted before, the theories of *pacta sunt servanda* and *clausula rebus sics stantibus* first emerged out of moral considerations. Thus, during the early medieval peried, *rebus sic stantibus* applied as a moral principle that was complementary to the binding nature of contracts in order to address the unfair effects that unforeseen events would cause in the contents of the obligations assumed by contracting parties.

[45] Gordley, supra note 43, p. 270. "*The theories are said to have emerged from the crisis through which philosophy passed in the seventeenth and eighteenth centuries. Descartes founded modern critical philosophy on a new method in which the only permissible starting points were matters that could not be doubted and the only legitimate conclusions were those reached by deductive logic. Reason was equated with deductive logic. This method broke with the Aristotelian tradition. Writers in that tradition had not tried to show by deductive logic that there are better and worse ways to live one's life. They had thought that first principles could only be established dialectically, that is, by showing that if one denied the principle, one would reach absurd conclusions or no conclusions at all. If one denied that the objects of choice can be better or worse, human choice would no longer be meaningful.*

[46] Id, p. 169.

[47] Ibid.

Valerie Ranouil, the French will theorists, once said: *"[t]he contract is obligatory simply because it is the contract".*[48]

Some modern theories, however, have tried to explain the way choices matter for the law independent of their objects. These explanations are generally based on two broader classes of theories, which may be referred as: 'autonomy' and 'revealed-preference theories'.[49] These are the normative theories that underpin much of the subsisting oppositions and legal resistance against recognition of the doctrine of change of circumstances. Thus, it is important to first examine the oppositions raised against the doctrine from the vantage of these theories, before considering the counter justifications provided in support of its application.

2.3.1. Oppositions of the Doctrine Based on the Classical Conceptions of Contracts

For autonomy theories, the origin of which could be traced back to Kant and Hegel, choice matters because it is an expression of freedom or autonomy.[50] These theories emphasise the importance of choice based on deontological explanations of the moral values in respecting the freedom or autonomy of individuals to assume self-imposed obligations. Thus, on this view, contracts are enforced by the law simply because that is a necessary consequence of freedom. Respect for individual freedom, more than safeguarding the right to freely enter into a contract and determine its contents, imposes *concomitant responsibilities.* Autonomy theorists have thus asserted that:

[I]t is just the fact that one has voluntarily promised something on certain terms that justifies the law in holding that one is legally obliged to perform. One need not have so promised in the first place. But, once having done so, one cannot reasonably expect the law of contract to permit one to escape from the promise, whatever its terms: If it were to do so, the law would

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[48] Gordley, supra note 43, p.169.

[49] M. Eisenberg, "Contract Theory," in Peter Benson (ed.), The theory of contract law: new essays, (2007), p. 235: but, unlike autonomy theories of contract, which have been explicitly worked out by various commentators, revealed-preference theories of contract tend to be implicit as theories of contract law generally, although they are often relatively explicit in the analysis of individual contract issues.

[50] Gordely, supra note 43, p. 271. *"For both Kant and Hegel, "although people do make such choices to have something they want, freedom means that a person acts, not because he wants something, but because he is a free and rational being. To be free, an action must have its source in one's self rather than one's inclinations".* Thus, contract law exists for the sake of Freedom, the choices that one makes or the purposes he seeks to achieve through exercising that freedom is immaterial.

fail to take seriously one's moral power to assume self-imposed obligations; it would dishonour one's capacity for autonomy and treat one as an infant.[51]

Pursuant to this conception of "freedom", the opposition against the doctrine of change of circumstances has two major aspects. Firstly, it has been asserted that the doctrine allows courts to exercise a discretion that is not only excessive but could also be dangerous.[52] This is said to leave the door wide open for the state to arbitrarily interfere and progressively reduce the private parties' autonomy of will. This opposition may be regarded as truly embracing concerns relating to the protection of freedom of contracts in its most usual sense. Secondly, the concept of freedom has been taken to further justify strict enforcement of promises pursuant to autonomy theories.[53] Thus, strict performance of contract is said to be essential not only for the law but also for morals, since respect for the pledged word is also considered to be a matter of honour. Allowing excuses from performance of contracts based on the doctrine of change of circumstances is therefore considered as amounting for the law to infantilise individuals by dishonouring their moral capacity for assuming self-imposed obligations.

The revealed-preference theories, on the other hand, have adopted a goal-based approach in justifying the value of choice. These theories are essentially the applications of normative or welfare economics to contract law.[54] Welfare economics leads naturally to the theory of contracts that posits, in the absence of a defect in consent, contracts are Pareto efficient, because if both parties did not believe the contract made them better off they would not have made it.[55] Accordingly, they generally hold that the law enforces contracts so that people's preferences can be satisfied to the greatest extent possible. This also means that the law employs the collective resources of the society for the enforcements of promises, merely for the sake of increasing the joint-gains of the private parties concerned in each particular transaction.

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[51] P Benson, "The Unity of Contract Law," in P Benson (ed.), The Theory of Contract Law: new essays, (2007), p.199.
[52] Litvinoff, supra note 39, p.5.
[53] However, providing support for the strict enforcements of contracts based on the concept of "freedom" has been regarded as logically absurd. As a certain writer has argued, "the power to promise exists only because, and to the extent that, it enhances our moral lives...the fact that having the power to promise is valuable does not mean that there is value in giving people the power to enslave themselves." See, Klass, supra note 41, p.4.
[54] Eisenberg, supra note 49, p. 236.
[55] Ibid.

Consistent with the consequentialist or goal-based justifications provided by these theories, the arguments to be posed against recognition of the doctrine of change of circumstances generally arise from concerns relating to efficiency and security of transactions. Accordingly, it has been claimed that a theory that allows departure from the basic principle of binding force of contracts is feared to introduce insecurity in legal relation of parties entering into contracts and to pose dangers against the overall stability of the market.[56] Thus the intervention of courts in contractual relations on the ground of changed circumstances has generally been deplored to pose a serious threat for the long term security of commercial transactions. The second, and perhaps the most important argument based on these theories, stresses the fact that contracts primarily serve as instruments of *prevision,* or foresight.[57] It has been held that parties entering into long-term contracts or credit transactions intend to allocate the risks arising from future fluctuations in economic circumstances. Accordingly, the excuses or revisions of contracts based on the doctrine of change of circumstances have been opposed as creating undue interference in the allocation of the market risks already accomplished by the parties through their contracts.[58]Accordingly, the application of the doctrine has been held to sharply contradict with the very purpose of contracts as risk distributing devices.

2.3.2. The Contemporary Arguments and Justifications of the Doctrine

The attempts of the classical theories to justify the enforcements of contracts on axiomatic and single values found in private choices has obviously become unsatisfactory both for explaining and providing solutions for problems relating to change of circumstances. Based on these theories, it is hard to explain why a party should be held to the initial terms of his promise, where, due to unforeseen change of circumstances, the literal enforcement of those terms later becomes excessive in view of the consent given at the time of contracting. [59] In such cases, autonomy theories merely state that contract law might enforce the first-order

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[56] Litvinoff, supra note 39, p. 5.
[57] Ibid
[58] Ibid
[59] Generally, it seems to be generally difficult to support enforcements of contracts *based on autonomy and revealed-preference theories, both of which are built on respect for choice. '' ...contract law coerces actors who choose not to perform. It is true that contract law only coerces an actor to hold to a choice that he did make at one time; but this is a choice the actor no longer stands by... There may be good reasons why the state should coerce a party to hold to his earlier choice despite the fact that he now autonomously rejects that choice, but those reasons cannot be found in the idea of respect for autonomy.* Thus, *enforcement of contracts viewed simply as expressions of individual preferences or freedom, there is no qualitative difference between the decision to contract and the decision to not perform that comes later."* Eisenberg, supra note 49, p.233.

moral obligation to perform, without justifying why it should be so. Similarly, pursuant to the revealed-preference theories, there is no reasonable criterion by which the initial preference may be given priority for the purpose of its enforcement by the law.

What is more, the ingenuity of applying the absolute principle of binding force promoted based on the classical views has also faced serious practical doubts after the World War I. Due to the abnormal economic hardships that resulted due to the catastrophes of the war, strict and literal enforcement of contracts practically resulted in harsh and unreasonable legal consequences. This reality facilitated the modern re-emergence of the doctrine of *rebus sics stantibus* in many jurisdictions.[60] In summarising the continued importance of the doctrine despite the theoretical oppositions against it, the German jurist Bernhard Windscheid once stated: *"thrown out by the door... it will always re-enter through the window".*[61] The aim of this sub-section is to find out the justifications behind this continued importance of the doctrine that the above discussed theories endorsing the classical views of contracts have overlooked to take into account.

2.3.2.1. Justifications Based on Different Legal Theories

A. Justice as Applicable Principle

The notion of justice in its application to private relations is subject to different interpretations in various positive and normative theories.[62] Some authors consider the application of the principle as the balance between the protection of legal rights and the interests of individuals. Others see it as a general rule that becomes concrete whenever the courts use equity and sense of fairness in interpreting and applying legislation. In the context of contracts, two different conceptions of justice may be broadly identified. The justice of a contract between two individuals may be either due to the fact that they reached a genuine agreement or the actual fairness of the terms of their agreement based on some independent criteria of justice.[63]

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[60] Tabor, supra note 23, p.557.
[61] Id, p. 558.
[62] K Varbanova, Hardship as one of the main principles of European Contract law: Proposing a Just Regulation of Hardship in the Common European Sales Law, p. 4. (Available at: https://www.dare.uva.nl/cgi/arno/show.cgi?fid=546116, last accessed on May 17, 2017).
[63] L DiMatteo, "The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"--A Non-unified Theory," *Hofstra Law Review*: Vol. 24: Issue 2, Article 8, (1995), p. 31.

Pursuant to the views based in the classical theories of contracts, the moral basis of contract does not in itself incorporate such concerns about substantive fairness that goes further than the traditional contract defences. Accordingly, as long as agreements are freely made, "*the role of contract law is not to assure the equity of agreements but simply to enforce only those willed transactions that parties to a contract believed to be to their mutual advantage*".[64] This conception, which is often identified as the formal approach of contractual justice, has been justified based on two major formulations: Firstly, by voluntarily entering into the arena of contractual obligations, one is said to be consenting to the rules of law that provide the framework for exchange. Thus, it is perfectly just for one to be held to the actual terms of his promise, as long as he has freely consented to them. An alternative formulation in justifying this formal approach is strictly based upon utilitarian grounds. Accordingly, failure to enforce bargained promises on account of substantive fairness considerations is said to subvert efficiency by diminishing the willingness of private actors to enter into and plan upon the basis of credit transactions. Moreover, substantive fairness considerations are said to pose dangers against security of transactions by reducing predictability and certainty of the law.

However, the formal approach of justice has often been criticised for totally disregarding the long established importance attached to the concept of commutative justice by the law. The nineteenth century classical theories of contract broke from this concept, which had been historically recognised as one of the fundamental principles of the law applicable to exchange contracts.[65] Along with their break from this basic concept of the law, as some recent writers have observed, the classical theories of contract have jettisoned the values of the law to preserve substantive justice in the enforcements of synollogical contracts.[66]

This has paved the way for renewed justice and fairness inquiries in recent theories of contract. Some of the views reflected in these fairness enquiries have attempted to justify the enforcements of contracts on criteria of distributive justice or fairness standards by totally

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[64] DiMatteo, supra note 63, p. 40.

[65] Gordely, supra note 43, p. 267.The origin of commutative justice could be traced to the ancient Roman and Greek philosophies. In its original formulation, the concept required that the resources exchanged between the parties to voluntary transactions be equivalent in value so that neither party's share is diminished. Accordingly, the writers in the Aristotelian tradition held that: "*the rules that govern obligations between private parties should depend, not simply on their will or revealed preference, but on which type of arrangement they had made. The rules should ensure, so far as practicable, in the case of an exchange, that each party receives an equivalent, and in the case of a gratituous contract, that the donor behaves sensibly*".

[66] Ibid.

disregarding the importance of choice.[67] However, this view faces difficulty in explaining the structure of the existing law - in particular, the principles of contract formation, the liberty to contract or not as one sees fit, and so forth.[68] These aspects seem to reflect, rather, a conception of liberty that is indifferent to distributive concerns. Fairness standards or redistributional criteria are also difficult to determine or quantify in order to be incorporated as normative values under the main principles of contracts.[69] There is also a real worry that the attempts to regulate inequality in exchange will backfire and impose greater harms on disadvantaged parties, either by producing iniquitous terms elsewhere in the transaction or by excluding disadvantaged parties from the market.[70]

Though the above expressed fears seem to provide a strong case against the incorporation of distributive criteria or fairness standards as basic principles of the law, relevant moral norms, such as norms against unfair advantage-taking, should still be reflected in determining the enforceability of private promises. On this view, the doctrine of change of circumstances should be distinguished from the sort of rules that are intended to serve a redistributive end. In this vein, the following observations have been made:

> *The justification of reallocation-on-collapse rules is not to achieve a proper distribution of wealth in society. Rather, it is that contracting parties themselves would want such rules, because the transaction costs of planning for the allocation of losses upon every possible scenario of collapse are too great". Correspondingly, a reallocation under such a rule would not be based on the criteria for the proper distribution of wealth in a society, but on the nature and purpose of the contractual enterprise in which the parties engaged.*[71]

The theory of corrective justice has thus been discussed by some writers as providing foundations for legal interventions in case of change of circumstances.[72] The basic problem

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[67] Eisenberg, supra note 49, p.256. Some writers have accordingly claimed that: *The principles of substantive fairness are part of contract, and that perhaps contract law as a whole, should also be understood as distributive. On this view, the very legitimacy of contract depends directly on whether it promotes a just distribution of resources and power.* Accordingly, they have emphatically asserted that *considerations of distributive justice must be taken into account [in designing rules for exchange] if the law of contracts is to have even minimum moral acceptability.*

[68] Benson, supra note 51, p. 198.

[69] DeMatteo, supra note 63, p. 39: In this line, it has been asserted that, "*the extreme indeterminacy . . . inherent in a principle of substantive fairness prevented it from providing the overarching account of contractual obligation that contract theory requires. The inability to quantify an objective principle for fairness will return this construct to the sarcophagi of the 'just price' theorists of the Middle Ages.*

[70] Klass, supra note 41, p. 10.

[71] Eisenberg, supra note 49, p. 259.

[72] Varbanova, supra note 62, pp. 8-9.

relating to the application of this theory is the fact that its application normally targets for redressing harms that result from a party's wrongdoing.[73] In the case of change of circumstances, however, injustice is normally created due to an extraordinary event beyond the parties' control. Despite such difference, corrective justice has been characterised by some writers as a general theory that subordinates private relationships and the freedom of contract to the unwritten norm of fairness. The main aim of the theory, in this sense, is to eliminate injustice in private relationships in which one party obtains more than it should have in connection to its counterparty. Thus, the main objective of corrective justice - to restore the equality in misbalanced private situations – may still provide the broader theoretical justification for the application of the doctrine. In general, the purpose of the doctrine of change of circumstances is to restore a fair balance between the rights and obligations in a contract. Consequently, its application should extend to all situations where unforeseen supervening events cause injustice for one of the parties.[74] The various legal theories discussed below, directly or indirectly recognise and try to give concrete definitions for this broad consideration of justice underlying the doctrine.

B. The Theory of Failure of Cause

In the civilian tradition, even though no "consideration" is needed to make a promise enforceable, a cause must be found at the root of every obligation in order to make it binding.[75] That cause is the motive, or end, or reason, or purpose for which a party binds himself. If that cause fails, the obligation fails also.[76] The concept of failure of cause has thus been recognised in the various doctrines applied throughout the civilian jurisdictions, including France and Germany.[77]

At common law, the problems of unforeseen change of circumstances are dealt with by the doctrines of "frustration of contract", or "frustration of purpose", and "impracticability". These doctrines commonly embrace the idea that a contract cannot be sustained if the common end anticipated by the parties has disappeared as a result of unforeseen change of circumstances.[78] The doctrines generally recognise that the life of a contract in some way

[73] Varbanova, supra note 62, p. 9.
[74] Ibid.
[75] Litvinoff, supra note 39, p. 14.
[76] Ibid.
[77] Id, pp. 15-18.
[78] Id, pp. 6-13.

depends on the viability of the purposes pursued by the contracting parties. Thus, the principle of failure of cause could be taken as an important principle underlying the various doctrines applied both in common law and civil law jurisdictions to deal with the problem of change of circumstance.

C. The Principle of Contractual Proportionality

Contractual proportionality or equivalence is one of the most important principles often invoked to challenge the traditional view that required absolute impossibility in order to exonerate an obligor. According to this principle, it is of the nature of a reciprocal contract that each party considers his performance as an equivalent for the counter-performance of the other. However, the principle should not be seen as a way of re-establishing the Canon Law idea of a fixed just price, *justum pretium*.[79] Though there need not be equality of values between the performances, the principle requires that obligations be proportional or at least for some relationship of adequacy to be present considering the position on each side and to each other, and all the circumstances in all stages of the contract.[80]

Contractual proportionality is said to provide the theoretical basis for the purpose of explaining many, but seemingly disparate, occurrences of requirements of fairness and justice in contractual relations.[81] Accordingly, many writers agree that objective and measurable criteria to enhance the application of all other theories invoked in case of change of circumstances could be provided on the basis of this principle. It is from the vantage of this principle that the economic motives of the parties, the nature and purpose of the transaction, and the relation of such elements to the change of circumstances have begun to matter far more.

D. Theory of Implied Term

In some of the jurisdictions where clear legal recognitions have not been granted for the doctrine, courts have also resorted to interpretation as a means to deal with the consequences of change of circumstances. Accordingly, they have assigned the widest connotation to the concept of "interpretation" in order to amend a contract affected by unforeseen change of

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[79] J. Munukka, "Harmonisation of Contract Law: In Search of a Solution to the Good Faith Problem," Stockholm Institute for Scandinavian Law , (2010), p. 8.
[80] Ibid.
[81] Ibid.

circumstances by injecting additional terms presumed to be conforming to the parties' intentions. Such practice among the courts of certain jurisdictions has resulted in contending views. There are some commentators that disapprove this theory asserting that it is based on an arbitrary formula that would likely impose external obligations to which the parties have never consented. In this line, the following criticism has been expressed:

> *The doctrine of implied conditions lacks a logical foundation. Application of the doctrine involves judicial speculation to determine what the parties would have provided had they anticipated the event in question. Is the judiciary better equipped to divine the true intentions of the parties to the contract? The implied terms could never be based on the actual intention of the parties since no such intent had ever actually been expressed.*[82]

The argument expressed above, essentially appears to be based on the will theories of contracts. The conception of the will theory, on which the argument ostensibly bases itself, however, is criticised to be wrong. The notion of "autonomy of will" or "party consent" in modern contract law has already acquired an objective construction in many jurisdictions. Accordingly, it has been asserted that the fact a contract is based on the will (combination of wills) does not suggest that courts are strictly constrained by what is expressly provided by the parties in the enforcement of contract.[83] Objective construction of will, in fact, suggests that it is also for the courts to determine the content of the parties' willed transaction based upon the "totality of the circumstances, in case the terms provided by the parties is not clear enough to allow enforcement of the contract.[84] In supporting this view, it has been further argued that:

> *First, the idea of "intention" is now considered genuinely wider than was once believed. On a philosophical level it has been demonstrated that someone may be intending something without having a mental picture of it before her. Therefore, for a court to say that a party must have "intended" something which had not occurred to her at the time may show faithfulness rather than disloyalty to the will theory. Second, the courts may, by way of "interpretation" of the contract, rightly invoke the parties' intention to ascertain the genuine content of an absent or inadequately-expressed will. By shedding light on the parties' true will, the courts again remain loyal to one of the central tenets of the will theory.*[85]

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[82] Walter, supra note 7, p. 231.
[83] P Legrand, "The Case for Judicial Revision of Contract in French Law (and beyond)," McGill Law Journal, vol.34 (1987), pp. 928-929.
[84] Ibid
[85] Id, p. 916.

Thus, according to this view, the wills of the parties expressed in contracts may be either qualified or limited by the meanings assigned to them by the law of the legal system under which they are to be enforced. This makes it possible for the courts to invoke the values and principles of justice upheld by the laws of the legal system in order to revise a contract whose terms have become grossly unfair to one of the parties due to unforeseen change of circumstances.

In short, implied term theory can be seen as a judicial technique for reaching a fair and just result for individual litigants without undermining a basic tenet of the law (which is the principle that contracts are based on a voluntary promises exchanged between the parties).The application of the theory can further be viewed as the manifestation of the attempts made by the judiciary to recognise the need of addressing the problem of unforeseen change of circumstances, while also trying to stay loyal to the principle of *pacta sunt servanda*. The theory may therefore be seen as judicial attempts made at striking the balance between the needs of protecting contractual certainty and freedom on one hand, and meeting the demands of justice in case of unforeseen change of circumstances on the other hand.

E. Theory of Good Faith

Despite certain objections against the theory of good faith as lacking precision with regard to the scope and criteria of its application, its relevance in cases of change of circumstances could not be totally ruled out.[86] This may be said in view of its explicit recognitions and legislative codifications especially in most civil law jurisdictions. In fact there are also enough examples to substantiate the importance of the principle in decisions rendered by both the common law and civil law courts.[87] In some cases, the theory has also been aligned with other principles such as "contractual proportionality" or the implied term theory, in its application to change of circumstances.

Generally, the principle of good faith is seen as an obligation that the law attaches to every contract as an expression of a more general moral relationship of solidarity that contractual relationships produce. Accordingly, a party's duty of good faith is said to include the obligation not to *"abandon his/her contractual intention to adjust to unanticipated*

[86] Generally see Litvinoff, supra note 39.
[87] Ibid.

contingencies in a fashion that secures the success of the contractual collaboration's shared plan."[88] This distinctive form of solidarity that the obligation of good faith generates is said to define a moral perspective that underlies not only the marketplace, but liberal democratic societies more generally.[89]

F. Theory of Unjust Enrichment

Unjust enrichment is one of the fundamental principles of law that stands as the manifestation of justice, fairness, and natural rights. In many legal systems, it is recognised as a general theory that serves to provide equitable remedy for most cases of injustice, where a person might be left without contractual or tort based remedies. This theory has been extended by the courts of some jurisdictions to deal with cases of change of circumstances, especially in relation to long-term contracts.[90] Unforeseen changes often render the performance of the obligations involved in such contracts exceptionally burdensome for one of the parties, while they produced an affluent wealth and windfall profit to the other. In such cases, courts have held demanding the uncommon profits resulting from external events as something falling beyond the contractual requirements and constituting an unjust exploitation of the mutual agreement.

G. Theory of Abuse of Right

Abuse of right is another general principle of law that has been frequently cited to address the cases of change of circumstances. According to this theory, the use of once own right in a manner that causes unreasonably disproportionate harm to others is generally held to constitute a wrongful act. In this regard, some jurists have considered the theory of abuse of rights as the basis for the doctrine of change of circumstances.[91] Accordingly, requiring strict performance of the contract under the changed circumstances causing extreme hardships leading to a party's financial distress or bankruptcy is thought to constitute an abuse of right.[92]

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[88] Klass, supra note 41, p.10.
[89] Ibid.
[90] F Etemadnia, A Zahid & J Hassim, (hereinafter, Etemadnia, et el.) "Justifications for the Doctrine of Excuse from Contract: An Overview of the Position under American Law and Iranian Law," International Journal of Technical Research and Applications, Volume-2, Special Issue 3 (2014) pp. 51-52.
[91] Id, p. 52.
[92] Ibid.

2.3.2.2. Economic Justifications

Before looking at some of the economic insights on the bases of which various arguments have been made in support of the recognition of the doctrine of change of circumstances, it is important to emphasise the equal relevance of efficiency considerations for all legal systems. This is because there are some writers that claim that efficiency or economic considerations can only be discussed in relation to the legal developments of the common law, and that the civil law tradition is indifferent to efficiency considerations by its very design.[93] This claim is essentially based on the difference existing between the two systems with respect to the assignment of rule-making powers.[94] However, other recent studies have contested the validity of this claim mainly on two related grounds.[95] First, the difference existing between the two legal systems with respect to the assignment of legislative powers has become only a matter of degree. In the civil law legislations usually leave detailed matters to be filled by the judiciary and in the process of interpretation the courts may sometimes well extend the scope of the law considerably beyond that originally contemplated. Secondly, and more importantly, the underlying premises of the claim holding judicial discretion as more pro-efficiency than that of legislative enactments is said to lack sufficiently tangible proofs.

From economic point of view, what the role of contract law ought to be can be approached from two different angles.[96] The first approach is facilitative, i.e., to enable the parties to achieve their goals in the best possible way. Contract law should strive for efficiency in this sense. The second approach is regulatory, i.e., to prevent the parties from doing something that contravenes with some generally set policy objectives. Most economists generally favour the first approach that emphasises the facilitative roles of contract law.[97] But when it comes to determining the way by which the law is supposed to accomplish those facilitative roles, consensus is virtually lacking.

The position of the classical revealed-preference theories, considers contracts as one of a private domain in which state's role should be as minimal as to merely providing

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[93] See B Arruñada & V Andonova, "Common Law and Civil Law as Pro-Market Adaptations," JEL codes: K40, N40, O10, P.2.
[94] Ibid.
[95] Id, pp. 3-4.
[96] V Goldberg (ed.), Readings in the Economics of Contract Law, (4th ed., 1993), P. X.
[97] Ibid.

enforcements to the arrangements freely reached by the private parties.[98] The assumption is that private choices are always made on free and well-informed bases, and are therefore more efficient than some collective decision-making processes. Such isolation of the role of the state in the context of contracts is predicated on the standard economic model of choice based on rational-actors psychology.[99] Rational-actor psychology posits that an actor who must make a choice in the face of uncertainty will rationally select the option that maximizes his subjective expected utility.[100] Rationality requires, among other things, that the likelihood of uncertain consequences be evaluated by actors without violating the basic rules of probability theory.[101] In reality, however, actors are said to behave in response to legal rules under constraints imposed by bounded rationality and limited information.[102] Because of bounded rationality, actors (including individuals and institutions) do not pay attention to all potentially relevant information (contrary to the perfect information assumption). Thus actors are said to instead only pay attention to information that their habits and routines make silent.[103]

Modern economic theories thus recognise that individuals do not always make free and well informed choices due to failures of the market to provide the required information or other factors. Accordingly, the theories admit the existence of unforeseen contingencies that could create contractual risks that were not within the contemplation of the parties, and hence require concomitant intervention from the state. But disagreement exists on the methodology to be employed to allocate the risk and the loss incurred as a result of the unforeseen change of circumstances.[104] Two different approaches of dealing with the effects of unforeseen change of circumstances may be generally considered here: the superior risk bearer approach and an economic dynamism approach.

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[98] As noted before, revealed-preference theories are based on normative or welfare economic study of law. Though the debates pertaining to the relevance of normative and positive economic analyses for legal theory is beyond the scope of this paper, the role of normative or welfare economics should be generally distinguished from positive economic analysis of law. Positive economic analysis does not, in principle, take a normative position. Rather, it instructs us about some likely consequences of adopting a given rule in terms of the incentives and disincentives the rule will provide, and the probable effects of these incentives and disincentives. Positive economic analysis is therefore consistent with, and indeed an important tool for, any theory of contracts that allows empirical propositions to mediate from policies and moral norms to doctrines. See, Eisenberg, supra note 49, p. 236.

[99] Id, pp. 249-250.

[100] Ibid.

[101] Ibid.

[102] D Driesen, "Contract Law's Inefficiency," Virginia Law & Business Review, Vol. 6, No.2 (2011), p. 334.

[103] Id, pp. 334-335.

[104] S Jenkins, "Exemption for Non-performance: UCC, CISG, UNIDROIT Principles-A Comparative Assessment," Tulane Law Review Vol.72 (2015), p.2017.

The superior risk bearer approach is motivated by the target of producing a result which may be treated efficient in relation to each particular case of change of circumstances. The judge is entrusted with the responsibility to decide cases involving change of circumstances in a manner that efficiently allocates the risks arising from it. Accordingly, if the promisee is the superior risk bearer, i.e., said to be in a better position to prevent or insure against the risk, the obligation of performance by the promisor is discharged.[105] Conversely, if the promisor should be allocated with the risk, as a superior risk bearer, performance must occur to avoid liability for non performance regardless of the increased burden.[106] Thus, pursuant to this approach, the risk arising from change of circumstances should be allocated by the courts based on case by case evaluation and determination of the party that should bear such risks. This approach implicitly assumes that contracting parties are generally able to calculate and act rationally towards the risks that unforeseen circumstances would create in their contractual relation. However, the very justification of state intervention in case of change of circumstances is based on the inability of the contracting parties to determine *ex ante* the possibility of potential risks and/or the magnitude of such risks. Thus, the approach is inconsistent with the kind of risks with which the doctrine of change of circumstances deals and its gap-filling application.[107]

The approach of economic dynamism, however, focuses on analysing change over time and view law as establishing temporarily extended societal commitments, rather than as insuring instantaneous efficient individualist transactions.[108] Thus, rather than the maximisation of private joint gains in each particular transactions, this approach emphasises the function of the doctrine of change of circumstances from the vantage of its long-term societal benefits.[109] Generally, strong arguments to show how the recognition for the doctrine of change of circumstances enhances both efficiency and security of transactions can be made based on

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[105] R Posner & A Rosenfield (1977), "Impossibility and Related Doctrines in Contract Law: An Economic Analysis," in Victor P. Goldberg (ed.), Readings in the Economics of Contract Law, (4th ed., 1993), p.212.

[106] Ibid.

[107] According to a certain critic of this approach: *No rational contracting party would willingly adopt the "superior risk bearing" approach as a default rule, given the parties' inability to determine ex ante how the court would resolve the factual determination of risk bearing capacity ex post and after the unforeseeable supervening event has materialized. Rational parties, aware of the "superior risk bearer" default rule would incur costs determining the possibility of potential risks and the magnitude of such risks or negotiate an express term to avoid the post frustrating event determination of its ex ante risk bearing or insuring potential. Thus, the efficiency of employing an "off-the-rack" default term is lost.* See, Jenkins, supra note 104, p.2018.

[108] V A. Aivazian, M J. Trebilcock & M Penny, "The Law of Contract Modifications: The Uncertain Quest for a Bench Mark of Enforceability," Osgoode Hall Law Journal, Vol. 22, No 2, (1984): 173-212, p. 175.

[109] Generally see Ibid.

this approach. Accordingly, the major economic advantages that have been identified in support of the doctrine are the following:

a. Promotion of economic exchange: The doctrine enables the preservation of contractual relationships by allowing revision in case of change of circumstances. In the absence of recognition for the doctrine, the usual alternative leads to termination of the contract in case a party refuses to perform the contract affected by unforeseen and fundamental change of circumstances.[110] Bringing the contractual relation to an end in case of change of circumstances, as it does not encourage performance of the contract by making reasonable adjustments to its affected terms, is held to be inefficient.[111]

b. Reduction of Costs: the presence of default rules of the law providing criteria for judicial revision of the contract could serve to avoid duplication of efforts and wastage of resources by contracting parties who may need to individually negotiate on contractual clauses to be applied in case of unforeseen change of circumstances.[112] Alternatively, the pool of judicial decisions allowing revision of contracts in case of change of circumstances could also provide specific guidance for those contracting parties who might want to negotiate ex post and decide for themselves on contractual terms that would be applied to govern their relationships in such cases.[113]

c. Providing incentives for wealth maximizing transactions to take place in the future: The doctrine of change of circumstances could also encourage people to enter into risky and wealth maximizing transactions by providing assurance that the disadvantaged party in case of unforeseeable fundamental change of circumstances would be able to force the other party to renegotiate, or to request judicial revision or termination of the contract.[114]

2.3.2.3. Risk Sharing Approach (A Hybrid of Economic and Fairness Considerations)

This approach provides the most comprehensive and accepted rationales for dealing with the problem of change of circumstances.[115] This approach recognises the doctrine of change of circumstances to discharge certain gap-filling roles that are justified by both economic and

[110] Legrand, supra note 83, p. 939.
[111] Id, p. 944.
[112] Id, p. 945.
[113] Ibid.
[114] Jenkins, supra note 104, p.2019.
[115] Ibid.

morally based fairness/justice considerations.[116] But the economic and fairness considerations justifying application of the doctrine according to this approach presuppose that its application be kept within reasonable bounds. Thus, from economic point of view, this approach does not deny the fact that contracts are used as very crucial devices of risk allocation between private parties. However, it stresses that the proper recognition and application of the doctrine could further enhance this basic utility of contracts. In elaborating the validity of this view, the following statements have been made:

> *If a legal system provides a harsh, bright-line rule that assigns almost all risk to a certain party, then those parties will have to spend money inserting additional provisions to allocate risks in a different manner. In contrast, if a legal system provides an overly lenient rule of discharge, parties have to make the same overcorrection; namely, writing in more detailed provisions in order to ensure a certain allocation of risk. Once again, transactional costs are increased because of the added expense of these provisions. In addition, an overly lenient rule of discharge may discourage certain parties from entering into contracts at all, negating the very important risk-diversifying aspect of contracts.*[117]

From the moral or fairness point of view, sharing is advocated as the guiding principle applicable for addressing the losses arising from change of circumstances.[118] This is mainly justified based on the fact that such losses are created due to supervening occurrences falling beyond the parties' contemplation and none attributable to the fault or negligence of any one of them. In such cases, upholding the letter of the contract, and forcing the obligor to perform at the cost of an excessive sacrifice, would only mean contradicting the true intent of the parties.[119] That is so because the intent of the parties is to make a contract that, even if more advantageous to one of them, is equitable in terms for both.[120] That underlying equity is destroyed if strict compliance with the contract must obtain in such case.[121] Thus a legal intervention that enables the sharing of losses between the parties is said to be necessitated in order to avoid results that would be both grossly unfair and contradictory to the true intention of the parties. Accordingly, consistent to the general use of default rules, the parties should be provided with the opportunity to renegotiate after the occurrence of the unforeseen events

[116] Jenkins, supra note 104, p.2019.
[117] Tabor, supra note 23, p. 563-564.
[118] Jenkins, supra note 116.
[119] Litvinoff, supra note 39, p 5.
[120] Ibid.
[121] Ibid.

based on their needs and the potential costs of the risks to be borne between them.[122] The intervention of courts to decide on the allocation of the losses arising from the unforeseen changes should come as a last resort remedy, when the risk sharing principle could not be realised through the renegotiations of the parties.

2.3.3. Conclusions

The theories adopting the classical views attempt to support the enforcement of contracts on single values found in respecting individual choices. The theories implicitly treat the contracting parties' relationship as an adversarial, and the institution of contracts as strictly belonging to the private domain. They have regarded contracts as relationships that merely affect and cater for the interests of the private parties particularly engaged in them. Consequently, the role of contracts law has been characterised as merely ensuring strict compliance with agreed terms of contracts. Hence, no room is left for the law to intervene in the "willed transactions" of private parties, even in the face of manifest unfairness caused due to unforeseen changes of circumstances. The values relating to ensuring freedom of contracts and security of transactions have been posited to justify such strict enforcements of contracts. Nonetheless, though concerns relating to the protection of these values may provide the criteria for establishing the reasonable limitations on application of the doctrine of change of circumstances, they could hardly serve to justify its absolute preclusion. As one writer has precisely observed, *"it is one thing to expound respect for binding agreements, a principle whose merits are beyond dispute, and quite another to turn contracts into instruments of oppressive unfairness".*[123]

In contrast to the classical views, the modern philosophy of contracts recognizes the importance of norms of fairness and cooperation in contractual relations.[124] The modern view conceives contracts as cooperative engagements based on a shared foundation of mutual trust and an appreciation of one another's interests. The private-public dichotomy of contracts advanced in the classical views has also lost its prominence.[125] Thus the economic and legal considerations justifying application of the doctrine generally emerge from the modern philosophy of the law recognising additional moral norms and the public dimension of the

[122] Jenkins, supra note 104, p.2019.
[123] Litvinoff, supra note 39, p.5.
[124] See Legrand, supra note 83, p. 947-951
[125] Ibid.

institution of contracts. The substantive contents of contracts are therefore no more treated as concerns that should be exclusively left to the choices of private parties. The need to insure justice and other public interests in the enforcement of private promises make the substantive contents of contracts relevant concerns for the law. Recognition of certain reasonable interventions in cases of unforeseen change of circumstances under the modern contracts law is therefore to be viewed and welcomed as one of the most commendable advancements of the modern law, to achieve greater equity and more fairness in the legal relations of private parties, thereby enhancing the importance of substance over form.

Chapter Three: Approaches to a Change of Circumstances: Comparative Survey of National Jurisdictions

Introduction

The previous chapter has hopefully shaded the theoretical context in which the approaches adopted by the national legal systems to be reviewed in this chapter may be pictured. In this chapter, the positions of five different national jurisdictions (including that of our own legal system) will be reviewed. Accordingly, the first part of this chapter commences by presenting the approaches of the two common law jurisdictions selected for this study, i.e., the English and the U.S. laws. This is followed by the discussion provided under the second part on the civil law jurisdictions, which covers the approaches of the German, the French and the Ethiopian legal systems. The discussion finally winds up under the third and the last part by presenting comparative conclusions on the main aspects of the positions adopted in each of the jurisdictions surveyed.

Part I. Common Law Jurisdictions

Early common law tolerated no deviation from the obligations set forth by the terms of a contract. A promise was absolute and the promisor was held strictly accountable for any failure in discharging what was promised to be performed. The promisor's obligation could be qualified, if at all, only to the extent expressly stipulated in the contract. This position, which came to be known as the doctrine of absolute contracts, had been established in the 1647 case of *Paradine v. Jane*. This rule of 'absolute obligation' applied until the courts began to develop a new doctrine known as the doctrine of frustration of contracts in the 19th century.

The doctrine of frustration in English law generally addresses situations where unforeseen supervening changes of circumstances render the performance agreed to be provided in the contract impossible, illegal, or at least significantly different from what was intended.[126] The English law, save for some very rare cases that arguably fall under the scope of this general doctrine, does not provide express solutions for the problem of change of circumstances by making specific exceptions to the binding force of contracts. Most common law jurisdictions

[126] R. Stone, The Modern Law of Contract, (8th ed., 2009), p. 529.

have also adopted a similar approach that does not provide explicit and specific exceptions to address the problem of change of circumstances.

The American law presents a notable exception to the general trend in common law jurisdictions, since it has gradually moved towards providing express legal reliefs for the problem of change of circumstances under the doctrines of impracticability and frustration of purpose. "Frustration of Purpose" is used merely to refer to the situation where performance has become pointless and the purpose of the contract has been frustrated. Other instances of change of circumstances or impossibility are referred to as "impracticability". Thus, "frustration of purpose" under the US law has a much narrower connotation as compared to the all embracing expression "Frustration of Contract" used in the English and other common law jurisdictions.[127] Under this part of the chapter, the parent system of English law will be closely examined under the first section. This will be followed by a brief look at the US law under the second section.

3.1. English Law: The Doctrine of Frustration

From historical perspective, it appears that English law has not been largely (if at all) influenced by the medieval doctrine of *clausula rebus sic stantibus*. Prior to the nineteenth century, the debtor's responsibility for non-performance of most contractual promises under English law had been based on the rule of absolute liability.[128] This rule began to be relaxed with the case of *Taylor v Caldwell* (1863), from which the modern doctrine of frustration developed.[129]

The doctrine of frustration of contract generally concerns the effects that supervening circumstances, unforeseen at the time of contracting, have upon the rights and duties arising from a contractual arrangement. It is a catch-for-all concept that generally deals with cases where unforeseen events, occurring after the time of contracting, render performance illegal, impossible, or destroy the known utility which the stipulated performance had to the parties.[130] This essentially implies that the English law does not expressly give recognition to the issue of change of circumstances on the basis of a specific doctrine particularly dedicated

[127] Litvinoff, supra note 39, p.10.
[128] C. Turner, Contract Law, (2nd ed., 2007), p185.
[129] Stone, supra note 126, pp.531-532.
[130] Litvinoff, supra note 127.

for that purpose. Thus, the discussion here will focus on the situations covered under the scope of the general doctrine of frustration in order to assess its relevance for addressing the problem of change of circumstances (if any). But before attempting to do this, it appears very useful to highlight the historical and theoretical background of the doctrine.

3.1.1. Development of the Doctrine of Frustration

As already noted, the English common law historically regarded contractual responsibilities as absolute, and once a contract was made, subsequent events could not justify non-performance. This rule was established in *Paradine v Jane.* In this case, a tenant who was sued for rent pleaded that he had for about two years of his tenancy been dispossessed by act of the King's enemies. The plea made by the tenant was rejected by the court. The justification for this approach was that the parties could, if they wished, have provided for the eventuality within the contract itself.[131] This doctrine of absolute contracts was said to work well enough where it would be reasonable, having regard to the nature of the contract or the circumstances in which it was made, to expect from the parties to provide for the event.[132] In fact, even during its earliest applications, there were some exceptions to the doctrine of absolute contract. The doctrine is said to have probably never applied to cases where the party bound by a contract that called for his personal performance had died or permanently become incapacitated.[133] Another early exception to the doctrine was in cases of supervening illegality.[134]

Despite such presence of some limited early exceptions, however, the doctrine of absolute liability gradually proved to be unworkable. This eventually led to the development of the doctrine of frustration. According to many writers, the foundation for the introduction of the doctrine of frustration into English contract law was said to be laid down by the verdict rendered by Blackburn J in the seminal case of *Taylor v Caldwell* (1863).[135] In this particular case, the parties had entered into an agreement concerning the use of the Surrey Gardens and Music Hall for a series of 'grand concerts, and day and night fetes'. The defendants had contracted to hire out the Surrey Gardens and Music Hall and to provide various side-shows

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[131] Stone, supra note 126, p. 531
[132] G. Treitel, The Law of Contract, (11th ed., 2003), p. 866.
[133] Ibid.
[134] Ibid.
[135] C Macmillan, *Taylor v Caldwell* (1863), (in Charles Mitchell and Paul Mitchell (eds.), Landmark Cases in Contract Law), (2008), pp.201-203.

and other entertainments in the gardens. Six days before the first concert was to have been given, the Music Hall was destroyed by an accidental fire. The plaintiffs sued for breach of contract, arguing that the defendants had failed to provide the Music Hall as agreed under the contract. The plaintiffs also claimed the money they had wasted on advertisements based on their belief that the concerts would go as planned. The court did not accept the plaintiffs' argument, holding that performance by the defendants had become impossible, so the contract had been frustrated.

In giving this decision, Blackburn J claimed to have relied on earlier authorities in which the obligation to perform a personal service had been found to be not binding, where the party whose personal service was sought died or became permanently incapable later on.[136] According to Blackburn J, the underlying rationale that excused the parties from their non-performance in case of contracts requiring personal performance of the obligor was that the nature of the contract implied a condition of the continued existence of the contractor, or his essential abilities, to perform the personal services. Based on this, he asserted that this same analogy applied to the case of *Taylor v Caldwell*—in which the destruction of the Music Hall, an object whose continued existence was necessary for performance of the contract, similarly constituted a ground of discharging the contract on the basis of frustration. Although the incremental change that the decision brought in the law has been admired, the correctness of the analogy used by the judge in justifying his decision has been challenged by many writers.[137] In invoking an implied term as the basis of discharging the contract, the main target of the judge was perhaps to make his decision to be squared with the prevailing approach to freedom of contract.[138] This apparently tied the decision with the then dominant view of the classical theory that suggested all is dependent on what the parties intended at the time of the contract. In reality, of course, this is said to be something of a fiction.[139]

After its first clear emergence in *Taylor v Caldwell*, the doctrine of frustration entered into a period of growth. It was extended to cases in which performance became impossible otherwise than through the perishing of a specific thing; and even to cases where performance did not become impossible at all but the commercial object, or purpose, of the contract was

[136] Macmillan, supra note 135, p. 197.
[137] Id, p. 198.
[138] Stone, supra note 126, p. 532.
[139] See the criticisms relating to implied term theory discussed in the next sub-section.

frustrated.[140] In the line of cases commonly referred as the coronation cases, the doctrine was expanded to encompass circumstances that are short of absolute impossibility. In *Krell v Henry,* which is perhaps the most discussed and popular one from these cases, the defendant hired a flat with a view of a processional route for the specific purpose of viewing the coronation procession of King Edward VII.[141] When the coronation was cancelled due to the illness of the King, the rental of the rooms remained physically possible even though the underlying purpose of the lease contract had been destroyed. When the plaintiff sued for enforcement, the court held that the contract was frustrated. Accordingly, further performance by the defendant, namely, the payment of the balance of the rent was excused by the court. The decision in *Krell v Henry* recognised the non-happening of an event upon which the parties have reasonably relied for conclusion of the contract as another basis of discharging contractual obligations without liability, and thus introduced the legal theory of frustration of purpose.[142] However, the broader construction adopted in this coronation case and the trend of expanding the doctrine beyond cases of impossibility has not been pursued in later decisions of English courts.[143]

3.1.2. Theoretical Basis of Frustration

The discussion in the above sub-section indicates that the development of the doctrine of frustration did not come about through a revolutionary and radical doctrinal shift. Consistent with the common law heritage of the English legal system, the exceptions introduced under the doctrine to the principle of absolute liability simply evolved through pragmatic solutions adopted on case by case basis in the past decisions of the judiciary. This ad-hoc nature of the doctrine, essentially based on case by case solutions adopted by the courts, generally makes it

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[140] Treitel, supra note 132, p.867.

[141] Ibid.

[142] Id p.885; See also infra 3.2.1.3. discussions under the sub-heading "Frustration of purpose".

[143] In *British Movietonenews Ltd v London and District Cinemas* (1952) the House of Lords rejected the argument that the cessation of war-time conditions in which the contract had been made was a ground of frustration. As one of the judges in that case was quoted saying: *"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate—a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to the execution, or the like. Yet this does not in itself affect the bargain which they have made".* This position has been further affirmed by the rule set in *Davis Contractors Ltd. v. Fareham Urban District Council,* which is claimed to set the most persuasive modern definition for the doctrine itself.[143] At this point, however, it should be noted that some traditional exclusions of application of the doctrine to certain kind of contracts has been lifted in more recent decisions of the courts. Particularly, in *National Carriers Ltd v Panalpina (Northern) Ltd* (1981), it has been clearly suggested that the doctrine applied to contracts generally. Thus, previous suggestions that the doctrine did not apply to particular contracts, such as time charters, demise charters, and leases of land, have from time to time been rejected by the courts: Ibid, pp.867-869.

very difficult to grasp its doctrinal or theoretical basis. Despite the presence of such challenge, however, there are certain attempts made to explain the underlying justification of the doctrine or to come up with some general formula to explain the conditions for its operation.[144] Accordingly, the main theories that are said to be inherent in various decisions of the courts and discussed by different commentators will be reviewed below.

3.1.2.1. Implied term

This theory suggests that the contract is discharged because, by implication, the parties have agreed that it will no longer be binding if the frustrating event occurred – in other words, if anyone had asked the parties, at the time of contracting, whether they would consider themselves still to be bound if such an event happened, they would both have said 'of course not'.[145] The main theme of this theory is said to have been well articulated by Lord Loreburn in *Tamplin SS Co Ltd v Anglo-Mexican Petroleum* Co.[146]

The implied term theory, taken in the subjective sense, is said to be hardly attainable in practice. To this effect, it has been observed that:

> *If the application of the doctrine of frustration simply arises as an extension of the parties intention, the implication would have to arise at the time of contracting and at that time the parties are unlikely to have any view as to the effects on the contract of the supervening event; and after the event has occurred, the parties might well have no common view as to its effects: for example, one party might well take the view that it should, and the other that it should not, discharge the contract.*[147]

If the implication is to be based on objective "reasonable man" standard, "the chief attraction of the theory, which is that frustration merely gives effect to the intention of the parties themselves, is essentially lost".[148] Thus, the implied term theory appears a mere fiction that provides cover for justifying the interventions made by the judges in contractual relationships

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[144] Treitel, supra note 132, p. 920.
[145] C. Elliott and F. Quinn, Contract Law ,(7th ed., 2009), p. 310.
[146] Accordingly to the observation stated in that case, "*no court has the power of absolving the contracting parties from their contractual responsibility, but the court will not regard an obligation as absolute if the parties themselves did not intend it to be absolute. Thus, if the parties must have made their bargain on the footing that a particular thing or state of things would continue to exist...a term to that effect will be implied*; Treitel, supra note 132, p. 920.
[147] Id, p. 921.
[148] Ibid.

by using the anthropomorphic conception of justice based on the hypothetical reasonable man standard.[149]

3.1.2.2. The just solution theory

This theory seems to mainly target overcoming the practical difficulty that faces the implied theory in justifying the doctrine of frustration on the basis of the parties' intention. In that endeavour, it drops any need of ascribing judicial interventions made in cases of frustration to the fictional intention of the parties. Accordingly, the courts have an inherent power from the law "to do what is just" in case frustrating events, not reasonably foreseen and attributable to the fault of either party, upset the contractual landscape.[150] This theory has support from the opinions expressed by some judges in different cases as quoted by various commentators. For instance, in *Hirji Mulji v Cheong Yue SS Co Ltd* (1926), Lord Sumner described the doctrine of frustration as "*a device by which the rules of absolute contracts are reconciled with a special exception which justice demands*".[151] Despite this support, however, the theory does not justify or describe what the courts are actually doing when they happen to intervene in cases of frustration. As Treitel puts it:

> *The "just solution" theory does not purport to explain why the courts sometimes abandon the doctrine of absolute contracts: it simply says that they do so. The theory should not, moreover, be interpreted to mean that the courts can do what they think just whenever a change of circumstances causes hardship to one party: it does not supersede the strict rules which determine the scope of the doctrine of frustration. Nor does it determine the type of relief which can be given. When a contract is frustrated, both parties are at common law discharged, though the "just solution" might suggest apportionment of liability.*[152]

3.1.2.3. Foundation of the contract

According to this theory, a contract may be frustrated if the continued existence of the specific thing on which its performance depends is brought to an end due to contingencies that are beyond control of the parties.[153] The same is also true, where the contingencies have such a sweeping effect as to destroy the very foundation of the contract or cause the

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[149] Treitel, supra note 132, p. 921.
[150] Elliott & Quinn, supra note 145.
[151] Stone, supra note 126, p. 533.
[152] Treitel, supra note 149.
[153] Id, p. 922.

disappearance of what the parties could reasonably be presumed to have had in their common contemplation at the time of contracting. [154]

This theory may be acknowledged for its simplicity as it does not involve making speculations about subjective intentions of the parties. This is particularly true for cases in which performance of the contract depends on continued availability of a specific thing. But, in other remaining majority of cases, its practical application is as much problematic as that of the implied term theory.[155] In fact, since what constitutes "foundation of the contract" in majority of cases seems to be evaluated based on the objective "reasonable man" standard, there is no as such difference between this and the "implied term" theory construed in its objective sense.[156]

3.1.2.4. Construction

All the theories discussed above, despite their differences, ultimately rely on construction of the contract. To that extent, the theories are said not to be mutually exclusive, but "shade into one another". Thus, construction of the contract is at the root of all the above theories, and therefore seems to provide the most acceptable explanation for the doctrine of frustration. The frequently cited statement that is said to precisely explain the central tenet of this theory is made by Lord Radcliffe in *Davis Contractors Ltd v Fareham UDC.* According to the opinion expressed in this particular case: *"frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni."*[157]

Thus, this theory instructs the court first to ask what the original contract required of the parties, and then to decide, in the light of the alleged frustrating event, whether performance of those obligations would be something "radically different". Application of the doctrine of frustration, therefore, seems to essentially depend on this practically daunting task of drawing

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[154] Treitel, supra note 132, p. 922.
[155] Ibid.
[156] Ibid.
[157] Mackmillan, supra note 135, p. 203 (see also the accompanying text at foot note 228).

proper distinction between situations that may be deemed to make performance 'radically different' and those that are not to be considered to make it as such.

3.1.2.5. Failure of consideration

This theory is sometimes applied to explain why both contracting parties must be discharged from their obligations, when it is only the performance of one party that becomes impossible in many cases. For instance, destruction of a specific thing may render the obligation of the supplier impossible, while the recipient's obligation to pay may still be possible. Pursuant to this theory, the latter is discharged from the obligation by failure of consideration, i.e. because he does not receive the performance for which he bargained. However, under English law, these cases are said to be explained on the ground of frustration of the "common object" of the parties.[158] Moreover, this theory seems to require total failure of consideration for the parties to be discharged. This does not go hand in hand with the actual position of the law that in certain cases admits partial destruction of the object of performance to release the parties from their obligations on the ground of frustration of their common object.[159] All in all, this theory is said to have already met express rejection in the House of Lords.

3.1.3. Cases Qualifying for Application of the Doctrine

3.1.3.1. Impossibility

As in many legal systems, English law generally categorises impossibility into initial and supervening impossibility. It is the latter kind of impossibilities, i.e., the one that comes after the formation of contracts that falls under the scope of the doctrine of frustration, and perhaps, could also be regarded as the most undisputed area of its application. Thus, the doctrine of frustration mainly deals with the situations in which unforeseen supervening events make performance of contracts impossible. The problem of change of circumstances may be addressed (if at all) under very exceptional and limited situations, where impediments nearly comparable to the cases of impossibility are created against regular performance of the contract. Thus, it is important to first highlight the cases of impossibility falling at the centre of the doctrine, before examining the approaches existing towards those borderline cases that normally embrace issues connected with the problem of change of circumstance.

[158] Treitel, supra note 132, p. 922.
[159] Id, p. 923.

Though, as already noted above, impossibility of performance provides the most obvious ground of frustration, this is not to suggest that it invariably results in discharge of the contract or that it might not be subject to different specific qualifications. Keeping this in mind, at its most generalised level, impossibility of performance may occur in any of the following major ways:

a) Destruction of a particular thing: *Taylor v Caldwell* provides a typical example of the cases in which a contract may be frustrated due to destruction of a particular thing essential for its performance. This case shows that the destruction need not be total, if the thing which reasonably forms the main object of the performance becomes unavailable, the contract may still be frustrated.[160] Thus, partial destruction of the object of performance might be the ground of frustration, where the main purpose of the contract is defeated due to that.

The destruction of a particular thing as a ground of frustration is subject to important exceptions in certain type of contracts like sale. In contract of sale, destruction of the goods to be transferred may or may not frustrate the contract, depending on the nature of the good and the time at which the destruction is caused in relation to the rules that determine transfer of risk. [161] In contract of sale, the risk may pass in certain cases before the goods are physically delivered to the buyer. If the goods are destroyed after such time at which the risk has passed, the contract is not frustrated: the buyer must still pay the price, while the seller is discharged from his duty to deliver.[162] Even where the destruction of the goods occurred before passing of the risk to the buyer, the contract is frustrated only if the goods are specific, or are to be taken from a particular source and all the goods from that source are destroyed.[163] On the other hand, if the sale is of unascertained goods by description, the contract is not frustrated merely because the particular goods which the seller intended to supply under the contract were destroyed before passing of the risk.[164] Thus, the seller is bound to deliver other goods that are of the kind described in the contract and the buyer is bound to pay their price where such delivery is made.

b) Death or incapacity of the party bound to render personal performance: Contracts that require personal performance from a party may be frustrated due to the death or

[160] Treitel, supra note 132, p.870.
[161] Id. P. 871.
[162] Ibid.
[163] Ibid.
[164] Ibid.

permanent incapacity of that party.[165] Likewise, where the personal attendance of the recipient is required, a contract may also be frustrated due to the death or incapacity of the party who is to receive performance.[166] An example provided for this is a situation where a person who had booked a course of dancing lessons was so seriously injured that he could no longer dance.

c) Unavailability: A contract may also be frustrated if its subject-matter, or a thing or person essential for its performance, though not ceasing to exist or suffering permanent incapacity, becomes unavailable at that critical moment at which such presence is required.[167] In this respect, where the time of performance appears to be of the essence from the nature or the terms of the contract, unavailability of the thing or the person can be a ground of frustration even if it was only for a temporary period.[168] Even where performance of the contract was not required to be undertaken only within a fixed time, it may be frustrated due to temporary unavailability when performance at the end of the delay is no longer of any use to the party to whom it was to be rendered.[169] This is also true if the enforcement of the contract at the end of the delay no longer appears to be reasonable due to the fundamental change that the delay has caused to the terms of the contract to which the parties have agreed at the time of contracting.

d) Failure of a particular source: This refers to cases of impossibility where the subject-matter of a contract that was specified to be obtained from a particular source becomes unavailable without the fault of either party. This may occur, for instance, where the goods to be delivered were to be taken from a particular crop which fails as a result of drought or disease; or where they are to be imported from a particular country and such import is prevented by war, natural disasters or prohibition of export. Such failures may frustrate the contract depending on the circumstances in which they arise. Accordingly, if the contract expressly provides that the goods are to be taken from the specified source, the contract is frustrated if that source fails.[170] When the source was only intended to be used by one of the parties and not referred in the contract, the contract will not be frustrated due to its failure.[171]

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[165] Treitel, supra note 132, p. 872.
[166] Ibid.
[167] Ibid.
[168] Turner, supra note 128, pp. 186-187.
[169] Treitel, supra note 132, p.873.
[170] Id, p. 875.
[171] Id, p. 876.

The most difficult situations are said to be presented where the contract makes no express reference to the source but both parties contemplate that it will be used. Although there is no clear English decision on the effect of failure of a mutually contemplated (but unspecified) source of supply, the contracts may be construed as containing an implied reference to the source.[172] But for the purpose of giving such effect, it is not sufficient to show that the parties contemplated the source, unless it is indicated that they exclusively intended only that source (and no other) to be used.[173]

e) Method of performance impossible: A contract may be frustrated if the particular method provided for carrying out its performance becomes impossible. In *Nickoll & Knight v Ashton Edridge & Co* (1901) a contract for the sale of cottonseed specified that it was 'to be shipped per steamship Orlando from Alexandria during January.' The *Orlando* later ran aground in the Baltic, and could not therefore make the journey to Alexandria in January. [174]A majority of the Court of Appeal interpreted the contract as requiring performance only in the stipulated manner, and therefore held that the contract was frustrated since this could not be done. The holding of the court in this case was said to have rested in its interpretation of the contract as providing for an exclusive method of performance. Had the method specified in the contract not been further regarded as the only method that the contract allowed to be used, the seller would have been obliged to perform through employing another substituted method. Such obligation may be avoided, and hence the contract may be frustrated, only where substitution of the other method of performance is to be reasonably regarded as being equal to imposing a fundamentally different obligation. If no as such fundamental difference is deemed to exist between the method of performance that became impossible and the one to be later substituted, the contract is not frustrated merely due to the impossibility of the method of performance contemplated by both parties or even expressly provided therein.[175] This seems to be an established rule especially as it appears form the decisions rendered by the courts in the cases that arose in connection to the closure of the Suez Canal.

[172] Treitel, supra note 132, pp.876-877.
[173] Id, p. 876.
[174] Id, p. 879.
[175] Id, p. 880.

3.1.3.2. Illegality

Supervening illegality is said to be treated as a ground of discharge that is distinct from supervening impossibility. This is because in cases of supervening illegality, the court has to take into account, not only the relative interests of the parties, but also the interests of the public in seeing that the law is observed; and this public interest may sometimes outweigh the importance of achieving a fair distribution of loss between the parties.[176]

If, after a contract is formed, a change in the law makes its performance illegal, the contract will be frustrated. This happened to many contracts made just before the First and Second World Wars; since, once war was declared, it became illegal to trade with enemy countries.[177] For instance, in one leading case, a contract for the sale of machinery which was to be shipped to Poland was frustrated because the port was occupied by the enemy. Trade in various types of goods was also restricted, which again led to contracts concerning those goods being frustrated. Frustration by supervening illegality can of course happen outside wartime situations, but the two World Wars appear to have been a fruitful source of cases on this issue.[178]

3.1.3.3. Impracticability

The notion of impracticability includes cases in which the performance of contracts, without being absolutely impossible, involves extreme and unreasonable difficulty, expense, injury or loss to one of the parties.[179] Typical examples are cases arising from severe shortage of raw materials or of supplies due to war, embargo, local crop failure and unforeseen shutdown of major sources of supply or the like, which cause abnormal and marked increase in cost. The concept has a direct and particular relevance for the problems relating to change of circumstances and, as shall be further discussed later on, has been expressly recognised in the United States and some other common law legal systems. Thus, the critical question to pose at this stage is whether the doctrine of frustration in English law covers the cases, in which supervening changes render performance of contracts commercially impracticable without making it literally impossible. The weight of English authority seems to suggest that

[176] Treitel, supra note 132, p. 887.
[177] Elliott & Quinn, supra note 145, P. 304.
[178] Ibid.
[179] Treitel, supra note 132, p. 881.

impracticability is not a ground of discharge covered under the scope of the doctrine of frustration.[180] This is also supported by the unequivocal statements made in the House of Lords, which stated, *"a wholly abnormal rise or fall in prices would not affect the bargain...The argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible seems [to me] a dangerous contention which ought not to be admitted unless the parties have plainly contracted to that effect*".[181]

There are several cases in which it has been confirmed that English law rejects the provision of legal reliefs based on any notion of impracticability or changed circumstances not amounting to impossibility. This position has been plainly stated in *Davis Contractors Ltd v Fareham Urban* DC (1956)[182], which is also frequently cited as the leading case that has articulated the modern theoretical basis of the doctrine of frustration itself. In this particular case, the plaintiff, a building company, contracted to build 78 houses for a local authority. The job was to take eight months, at a price of £94,000. Due to labour shortages, the work ended up taking 22 months and costing the builders £21,000 more than they had planned. The defendant was willing to pay the contract price, despite the delay. As the contract price did not cover their costs, the plaintiff (the building company) sought to have the contract discharged on the grounds of frustration, alleging that the labour shortages made performance fundamentally different from that envisaged in the contract. In fact, the underlying target of the plaintiff (as could be imagined from the circumstances of the case) was to seek payment on a *quantum meruit* basis (a reasonable compensation assessed based on extra benefits conferred on the defendant) to recover its costs.

However, the House of Lords decided that the events which caused the delays were within the range of changes which could reasonably be expected to happen during the performance of a contract for building houses, and the changed circumstances did not make performance radically different from what was expected. It was a contract to build houses, and houses were in fact built. The problems encountered by the builder made his performance more burdensome to him, but they did not change the nature of what he was expected to do; therefore, the contract was not frustrated. According to the frequently quoted statements made by Lord Radcliffe in the case: *"It is not hardship or inconvenience or material loss*

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[180] Contract Law, Cavendish Law Cards Series (4th ed., 2004), p.137; see also Treitel, supra note 132, pp. 881-882.
[181] Id, p. 881.
[182] Ibid; see also, G Samuel, Law of Obligations and Legal Remedies, (2nd ed., 2001), pp. 379-380.

itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for".[183]

The group of cases that arose when the Suez Canal was closed as a result of hostilities in the Middle East in 1956 and again in 1967 also provide additional confirmation to the rule that a contract may not be frustrated simply because performance has become more onerous or expensive than expected.[184] These cases also illustrate the strict approach that English law has taken to admit the impossibility of method of performance as a ground for frustration of contracts. To appreciate the core issues presented in these cases, it is important to first stress on the general fact that the Suez Canal serves as the short cut and customary route for ships travelling between Europe and Asia. When this customary route was closed, charter parties that made their contracts in the expectation to use this shorter route, sought to be discharged from their contracts, since they had to follow a much longer route, which was therefore more expensive. But the courts held that if performance was still possible, the fact that it was now more expensive was irrelevant to the issue of frustration. The arguments based on the impossibility of method of performance also did not succeed in these cases.

For instance, in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*[185], a contract was made for the sale of Sudanese groundnuts at an inclusive price to cover the cost of the goods, insurance and carriage to Hamburg. When the contract was made both parties expected that shipment would be via Suez, but the contract did not so provide. It was held that the contract was not frustrated by the closure of the Suez Canal, so that the seller ought to have shipped the goods via the Cape of Good Hope. Although this would have taken two and a half times as long as shipment via Suez and would have doubled the cost of carriage. The difference between the two methods of performance was held not to be sufficiently fundamental to frustrate the contract. Thus, neither the unexpected substantial increase in the cost of performance, nor the impossibility in the contemplated method of performance, served to establish frustration of the contract.

There are decisions made in some cases that at first sight seem to suggest that supervening change of circumstances, at least in limited cases, may serve as the ground for discharge of a

[183] Treitel, supra note 132, p 881.
[184] Ibid.
[185] Id, p. 879.

contract based on frustration in English law.[186] In one most discussed case of *Staffordshire Area Health Authority v South Staffordshire Waterworks Co,* a hospital had in 1919 contracted to give up to a Water-works Company its right to take water from a well, and the Company had in return promised "at all times hereafter" to supply water to the hospital at a fixed price specified in the contract. In 1975 the cost to the Company of making the supply had risen to over 18 times than the fixed price and the Company gave seven months' notice to terminate the agreement. It was held that this notice was effective. Lord Denning M.R. regarded the contract as frustrated by the change of circumstances which had occurred between 1919 and 1975.

Though the above particular decision has been cited by different authorities as exemplifying the admission of change of circumstances as the basis of frustration, more convincing arguments have also been made to show that it was in fact not. As Treitel has most convincingly explained it, the preferable reason for the decision is stated by the majority of the judges in the case, who held that the agreement was, on its true construction, intended to be of indefinite (and not of perpetual) duration: hence the case fell within the general principle under which, in commercial agreements of indefinite duration, a term is often implied entitling either party to terminate by reasonable notice.[187] This reasoning has a very important further implication, that is, the decision would have gone the other way if the agreement had been for a fixed term, *e.g.* for 10 years.[188] Thus the agreement could not have been terminated by notice before the end of the ten years, nor would an increase in the suppliers' costs during that period would have served as a ground of frustration.[189]

3.1.3.4. Frustration of Purpose

Frustration of purpose is normally presented as the converse of impracticability. Impracticability is usually said to arise when a *supplier* of goods, services or other facilities pleads that supervening events have made performance of his own promise so much more burdensome to him that he should no longer be bound to render it.[190] The argument of

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[186] However, Treitel argues that, the cases are all explicable on other grounds and do not lend any support to the view that impracticability or change of circumstances (in the sense of great financial or commercial hardship to one of the parties) is of itself sufficient to discharge a contract in English law: Treitel, supra note 132, p. 882.
[187] Id, pp. 883-884.
[188] Id, p. 884.
[189] Ibid.
[190] Id, p. 885.

frustration of purpose, on the other hand, is normally put forward by the *recipient* of the goods, services or facilities.[191] Accordingly, in the case of frustration of purpose, a party argues that he should no longer be bound to accept the other party's performance and to pay the agreed price by showing that such performance has become completely pointless due to supervening change of circumstances.[192] Such an argument has been put forward and succeeded in some of the cases which arose out of the postponement of the coronation of King Edward VII.

As it has already been introduced, in *Krell v Henry* (1903), the court held that a contract to hire a room overlooking the proposed route of the coronation procession was frustrated when the coronation was postponed. The purpose of the contract was to view the coronation, not merely to hire a room. The Court of Appeal held that although the contract was still capable of physical performance, it was frustrated, because the viewing of the procession was the 'foundation of the contract'. The judge in the case contrasted it with the hire of a taxi to take the client to Epsom on Derby day. This would be a normal contractual transaction for the taxi driver; the cancellation of the Derby would not, therefore, frustrate the contract. Thus, in the case of *Krell v Henry* the fact that the hire of the room was a 'one off' transaction was emphasised. The contract did not mention the coronation, but the price agreed to be paid reflected the significance of the day.

The decision in *Krell v Henry,* however, has not been welcomed from its very beginning as it was criticised to seriously jeopardise the principle of sanctity of contracts that continues to be strictly upheld in English law.[193] Such criticism is based on the assertion that the rule established in the decision can all too easily be invoked by a party for whom a contract has simply become a very bad bargain. Thus, in another well-known coronation case of *Herne Bay Steamboat Co v Hutton* (1903)[194], the court refused to hold that a contract to hire a boat to see the king review the fleet was frustrated when the review was cancelled. Here the defendant had hired a steamboat in order to take passengers to watch the naval review by the king, organised to mark the coronation. When the coronation was cancelled, so was the review, but the Court of Appeal held that the ability to watch the review was not fundamental to the contract; the defendant could still carry out pleasure trips on the boat. The contract was

[191] Treitel, supra note 132, p. 885.
[192] Ibid.
[193] Id, pp. 885-886.
[194] Id, p. 886.

therefore not frustrated. The distinction between these two cases is obviously an extremely fine one, and perhaps hard to justify. In any case, as Treitel notes it: *Although the actual decision in Krell v Henry appears to be justifiable on the ground that the contract was, on its true construction, not merely one for the hire of the flat, but one to provide facilities for viewing the coronation processions, the case has scarcely ever been followed in England.*[195]

3.1.4. Circumstances in which Application of the Doctrine May be Excluded

The application of the doctrine of frustration in the above discussed situations may be excluded if the contract provides for the event; if the event was foreseen or foreseeable; or if it was due to the "fault" of one of the parties.[196]

3.1.4.1. Contractual Provision

The main purpose of the doctrine of frustration is to supply gap filling terms that help to allocate the risk of supervening events that the parties fail to address in their contracts. Thus, as a matter of principle, the parties can still regulate the risk of the supervening events by stipulating for such risk to be borne only by one of them, or be apportioned between them in various ways. In English law, such contractual provisions by which the parties attempt to regulate the risks of supervening events are generally known as *force majeure* clauses.[197] The application of these clauses, however, is subject to certain strict regulations and qualifications. One notable exception relates to the cases where a contract may be frustrated by supervening illegality on the ground that it involves trading with enemy. [198] In such cases, the parties cannot exclude the operation of the doctrine by stipulating contrary provisions in their contracts. Giving effect to such provisions is generally thought to contravene the public policy against providing aid to the economy of an enemy in war time.[199]

What is more, provisions excluding application of the doctrine are usually narrowly construed by the courts. In *Metropolitan Water Board v Dick Kerr & Co* (1918)[200], contractors agreed in July 1914 to construct a reservoir in six years; in the event of delays "however occasioned', they were to be given an extension of time. In February 1916, the

[195] Treitel, supra note 132, p.886.
[196] Id, p. 898.
[197] Stone, supra note 126, p. 542.
[198] Treitel, supra note 132, p. 899.
[199] Ibid.
[200] Ibid.

contractors were required by a Government Order to stop work, and to sell their plant. In this case, a reference to 'delays' was held to refer only to ordinary delays, and not to a delay caused by government decree. Thus the contract was frustrated although the events which had happened were literally within the delay clause. That clause was held to have been intended to apply only to temporary difficulties, such as labour shortages, bad weather, or failure of supplies. It was said that the clause did not *"cover the case in which the interruption is of such a character and duration that it vitally and fundamentally changes the conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made".*[201] This seems to reduce the practical merit of *force majeure* clauses; since, in most cases, it would be hardly possible for the parties to anticipate and specifically exclude the particular types of events which might otherwise frustrate their contracts.

3.1.4.2. Foreseen or Foreseeable Event

Where the supervening event which interferes with performance is one which the parties foresaw, or could have foreseen, it is generally assumed that they made the contract with the knowledge of what could happen, and shaped their terms accordingly.[202] Thus, the loss that ensues from the occurrence of that event lies where it falls.[203] But there is one major exception to the proposition that foresight or foreseeability of the supervening event excludes frustration. This is where the frustrating event is a wartime prohibition on trading with the enemy, the fact that the war was a foreseeable event does not prevent the prohibition from frustrating the contract.[204]

Moreover, even to cases falling outside this exception, courts are said to apply a very high standard when it comes to determining the degree and extent of forseeability. Thus, the assumption that the parties contracted with reference to the supervening event (and so took the risk of its occurrence) can be drawn only if the event was either actually foreseen or if the degree of foreseeability was a very high one.[205] To support the inference of risk-assumption,

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[201] Treitel, supra note 132, p.899.
[202] D. Oughton, M. Davis, Source Book on Contract Law (2nd ed., 2000), p. 307.
[203] Ibid.
[204] Elliott and Quinn, supra note 145, P. 306.
[205] Treitel, supra note 132, p. 902.

the event must be one which any person of ordinary intelligence would regard as likely to occur.[206]

Moreover, the event or its consequences must be foreseeable in some detail. It is not sufficient that a delay or some interference with performance can be foreseen if the delay or interference which occurs is wholly different in extent.[207] This distinction is said to be similar to the one that applied to restrict the scope of express provisions dealing with the risks of supervening events or *force majeure* clauses.[208]

3.1.4.3. Self-induced Frustration

A party cannot rely on self-induced frustration, that is, if the event leading to frustration of the contract is due to his own voluntary conduct or due to the conduct of those for whom he is responsible.[209] Thus, the doctrine of frustration does not protect a party whose own breach of contract actually is, or brings about, the frustrating event. For instance, courts have held in various cases that a charterer who in breach of contract orders a ship into a war-zone, so that she is detained, cannot rely on the detention as a ground of frustration.[210]

Another, perhaps somewhat controversial, instance in which courts have treated frustration as self-induced and refused to discharge the contract is where any other alternative choice for performing the contract had indeed been open to the party claiming excuse. This usually occurs in cases where a party who has entered into a number of contracts is deprived of the power of performing them all, without losing his capability to perform one or some of them.[211] In such instance, that party may claim that one or more of the contracts are frustrated because the supervening events for which he was not responsible; but such claims have failed in some cases. In *Maritime National Fish Ltd v Ocean Trawlers Ltd* (1935)[212], a ship, the *St Cuthbert*, was chartered for a year from the owners. Both parties were aware that the *St Cuthbert* was a type of ship that required a licence from the Canadian Government before it could be legally operated. The charterers were operating five ships, but were only granted three licences, which they used for three ships that they owned. They then claimed that the

[206] Treitel, supra note 132, p. 902.
[207] Ibid.
[208] Ibid.
[209] Id, p. 905.
[210] Ibid.
[211] Id, p. 906.
[212] See Id, p. 906-907.

charter was frustrated by the Government's refusal to grant more licences. The Privy Council rejected this view, on the grounds that the charterers themselves had a choice, and decided not to use one of the available licences for the *St Cuthbert*. Similarly, in *The Super Servant Two* (1990)[213] the defendants contracted to carry the plaintiff's drilling rig in one of their two vessels designed for this purpose, the *Super Servants One* and *Two*. Before the contract was carried out, the *Super Servant Two* sank; the defendants said they could not use the *Super Servant One* because it was needed for another contract, and therefore claimed that the sinking frustrated the contract. The courts denied this claim: the defendants had chosen to use the *Super Servant One* on the other contract.

3.1.5. Effects of Frustration

Once it is held that a contract is frustrated, it is automatically terminated. The court may consider the contract terminated from the occurrence of the supervening event, even though the parties for some time after the event went on behaving as if the contract still existed. Thus, as a matter of general principle, frustration is thought to bring termination of the contract without leaving any chance for election to be made by either party.[214] This also implies the absence of any possibility for the courts to adapt the terms of the contract in view of the supervening events.[215]

When it comes to the consequences following termination of the contract, English common law traditionally took the view that any loss resulting from the frustration should lie where it fell.[216] Pursuant to this rule, frustration only brings termination of the obligations to be performed in future, while those already performed or due before the occurrence of the frustrating event remain valid.[217] But the application of this principle could lead to injustice, where one party's performance under the contract had become due before the frustrating event while that of the other was only to be rendered thereafter; for in such a case, the former party would have to still perform, without getting what he had bargained for in return.[218] This traditional common law rule was modified to some limited extent in *Fibrosa Spolka Akcyjna*

[213] Treitel, supra note 132, p. 907.
[214] Id, p. 909.
[215] Ibid.
[216] C Elliott and F. Quinn, supra note 145, P. 307.
[217] Treitel, supra note 132, p.910.
[218] Ibid.

v Fairbairn Lawson Combe Barbour Ltd (1943).[219] In this case, an English company had agreed to sell machinery to a Polish company for £4,800, of which £1,600 was to be paid in advance. When £1,000 had been paid, the contract was frustrated by the German occupation of Gdynia after the outbreak of war in 1939. The House of Lords held that the Polish company could recover back the £1,000 since the consideration for the payment had wholly failed: no part of the machinery had been delivered. Liability to pay the outstanding £600 was likewise discharged, for it was held futile to require the buyer to make a payment which he would then immediately have been entitled to recover.

The rule established in the above mentioned *Fibrosa* case, however, was found to be still unsatisfactory in two major respects.[220] Firstly, it applied only where there had been total failure of consideration.[221] Secondly, to allow the payer to recover back the whole of his advance payment might in turn cause injustice to the payee, who might use the payment for the purpose of facilitating performance of the contract.[222] If, in consequence of frustration, that expenditure was wasted, the payee would still be required to refund the full amount of the advance payment and the resulting loss would fall entirely on the same.[223] To remedy this, legislative intervention (prompted in part by Second World War circumstances) occurred via *Law Reform (Frustrated Contracts) Act 1943*.[224]

Frustration itself was not defined in the Act, leaving intact the definition found in jurisprudence. Thus the Act only affects the legal consequences of frustration, once a contract is held to have been frustrated under the relevant rules of the common law.[225] It drew distinction between obligations to pay money and other types of obligation that existed prior to the frustration. Accordingly, Section 1(2) of the Act deals with obligations relating to the payment of money, and provides that:

> *All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid and, in the case of sums so payable, cease to be payable: Provided that, if the*

[219] See Treitel, supra note 132, p. 911.
[220] Ibid.
[221] Ibid.
[222] Ibid.
[223] Ibid.
[224] Ibid.
[225] C Elliott and F. Quinn, supra note 145, P. 308.

party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.[226]

The above subsection of the act provides three rules, each addressing distinct scenarios. The first rule, removes obligations relating to all payable sums before the time of discharge. Thus any obligation to pay money that existed prior to discharge of the contract cease to exist on frustration.[227] The second rule enables a party to recover all sums actually paid prior to the frustrating event and discharge of the contract. This rule abolishes the common law rule laid down in the above mentioned *Fibrosa* case that required total failure of consideration as a precondition for recovering the sums paid under the frustrated contract.[228] The third rule provides that: if the party to whom the sums have been paid or are payable has already incurred certain expenses in or for the performance of the contract before the time of discharge, the court may allow him to retain a sum up to the total of his expenses.[229] This third rule attempts to cure the other remaining defect of the common law rule identified in the *Fibrosa* case above by striking the balance of justice through accommodating the interest of the payee (or the party against whom the two forgoing rules operate). In practical implementation of this rule, the court retains broad discretion.

Obligations other than to pay money is covered in Section 1(3) of the Act, which states that:

Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular –

***(a)** the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and*

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[226] See A Tettenborn, Law of Restitution in England and Ireland, (3rd ed., 2002), p. 149.
[227] Id, PP. 149-152; see also Stone, supra note 126, pp.549-550.
[228] Ibid.
[229] Ibid.

(b) *the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.*

Under the traditional common law approach, a party who had rendered partial performance of the contract before the occurrence of frustration had nothing to claim in respect of that performance.[230] For instance, in *Appleby v Myers* (1867) [231], engineering contractors agreed "to make and erect the whole of the machinery" in the defendant's factory "and to keep the whole in order for two years from the date of completion". After part of the machinery had been erected, an accidental fire destroyed the factory with such of the machinery as was already in it, and frustrated the contract. It was held that the contractors could recover nothing for the machinery which they had erected. Before anything was to be claimed by the contractors, full performance should be rendered first. This strict requirement has been lifted by Section 1(3) of the Act reproduced above. Thus the main effect of this provision is in that it gets rid of the general common law prohibition on recovery for part performance, and stipulates for a generalised right to sue in respect of 'valuable benefits' conferred by one party on the other.[232] The right to claim in respect of "the valuable benefits" is never the less qualified by the right granted to the recipient to deduct expenses incurred in or for the performance of the contract.

In applying Section 1(3) to practical cases, at least two particularly important issues are said to be required to be resolved by the court: the first issue is determining as to what constitutes "valuable benefits" for the purpose of the right of recovery; secondly, once the court has determined the presence of "valuable benefits", it has to assess and fix the "just sum" which is proper to award to the claimant.[233] These issues have been entertained by the court in *BP (Exploration) Libya Ltd v Hunt* (1982).[234]According to the facts of this case, the parties concluded a contract in which BP were to do the required works of exploration and provide the necessary finance on an oil concession owned by Mr Hunt in Libya. They were also to provide certain 'farm-in' payments in cash and oil. In return, they were to get "reimbursement oil" (to be taken out of Mr Hunt's share) until they had recouped 125 percent of their initial expenditure. A large oil field was discovered and oil began to flow from it in

[230] Treitel, supra note 132, p 912.
[231] See Id, p. 913.
[232] Tettenborn, supra note 226, p, 150.
[233] See Stone; supra note 126, pp 551-553.
[234] Treitel, supra note 132, pp.913- 914.

1967; but in 1971 the contract between BP and Mr Hunt was frustrated when their interests in the concession were expropriated by Libyan decrees.

In the above particular case, the court defined "valuable benefit" as referring not to the cost of performance incurred by the claimant, but to the "end product" received by the other party.[235] That "end product", according to the court, was the enhancement of the value of Mr Hunt's share in the concession resulting from BP's work. However, because Section l (3)(b) required the court to have regard to "the effect, in relation to the said benefit, of the circumstances giving rise to...frustration", the value of that benefit had to be reduced by taking account of the expropriation. Based on this analysis, the court held that the "valuable benefit" to Hunt was the net amount of oil received plus the compensation payable by the Libyan Government which amounted to £85,000,000. In assessing the "just sum'', the court held the work done by BP to be relevant, and then reduced it by the value of the reimbursement oil already received.[236] This was fixed at £34,000,000. As the valuable benefit exceeded the just sum, BP recovered their expenses in full.[237]

The above analysis of the court in *BP (Exploration) Libya Ltd v Hunt* worked satisfactorily because of the fact that, the valuable benefit, even when reduced in the light of the frustrating event, exceeded the just sum. However, the position would have been different if the expropriation had occurred immediately before oil had begun to flow and if no compensation for expropriation had been paid.[238] On the reasoning of the judgment, there would then have been no valuable benefit (beyond the "farm-in" oil); for that reasoning has regard to "the circumstances giving rise to the frustration" within Section l(3)(b) in appraising the "valuable benefit" rather than in assessing the "just sum". For instance, if the same reasoning had applied to cases like *Appleby v Myers* mentioned above, in which a substantial amount of the work already done by the plaintiff had been destroyed by the event that brought frustration of the contract, the effect of applying Section l (3)(b) to the assessment of the "valuable benefit" would be to reduce the award to nil.[239]

Thus, some commentators suggest that the application of Section 1(3) b should be relevant, not to the identification of the valuable benefit, but to the assessment of the just sum.

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[235] Treitel, supra note 132, pp.913- 914.
[236] Id, p. 914.
[237] Ibid.
[238] Id, pp.914-915; see also Tettenborn, supra note 226, p. 151.
[239] Ibid.

According to Treitel, two points seem to support such an interpretation. [240] First, Section l(3) applies where a valuable benefit has been obtained *before* the time of discharge: thus to identify the benefit in a case like *Appleby v Myers* the court must look at the facts as they were before, and not after, the fire. Secondly, the structure of the subsection seems to imply that Section 1(3) b is addressed to deal with the circumstances in which the court has power to make an award *{i.e.* when a valuable benefit has been obtained) to provide guidelines for the exercise of that power. The guideline contained in Section l (3) (b) is introduced by the words "such sum as the court thinks just having regard to. . . "; and these words seem to link the guideline to the *exercise* rather than to the *existence* of the court's discretion.[241] This interpretation cannot cause any injustice, for if the court thinks that very little or nothing should be awarded it can exercise its discretion to that effect; and for this purpose the court can take the destruction of the benefit into account so as to split the loss in such proportions as the court thinks just.[242] But this approach does not seem to have been adopted by the courts.

3.2. The United States Law

3.2.1. Introduction

Before going into elaborating how the issue of change of circumstances has been addressed under the United States Law, it is good to have some preliminary notes in order. As part of the common law, the cases discussed above in relation to the English law may also be relevant to illustrate certain aspects of the US law applicable to contract. However, as it is the case for other areas of the law, the issue of change of circumstances and the concept of frustration has been subject to considerable local innovations and developments in the US law. The main focus of the discussion in this section is therefore on these unique features and developments existing under the United States law that are particularly relevant for addressing the problem of change of circumstances.

[240] Treitel, supra note 132, p.915.
[241] Ibid.
[242] Ibid.

When it comes to the general structure of the US contract law, there is no unified body of law for all member states of the country.[243] This statement, however, should be qualified by some notable exceptions. Firstly, there is the Uniform Commercial Code (herein after, the UCC) enacted by the Federal legislator in 1979 and applicable in all states except Louisiana.[244] Article 2 of the Code that governs the sales of goods is particularly important in discussing issues relating to change of circumstances and contracts in general. The Second Restatements of the Law of Contracts (hereinafter, the Restatement Second), published by the American Law Institute (ALI) in 1981, is another valuable legal document containing an orderly presentation of the common law of contract.[245] Although the Restatements are not law in themselves, they are said to possess highly persuasive value in the courts.

The discussion to be made in this section will focus on the two major and unique doctrines of American law that are essential to address issues relating to supervening change of circumstances. The discussion of the first sub-section takes on the doctrine of impracticability in reference to the relevant provisions of the UCC and the Restatement Second. This will be followed by the discussion relating to the doctrine of frustration of purpose as recognised under the common law and the Restatement Second. Once the general conceptions of the two doctrines are presented, the discussion will be finalized by evaluating their legal effects under the last sub-section.

3.2.2. The Doctrine of Impracticability and Its Application

American courts historically admitted exceptions to the principle of strict liability only in those cases where performance had become literally impossible. The doctrine of commercial impracticability appeared for the first time in *Mineral Park Land Co. v. Howard* (1916), when the Californian Supreme Court extended the doctrine of impossibility and held that performance did not have to be impossible, but merely impracticable, i.e., it could only be done at an excessive and unreasonable cost.[246] Thus the doctrine of impracticability represents a softened approach of the common law's historical requirement of objective impossibility as a ground of excusing non-performance of contracts. The provisions of the

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[243] R. A. Mann and B.S. Roberts, Essentials of Business Law and the Legal Environment, (12th ed., 2016), p. 165.
[244] Ibid.
[245] Ibid.
[246] S W. Hubbard, "Relief from Burdensome Long-term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment," Missouri Law Review, Vol. 47, (1982), p.84.

Restatement Second and the UCC have welcomed this relaxation of the common law's traditional test of objective impossibility by similarly providing to the effect that performance need not be actually or literally impossible; rather, commercial impracticability, or unforeseen and unjust hardship, will excuse non-performance. [247]

Thus, as a ground for granting relief in case of supervening change of circumstances, the doctrine of impracticability has received its legislative codification in Article 2, Section 615 of the UCC. The operation of the doctrine of impracticability under the UCC is confined to the area of contracts for the sale of goods. What is more, the revised version of Article 2 also appears to reflect the intention of the drafters to make a relief based on impracticability exclusive to the sellers, and limit the buyers to a relief that is available to them under the common law doctrine of frustration of purpose.[248] The confinement of operation of the doctrine to sale contracts under the UCC, however, has been eliminated by the Restatement Second, and its application has been extended to contracts in general without limit to a particular type.[249] Despite the difference with regard to their scopes, the UCC and the Restatement Second provide essentially similar substantive definitions for the doctrine of impracticability. Section 615 of the UCC provides the following definition:

> *Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made...*

The Restatement Second, on its part, defines the doctrine in Section 261 in a more concise manner, and provides that: "*[W]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.*"

Pursuant to the definitions enshrined in the above provisions, impracticability may be invoked where performance becomes impracticable without the parties' fault, due to an

[247] Mann & Roberts, supra note 243, p. 310.
[248] Jenkins, supra note 104, p. 2023.
[249] Litvinoff, supra note 39, p.6.

unexpected event or contingency, the non-occurrence of which was a basic assumption on which the contract was made.[250] From this, it is possible to identify at least two basic elements on which the bulk of analysis made to ascertain application of the doctrine generally turns on. The first basic element relates to the nature of the event that made performance impracticable: a party invoking the doctrine must establish that the non-occurrence of the event or contingency responsible was a basic assumption on which the contract was concluded.[251] The second basic element relates to the nature of the inability to perform: a party must additionally prove that performance of his obligation has become impracticable due to the said event. [252]

Thus, according to the forgoing observations, the first essential element that should be ascertained by the court before granting relief based on the doctrine of impracticability is the fact that performance was made impracticable by an event, which, at the time of contracting, the parties had assumed would not occur. A party is relieved from his or her duty on the basis of the doctrine of impracticability, because the contract, having been made on a different basic assumption, is regarded as not covering the factual situations that has arisen due to the supervening event. The role of the doctrine is to address that kind of risk that has been omitted from the parties' assumptions and therefore falls within a "gap" in the contract. Thus, whether or not the non-occurrence of the event in question formed a basic assumption of the parties turns out to be the basic question for the court. From the bulk of analysis made in impracticability cases, factors such as forseeabilisty of the event and assumption of risk are said to be the most important considerations that the courts take into account before reaching on the finding that the non-occurrence of an event was a basic assumption on which the contract was made.[253]

Foreseeability is said to be the major factor to be considered in any commercial impracticability analysis. A finding that the event was unforeseeable generally carries much weight in suggesting that its non-occurrence was indeed a basic assumption. This idea encompasses the theory of "bounded rationality," which suggested that it is not possible for humans to evaluate all possible contingencies of a particular situation. When parties contract, they include only a small subset of possible contingencies in the agreement, thus, courts can

[250] Litvinoff, supra note 39, p.6.
[251] See Id, pp.6-9,
[252] Ibid.
[253] See, Walters, supra note 7, pp 234 et seq.

enforce a contract only to the extent of the contingencies included in the agreement. Nevertheless, opinions seem to vary when it comes to the conclusion to be drawn where the facts of the case imply that the event was foreseeable.

One position, which is said to be generally reflected in majority of the decisions of the courts, holds that foreseeability of the event always supports the finding that the non-occurrence of the event did not form the basic assumption of the parties at the time of the contract and the non-applicability of the doctrine.[254] The suggestion is that, "forseeability test" conclusively serves to draw the line between events that were "reasonably part of the decision making process and those that were not".[255] If the event was foreseeable, the party seeking relief on the basis of the impracticability doctrine should have included a contractual provision against assuming the risk of that event with the expectation that such event might occur. Thus, the non-inclusion of such contractual provision leads to the conclusion that a party assumed the risk arising from the occurrence of that particular event.

According to another different view, however, foreseeability of the event should be only an index, not the ultimate test for drawing the conclusion that the risk of such event has been tacitly assumed.[256] The finding that a party has tacitly assumed the risk should usually be resolved on the basis of the fact-finder's common-sense intuition concerning what tacit assumptions would probably have been held by similarly situated parties.[257]As one writer has suggested in this vein, "*the fact that it was foreseeable, or even foreseen, does not, of itself, suggest a contrary conclusion, since the parties may not have thought it a sufficiently important risk to have made it a subject of their bargaining. The court should also look into other circumstances such as the effectiveness of the market in spreading such risks*".[258] This position is also supported by the accompanying comments made on the relevant provisions of the Restatement Second and the UCC dealing with impracticability.[259] This seems to imply that foreseeability of the event or contingency is not a dispositive factor: a finding that the contingency was foreseeable does not automatically allocate the risk to the promisor and stand as an absolute bar to relief based on the doctrine of impracticability.

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[254] Walters, supra note 7, p. 238.
[255] Tabor, supra note 23, pp. 587-588.
[256] M A. Eisenberg, "Impossibility, Impractiability, and Frustration," Journal of Legal Analysis Vol. 1 No 1(207), (2009): Available at: http://scholarship.law.berkeley.edu/facpubs/402, p.216.
[257] Ibid.
[258] Litvinoff, supra note 39, p.7.
[259] See Ibid.

Although many of the decisions passed by the courts in impracticability cases are said not to have indorsed this position, it is still possible to find decisions in which it has been otherwise indorsed. For instance, in *Asphalt International, Inc v Enterprise Shipping Corp, S.A.,* the court took the position that an impracticability defence may be upheld even though the event causing the loss was foreseen at the time of contracting, where the magnitude of the loss does not indicate that a party has tacitly accepted the risk of that loss.[260]

The other factor that courts consider in impracticability cases is whether the risk of the event was assumed by a party. As could be perceived from what has already been observed above, the concept of risk assumption is much intertwined with the foreseeability factor, but it is a decisive test in determining the applicability of the doctrine of impracticability to a particular case. Assumption of risk by a party, though not expressly provided in the contract, may be concluded from the circumstances surrounding the contract. If one of the parties has implicitly assumed the risk of the event, there is no remedy to be granted on the basis of impracticability. Thus, the defence based on impracticability of performance does not apply if the disadvantaged party has assumed the risk of the event.

Once the promisor has established that an event has occurred, the non-occurrence of which was a basic assumption on which the contract was made, he must show that the event has rendered performance impracticable. The second critical element in applying the doctrine is to identify the situations in which performance may be said to have become "impracticable". As it has already been mentioned at the beginning of this section and elsewhere, the doctrine of impracticability developed as an extension of the traditional impossibility doctrine. Thus, impracticability is inclusive of the cases where unexpected circumstances make performance impossible. Thus, it may be invoked where unexpected events taking the form of physical or legal impossibility prevent performance of the contract. [261] Nevertheless, as it is

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[260] In this particular case, the plaintiff chartered a tanker from the tanker's owner. The tanker sustained extensive damage when it was struck by another vessel. Under the contract, the defendant was responsible for routine maintenance, including minor damage repairs, but there was no allocation of risk for major damage. The cost of repair was $1.5 million, which was twice the pre-collision value of the ship. When the plaintiff instituted a breach of contract claim for failure to repair the tanker, the court held that, although certain risks were allocated by contract, the extensive damage to the tanker was a contingency, the non-occurrence of which was a basic assumption of the parties at the time of contracting. Therefore, the defendant's duty to repair was commercially impracticable. A similar example in which forseeability of the risk of loss was rejected as a determinative factor to deny impracticability defense coud also be found in in *Aluminum Company of America v. Essex Group, Inc. (hereinafter the Alcoa case)(1980)*: See J R Trentacosta, " Commercial Impracticability and Fair Allocation under UCC 2-615," Michgan Bar Journal, (2010), p. 43

[261] M. A. Frey, T.H. Bitting, P. H. Frey, An Introduction to the Law of Contracts (3rd ed., 2000), p. 335.

unquestionably recognized, the doctrine of impracticability is not merely limited to the cases of impossibility. It also operates to discharge a party's duty even though the happening of the unexpected event has not made performance absolutely impossible.[262] It is this later aspect of its application that deserves further evaluation.

In the interest of insuring generality of the law to be sufficiently inclusive of various practical situations, both Sections 2-615 of the UCC and 261 of the Restatement Second have clearly refrained from listing specific situations in which performance is to be deemed impracticable.[263] But Restatement Second Section 261, Comment d, explains the general situations in which impracticability of performance may be found.[264] Accordingly, impracticability of performance may be said to exist where a severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, either causes a marked increase in cost or prevents performance altogether. Performance may also be impracticable because it will involve a risk of injury to person or to property, of one of the parties or of others, that is disproportionate to the ends to be attained by performance. The comment finally stresses the fact that, "impracticability", though does not presuppose literal impossibility, is more than "impracticality". Thus, an increase in price or cost of performance must be "marked" or "extreme and unreasonable", or should be well beyond the sort of risk that a fixed-price contract is intended to cover, before the standard of impracticability is met. U.C.C. Section 2-615 (1978), Comment 4, likewise provides:

> *Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply and the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance is within the contemplation of this section.*[265]

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[262] Litvinoff, supra note 39, p. 8.
[263] Id, p. 6.
[264] Id, p. 8.
[265] Hubbard, supra note 246, p. 91 and the accompanying note at foot note 75.

There are some decided court cases that provide interesting examples for the situations in which performance may be deemed to be impracticable. In *Mineral Park Land Co v Howard* (1916), which is said to provide the earliest common law authority for the doctrine itself, impracticability of performance was deemed to be present in case of "extreme and unreasonable" cost increase.[266] In *Northern Corporation v. Chugach Electrical Association*, the court found that a party is discharged from its contractual obligation, even if it is technically possible to perform, if the cost of performance would be so greatly disproportionate to that reasonably contemplated by the parties at the time of contracting.[267] In addition, it was also stated that a serious risk to life or health will excuse non-performance.

Finally, even in cases where performance may be generally deemed to have become impracticable, it should be additionally proved that such impracticability was not within the control of the party claiming for relief, or attributable to the personal fault of the latter. This requirement arises from the general duty of good faith applicable to the performance and enforcement of contracts under Section 1-203 of the UCC (1990) and Section 205 of the Restatement Second (1981).[268]

3.2.3. Frustration of Purpose

The frustration of purpose doctrine is closely akin to the doctrine of impracticability. There is, however, an important distinction with regard to the event that triggers its application.

[266] Walters, supra note 7, pp 232-233: In this case, the defendants agreed to take all the gravel needed for a particular construction project from the plaintiff's land, against payment of five cents per cubic yard. After only half the required amount of gravel had been removed from the land, however, the water table was reached, so that removing the rest of the gravel would have cost 10 to 12 times more. In addition the gravel would have to be dried before use, which increased the time required for performance. The defendant refused to perform further under the contract, arguing that this had become prohibitively expensive. The court held that "a thing is impossible in legal contemplation when it is not practicable" and discharged the defendant. Courts are generally said to show more leniency when the obligor has faced an out- of- pocket loss due to the increase in the cost of performance of his obligations. In contrast, they generally tend to deny the remedies based on impracticability when the obligor has invoked the defence merely on the ground of loss of profit: See A Schwartz, "Sales Law and Inflation," (1976), Yale Law School, Faculty Scholarship Series, Paper 1115, pp. 2-5. Available at: http://digitalcommons.law.yale.edu/fss_papers/1115

[267] See Mann & Roberts, supra note 243, p 310: In this case the defendants (Northern Corporation) entered into a contract with the Plaintiffs (Chugach) to repair and upgrade the upstream face of Cooper Lake Dam in Alaska. The contract required Northern to obtain rock from a quarry site at the opposite end of the lake and to transport the rock to the dam during the winter across the ice on the lake. In December 1966, Northern cleared a road on the ice to permit deeper freezing, but thereafter water overflowed on the ice, preventing use of the road. After encountering several difficulties and losing two of its employees due to the unsafe condition of the lake ice on which the transportation of the rock was to be carried out, the defendants ceased its operation. When the plaintiffs sued to enforce the contract, the court ruled for the defendants by accepting their defence of impracticability.

[268] See R Kreitner, Calculating Promises-The Emergence of Modern American Contract Doctrines, (2007), pp.176-190.

Instead of focusing on supervening events that impede performance, the doctrine of frustration of purpose focuses on the reasons a party entered into a contract, and provides excuses when those reasons no more continue to exist due to the occurrence of supervening and unexpected events. Frustration of purpose, therefore, comes into play when the object of the intended performance has been destroyed; where performance may still be possible, but the purpose of the performance has evaporated.[269]

The so-called English coronation cases are frequently cited as illustrations for the application of the doctrine of frustration of purpose. Particularly, *Krell v. Henry,* though it was decided by an English court as discussed in previous section, seems to be regarded as the *locus classicus* on frustration of purpose in the US as well. Frustration of purpose has not been specifically provided in the UCC, but many writers contend that this was because the common law was intended to apply. [270] The Restatement Second, on the other hand, reformulates the doctrine of frustration of purpose in section 265 stating that: "*[W]here, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.*" [271]

Though frustration of purpose is distinct from the problem of impracticability, the standards for relief in both doctrines are said to be essentially similar.[272] Thus, for the application of the doctrine of frustration of purpose, there must be unexpected event that occurred after formation of the contract, the non-occurrence of which was a basic assumption on which it was made.[273] Secondly, it should be proved that the occurrence of the unexpected event has totally destroyed the purpose that one of the parties had in concluding the contract or rendered the value of the other party's performance virtually worthless.[274] The contracting party's purpose, which has been destroyed by the occurrence of the unexpected event, should

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[269] G B Smith & T J Hall, "The Frustration of Purpose Doctrine is Alive and Well," New York Law Journal, Vol. 246, No. 78, p. 1.
[270] See Jenkins, supra note 104, p. 2023
[271] The comment on the section states that it applies to the situations where change of circumstances makes the performance of the other party virtually worthless to a party and thereby frustrates the latter's purpose in making the contract; Litvinoff, supra note 39, p. 13.
[272] Hubbard, supra note 246, p. 93.
[273] Id, p. 94.
[274] Ibid.

have been made known to the other party, or at least impliedly contemplated by, both contracting parties.[275]

3.2.4. The Effects of Impracticability or Frustration

The usual effect of impracticability and frustration of purpose is termination of the contract (or the contract will be discharged) with the effect that the parties will not perform future or remaining obligations imposed by the contract.[276] Once the contract is terminated, restitution or reliance damages may be granted in proper cases. Restitution is generally said to be rooted in the principle of justice preventing a party from unjustly retaining benefits or enrichment conferred on him by the other party before termination of the contract.[277] Restitution merely aims to avoid unlawful enrichment between the parties by protecting their interest in having restored to them any benefit that they had conferred on one another before termination of the contract. Accordingly, the courts require the parties to make restitution of the benefits which have been conferred on them pursuant to the contract subject to termination. If one of the parties has paid sum of money to the other, before the discharge of contract, American courts award restoration of the paid sums.

From the above, restitution does not compensate for losses resulting from termination of the contract, where a party had incurred certain expenses that were necessary for the purpose of preparing or facilitating performance of the contract but did not confer tangible benefits on the other party. In such and other cases, where redress of profits and losses beyond mere unjustified enrichment might be required, Section 272(2) of the Restatement Second suggests that the courts may grant relief *"as justice requires including protection of the parties' reliance interests."* However, as none of the parties is at fault for termination of the contract in cases of frustration of purpose and impracticability, the parameters to be used by the courts in awarding reliance damages is not precisely clear. But the courts are said to make the obligor liable for such damages, where the latter is proven to have been at fault, and the fault was minor.[278] If the promisor's fault is more extreme, since he will not be able to set up the

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[275] Ibid.
[276] Id, p. 103.
[277] Eisenberg, supra note 256, p.227.
[278] M A Eisenberg, "The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance," In O Ben-Shahar & A Porat (eds.), Fault in American Contract Law (Cambridge University Press, 2010), P. 87.

defence based on unexpected circumstances from the very beginning, the issue of liability for damages will not be normally considered here.[279]

However, there are cases in which restitution or reliance damages will not provide sufficient remedies to return the parties back to their original positions. For instance, restitution or reliance damages will most probably become inadequate to safeguard the interest of a party who has spent money in capital improvements in reliance on a long-term supply contract if the supply is unavailable or prohibitively expensive to acquire from elsewhere.[280] When performance is excused in such cases, the party may end up bearing huge losses despite the presence of these remedies. Thus, the question to be asked at this juncture is whether additional remedy, such as revision or adjustment of the contract, could be granted in American law to protect such party.

From the authorities found both in the Restatement Second and the UCC, the answer to this question seems to be in the positive. Section 2-615 of the UCC, Comment 6, which provides:

> *In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of "excuse" or "no excuse, "adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.*[281]

To the same effect, the Restatement second also provides that the court can supply a reasonable term to adjust the rights of the parties when the normal remedies for mistake, commercial impracticability, and frustration of purpose will not prevent injustice.[282] Thus, it seems courts are not restricted to "the all or none approach" in which the obligor may be granted total excuse, or required to render total performance. In proper cases, the courts possess the power to specifically enforce the contract by equitably adjusting its terms to the supervening change of circumstances. None the less, it must be stressed at this point that such power is to be exercised both under the provisions of the UCC and the restatement second in very limited cases, only as a last resort remedy to address the situations where serious injustice could result by applying the usual remedy of bringing the contract into termination.

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[279] Eisenberg, supra note 178.
[280] Hubbard, supra note 246, p. 103 and the accompanying foot note at 145.
[281] Id, pp. 104-105.
[282] Ibid.

Court adjustment of contract terms in cases of impracticability and frustration of purpose, as suggested above, has both its supporters and those who strongly oppose to it. These contending positions arise in association with some difficult issues for which precise and accurate answers could not be provided. To clarify the major points embraced in the ongoing contentions, it is important to precisely discuss one typical case in which equitable adjustment of contract had been experimented by the court and continued to be the subject of much debates. This case concerns the famous judgment made in *Aluminum Corporation of America v Essex Group Inc.*[283] According to the facts of this case, in late 1967, Essex Group, Inc. (Essex) entered into a contract with the Aluminium Company of America (Alcoa) to secure a long-term source of aluminium to meet its expanding needs. The contract's terms required Essex to deliver specified amounts of alumina (raw material) to Alcoa for conversion into aluminium. After Alcoa had completed the conversion process, Essex was required to pick up the aluminium. The agreement was to last until 1983, but Essex had the option to extend it until 1988.

The price term of the contract was subject to an escalation formula, but the maximum cost to Essex was set at 65 % of the market price of aluminium as published in a trade journal. The escalator was tied in part to the federal government's Wholesale Price Index-Industrial Commodities (WPI-IC). The WPI-IC failed to reflect an unexpected rapid increase in the cost of electric power. 'Electric power is the principal non-labour cost factor in aluminium conversion, and the electric power rates rose much more rapidly than did the WPI-IC. Moreover, there was a sharp increase in the demand for aluminium. Thus, the price escalation mechanism in the contract failed to reflect Alcoa's production costs and failed to work as the parties expected, and Alcoa began to sustain heavy losses. During 1977 and 1978, Alcoa lost a total of $12,000,000 on the contract; in 1979, Alcoa predicted additional out-of-pocket losses of more than $75,000,000 if it performed for the remainder of the contract.

In 1979, Alcoa sued Essex in the United States District Court for the Western District of Pennsylvania requesting the court to equitably adjust the contract by revising the price formula provided therein. Essex counterclaimed for damages and asked the court to specifically enforce the contract for its remaining term. The court found that Alcoa was excused from performing the contract under the doctrines of mutual mistake, impossibility

[283] The discussion of the case is adopted from Walters, supra note 7, pp.249-251.

and frustration. However, the judge asserted that granting total excuse to Alcoa from performance of its obligations under the contract would be seriously unjust under the circumstances of the case, and decided to uphold performance of the contract through the "revision or equitable adjustment" of its terms, so that the price formula would reflect Alcoa's actual non-labour production cost. Although Alcoa was not allocated the entire risk of the disparity between its actual cost and the price as computed under the formula, the court decided that Alcoa had assumed the risk of increased costs in excess of the maximum ceiling price on which the parties originally had agreed. The maximum price Alcoa will receive under the adjusted contract is therefore contract ceiling price. If its actual cost does not reach that level, Alcoa is to receive the greater of either the amount it would receive under the original contract or a profit of one cent per pound of aluminum converted.

However, adjustment of terms of contracts, especially the basic terms of a long term contract as done by the Alcoa court in the above case, is said to present some difficult questions. Firstly, it may be questioned whether the courts should ever adjust such basic terms. The objection to such adjustment is generally based on the maxim that a court cannot make a contract for the parties by rewriting its terms.[284] Though this maxim cannot be taken at its face value, it still reflects the principle that courts do not have unlimited power to impose terms to which the parties never agreed. Thus, the critical issue is as to the bench mark to be used to allow the courts to exercise the power to adjust contract terms. The real question to be raised in *Alcoa* is whether adjustment of basic terms in long-term executory contracts exceeds the level of power that courts should have in resolving contract disputes.[285] Both the Restatement Second and the UCC do not seem to impose restrictions as to the terms that could be adjusted by the courts, as long as, from the circumstances of the case, making such adjustment was exercised as a last resort remedy and absolutely necessary to prevent serious injustice that would be sustained by one of the parties.[286]

Secondly, if the court is said to have the power to execute adjustment of contracts, in what situation should it be available to a party claiming it? The Uniform Commercial Code and the Second Restatement suggest that the courts will use the remedy of equitable adjustment only when the normal application of the underlying theories coupled with the normal "excuse or

[284] Hubbard, supra note 246, p. 105.
[285] Ibid.
[286] Id, p. 107

no excuse" solution are found inadequate to provide a fair solution.[287] Practical considerations also will be important in deciding whether to use equitable adjustment. It is also stressed that, unless a party seeking adjustment is able to convince the court that a fair adjustment can be determined with reasonable certainty, it is unlikely that the court will consider adjustment a preferable alternative.[288] This would be true especially if specific performance of the executory portion of the contract as modified is being considered.

In the Alcoa case, the court thought that Alcoa should not be allocated the entire risk resulting from the contract, since some of such risk, which it had thought to have been covered by the price formula, should not be treated to fall within the zone of risk it had assumed upon entering into the contract. However, the court thought it unfair to excuse Alcoa entirely from its obligations under the contract. It said:

> *[T]o decree rescission in this case would be to grant Alcoa a windfall gain in the current aluminium market. It would at the same time deprive Essex of the assured long term aluminium supply which it obtained under the contract and of the gains it legitimately may enforce within the scope of the risk Alcoa bears under the contract...* Thus, the *Alcoa* court applied the remedy for the very reason recognized in the Restatement Second and the UCC and stated, *[A] remedy modifying the price term of the contract in light of circumstances which upset the price formula will better preserve the purposes and expectations of the parties than any other remedy. Such a remedy is essential to avoid injustice in this case.*[289]

The last, perhaps the most difficult issues is as to what methods will be used to adjust the rights of the parties fairly. In *Alcoa,* the price was set at the point where Alcoa was required to bear only those losses attributable to risks it had assumed. Thus, it appears in this case that all future risks are shifted to Essex. Apparently the court decided that such an adjustment was fair to both parties. One approach the courts might take is to attempt to isolate the causes of each portion of the loss and then to allocate the risk of each cause to one or the other party. This approach, as discussed in the second chapter of this paper, was supported by the economic theory of "superior risk bearer". But as it was further expounded therein, the problems inherent in attempting to isolate each cause of loss and to allocate each risk related to those causes, militates against the adoption of this approach.

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[287] Hubbard, supra note 246, p.107.
[288] Id, pp. 107-108.
[289] See Walters, supra note 7, p. 251; Hubbard, supra note 246, p.105.

Thus, a more flexible approach that assumes that all risks cannot be allocated specifically, and according to which the loss attributable to non-allocable risks can be apportioned based on notions of fairness and equity seems preferable to adopt.[290] Though this method could be objected on the ground of ensuring certainty, its application is said to be favoured in those cases where the "excuse or no excuse" solution is not flexible enough to do justice.[291] This exactly seems to be what was done by the Alcoa court. However, despite the favourable condition provided by the American law, the courts are generally not inclined to undertake adjustment of contracts and the judgement passed by the Alcoa court is said to remain a much isolated case.

Part II: Civil Law Traditions

A significant divergence historically existed between the common law and civil law traditions with regard to their conceptual orientations towards non-performance of contractual obligations. The civil law tradition rejected the notion that a party could contract to do the impossible as clearly manifested in Justinian's Digest: *impossibilium nulla obligatio*. Thus, even from its earliest outset, the civilian tradition has recognised as a general rule that a party cannot be required to do the impossible notwithstanding it was promised in a contract. This indicates the fact that the recognition of the theory of *force majeure* has the oldest history in the civil law traditions. However, as the theory of *force majeure* has a limited scope confined to cases of objective impossibility, new doctrines applicable to address the problem of change of circumstance have evolved in many civil law jurisdictions. Thus, with the exception of the Ethiopian law, the other two remaining civil law jurisdictions to be considered in this part, i.e., Germany and France, have introduced new legal rules that clearly recognise and address the issue of change of circumstances.

As already noted above and elsewhere in this paper, the concept of *force majeure* is not strictly relevant for addressing the problem of change of circumstances. Despite this fact, never the less, few historical excursions will be made to discuss the interpretations provided for this and other legal concepts by the courts of these jurisdictions in their attempts to address the problem of change of circumstances, especially prior to the recognitions of the specific doctrines applicable to the latter. Such discussion will hopefully provide some

[290] Hubbard, supra note 246, p. 110.
[291] Ibid.

comparative insights to evaluate the current state of the Ethiopian law in which clear recognition is absent for the doctrine of change of circumstances. It is also useful to appreciate the backgrounds and the distinguishing features of the new legal devises that the two jurisdictions have introduced to address the problem of change of circumstances.

3.3. The German Law: The Doctrine of *Störung der Geschäftsgrundlage* /Disturbance of Foundation of Transactions/

The original position of the German law was based on the traditional liberal theory of contract according to which preserving the justice of contractual relations was assumed to require nothing more than insuring procedural fairness upon its conclusion. Hence, the contents of contracts as such (as long as there is no violation against the relevant provisions of the law or *bonos mores*) were not regarded to furnish sufficient ground for intervention of the court.[292] But this original position shifted as the judiciary looked for new theories in order to deal with the chaotic economic and social situations that were created following the end of the two World Wars.[293] The legal devices, to which the courts turned as the practical necessities of addressing these situations, gradually became refined and developed into the doctrine of *Wegfall der Geschäftsgrundlage,* or, more accurately, of *Störung der Geschäftsgrundlage*, which is currently applied to address the problem of change of circumstances.[294]

In its current application, the doctrine addresses three main cases where: (a) the purpose of the contract cannot be fulfilled because of the occurrence of subsequent unforeseen events; (b) the performance, though strictly possible, has become excessively burdensome or the value of the counter-performance has significantly changed; and (c) the contract was concluded based on mistake in shared basic assumptions.[295] The application of the doctrine to these described situations was recognised *praeter legem,* before its incorporation in the current Section 313 of the German Civil Code (the *Burgerliches Gesetzbuch,* hereinafter the BGB).[296] After highlighting the historical and theoretical factors behind its development, the

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[292] B.Markesinis, H Unberath, & A. Johnston, The German Law of Contract: A Comparative Treatise, (2nd ed., 2006), p. 46.
[293] See id, pp. 326-336.
[294] See id, pp. 319-320.
[295] Id, p. 319.
[296] R Zimmerman, The New German Law of Obligations: Historical and Comparative Perspectives, (2005), p. 4.

discussion in this section will focus on the present application of the doctrine pursuant to Section 313 of the BGB.

3.3.1. Historical Backdrop of the Doctrine

The origin of the German doctrine of *Störung der Geschäftsgrundlage* could be tied with the medieval doctrine of *clausula sic stantibus.* As already discussed in the second chapter of this paper, the *clausula* doctrine had gained a prominent status before the hostile stance taken by the nineteenth century legal science led to its disappearance. But the underlying idea of the doctrine has not lost its attraction once and forever. Windscheild's theory of tacit presupposition was said to be the first major attempt made to revive acceptance of the doctrine in German legal system.[297] The theory posited that, a person that promises to procure a definite legal consequence in the future relies on certain basic assumptions that he makes in relation to the future state of affairs that are usually not expressly incorporated in the contract.[298] In cases where such assumptions could be proved to have been made known to the promisee, the person should not be held to his promise in case of their subsequently proving to be wrong.[299] This is essentially close to saying that every contract is concluded subject to an 'inchoate condition' (*unentwickelte Bedingung*) that the assumed state of affairs would remain the same. The theory thus became to be known as the 'theory of presupposition' (*Lehre von der Voraussetzung*).[300]

Windscheid had tried, but did not succeed to convince the German legislature for the inclusion of his theory in the previous version of the BGB.[301] None the less, as he had prophesised following the failure of his attempt, the need to address the problem of change of circumstances in German law, did not die once and for all. Due to the hyperinflation and huge disruptions in the German economy caused by the WWI, the problem of change of circumstance made its reappearance and presented itself before the German courts. Thus, the courts had to grapple with that same problem that the German legislature once decided to disregard.

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[297] Markesinis, Unberath, & Johnston, supra note 292, p. 321.
[298] Ibid.
[299] Ibid.
[300] Ibid.
[301] Ibid.

The courts first tried to deal with the problem by extending the traditional doctrine of excuse based on impossibility of performance. As it will be further highlighted below, however, the application and remedy available on the basis of this traditional doctrine proved to be unfit for addressing this new problem. This opened up a wide opportunity for the courts to turn to Oertmann's the then newly arrived theory of *Wegfall der Geschäftsgrundlage* or the basis of transactions theory. The courts cited this theory in their decisions that addressed the consequences of WW I on long-term contracts. A closer look at those decisions, however, is said to disclose exceeding importance of the good faith principle in developing and achieving flexible application of the theory for proper allocation of the risks arising from change of circumstances. Based on these preliminary observations, we will now try to elaborate how the courts developed the doctrine of *Wegfall der Geschäftsgrundlage*, which has been directly incorporated without any change in its substance under the new title of Article 313 of the BGB- '*Störung der Geschäftsgrundlage*'.

3.3.2. Development of the Doctrine

As it has already been noted above, German courts initially attempted to deal with the effects of a change of circumstances, by enlarging the notion of impossibility incorporated in Art 275 of the BGB. This was sometimes achieved with the help of the good faith principle enshrined in Article 242 of the BGB on the grounds that to decide otherwise would be 'asking too much of the debtor' (*dem Schuldner unzumutbar*). But these cases, although they have facilitated a convenient bridge for the most radical decisions that followed later on, could not be yet considered as the cause of the "revolution" in German law with regard to the treatment of the problem of change of circumstances.[302]

The concept of economic impossibility was employed by the courts generally in two typical and broadly classified situations. The first group of cases dealt with subsequent impossibility concerning generic goods. Here, the governing rule contained in the previous Article 279 the BGB stated that '*if a debt described by class is owed, and so long as delivery of this class of object is possible, the debtor is responsible for his inability to deliver, even though no fault may be imputed to him.*' In one case, the defendant had agreed to sell the plaintiff flour produced in accordance with his own mill's secret recipe.[303] Before the goods could be

[302] Markesinis, Unberath, & Johnston, supra note 292, p. 326.
[303] Discussed in Ibid, pp. 326-327.

delivered, the mill was destroyed by fire but not before 2000 tons of this flour had left the mill, destined for another customer. In the light of this last-mentioned fact, it was not possible to maintain that the merchandise of the kind provided in the contract had been rendered no longer available.[304] Nevertheless, *aided* by Article 242 of the BGB, the *Reichsgericht* (the then highest court of Germany) established the rule that *the debtor is relieved where the fortuitous event has rendered performance so difficult that commercial men would regard such extraordinary difficulty as amounting to 'impossibility'.*[305]

The second class of cases addressed the problem of price fluctuations faced especially by a seller who had contracted to make bulk supplies.[306] In one of these cases (RGZ 100, 134), a sole distributor of Opel motorcars in Southern Germany had entered into contracts to sell cars on the basis of the 1919 price list.[307] Because of the hyperinflation that affected Germany after the end of the War (see next section), the price of the cars had increased very considerably when the contract had to be performed. When the buyers brought their actions to enforce the contract based on the originally stipulated prices, the *Reichsgericht* released the seller from its obligation by applying a newly coined version of the concept of economic impossibility known as 'defence of ruination'.[308] Accordingly, the court held that, "*it would be 'utterly ruinous' (geradezu ruinös) to the seller to insist that he must perform at the originally stipulated price*".[309]

However, the above "defence of ruination" was found to be such a lofty concept without precise boundary for its application. For instance, it was found hard to ascertain whether discrimination was to be made between suppliers on the basis of their economic capacity or wealth in applying the concept.[310] More generally speaking, the whole notion of economic impossibility proved difficult to clearly define and became highly uncertain in its application. What was more important, the theory of economic impossibility only provides the remedy that allows the courts to declare termination of the contract. Invariable application of this remedy to the large number of cases that appeared before the courts, especially following the end of the First World War, was reasonably feared the to produce further disastrous

[304] Markesinis, Unberath, & Johnston, supra note 292, pp. 326-327.
[305] Ibid.
[306] Id, p. 327.
[307] Id, pp. 327-328.
[308] Ibid.
[309] Ibid.
[310] Id, p. 328.

consequences for the already fragile economic conditions.[311] Due to these reasons, the courts began to search for another theory, which would help to more openly address the disproportionality between performance and counter-performance brought about by the unexpected turn of events, while also allowing the parties to keep the contractual bond alive.[312] The search for such theory, as already noted, led the courts to the theory of *Wegfall der Geschäftsgrundlage, which* they eventually shaped and brought to more refinement through applying it to solve the practical legal problems they faced.[313]

The theory of the contractual basis or *foundation-Geschdftsgrundlage*, in its most basic formulation, is an assumption made by one party that has become obvious to the other during the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence of circumstances forming the basis of the contractual intention. Thus, at this basic level of its evolution, the theory allowed termination of the contract when the circumstances are altered in such a manner as to leave the contract without a reasonable basis, thereby frustrating the parties' expectations. But the courts expanded the situations and type of remedies to be considered under the scope of the theory through flexible interpretations based on the underlying philosophy of the good faith principle enshrined in Article 242 of the BGB.[314]

Article 242 of the BGB provides that: "*The obligor is bound to render his performance in the manner required by good faith with due regard to prevailing usages.*" Using this principle, the courts extended application of the doctrine in order to deal not only with situations where performance had become excessively burdensome, but also to cases where performance had been turned into something worthless to the obligee. Thus, for instance, performance of the obligation of repaying a loan is physically, and even legally, possible when the currency in which the loan was made has lost all its value, but holding that the lender must be satisfied with such a performance by the borrower was held by the courts to be in violation of the elementary and overriding principle of good faith.[315] In a similar vein, the importance of good faith was invoked by the courts in order to assert solutions aimed to address frustration of

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[311] I Kokorin, "Force Majeure and Unforeseen Change of Circumstances:The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches)," Russian Law Journal, Vol. 3, Issue 3 (2015), p. 64.
[312] Markesinis, Unberath, & Johnston, supra note 292, p.328.
[313] H Rösler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law", European Review of Private Law, Vol. 15, No. 4 (2007), pp. 488-489.
[314] Litvinoff, supra note 39, p.19.
[315] Id, p. 20.

statutes and beyond the realm of contracts. Thus, good faith was declared to be such an overriding principle of justice that even preceded the application of statutes.[316]

The courts also used the doctrine of destruction of the contractual foundation- *Wegfall Der Geschaftsgrundlage-* in order to make adjustment of contract in the cases connected to the great turmoil in a currency market that resulted after WWI.[317] In doing this, the first argument was that if the court had the power to dissolve the contract it was also empowered, logically, to change one of its terms so that the loss would not fall exclusively on one party. [318] However, it must be emphasised that modification of contract was applied by the courts only to the most extreme and exceptional cases.

From the decisions passed after the WWI in cases involving the exceptional problems relating to currency risk, adjustment of contract (through revalorisation of the currency) appears to be subject to three conditions: firstly, both parties must wish to continue with the contractual relationship; secondly, an adjustment for both parties must be possible; and thirdly, such an endeavour will be undertaken only in cases involving a 'very exceptional transformation of circumstances'.[319] In one of its important decision passed in1920 *the Bundesgerichtshof (the German Supreme Court)* stated that adjustments to the terms of contract would only be undertaken in very special and quite exceptional transformation and change of circumstances.[320] In its another later decision passed in 1923, the court pointed out that currency revalorisation was to be done only in cases where, *"strict enforcement of the principle of monetary nominalism, as a result of an especially heavy depreciation of legal tender, not foreseen at the time when the currency regulation was passed, would lead to results which could no longer be reconciled with justice and good faith".*[321] Though mere presence of certain changes to the balance of a contract arising from unforeseen changes in the relevant circumstances may not suffice in itself to justify interventions, the court

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[316] Litvinoff, supra note 39, p.20: thus, in a difficult situation where focus had to be made on statutes under which worthless currency was still legal tender, a committee of judges of the *Reichsgericht,* then the German Supreme Court, addressed to the government a sort of manifesto expressing that, *"The idea of good faith stands outside any particular statute or provision of positive law. No legal order that deserves the name can exist without this fundamental idea. Therefore the legislature may not through its peremptory order defeat a result that good faith irresistibly commands."*

[317] Ibid.

[318] Ibid.

[319] Rösler, supra note 313, pp. 488-490.

[320] Markesinis, Unberath, & Johnston, supra note 292, p. 337.

[321] Ibid.

nevertheless asserted that no general and mechanically applicable rule could be formulated for determining the degree of changes required to warrant such interventions.

In a post-WWII case, the *Bundesgerichtshof* made the points that well summarised the relevant considerations in determining the situations warranting intervention of courts on the basis of the doctrine. It stated:

> *One of the stated requirements for the application of the theory of the collapse of the basis of the transaction . . . is that the intervening change be of critical nature and affect the interest of the parties to a significant degree. Not every adverse modification of the prior relationship of equivalence, unforeseen by the parties at the time of the contract, justifies a departure from the principle that contracts must be adhered to (pacta sunt servanda). What is really required is such a fundamental and radical change in the relevant circumstances that it would be an intolerable result, quite inconsistent with law and justice, to hold the party to the contract.*[322]

From the foregoing, one can observe the cautious and well restrained approach that German courts adopted in making adjustments to the terms of a contract in the period prior to codification of the doctrine. But it is also good to note that the courts treated termination only as a secondary last resort remedy and gave more favour to making adaptations of the terms of the contracts based on justice and good faith considerations in cases where they held the doctrine applicable to deal with cases of change of circumstances. This judicial approach giving more favour to adaptation of the contract has been fully indorsed in the German law by the legislative action taken in 2002 that codified the doctrine in Article 313 of the BGB.

3.3.3. Application of the Doctrine under the 2002 Revised Version of German Civil Code

The German contract law reform carried out in 2002 was said to be the most comprehensive one since the enactment of the BGB. In relation to the issue of change of circumstances, the merit of the reform is primarily found in the official sanctioning provided to the already existing judicial recognition for the importance of addressing the problem.[323] The reform attempted to achieve this by supplying an all-encompassing statutory basis for the doctrine of the foundation of the transaction in Article 313 BGB. The stipulations contained in this particular provision may also further represent the attempts made by the legislature to capture the basic tenets of the doctrine as previously developed by the academics and flexibly applied

[322] Kokorin, supra note 311, p. 65 (citation omitted).
[323] R Zimmerman, supra note 296, p. 47.

by the courts. Thus, it is important to be reminded once again that the codification of the doctrine in this new provision has no intention to bring change to the previous (case) law.

Article 313 of the BGB contains three sub-articles. Situations that may be covered under the scope of application of the doctrine are defined in the first two Sub-articles. Judicial adaptation of the contract also figures out as the principal effect of application of the doctrine from these two sub-articles. The last sub-article recognises termination as the secondary effect of the doctrine to which the court may resort in exceptional and proper cases.

Based on this general introduction, situations that may qualify for application of the doctrine, as defined in the two sub provisions of Article 313 of the BGB will be highlighted in the first sub-section. The exact boundary between the situations that are subject to the doctrine under these provisions and those to be subject to the provisions applicable to impossibility has raised perhaps the most difficult issue after the reform of the BGB. Cases of personal and practical impossibility to which the doctrine applied prior to the reform, are now said to be subject to the law of impossibility in Articles 275 II and III BGB.[324] This has essentially brought the distinction between change of circumstances and impossibility to stand on a much technical and finely made line. Thus, an attempt will be made to take a closer look at this difficult issue in the second sub-section, before winding up the discussion on the German law by taking a look at the major effects or remedies attached to the current application of the doctrine.

3.3.3.1. Situations in which the Doctrine May be Called into Application

As noted above, Article 313 (1 & 2) of the BGB set forth cases that may be covered under application of the doctrine. Accordingly, disturbance of transactions may be deemed to exist:

> *(1) If the circumstances which have become the foundation of the contract have seriously altered after the conclusion of the contract and if the parties would not have concluded the contract, or would have concluded it with a different content if they had foreseen this alteration, then adaptation of the contract can be demanded in so far as adherence to the unaltered contract cannot be expected of one party taking into consideration all the circumstances of the individual case and in particular the contractual or statutory division of risk.*

[324] See, R Zimmerman, supra note 296, pp. 48-50.

(2) It is equivalent to an alteration of the circumstances if essential preconceptions which have become the foundation of the contract turn out to be wrong.

Article 313 (1) of the BGB establishes an objective standard for the purpose of determining the presence of change of circumstances warranting application of the doctrine. Under the second Sub Article of the provision, a subjective evaluation is to be applied for the same purpose. Thus, under this later provision, initial absence or subjective mistaken assumption of the parties relating to the motivation or circumstances reasonably forming the basis of the contract may trigger application of the doctrine. None the less, it should be emphasised that the distinction created between objective and subjective standards merely serves to achieve a conceptual ordering between the situations covered in the two sub-articles and does not produce difference as regard to their legal outcomes.

Therefore, it should be emphasised that the difference of Article 313 Sub-articles 1 and 2 of the BGB should not be performed by focusing on objectivity or subjectivity of the impediment created against performance of the contract, the focus should rather be on the time of the occurrence of such impediment. If the impediment was created subsequent to formation of the contract, the first sub-article would be applicable to determine the matter. [325] On the other hand, if the obstacle to performance of the contract was present at the time of conclusion of the contract but the parties were unaware of this fact, the second sub-article would normally apply to judge the situation. This second sub-article gives the impression that situations that many legal systems categorise as cases of mistake and treat under the rules relating to formation of contracts are to be addressed by the doctrine of change of circumstances in German Law. But such impression is not entirely true and should be cautiously approached. This is because Article 119 of the BGB provides that a contract may be invalidated on the ground of a mistake relating to its formation.[326] This provision is said to envisage cases of mistake affecting only one of the parties and related to the content of the expression of will. Article 313 Sub-article 2 of the BGB, on the other hand, applies to cases of mutual mistake, where both contracting parties had shared a misrepresented understanding of essential circumstances relating to their contract upon its conclusion. [327]

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[325] Rösler, supra note 313, p. 489.
[326] .See, Markesinis, Unberath, & Johnston, supra note 292, pp.346-348.
[327] See Rosler, supra note 313, p. 490.

The apparent broader construction given to the doctrine that could be unmistakably gathered at first impression from reading the above two sub-articles, however, should not conceal the still subsidiary nature of its application. The last phrases contained in the first Sub-article, indicates that the doctrine will only step in if the risks arising from the change of circumstances have not been already allocated by the contract or any other provisions of the law. Thus, generally speaking, application of the doctrine may be triggered after the exhaustion of all other means of legal protection; only where proper allocation of the risk from the changed circumstances could not be determined based on interpretation of the terms of the contract or the norms of the law applicable to mistake, impossibility and non-performance.[328]

3.3.3.2. The Division between Cases of Change of Circumstances and Impossibility

Under the new provision of the BGB, the existence of contract does not require that its object be possible. This new rule is exactly to the contrary of the former provision of the Code that regarded a contract as void when it is impossible to render the performance that has been promised. But the new law seems to adopt a dualistic approach as regards to the legal consequences that impossible obligations may produce. In one respect, the new law provides that specific performance cannot be claimed in respect of a contract involving impossible obligations.[329] Pursuant to Article 275 (1) of the BGB, the right to claim specific performance is excluded, as far as such performance is (factually) impossible.[330] This provision seems to deal with the traditional objective impossibility covering the cases where nobody can perform the contract. Thus, the cases where impediments to performance can be overcome by the debtor, or the cases where performance of the obligation merely becomes more onerous but technically possible, are not covered by this provision. Moreover, the provision does not exclude the creditor's right to terminate the contract and the debtor's liability in damages if the impossibility was due to his fault.

But Article 275 does not exclusively deal with cases of objective impossibility, further rules applicable to cases of "practical" and "personal" impossibility are provided under the other

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[328] Rosler, supra note 313, pp. 490-491.
[329] Thus, the new law has, at least in some respects, maintained the old Roman principle of *impossibilium nulla est obligation that* corresponds to the basic principle of moral philosophy, that 'ought implies can': Zimmerman, supra note 296, pp. 44-45.
[330] Ibid

two remaining Sub-articles of the provision.[331] Accordingly, Article 275 (3) of the BGB further addresses cases of "personal" impossibility to which some writers have referred to as 'moral impossibility'.[332] The provision seems confined to contractual obligations that must be performed in person. It does not, therefore, have a wide application. Moreover, it does not exclude the duty of performance as a matter of law, but merely entitles the debtor to raise the defence of impossibility where performance cannot be reasonably expected of him. [333] The recognition to such defence is said to be crucial in order to solve situations in which performance of contract conflicts with necessities of life to which the debtor had to give priority. Examples provided for these situations include the case of an opera singer who refuses to sing at the performance because her child has been taken seriously ill.[334] Another illustration is the case of a Turkish national who did not appear at work in Germany because he had been required to perform his national service in Turkey and faced the death penalty if he failed to honour his duty towards the State.[335]

Although the situations falling under objective impossibility and the above category may be said to be relatively clear, difficult problems are posed when it comes to determining the precise scope of the situations covered by "practical impossibility" under Article 275 (2) of the BGB. Article 275 (2) grants the debtor a right to refuse to perform as far as such performance is practically impossible.[336] In the face of this provision, it is particularly challenging to identify, whether, and to what extent, relief may be granted to a debtor in cases of economic impossibility on the basis of the rules on change of circumstances-*Störung der Geschäftsgrundlage.* Determining this issue is important because the remedies available to the debtor based on each legal course is essentially different. In cases of impossibility, the German law allows termination of the contractual relationship and restitution. However, if relief is to be granted to the debtor on the basis of the doctrine of change of circumstances, rather than termination of the contract, the primary remedy is adaptation of its terms pursuant to Article 313 (1) of the BGB. Thus, what makes practical impossibility to be governed by Article 275 (2) different from change of circumstances?

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[331] See Zimmerman, supra note 296, pp. 48-50.
[332] Markesinis, Unberath, & Johnston, supra note 292, p. 418.
[333] Ibid.
[334] Ibid.
[335] Ibid.
[336] Zimmerman, supra note 296, pp. 46-47.

There are some demarcations attempted to be introduced between Articles 313 and 275 (2) of the BGB at least at the theoretical level. Pursuant to the distinction made, the decisive difference between the two provisions lies in the fact that the starting point for Article 275 (2) of the BGB is the creditor's interest in obtaining performance, while Article 313 BGB focuses on the debtor's interest in refusing performance. Accordingly, it is suggested that Article 275 (2) is not meant to address the situations where performance is practically difficult to achieve, but rather the situations where it would require a financial effort that cannot reasonably be expected from the debtor.[337] The hypothetical often discussed to explain the distinction between these two situations is a case of a contract of sale regarding a ring which, after the conclusion of the contract, has fallen into a lake.[338] In this case, the assumption is that it would technically be possible to retrieve the ring, but that it would involve an excessive amount of money which would be wholly disproportionate to the value of the ring.[339] Having regard to the content of the contract and the requirement of good faith, performance of this particular contract should not be forced on the debtor as this would impose on the latter to incur an expense that is grossly disproportionate to the creditor's interest in the performance.[340]

From the above, the application of Article 275 (2) seems to require disproportionate difference between the cost of performance and the utility that the creditor derives from acquiring such performance. Thus, by granting the debtor the right of refuse performance, the provision is said to support a macroeconomic goal of avoiding extreme cases of wastage of resources by applying the criterion of reasonability that is based on cost-utility analysis (between the interest of the creditor in getting performance and the cost that is entailed for the debtor in providing such performance).

3.3.3.3. Remedies/ Effects of the Application of the Doctrine

The legal effects of the German doctrine applying to change of circumstances, as already mentioned at the beginning of this section, could be gathered from the first and third paragraphs of Article of 313. The rules contained in these sub-articles do not seem to add anything new to the position that the courts had already tended to recognise in their case law.

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[337] Zimmerman, supra note 296, pp. 46-47; See also, Markesinis, Unberath, & Johnston, supra note 292, pp. 413-414.
[338] Ibid.
[339] Ibid.
[340] Ibid.

Rather than bringing an end to it through declaring termination, the present provision explicitly favours making adaptations to the contracts affected by a change of circumstances to preserve the relationship of the parties. The priority given for maintaining the continuation of the contractual relationship through adaptation of its terms is said to reinforce the reasonable expectations of the parties, by providing a solution that conforms to the basic principle that contracts are made to be performed.[341]

When it comes to the particulars of implementing the judicial adaptation of contract, Article 313 (1) of the BGB generally provides that *"adaptation of the contract may be claimed"* in situations qualifying for application of the doctrine discussed above. But the provision does not clearly make the right to request such adaptation subject to any precondition, and there is nothing clearly stated as to whether a party would be required to renegotiate in good faith before requesting the court to make the adaption of contracts envisaged here.

In cases where adaptation of the contract may be *deemed impossible or cannot be reasonably expected of one party*, Article 313 (3) of the BGB provides a residual protective measure that entitles the affected party to the right of termination.[342] The right to termination provided in this provision may take two different courses depending on the nature of the contractual obligation against which it is to be effective. As a matter of general rule, termination in German law has no retroactive effect in so far as the validity of the contract is concerned: it operates *ex nunc* and releases the parties from the duty to perform remaining obligations under the contract.[343] Such release perhaps may be considered sufficient where none of the parties has started committing to performance of the contract before the time at which its termination is declared.

In many cases, termination is declared after the parties have already incurred certain expenses or exchanged something in pursuance of its performance. In such cases, a fair restitution may be required between the parties in order to make sure that abortion of the relationship does not leave its entire harm or unjust benefits to one of them. This is said to be achieved in German law by actually reversing the contractual obligations and transforming the contract into a 'relationship of obligation for restitution' or *Rückgewährschuldverhältnis*.[344] Thus,

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[341] Rosler, supra note 313, pp. 489-490.
[342] Id, p. 490.
[343] Ibid.
[344] Markesinis, Unberath, & Johnston, supra note 292, pp. 432-433.

after termination of the contract the parties may refuse any further performance and claim back any performance that might have been already rendered based on the rules of restitution laid down in Articles 346 *et seq.*[345] The restitutionary effect of termination suffers one major exception regarding so-called 'continuing contracts', i.e., contracts which are not fulfilled by single acts of performance on each side, but require continuing acts of performance over a period of time.[346] Examples of such contracts include, leases (*Miete*), usufructuary leases (*Pacht*), contracts of partnership (*Gesellschaft*). In these types of obligations, the right to terminate the contract takes effect with only prospective or future consequences pursuant to Article 314 of the BGB.[347]

3.4. The French Law

3.4.1. Introduction

A groundbreaking and radical legal reform has recently been implemented in French law of obligations. The reform has brought considerable changes to the French Civil Code that had been in place for over two hundred years starting from its enactment in 1804 during the Napoleonic era. The reform was realised through the enactment of Ordinance Nr. 2016-133 that came into effect on 1st October 2016.[348] This new law has addressed various areas of contract law that were not previously specifically addressed. It has also rearranged the structure of the French Civil Code to bring more logical consistency and flaw between its provisions.[349]

Some of the areas covered under the reforms introduced by the new law merely involved the codification of already existing legal developments in French case law.[350] In other areas like change of circumstances, which is the particular interest of this paper, generally new and innovative provisions that brought development of the law to an entirely new stage have been incorporated.[351] Under this section, we will first review the position of the law under the old

[345] Rösler, supra note 313, p. 490.
[346] Ibid.
[347] Ibid; See also Markesinis, Unberath, & Johnston, supra note 292, pp. 436-437.
[348] S Rowan, "The New French Law of Contract," International and Comparative Law Quarterly (2017, British Institute of International and Comparative Law), available in LSE Research Online at : http://eprints.lse.ac.uk/75815/, p. 1.
[349] See Id, p. 6-7.
[350] Id, p. 6.
[351] Ibid.

provisions of the French Civil Code before embarking on the discussion pertaining to the new approach introduced by the reform to deal with the problem of change of circumstances.

3.4.2. Treatment of Change of Circumstances in French Law Prior to the Recent Reform

The French Civil Code of 1804 incorporated a very strict and nearly absolute principle of *pacta sunt servanda.* This stance of the Code could not be of a matter much surprise, since it conformed to the liberal economic and legal philosophies that generally prevailed at the time of its enactment.[352] Thus, Article 1134 of the French Civil Code has expressly reaffirmed the primacy of the principle of binding force by stating that *"agreements lawfully entered into take the place of the law for those who have made them".* This position had been further rooted through the historical decisions rendered by the French Supreme Court in the much discussed cases such as "*Canal de Craponne*".[353]

The French law has promoted this very strict stance towards the binding nature of contracts until certain compromises began to appear following the two world wars and intensification of the search for contractual justice in later years. To address the extraordinary hardships created in the performance of long-term contracts due to the economic conditions created by the First World War, the French administrative courts initiated the development of the doctrine of *imprévision* [354] The doctrine introduced an important exception to *pacta sunt servanda* on the ground of change of circumstances not amounting to the traditional defence of impossibility or *force majeure.* The exception introduced under the doctrine, however, is more or less limited to public law contracts. The dual treatment of the problem of change of circumstances in public law and private law contracts characterised the position of French law prior to the introduction of the recent reform. The presence of a more visible and direct public interest has been used as the main factor to create such division between the two

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[352] See, D. Philippe, "France and Belgium," In A.G. Castermans, K.J.O. Jansen, M.W. Knigge, P. Memelink & J.H. Nieuwenhuis (eds.), Foreseen and Unforeseen Circumstances, Deventer – Kluwer – 2012), P. 157.

[353] In this particular case, a contract for provision of water from the Craponne canal was concluded in 1567 and by 1873 the contractual remuneration paid by the receivers amounted to no more than a token amount, wholly disproportionate to counter-performance. The court of appeal in Aix, after the heirs of de Craponne family sued and asked for adaptation, allowed for the contractual amount to be adjusted in accordance with contemporary reality, openly proclaiming that this was recognized in law. But the decision was quashed in 1976 by the *Cour de Cassation* stating: *'[...] under no circumstances is it for the courts, however fair their decision may appear to them to be, to take into account the time and the circumstances in order to substitute new terms for those which have been freely accepted by the contracting partie:* See I Kokorin, supra note 311, p 73.

[354] See, Litvinoff, supra note 39, pp.15-17.

classes of contracts.[355] But this argument does not seem tenable, since it is not acceptable to treat private interests so differently, as many of them actually accrue together to form a public or general interest.[356]

However, the above is not to imply that the courts did not at all attempt to address the problem of change of circumstances in relation to private contracts. In fact, it is possible to trace the attempts made by the courts to expand various traditional theories of the law to address the problem from decisions they rendered prior to the reform. Thus, before focusing on the recently incorporated doctrine of change of circumstances, it appears important to give some consideration to the basic tenet of the doctrine of *imprévision* and other theories that the courts attempted to extend to the problem.

3.4.2.1. The Doctrine of *Imprévision*

The doctrine of *imprévision* deals with cases in which unforeseen change of circumstances that occur after conclusion of a contract make its performance extremely difficult or costly, but not absolutely impossible. The doctrine was not recognized in the 1804 French Civil Code. The primacy of the principle of binding force clearly figures out in the core provision of Article 1134 and further elaborative rules found in provisions like Article 1793 of the Code. Thus, other than the Roman law based defence of *force majeure (Art 1147 & 1148)* that applied to cases of absolute impossibility of performance, the former French Civil Code had left little or no room for judicial intervention in contractual relations on the basis of change of circumstances or the doctrine of *imprévision*.[357]

However, temporary and specific legislations that departed from the traditional adherence to the principle of *pacta sunt servanda* and were meant to address the effects of radical economic changes on performance of long-term contracts have appeared in France following the World War I and II.[358] The most notable example of such legislations is the 'Loi Faillot' that was enacted in 1918 and provided clear recognition to the concept of change of circumstances in relation to successive or postponed performance contracts concluded before

[355] Zivkovic, supra note 21, pp. 4-5.
[356] Id, p. 5.
[357] Litvinoff, supra note 39, p.13.
[358] Philippe, supra note 352, p. 158.

1914.[359] The act allowed the termination (but not the revision) of contracts concluded before 1914 if one of the parties had been the victim of a reasonable assumption when concluding the contracts.[360]

The resulting effects of the two world wars were not only felt by the French legislature and did not culminate only by forcing to respond through the enactment of such temporary legislations. They have further induced a general search for a theory of dealing with the problem of change of circumstances both among the French academics and judicial organs. In judicial arena, the decision rendered by the *Conseil d'Etat* (the highest French administrative court) in 1916 expressly recognised and brought the rebirth of the theory of *imprévision or* change of circumstances in the French legal doctrine.[361]

3.4.2.2. *Force Majeure*

The concept of *force majeure* generally applies to cases of impossibility and French courts are said to be generally reluctant to extend the concept to cases of change of circumstances. However, it is possible to note at the beginning that the concept of *force majeure* in French law presupposes the debtor's failure to render performance of his contractual obligations. In that sense, it is important to define the nature of the obligation that the debtor was bound to perform in applying the concept. The way in which the doctrine of *force majeure* is applied depends on how the effects of an obligation are defined.[362] The French law distinguishes between obligations of means and obligations to procure. If the contractual obligation qualifies as an obligation of means, the debtor is only liable if he is proved to be at fault, whereas with regard to obligations to procure, the debtor bears the burden of proof that he was not at fault.[363] This seems to indicate that the legal importance of creating distinction

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[359] Philippe, supra note 352, see at foot note 8.
[360] Ibid.
[361] Id, p.159: In *Compagnie Gindrale d'Eclairage de Bordeaux v. Ville de Bordeaux,* a private gas supplier had contracted to make fixed rate and long-term deliveries to the city of Bordeaux. Due to eighty percent devaluation in the franc and a drastic increase in the price of coal, the supplier thought an increase of the price rate fixed in the contract and the claim was denied by the department authorities. When the case was brought before the *Conseil d'Etat* on appeal, the court recognised for the first time judicial revision of contract terms based on the theory of *imprévision.*
[362] Id, p. 163: In one case, the lessor was released from his obligation to repair because the leased property could not be retained without excessive expenses. Although it did not make the performance of the contract impossible but merely more costly, it came close to a fortuitous loss. This was based on the definition of the content of the lessor's obligation. The obligation to repair was held not to extend to repairs caused by unforeseeable circumstances, which led to substantial expenses.
[363] Ibid.

between obligation of means and result in French law is merely for the purpose of determining the party that bears the burden of proof.

It is also possible to find some very rare cases in which the concept has been assigned a wide interpretation so that it can be extended to cases of change of circumstances. One well known case in which this has been accomplished is *Dispot Merlin v. Robillard* in which the concept of *force majeure* was employed to address a situation involving frustration of purpose.[364] A contract between the parties regulated an express service by road between Rouen and Paris. When a rail connection was established between these two cities two years later, and with unexpected speed, the judge applied the concept of *force majeure* to allow termination of the contract.

3.4.2.3. The Theory of *Causa*

The presence of "cause" was set out in article 1108 of the 1804 Code as one of the requirements that had to be fulfilled for an agreement to be valid. The theory of cause was said to have had two different aspects: subjective and objective aspects.[365] 'Objective cause' was the abstract goal of the contract, which was the same for similar category of contract.[366] 'Subjective cause' on the other hand related to the subjective reasons why the contracting parties entered into the contract.[367] This differed for each contract: parties enter into contracts for a multitude of reasons. Thus, French courts have managed to temper the originally stringent approach to impossibility on the basis of the theory of cause. In one case, a tract of land had been leased for hunting purposes, but the authorities forbade hunting in that area. [368] The court held that the lessee was entitled to a reduction of the rent. It is clear in such a case that the prohibition did not make the performance of the contract of lease impossible, since it interfered neither with occupation of the leased premises nor with payment of the rent, but rather destroyed the expectation of one of the parties.

Still in another case, a French court reached an even more interesting conclusion. Plaintiff was a tailor who, under a long-term contract, had been employed for the purpose of making

[364] Philippe, supra note 352, p.163.
[365] See J Rochfeld, "A Future for *la cause*? Observations of a French Jurist," In J Cartwright, S Vogenaeure & S Wittaker (eds) Reforming the French Law of Obligations: Comparative Reflections on the *Avant- projet de Reforme du droit des obligations et de la prescription* ('the Avant-projet Catala, (2009), pp. 77-84.
[366] Ibid.
[367] Ibid.
[368] See Litvinoff, supra note 39, p. 14.

fine clothes for defendant's establishment. [369] World War I, however, caused a dispersion of most of defendant's customers thereby making plaintiff's services superfluous. Though it is clear that performance was still physically and legally possible under the traditional approach, the *tribunal de commerce* declared the contract dissolved. It is clear that the underlying reason for the court's reaction was the fact that unpredictable circumstances prevented the parties from attaining the purpose for which the contract was entered.

However, the drafters of the new Revised French Civil Code asserted that the notion of cause had always been controversial and difficult to precisely grasp its scope of application.[370] The main reason that 'cause' was problematic was that it came to be invoked broadly by French courts to interfere with contracts. It was feared to erode certainty of transactions as courts were said to employ the theory as a basis for rebalancing contracts that were perceived to contain unfair terms. French courts were also known to use 'cause' to annul contracts which had become bad bargains. In one well-known case, the *Cour de cassation* annulled a contract in which, although performance on both sides was still possible, it became apparent that the promisee's commercial rationale for entering into the contract was unrealistic and his commercial aspirations for the contract were unachievable.[371] Thus, the new codification no longer makes reference to 'cause' and the theory has been excluded.[372]

3.4.2.4. Interpretation

According to Article 1156 of the French Civil Code, in case of doubt, judges will interpret the will of the parties in order to determine the effects of a contract. Frequently, parties have not thought about various situations that give rise to a dispute and have not expressly regulated this matter.[373] The courts accordingly assigned a role to the *rebus sic stantibus* clause in interpreting the contract and fill its gaps on the basis of the parties' presumed wills.[374] The parties only accept that they are bound by the contract on the basis of an implied term that the contract will not be binding if unforeseeable circumstances occur, which render the performance of the contract extremely burdensome for one of the parties.[375] However, some

[369] Litvinoff, supra note 39, p. 14.
[370] See, S Rowan, supra note 348, pp. 9-11.
[371] Id, p. 10.
[372] Id, p. 9.
[373] Philippe, supra note 352, p. 166.
[374] Ibid.
[375] Id, pp. 166-167.

authors have denounced this approach asserting that it would be hypocritical for the courts to attempt to determine a will that does not exist, and further argued that a more honest approach would be to construe a solution based on good faith or usage.

3.4.2.5. Good Faith and Equity

Article 1134 (3) of the French Civil Code stipulates that contracts must be performed in good faith. The hierarchical relationship existing between the principle of good faith and the principle of *pacta sunt servanda* that has been laid down in the first Sub-article of this provision has been a matter of considerable debates in French law. Nonetheless, it is admitted that, in principle, good faith cannot have a corrective effect. In one of its later decisions, the *Cour de Cassation* refused to intervene concerning the content of contractual obligations.[376] The court recognised that the principle of good may be relevant to impose the obligation to renegotiate in case the balance of the contract was fundamentally upset due to unforeseen supervening change of circumstances. In case a party all in all refused to engage in such renegotiation or acted in bad faith in conducting the process, the court noted that, the principle of good faith did not empower the court to adjust the contract, but only to impose certain sanctions to punish the behaviour of that party.[377]

Thus, the principle of good faith seems to have been exclusively limited to policing behaviour of the parties in the performance of the obligations already specified according to the terms of their contracts, without empowering the judge to take certain corrective measures through adjusting such terms. But the role of good faith to play corrective function by completing the terms of a contract seems to have been recognised through its interpretation and application in conjunction with the requirements of equity found in Article 1135 of the Civil Code.[378] Thus, in case of unforeseen change of circumstances, the courts have resorted to good faith and equity considerations in order to complete the contract and provide a legal regime for the new circumstances.

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[376] Philippe, supra note 352, p. 168.
[377] Ibid.
[378] Id, pp. 168-169.

3.4.3. Recognition of the Doctrine of Change of Circumstances in Private Law Contract

3.4.3.1. Genesis of the Reform

Different views were promoted during the reform of the French Civil Code with regard to the approach that the new law should adopt in addressing the issue of change of circumstances. Some have generally advocated for the law to provide more competence to the judge simply by elevating and clearly restating the importance of the principle of good faith found in Article 1134 (3) of the former Code. It seems this movements wanted to limit recognition of the doctrine to the positions found in the decisions of the *Cour de Cassation*.[379] That position merely imposed on the parties obligations of means to conduct renegotiation in good faith, if the renegotiation fails to produce result despite compliance in good faith, entails no further consequences such as judicial adaptation of the contract.

The three major reform projects, which preceded the enactment of the new Civil Code, proposed some provisions that would expressly overrule the decision in *Canal de Craponne.* The first of these projects, which is popularly referred to as the *avant-projet Catala,* allowed the courts to order renegotiation of a contract in case of supervening circumstances, failure of which would give both parties a right to terminate the contract.[380] Thus, it could be noticed that this proposal did not leave any possibility of court adaptation of the contract. The second proposal, which is commonly referred as *projet Terré*, imperatively puts the obligation of parties to renegotiate in cases of unforeseen change of circumstances, but if no solution is reached in reasonable time, a judge is allowed to adapt or end the contract.[381] The last French Ministry of Justice 2008 project also gives the party a right to demand renegotiation (without any court involvement in that process) while sanctioning that the same party must continue with its performance during these renegotiations. [382] Should renegotiations be refused or fail, the judge may adapt the contract *if the parties so agree* or put an end to it on conditions he sees fit. Thus, the court's power to adapt the terms of the contract was made subject to the agreement of both parties; otherwise, the court cannot exercise such power.[383]

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[379] Zivkovic, supra note 21, p.5.
[380] Id, p. 6.
[381] Ibid.
[382] Ibid.
[383] Ibid.

3.4.3.2. The New Doctrine of Change of Circumstances: Application and Remedies

After providing for some general principles that lay down the overall conceptual and policy roadmap of the law, the new code has incorporated the specific provisions that address the more particular problems of the law.[384] In this respect, as noted earlier, the legislature of the new French Civil Code has opted to expressly regulate the problem of change of circumstances in Article 1195 of the Code. However, none of the above observed proposals seems to be fully indorsed, as it evidently appears from the text of the current Article 1195.[385]

The clear incorporation of the doctrine in this new provision has been acclaimed by some commentators, as it is said to serve legal certainty by avoiding the former judicial speculations made to address the problem of change of circumstances on the bases of different theories. It has also made the position of the law more clear and brought an end to the debates that surrounded the issue. Furthermore, it has also been argued that such clear inclusion of the doctrine would help to make the law more accessible to the common user, since judge-made laws are said to be difficult to access even if they are free from controversies and clearly stated. Despite the wide acknowledgement given to the incorporation of the doctrine mainly based on these already mentioned reasons, some remaining ambiguities may still be indicated in relation to the basic elements of the doctrine as provided in Article 1195. Now let us try to closely examine the essential elements of this provision to appreciate the preconditions for the application of the doctrine, and the remedies that may be granted based on such application.

The first Sub-article of Article 1195 provides: *"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*

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[384] The new Code opens with general provisions that expressly stipulate three core principles that provide the general guiding rules in interpreting its whole provisions. These principles are: Freedom of Contract, Binding Force of contracts, and good faith.

[385] It stipulates that: *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. 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: This text is taken from:* The new provisions of the *Code civil* created by *Ordonnance* n° 2016-131 of 10 February 2016 translated into English by J Cartwright & B Fauvarque-Cosson.

other contracting party to renegotiate the contract..." This provision sets forth three conditions that should be satisfied in order to invoke the doctrine of change of circumstances:

First, there must have been unforeseen change of circumstances. While this test makes sense, it has been pointed out that the requirement is not sufficiently clear as to the degree of extraordinariness or unexpectedness that the change should exhibit in order to successfully invoke the doctrine.[386] For the purpose of comparison, the doctrine of *imprévision* that has been accepted in the field of administrative contract law required a *disruption of circumstances* and this seems much more restrictive than a mere *change* of circumstances.[387] The provision is also said to be devoid of reasonable clues as to what types of changes would merit application of the doctrine. Questions still linger as to whether a party could invoke an *economic*, *financial*, *physical*, *legal,* or even *technological* change to demand application of the doctrine.[388]

The second element of the doctrine provided in the provision is that the unforeseen change of circumstances must render a party's obligations under the contract *excessively onerous* to perform. With respect to this element, precisely ascertaining the situations in which performance may be said to have become '*excessively* onerous' would become the real challenge. The interpretations provided by the courts for the legal control of penalty clauses has been suggested as a possible lead to be exploited for the purpose of determining the excessiveness of the burden caused on performance of the contract.[389] According to the French legal practice courts revise penalty clauses when the clause stipulates a penalty four or five times the amount of the prejudice actually suffered. [390] Thus, this is to say the application of the doctrine should be limited to cases where the burden caused on performance goes four or five times the amount of the original obligation in excess.[391]

The last element that figures out in the provision is the essential requirement that the party invoking application of the doctrine must not have accepted the risk of the change of

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[386] B Fauvarque, "Towards an Important Reform of the French Civil Code," Montesquieu Law Review, Issue No. 3(2015), p. 9.
[387] A Downe, "The Reform of French Contract Law: a Critical Overview," Revista da Faculdade de Direito – UFPR, Curitiba, vol. 61, n. 1, jan./abr. 2016, p. 56.
[388] Ibid.
[389] Ibid.
[390] Ibid.
[391] Ibid.

circumstances.[392] This requirement seems to exclude cases where a party has either expressly or impliedly undertaken the risk of the unforeseen change of circumstances.

If the above three conditions or elements are fulfilled, the affected party can ask the other party to renegotiate the terms of the contract. This effect of the doctrine is said to involve nothing new, as it has already been accepted in French case law. Article 1195, second Sub-article, sets out the consequence that would come if the unaffected party refuses the request to renegotiate or if the renegotiation fails to settle the matter. In that case, *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.* According to this Second Sub-article, therefore, the parties can also turn to the judge and ask him to *adapt* the terms of the contract to the changed circumstances. But it is good to emphasis here that the provision requires "common agreement" of the parties before adaptation by the court can be realised. [393]

Where both of the above mentioned measures– party renegotiating or seizing the judge (to adapt terms of the contract through the mutual agreement of the parties) – have failed or refused then either of the parties can ask the court to terminate the contract as from the date and subject to conditions it shall determine. Thus, termination may be requested by either of the parties- and no need of both parties' consent (as in the case of adaptation) for the court to declare termination of the contract. Thus the usual remedy under the new doctrine (as in the case of the doctrine of *imprévision)* seems to be the termination of the contract, judicial modification being only possible where both parties agree on it.[394]

The most important aspect of the provision in relation to the above discussed remedies arising from the doctrine is found in the prior opportunity provided to the parties to decide on the fate of their contract. They may agree to its termination based on their own terms or may further renegotiate and adapt its terms of their own accord, before the court is allowed to step in. Once the court is allowed to step in, the text of the provision does not provide indications as to the criteria to be used by the judges to revise contracts.

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[392] Downe, supra note 387.
[393] Fauvarque, supra note 386, p. 9.
[394] Id, p. 10.

In general, the forgoing discussions disclose that the reform has further enlarged the power that courts hold in deciding the fate of private contracts. Apart from extending the prominence of the principle of good faith, the remedies that the courts are authorised to provide on the basis of the doctrine discussed above have also entrenched the power of the judiciary. On the whole, the expansion of judicial power through admission of the doctrine of change of circumstances does seem to promote fairness and commutative justice that are important tenets of the modern contract law. However, it has also raised fears from different corners that broad discretions the present provision of the French Civil Code has left to the judges could also produce some backfiring effects with regard to insuring legal certainty. The imprecise nature of the criteria provided for application of the doctrine, and the fact that they have not yet been firmly defined by case law, reduces the ability of contracting parties to predict the situations in which the doctrine could potentially become applicable to their contracts. But it may be still hoped that the present uncertainties would be cleared in the near future, as the French courts develop and refine application of the doctrine by using the experiences of courts in foreign jurisdictions, particularly the rich experience available among their German counterparts.

3.5. The Ethiopian Law

3.5.1. Introduction

The rules applicable to contracts in general are set forth in Book IV, Title XII of the Ethiopian Civil Code.[395] Special rules that will preside over these general rules are further provided with respect to the various types of nominate contracts particularly regulated in the special parts of the Civil Code and in the Commercial Code.[396] The objective of the discussion in this section is to examine the overall approach of the law towards the issue of change of circumstances by primarily relying on the provisions found in the general part of the Civil Code, since separate and closer evaluation of the special rules relating to each of the nominate contracts cannot reasonably be attempted here. This, however, is without excluding the possibility of making occasional references to specific rules relating to particular types of contracts whenever absolutely necessitated to more conveniently state the position of the law.

[395]Civil Code of the Empire of Ethiopia, Negarit Gazeta, Proclamation No. 165 of 1960, 19th year No. 2, (here after "the Ethiopian Civil Code").
[396] Commercial Code of the Empire of Ethiopia of 1960, Negaret Gazeta, Extraordinary Issue 19th year No.3 (here after "the Ethiopian Commercial Code").

What is more, due to the exceptional approach adopted with regard to the treatment of the problem of change of circumstances, the special provisions of the Civil Code regulating administrative contracts also deserve some separate treatment.

As its general policy orientation, the Ethiopian Civil Code promotes a strict principle of *pacta sunt servanda*. Except for some scattered and very specific rules that may be of relevance, the Civil Code generally does not incorporate a general theory or rule that expressly limits the principle of binding force of contracts on the ground of change of circumstances. However, as it shall be further highlighted below, important derogations have been introduced to this most celebrated principle of the Code in the area of administrative contracts through incorporation of special theories that are generally inapplicable to private law contracts. Particularly speaking, the French theory of *imprévision* and the doctrine of *causa* have found their way into the special part of the Ethiopian Civil Code regulating administrative contracts. Thus, these special theories, which have exceptional importance for issue relating to change of circumstances, will be accorded with some separate attention in the last sub-section.

3.5.2. Freedom of Contract and the Principle of Binding Force

The prominence of the principles of freedom of contracts in the Ethiopian Civil Code could be observed from the very definition of "contract" provided in Article 1675 of the Ethiopian Civil Code. This provision puts that: "*a contract is an agreement whereby two or more persons as between themselves, create, vary or extinguish an obligation of a proprietary nature*". This essentially indicates the primacy of the consent of the parties in order to create, vary or terminate contractual obligations. The Civil Code further illustrates the basic tenet of the freedom of contracts in Article 1711 by providing affirmation to the private parties' freedom to define the nature and contents of their undertakings subject to the limitations that may be prescribed by mandatory provisions of the law in the interest of public policy. Article 1731 of the Code additionally reinforces this freedom through explicit confirmation for the obligatory nature of lawful contractual terms freely agreed upon as between private parties.[397] Thus, the Civil Code recognises freedom of contracts and *pacta sunt servanda* (the principle of binding force) as the core principles of the law.

[397] Article 1731 (1) of the Ethiopian Civil Code stipulates:*"[t]he provisions of a contract lawfully formed shall be binding on the parties as though they were law."* According to the Drafter of the Ethiopian Civil Code, the principle contained in the provision "*reaffirms solemnly, in the legal plane, that a man's word is his bond*" This statement of the drafter is further suggestive of the fact that the drafting of the provision was mainly inspired by the classical "will" theories of contracts: R David, Contracts in Ethiopia (1973), p. 36.

The Code also contains provisions that expressly recognise the role of the principle of good faith in relation to various specific aspects of contracts.[398] However, the role of good faith to act as a general counterbalancing principle to the above mentioned principles of *pacta sunt servanda* and freedom of contracts does not seem well established. This being generally the case, now let us evaluate some relevant provisions of the Code, particularly those relating to variation, termination, and non-performance, to see if there are certain specific limitations imposed by the law on the application of these core principles in order to give regard to the problem of change of circumstances.

3.5.3. Relevance of Certain Exceptional Cases Relating to Variation[399] and Termination[400]

The provisions of the Civil Code relating to variation and termination of contracts give further specific expressions to the above core principles of freedom of contracts and *pacta sunt servanda*. The provisions embody the basic theme of the classical will theories of contracts that try to explain contracts simply as the expressions of private wills, the modifications or terminations of which should also proceed from the same expressions. In this sense, the Ethiopian law seems to implicitly assume that the parties are always in perfect positions to regulate the risk of supervening change of circumstances based on their freedom of contracts to provide contractual terms applicable to that effect. This being the assumption, the law finds no obvious and sufficient reasons to empower the courts to intervene in the enforcement of contracts on the ground of change of circumstances that may render their performance excessively onerous or grossly unfair to one party. Since the assumption is that the parties are perfectly in a position to regulate the effects of such risks whenever they wish

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[398] Particularly, the role of good faith (and thus considerations of fairness and justice) could be observed in the provisions of the Ethiopian Civil Code -Articles 1713 (in determining the object of the contract) , 1732 (in relation to interpretation), and 1785 (in relation to cancellation of the contract as a consequence of non-performance)

[399] The concept of variation in Ethiopian law refers to modifications made to the terms of a contract without changing its object or nature. Thus, it does not concern cases where a new object is replaced for the original one (e.g. cases where the original object of a sale contract that was delivery of a horse is later changed to delivery of an ox) or cases involving changes in the nature of the contract (e.g. cases where a contract of sale is changed into contract of donation or pledge). This later cases bring an end to the original contract and brings the birth of a new contractual obligation, and are addressed by the rules of the Civil Code applicable to novation contracts.

[400] The concept of termination broadly refers to the situation in which the parties are released from the obligations remaining to be performed under their contract without any retrospective effects. Termination principally results from the agreement of the parties. Thus termination is to be distinguished from the concept of "cancellation", since this latter concept is applicable to cases of non-performance and may also generally involve restitution (retrospective effects).

entitle the party contracting with the administration to request its restoration by the court of law.[404]

When it comes to termination, the possibility of its unilateral implementation has been anticipated by the law particularly in relation to contracts of indefinite duration.[405] This exception emanates from the general legal principle recognised across many jurisdictions, which holds that contracts are not supposed to give rise to obligations of eternal durations. Thus contractual obligations made for an undefined period may be terminated by both parties upon providing reasonable notice, where such period of notice is not customarily or legally provided. In this connection, the Federal Supreme Court Cassation division has confirmed that a lease contract concluded for indefinite period may be terminated by either of the contracting parties upon giving a reasonable notice period pursuant to Article 2966 (1) of the Civil Code.[406] It is important to stress at this point that the operation of this exception does not extend to long-term obligations with periods of performance already fixed in the contracts. This implies that such contracts should be performed according to their terms until the expiry of the period fixed for their performance notwithstanding that radical changes in the circumstances that prevailed upon their conclusion have caused excessive imbalance to the original equilibrium of the parties' obligations.

Lastly, some digressions from the strict principle of *pacta sunt servanda* in favour of equitable construction of the debtor's obligations could be found in relation to gratuitous contracts.[407] Accordingly, gratuitous contracts may be terminated by the courts for good

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[404] Articles 3190-3193 of the Civil Code enshrine the French theory of Act of Government (or *theorie de Fait du Prince*) this theory is concerned with the situations in which the economic basis of a contract concluded between a private party and government department is upset by the act of the latter. Accordingly, unless the governmental act constitutes a generally applicable public policy decision emanating from some general legislation affecting all citizens equally, the contractor may be entitled to a monetary indemnity or to increase the charge to the consumer. Thus, the cross-reference made by Article 1767 of the Civil Code seems to extend the application of this theory to contracts concluded with government organs regardless of the fact that such contracts may be non-administrative in nature: See G Krezeczunowich, supra note 1, pp. 124-125.

[405] Note that other remaining cases for judicial variation will be addressed latter on under the sub-sections provided below dealing with excuses relating to non-performance of contracts: See the discussions on the effects of force majeure *infra* 3.5.6.5.

[406] Government Housing Agency v. Tadele Abebe, (Federal Supreme Court Cassation Division, Jan 20, 2000 E.C.), Federal Supreme Court Cassation Division Decisions, Vol.7, pp. 70-73.

[407] The Ethiopian law does not incorporate consideration as a validity requirement for the formation of contracts. Thus gratuitous contracts are recognised by the law with certain special rules provided with respect to their interpretation, cancellation, and termination. With regard to interpretation, the law provides that *'the obligations assumed by a party who derives no advantage from the contract shall be construed more narrowly.'* What is more, as it will be discussed below, the gratuitous debtor is liable to pay damages in cases of non-performance only if such non-performance was due to his grave fault.

cause at the request of the party who gratuitously undertook the performance of an obligation. Thus pursuant to Article 1824 of the Code,"' *a person obligated by a contract for the exclusive advantage of the other party may require the judge to be freed from such contract for good cause".* Here, it seems the law intends to protect the non-expressed hopes or expectations of the gratuitous party against its unfair frustration due to capricious conducts of the party who exclusively drives benefits from the contract.

In this connection, some of the decisions passed by the Federal Supreme Court Cassation Division in cases involving donation, provide some particularly interesting insights into the special place allowed for the working of equitable considerations in deciding the enforcement of gratuitous contracts. In one case[408], an elderly lady voluntarily relinquished her rural farm land holding of about 1.64 hectares in favour of a young fellow to whom she had no blood relation. Because she could not exploit the farm land by herself due to her old age, she transferred the farm land to the young fellow based on the intrinsic hope of getting material supports from him from the yields he makes through exploitation of the land. But this intrinsic expectation did not find its expression in the contract made concerning transfer of the land, and it was merely based on an informal oral promise allegedly given by the young man in their local church yard. When the young man changed his initial friendly gestures and backed on his alleged oral promises later on, the old lady brought action reclaiming her holding, asserting that she had somehow been tricked into the unscrupulous arrangement.

The trial court decided against the old lady by stating that there were no sufficient and relevant facts to support commission of any fraudulent act by the defendant young fellow to challenge validity of the donation contract by which the farm land was transferred to him. The decision of the trail court was confirmed by the appellate court, and the old lady finally brought her petition before the Federal Supreme Court's Cassation division. The Federal Supreme Court's Cassation division examined the case based on Articles 2458 (1), according to which the court stated that: "the one who benefits from the benevolent act of another and to whom a property had been donated, shall have the duty to provide material support to the donor (to the old lady in this particular case) should the same fell into serious needs later on. The duty to support, according to the court, exists notwithstanding that it had not been

[408] Emahoy W /Gabriel v. Dereje Dessaleng, (Federal Supreme Court Cassation Division, April 14, 2007 E.C.), Federal Supreme Court Cassation Division Decisions, Vol.17, pp. 121-123 (translation belongs to this writer).

specified in the contract. The court observed the petitioner in this particular case (i.e., the old lady) had found herself in a very desperate situation as she could not provide herself due to her old age and there were no other relations to whom she could possibly turn in order to seek support. The court asserted, the young fellow had shown his ungratefulness towards the generous act of the old lady through denial of his support in times of her serious needs. Thus, the court concluded that it would be outrageously contradictory to equity and reasonable conscience to uphold validity of the donation contract and to let the young fellow keep the piece of land transferred to him on the basis of that contract. Accordingly, the court declared cancelation of the contract by further invoking Article 2464 (1) of the Civil Code in supporting its decision.

In another case,[409] subsequent birth of a child to the donor after conclusion of a donation contract was raised as unforeseen supervening change of circumstances that constituted a valid ground to challenge enforcement the contract. But the court rejected the request made for cancellation of the contract, by invoking Article 2450 of the Civil Code and stating that a donation contract was not to be subject to cancellation *ipso jure* on the ground that the donor had had a child subsequent to its conclusion, unless an indication to the same effect could be inferred from the terms of the contract itself.

The above decisions, and the provisions of the law cited therewith, generally point to the fact that equity and considerations of justice have their stronger grips in relation to deciding the enforceability of gratuitous contracts as opposed to the case of onerous contracts. Thus, subsequent changes in personal relationships of the parties and destitution of the gratuitous performer may have their own bearings on the enforceability of the contracts. But such subsequent changes do not seem to have similar effects on the enforcement of contracts made for considerations. The law generally appears to be very harsh and require strict compliance in this latter case. As it shall be further discussed below, the rules relating to non-performance of contracts similarly appear to exceptionally attenuate the standard for determining the non-performance of gratuitous contracts and consequent liabilities.

[409] Meymuna Hassen et al Vs Haleha Hassen et al (Federal Supreme Court Cassation Division, June 26, 2009 E. C.), Federal Supreme Court Cassation Division, Vol. 20, pp. 207-211.

3.5.4. Non-performance and Impossibility in General

The Ethiopian Civil Code adopts a unified and simplified conception of non-performance. Non-performance of contract covers various situations in which the debtor fails to fully and properly discharge his obligations. It is not used only to refer to the debtor's total and irreversible failure to perform, but extends to cases where the same offers defective, partial, or untimely performance. Thus the provisions of the Code provide forced performance, cancellation and damages, as the three basic remedies of non-performance, with no need for the complex approach that provides remedies classified by the types of breach committed by the debtor.[410]

In Ethiopian law, specific performance is a remedy that can only be provided by the court. The court may order forced performance of the contract where it does not affect the personal liberty of the debtor, and the creditor shows a special interest in getting actual performance of the contract. This appears to indicate that the Ethiopian Civil Code adopts the approach of the common law legal systems, which makes specific performance an exceptional remedy less frequently available as compared to cancellation. This is in contrast to the continental traditions that usually apply forced performance as the principal remedy, save for the cases where it affects the debtor's personal liberty.

The remedy of forced performance cannot also obviously apply to cases where the performance of obligations assumed by the debtor no more remains possible. The Ethiopian law generally recognises two broad types of impossibility: initial and supervening impossibility. Initial impossibility generally comprises cases in which one or both parties assume the performance of obligations that are impossible at the time of conclusion of the contract. These cases are dealt with by the rules of the Civil Code applicable to formation of contracts. The cases of supervening impossibility, in which performance of the obligations becomes prevented after formation of the contract, are nevertheless subject to the rules of non-performance. Accordingly, cancellation is the remedy normally applicable to such cases of impossibility.

As a matter of principle, cancellation as a remedy for non-performance of contracts is to be granted by the court in Ethiopian law. However, the law also provides some specific

[410] For instance, this is generally the case under the German law.

circumstances in which it may be exceptionally declared by the party aggrieved by the non-performance of contracts. Supervening impossibility is one of the circumstances specified by the Civil Code to fall under these exceptional situations. Thus the contract may be unilaterally declared cancelled by the creditor if the debtor's performance of his obligations proves to be impossible after its conclusion. This is particularly true where the debtor's performance of his obligations has become absolutely and totally impossible. Unilateral cancellation also seems possible in cases of partial impossibility or delay of performance obviously affecting the very basis of the contract. The fundamentality of the breach resulting from the partial impossibility or delay of performance will be determined by the court in disputed cases. The court may declare cancellation in such cases by taking into accounts the fundamentality of the breach caused by the delay or partial impossibility of the debtor's performance, the requirements of good faith and relative interests of the parties. Thus, cancellation in these latter cases is generally dependent on the court's determination of fundamentality of the breach and exercise of its discretionary power.

In the above discussed cases, cancellation of the contract is merely grounded on the impossibility of the performance of the debtor's obligations. Cancellation may be implemented irrespective of the causes behind the impossibility- it is still available regardless of the fact that it was not due to the debtor's fault, or was caused by a *force majeure*.[411] Issues relating to the debtor's fault or *force majeure* become central when it comes to determining the consequent liability for the payment of damages. This shows that cancellation of the contract on the ground of impossibility is to be separately viewed from the question relating to the debtor's liability for the damage caused by the non-performance of his obligations.

Thus, in case of cancellation of the contract on the ground of supervening impossibility, the debtor is not to be automatically released from his liability to pay damages or monetary compensations for the economic prejudices caused to the creditor due to the non-performance of his obligations. He often needs to show something more- that the impossibility of his performance was caused by a *force majeure* event. Except in some limited cases in which he may be released by proving absence of his fault, the debtor is generally required to satisfy the stringent definition of *force majeure* provided in the Code to escape liability.[412] These issues,

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[411] See, G Krezeczunowich, supra note 1, p. 153.
[412] See David, supra note 397, p. 68.

relating to the debtor's liability and defences recognised by the law, will be the main focus of the discussions in the following sub-sections.

3.5.5. The Strict Liability Rule and Exceptionality of the Fault Requirement

Article 1791(1) of the Civil Code puts that: "*the party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault*". This provision clearly reveals that the Ethiopian Civil Code adopts the common law principle of strict liability for determining liability for non-performance damages, as opposed to the fault based system of many continental jurisdictions. In explaining why the approach of the continental traditions was not favoured, the drafter of the Code provided the following explanations:

> *The approach of the continental legal systems (such as the German and Swiss Codes) was avoided because of a fear that it would encourage the courts to be lax... A rule of strict liability seemed necessary; in principle, the Code favours the party who does not receive what was promised over the party who cannot do what he has promised to do. In using the stricter approach, the Code has tried to increase the responsibility of the debtor and make it more difficult for him to escape liability when he has not properly performed his obligations....by very narrowly defining the bases for his discharge, which is in conformity with a policy also followed in the common law.*[413](Emphasis added)

The drafter's comments make it clear that the common law principle of strict liability was adopted as a matter of consciously made public policy choice at the time of the codification, in order to narrow down the debtor's escape route from his liability of paying damages in cases of non-performance. However, it is also possible to identify some limited instances in which the law has exceptionally recognised the relevance of the debtor's fault in determining such liability. The first relates to obligations of diligence, where the debtor merely undertakes the obligation to do his best without promising to procure a definite result. Application of this exception may be implied from the nature the debtor's obligation, the terms of the contract, or by special provisions of the law. The second situation in which the concept of fault may be exceptionally called into application is in case the debtor's failure to perform is related to gratuitous contracts.[414] In these exceptional cases, it is worth noting that the debtor's

[413]David, supra note 397, p. 69.

[414] Note that the Ethiopian law does not require consideration (unlike in most common law legal systems) for validity of contracts. Thus pursuant to Article1796 of the Ethiopian Civil Code, a person would be liable only in case of his fault for the non-performance of contractual obligations that he has gratuitously undertaken without deriving reciprocal benefits.

objection against his liability goes to the very roots of the creditor's allegations regarding non-performance of the contract. The debtor is not merely challenging his liability for the payment of damages, but he is asserting that there was no non-performance of the contract for which the court should hold him liable. It should also be stressed that, since the principle established by the law holds him strictly liable for the non-performance of his obligations, the debtor is expected to plead and prove the relevance of these exceptional cases.[415]

Outside the above limited cases, in which the law admits the notion of fault, it is not sufficient for the debtor to prove the fact that the performance of his obligations was made impossible by factors that were not imputable to his own failure. In majority of the cases for which these exceptions are not relevant, the debtor is generally exempted only where he successfully establishes that the performance of his obligations was prevented by *force majeure* events. The cases in which the requirements of the *force majeure* defence provided in the Code could actually be satisfied by the debtor, unfortunately, appear to be practically very rare. This being the case, we will now turn to issues particularly relating to the definition and application of the concept of *force majeure.*

3.5.6. Definition, Application, Effects of the *Force Majeure* Defence under the Civil Code

3.5.6.1. Definition

Article 1792 of the Civil Code defines force *majeure generally* by owing reference to the nature of its cause and the effect it finally produces on performance of the debtor's obligations. The first Sub-article of the provision supplies a positive definition of the concept and states that: *"[F]orce majeure results from an occurrence which the debtor could normally not foresee and which prevents him absolutely from performing his obligations".* Thus pursuant to this provision a supervening event that impedes the debtor's performance qualifies to be a *force majeure* upon satisfying two cumulative elements: a) Firstly, the event could not have "normally" been foreseen by the debtor (an *average* person would not have foreseen it), *and;* b) Secondly, the event must have "absolutely" prevented the debtor from performing his obligations *(the event must have been absolutely* insurmountable that no one in place of the debtor could have overcome it to perform the obligations).[416] The two

[415] G Krezeczunowich, supra note 1, pp. 152-153.
[416] David, supra note 397, p. 68.

requirements enshrined in this provision are cumulative- both the reasonable unforeseeability and absolute insurmountability should be attained to successfully invoke the theory of *force majeure*.[417] This has been further clarified by the negative definition additionally provided in the second Sub-article. Accordingly, nor foreseeable events making performance of the debtor's obligations absolutely impossible, neither unforeseen events that only increase the difficulty and costs involved in the performance of such obligations, without making them absolutely impossible, constitute a force majeure.

The careful and very restrictive definition of *force majeure* in the above provision obviously indicates the utmost care that the Ethiopian law has taken to ensuring certainty of transactions through upholding almost absolute adherence to the principle of binding force of contracts. Further attentions given to insuring certainty of transactions are further manifested in Articles 1793 and 1794 of the Civil Code that produce specific cases in which application of the defence may be upheld or is subject to outright exclusion by virtue of the law. [418]

3.5.6.2. Cases of *Force Majeure*

Article 1793 of the Code supplies illustrations of events which, according to the case, may or may not be treated as cases of force majeure.[419] It is therefore important to note that this provision does not make any change to the law, since it merely aims to supply examples of the occurrences that may be treated as *force majeure* subject to fulfilling the elements of the definition already provided in Article 1792. Depending on the illustrative cases provided in this provision, it is possible to evaluate the applicability of *force majeure* to the typical cases of supervening impossibility in which the debtor may be excused for the performance of his obligations in other legal systems. Accordingly, let us try to closely evaluate the applicability of the defence of *force majeure* in the following typical situations:

Destruction of the subject matter of the contract: Performance may become impossible when the specific thing to be delivered according to the contract is no more in existence or in

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[417] David, supra note 397, p. 68.
[418] According to the statement made by the drafter of the Code: *In order to make it very clear what is meant by force majeure, Article 1792 defines it twice, first in a positive formulation and then in a negative one. The general formula of Article 1792 is supplemented by the two following Articles.* [418]*Article 1793 suggests certain situations that, according to the circumstances, may or may not be cases of force majeure. Article 1794, on the other hand, enumerates various· situations and states that in no case may any of them ever be considered to constitute force majeure:* Id, p. 69.
[419] Ibid.

a condition required for its delivery to the creditor (e.g. the ox to be delivered dies or a cargo to be delivered sinks). The specific thing to be delivered may be subject to total destruction due to: *unforeseeable act of a third party for whom the debtor is not responsible,* or a *natural catastrophe such as earthquake, lightning, or floods*- as respectively specified in Sub-articles (a) & (c) of Article 1793.

But the mere non-existence or destruction of the subject matter is not sufficient to excuse the debtor under the above provisions. The debtor must prove that the occurrences causing destruction to the thing were neither reasonably foreseeable nor possible to be overcome. Thus an act of a third party or the natural catastrophes anticipated in the above provisions may be invoked when these two cumulative requirements are fulfilled. For instance, an act of a third party may constitute a ground of invoking *force majeure* pursuant to the first Sub-Article, in case of irresistible armed robbery of the thing due (which reasonably makes performance absolutely impossible), occurring in a usually safe district(which makes the occurrence of the robbery normally unforeseeable).[420] Likewise, the debtor may invoke the defence of *force majeure* under the latter sub-article, if the natural catastrophes anticipated therein occur in an unlikely area (which generally makes it unforeseeable) causes total destruction of the thing due that could not be moved or carried away in time (which shows that performance was absolutely prevented).[421]

However, the application of the defence of *force majeure* on the ground of destruction of the thing in the above cases will not release a debtor whose obligation consisted in the delivery of unspecified things. The application of *force majeure* in this particular case should also be distinguished from the theory of risk transfer that similarly deals with allocation of risk arising from the loss or deterioration of determined things- things which are specific (a horse) or specified things (things which the parties have particularly specified, for instance, a particular sack of grain).[422] Accordingly, the theory of risk determines, which one of the contracting parties, as between the debtor and the creditor, should bear the loss where unpreventable (*force majeure* events) cause the deterioration or destruction of the thing to be delivered according to the contract.[423]Under the Ethiopian law, in the absence of an otherwise stipulation made by the parties, the principle is that risk shall pass to the creditor upon

[420] See Krezeczunowich, supra note 1, p. 154.
[421] Ibid.
[422] See Id, pp. 115-116.
[423] Ibid.

delivery of the thing. Thus, before the specific thing is delivered to the creditor, the debtor remains its owner and bears the risk of its loss or deterioration by a *force majeure* event as a matter of principle. Exceptionally, if the creditor is in default for not taking delivery of the thing, the risk will be transferred to him despite the fact that he did not receive actual delivery of the thing.

Thus, depending on the rules relating to risk transfer, if the thing to be delivered is subject to total destruction or deterioration before the risk has passed to the creditor, the debtor may lose the price or may receive a reduced price in cases where the contract should not be subject to full cancellation. If a *force majeure* is established to be the cause of the destruction or deterioration preventing delivery of the thing in its initial condition, the debtor will be relieved from his liability to pay damages.[424] From this, it is possible to observe that the concept of *force majeure* applies to release the debtor from his liability to pay damages. But if the debtor "bears the risk" of the loss caused by the *force majeure*, he will still be losing his claim for payment (counter performance).[425] In cases where the *force majeure* results only in slight deterioration of the thing, which does not justify full cancellation of the contract, the debtor will still be only entitled to the price of the thing that is proportionally reduced.

Death or incapacity of the debtor: Pursuant to Article 1793 (e) *force majeure* may also arise due to the death or a serious accident or unexpected serious illness of the debtor - This applies to contracts that provide for obligations requiring personal performance of the debtor.[426] For instance, when the debtor has undertaken to personally perform a certain work, such as to paint a portrait, write a book or repair a watch.

Legal impossibility: *Force majeure* may also be invoked in cases provided in Article 1793 (b) on the ground of supervening legal impossibility arising from *official prohibitions preventing the performance of the contract*: For instance, if the importation of the goods to be delivered is prohibited by a mandatory law that was unexpected at the time of the contract and that became effective without leaving reasonable time limit.[427] The unexpectedness of the enactment of the law makes the prohibition unforeseeable, and the absence of time limit for its application makes performance absolutely impossible. Thus it must be noted again that the

[424] Krezeczunowich, supra note 1, pp. 115-116.
[425] Id, p. 116.
[426] See Id, p. 154.
[427] Ibid.

applicability of the *force majeure* defence in this case is also still subject to the fulfilment of the conditions provided in Article 1792. The debtor must prove that the official prohibition was reasonably unforeseeable and that it was insurmountable making performance absolutely impossibility.

Thus the concept of force majeure may be applied to the above cases of supervening impossibility, where unforeseen supervening occurrences absolutely prevent performance of the contract. But there are other remaining types of supervening impossibility recognised in foreign legal systems that may be said to fall in the "grey area" with regard to the applicability of the *force majeure* defence. For our purpose here, cases of supervening impossibility arising from failure of source and impossibility of method of performance will be particularly discussed as they appear to be the most frequently faced in practice.

Impossibility of method of Performance: Pursuant to Article 1793 (d) of the Civil Code, *international or civil war* that unexpectedly occurs and causes interruption in the means of transportation available, and thereby absolutely prevents undertaking the carriage of the goods to be delivered may lead to the finding of *force majeure*. From the two cumulative conditions already found in Article 1792 of the Civil Code are apparent: a) The first is the condition that the supervening occurrence resulting in impossibility of the method should be unexpected or normally unforeseeable by the debtor; b) Secondly, the said unexpected or unforeseen occurrence must have prevented the debtor *absolutely from· performing his obligations.*

From these conditions, especially based on the second condition, it is possible to suggest that impossibility of method of performance specified in the contract does not always lead to the finding of *force majeure*. It may be possible to add a third implicit condition that obliges the debtor to exhaust all other methods that may be alternatively used for the purpose of discharging his contractual obligations. Perhaps the only exception to the debtor's obligation to employ alternative method of performance is where the method that became impossible had been otherwise expressly qualified in the contract as the only method to be used. This seems to imply that supervening impossibility relating to the method of performance is not to be treated as a case of *force majeure* as a matter of general principle. Thus, unless the impossible method of performance had clearly been specified by the terms of the contract as the only method of performance to be used by the debtor, the law seems to oblige the debtor

to use any other alternative method available for the purpose of discharging his contractual obligations. This obligation seems to apply without regard to the relative cost increases that the use of such alternative methods of performance might entail for the debtor.

Failure of Source: In certain cases, the debtor might enter into a supply contract entirely relying on a particular source or supplier in order to acquire the goods specified to be delivered. One may ask whether the debtor could invoke the defence of *force majeure,* in case of the non-delivery of the goods due to failure of that particular source or his supplier's default. As suggested above, as far as the obligation to deliver fungible goods is concerned, the debtor may not be released from his liability for non-performance simply because the goods he specifically designated for the purpose of carrying out that delivery have been physically destroyed.[428] The debtor is still expected to meet his delivery obligations as long as the substitutes for the goods subject to destruction are still available on the market. A similar rule seems to apply in case of the failure of the particular source he had intended to use. Thus, except where the contract expressly specifies that the goods to be delivered are to come exclusively from that failed source, the debtor may not be excused from his obligations simply because the source that he personally planned to use has failed to meet his demands. David provides the following illustrations: [429]

> 1. *A sells 100 quintals of sorghum to B. He is counting his harvest in order to be able to perform his obligation. The harvest is less than 100 quintals. This may be an event that is exterior to and not imputable to A. But this event does not prevent A absolutely from performing his obligations, so long as he "did not promise that the 100 quintals "would come from his harvest." Since sorghum is fungible, he can obtain it elsewhere. He is liable if he does not perform his obligations.*
>
> 2. A *sells 100 quintals of paper to B. He is counting on C to provide him with this paper. C does not deliver it and as a result A cannot keep his promise. In this case, the event is not exterior to A. A must bear the risk of having badly chosen his cocontractant, C. A is liable if he does not perform the contract.*

But note that, in the second illustration, A's liability does not depend on the fact that he had *badly chosen* his supplier. Even where A had used all the reasonable care that could have been possibly applied in selecting C as his supplier, his liability is not excused. This is because A's liability for non-performance is not contingent on any commission of "fault" on

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[429] David, supra note 397, pp. 69-70.

his part; rather it strictly arises from his mere failure to deliver the fungible thing specified in the contract.

3.5.6.3. Clear Rejection of Change of Circumstances

Article 1794, as already noted above, provides certain occurrences that shall not be deemed cases of force majeure. It provides that, *unless expressly agreed otherwise, the following occurrences shall not be deemed cases of force majeure:*

> *(a) A trike or lock-out taking place in the undertaking of a party or affecting the branch of business in which he carries out his activities;*
>
> *(b) An increase or reduction in the price of raw materials necessary for the performance of the contract;*
>
> *(c) The enactment of new legislation whereby the obligation of the debtor become more onerous.*

The exclusions contained in Sub-Articles (b) & (c) do not seem to bring any change in the law, since these occurrences (which do not result in absolute impossibility of performance) do not satisfy the very definition of *force majeure* provided in Article 1792 of the Code.[430] However, these exclusions represent the utmost caution taken by the legislature to foreclose any judicial attempts that might be later made to incorporate the doctrine of change of circumstances into the law. Thus unforeseen supervening events that excessively increase the costs and difficulties involved in the performance of his obligations, without making it absolutely impossible, do not entitle the debtor to invoke the defence of *force majeure*. The occurrences specified in sub-Article (a), however, seem to make a change in the law. It is hardly clear why the occurrences should be totally excluded from the ambit of the *force majeure* defence, at least within the parameters of the restrictive definition already contained in Article 1792 of the Code.

Finally, it is good to note that even though the above occurrences are excluded from constituting cases of *force majeure* as a matter of the law, they may still be otherwise treated as cases of *force majeure* if contrary stipulations to that effect have been expressly provided by the parties. Thus the Ethiopian law, while it adopts a very strict and reserved approach in

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[430] Perhaps these clear exclusions merely signify lack of confidence in the courts' proper application of the general principle under Article 1792: Krezeczunowich, supra note 1, p. 155.

defining the debtor's legal defence against liability for non-performance, it generally does not prohibit the parties from expanding the scope of such defence through providing express contractual provisions. This permissive nature of the law could be seen together with Article 1887 of the Code that equips the parties with the possibility of limiting the scope of their liability for non-performance only to cases where it results from the commission of fault.

3.5.6.4. Limitations on the Application of *Force Majeure*

There are certain cases in which the debtor may be held to his liability to pay damages despite the fact that performance was prevented by *force majeure*. Accordingly, two important and specific limitations are imposed on the rule that *force majeure* releases the debtor. The first limitation applies where the debtor has failed to give a forthwith notice to the creditor as to the occurrence of the *force majeure* event preventing performance of his obligations.[431] In such case, the debtor will be liable to the extent of the damage caused to the creditor that could have been prevented by giving a timely warning to the latter. The second exception to the release of the debtor by *force majeure* is where the occurrence of the *force majeure* event was after he was put in default by the creditor to discharge his obligations. This limitation may be justified based on the assumption that the debtor could have escaped the occurrence of the force majeure had he been diligent enough to discharge the performance of his obligation timely (faultlessly).[432] In general, the two limitations attempt to disallow the debtor from benefiting from the defence of *force majeure* to the extent his own fault has played a major role in relation to its occurrence or consequent effects thereof.

Lastly, it is important to note that application of *force majeure* could also be excluded through contractual provisions. In the same manner they are allowed to limit the scope of their liability through contractual provisions, the parties can also extend the scope of their liability by expressly assuming responsibility for non-performance in case of *force majeure*.[433]

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[431] Article 1797 of the Ethiopian Civil Code; see also Krezeczunowich, supra note 1, p. 158.
[432] Article 1798 of the Ethiopian Civil Codes; see Ibid.
[433] This contractual freedom is explicitly provided in Article 1886 of the Civil Code that provides: *"[t]he parties may extend their liability under the contract and provide that they will be liable for non-performance notwithstanding that performance is prevented by force majeure".*

3.5.6.5. The Effects of *Force Majeure*

As already noted, total and irreversible impossibility of performance of the contract would normally lead to unilateral cancellation. Where such impossibility has resulted from *force majeure* situations, the debtor is released from liability for the resulting damage, while the creditor is relieved from doing his part through unilaterally declaring the contract cancelled.[434] However, as it has been further noted earlier, unilateral cancellation of the contract may not be always proper in cases that only involve delay or partial impossibility of performance. In these latter cases, the Ethiopian law adopts a somewhat flexible approach that leaves some discretionary power for the courts to take the principle of good faith and relative interests of each party before deciding cancellation of the contracts.[435]

Where total cancellation of the contracts is not granted in cases involving partial impossibility, the balance of the contract should nevertheless be adjusted to the new circumstances. Thus the courts should adjust the contract by reducing the counter-performance of the other party in proportion to the extent the value of the debtor's performance has been reduce due to the partial impossibility.[436] It is important to see that the variation or adaptation of the contracts in this case simply arise as the necessary consequence of bilateral obligations. If the cause of the partial impossibility is proved to be a *force majeure,* the debtor is released from his liability for the resulting damage. But, still, the other party's payment must be proportionately reduced. It should be remembered, however, that this conclusion is subject to the rules regulating the issue of transfer of risk discussed earlier.

The courts also exercise a discretionary power to vary the time of performance where the *force majeure* situation only causes or is expected to result in some delay without totally preventing the debtor from performing his obligations. The courts in such cases are authorised to defer the date originally fixed for performance of the contract and grant a maximum of an additional six months period to the debtor so that he would be able to discharge his obligations. This discretionary power is to be exercised by the courts, *"having regard to the position of the debtor and the requirements of justice".*[437] This basically means that the court should give consideration, for example, to the fact *that the debtor was in good*

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[434] See David, supra note 397, pp. 66-67.
[435] Ibid.
[436] See Article 1768 of the Ethiopian Civil Code.
[437] See Article 1770 of the Ethiopian Code; and Krezeczunowich, supra note 1, p. 129.

faith, unlucky, temporarily unable to perform his obligation through no fault of his, and must have prospects to improve his situation".[438] The requirement of "justice" further implies that the court must additionally insure that the grant of the period of grace to the debtor would not expose the creditor's interests to disproportionate and serious harms.[439]

3.5.6.6. Overview of the Application of *Force Majeure* in the Decisions of the Cassation Division

As already noted, the defence of *force majeure* seems to be the only general legal doctrine explicitly recognised in the Ethiopian Civil Code to provide the debtor an escaping route from the harsh rule of strict liability. The stringent requirements attached to application of the defence by the Code provisions, are said to have been taken to their most extreme level of strictness by the approaches generally adopted by the courts in interpreting those requirements. This appears to reduce the practical merit of the defence of *force majeure* to most debtors that face liability arising from non-performance caused due to unexpected and extreme cases of hardship.

In one case, [440] a vehicle that was carrying refined petroleum oil from the port of Djibouti to Bahir Dar city sustained a crush while it tried to avoid running over a pedestrian who accidentally got into its way. All the oil that was being transported by the vehicle was lost due to the damage caused to its tanker during the crush. When the owners of the oil brought their action claiming compensation for the loss of the oil, the carrier invoked the defence of *force majeure.* Both the trial and appellate courts upheld the *force majeure* defence invoked by the carrier and released the same from its liability for the loss of the oil.

The Federal Supreme Court's Cassation Division overturned this decision for fundamental error of law. The court first noted that the liability of the carrier is to be determined in accordance with Articles 590 and 591 of the Commercial Code. The court stated that Article 590 imposes liability of the carrier for partial or total loss of the goods, or for any damage thereto or delay in the conveyance thereof. Article 591 of the code, however, recognises *force majeure* as one of the grounds for excusing liability of the carrier. Noting that the

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[438] Krezeczunowich, supra note 1, p. 129.
[439] Ibid.
[440] Ethiopian Oil Co. *V.* Comet Transport Co. et al, (Federal Supreme Court Cassation Division, July 29, 1997 E.C.), Federal Supreme Court Cassation Division Decisions, Vol.1, p. 26 (translation belongs to this writer).

Commercial Code does not provide definition for *force majeure*, the court asserted the applicability of the definition contained in the Civil Code.

The court attached much emphasis and a very strict connotation to the requirement of "unforeseeability" as an essential constitutive element of the definition enshrined in Article 1792. In this connection the court stated that: "*To say the debtor's non-performance was caused by a force majeure, the occurrence that prevented performance of his obligations must prove to be something absolutely beyond his reasonable expectations and bounds of imagination*". Unforeseeablity thus being defined, it concluded that, since the probability of running into a reckless pedestrian on the road is something that was not too far from the imagination of a reasonable and cautious driver, an accident caused in an attempt to avoid hitting a pedestrian could not be treated as a case of *force majeure.*

In another similar case, [441] the Supreme Court reversed the decisions of the lower courts in which they released the carrier on the ground of *force majeure,* when goods being transported were lost together with the lorry undertaking the transportation by a fire caused due to a technical failure of the vehicle's electrical and mechanical system. In reversing the decision, the court noted that:

> *[t]he carrier had the opportunity to ensure the technical reliability and suitability of the lorry for the particular topographic and climatic conditions before buying it; once bought, it has also the opportunity to periodically check to ensure that it continues to be reliable. A fire caused by technical failure in the electrical and mechanical system of the lorry is something that can normally be foreseen by the carrier at the time of the contract, and hence it cannot be considered as force majeure.*[442]

The way the Supreme Court construed the requirement of unforeseeability in the above and many other cases, appears to be very harsh in the context of the usual reality of life in which contracts operate. In many cases, the events that cause disruption to the performance of contracts are not totally hidden from foresights. But the parties are usually in the dark as to whether, when and where such events would actually hit. It may be correct to hold that one who takes the wheel as a driver should not always expect that others on the road would reasonably behave; he should also expect unreasonable behaviours and accordingly apply the

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[441] *Global Insurance S.C. v. Nib Transport S.C.* [2007], Federal Supreme Court, Cassation File No. 26565, Discussed in Mulugeta Ayalew, 'Ethiopia'. In *International Encyclopedia of Laws*: *Contracts*, edited by J. Herbots. Alphen aan den Rijn, NL: Kluwer Law International, 2010, at 248, P. 124.

[442] Ibid.

required care. But what if, despite all the care he takes, the loss could not have been avoided under the circumstances of the case? Should he incur liability merely because the event that led to the loss was "foreseeable" in the general sense of the term? The interpretations of the court, rather than indicating any attempts made to moderate its effects, generally seem to take the harsh position already adopted by the law to its most extreme limits. This has been confirmed in many similar decisions that did not show any compassion towards debtors desperately trying to cling to the defence of *force majeure* in order to avoid their liability based on the harsh rule of strict liability.

3.5.7. Special Theories Applicable to Administrative Contracts

3.5.7.1. General Overview

The traditional distinction of the French law between civil and administrative contracts has been imported into the Ethiopian law with some slight modifications. The Ethiopian Civil Code provides special legal regime that is particularly applicable to govern administrative contracts. In Ethiopian law, however, there are no special administrative courts to examine disputes arising out of administrative contracts; both civil and administrative contracts are subject to the adjudicatory power of the ordinary courts. This is unlike the French system, in which the power to adjudicate disputes arising out of administrative contracts has been vested in separate administrative courts. Apart from this most visible difference, the rules contained in the special part of the Ethiopian Civil Code applicable to administrative contracts are said to be largely based on doctrinal works of French authors that provided systematic explanations on the case laws of the French administrative courts.[443]

Thus, in the Ethiopian contracts law, the rules that generally regulate various types of civil and commercial contracts will be applied to administrative contracts only to the extent they do not contradict the exceptional rules and theories contained in the special part of the Civil Code particularly governing the latter. For this purpose, Article 3132 of the Civil Code provides the criteria for distinguishing administrative contracts from other types of contracts. Expounding on the criteria contained in this provision and by referring to other relevant laws, the Federal Supreme Court Cassation Division has stated that a contract may be deemed an administrative contract where: the law or contractual provisions inserted by the parties clearly

[443] See R David, "Sources of the Ethiopian Civil Code," Journal of Ethiopian Law, Vol. IV, No. 2, p. 348.

qualifies it as such, or where sufficient indications to the same effect may be found from the nature, objective, and identity of the parties to the contract. [444] From this, some contracts that may be concluded by the public authorities are directly qualified by the law, *ipso jure*, as administrative contracts pursuant to Art 3132 (a).[445] Absent such direct qualification by the law, relatively higher and direct involvement of the general public interest in performance of the contract is said to be the most decisive criterion of distinguishing administrative contracts from other ordinary civil and commercial contracts that are primarily subject to the ordinary rules of the Civil and Commercial Codes.[446]

The presence of public interest, however, is not merely used for the purpose of creating the above mentioned theoretical distinction between administrative and other private law contracts; more importantly, it is also the main reason posited to justify the special theories and rules exceptionally applicable to the former. Thus, due to the presumed presence of exceptionally higher public's interest in them, administrative contracts are said to attract the application of similarly exceptional theories and concepts that are often alien to private law contracts.[447] Among the theories that are typical to administrative contracts in Ethiopian law, the most notable ones include: the legal recognition and safeguards provided to the doctrine of c*lause exorbitante du droit commun*;[448] the non-applicability of the doctrine of *exceptio non adimpleti contractus*;[449] Act of Government (*the theorie de Fait du Prince*);[450] the theory

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[444] Woira Wood and Metal Works Plc. V. Addis Ababa City Administration Trade and Industry Development Bureau , (Federal Supreme Court Cassation Division, Dec 16, 2005 E.C.), Federal Supreme Court Cassation Division Decisions, vol 14, pp. 106-109.

[445] The types of contracts that are recognised as administrative contracts and regulated in the Civil Code: government concession contracts (Articles 3207- 3243), public construction contracts (Public works contracts) (Articles 3244- 3296), and government supplies contracts (Public supply contracts) (Articles 3297-3306).

[446] See Tekle Hagos, "Adjudication and Arbitrability of Government Construction Disputes," Mizan Law Review,Vol. 3 No.1, (2009), pp. 6-7.

[447] See Ibid.

[448] (Article 3132 (c) and Articles 3179-3182 of the Ethiopian Civil Code) The regime applicable to administrative contracts, provides the contracting authority with certain prerogatives that are not normally found in private law contracts. Accordingly, the law accommodates the possibility by which the contracting public authority could direct, supervise or monitor execution of the contract, or even unilaterally impose sanctions or bring termination of the contract in case of serious failures on the part of the private contractant.

[449] See Article 3177 of the Civil Code; One most important feature of bilateral or synollogical contracts is the mutual interdependence existing between the obligations assumed by each of the parties. The rules applicable to the performance and non-performance of bilateral contracts reflect the prominence of this mutual subordination (Cont.) existing between the rights and obligations of the parties. For instance, in the absence of otherwise agreement, the principle governing the time of performance in such contracts is that performance shall be carried out simultaneously. This doctrine, however, loses its full force when it comes to administrative contracts. As provided in Article 3177, "*the non-performance by the administrative authorities of their obligations shall not entitle the other party to suspend or to fail to perform his obligations unless it makes impossible the performance of such obligations*".

of *imprévision* and the doctrine of *causa.* From these, due to their particular relevance for issues relating to change of circumstances, the latter two theories will be further separately discussed in the sub-sections provided below.

3.5.7.2. The Doctrine of *Causa*

The notion of *causa* seems to be imported into the Ethiopian law from the French legal system. As it has been observed earlier, the former French Civil Code required the presence of a lawful cause as one of the basic requirements for the formation of a valid contract. Even though the Code incorporated it only as a requirement applicable to formation, it was later expanded by the courts to determine issues relating to the effects of contracts. In many French cases, the courts applied the notion to drive the finding that a contract that lacked a cause did not have to be performed. Thus, the notion was historically applied to deal with situations that share close similarity with those addressed by the concept of frustration of purpose.[451]

When it comes to the Ethiopian law, the section of the Civil Code providing the general rules applicable to contracts, at least in its explicit terms, does not incorporate the notion of *causa* as one of the requirements for the conclusion of valid contracts.[452] But the special part of the Code dealing with administrative contract explicitly requires a lawful and possible cause for validity of the contracts. In this vein, Article 3170 of the Code stipulates that an administrative contract shall be null and void on the ground of lack of cause, where it was concluded for pursuing a purpose that cannot be achieved. Article 3171, on the other hand, provides that: an administrative contract made by the authorities with unlawful purpose in view (for instance with a view to procuring advantages of a pecuniary nature to the other contracting party and not for a reason of general public interest) shall be null.

The relevance of the notion of *causa* in the area of administrative contracts appears to well extend beyond the time of conclusion as one could gather from the special provisions. For instance, Article 3180 of the Civil Code stipulates that: *"The administrative authorities may*

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[450] See Articles 3190-3193 of the Civil Code; This theory operates when the economic basis of the contract is upset by the act of government department itself. According to this doctrine, unless the governmental act constitutes a generally applicable public policy decision emanating from some general legislation affecting all citizens equally, the contractor is to be entitled to a monetary indemnity or to increase the charge to the consumer

[451] Philippe, supra note 352, p. 164.

[452] See Krezeczunowich, supra note 1, pp. 14-16.

terminate the contract notwithstanding that the other party has committed no fault where the contract has become useless to the public service or unsuitable for its requirements". This provision therefore seems to clearly establish the relevance of the doctrine of *causa* for addressing similar situations to which the concept of frustration of purpose is applicable. The notion of *causa* thus seems to address situations in which the performance to be rendered by the party contracting with administrative authorities loses its value due to the change in the underlying purpose originally envisaged upon conclusion of the contract. Thus, in the situations covered here, there is no as such change in the nominal value of the party's performance, but the value attached to that performance has vanished due to new circumstances later disclosed to the administrative authorities. This may be contrasted with the problem that the theory of *imprévision* tries to address, which basically relates to cases where unforeseen supervening events make the performance of the obligations assumed by the party contracting with the administrative authorities excessively burdensome.

3.5.7.3. The Theory of *Imprévision*

The French theory of *imprévision* is found incorporated in Articles 3183-3189 of the Civil Code. The theory addresses cases where the balance of the rights and obligations originally established by the contract gets exceptionally upset due to unforeseen supervening occurrences not related to the behaviour of either party. [453] Pursuant to the provisions of the Civil Code, application of the theory presupposes the fulfilment of certain basic elements. The first and the most obvious element to trigger application of the theory is the presence of a new circumstance. Secondly, the possibility of the happening of the said new circumstances, or their consequences thereof, should be beyond what could have been reasonably foreseen at the time of conclusion of the contract.[454] Lastly, the new circumstances need not make performance absolutely impossible to seek the remedies based on the theory; it suffices if such circumstances impose additional obligations that disturb the equilibrium of the contract beyond the reasonable extremes of expectations presumed to be present at the time of contracting.[455]

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[453] This may be contrasted against the cases in which balance of the contract may be affected due to the acts of the public authority; see the situation generally highlighted in note 450 above.

[454] The requirements relating to this basic element of the theory are more elaborately stated in Article 3185 of the Ethiopian Civil Code.

[455] This could be clearly inferred from Articles 3183 (1) Cum. 3184 of the Ethiopian Civil Code.

Once the conditions for its application are met, the principal remedy to be implemented either by the parties themselves or by the court is adaptation of the contract, so that the consequent losses resulting from the supervening change of circumstances is fairly apportioned. In this respect, Article 3183 of the Civil Code establishes the principle excessive losses that may arise due to newly created circumstances does not discharge the party contracting with administrative authorities as long as performance still remains materially possible. Thus the basic remedy granted to the party in such cases is the right to require fair compensation from the administrative authorities for the loss arising from such circumstances. At this point, it is not sufficient for the party to prove the presence a lost benefit or reduction in the expected profits of the contract to be entitled to compensation form the administrative authorities. This is because the law requires the party to sustain absolute economic losses from the situations newly created in the contractual arrangement before the right to claim compensation becomes effectively useful.[456]

As noted earlier, the exceptional application of different theories to administrative contracts is usually justified by the degree of the public's interests involved in ensuring their effective performance. In this vein, it has been argued that the provision of legal relief to the party contracting with the administrative authorities in cases of *imprévision* similarly has the primary aim of protecting the interest of the public by encouraging performance of the contracts. This "public interest argument" used in justifying the exceptional application of the theory of *impervesion* to administrative contracts has also been similarly echoed in the relevant decisions of Ethiopian courts.

In one case,[457] which was examined by the Cassation Division of the Federal Supreme Court, a private contractant had undertaken to supply a specified number of bread on daily basis and at a fixed price to the student dining service of the University of Gondar. But during the currency of the contract, the price of flour, which is obviously the primary raw material for producing bread, became doubled due to a nationwide and officially recognised inflation.

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[456] Article 3187 of the Ethiopian Civil Code stipulates that: [n]o compensation may be claimed where circumstances have only 'reduced or taken' away the benefits, without bringing about a loss for the party; this manifests the subsistence of the application of the principle of *pacta sunt servanda*, which generally necessitates limiting the scope of operation of the theory of imprévision.

[457] Hilala Suleiman vs Gonder University (Federal Supreme Court Cassation Division File No. 69797, December 4, 2005 E.C.), Federal Supreme Court Cassation Division Decisions, Vol..8, pp. 13-19 (translation belongs to this writer).

After making several complaints about the losses being sustained due to the inflation and failing to persuade the University to make adjustments to the contract price, the contractor finally notified its plan to suspend the supply. Soon after this notification, the University commenced an urgent bidding procedure that culminated in a new contract made for the same supply, but which was concluded with another contractor and based on modified price terms.

The former supplier sued the university as a plaintiff for breach of contract, asserting that the latter should have cooperated with its repeated requests to modified price terms of their former contract before deciding to make the new allocation. The Supreme Court did not accept the argument on which the plaintiff's allegation was based. Instead, the court observed that the university had all the rightful reasons for allocating the contract to a new supplier (in the face of the clear notification provided by the petitioner to discontinue the supply). The court emphasised the absolute necessity involved in insuring uninterrupted continuation of the supply; noting that, the suspension of the supply, even for a single day, would have had very fateful consequences for the university's operation. Thus, the court stated the petitioner should not have even considered suspension of the supply as one of the available options; instead, it should have sought the court's aid to enforce the remedies provided pursuant to Articles 3181 and 3189 of the Civil Code.

The view reflected in the above decision of the court seems to precisely fall into line with the 'public interest' argument that has been frequently posed to support exceptional application of the theory of *imprévision* to administrative contracts. The argument is that, the need to insure continuous and uninterrupted provision of essential public services or utilities, which is claimed not to be as equally present in any other areas of contracts, justifies special application of the theory to administrative contracts. But this traditional argument, which categorically casts aside the value of recognising the application of *imprévision* in other areas of contractual relations, has lost its favour in many jurisdictions. In fact, there is no better example to give evidence for this state of affairs than the current position of the French law. As discussed in the previous section, the French law has abrogated its traditional distinction between administrative and private law contracts in addressing the problem of change of circumstances. But the Ethiopian law firmly holds to the dual approach already abrogated by the French law; and the problem of change of circumstances is still subject to completely different treatments, depending on whether it arises in relation to administrative or private law contracts.

Part III. Comparative Conclusions

The domestic legal systems considered in this chapter provide interesting contrasts in the approaches adopted towards the problem of change of circumstances. The diverging approaches adopted in the laws of the jurisdictions generally seem to reflect the degree to which their socio-economic realities had historically been subject to abrupt and widespread changes. This is particularly true to explain the difference between the approaches of the English and German laws. In connection to this, one esteemed English judge once observed in a certain case: *"certainly England never experienced inflation of this kind; and one may be permitted to speculate that if it ever did, its attachment to nominalism would fall by the wayside as it did in Germany."*[458] But one cannot undermine the influences from the doctrinal or the legal thinking particular to each jurisdiction in producing disparity in the approaches adopted towards the problem change of circumstances.

When we specifically compare the approaches adopted by the jurisdictions, the Ethiopian law appears to take the most reluctant position in addressing the problem of change of circumstances. The English law could also be identified as the most reserved one. The laws of both these legal systems do not incorporate any exceptional doctrine that explicitly puts limitation on the principle of binding force of contracts to provide specific solutions applicable for addressing the problem of change of circumstances. Thus both jurisdictions are characterised by their utmost emphasis on insuring respect for the principle of binding force of contracts and promoting its intrinsic values of protecting private autonomy and security of transactions. In line with this, there is "strict" liability for non-performance of contracts in the English law (this is also generally the case in most common law jurisdictions including the US law). In the Ethiopian law, the principle for contractual liability is similarly based on strict liability or obligation of result. Consideration relating to the debtor's fault may be relevant only in exceptional cases clearly provided by the law. But this is in contrast to the prevailing approach in many civil law jurisdictions, including in those considered in this chapter (namely, the German and French legal systems), in which *fault* is an essential ingredient of establishing the debtor's liability for non-performance.

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[458] This is Lord Denning's views in *Staffordshire Area Health Authority v South Staffordshire Waterworks Co* [1978] cited by Markesinis, Unberath, & Johnston, supra note 292, p. 329.

The doctrine of frustration provides the general defence against strict liability in the English law. In the case of the Ethiopian law such defence may be based on the theory of *force majeure.* However, the much narrowly defined *force majeure* defence of the debtor provided in the Ethiopian Civil Code could still be contrasted with the relatively wider English law doctrine of frustration. The doctrine of frustration, though often presented as the common law equivalent of the civil law *force majeure* concept, could generally be conceived to have by far wider scope of application than the latter. The doctrine of frustration, as already observed, is not merely limited to address the traditional cases in which supervening events render performance factually and absolutely impossible. The doctrine has generally been recognised to apply to the cases where, though not absolutely prevented, performance of contracts becomes something different from what was originally contemplated by the parties. This seems to make the doctrine of frustration essentially broader than the *force majeure* defence that appears to be the only general theory recognised under the Ethiopian law to provide the debtor the defence against the liability for non-performance.

Pursuant to the definition provided in the Ethiopian Civil Code, the concept of *force majeure* hinges on two essential elements requiring the presence of a supervening occurrence that was reasonably unforeseeable to the debtor at the time of conclusion of the contract, and that renders the performance of his obligations absolutely impossible. The first element relating to unforseeability, is based on a less strict standard and may be fulfilled by any event that could not normally be foreseen. The second element, however, embodies a more strict standard that may not be fulfilled unless the occurrence that has allegedly prevented the debtor's performance was *insurmountable not just by the debtor, but by anyone in the world-thus proving that performance was absolutely (not just normally)* impossible. Thus it is good to emphasise here the fact that the preference given for the common law principle of strict liability in the Ethiopian Civil Code, has not been likewise replicated with respect to the defence provided to the debtor against such liability.

When it comes to the approach adopted towards the problem of change of circumstances in the US law, it could be regarded as the most progressive one when compared to the English law or generally to the laws of most common law jurisdictions. The US law, unlike the English and the laws of other most common law jurisdictions, has adopted two important doctrines that expressly and specifically address the problem. The first doctrine, referred as the doctrine of impracticability, has a broad scope of application that includes, but not limited

to, the traditional cases of supervening impossibility. Thus the doctrine may be applied to address cases where requiring performance becomes practically or economically unreasonable, though such performance is still objectively possible. This doctrine is said to incorporate reliefs that may be invoked by sellers or those who are providers of goods. The other remaining doctrine, known as the doctrine of frustration of purpose, addresses cases where a party has lost all or substantial part of the values expected from receiving the performance agreed to be rendered by the other party. Thus, this latter doctrine is said to incorporate reliefs that are normally to be asserted by the buyers. Here, delivery of the goods bought from the seller may still be possible, but the purpose for which the goods were intended happens to vanish- thus receiving delivery of the goods loses all its value to the buyer. Unlike the English doctrine of frustration, which almost always results in termination of contracts, the US law provides recognition for the possibility of judicial adaptation of the terms of contracts based on the above doctrines. Despite presence of favourable legal environment for adapting terms of contracts, however, the US courts are generally said to remain much reluctant to undertake the task. Thus, rather than enthusiastically embracing them, the US judiciary generally seems show resistance against the application of these legislatively backed and progressive legal doctrines that provide more effective legal remedies for the problem of change of circumstances.

The approaches of the above jurisdictions could be further contrasted with that of the German and French laws, which may be categorised as the most open systems to addressing the problem of change of circumstances. Both of these legal systems have explicitly incorporated into their laws specific doctrines that clearly provide for judicial authority either to terminate or adapt the terms of a contract on the ground of change of circumstances. The present approach of the German law towards the issue of change of circumstances was essentially developed by the courts in dealing with the mounting legal problems created due to the economic disruptions caused following the end of the two World Wars. Thus the current Article 313 of the BGB is said to represent the attempt made by the legislature to capture the essential elements of the law as developed and found in case law. It is therefore to be noted that the somewhat broader construction of the doctrine, the preference given for adaptation over termination, and other aspects of the doctrine found in the provision are just the confirmations of the positions that already evolved from the case laws of the courts.

After the First World War, the French administrative court explicitly endorsed the theory of *impervision.* After this endorsement, the approach of the French law remained largely divided as regards to the treatment of change of circumstances in the area of administrative and private law contracts. This division culminated upon the adoption of the doctrine of change of circumstances in Article 195 of the new French Civil Code. Though the doctrine enshrined in this provision did not merely codify already existing and practically tested judicial approaches, as in the case of the German doctrine, long traced historical attempts to address the problem could still be found in the French jurisprudence. This is particularly evidenced by the prevalent past examples of the attempts made by the French courts to provide solutions for the problem of change of circumstances through extended interpretation and application of traditional legal theories. Unlike the German doctrine, the newly adopted French doctrine explicitly recognises renegotiation as one of the consequences attached to its application in addressing cases of change of circumstances. Thus the French doctrine gives priority to the solutions that may be adopted by the parties themselves in dealing with the problem of change of circumstances. Intervention of the courts is mandated only in cases where the parties have failed to come up with a mutually provided solution for the problem. In cases where they have failed to provide consensual solutions, the parties may request the court to make adaptation of the contract based on their common consent. Thus, it is possible to note that the general recognition for the power of the courts to conduct adaptation of the contract has been drastically affected by the claw-back condition requiring the consents of both parties by the doctrine adopted under the French law. In contrast to this, however, termination of the contract may be requested only by one of the parties.

Generally, the discussions made in this chapter have brought to our attention the fact that the approach of the Ethiopian law is found on a very isolated road, when compared to the trends existing in the rest of the surveyed jurisdictions. The Ethiopian law still remains clinging to the dual approach towards the treatment of change of circumstance in the areas of administrative and private law contracts. Thus, there is no solution provided for the problem in the area of private law contracts. Such complete rejection of the problem in the Ethiopian law could raise more deeply felt concerns, especially when one is to look into the justifications usually posed to support similar rejection of the problem under the English law or elsewhere. The negative effects of the rejection to address the problem of change of circumstances by the English law is said to be significantly reduced in practice. This is

because English law is mainly used by sophisticated contracting parties that usually implement their own contractual devices (which are said to be even better than those the law could ever provide to deal with the problem). However, it should be noted that contractual devices cannot totally replace the need for the law to deal with the problem of change of circumstances. But the concern relating to the Ethiopian law still becomes all the more serious, since the law could normally be assumed to be addressed to parties that generally lack the technical capacity to devise their own contractual mechanisms for addressing the problem.

FOUR: APPROACHES TO A CHANGE OF CIRCUMSTANCES: COMPARATIVE SURVEY OF INTERNATIONAL INSTRUMENTS

4.1. Introduction

In continuation of the previous chapter's discussion on the approaches of some selected domestic jurisdictions, this chapter presents the approaches adopted towards the problem of change of circumstances in four major international instruments: the Convention on Contracts for the International Sale of Goods (CISG), [459] the UNIDROIT Principles of International Commercial Contracts (PICC), [460] the Principles of European Contract Law (PECL) [461] and the Draft Common Frame of Reference (DCFR)[462].

From these instruments, the CISG is an international convention and is therefore binding on the states parties. The remaining three instruments can be considered as soft-laws or non-legislative codifications in the sense that they are not based on sovereigns' wills and have been drafted outside the political sphere of states and governments. Another overall difference between the instruments that is worth mentioning here is with regard to the scopes of the legal relations they intend to govern. Accordingly, the PECL and the DCFR are broader content wise, covering all kinds of contracts, including transactions of a purely domestic nature. In contrast to this, the scopes of the PICC and the CISG are respectively limited to international commercial contracts and sale of goods, and do not extend to purely domestic transactions.[463]

Furthermore, in relation to their territorial sphere of application, the PICC and the CISG are officially targeted to have universal applications. On the other hand, the PECL and the DCFR formally limit their scopes to a regional level, only to the member States of the European Union. Despite this formal limitation, however, the PECL and the DCFR still provide worldwide source of inspiration for new legal developments and essentially enjoy universal influences not merely limited to the member states of the European Union. Thus, generally

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[459] The United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, 1489 UNTS 3; 19 ILM 671; [1988] (hereafter referred to as CISG).
[460] UNIDROIT Principles of International Commercial Contracts (2010), (hereinafter referred to as PICC).
[461] O Lando and H Beale (eds.), Principles of European Contract Law Part I and II, (1999), (hereinafter referred to as PECL).
[462] C. von Bar, E. Clive and H. Schulte-Nölke et.al (eds.), Principles, Definitions and Model Rules of European Private Law: Draft Common Frame of Reference ,(2009), (hereinafter referred to as DCFR).
[463] SEE MJ Bonell, "UNDROIT Principles of International Commercial Contracts and Principles of European Contract Law: Synoptic Table", Unif. L. Rev. (2009), 437-554, pp.449-456

speaking, the international instruments to be considered in this chapter could all be regarded as indispensable sources in the study of comparative contract law despite the differences that may be pointed out with respect to their overall natures and origins.

4.2. UNIDROIT Principles of International Commercial Contracts (PICC)

4.2.1. General

The PICC is regarded by most as a very important codification that restates the most up-to-date and practically useful principles applicable to international commercial contracts or contracts in general. The principles were first published in 1994 by the International Institute for the Unification of Private Law (UNIDROIT), and have been updated by the two later editions respectively publicised in 2004 and 2010. But these later two consecutive editions are said to have been merely intended to incorporate additional topics of interest to the international business and legal communities.[464]

Particularly in relation to the provisions of the 2004 edition applicable to the problem of change of circumstances, there are no changes introduced by the latest 2010 edition of the Principles. Thus, there is no as such difference between the two editions as regards to the issue of change of circumstances that should be particularly emphasised here. In both editions, the problem of change of circumstances is explicitly addressed under the heading of "hardship" and is subject to specific solutions including mandatory obligation to renegotiate, judicial adaptation, and termination of the contract as a remedy of last resort. Application of the concept of hardship and the remedies arising from such application will be further discussed below.

4.2.2. Recognition of Hardship as an Exception to the Principle of Binding Force Contracts

Articles 6.2.1, 6.2.2 and 6.2.3 of the PICC address the problem of change of circumstances under the title of "hardship". As indicated in the official comments, the use of the term "hardship" in describing the problem was said to be mainly inspired by its wider familiarity among international commercial parties, as could be particularly evidenced from the widespread use of the so-called "hardship clauses" in international contracts.

[464] See the introduction to the 2010 edition of the PICC, p. IV.

Before defining hardship and dealing with its effects, strong reaffirmation is provided for the principle of binding nature of contracts. To this effect, Article 6.2.1 provides that: "*where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship*". The official comment indicates that this provision explicitly confirms the general principle that contracts must be performed as long as performance is possible and regardless of the burden that it may impose on the performing party. Thus, according to this basic rule, even if a party experiences heavy losses instead of the expected profits or the performance has become meaningless for that party, the terms of the contract must nevertheless be respected. This basic rule, however, is subject to the exception based on the concept of hardship provided in the second paragraph of the provision.

4.2.3. Definition of Hardship

Pursuant to Article 6.2.2, hardship exists: *[w]here the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and:*

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

As could be seen from the definition, hardship is invoked when the presence of fundamental alteration in the equilibrium of the contract is proved, provided that the events resulting in such alteration satisfy the requirements set forth in subparagraphs a to d. The circumstances in which *"fundamental alteration of equilibrium of the contract"* may be said to exist and the qualifications laid down by the provision in relation to the nature of the events that cause hardship will be separately considered below.

4.2.3.1. Fundamental Alteration of Equilibrium of the Contract

Fundamental alteration of the equilibrium of the contract may result due to increase in cost of performance, and this is said to be normally faced by a party assuming the performance of

non-monetary obligations.[465] The cost of performance may become excessive due to unexpected increase in the price of the raw materials or the cost of the process used for producing the goods or services to be provided by the party. This aspect of hardship thus seems to cover situations addressed by the doctrine of *impracticability* in the US law.

Hardship may also result where the performance to be received has no value to a party. This aspect of hardship clearly covers situations addressed by the doctrine of frustration of purpose in domestic legal systems such as the US law, where the performance to be received under the contract is no longer relevant for the purpose envisaged upon conclusion of the contract. It should be emphasised, however, that the application of hardship to these cases requires that the purpose in question was known or at least ought to have been known to both parties.[466]

4.2.3.2. Additional Requirements for Application of Hardship

a) Events occurred or came to parties' knowledge after conclusion of the contract

According to sub-paragraph (a) of the above cited definitional provision, the events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract. This indicates that events that existed at the time of conclusion of the contract, which the disadvantaged party was not aware of at that time, may be invoked.[467] If the events could reasonably be regarded to fall within the knowledge of the disadvantaged party at the time of conclusion, the position of the law is that they should be taken into account at that time and hence should not be relied upon to invoke hardship.

b) Events could not have been reasonably taken into account upon conclusion

The second additional requirement to successfully invoke hardship is that the disadvantaged party should prove that the events causing it could not have been taken into account at the time of conclusion. Thus, proving the occurrence of the events was after the time of conclusion of the contract may not be in itself sufficient to trigger application of hardship: such event should additionally be ascertained to be incapable of being taken into account at that time.

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[465] Official Comments on Article 6.2.2 of the PICC (2010), p.215.
[466] Id, pp. 215-216.
[467] See our discussion infra under 4.3.2. (d).

c) Events beyond the control of disadvantaged party

As provided under sub-paragraph (c) of the definitional provision, hardship does not arise if the events disrupting the equilibrium of the contract are within the control of the disadvantaged party.

d) Risks must not have been assumed by disadvantaged party

Finally, hardship is also excluded if it could reasonably be presumed from the nature of the contract that the disadvantaged party had assumed the risk of the supervening event. This implies the fact that assumption of risk may follow from the very nature of the contract, and that it need not always be expressly undertaken by the disadvantaged party.[468] Thus, a party who enters into a speculative transaction is considered to accept a certain degree of risk despite the fact that he might not have been fully aware of such risk upon concluding the contract.[469]

4.2.3.3. Hardship and the Provision on *Force Majeure*

The concept of *force majeure* has also been incorporated in the Principles as a ground of defence for the debtor facing liability for non-performance.[470] In view of this, it is important to determine what will happen in situations where the factual situations overlap and both concepts of hardship and *force majeure* may be attained. As indicated in the official commentary, the choice between either of the two concepts is left to the affected party.[471] If the party only wishes to be excused from incurring the liability for non-performance, he may opt for the defence of *force majeure*, since the defence is tailored just for that purpose. However, if the party seeks to keep the contractual bond through renegotiation or judicial

[468] See Art. 6.2.2 of the PICC (2010), Official Comments 3 (a), p.216.
[469] Id, Official Comments 3 (d), p. 217.
[470] Article7.1.7 of the PICC (2010), which is captioned as *"Force majeure"* provides:
(1) Non-performance by a party is excused if that party proves that the nonperformance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non receipt.
(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.
[471] See Art. 6.2.2 of the PICC (2010), Official Comments 6, p.218.

adaptation of its terms, his proper choice would then become relying on the hardship provisions. As would be further discussed below, perhaps one most essential aspect of the concept of hardship is in allowing the parties to keep their relationship alive through adjustment of its terms to the supervening change of circumstances. In fitting cases, the affected party may invoke the defence of *force majeure* that always guarantees termination of the relationship, assuming that he does not find the aspect of hardship that helps to maintain the relationship as such attractive under the circumstances of the case.

4.2.4. Effects of Hardship

With regard to the effects of hardship, Art. 6.2.3 of the PICC provides:

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

The above provision enshrines the possibility for the parties to sort out mutually agreed solutions through conducting renegotiation in cases of hardship. When such party-led processes fail to bear consensual solutions within reasonable time, the court may be invited to intervene either to terminate or adapt the terms the contract as may be warranted by the case. These are the main consequences of hardship stated in the provision that will be separately considered below.

4.2.4.1. Renegotiation of Terms of the Contract

Pursuant to Paragraph one of the above cited provision, requesting renegotiation of the contract with the view of adjusting its terms to the change of circumstances is recognised as an entitlement to be initially exercised by the disadvantaged party. The fact that renegotiation is provided as an entitlement for the disadvantaged party may be taken as indicative of the presence of a complementary obligation for the other party to comply with the request for renegotiation that is properly made. The official commentary accordingly identifies certain duties that are inherent in making a proper request for renegotiation.

The first duty imposed on the disadvantaged party in relation to the request for renegotiation is that such request must be made without undue delay. The disadvantaged party is expected to request renegotiation within the possible shortest time after the occurrence of the hardship. The length that determines the timeliness of the request for renegotiation may depend on the circumstances of each case. According to the official commentary, delay in making the request for renegotiation does not automatically obliterate the right of the disadvantaged party to the right to request for renegotiation, but affects the finding as to whether hardship actually existed and, if so, its consequences for the contract.[472]

Paragraph (1) of the above provision also imposes on the disadvantaged party to specify the grounds on which the request for renegotiation is based. The imposition of this duty is said to be necessitated so that the reasonableness of the request can be more realistically appraised by the other party. A request for renegotiation that was communicated without complying with this duty would be deemed as if it had not been made, unless the events causing hardship are so obvious and thus as such do not require to be specified.[473] Thus the failure to show compliance with this duty may produce a similar effect applying in the case of the failure of requesting renegotiation within due time

Pursuant to the second paragraph of the provision, the request for renegotiation does not in itself empower the disadvantaged party to withhold performance.[474] The official comments of the provision indicate that exceptions may be admitted to this general position only in *extraordinary circumstances* in which withholding performance reasonably appears to be justified.[475] One final point is that the provision does not explicitly mention the importance of good faith and other related principles in make the renegotiation an effective tool for providing remedy in cases of hardship. The official commentary, however, comes to the aid of the provision to supplement its silence in this regard. The comments make it clear that both the request for renegotiation and the conduct of the process are subject to the general principles of good faith and fair dealing, and as well as the duty of cooperation recognised in

[472] Article 6.2.3 of the PICC (2010), Official Comments 2, p. 220.
[473] Id, Official Comments 3.
[474] Id., Official Comments 4, p. 221.
[475] Article 6.2.3 of the PICC (2010), Official Comments 4, p.221: the commentary notes that the prohibition on withholding of performance has the objective of foreclosing possible abuse of the remedy. Thus it is subject to exceptions in justified cases.

the Principles.[476] This may be taken as additionally indicative of the fact that the request for renegotiation is recognised to result into legally enforceable rights and obligations between the concerned parties.

4.2.4.2. Measures that the Court May Take in Cases of Hardship

As could be observed from Paragraph (4) of the provision already reproduced above (and further affirmed in the official commentary provided to it), the court exercises the widest discretion to determine the measures that are most suitable in each of the particular cases in which it finds hardship. This indicates that termination and adaptation of the contract are not the only alternative measures that the courts could take in cases of hardship (though they may still perhaps constitute the most common measures in practice). As Paragraph (4) expressly states, the court may terminate or adapt the contract only when this is reasonable; and nothing prevents the court from denying both of these remedies if it thinks that none of them is reasonable to be granted. Thus, in the most extreme cases, it has been observed that: *"[t]he circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand."*[477]

a) Termination

The effect of termination in case of hardship is distinguished from the cases in which a contract is terminated due to non-performance. The official commentary states that, "the case of hardship does not depend on non-performance by one of the parties; its effects on the performances already rendered might be different from those provided for by the rules governing termination in general (see Articles 7.3.1 *et seq.*)."[478] Consequently, termination of the contract on the ground of hardship is to be declared "at a date and on terms to be fixed" by the court.[479] This indicates that the court is given discretions to fix the date and the terms

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[476] Article 6.2.3 of the PICC (2010), Official Comments 5, p. 221: stresses that: *the disadvantaged party must honestly believe that a case of hardship actually exists and not request renegotiations as a purely tactical manoeuvre. Similarly, once the request has been made, both parties must conduct the renegotiations in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information.*

[477] Id, Official Comments 7, p. 222.

[478] Ibid.

[479] Ibid.

upon which termination of the contract takes place. Similar discretion is left to the court under the comparable provisions of the DCFR and the PECL discussed below.

b) Adaptation of the Terms of the Contract

With regard to adaptation, the commentary first states that the objective of the court is to restore equilibrium of the contract (paragraph (4) (b)). Adaptation of the terms of the contract may be made in various ways, such as by extending the time of performance or by changing the manner in which payments of the price may be effected, etc. Thus the commentary states adaptation of the contract may not always necessarily involve a price adaptation. If the court decides to make price adaptation, the commentary clearly states that "*such adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.*"[480]

4.3. The Draft Common Framework of Reference (DCFR)

4.3.1. Introduction

The DCFR is another important codification that originated from the initiatives of European legal scholars. As stressed by its authors, the DCFR does not contain a single rule or definition or principle which has been approved or mandated by a politically legitimated body at European or national level. [481] However, more than just making contributions as an academic text, the document was also hoped to provide a possible model for an actual or 'political' Common Frame of Reference (CFR). [482]

With respect to its contents, the DCFR is generally said to have considerably broader coverage than the PECL. In areas of the law covered by both (particularly in the area of contracts law), the DCFR incorporates several rules from the PECL, but using different syntax and without exactly replicating them.[483] Nonetheless, regarding certain issues, there are rules in the DCFR that introduce clear deviations from the comparable rules of the PECL.

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[480] Article 6.2.3 of the PICC (2010), Official Comments 7, p. 222.
[481] See DCFR introductory Comments 4, pp. 7-8.
[482] Id, Comments 6, p. 8.
[483] Id, Comments 49, p. 26.

In the area of our interest, as shall be further expounded on, some important departures from the comparable rules of the PECL may be observed in the rules of the DCFR. This is particularly true in relation to the issues of renegotiation and adaptation of terms of contract by the court. The DCFR addresses the issue of change of circumstances in Article III-1:110. The full text of the provision states as follows:

> *III.–1:110: Variation or termination by court on a change of circumstances*
>
> *(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.*
>
> *(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:*
> *(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or*
> *(b) terminate the obligation at a date and on terms to be determined by the court.*
>
> *(3) Paragraph (2) applies only if:*
> *(a) the change of circumstances occurred after the time when the obligation was incurred,*
> *(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;*
> *(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and*
> *(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.*

In a similar fashion to the provision of the PICC and that of the PECL (as shall be discussed), this article begins by recognising the principle of *pacta sunt servanda* under its first paragraph.[484] The provision then recognises that there can be situations in which, due to exceptional change of circumstances that could not have been reasonably taken into account upon its conclusion, it would be manifestly unjust to hold the obligor to the original terms of the obligations provided in the contract. In such cases, the court may adapt the terms of the contract to the changed circumstances or terminate it altogether. With this general introduction, now let us take some closer look at the preconditions for the application of the

[484] See Articles 6.2.1 of the PICC in sub-sec. 4.2.2 above, and the discussion on Article 6:111(1) of the PECL in sub-sec. 4.4.1 below.

doctrine of change of circumstances and the effects that ensue from such application pursuant to Article III.-1:110 of the DCFR reproduced above.

4.3.2. Preconditions for Application of the Doctrine of Change of Circumstances

The official commentary on Article III.-1:110 of the DCFR states that the application of the provision does not extend to obligations that arise by operation of the law. This is generally said to be justified because "*the idea of assumption of risk which is crucial to the rules on change of circumstances is not applicable in the case of obligations which are not voluntarily undertaken.*"[485] Thus, the commentary makes it clear that the court's powers to adapt the terms of obligations established between private parties or declare termination of the same on the basis of the doctrine of change of circumstances arise only in the case of contractual obligations and obligations arising from a unilateral juridical act. With regard to the inclusion of unilateral obligations into the scope of the doctrine, the commentary states that: *"there is no reason to exclude obligations arising under unilateral juridical acts from the scope of the provision. Indeed there may be a stronger case for including such obligations, which are often gratuitously undertaken, than for including many contractual obligations."* [486]

Thus, as provided in the second paragraph of Article III.-1:110, where *performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court.* [487] The conditions that need to be satisfied for the courts power to arise are not fully provided in this paragraph. But it makes it clear that the courts' powers to intervene is subject to the strict conditions that the change of circumstances must be exceptional and that the performance of the contact as it stood must have become manifestly unjust. The other remaining preconditions for the court's exercise of the power to adapt or terminate a contract are further elaborated in the third and the last paragraph of the provision (See Article III-1:110 (3) (a-d) reproduced above). From the reading of these two

[485] DCFR Article III.-1:110, Official Comments B, p. 738.
[486] Ibid; It is interesting to note that this comment also partly indicative of the possible justifications behind the position of the Ethiopian law that somewhat attenuates the strict principle of *pacta sunt servanda* in relation to the non-performance of obligations gratuitously undertaken by the debtor.
[487] Incidentally, note that Article III-1:110 of the DCFR introduces the possible legal effects of application of the doctrine of change of circumstances, before it even defines the concept under its third and last paragraph. This is similarly the case for Article 6:111 of the PECL discussed below.

paragraphs, the powers of the court to vary or terminate an obligation on the ground of a change of circumstances is subject to the following qualifications that are said to put reasonable checks on their powers:

a) Change of circumstances must be exceptional- This requirement is said to be implied but not expressly stated in the PECL. The official commentary of the DCFR mentions that the lack of express statement regarding this requirement in the PECL was criticised by stakeholders.[488] Thus the commentary states that decision was taken to expressly incorporate it in the present provision of the DCFR by clearly stating that the court's powers will not arise unless there is exceptional change of circumstances. But it is not clear from the comments as to what is exactly required for the change of circumstances to be treated as "exceptional". However, one may assume that this requirement generally emerge from the intention of the drafters to make operation of the doctrine subject to some strict limitations.[489]

It must be noted that no such requirement is found in the above discussed provision of the PICC, nor does its presence in the present provision of the DCFR seems justified in view of various problems identified with its application by some writers. The problems with the application of this requirement are summarised by a certain author in the following words:

> *...it can be argued that the requirement of exceptionality places too heavy a burden on the affected party to rely on the provision and may have the effect that it cannot be invoked in practice. The requirement of reasonable foreseeability (the requirement that the debtor could not have reasonably foreseen the change in order to take it into account upon conclusion of the contract (see below)) is sufficient both to protect the general principle of the sanctity of contracts and the interests of the creditor. The standard of reasonableness implies objective criteria for measuring foreseeability and does not rely only on the internal considerations of the debtor, therefore providing legal certainty to the process of assessing that foreseeability and avoiding eventual opportunistic behaviour by the debtor.*[490]

b) Performance must have become unjustly onerous: This element is said to cover situations where the costs of performance excessively increase, or where the expected value

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[488] See DCFR Article III.-1:110, Official Comments D, p. 739.

[489] The example given by the authors of the DCFR does not seem to give any typical explanation to justify this requirement; See Ibid.

[490] R Momberg, "Change of Circumstances in International Instruments of Contract Law: The Approach of the CISG, the PICC, the PECL AND the DCFR," The Vindobona Journal of International Commercial Law and Arbitration, Vol. 15, No.2, (2011), P. 253.

of the performance to be received substantially diminishes or totally disappears.[491] Hence, it comprises cases of impracticability and frustration of purpose, where excessive imbalances have resulted between the parties' respective rights and obligations due to supervening events. It is important to note that the DCFR explicitly requires that the imbalance caused in the performance of the obligations of the parties to be manifestly unjust for the courts to intervene. Even though it is generally admitted that consideration of justice underlies the background of any provision on change of circumstances, it has been contended that requiring evaluation of justice as a condition for application of the doctrine as in the case of the present provision should nevertheless be avoided as far as possible. Such contention is based on the assertion that assessment of justice "*may lead the court to examine, for the application of the provision, factors which are external to the contract itself, e.g. the economic situation of the promisor, its relative position on the market and even its related contracts with third parties*".[492]

c) Debtor must have attempted a negotiated settlement: This requirement implies the fact that the DCFR does not provide renegotiation as one of the effects of change of circumstances. Rather than providing renegotiation as one of the rights to which the disadvantaged party is entitled, or imposing it as an obligation that should be observed by contracting parties, it simply makes it a requirement for seeking a court imposed remedy.[493]

d) Change must have occurred since the obligation was incurred: This clarifies the fact that change of circumstances referred in the provision only comprises those changes which have occurred after the obligation was incurred. This is similar to the requirement contained in the comparable provision of the PECL. The official commentary unequivocally states that: *If, unknown to either party, the circumstances which make the contract excessively onerous for one of them already existed at the time at which the contract was made, the present Article does not apply.*[494] *In certain cases, but not in all, the rules on mistake may come into operation.*[495] From this, it appears that both international instruments do not support the position of the German doctrine on change of circumstances that encompass cases of common mistake. However, this is to be contrasted with Article 6.2.2(a) of the PICC

[491] See the example given under DCFR Article III.-1:110, Official Comments D, p. 739.
[492] Momberg, supra note 490, pp. 249-250.
[493] See the first paragraph of Article 6.2.3 of the PICC (above) and also the discussions provided below in sub-sections 4.3.4.1. & 4.4.4.1.
[494] DCFR Article III.-1:110, Official Comments D, pp. 739-740.
[495] Ibid.

considered above that states "*the events [...] become known to the disadvantaged party after the conclusion of the contract*". This is taken to include in the scope of hardship the events that were already present at the time of conclusion of the contract, but which were not reasonably known to the affected party.[496] This is said to provide the opportunity to claim remedies on grounds of hardship with respect to events that can conceptually be considered as cases of mistake.

e) Circumstances could not have been taken into account: It is also stressed *that the court's powers will not arise if at the time when the obligation was incurred the debtor took into account, or could reasonably be expected to have taken into account, the possibility or scale of the change of circumstances.*[497] Note that this requirement not only refers to the occurrence of the change of circumstances, but also takes into account the magnitude or intensity of its effects. This is said to be an improvement in comparison with the respective provisions of the PECL and the PICC that seem to refer only to the possibility of the occurrence of that change.[498] In some cases, even a foreseeable event may have an unforeseeable intensity with respect to its effects. Thus, though the nature of the event may be generally regarded foreseeable, it does not always serve to automatically preclude the affected party from relying on the doctrine of change of circumstances; since its magnitude or consequences concerning the obligations of the parties may still be assessed and deemed to be unforeseeable.

f) Assumption of risk: The court's power to vary or terminate the obligation is also excluded if the debtor assumed the risk of the change of circumstances. As in the case of application of the concept of hardship under the PICC, risk assumption in this case too need not be an express one. The official commentary suggests that it "*would generally be reasonable to take the view that the debtor had assumed the risk, for instance, if the obligation arose out of an inherently speculative transaction (for instance a sale on the futures market) or if the events which occurred were within his own control.*" [499] But note that the reference made to the intensity or magnitude of the change of circumstances discussed above may have its own bearing on the conclusion to be made here with regard to the debtor's assumption of risk. The debtor may still be allowed to rely on the doctrine with regard to that part of the risk which is

[496] Momberg, supra note 490, pp. 250-251; See also further discussions provided below in sub-sec. 4.4.2. (b).
[497] DCFR Article III.-1:110, Official Comments D, p. 740.
[498] Momberg, supra note 490, P.251.
[499] DCFR Article III.-1:110, Official Comments D, p. 740.

to be regarded "excessive", in order to presume that it has reasonably been foreseen and assumed by the same.

4.3.3. Relationship between the Provision on Impossibility and Change of Circumstances

Article III – 3:104 of the DCFR provides excuses where the debtor's non-performance is caused due to "an impediment".[500] This provision seems to concern itself with cases of "impossibility" that are traditionally regulated under the theory of *force majeure*. In the cases falling under this provision, there is an event that has caused an insurmountable obstacle to performance. In the situation covered by the provision on change of circumstances, however, the official commentary notes that: "performance may still be possible, although ruinous, for the debtor".[501] Thus, the consequences arising from the concepts enshrined under the two provisions are likewise different. Accordingly, the official commentary notes that, "*impossibility of performance, if it is total, can only lead to the end of the obligation. Exceptional change of circumstances, on the other hand, gives the court the choice of revising the terms regulating the obligation or terminating it altogether.*"[502] The commentary finally adds that differentiating between situations falling under the two provisions may sometimes pose challenges and states that: *"[o]f course there is sometimes a very fine line between a performance which is only possible by totally unreasonable efforts, and a*

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[500] DCFR Article III.–3:104 provides-: Excuse due to an impediment
(1) A debtor's non-performance of an obligation is excused if it is due to an impediment beyond the debtor's control and if the debtor could not reasonably be expected to have avoided or overcome the impediment or its consequences.
(2) Where the obligation arose out of a contract or other juridical act, non-performance is not excused if the debtor could reasonably be expected to have taken the impediment into account at the time when the obligation was incurred.
(3) Where the excusing impediment is only temporary the excuse has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental nonperformance, the creditor may treat it as such.
(4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated by the rules in Chapter 3, Section 5, Subsection 4 (Restitution) with appropriate adaptations.
(5) The debtor has a duty to ensure that notice of the impediment and of its effect on the ability to perform reaches the creditor within a reasonable time after the debtor knew or could reasonably be expected to have known of these circumstances. The creditor is entitled to damages for any loss resulting from the non-receipt of such notice.
[501] DCFR Article III.-1:110, Official Comments C, pp. 737-738.
[502] Id, p. 738.

performance which is only very difficult even if it may drive the debtor into bankruptcy. It is up to the court to decide which situation is before it."[503]

4.3.4. Effects of Application of the Doctrine of Change of Circumstances

4.3.4.1. The Role of Renegotiation

As we have already noted above, renegotiation is provided as a requirement for seeking the judicial remedies arising from the doctrine of change of circumstances. Thus the debtor has to attempt in good faith to achieve a reasonable and equitable adjustment by negotiation before seeking the remedies discussed below that the courts are empowered to grant. According to the official commentary, the approach of the PECL that imposes real obligation to renegotiate on the parties is *'undesirably complicated and heavy'*.[504] As an example for the drawback of the approach under the PECL, the commentary discusses that 'a creditor in an obligation might be acting in a fiduciary capacity and might be placed in a difficult situation of conflict of interests if obliged to negotiate away its advantage'.[505] In fact, the Commentary also refers to the PICC, which according to the opinion expressed therein, *'adopt a similar basic approach but use a slightly different drafting technique'*.[506] But, in view of the accompanying comments of the comparable provision of the PICC and observations made by some commentators, the accuracy of the opinion expressed in this regard is to be put in serious doubts.[507]

4.3.4.1. Modification or Termination of the Contract by the Court

Where the above discussed requirements for application of the doctrine are fulfilled, the court may terminate the obligation or modify the terms of the contract or juridical act regulating it. With regard to modification, it is said that the court's aim should be at making the obligation reasonable and equitable in view of the newly prevailing circumstances. Thus, the court's job

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[503] DCFR Article III.-1:110, Official Comments C, p. 738.
[504] Ibid.
[505] Ibid.
[506] Id, p. 739
[507] Article 6.2.3 of the PICC entitles the disadvantaged party to the right of requesting renegotiations in cases of hardship. The presence of this right is said to necessarily imply the existence of an obligation to renegotiate (for the other party), which can be the ground for *claims of specific performance or damages in case of its non-compliance. This interpretation obviously indicates that the PICC's renegotiation regime is closer to that of the PECL than to that of the DCFR.;* J. Hijma, "The Role of the Court and of the Parties in Adapting a Contract to Unforeseen Circumstances," In A.G. Castermans, K.J.O. Jansen, M.W. Knigge, P. Memelink & J.H. Nieuwenhuis (eds.), Foreseen and Unforeseen Circumstances, Deventer – Kluwer –(2012), PP.17-28.

is to ensure that the risks which resulted from the change of circumstances are fairly distributed among the parties. As indicated in the commentary of the provision, such *modification could take various forms, including an extension of the period for performance, an increase or reduction in a price, or an increase or reduction in what is to be supplied or provided.*[508]

The official commentary indicates that termination of the contract is only to be ordered by the court as a last resort remedy. It states that, *"[i]n some cases the only option open to the court would be to terminate the obligation".*[509] Upon declaring termination, the court is required to fix the time from which such termination takes place, taking into account the extent to which performance has already been made. It is this time which will determine the extent of restitution which will become due. The commentary also notes that wide discretions are left to the court in determining the terms upon which it declares termination of the contract. It particularly states that "*the Article empowers the court to terminate upon terms, for instance by providing that an indemnity is given. It may also order the payment of an addition to the price or of compensation for a limited period and termination at the end of the period.*" [510]

4.4. Principles of European Contract Law (PECL)

4.4.1. General

Some writers have characterised the Principles of European Contract Law (the PECL) as a document that summarise a 'common core' of European contract law and thus to be likened with the US Restatements. However, unlike the US Restatements that generally summarise the law as it is today, the PECL is said to embrace the further aim of promoting the unification of contract law through guiding and facilitating its future development- thus it goes more than merely restating a current status.[511] Thus, the PECL could more properly be regarded as a kind of model code for European contract law, serving both the unification and modernisation of domestic contract law.

The PECL incorporate explicit and elaborate rules applicable to address the problem of change of circumstances in its Article 6:111. This provision could perhaps be taken as one

[508] DCFR Article III.-1:110, Official Comments E, p. 741.
[509] Ibid.
[510] Ibid.
[511] R Backhaus, "The Limits of the Duty to Perform in the Principles of European Contract Law," Electronic Journal of Comparative Law, Vol. 8, No. 1 (2004), P. 3, foot note 9.

particular example reflecting the PECL's aim to facilitate future development of the law. The provision begins by confirming the basic principle of *pacta sunt servanda* under its first paragraph, [512] before it provides recognition to the exception based on the doctrine of change of circumstances. The provision first imposes on the parties the obligation to renegotiate if performance of the contract becomes excessively onerous due to change of circumstances. If the parties fail to come up with negotiated solution to address the change of circumstances within a reasonable period, it further provides the possibility for the courts to step in with the power to modify or terminate the contract. In addition to the rules applicable to the problem of change of circumstances, Article 8:108 of the PECL provides further excuses that may be invoked by the debtor in cases of non-performance. In this section, the difference existing between this provision and Article 6:111 will also be emphasised. But before doing this, the basic preconditions for triggering the application of the doctrine of change of circumstances enshrined in the latter will be first treated in the next-subsection.

4.4.2. Prerequisites of Application the Doctrine of Change of Circumstances

As already noted, the first paragraph of Article 6:111 begins by providing confirmation to the cardinal principle of contract law- *pacta sunt servanda*. However, since the binding force of contracts is recognised as a "principle", and not as an absolute rule, exception is admitted to it on the ground of change of circumstances under the second paragraph of the provision. Thus, right next to the principle that a contract should be performed *even if performance has become more onerous,* the second paragraph of Article 6:111 of the PECL provides that, *[i]f, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it, provided that:*

a) *the change of circumstances occurred after the time of conclusion of the contract,*
b) *the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and*
c) *the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.*

[512] Article 6: 111 (1) of the PECL stipulates that, *"[a]party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished."*

circumstances has caused to the equilibrium of the contract, rather than the personal consequences produced for that particularly disadvantaged party.

b) The change of circumstances must occur after conclusion of the contract

The second condition for application of the doctrine is that the change of circumstances occurred after conclusion of the contract. This condition necessarily leads to the question whether application of the doctrine totally excludes circumstances that existed at the time of conclusion of the contract, but which are in fact discovered or can only be discovered afterwards. Both the provision and the discussion presented in the official comments seem to suggest that the answer to this question is in the affirmative.[516] Thus, for the purpose of invoking the doctrine, it seems that a party cannot rely on facts that were present at the time of conclusion of the contract, even if such facts actually became known to him or could only be discovered later on.

c) The changed circumstances could not be taken into account at the time of conclusion of the contract

Thirdly, the doctrine of change of circumstances does not apply to address the effects of supervening changes that could have been reasonably taken into account at the time of conclusion of the contract. The official comment states that no remedy is available if a reasonable man in the position of the aggrieved party could have taken the change of circumstances into account at the time of conclusion of the contract.[517] If the change could have been taken into account by the aggrieved party, the expectation is that he should have insisted on incorporating a specific contract clause to deal with the problem.[518] Thus, in the absence of such contractual clause, legal remedy is excluded because the presumption of the law is that the affected party has (at least impliedly) consented to take on the risks arising from such change. This further implies that this condition is essentially connected with the last condition relating to assumption of risk discussed below.

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[516] I Schwenzer, "Force Majeure and Hardship in International Sales Contracts," University of Wellington L. Rev, Vol. 39 (2008): 709-725, p. 717.
[517] PECL, Article 6:111, Comments B (III), P. 325.
[518] See Schwenzer, supra note 516, p. 719.

d) The debtor must not assume the risk of the change of circumstances

According to the PECL's commentary, the loss encountered due to the change of circumstances has to be borne if the party seeking relief has assumed the risk expressly or if the contract is a speculative one like sale on a future market.[519] Thus, application of the doctrine comes to the scene only whenever the risks of the change of circumstances cannot be allocated to one of the parties at least on the basis of some tacit terms to be reasonably derived from the contract itself.

4.4.3. Change of Circumstances and *Force Majeure*

As we have noted earlier, Article 8:108 of the PECL enshrines a defence that may be invoked by the debtor to be excused from his liability for non-performance. [520] This provision essentially embodies the traditional defences based on the concepts of *impossibility or force majeure*, according to which the power of the courts is only limited to declaring termination of the contract and excusing the debtor from the liability to pay damages. With respect to the nature of its relationship with Article 6:111, the approach of the PECL is generally similar to that of the DCFR. Thus a clear distinction is established between *force majeure* and change of circumstances. Accordingly, the problem of change of circumstances addressed in Article 6:111 is treated as totally distinct problem from the issue of *force majeure* which is addressed in Article 8:108. While change of circumstances is treated as a problem of performance, force majeure is regarded to fall under non-performance. This could be contrasted to the approach of the PICC that does not firmly establish this sort of distinction between the two concepts.

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[519] See PECL Article 6:111, Comment B (IV), p. 326.

[520] *Article 8:108: Excuse Due to an Impediment*
(1) A party's non-performance is excused if it proves that it is due to an impediment beyond its control and that it could not reasonably have been expected to take the impediment into account at the time of the conclusion of the contract, or to have avoided or overcome the impediment or its consequences.
(2) Where the impediment is only temporary the excuse provided by this Article has effect for the period during which the impediment exists. However, if the delay amounts to a fundamental non-performance, the creditor may treat it as such.
(Cont.) *(3) The non-performing party must ensure that notice of the impediment and of its effect on its ability to perform is received by the other party within a reasonable time after the non-performing party knew or ought to have known of these circumstances. The other party is entitled to damages for any loss resulting from the non-receipt of such notice.*

4.4.4. Effects of Change of Circumstances

4.4.4.1. The Obligation to Renegotiate

The obligation to renegotiate in cases of change of circumstances is said to be the specific application of the general principle of good faith and fair dealing; which, according to the official commentary of the PECL, must be viewed as one of the central pillars of the Principles.[521] Accordingly, Article 6111 (1) of the PECL provides for the obligation to renegotiate in case of change of circumstances. The legal consequence of non-compliance with this obligation is further addressed in Article 6111(3) b, last statement, provides that: '*a party who has negotiated or broken off negotiations contrary to good faith and fair dealing is liable for the losses caused to the other party*'.

It is important to note at this point that the PECL makes renegotiation an obligation for both parties. This means either party could force renegotiation, notwithstanding that such party is not the one adversely affected due to the changed circumstances. Instead of imposing renegotiation as a duty, with the consequence of potential liability for breach thereof, the DCFR merely requires the debtor to make reasonable attempts to renegotiate the contract in order to equitably adjust its terms before seeking remedy from the court. Thus renegotiation is merely a precondition that the debtor should observe, before going to court to have a solution imposed upon an unwilling creditor.[522]

The PICC, on the other hand, makes renegotiation the right that can be requested by the disadvantaged party. Such party, however, is expressly prohibited from refusing performance on the mere fact that the request for renegotiation is made. The PECL, does not expressly regulate whether the debtor is prohibited from withholding performance during the period in which the renegotiation is to be conducted. But it seems one may still deduct such prohibition, since the imposition of the duty to renegotiate may in itself be taken to imply that the disadvantaged party does not have the right to refuse performance and insist on dissolution of the contract.[523]

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[521]The Official Commentary notes that: *Good faith and fair dealing presides over the initial contractual negotiations and continues to apply should the contract have to be renegotiated after its formation*: See PECL Article 6:111, Comment B (IV), p. 326

[522] H L. Macqueen, "Change of Circumstances: CISG, CESL and a Case from Scotland," Journal of International Trade Law and Policy, Vol.11, No: 3 (2o12), Pp. 300-305.

[523] But is good to note that the prohibition is not absolute, but may suffer exceptions in cases where the circumstances so require: see *infra* discussion in 4.2.4.1.

4.4.4.2. Adaptation or Termination of the Contract

As noted above, the PECL provides that the parties have the obligation to renegotiate in case of change of circumstances. However, if the parties fail to succeed in their negotiation to make adjustment or termination of the obligation within a reasonable time, it further equips the court with the power to implement either of these measures. Accordingly, the third and the last paragraph of Article 6:111 of the PECL provides that: "*[i]f the parties fail to reach agreement within a reasonable period, the court may: (a) terminate the contract at a date and on terms to be determined by the court; or (b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances...*"

The above cited provision does not clearly state as to which of the two options, from the termination and modification of the contract, the court should give priority. The official commentary, however, suggests that '*in accordance with the purpose of the provision, [the court's] first aim should be to preserve the contract*'.[524] The provision also does not clearly provide the specific criteria to be used by the court in deciding the choice to be made between the two options. There are no clues provided to the court for determining the situations in which termination of the contract may be warranted rather than its adaptation, or vice versa.

Furthermore, other than vaguely suggesting that adaptation by the court has the object of distributing *the losses and gains resulting from the change of circumstances in a just and equitable manner,* the above provision stipulate no clear guidelines or standards to be used by the courts in deciding the contents of the adaptation itself. The official comments of the PECL (and that of the DCFR for that matter) further add that in the case of contractual obligations this entails re-establishing the contractual balance "*by ensuring that any extra costs caused by the unforeseen circumstances are borne fairly by the parties. They should not be placed solely on one of them*".[525] Thus it seems the target that the court should meet in making adaptation of the contract is reinstating the parties back to their previous positions that they occupied upon conclusion of the contract.

[524] PECL, Article 6:111 Comment D, p. 326.
[525] See Momberg, supra note 490, p. 262.

4.5. United Nations Convention on the International Sale of Goods (CISG)

4.5.1. General

The CISG is the most notable and important international instrument of contract law that has a binding effect among its signatories. The convention exclusively applies to international sales contracts, and does not extend to purely domestic transactions. The applicability of the Convention to international sales contracts generally arises if both contracting parties belong to its signatory member states. In case of international sales contracts between parties belonging to a non-member and member states, the convention may still become applicable if the dispute arising under such contracts would be subject to the laws of the latter according to relevant private international law rules.

The CISG adopts the widest conception of breach of contract covering almost all conceivable cases of non-compliance with the terms provided therein. Thus the concept of non-performance is not limited to cases in which the debtor totally fails to perform, but may further comprise cases involving delay or delivery of non-conforming goods. The debtor's liability for damages for non-performance is generally based on the principle of strict liability as could be inferred from Articles 45 & 74 et seq.[526]As the necessary limitation to the system of strict liability, the Convention also incorporates in its Article 79 a general excuse that the debtor may invoke to be exempted from his liability for damages. The exemption enshrined in this provision has a wide scope of application that goes parallel with the expansive concept of breach basically laid down in Article 45 (1) of the Convention.[527]

According to the basic rule in Article 79 (1) of the Convention, the debtor is excused from liability, if *"his failure to perform his obligations was due to an impediment beyond his control"*.[528] Apart from the exemptions that may be granted based on this general rule, the CISG does not additionally incorporate a specific provision applicable to the issue of change of circumstances. This is in sharp contrast to the approach generally observed under the non-binding international instruments that we have considered thus far.

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[526] P. Huber & A. Mullis, The CISG: A new textbook for students and practitioners, (2007), P.258.
[527] Huber & Mullis, supra note, 526.
[528] L A. DiMatteo, Lucien J. Dhooge, Stephanie Greene, Virginia G.Maurer, Marisa Anne Pagnattaro, International Sales Law: A Critical Analysis of CISG Jurisprudence, Cambridge University Press, (2005), p.158.

In the absence of clearly applicable specific provision, the question of addressing the problem of change of circumstances therefore normally depends on the identification of the situations that would be treated to constitute "impediments beyond the debtor's control", within the meaning of Article 79 of the Convention. However, there are also several writers that assign some supplementary role to the comparative provisions contained in related international instruments (particularly, those of the PECL and PICC) to expand the scope of the exemptions recognised under the Convention to the problem of change of circumstances. Nevertheless, the supplementary role of related international instruments is generally recognised to arise only with respect to those matters that are regarded to fall within the scope of the Convention in the general sense, but still left without being specifically regulated.[529] Thus the discussion on the supplementary role of the related instruments presupposes that the provision of solutions for the problem of change of circumstances (at least in a very general sense) falls within the purview of Article 79 of the Convention. This makes issues relating to the content and scope of Article 79 of the CISG the central themes of our discussions in this section in appraising the approach adopted by the Convention towards the problem of change of circumstances.

4.5.2. Article 79 and Its Application to Cases of Impossibility

In order to facilitate the discussions to be made in this section hereafter, the full text of Article 79 of the CISG provides:

> *(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*
> *(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:*
> *(a) he is exempt under the preceding paragraph; and*
> *(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.*
> *(3) The exemption provided by this article has effect for the period during which the impediment exists.*
> *(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received*

[529] See B Zeller, "The Black Hole: Where are the Four Corners of the CISG?" In R Jones & G A Moens, International Trade and Business Law Annual, Vol. VII, (2002), pp. 252-253.

by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

As could be observed, the CISG exempts the debtor from liability for damages if the non-performance of his obligations was due to "impediment" within the meaning of Article 79. This provision is said to share similarity with the previously observed Article 7.1.7(1) of the PICC, Article 8:801(1) of the PECL, and Article III-3:104(1) of the DCFR, which have all enshrined excuses that are essentially based on the concept of *force majeure*.[530] But Article 79 of the CISG differs from the cited provisions of the three non-binding instruments in some major respects. Perhaps the most essential difference relates to their respective scopes of applications.[531] Such difference emerges from the presence of specific provisions particularly applicable to address the issue of change of circumstances in the other three instruments; and the absence of such provision in the CSIG.[532] This understandably entails some significant differences to arise in the interpretation and practical application of the respective provisions despite their textual similarity that makes them appear on the face to have been addressed for the same issue. Thus it should be conceded that the exemption in Article 79 of the CISG is generally broader than the exemptions contained in the provisions of the other three instruments, which are strictly confined to cases of *force majeure* or impossibility (the issue of change of circumstances being subject to the specific doctrines separately provided in other provisions).

However, whether the scope of the exemption provided in Article 79 of the CISG is broad enough to cover cases of change of circumstances is still subject to different opinions. But before we turn to the views expressed regarding this critical question, the overall requirements for the application of the exemption under Article 79 of the Convention will be briefly discussed here in reference to the less disputed areas of its application generally covering cases of impossibility. In this respect, it is possible to identify that Article 79 (1) of the CISG clearly incorporates three distinct prerequisites: the impediment must fall outside

[530] See Schwenzer, supra note 516, pp. 713-714.
[531]. See A. M. Garro, "Exemption of liability for damages: Comparison between provisions of the CISG (Art. 79) and the counterpart provisions of the UNIDROIT Principles (Art. 7.1.7)," In J Felemegas (ed.), An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law, (Cambridge University Press, 2007), p. 238.
[532] Id, p. 531.

the sphere of risk reasonably assumed by the debtor (exteriority test); the impediment must have been unforeseeable (unforeseeability test); and, the impediment or its consequences must have been unavoidable (unavoidability test).[533]

Impediment beyond control of the debtor: Pursuant to this first requirement, the impediment preventing performance must be beyond the debtor's control. In the absence of any express or implied agreement, this requires conducting some risk analysis, i.e. one has to look whether the risk of the occurrence of the impediment was something within the seller's or the buyer's sphere of control.[534] For instance, the seller generally bears the risk of impediments arising from disruptions caused in its business operation. Thus if the seller suffers from a shortage in his production because important employees have left his company, it will not be regarded as something that falls "beyond his control". The same is true for breakdowns in his production machinery or computer systems. Courts have also been usually reluctant to treat cases involving non-conformity of the goods to fall outside the sphere of the seller's control, even where the latter has shown that such non-conformity was due to the failure of his supplier or the producer.[535] What is more, where the seller has sold generic goods, it has been more consistently argued that he will have to bear the so-called "acquisition risk" (or "procurement risk").[536] Thus, as a matter of a general rule, national courts are not generally inclined to excuse a party for an impediment rendering performance unforeseeably become more difficult or unprofitable. This particular issue will be in fact further pursued in the next sub-section when we evaluate the scope of the provision in relation to change of circumstances.

Unforeseeability: Article 79 (1) of the CISG further requires the debtor to prove that he/she could not have reasonably taken the impediment into account at the time of conclusion of the

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[533] See Garro, in J Felemegas (ed.), supra note 531, p.714. Incidentally, it is interesting to note that the concept of *"impediment"* in Article 79 of the CISG, as it does not seem to be strictly limited to cases of absolute impossibility, has a broader scope than the *force majeure* concept found under Article the Ethiopian Civil Code. What is more, the concept of *force majeure* under the Ethiopian Civil Code has no analogous general requirement relating to the "exteriority" of the force majeure event, though one may still argue for the relevance of this requirement in limited cases at least based on the exclusion of those events specified in Article 1794 (a) of the Code.

[534] Huber & Mullis, supra note 526, p. 259.

[535] In one related case involving the sale of defective powdered milk, the German Supreme Court once held that 'the seller would not be freed from its obligation to pay damages, unless it is proved that the infestation of the delivered milk could not have been detected and that the probable source of infestation was outside of its sphere of influence': For an elaborate discussion of this and other related cases see P. Mazzacano, "The Treatment of (Cont.) CISG Article 79 in German Courts: Halting the Homeward Trend," P Zumbansen, J W. Cioffi (eds.) Nordic Journal of Commercial Law, issue 2(2012).

[536] See Huber & Mullis, supra note 526, pp. 261-262.

contract. This requirement is commonly present in provisions applicable to cases of impossibility or particularly addressing the problem of change of circumstances in most of the domestic as well as international instruments so far considered in this paper.

But variations are to be observed with regard to the time frame in which the requirement of unforeseeability is to be evaluated. As it has already been noted, the PECL and the DCFR seem to render the test relating to this requirement irrelevant, where the impediments under consideration are proved to have existed at the time of conclusion of the contract. Thus no exemption is to be admitted on the ground of an impediment that existed at the time of conclusion, though the parties were not aware as to their existence at the time. This may be contrasted with the provision of the PICC that seems to open the possibility of considering impediments that existed at the time of conclusion of the contract, subject to the condition that they were not reasonably disclosed to the parties in order to be taken into account at the time. This latter position adopted in the PICC seems to be equally embraced by Article 79 (1) of the CISG.[537]

Unavoidability: Finally, the application of Article 79(1) CISG presupposes that the debtor could not reasonably be expected to have overcome the impediment or its consequences. This requirement is said to essentially involve evaluation of the degree of efforts and costs that the debtor should reasonably be expected to invest to overcome the impediment or consequences of the same. Statutory or contractual risk allocations also play major roles and frequently shape the balance involved in this particular requirement. In default of allocations provided by the law or the contract, the general rule seems to suggest that the debtor will be excused only where extraordinary expenses and efforts would be required in order to overcome the impediment.[538]

Finally it must be noted that the party invoking impediments to performance has to timely notify the other party of the impediment and its effect on his ability to perform.[539] If he fails

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[537] Huber & Mullis, supra note 526, p. 262: "*It may be the case that the impediment already existed at that time, but that it was not recognisable to the debtor. In such a case, the unforeseeability requirement of Article 79(1) CISG will be met*". The position of the CISG on this point seems to share similarity with the position of the German law.

[538] Ibid. (Citation omitted).

[539] See Article 79 (4) of the CISG reproduced above at the beginning of this sub-section.

to give such notice within a reasonable time, he will be liable for damages resulting from the non-receipt of the notice by the other party.[540]

Once the requirements discussed above are fulfilled, certain legal effects would follow. The legal effects arising from the exemption under Article 79 of the CISG will be evaluated after addressing whether cases of change of circumstances would be covered under the scope of application of the provision.

4.5.3. Applicability of Article 79 to Cases of Change of Circumstances

As already noted, the CISG does not incorporate a specific provision on hardship or change of circumstances. Judicial decisions on the subject is also said to be insufficient and inconclusive to produce a stable precedent for deciding either in favour of the exclusion or inclusion of the doctrine within the purview of Article 79 of the Convention.[541] This has resulted in some divergence in legal doctrine with regard to the position of the Convention on the issue of change of circumstances.

On one hand, there are writers that firmly believe in the role of the PICC (and other related international instruments) to interpret and supplement the provisions of the CISG. On the other hand, there are those who totally dismiss the role of the PICC (or the PECL for that matter) to interpret or supplement the CISG. However, the more acceptable approach takes the middle ground between these extreme positions.[542] Accordingly, the PICC may well be used to interpret or supplement international law instruments notwithstanding that the said instruments were adopted prior to their publications, as in the case of the CISG.[543] This, however, does not mean that the PICC can be used in their entirety. It must be satisfied that the issue at stake falls within the scope of the CISG and that the relevant provisions of the PICC can be considered, in the language of Article 7(2) CISG, as an expression of the *"general principles on which [the Convention] is based*".[544]

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[540] See Article 79 (4) of the CISG.
[541] See Garro, In J Felemegas (ed.), supra note 531, p.242.
[542] B Zeller, CISG and the Unification of International Trade Law, (2007), P 26.
[543] R Michaels, "The UNIDROIT Principles as Global Background Law," Uniform L. Rev, Vol. 19, (2014):643–668, p. 665.
[544] In this connection it is asserted that the PICC and the PECL could be regarded as alternative sets of international sales law that 'reflect a more rounded view of contractual principles'. It is therefore conceivable that within the two instruments have managed to legislate. At the very least these international sales laws can

According to the prevailing view, therefore, the relevance of the provisions of the PICC (or the PECL) to supplement the CISG on the issue of change of circumstances should pass two crucial tests.[545] The first test is that it must be ascertained that the issue of change of circumstances or hardship is at least not excluded, or generally falls within the scope of the CISG. Once this test is passed, the relevant provision of the PICC to be applied to the case should still qualify to be the manifestations of, or at least to be in line with, the general principles on which the CISG is based.

With regard to the first test, it should be noted that the CISG does not contain a single provision that clearly mentions the concept of hardship or change of circumstances. Thus the major issue becomes as to how this silence of the convention is to be construed. Some opine that the non-inclusion of specific provision on change of circumstances is due to the fact that the term "impediment" used in its Article 79 (1) was perceived to be indicative of the fact that the provision was intended to cover very exceptional cases of change of circumstances in which totally unpredictable changes render performance of contracts extremely difficult.[546]

Others, on the other hand, assert that the non-inclusion of specific provision under the CISG should be interpreted as implied rejection of the doctrine of change of circumstances.[547] In a bid to support this position, the legislative history of Article 79 of the CISG is frequently discussed. The legislative history of the provision is said to indicate the intention of the drafters to provide exemption rule stricter than the version found in its predecessor Article 74 of the former Uniform Law of International Sales (ULIS), which, according to some commentators, *"had been criticised for excusing non-performance too readily, such as where performance merely became more difficult".*[548] The UNCITRAL (the United Nations Commission on International Trade Law) debates are also said to show that the CISG drafters were opposed to allowing commercial or economic hardship as an excuse for non-

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(Cont.) assist in providing a possible direction for interpretation without falling into the trap of 'manufacturing' laws: Zeller, supra note 529, p. 253.

[545] Michaels, supra note 543.

[546] Garro, In J Felemegas (ed.), supra note 531, p. 242.

[547] Ibid.

[548] D Flambouras, "Exemption and hardship: Remarks on the manner in which the Principles of European Contract Law (Articles 6:111 and 8:108) may be used to interpret or supplement CISG Article 79," In J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007) p. 501.

performance and that this was the reason for adopting the requirement of an *impediment* as a pre-condition for relief in place of the more liberal ULIS test of a change of circumstances.[549]

However, other writers assert that the accounts given on the legislative history of Article 79 of the CISG are particularly obscure and in some respect conflicting, to sufficiently imply the rejection of the possibility of providing solutions for the problem of change of circumstances under the convention. [550] From practical point of view, it was further asserted that total rejection of the doctrine under the Convention would be difficult to presume, "*since it would be obviously unsatisfactory to treat some extreme cases of change of circumstances (involving economic impossibility) different from cases of physical or factual impossibility.*"[551] In view of these, the current prevailing view seems to generally admit the possibility that the problem of change of circumstances may be addressed under the CISG.

Once it is conceded that there are situations of change of circumstances calling for a legal response of some kind, still there is no single view on how such legal response should be provided under the convention. Accordingly, once we have found a proper hypothetical covering change of circumstances, it seems there are two alternative options left to be considered.[552] The first option that should be considered is the possibility to deal with genuine hardship situations based on Article 79 and other relevant provisions of the CISG itself. In the absence of such possibility, it seems we are left with no other option than to resign via Article 7(2) to using the provisions of related international instruments in order to provide proper reliefs for cases of change of circumstances through a stretched interpretation of Article 79 of the CISG.

Some writers generally oppose and try to avoid the latter option that enables the provisions of other related international instruments to supplement the basic recognition of the problem derived from Article 79 of the CISG. One argument to justify such opposition asserts that the hardship rules of the PICC, found in Articles 6.2.2 and 6.2.3, did not yet acquire the status of "general principles of law" in order to discharge that purpose pursuant to Article 7(2) of the CISG. Secondly, it has been further argued that the hardship provisions of the PICC are

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[549] Flambouras, In J Felemegas (ed), supra note 548.
[550] Garro, In J Felemegas (ed.), supra note 531, 244.
[551] R. Pirozzi "The Effect of Changing Circumstances in International Commercial Contracts: The SCAFORM Case," Vindobona. Journal of International Commercial Law and Arbitration, V. 16, No 2(207-222), p. 221.
[552] Note that the option of applying domestic legal concepts is generally excluded and totally unacceptable in view of the clear prohibition that could be derived from Article 7 (1) of the CISG.

particularly tailored for long-term service contracts and the so called relational contracts, which, according to some commentators, makes them unsuitable for addressing cases arising under international sales contracts.[553] There are also other group of writers that claim there are no reasonable gaps with respect to applying Article 79 of the CISG to cases of change of circumstances so as to necessitate making reference to the provisions of the other related international instruments via Article 7 (2) of the Convention.[554] On the views advanced in this line, the problem of change of circumstances is both recognised and sufficiently regulated by the provisions of the CISG itself. Thus the debate regarding the supplementary application of the provisions of related international instruments should simply be dismissed as completely irrelevant.

Still there are others who take the less extreme position that admits the possibility of referring to the provisions of the PICC or that of the PECL, at least with regard to determining the remedies that may be awarded in those cases of change of circumstances found to be governed under Article 79. It should be noted, however, that such reference is not equally admitted on the point of determining the situations for which those remedies may be available. This is based on the claim that the recognition for addressing change of circumstances under the CISG is confined to the most extreme cases. Accordingly, it is held that the Convention may provide remedy only for the extreme cases, where performance has become excessively onerous (not merely more onerous) due to totally unexpected changes- where, in the words of a certain commentator, *"the deal contained in the contract has unexpectedly turned into a nightmare for one party and a steal for the other"*. [555] It is asserted that the less strict doctrines enshrined in the related instruments, liberally allowing remedies based on change of circumstances or hardship, cannot serve for the purpose of interpreting the much narrower recognition admitted by the CISG for addressing the problem. Thus the provisions of related instruments may be used, if at all, only with respect to determining the effects of application of Article 79 of the CISG, but not in relation to determining the standard for its application to cases of change of circumstances. But this view still seems

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[553] For the discussion relating to the special purpose of the provisions, MJ Bonell, "The CISG, European Contract Law and the Development of a World Contract Law," The American Journal of Comparative Law Vol. 56, No. 1 (Winter, 2008), pp. 17-18. Regarding the conclusion drawn with respect to the non-s uitability of the provisions for the purpose supplementing Article 79 of the CISG, see Michaels, supra note 543, pp.666-667: This writer asserts that: *"[t]hese rules (Articles 6.2.2 and 6.2.3 of the PICC) are useful for long-term contracts and changed circumstances. By contrast, the typical sales contract, as governed by the CISG, is a one-off transaction that would be severely impaired if it stood under a general hardship exception"*.

[554] For instance, generally see Schwenzer, supra note 516.

[555] Garro, in J Felemegas (ed.), supra note 531, p. 243.

problematic, since no clear guiding standard is left to insure uniform application of the CISG (in that claimed "narrower" sense) to address the problem of change of circumstances.

4.5.4. Effects of the Exemption in Article 79 of the CISG

As it has already been mentioned, the prevailing view with regard to the scope of Article 79 of the CISG does not rule out its application to tackle the most genuine cases of hardship or change of circumstances. Article 79 may thus be viewed as a unique provision that merges cases that arise based on the traditional theory of *force majeure* and the concept of change of circumstances under the scope of its application. For some commentators (and also according to the positions indorsed in the PECL and the DCFR), the attempt to address cases arising from the two distinct concepts under a single system of rules may perhaps be regarded an awkward enterprise.

The PECL and the DCFR, as previously observed, seem to recognize the presence of clear factual and functional differences between the two concepts. The concept of change of circumstances is generally viewed to address situations in which the unexpected occurrences compel the parties to make some changes to their contractual program, without totally annihilating their aim to enforce the contract.[556] Thus the concept is generally assumed to deal with cases involving problems relating to performance, in which the performance of the contracts still remains possible (and also usually beneficial to both parties), although it may not be carried out exactly as initially planned by the parties. Cases of *force majeure,* in contrast, are treated in the context of non-performance, usually with more likelihood to result in the suspension of performance and termination of the contract.[557] The possibility to save the contractual relationship, albeit on a different arrangement, often appears to be less likely.[558] The recognition of these differences between the cases covered by each of the concepts further implies the appropriateness of attaching equally distinct remedies to each.

The PICC, as we have noted before, adopts a liberal view that does not strictly draw rigid lines between the two concepts, and allows the affected party to opt for the application of either concepts where the factual situations overlap. The PICC, even though does not take the view that the remedies arising under the two concepts should be strictly compartmentalised,

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[556] R Pirozzi, "Developments in the Change of E conomic Circumstances Debate?" Vindobona. Journal of International Commercial Law and Arbitration, V. 16, 95-112: (2012), pp. 102-103.
[557] Ibid.
[558] Id, p. 556.

the situations regulated under the two concepts are not still subject to the same form of remedies. In cases of change of circumstances, remedies that help to keep the contractual bond alive are favoured over those which lead to its termination. In contrast, the cases of *force majeure* generally lead to termination and remedies aiming for the preservation of the relationship are usually excluded due to objective impossibility of performance.

The most critical question to grapple with at this juncture is, therefore, as to whether similar differentiation between the remedies could be achieved under Article 79 of the CISG in its application to cases of change of circumstances and those of *force majeure.* This is another major issue on which we may be left without conclusive and settled view. As generally noted above, some would recommend referring to the detailed regulations found in other related international instruments, particularly the PICC and the PECL, via Article 7(2) of the CISG. Others, on the other hand, attempt to avoid the possibility of making such reference, mainly asserting that the problem of change of circumstances is not only 'governed', but also 'settled' by the provisions of the CISG itself. These being generally the case, now let us try to wind-up our discussion by taking some closer view at the specific consequences that will probably follow the application of Article 79 of the CISG.

4.5.4.1. Exemption from Liability for Damages

The most essential consequence of Article 79 of the CISG is that the debtor will not be liable for damages as a result of his breach.[559] Article 79 (1) of the CISG opens with the phrase "[a] party is not liable..." which is further clarified by Article 79 (5) of the CISG to actually mean that the defaulting party's liability is excused as far as the liability for damages is concerned; all other remedies being still reserved to the other party.[560] These other remedies may particularly include the right to reduce the price (Article 50 of the CISG), the right to compel specific performance (Articles 46 and 62 of the CISG), the right to avoid or terminate (Articles 49 and 64 of the CISG), and the right to collect interest on money due as separate from damages (Article 78 of the CISG).[561] Yet, as it shall be highlighted below, the actual grant of these remedies to the other party seems to depend on the particular circumstances of the case and the nature of obligations arising under the contract.

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[559] Article 79(5) recognizes exemption from liability to pay damages as the main effect following application of the provision, while the exercise of other rights available under the convention are still reserved: Huber & Mullis, supra note 526, p. 264.
[560] Garro, in J Felemegas (ed.), supra note 531, p. 240.
[561] Ibid.

In cases where the impediment is only of a temporary nature, the exemption will be effective for the period during which the impediment exists as per Article 79 (3) of the CISG. Another important point to mention here is that the exemption provided to the debtor will also apply to contractual penalty clauses, unless such clauses contain additional provisions or indications to the contrary.[562]

4.5.4.2. Application of Article 79 and Performance Claims

As noted before, except the right to claim damages for non performance, other remaining types of rights recognised under the Convention are still available to the creditor of the obligation in question under Article 79 (5) of the CISG. Thus the CISG seems to reserve the right to require specific performance of the obligation to the creditor, irrespective of the fact that the debtor's non-performance was subject to excuse.[563]

Nonetheless, the exercise of the right to claim performance could logically come under strain, where it essentially deprives the debtor from all practical merits of the exemption from liability in damages. In fact, total exclusion of a claim for performance in cases of change of circumstances may not always produce satisfactory results.[564] In cases of change of circumstances, it is good to be reminded of the fact that the law excuses the obligor on the account of the nature and seriousness of the obstacles faced by him in discharging his obligations, though performance of the contract may still be objectively possible. Thus the law has to decide the conditions in which such obstacles may provide proper justifications to exempt the debtor all in all from his duty to perform. In cases of objective impossibility, there is no as such problem for the law to excuse the obligor from such duty, as it would be highly inappropriate for the court to issue an order against him to do something that is impossible. In the cases of change of circumstances, however, it is generally asserted that: "*an all-or-nothing-approach, either always refusing to take into account any hardship or relieving the*

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[562] Huber & Mullis, supra note 526, p. 265.

[563] This provision may be compared with Article III.–3:101 (2) of the DCFR and Article 8: 101 of the PECL, which *explicitly state that the creditor may resort to any of those remedies except enforcing specific performance and damages, in cases where the debtor's non-performance is excused. Thus, in these instruments the other party's right to require specific performance of the contract is expressly excluded where excuse is granted to the defaulting party. But it is important to note that the excuses referred to in these provisions exclusively apply to cases of impossibility or force majeure.*

[564] Huber & Mullis, supra note 526, p. 194.

obligor from his obligation in every case where he faces difficulties in effecting his performance, does not offer an attractive solution."[565]

Some authors, in an attempt to avoid application of the right to claim performance as per Article 79 (5), try to find solution by reference to domestic law through the aid of Article 28 of the CISG. Article 46 of the CISG gives the buyer the right to request specific performance, subject to certain qualifications stated therein. The buyer's right to claim performance, however, is subject to further restriction provided under Article 28 of the CISG, which expressly states that the domestic courts are not bound to enforce the right if it would similarly be not granted according to their national laws.[566] Others try to modify the application of the provision based on the principle of good faith, which is- in the expression of a certain writer - "found buried in Article 7(1) of the CISG".[567] In this vein, it has been argued that *"the CISG limits specific performances pursuant to article 7(1), which requires an application of the principle of good faith. Specific performance where the price has dramatically changed in the market place would be difficult to enforce, as it would be in breach of good faith. It could be argued that 'coerced performances' would fall under the same category, namely a breach of good faith."*[568]

Other remaining approaches that try to neutralise the application Article 79 (5) of the CISG are those highlighted earlier, which resort to provisions of related instruments via Article 7 (2) of the CISG, or attempt to exclusively rely on the provisions of the CISG itself. Perhaps the more commonly held position in this regard seems to support maintaining the direct application of Article 79 of the CISG with respect to claims for damages. As regards to performance claim, however, it is not to be directly applicable, but to serve only as the basis for the general principles anticipated in Article 7(2) of the CISG.[569] Thus some authors specifically suggest that the provisions of other international instruments (particularly, the PECL and PICC) should be used as models to determine the effects that Article 79 of the

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[565] Huber & Mullis, supra note 526, p. 194.
[566] S Troiano, "The CISG's Impact on EU Legislation," in F Ferrari (ed.), The CISG and Its Impact on National Legal Systems, (2008), p. 405.
[567] Garro, In J Felemegas (ed.), supra note 531, p.246.
[568] But there are conflicting views expressed regarding the role of the principle of good faith under the Convention: B Zeller, supra note 542, pp.58-59. See also the comparative discussion made on the role of the principle of good faith under the CISG and PICC; See also U Magnus, "Comparative editorial remarks on the provisions regarding good faith in CISG Article 7(1) and the UNIDROIT Principles Article 1.7," in J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007), Pp. 45-48.
[569] Huber & Mullis, supra note 526, pp. 194-195.

CISG will produce on the rights of the parties relating to performance. Though it may not be sufficient to imply any established precedence, some support could be traced from the decisions of some domestic courts for this approach. In this regard, the decision rendered by the Belgian Supreme Court in 2009 (commonly referred as the "SCAFORM" case) perhaps provides the most frequently cited example to indicate the presence of such judicial support.[570] It is also possible to add another most recent example produced by the French *Cour de cassation* (the judgement was passed after the 2016 reform of the law of obligations, but the contract was concluded before the reform). In this particular judgement, the court expressly recognised that the relevant provisions of the PICC could be used to determine the legal effects of change of circumstances under Art 79 of the CISG, provided that they have been invoked by one of the claimants.[571]

The above approach that interprets the possible effects of Article 79 of the CISG in reference to the provisions of related instruments may reasonably be supported based on its potential to promote uniformity in the application of the provision to change of circumstances. The use of the general principle of good faith in interpretation of the provision, however, has been criticised to lead to a varied and highly uncertain results. This is said to be mainly due to the fact that the concept of good faith lacks internationally uniform and precise meaning, and implicit or explicit references are made to the divergent domestic rules to decide its application in particular cases.[572] This would pose serious threat against promoting uniformity in the application of the Convention, and hence should not be encouraged in its future application.

Finally, as it has already been mentioned above, some writers argue that the issue of change of circumstances could be effectively addressed exclusively based on flexible application of

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[570] This particular case concerned *a number of contracts for the sale of steel tubes entered into between a Dutch and a French company and governed by the CISG. A dispute arose when after the conclusion of the contracts the seller gave notice to the buyer that it was forced to recalculate the agreed price because of an unforeseeable 70% increase in the price of steel. The Belgian Supreme Court, after noting that the CISG does not expressly address hardship, held that in accordance with Article 7 of the CISG the gap was to be filled having regard to the "general principles governing the law of international commerce", and with no further explanation affirmed that such principles are to be found, among others, in the UNIDROIT Principles and without citing Article 6.2.3 on the effects of hardship concluded that in the case at hand the seller was entitled to request renegotiation of the price of the contract.*

[571] G. Cerqueira, "The Unidroit Principles of International Commercial Contracts in the Sino-European Sale of Goods Contracts," in N Nord & G. Cerqueira (eds.), International Sale of Goods: A Private International Law Comparative and Prospective Analysis of Sino- European Relations , (2017), p. 110.

[572] See J Felemegas, "Introduction" In J Felemegas (ed), *An International Approach to the Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007), p. 14.

the pertinent provisions of the CISG itself. Such arguments are basically entrenched in the very fact that Article 79 (5) of the CISG does not exclude performance claims. This fact has been presented as an important indication for the CISG's inclination towards a flexible approach that allows the courts to decide between termination and adaption of contracts based on the circumstances of each case. The writers adopting this view, however, generally fail to provide arguments likewise intended to show that renegotiation of contracts can similarly be based on the provisions of the CISG itself. In fact, some of them simply reject the legal merit of recognising the right/obligation to renegotiate as one effect of change of circumstances. The approaches proposed by the writers in this view and the possible defects relating to the same will be specifically highlighted below.

4.5.4.3. Termination (and the Possibility for Adaptation)

Under the three international instruments so far considered, priority is given for adaptation of the contract rather than its termination in cases of change of circumstances. Even if consensus seems to exist that the problem of change of circumstances may be addressed under Article 79 of the CISG, a clear mandate is apparently lacking to give similar favour for adaptation of the contract. As we have already noted above, some have resorted to the provisions of related instruments or the principle of good faith via Article 7 of the CISG in order to overcome the ambivalent situation and to achieve the result of adaptation. However, some writers denounce these approaches as totally unnecessary, or totally devoid of any legal basis, claiming that adaptation can be achieved based on provisions of the CISG itself.[573] The preservation of the right to claim specific performance despite exemption from liability for damages under Article 79 (5) of the CISG, the stipulation of "fundamental breach" as a general prerequisite for termination of contracts, and the price reduction mechanism recognised under the CISG form the foundation of their claim.[574]

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[573] For instance it is argued that: "*...it has been proposed to rely on Article 6.2.3(4) of the PICC as constituting an international usage in the sense of Article 9(2) of the CISG in order to reach the desirable result of adaptation. These doctrinal methods, through which references are made to other international instruments, do not seem to be necessary, however. The usual remedy mechanism under the CISG in combination with the duty* (Cont.) *to mitigate as a general principle91 may yield satisfactory and flexible results in practice." (Emphasis added):*Schwenzer, supra note 516, p. 724.

[574] The concept of fundamental breach particularly figures out and defined in Article 25 of the CISG, but it should be recognised that the concept may also be found to underlie other provisions of the Convention particularly concerned with the preconditions for termination in specific cases: See R Koch, "Fundamental breach: Commentary on whether the UNIDROIT Principles of International Commercial Contracts may be used to interpret or supplement Article 25 CISG," in J Felemegas (ed), *An International Approach to the*

The right to termination may arise despite the fact that non-performance is excused under Article 79 of the CISG. The right to termination under the CISG is presupposed on the concept of "fundamental breach", and there are two general models provided in the Convention for implementing the requirement. The first model simply imposes the presence of fundamental breach as essential prerequisite for termination of contract and leaves to the courts the task of determining in what conditions breach should be treated as such. The second model sets forth a general requirement that the creditor should first set an additional reasonable period of time to allow the debtor a second chance. The contract is terminated if the additional period expires without enticing the debtor to fully and correctly perform his obligations. Perhaps this second model is the one which is practically more useful,

The definition of fundamental breach provided in Article 25 of the CISG is said to comprise three elements, which require asking: first, what was the creditor *entitled to expect*; whether the non-performance *substantially deprives* the creditor of what he/she was entitled to expect; whether the debtor *foresaw or could reasonably be expected to have foreseen* the result.[575] If these questions are positively answered, then we do have a fundamental breach of the contract pursuant to the first model of its application. It is important to note here that the concept of fundamental breach embraced by the Convention is said not to be confused with the well-known domestic concepts that appear to share similarity, and thus needs to be "autonomously interpreted".[576] For some writers, arriving on the exact meaning of terms such as 'substantial detriment' mentioned in article 25 CISG pose problems for implementing the concept. However, the concept is by far justified to be maintained on its far reaching doctrinal merits for screening out the truly deserving claims for termination as a remedy for non-performance.[577] Moreover, it is also defensible to be kept due to the rarity of the

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(Cont.)*Interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (Cambridge University Press, 2007), pp. 124-133.

[575] S Troiano, in F Ferrari, supra note 566, pp. 407-408.

[576] For instance it is held that the concept should be differentiated from the notion of fundamental breach of contract that is found in English law. While fundamental breach in the case of English law refers to the term of the contract that the debtor has breached, the concept in the CISG is said to give emphasis to the fundamentality of the breach itself (or whether the breach has substantially deprived the creditor from what he was reasonably (Cont.) entitled to expect under the contract): See Id, P. 366 and the accompanying notes in foot note 66.

[577] Ibid: *Requiring fundamentality of the breach is said to be justified in the light of the "destructive" nature of termination... that would result in "considerably unnecessary and unproductive costs, such as those associated with the return or storage of the goods". It is likewise argued that the requirement would further help to contain the cases in which in which the aggrieved party may take advantage of the defaulting party's breach in order to revise an agreement based on a specific economic situation or to shift the risk of a change in the market conditions to the other party"*

interpretational difficulty raised by the writers.[578] This is because the concept is said to be often implemented in practice based on the second model of setting additional time limits or the setting of a *Nachfrist*.[579]

The above raised points indicate that termination is not an outright solution granted in cases of non-performance of contracts governed by the CISG in cases where non performance is excused under Article 79 of the Convention. It is this basic orientation of the CISG that paved the way for further arguments made to establish adaptation of contract in cases of change of circumstances as normally recognised and available remedy under the Convention. The general outline of the arguments made in this line could be captured from the hypothetical presentation made by a certain writer.[580] Assume that the acquisition costs for the seller have tripled, and note that if the seller wants to raise plea of change of circumstances, he has to promptly notify the buyer. Two possible scenarios are posited to be reasonably expected upon communication of such notification to the buyer. Under the first scenario, the seller may propose to deliver the goods if the buyer is willing to pay a higher purchase price. Under the second scenario the buyer offers to pay a higher price. In both of these cases, the contract is adapted with no need for intervention of the court if the offers are accepted. If the proposed offer in either of the cases is rejected by the other party, the case would finally rest with the court. It is claimed that, in both cases, the court has to evaluate as to whether the terms offered for the modification of the contract were reasonable and just to be accepted by the other party. Depending on the circumstances in each case, therefore, the court will have to decide on whether the contract should be enforced on the basis of the proposed terms or maintained on its original terms; or whether the contract should be terminated, and if so, the parties' rights and obligations relating to damages. Thus, it is said that, *in both scenarios, results can be reached similar to those in legal systems that expressly provide for the power of the court or tribunal to adapt the contract to the changed conditions.*[581]

The arguments made in the above line of thought are perhaps somewhat stretched, since, for the most part, they are not always based on the exact wordings of the provisions of the

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[578] Zeller, supra note 542, p.88.
[579] Ibid: In this regard it is asserted that: *"[p]ragmatically speaking, a buyer or seller of goods contemplating avoidance of contract would choose the setting of a Nachfrist unless the breach is so obvious or substantial that such an additional time is not necessary. Also from an economic point of view – as the aggrieved party has invested time and energy into the contract – the setting of a Nachfrist makes sense."*
[580] Schwenzer, supra note 516, pp. 724-725.
[581] Id, p. 724.

Convention they happen to call to their supports. It is also important to note here that most of the provisions of the CISG on which the arguments rely to establish adaptation of contract are usually interpreted or clarified by referring to the comparable provisions of the PICC or the PECL.[582] Thus, it often becomes unavoidable to revert back to the provisions of those instruments, which the arguments purport to avoid from the very beginning. In light of this, it seems we are still left with far unsettled issues in relation to the legal consequences of the excuses based on change of circumstances under Article 79 of the CISG.

Looking for the future, however, the approach that suggests referring to the provisions of the PICC (or the PECL) is perhaps preferable based on two major considerations that we already touched in-passing. Accordingly, the approach is first to be supported due to its better potential in promoting uniformity of the application of Article 79 of the Convention (since it would at least enable decisions to be made in reference to the standards enshrine in the same or essentially similar materials). Secondly, the adoption of the approach may be preferred due to the ease of application it provides through enabling reference to provisions that contain a more clear-cut and detailed regulations for the matter. This will also further contribute to the aspired objective of promoting uniformity in the application of the provisions of the Convention.

4.6. Comparative Conclusions

The discussion of this chapter on the approaches of the major international instruments of contracts towards the issue of change of circumstances discloses some essential differences existing between them. Speaking at a broader level, these differences seem to be directly related with the binding or non-binding character of the instruments. Accordingly, the most glaring differences are to be identified between the approach of the CISG and the approach adopted by the other remaining non-binding international codifications. The comparison made between the approaches of the non-binding instruments (the PECL, the DCFR, and the PICC), on the other hand, largely seems to exhibit their shared similarities than to disclose any fundamental divergence to be identified between them. Some specific differences, perhaps having relatively minor practical implications, may nevertheless be identified between them at their closer inspections.

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[582] See for instance the discussion on Article 25: R Koch, in J Felemegas (ed.), supra note 574.

The similarity existing between the non-binding instruments starts from the fact that they all provide express and more detailed rules applicable to address the problem of change of circumstances. In a much similar fashion, the opening provisions of all the three non-binding instruments start by reaffirming the fundamental principle of binding force of contracts, before explicitly recognising the doctrine of change of circumstances as an exception to that principle. Accordingly, Articles 6.2.1 of the PICC, III-1:110 of the DCFR and 6:111(1) of the PECL establish the principle that contracts must be performed, notwithstanding that their performance later becomes unprofitable or more onerous than initially expected. These provisions essentially imply the fact that the application of the doctrine of change of circumstances does not at all aim to release a party from the consequences of his own bad bargains. Thus the recognition provided for the concept of change of circumstances in all of the three instruments clearly targets to address contractual risks that are created by totally unexpected turn of events that are truly beyond the contemplation of any reasonable parties.

Accordingly, provisions that specifically define the situations to be governed by the doctrine of change of circumstances and provide the possible consequences of its application try to bargain between the binding force of contracts and the need of maintaining justice in the parties' relationships. Thus the instruments commonly require that the change of circumstances must not/could not have been foreseen, that it could not have been taken into account upon conclusion of the contract, and that the risks arising from it have not been expressly or impliedly allocated to the party seeking for relief. Despite their overall similarity, some differences could still be pointed out between the non-binding instruments at their closer looks.

With respect to the preconditions provided for the application of the doctrine, one important difference is the requirement of the DCFR that provides the change of circumstances to be of an "exceptional" nature, which is not equally present in the other two non-binding instruments. It is hard to arrive at what exactly makes change of circumstances "exceptional", both from the black letter of DCFR provision and its accompanying official commentary. But it may be assumed that the requirement was generally intended to make application of the doctrine subject to very strict conditions. Based on this assumption, it may be at least reasonable to further suggest that the prerequisites contemplated for application of the doctrine in the DCFR provision are stricter than those provided in the comparable provisions of the PECL and the PICC.

Another difference relates to Article 6.2.1 (a) of the PICC, which clearly requires that the events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract. This requirement seems to indicate that the PICC does not intend to exclude from the scope of the doctrine events that existed at the time of conclusion of the contract, provided that the parties had not been aware of them to take them into account at the time. This may be contrasted, with the comparable provisions of the DCFR and the PECL that exclude events that existed at the time of conclusion of the contract from the ambit of the doctrine, notwithstanding that the parties had not been aware of them at the time. In this regard, it is good to note that the position indorsed by the PICC had also been already been adopted by the CISG, since the concept of "impediments" may cover the cases where the performance of contracts may be prevented by events that actually existed at the time of its conclusion. The approach of the PICC and CISG also seems to share similarity with the position of the German law, which has been considered in the previous chapter.

Article 7.1.7 of the PICC, Article III – 3:104 of the DCFR and Article 8:108 of the PECL further provide excuses of non-performance that are generally said to be based on the concept of *force majeure.* However, with respect to the relationship existing between these excuses and the specific doctrines applicable to the problem of change of circumstances, the position taken by the PICC diverges from that of the DCFR and the PECL. According to the position taken by the PICC, where factual situations fit for the application of both, a party can freely elect to rely on either one of the provisions respectively embodying the concepts of *force majeure* and hardship. The PECL and the DCFR, however, draw clear distinction between the situations that should be subject to each of the concepts enshrined under the different provisions.

When it comes to the specific effects of the application of the doctrines of change of circumstances recognised in the three non-binding instruments, important differences may be pointed out in relation to the roles assigned to renegotiation and the criteria set forth to enable adaptation of terms of the contract by the court. The first major effect of the application of the doctrine of change of circumstances is the 'obligation' to renegotiate the contract. Although all the three instruments recognise the possibility for conducting renegotiation in case of change of circumstances, they do not assign exactly the same role to it. The PECL explicitly imposes renegotiation as a real obligation for both parties, with the consequence of imposing liability for damages against the non-complying party. The PICC also seems to

similarly impose renegotiation as an obligation, the non-compliance of which may similarly entail liability for the party failing to comply. The DCFR, on the other hand, merely specifies it as a precondition for the affected party to seek intervention of the court. The DCFR official commentary stresses that the debtor has not an obligation to procure, but the obligation to attempt, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the contract before requiring aid from the court. But the effect of non-compliance with the requirement of renegotiation is not clear. What is more, it may be further asked whether the obligation to renegotiate only applies to the debtor, and the creditor is totally free of any obligation in relation to it. If this question is affirmatively answered, the whole value of the obligation to renegotiate appears to be essentially lost; since the mere imposition of the requirement to renegotiate on the affected party becomes pointless if the other party is not simultaneously put under the obligation to cooperate in good faith for the success of the process.

The non-binding instruments also clearly incorporate the powers of the court to adapt the terms of a contract or declare its termination as the alternative major consequences attached to the application of the doctrine. The instruments generally indicate that the court should, as far as possible, attempt to keep the contractual relationship alive through adjustment of its terms, before they eventually turn to declaring its termination. The priority accorded to adaptation of the contract generally goes in line with the principle of *favor contractus,* which similarly requires the court to explore ways to keep the contractual bond alive before resorting to its termination. This is found to be essential in order to protect the parties' reasonable expectations from being defeated. With respect to the standard of determining the content of the adaptation, the PECL and DCFR seem to instruct the court to conduct adaptation aiming to totally reverse the effects of the change of circumstances. The position of the PICC clearly indicates that the objective of the court in conducting adaptation of the contract should not necessarily be reinstating the parties to the positions they had occupied before or upon conclusion of the contract. This is because the court should also take into account situations that could have changed since conclusion of the contract in conducting adaptation of its terms.

When we finally return to the approach of the CISG, as already noted, wider gaps are to be observed in comparison to the above discussed approaches present under the non-binding instruments. Unlike the case of the non-binding codifications, the CISG does not contain

specific provision that explicitly deals with the problem of change of circumstances. This absence of express regulation of the problem has resulted in conflicting views as regards to whether, to what extent and how, the problem of change of circumstances should be addressed under the Convention. These conflicting views basically emerge from the non-uniform interpretations existing in legal doctrine with respect to the scope and the effects arising from the application of Article 79 of the CISG.

Under Article 79 (1) of the CISG, the debtor is exempted from liability to pay damages if the non-performance was proved to be caused by "an impediment beyond his control". Thus, the first basic question is whether the situations covered by the concept of "impediment" also include cases involving change of circumstances. According to one position, the concept of "impediment" does not extend beyond the traditional cases in which the debtor's non-performance may be excused based on impossibility or *force majeure*. Thus, in this view, cases of change of circumstances or hardship are completely excluded from the scope of the provision and hence may not be addressed under the convention. The view that currently prevails, however, seems to allow the overall presence of the possibility to address the problem of change of circumstances under the Convention. None the less, consensus still seems lacking with regard to the specific standards proposed for realising such application and the ultimate effects/remedies that would be attached to it.

According to one generally advanced view, cases of change of circumstances could be effectively addressed through somewhat liberal and systematic interpretation of Article 79 and other related provisions of the CICG, with no need of referring to the provisions of external instruments. This view basically develops from discussions relating to the non-exclusion of performance claim under Article 79 (5) of the CISG, the concept of fundamental breach and the price reduction mechanism recognised under the provisions of the Convention on non-performance. Thus the discussions attempt to indicate ways in which the courts can flexibly choose between termination and adaptation of the contract based on the provisions of the CISG itself in determining the effects of the cases of change of circumstances that are once found to be covered under Article 79 of the Convention.

Another major and perhaps also more acceptable approach suggests making reference to the comparable provisions of PICC or the PECL, in order to inject the proper modifications to Article 79 of the CISG in addressing the problem of change of circumstances. Accordingly, it

is generally asserted that the interpretative or supplementary roles of the PECL and the PICC could be derived from the "general principle" recognised in Article 7(2) of the CISG. More importantly, assigning such role to these related instruments is further justified by their potential to contribute to the objective of promoting uniformity in the application of the provisions of the CISG as stated in Article 7(1) of the Convention.

Thus, as could be perceived from the foregoing points, even among the views that agree on the fact that the Convention does not totally reject addressing the issue of change of circumstances, there are divergent recommendations with regard to the specific ways by which the problem is supposed to be addressed. For some, the approach for addressing the problem is derived or should necessarily be derived from the use of a neutral and conceivably broad term "impediment" in Article 79 of the Convention. Still others take the view that the possibility of addressing cases of change of circumstances under Article 79 of the CISG should be achieved by interpreting the provision through references made to the comparable provisions of related international instruments such as the PICC.

In the opinion of this writer (and many others for that sake), the approach allowing reference to the comparable provisions of PICC and PECL seems both justified and preferable, particularly in relation to determining the effects of application of Article 79 of the CISG to cases of change of circumstances. In addition to its use in promoting uniformity of application, the approach could also further help to keep the provisions of the Convention up to date abreast of new legal realities that evolved after its adoption. In this regard, it is good to emphasise that both the PECL and the PICC were constructed based on the contents of the CISG, which had already been in operation before their adoptions. Thus, the two non-binding instruments were sponsored by eminent jurists who were not bound by political motivations and who tried to incorporate the most up-to-date rules aimed to overcome the perceived shortcomings of the CISG. From this one may reasonably be compelled to hold the belief that interpreting and supplementing the CISG through reference to the provisions of these instruments could be helpful to keep the Convention up-to-date by promoting progressive improvements in its contents.

CHAPTER FIVE: THE EFFECTS OF CHANGE OF CIRCUMSTANCES ON THE BINDING NATURE OF CONTRACTS

5.1. Some Preliminary Observations on the Broader Distinctions between the Approaches of the Surveyed Jurisdictions

A recent research that examined the treatment of change of circumstances under the laws of several European jurisdictions has identified two broader doctrinal trends existing among the jurisdictions.[583] Accordingly, jurisdictions establishing a fault based system of contractual liability were identified as more tending to admit express exception to the principle binding force of contracts in order to address the problem of change of circumstances. Jurisdictions that apply objective or strict liability as the standard of ascertaining non-performance of contracts, on the other hand, were generally said to be less open to admitting similar exceptions. These broader trends, although may not be maintained in their absolute sense, appear to roughly portray the civil law jurisdictions, which generally indorse the fault based system of contractual liability, as more open to admitting the doctrine of change of circumstances. In contrast, the common law jurisdictions that largely adopt the strict contractual liability principle are essentially to be identified with their persistent reluctance to admitting express exceptions to the principle of binding force to accommodate the issue of change of circumstances.

The approaches of the domestic jurisdictions considered in the previous chapters of this paper generally seem to agree with the general truth found in the above identified broader trends. The approach of the German legal system that expressly recognises and provides specific remedies intended to address the problem of change of circumstances gives a tangible example for this. The French legal system, which has indorsed this overall approach through its recent reform of the law of obligations, adds further practical testimony to show the strength of the core claims found in the general trend highlighted above. The Ethiopian law, in deviation from its continental origin, indorses the common law principle of strict liability, and adopts perhaps the most conservative position that virtually denies place to the need of addressing the problem of change of circumstances.

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[583] E.H. Hondius, "Change of circumstances: the Trento project," (In A.G. Castermans, K.J.O. Jansen, M.W. Knigge, P. Memelink & J.H. Nieuwenhuis (eds.), Foreseen and Unforeseen Circumstances, Deventer – Kluwer – 2012), P. 119.

In contrast to the first two major continental jurisdictions considered above, the common law jurisdictions considered in the third chapter of this paper, generally establish strict liability of the debtor for non performance of his contractual obligations. The English legal system also does not expressly address the problem of change of circumstances, but opens some limited chances in which the problem might be addressed through relaxing the doctrine of frustration that historically applied to cases of impossibility. Thus, the English law provides example for the second contrasting general trend stated above. In this connection, the US law represents a typical deviation from the general trend of the common law jurisdictions by adopting an approach that to some extent clearly and expressly addresses the problem of change of circumstances.

With regard to the approaches of the international contracts law instruments surveyed in the previous chapter, it is possible to identify more convergence among the three non-binding instruments, i.e., the PICC, the DCFR, and the PECL. The non-binding instruments incorporate exceptional doctrines that particularly address the issue of change of circumstances. They elaborately define the conditions in which change of circumstances may be addressed and the particular remedies applicable to it. The approach of the CISG, which is a binding international convention, appears to distinguish itself from the approaches indorsed by these three non-binding international instruments. The approach of the CISG is characterised by some writers as a "neutral" one, due to its difference from the general approaches found in major domestic jurisdictions and international codifications considered in this paper. The neutral approach of the Convention is said to manifest the efforts exerted by its drafters to strike the balance between the divergent approaches found in domestic laws. Thus, the CISG's approach may be regarded as more responsive to the problem of change of circumstances than the approaches found in the English law and Ethiopian law, both of which appear to be nearly absolutely devoted to the principle of *pacta sunt servanda.* It nevertheless seems to provide narrower room for addressing the problem of change of circumstances as compared to the approaches of the other remaining jurisdictions considered in this paper.

Based on the above summarised introduction, the approaches existing among the jurisdictions surveyed in the previous two chapters of this paper may be broadly categorised into three classes reflective of the ranks they occupy in accommodating the problem of change of circumstances. The first approach, which more or less seems to have been adopted by the Ethiopian law, generally rejects to address the problem of change of circumstances, except in

some specific areas of contracts law or few scattered examples that are arguably relevant for addressing the problem.

The second broad approach, though it fails to admit clear exceptions to the binding nature of contracts to provide specific solutions for addressing the problem of change of circumstances, does not totally and out rightly reject the problem. The English legal system, which neither totally rejects nor directly addresses the problem of change of circumstances, may be particularly identified to adopt this second approach. The English law attempts to address the problem of change of circumstances through the "expansion of conventional doctrines". Thus, some very limited cases of change of circumstances may be addressed under the English law through somewhat stretched application of the doctrine of frustration beyond its traditional confines that was limited to cases of objective impossibility. Arguably, the concept of "impediment" adopted by the CISG could also be perhaps categorised under this second approach, since the concept appears to represent an over extension of the traditional theory of impossibility or *force majeure*.

The third approach, rather than relying on the "expansion" of conventional doctrines, opts for the "creation" of new exceptional doctrines that clearly make exceptions to the binding force of contracts and provide specific solutions particularly tailored for addressing the problem of change of circumstances. Unlike the second approach, in which the traditional remedy of termination may be normally extended to cases of change of circumstances, this third approach clearly provides the courts' power to make adaptation of the contracts as the principally applicable remedy. Although both fail to meet some of the relevant criteria that distinguish this third broad approach, the approach of the US and French laws have been roughly classified as belonging to this third group.[584] In the section below, the approach of the Ethiopian law that generally rejects to address the problem of change of circumstances will be precisely reviewed first. Once this is done, the two remaining approaches towards the problem of change of circumstances, respectively relying on the "expansion of conventional doctrines" and the "creation of exceptional doctrines", will be contrasted with concluding arguments made in support of the latter approach.

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[584] This is because the respective doctrines adopted under the laws of both jurisdictions do not seem to apply adaptation of contracts by the courts as a principal remedy applicable in cases of change of circumstances. Moreover, the US doctrine of impracticability, arguably, may be viewed as an "expansion" of the scope of the doctrine of frustration that traditionally applied to cases of objective impossibility. However, despite the presence of these defects, more weight is given to the very fact that the approaches of both jurisdictions explicitly recognise the possibility of adaptations of contracts by the courts in cases of change of circumstances.

5.2. Approaches to Change of Circumstances: Rejection, Expansion, and Creation

5.2.1. The Overall Approach of the Ethiopian Law: Rejection towards the Problem

The Ethiopian law generally appears to place absolute values on insuring respect for the principle of *pacta sunt servanda* and promoting security of transactions. The law, in deviation from its commonly ascribed continental origin, endorses the common law principle of strict liability as the basis for determining liability for the non-performance of contracts. The relevance of the concept of fault based liability is exceptionally recognised in relation to obligations of "diligence" and gratuitous undertakings. These exceptional cases must be pleaded and shown by the debtor, and they do not operate by virtue of the law to shift the burden to the creditor. Thus, as a matter of general rule, the mere failure of the debtor to fulfil the terms of his promise as expressed in the contract is sufficient to establish his liability for the payment of damages, with no further need to evaluate whether such failure was attributed to his fault or otherwise. This is in contrast to the approach commonly embraced by most continental systems, such as the German law, in which the debtor's liability for damages is generally tied to his fault.

Some German authorities have described this system of fault based liability, as "ethically superior" or as more in line with equity and fairness.[585] In contrast, it is also generally contended that an invariable requirement of fault for liability for damages is at odds with the pomisory principle of contracts; since the obligor *does not promise to do something 'if he is able' or 'unless he is prevented', but simply to do it.*[586] However, still several writers argue that whichever of the two principles of liability is adopted, the practical outcome would not be significantly diverging as one might be led to believe.[587]

In the Ethiopian case, the drafter of the Civil Code has made it pretty clear that the adoption of the principle of strict liability was a consciously made public policy choice with the object of insuring security of transactions through enhancing the safeguards provided to the binding

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[585] Thus automatic fault-based liability for damages was claimed to be ethically superior approach; M Hogg, Promises and Contract Law: Comparative Perspectives, (2011), P.376 & P.386.

[586] Ibid.

[587] Accordingly it has been emphasized that:"in actual practice the differences between English law and continental law have to a large extent been leveled out. Essential for the debtor's liability even on the Continent is (judicial) determination of his range of duties under the contract (i.e. an objective criterion). Breach of such (Cont.) contractual duty, as a rule, implies fault. Thus it is up to the debtor to establish (and prove) that he was *not* at fault": R. Zimmerman, Roman Foundations of the Civilian Traditions, (1990), foot note 224, p. 814:

nature of contracts. Fault becomes the requirement for the obligor's liability, where this could be necessarily implied from the nature of his promise (which seems to be the case for obligations of diligence- in which the obligor's promise is not to "procure" but merely "to do his best"). The Ethiopian law also attenuates the application of the principle of strict liability in relation to the non-performance of gratuitous obligations, in which the obligor undertakes to confer benefits to the other party without expecting any clearly stipulated reciprocal benefits in return. Thus such party should not be punished for his goodwill, where he unfortunately later became unable to fulfil the terms of his promise without any fault on his part. In fact, there are several specific instances in which the Ethiopian Civil Code attenuates strict adherence to the principle of *pacta sunt servanda* when it comes to the enforcement of gratuitous obligations.

Perhaps the only general theory in the Civil Code that provides excuse to the debtor from his strict liability for damages is based on the concept of *force majeure*. The Civil Code's concept of *force majeure* is anchored in two basic preconditions, which require: the event hindering performance to have been reasonably unforeseeable and absolutely insurmountable. The first test relating to foreseeability of the event is based on somewhat relaxed standard of "reasonableness", while the second test is said to be based on a much stricter standard requiring the event preventing performance of the contract to be something that could not have been overcome by anyone in the world, and not merely by the debtor. This is precisely to mean that performance of the contract must have been absolutely prevented.

In view of the second determinative condition requiring absolute impossibility of performance, one may reasonably be interested to know if anything, other than standing as a mere legal decorum, is left at all to the defence of *force majeure*. In this connection, it is good to note that nowadays almost nothing is "impossible" in the absolute sense of the term, and the very concept of "impossibility" has come to be expressed in relative terms. This makes the enquiry raised as to the practical utility of the *force majeure* defence totally justified, since almost any obstacle to performance could be overcome in this modern world, as long as the debtor is both capable and willing to invest the efforts and resources required for it. Thus it appears hard to practically come by the sort of impossibility, in the absolute and complete sense of the term, anticipated by the provision of the Civil Code. This is in fact one of the main practical considerations that necessitated pushing the legal concept of impossibility

beyond its traditional bounds in many jurisdictions.[588] All of the other jurisdictions surveyed in this paper have thus deserted the traditional legal approach that required absolute impossibility as the unassailable precondition of excusing non-performance.

In the Ethiopian law, exceptional emphasis that the law placed on the principle of binding force of contracts has been further entrenched by the niggardly attitude generally taken by the courts (especially by the Cassation Division of the Federal Supreme Court) in granting excuses that may even be grounded on the limited exceptions already admitted by the law. This could be particularly contrasted with the historically active roles that the German and French courts had played in expanding exceptions to the principle of binding force, even before legislative incorporation of the respective doctrines currently applicable to change of circumstances. Though judicial development of exceptions to this core principle of contract law obviously involves its own far reaching dangers (perhaps except where it has become absolutely necessary as was the case for the German courts), the case to be made here is that the Ethiopian courts generally do not seem much enthusiastic to take that kind of task up on themselves.

However, it should be noted that the foregoing observations are not meant to absolutely deny the presence of some narrowly defined cases in which the Ethiopian Civil Code has admitted some considerations of justice and equity to act as counter balancing principles on the binding force of contracts. Thus, it is possible to indicate some specific instances found here and there, where considerations relating to equity and justice have worked their way into the provisions of the Code to place some specific limitations on the principle of binding force of contracts.

The first important point that may be mentioned to the credit of the law in this regard is the role assigned to the principle of good faith and equity in relation to cancellation of contracts. Cancellation of contract is generally independent from the question of the debtor's liability for damages. Thus it may be available irrespective of whether the debtor may be excused or subject to the liability for damages. But cancellation is not a legal consequence attached to all conceivable cases in which terms of the contract may be breached- it generally applies in cases where the breach may be regarded "fundamental", in the sense that the very basis of the

[588] For instance see our observations with regard to the evolution of the doctrine of impracticability under the US law. Perhaps it could also be one of the factors behind the expansion of the English doctrine of frustration beyond its initial scope that was limited to cases of absolute impossibility.

contract is affected.[589] It is possible to generally point out some modalities by which fundamentality of the breach may be ascertained. Firstly, there are certain specific types of breach that are qualified as fundamental and hence worth triggering cancellation of the contract by virtue of provisions of the law.[590] Secondly, the expiry of the additional reasonable period granted by the creditor or the court, without inducing proper performance from the debtor, may also be used to suggest fundamentality of the breach as to justify cancellation of the contract.[591]

The requirement relating to fundamentality of the breach generally implies that cancellation may sometimes be differed by the court in relation to cases that only involve delay and defective performance. Accordingly, in cases of delay the Civil Code recognises the court's power to adapt the terms of contracts relating to the time of performance by granting additional period to the debtor who was diligent enough, but unfortunately prevented due to circumstances beyond his control to timely carry out his obligations.[592] The power of the courts (in relation to cases of partial impossibility) may further extend even to modifying the parties' obligations. Thus, where a party's performance has become partially impossible, the court may reduce the other party's counter-performance proportionally, as an alternative to cancellation of the contract. These two cases exemplify perhaps the most progressive aspects of the Code where the requirements of justice and reasonableness have been accorded their deserved place.

Secondly, there are some interesting specific cases in which the law gives cognition to the presence of some form of informal intimate relationships of reciprocity, trust, and reliance between the parties and provides some sort of protections to offset against the lingering risk of opportunism and abuse of trust. These cases may be identified particularly in relation to gratuitous or long-term obligations, or in the case of contracts in which some form of

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[589] This requirement is provided in Article 1785(2&3) of the Ethiopian Civil Code. The second sub-Article of this provision that states *"[a] contract shall not be cancelled unless except in cases of breach of fundamental terms provision of the contract"* ...But the most essential element of the provision is enshrined in the third last sub-article that requires the court to evaluate as to whether the breach affects the very essence of the contract before deciding termination. The court is also further required to give consideration to the principle of good faith and relative interests of the parties before deciding termination of the contract pursuant the first sub-article of the same provision. It is interesting to note that this requirement seems to share some similarity with the concept of "fundamental breach" enshrined under the CISG.

[590] For instance, this is the case in relation to total and irreversible impossibility of performance as anticipate d in Article 1788 of the Ethiopian Civil Code.

[591] See Article 1787 of the Ethiopian Civil Code.

[592] See Article 1770 of the Ethiopian Civil Code.

informal intimacy may be perceived to exist between the parties.[593] These particular exceptions also stand as the specific evidences of the fact that the role of contract law is not merely about providing enforcements for private preferences, but it is also about promoting communal values of equity, justice and voluntary cooperation. The cases symbolise the recognition of the law for other essential aspect of contractual relationships that comprise a zone of trust, solidarity, and sharing.[594] But it remains to be seen in the future if these latter aspects of contracts would be entrenched in firm and broader legal foundations mainly through explicit incorporation of a specific doctrine that addresses the issue of change of circumstances.

5.2.2. Expansion of "Conventional Doctrines" Versus Creation of "Exceptional Doctrines"

As already noted above, some legal systems attempt to address the problem of change of circumstances by expanding the scope of conventional doctrines such as those which traditionally addressed cases involving impossibility and mistake. The most commonly shared trait among such attempts is in that they all try to draw their justifications for addressing the problem from presumed intention of the parties. The English doctrine of frustration as we have observed under the third chapter, for instance, justifies intervention because supervening events have rendered the contract radically different from what the parties could reasonably be presumed to have intended upon its conclusion. Thus the approaches based on expansion of conventional principles give the impression of harmony between the interventions made in cases of change of circumstances (which are treated to arise from the intention of the parties) and ensuring adherence to the principle of binding force of contracts. However, the problem of change of circumstances basically comprises risks caused by unexpected events that are beyond the parties' imagination and thus beyond their disposition. This makes it highly unlikely that cases involving change of circumstances can be rectified by remedies that are truly based on intention of the parties. Hence, it is asserted that, "*in many cases of unexpected circumstances the application of a 'conventional'*

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[593] See the power provided to the courts to adapt the terms of contracts or declare termination on the ground of the "special relationship between the parties" respectively provided in Articles 1766 & 1823 of the Ethiopian Civil Code; See also the powers of the courts in relation to the termination of contracts for undefined period and gratuitous contracts enshrined in Articles 1821 & 1824 of the Code, respectively. For more details refer to our discussions in chapter three on the approach of the Ethiopian law.

[594] H. Dagan, The law and Ethics of Restitutions, (2004, Cambridge University Press), p. 208.

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."[595]

From the above, it should be generally conceded that the problem of change of circumstances necessarily calls into attention the real conflict existing between equity and the principle of binding force of contract. Thus any system that will be devised for addressing the problem should likewise start from recognising this basic and unavoidable conflict existing between the values of the law relating to insuring the sanctity of contracts and maintaining the minimum standard of equity in the parties' relationships. The approaches addressing the problem of change of circumstances based on the creation of "exceptional doctrines" are to be preferred due to their express recognition for this inevitable conflict.

Thus, the view endorsed in this paper supports the approaches of the legal systems that incorporate various exceptional doctrines to provide specific and express solutions for the problem of change of circumstances. Accordingly, broadly speaking, the approaches of the German law, the French law, and the non-binding European and international codifications (the PECL, the DCFR and the PICC) considered in this paper generally present the more preferable options for addressing the problem of change of circumstances. Taking this broader view as our starting point, the basic prerequisites for the application of the exceptional doctrines and the remedies provided for addressing the problem of change of circumstances will be further considered. But before embarking on these major tasks, we will first give consideration to some preliminary issues generally concerned with the nature of the relationship existing between the exceptional doctrines applicable to change of circumstances and other related traditional doctrines.

5.3. The Relationship between the "Exceptional Doctrines" and Some Related Theories

5.3.1. The Concept of Impossibility/*Force Majeure*

As we have observed before, the English law doctrine of frustration initially developed and exclusively applied to cases involving impossibility. In its earlier stages of development and application, the doctrine could thus be regarded as the common law equivalent of the civil law *force majeure* doctrine. However, as further observed, some very rare and exceptional

[595] Hondius, supra note 583, p. 127.

cases of change of circumstances may be addressed under the doctrine of frustration according to the generally sustained legal position in relation to its present scope of application. Thus, the current application of the doctrine of frustration may be viewed to embrace some comparative similarity with that of the concept of "impediment" enshrined under the CISG. Both of these concepts, albeit with slight differences with respect to their scopes, generally attempt to accommodate the issue of change of circumstances through broadening the scope of the traditional defence against liability for non-performance that was exclusively grounded on impossibility.

As we have additionally noted before, the approach that attempts to address the problem of change of circumstances through broadening the application of conventional doctrines (as in the case of the application of the doctrine of frustration) does not seem to drive support from the currently prevailing legal argument. Under the doctrine of frustration, the problem of change of circumstances is to be characterised merely as another additional ground in which obligations may be extinguished. However, the Law Reform (Frustrated Contracts) Act 1943 has somewhat relaxed the rigid common-law rules and has provided extensive discretions to the courts in order to achieve just results by way of ordering restitutions and/or compensations between the parties in cases of discharge of contracts by frustration. But still courts are not as such inclined to make use of the discretionary powers granted to them, and the traditional 'all or nothing' approach, merely leading to discharge of the contract, appears to still effectively hold its traditional place.

What reasonably emerges from the above is the fact that the application of conventional doctrines is not basically suitable for insuring effective remedies in cases of change of circumstances. Express incorporation of exceptional doctrines to address the problem of change of circumstances, more than enabling the provision of well tailored remedies, is generally assumed to facilitate the practical application of such remedies by the courts in addressing cases of change of circumstances.

We have therefore indicated our preference for the approach by which the issue of change of circumstances is subject to exceptional doctrines. The relationship between the application of the exceptional doctrines, specifically applicable to cases of change of circumstances, and the traditional defences of non-performance arising from the concepts of impossibility or *force majeure* is nevertheless still subject to different treatments. Under some of the laws

considered in this paper, the relationship is defined as mutually exclusive. This position implicitly embraces the view that the doctrines applicable to change of circumstances and the concept of *force majeure* address separate legal problems; thus, their applications should likewise be confined to their respective scopes. Others have taken the view according to which a party may freely choose between the doctrines of change of circumstances and force majeure, provided that the factual situations qualify the preconditions relating to the application of both concepts.

Thus the question to be raised here is as to whether a clear distinction should be drawn between the application of the doctrine of change of circumstances and the traditional defences of non-performance that are based on the concepts of impossibility or *force majeure*. More importantly, as to whether there are legal considerations that necessitate the presence of such distinction.

As we have considered before, the relationship between impossibility and the exceptional doctrine relating to change of circumstances is not subject to uniform treatment in the laws of the jurisdictions considered under the previous chapters of this paper. The approach existing in the German law generally appears to create distinction between the cases falling under the two concepts (though that distinction is not always neatly defined and even brought into some further complications after the reform of the BGB).[596] The positions adopted in the relevant provisions of the PECL and DCFR similarly appear to clearly distinguish between the problems subject to the concept of impossibility/*force majeure* and those addressed by the doctrines on change of circumstances. The clear distinction that these laws attempt to create between the concepts may perhaps be justified in view of the dissimilarity of the remedies primarily triggered based on the application of the two concepts. While cases that fit into the concepts of impossibility or *force majeure* generally lead to termination of the contracts, remedies that help to maintain the parties' relationships are generally preferred in cases of change of circumstances. Thus, in view of the underlying differences with respect to the remedies available based on the two concepts, it seems generally acceptable to clearly distinguish between the cases that should be addressed by each.[597]

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[596] Zimmerman, supra note 296, p.47.

[597] But some writers assert that, especially in the case of international commercial contracts, force majeure is said often to lead to an adaptation of contract. This indicates the absence of as such wide the difference between the consequences of force majeure and change of circumstances. Thus, in relation to international commercial contracts, the approach of the PICC that abstains from drawing clear distinction between the cases addressed

5.3.2. Initial/Existing Mistake

Another important issue relates to distinguishing between cases that should be addressed by the doctrine of change of circumstances and those which should be left to the rules applicable to mistake. Thus the issue at stake here is as to whether the exceptional doctrine applicable to cases of change of circumstances should also provide solutions for cases in which the equilibrium of a contract may be fundamentally affected due to a mistake of one party or a mutual mistake of both parties with respect to factors already present before or at the time of its conclusion. In fact, it is commonly observed that cases connected with initial mistake and supervening change of circumstances involve relatively identical questions of justice that should likewise be addressed based on similar remedies.[598] Thus, "*both cases are said to be essentially solved with two remedies: the contract can either be terminated or it can be adjusted to take into account the relevant aspect.*"[599] The laws surveyed in this paper take divergent views with regard to this particular issue as well. The German law, and also the approach adopted in the PICC and the CISG, appear to admit the cases traditionally classified under mutual mistake to be addressed under the doctrine applicable to address the problem of change of circumstances.

However, a clear distinction between pre-existing and supervening factors is meaningful for the doctrinal treatment of change of circumstances, because it is generally easier for the parties to recognize and control pre-existing factors than future developments. 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. Thus, it is emphatically stated that, "*in a rational legal system*

(Cont.) based on the two concepts may be supported: See D. Philippe, "CECL: Change of Circumstances and Prescription," The Draft Common European Sales Law: Towards an Alternative Sales Law? A Belgian Perspective, Intersentia, 2013, pp. 299 à 322, p.305.

[598] Thus, it has been argued that, if remedies are provided in cases of mistake, there would be no logical ground to deny remedies in cases of unforeseen change of circumstances: *"since it is as unfair to profit from circumstances that were unforeseen at the time of contracting as it is to profit from the other party's ignorance of circumstances that existed at that moment":* Litvinoff, supra note 39, p.58.

[599] Hondius, supra note 583, p. 129.

with a systematic approach, both problems should be addressed in the same way, but should be addressed under different system of rules".[600]

Under the two of the non-binding international instruments considered in this paper, particularly the PECL and the DCFR, the doctrine of change of circumstances will only be applied to address risks arising from supervening changes, and the cases in which such risks arise due to mistakes relating to facts that existed at the time of conclusion of the contract are generally excluded. Provided that these latter cases are sufficiently addressed by the rules applicable to mistake relating to the formation of contracts, their general exclusion from the purview of the application of the doctrine of change of circumstances thus appears to be justified. However, in some cases, it may be difficult to identify whether the change of circumstances resulted before or after conclusion of the contract. Such cases are covered by the doctrine of change circumstances in some jurisdictions such as the Belgian law. [601]

5.3.3. Theory of *Imprévision* Relating to Administrative Contracts

As our starting point, in legal systems where the application of the theory of *imprévision* has already been recognized in the area of administrative contracts, we may wonder as to whether a separate doctrine to address the issue of change of circumstances in relation to private law contracts would be required. The approach of the French law is particularly relevant to form some general views regarding this point. The French law has separately introduced regulation of change of circumstances in the field of private contracts despite the prior recognition and application of the essentially similar theory of *imprévision* to administrative contracts. It seems this approach is generally preferable in the interest of insuring clarity of the law and providing a well focused solutions for cases of change of circumstances. Nonetheless, it is still possible to borrow the stronger and the well conforming aspects of the theory of

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[600]Hondius, supra note 583, P.129: The treatment of cases of mutual mistake under the doctrine of *Geschäftsgrundlage in the German law is said to be mainly explained* by certain deficiencies in the respective rules of the BGB on the law of mistake. Thus, it is observed that:

> *[i]f 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.*

[601] Philippe, supra note 597, p. 304.

imprévision upon formulation of the new legal devise that will be particularly applicable to address the issue of change of circumstances in private law contracts.

5.4. Prerequisites for Interventions Based on Change of Circumstances

5.4.1. Presence of Fundamental Imbalance Caused in the Equilibrium of the Contract

The first point of emphasis in determining availability of relief in cases of change of circumstances is on the adverse effects caused to one of the parties due to the imbalance that has resulted in the equilibrium of the contract due to the change of circumstances. The effects on the equilibrium of the contract from the change of circumstances that serve to trigger reliefs by the law generally encompass two major situations: under the first situation, the change of circumstances results in excessive increase in the cost of performance of a party's obligations; under the second situation, rather than increasing a party's burden with respect to the performance of his own obligations, it renders the performance he expects to receive from the other party substantially or totally worthless for achieving its objectives. It is important, however, to note that the mere fact that unexpected benefits are conferred to one of the parties may not suffice in itself to trigger any form of relief, even if the benefits are out of proportion with the consideration.[602]

Thus the change of circumstances may cause excessive imbalance in the contractual equilibrium either by increasing the costs entailed for a party to discharge his own obligations, or by substantially diminishing the value of the performance expected to be received from the other party for furthering its objectives. In cases involving the latter, where performance to be received loses its value, relief is usually not granted if such loss is merely due to frustration of individual purpose. The possibility for relief may, however, exist where the individual purpose was incorporated in the contract or at least made known to the other party upon its conclusion. Under the US law these situations are respectively regulated under the doctrines of impracticability and frustration of purpose. The other remaining domestic and international instruments surveyed in this paper generally conjointly address both of

[602] In this regard, all the jurisdictions surveyed in this paper seem to require the presence of an adverse effect from the change of circumstances. Thus, a party may not be able to successfully invoke application of the doctrine of change of circumstances on the mere ground that windfall gains have accrued to the other party due to the change. For similar conclusions see Hondius, supra note 583, p. 121.

these situations under their respective exceptional doctrines applicable to the issue of change of circumstances.[603]

5.4.2. Non-Foreseeable Nature of the Change of Circumstances

Another general requirement that serves as the benchmark of excluding reliefs on the ground of change of circumstances is where the change has actually been foreseen and could have been regulated by the parties themselves. Thus the respective applicable doctrines of the jurisdictions surveyed in this paper generally provide the precondition that the event affecting equilibrium of the contract must not have been foreseen or reasonably capable to be taken into account by the parties at the time of its conclusion.

But foreseeability of the event alone arguably does not always serve as the dispositive factor to exclude such reliefs under the laws of some of the jurisdictions. This is due to the presence of certain events that the parties may not be able to regulate ex ante, even though the happening of such events could have been reasonably foreseen or actually foreseen by the parties at the time of conclusion of the contract.[604] Thus evaluation of whether the events could have been taken into account at the time of conclusion provides the additional factor that serves as the ultimate bar to legal remedies.

It is also important to finally note that the remedies relating to change of circumstances do not apply with respect to risks that are already allocated by the parties' contracts or specific provisions of the law. This seems to be unanimously indorsed as the initial consideration that excludes the application of the doctrines addressing the problem of change of circumstances.

5.5. Effects of Change of Circumstances

5.5.1. Renegotiation

The general view regarding the consequences of change of circumstances seems to be in favour of conferring the parties the prior opportunity to provide their own consensually agreed solutions for addressing the effects of the change of circumstances through conducting renegotiations. This is generally thought to limit the need for court intervention only to those

[603] For more details, see our discussions relating to the German and the French doctrines under chapter three, and discussions relating to the respective provisions of the PECL, the DCFR, and the PICC under the previous chapter.

[604] Our discussion relating to the application of the doctrine of impracticability under the US law is particularly of relevance on this point.

cases where it is absolutely necessary and the chances provided to the parties have been exhausted without producing in mutually agreed solutions to take care of the situations. This helps to insure adherence to the principle of freedom of contract by minimising the cases in which the courts may exercise the power to intervene in private agreements. It is also generally in the interest of the public since it forestalls the wastage of the courts' time and resources in addressing cases that could have been effectively handled by the parties themselves. But the particulars of the legal framework that should be established by the law to encourage the conduct of renegotiation by the parties and facilitating the process have been subject to various debates.

At a more general level, a clear divergence seems to exist between the common law and civil law jurisdictions in relation to providing the duty to renegotiate in cases of change of circumstances. The duty of renegotiation is generally absent among the common law jurisdictions as could be evidenced from the discussions made on the positions of the English and US laws under the third chapter of this paper. This general absence has been attributed by some writers to the alleged non-recognition for overriding principles of good faith and fair dealings in the common law jurisdictions.[605] In contrast to this, most civil law jurisdictions provide recognition for the duty relating to renegotiation. In fact, the absence of clear recognition for the duty of renegotiation under the current German law doctrine of *Wegfall der Geschäftsgrundlage* enshrined in Article 313 of the BGB could perhaps be regarded as a notable exception to the overall trend found in most civilian jurisdictions.

When it comes to the approaches of the international instruments considered in the previous chapter, there is no explicit recognition of the duty under the CISG. The non-binding international instruments, however, generally seem to incorporate the duty of renegotiation with some specific differences that may be identified at closer looks. Under the PECL (arguably also under the PICC), renegotiation in cases of change of circumstances seems to be imposed as a real obligation for both parties. In this approach, both parties are obliged to engage and conduct renegotiation in compliance with general requirements of good faith and fair dealings with the view to achieve equitable adaptations or decide on the termination the contract affected by change of circumstances. Failure of compliance with this obligation by either of the parties clearly entails liability for the damage caused due to such failure.

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[605] See schwenzer, supra note 516, pp. 721-722.

This may be contrasted with the approach of the DCFR that does not provide renegotiation as a real obligation for both parties, but merely imposes as the duty that should be observed by the affected party as the precondition for requesting court aided remedies. But one may be baffled with regard to how imposing the duty to renegotiate on the affected party could achieve its reasonable goal if there is no complimentary duty imposed on the other party. If there is no duty for the latter to comply in good faith with the attempt of renegotiation that the disadvantaged party is required to make, it seems the whole purpose of the project is essentially lost. In fact, one may also generally ask as to what legal consequences to expect in cases of failure to comply with the duty. The position of the DCFR is not also clear on this basic question, but one may speculate that the failure of the disadvantaged party to comply with the duty excludes his right to request judicial remedies. But there is no similar consequence provided to deal with the failure that may exist on the part of the non-affected party.

5.5.2. Adaptation

5.5.2.1. The Concept of Adaptation

The concept of adaptation is somehow hard to clearly distinguish from termination. At a more radical level, termination could simply be viewed as a form of adaptation to the terms of the contract since it brings an end to the same usually before the expiry of the time fixed by the parties. But the distinction between adaptation and termination particularly becomes challenging due to the wide discretions available to the court in cases of change of circumstances to fix various terms and dates upon declaring termination of the contract. The discretionary powers available to the court make termination essentially similar with adaptation of the contract. In fact, except in the case of legal systems that recognise court adaptation of the contract as the last resort remedy, it is not as such practically important to indulge into the theoretical precisions pertaining to drawing this difference in the case of the laws that have provided adaptation as the principal remedy. Thus differentiating termination from adaptation of the contract may be important, for instance, in the case of the doctrines applicable in the French and the US laws.

The doctrine applicable under the French law provides adaptation as the remedy that may be applied by the courts subject to the consent of both parties, while in US law adaptation is to

be applied as a remedy of last resort.[606] This may be contrasted to the cases under the German legal system and the non-binding international instruments, which all seem to converge on the position that the court should give priority to adaptation of the terms of the contract before resorting to its termination. Such clear preference for adaptation of the terms of the contract can be clearly discerned from Article 313 of the BGB, and the comparable provisions (and the respective commentaries) of the PECL, DCFR and that of the PICC.

Though distinguishing between cases of termination and adaptation may not be as such essential in the application of the above provisions, the question as to what the court exactly does (or is exactly expected to do) in cases where it means adaptation of the contract is still a challenging issue subject to different contentions having far reaching practical ramifications. In this regard, two different standards have generally been proposed to provide guidance for the court in completing its task relating to adaptation of the terms of the contract. According to the first standard, the court should undertake adaptation of the contract with the object of equally distributing the losses arising from the change of circumstances between the parties. Pursuant to the second standard, on the other hand, the disadvantaged party should continue to bear the losses arising from the change of circumstances to the extent that the degree of such losses may be regarded reasonable. Thus in this latter approach, the distribution of the losses arising from the change of circumstances through adaptation of the contract applies only to those parts of the losses that are treated to be "excessive" or beyond the reasonable.

With regard to the standards highlighted above, the contrast existing between the approaches of the non-binding international instruments considered in this paper is particularly interesting. The first standard seems to be incorporated by the provisions of PECL and DCFR, while the comparable provision of the PICC seems to favour the second standard. Most writers seem to give support for the second standard indorsed under the provision of the PICC. Thus it is generally to be conceded that adaptation in case of change of circumstances should not be aimed at reinstating the parties back to their original positions that existed at the time of conclusion of the contract. This is justified by the fact that the court should also take into account the contractual environment that could have changed since the conclusion of the contract upon conducting adaptation of its terms. To put it more precisely, the disadvantaged party must continue to bear the consequences of the change of circumstances.

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[606] See the discussion in chapter relating to the two jurisdictions.

This simply follows as the necessary consequence of the principle of *pacta sunt servanda*, which generally requires performance of the terms of a contract, even though it has become more onerous. Thus to avoid total erosion of this basic principle, all that has to be 'fairly shared' by way of adaptation should only relate to those costs that are reasonably regarded to be beyond the debtor's maximum 'limit of sacrifice', which means some of the consequences of the change of circumstances must always be borne by the disadvantaged contracting party.[607] Thus, adaptation is not the means for removing the whole of the burden created by the change of circumstances for the disadvantaged party- it merely serves to make that burden reasonably and objectively tolerable under the circumstances of the case.

5.5.2.2. Arguments for and Against Judicial Adaptation

Several contending arguments relating to the application of the doctrine of change of circumstances in general, as well as those particularly relevant to the power of the courts to adapt the terms of contracts in particular, have been fairly treated in the second chapter of this paper. The conflicting views held with regard to judicial adaptation of contracts will be precisely evaluated here by drawing on the arguments already exposed there. But to start with, the oppositions against the doctrine of change of circumstances are primarily based on the argument that it gives the courts a *carte blanche* to arbitrarily interfere in private agreements, and thus lead to the dilution of the basic principle of binding force of contracts. The dilution of this basic principle, by seriously threatening the security of transactions, is held to further result in an overall decline in the efficient performance of the economy and ultimately cost the society in general welfare loses.

In relation to the grant of the power to make adaptation of contracts to the courts, it is argued that it is virtually impossible for the law to exactly fix the proper criteria for determining the appropriateness and the contents of the adaptations to be made by the courts in each particular cases of change of circumstances. Since this would depend on the circumstances involved in each case, all the law could do is to stipulate for some general standards and to trust their proper interpretations in specific cases to the good judgments of the courts. Thus it is generally contended that the grant of the power adaptation to the courts cannot be detached from the inherent tendency of leaving the judiciary with unbridled discretions to freely interfere in determining the fate of contracts concluded between private parties.

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[607] See Philippe, supra note 597, p 308.

Secondly, it is argued that the proper exercise of the power of making adaptations by the courts usually presupposes possessing the required expertise to properly evaluate and pass judgements on matters involving purely economic questions. Since such expertise could generally be assumed to be lacking among the judiciary, it is asserted that judges are not generally qualified to make proper adaptation to the terms of contracts. Based on this, it is argued that the provision of the power of adaptation to the courts would serve no purpose other than providing a legal blessing for arbitrary decisions and further creating a major source of insecurity in the market. Thus providing the courts with the power to adapt the terms of contracts on the ground of change of circumstances is feared to cause serious market distortions that can potentially bring down the whole system of economic interactions.

On the other hand, perhaps the most essential merit of the doctrine of change of circumstances is in that it enables the preservation of contractual relationships by allowing the courts to adapt the terms in proper cases. The traditional doctrines like that of *force majeure* that provide excuses relating to non-performance generally lack this merit of preserving relationships, even if their scopes have been expanded in some jurisdictions to cover cases of change of circumstances. Thus, in view of the above highlighted oppositions, it is essential to evaluate why the grant of the power to adapt the terms of contracts should otherwise be maintained as the most important aspect of the doctrine of change of circumstances.

The most fundamental consideration to justify adaptation of contract under the doctrine arises from the special nature of the risks to which it often applies to address. The risks addressed under the doctrine of change of circumstances often affect large number of debtors that belong to single or different classes. This may be contrasted with the cases of *force majeure* that normally comprise risks that are felt only at the individual levels, and without that sweeping consequences in which large number of debtors may be affected at a time. This contrasting nature of the risks involved in the cases falling under the respective coverage of the two doctrines, has its own important implications for the remedies arising from their applications. Accordingly, since cases of change of circumstances usually comprise risks in which large number of debtors belonging to a given economic sector or throughout the economy may be affected, applying termination as the only remedy in such cases may have far more destructive consequences for the economy. This assertion is not just a matter of theoretical speculation, but it is supported by practical evidences gathered from the

catastrophic economic conditions experienced in many countries in the aftermaths of the two world wars. The experience of the German courts in dealing with the huge and abrupt economic downturns caused as the after-effects of the WWI and WWII provides the most notable example to prove unsuitability of termination for addressing huge number of cases and widespread risks characteristically associated with cases of change of circumstances.

What is more, it should also be emphasized that in cases of change of circumstances performance of the obligations usually does not totally become impossible, but proves to be burdensome to the excess of the maximum level that should reasonably be borne by the performing party. This generally implies the possibility of preserving the contractual relationship by bringing the burden in performance of the contract that has gone "excessively burdensome" to a 'reasonably burdensome' level through adaptation of the contract. Thus, adaptation is merely intended for extreme cases, where performance of the contract in its original terms would be patently contradictory to both reason and justice. It is also the alternative that saves the contractual relationship for which perhaps so much time and resources might have already been invested by the parties. Since, in many of the cases, the parties have already devoted considerable amount of resources for the purpose of establishing the contractual relationship and preparing for performance of the same, adaptation is the appropriate remedy that would most likely promote their reasonable expectations. This makes it a less interfering, but a more sensible remedy, which should generally be applied in addressing the cases of change of circumstances.

5.5.2.3. Features of the Power of Courts

It is possible also to raise some critical questions that are essential to appreciate the basic legal features of the power of courts to conduct adaptation of contracts in cases of change of circumstances. The first important question to address is whether there are substantive and technical requirements that should be or in fact provided for triggering the courts' power to undertake adaptation. Particularly speaking, one may wonder to identify the conditions in which undertaking adaptation of the contract might be expected from the courts as opposed to declaring termination of the same. In fact, this issue is not explicitly addressed and subject to specific regulations in majority of the laws surveyed in this paper. Only some very broad suggestions, generally leaving wide discretions to the courts and presumably implying the strong faith on the part of the laws in their prudent exercise by the courts, could be found.

However, a notable exception to the above general trend is to be observed in the case of the newly introduced doctrine of the French law, according to which the power of the courts to adapt the terms of contract arises only if both of the contracting parties consent to it. In this approach, as either of the parties could obstruct the court's application of the remedy simply by indicating their objections to it. The merit of providing the remedy of adaptation is drastically reduced in this approach, since a mere opposition from one of the parties is legally sufficient to exclude its application even in the most proper cases. Thus the approach generally does not seem to go in line with the basic considerations of public interest and the requirements of justice that underpinning the recognition of the courts' power to adapt the terms of contracts in cases of change of circumstances. The US law, somewhat in contrast to this strict approach, allows the courts to engage in adaptation of the contract only where applying the other remedies recognised by the law becomes insufficient to prevent a grave injustice that would otherwise be caused to one of the parties under the circumstances of the case. The construction is very broad, but the US courts are said to be not that much enthusiastic to take on the trouble of adapting the terms contract and thus termination remains the most common remedy granted by them.[608]

Another basic question relates to the legal techniques by which the power of the courts relating to adaptation practically becomes implemented. In some legal systems, adaptation of the contract may be realised by the courts only as far as a specific request to that effect (perhaps by additionally specifying the content of the adaptation) has been submitted by the disadvantaged party.[609] Thus adaptation of the contract by virtue of the operation of the law (or based on the courts' own interpretations of the cases laid before them) is essentially out of order.[610]

None of the laws of the jurisdictions considered in this paper seems to grant the affected party the right to determine the specific contents of the adaptation to be conducted by the court.

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[608]Perhaps the most discussed case in which adaptation has been undertaken by the court that could be regarded as an exception to the general trend among the US courts is the case referred as ALCOA, previously discussed in chapter three.

[609] For instance, in the Dutch Civil Code, (which of course not surveyed here), adaptation of the contract by the court should "upon demand of one of the parties". This is interpreted by some commentators to mean that the courts' power of adaptation should be confounded by the "concrete demand" made by the party-In case the court does not want to conduct adaptation in line with that demand, it cannot freely undertake adaptation fundamentally deviating from the demand. Thus all that is left is for the court to apply the other remaining subsidiary remedy, which is termination of the contract: see Hijma, In A.G. Castermans, K.J.O. Jansen, M.W. Knigge, P. Memelink & J.H. Nieuwenhuis (eds.), supra note 507.

[610] Ibid

The commonly indorsed position thus seems to generally leave the task of defining the particular contents of adaptations to the discretionary powers of the courts.

Lastly, it is important to stress the fact that the power of the courts to modify terms of the contract in cases of change of circumstances does not seem to grant them the power to change the nature of non-monetary obligations existing between the parties. Thus the power to change the content of the obligations generally does not seem to embrace undertaking substitutions between obligations in kind; in which case, monetary compensation may be used to restore the balance of the contract. However, it seems that such limitation is related only to changing the content of the non-monetary obligation per se. Thus, for instance, adaptation seems still possible in relation to subsidiary obligations, such as the time terms provided for the discharge of the non-monetary obligations.

5.5.3. Termination

The exceptional doctrines contained in the laws of the domestic jurisdictions and international instruments surveyed in this paper generally stipulate that termination should be limited to cases where adaptation of the contract either could not be attained or would procure unsatisfactory results.[611] But they generally refrain from providing specific and detailed criteria to identify the particular situations in which adaptation of the contract may be deemed improper. But the effects that will be produced on the legitimate interests of the non-affected party is said to constitute the major consideration to be taken into account by the court to determine the cases in which it should refrain from adapting the terms of the contract.[612] Normally speaking, since neither of the parties is responsible for the losses that have arisen from the changes in the equilibrium of the contract, the court should take utmost care not to impose a remedy that wrongly punishes or shifts such losses to the non-affected party.

Therefore, before choosing the remedies to be granted in each cases of change of circumstances, it is very important that the court should first effectively appreciate the likely effects that will be produced on the distribution of risk between the parties. Where termination of the contract is chosen by the court as the proper remedy for addressing a

[611] But note the exceptions in the case of the US and French laws that we have already considered above.
[612] For instances, the German law clearly implies that the court should not attempt adaptation of the contract in cases where it results serious prejudices to the interest of the non-affected party.

particular case of change of circumstances, it should further fix the date and the terms on which it is to become effective. In this regard, the laws surveyed in this paper appear to give wide discretions to the courts to determine the conditions applicable in case of declaring termination of the contract.

5.6. Concluding Remarks and Lessons for the Future

In the preceding sections of this chapter, we have attempted to summarise the approaches existing among the jurisdictions surveyed in the previous two chapters of this paper. Based on this, an attempt has been made to discern some core aspects of the approaches adopted by the jurisdictions to respond to the problem of change of circumstances. Accordingly, we have first tried to precisely present the approach of the Ethiopian law that generally appears to reject the need of addressing the problem of change of circumstances. Then, we have tried to broadly contrast the approaches of the jurisdictions that rely on the "expansion of conventional doctrines" against the approaches of those jurisdictions that provide clear and specific solutions for the problem under exceptional doctrines introduced for that purpose. Accordingly, we have argued in support of the approaches adopted in the latter jurisdiction in which the problem of change of circumstances is explicitly regulated under the exceptional doctrines introduced for that purpose.

Once we have stated our dissatisfactions with the "expansion of conventional" doctrine and indicated our overall preference for the incorporation of exceptional doctrines, we have further attempted to overview some basic questions relating to the prerequisite and the types of remedies that may be involved in the applications of the latter. This is briefly the report of the journey we have made so far. Then, where do we go from here? The remaining paragraphs of this section are dedicated to make some forward-looking suggestions to sketch the basic platform on how the law should address the problem of change of circumstances, by particularly emphasising on the Ethiopian law.

The doctrine of change of circumstances addresses the fundamental imbalance that results in the equilibrium of contracts due to supervening changes that are both beyond the control and reasonable foresights of the parties. The Ethiopian law, except where supervening changes result in objective impossibility and may be subject to the theory of *force majeure*, generally does not give recognition to the cases addressed by the doctrine of change of circumstances.

This is in fact subject to exception in relation to administrative contracts to which different exceptional theories including the theory of *imprévision* are applicable. In the case of private law contracts, the position of the Ethiopian law generally remains excessively in favour of the principle of *pacta sunt servanda,* and generally indicates its reluctance to address cases of change of circumstances. Thus the Ethiopian law generally seems to take the view that the effects of change of circumstances should be regulated by the parties themselves, via the classical principle of freedom of contracts.

However, as it has already been explained in this paper, the nature of the risks arising from change of circumstances are often difficult or totally insurmountable to be effectively taken into account and regulated through *ex post* agreements made between the parties. From economic point of view, proper rules that address these risks could reduce transaction costs by offsetting the need for the parties to engage in costly negotiations to provide such ex-post regulations, which in fact do not often yield optimal results regardless of the costs that may be incurred by the parties. Thus, both economic considerations and the requirements of justice provide support for clear intervention of the law through incorporation of exceptional doctrines that address the effects of change of circumstances in contractual relationships.

The trends in many domestic jurisdictions and international instruments of contracts (including those surveyed in this paper) also disclose the presence of a growing recognition for the need of providing legal remedies for cases of change of circumstances by providing clear exceptions to the binding force of contracts. This growing recognition equally reflects the increasing acceptance accorded to the norms of cooperation, equity and justice as the most essential precepts of the modern contract law. In the face of this modern development, the Ethiopian law appears to be peculiar even among the laws surveyed in this paper, with its curious position that totally denies any place to the problem of change of circumstances. This additionally points to the risk of legal isolation that is more real than apparent, especially in the coming near future. The absence of almost any judicial efforts to event around certain solutions for cases of change of circumstances further implies that the Ethiopian legal system would be caught totally unprepared should it be confronted by huge and systemic legal problems similar to those that had historically occurred in countries like Germany. These obvious relative weaknesses in the approach adopted by the Ethiopian law towards the issue of change of circumstances, normally compels us to make some basic suggestions that may be useful to produce a general roadmap for guiding future improvements of the law.

Thus, it should be explicitly conceded that the suggestions to be made here are merely intended to provide the starting hints that still need to be further researched. It is reasonable to keep our ambitions to this modest level, in view of the discussions made in this paper, which generally discloses the absence of readily adoptable and universally accepted formula among legal systems in determining the proper design of the legal intervention to be used in responding to the problem of change of circumstances. Even among those jurisdictions that make clear exceptions to the binding force of contracts and incorporate exceptional doctrines applicable to address the problem, divergence is still present when it comes to questions pertaining to particular aspects of such doctrines.

In the context of the Ethiopian law, the first question that may be relevant to regulate the problem of change of circumstances is as to whether such regulation should be based on totally original and independent doctrine, or should be achieved merely by expanding the scope of existing concepts of the law. On this point, we have argued that the regulation of change of circumstances should be subject to an exceptional doctrine that independently stands from other traditional doctrines applicable to cases of impossibility, mistake, or the theories addressing the cases of change of circumstances in specific areas like administrative contracts. Thus cases involving impossibility of performance should be regulated by the traditional concept of *force majeure*. The problem of change of circumstances in the area of administrative contracts should likewise continue to be regulated by the theory of *imprévision* and/or other relevant theories already applicable.

Moreover, as we have already noted, it is generally submitted that the remedies that the law provides in cases of mistake should generally be similar to those remedies applicable in cases of change of circumstances. The rules of the Civil Code applicable to mistake interestingly appear to be fairly up-to-date, and there seems no need to consider the incorporation of issues relating to initial mistake if decision is made to introduce a new doctrine that addresses the problem of change of circumstances. The Ethiopian Code recognises the possibility of invalidation of contracts affected by mistake at the request of the mistaken party.[613] The Code also assigns important roles to the principle of good faith when it comes to invalidation of

[613] Invalidation on the ground of mistake, or more generally, invalidation of contracts is a judicial remedy and cannot be unilaterally declared by a party as clearly evident from Article 1808 (1) & (2) of the Ethiopian Civil Code that indicates the remedy may be requested from the court. Moreover the decision to request invalidation is clearly left to the party who gave his consent by mistake as provided in Article 1696 of the Code.

contract on the ground of mistake.[614] Accordingly, the Code provides that a request for invalidation on the ground of mistake should not be made in a manner contrary to good faith. It also further recognises a mechanism by which the other party may prevent invalidation of the contract by timely proposing terms for adaptation of the contract in order to effectively remove the prejudice that the person entitled to invalidation might suffer by the continuance of the contract.[615] The Code also seems to recognise the possibility for adaptation by the court, since it clearly provides that a contract should not be invalidated in its entirety unless its basic essence is affected.[616] Thus the doctrinal division between initial mistake and supervening changes should be maintained.

As regards to the particulars of the doctrine itself, there are many issues which have not been yet clearly resolved. As it has already been indicated, it is generally conceded that the application of the doctrine should be triggered only where the change of circumstances produces fundamental effect on equilibrium of the contract (assuming the other remaining conditions relating to foreseeability, risk allocation, and the like are also met). But what may be regarded "fundamental" in this sense could be subject to different interpretations. Some laws have in fact introduced a minimum threshold for the purpose of clearly separating the cases that warrant intervention from those which do not. This may be considered as one alternative for reducing the subjectivity that is innate to this requirement. However, most legal systems (including those we have surveyed in this paper) do not seem to indorse this alternative on the ground that it flatly disregards individual risk considerations that may be important in particular cases. Thus, it seems the prevailing view is to leave wide discretions to the courts by defining the basic standard.

There are as much challenging issues in relation to the possible effects of the doctrine. But at a broader level, the preferred approach seems to incorporate the parties' obligation to renegotiate, and the powers of the courts to adapt the terms of the contract or declare its

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[614] Article 1712 (1) provides, "[t*]he mistaken party may not invoke his mistake in a manner contrary to good faith.*" The second sub-Article of the same provision provides option for the non-mistaken party to save the contract from invalidation, by stipulating. "[h]e (the party invoking mistake) shall be bound by the contract he intended to make where the other party agrees to perform such contract."

[615] See (above) Article 1712 (2) of the Ethiopian Civil Code

[616] Where the mistake affects only a separable part of the contract, and such affected part may not be regarded "fundamental" to justify invalidation of the whole contract, the court may declare invalidation only with respect to the part affected. Incidentally, this may be compared with similar provisions of the Civil Code relating to cases of cancellation that allow to declare partial cancellation where the breach only affects only part of the contract that is not fundamental enough to justify its whole cancellation.

termination. With respect to the obligation to renegotiate, some writers even do not see the purpose of imposing such obligation on the parties- it has been asserted that, *as negotiation is based on voluntary basis the same should apply in relation to renegotiation.*[617] However, provision of the obligation may be justified from the angle of protecting the public interest and the interest of the private parties involved in particular cases of change of circumstance. With regard to adaptation and termination of the contract, very fundamental yet unresolved issues generally seem to be trusted to the discretionary powers of the courts by the jurisdictions surveyed in this paper. As a matter of fact, judicial discretion is both important and unavoidable in dealing with many of the particular issues associate with the problem of change of circumstances. As each case involves its own unique aspects, the courts should be provided with the discretionary powers to render flexible decisions according to the unique features of the cases brought before them. However, it is also desirable to provide some general criteria or standards at least with regard to some basic questions that are generally supposed to recurrently confront the courts.

[617] See schwenzer, supra note 516, p. 722.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1. Conclusion

The principle of binding force of contracts is one of the most important legal principles with the longest tradition of recognition in almost all civilised legal systems. As first expressed by the old Latin maxim - *pacta sunt servanda*, the principle embodies the idea that "contracts are made to be performed". This basic idea, backed by both moral and goal oriented or socio-economic justifications deployed in its favour, has long been declared as the core principle that constitutes the bedrock of the modern institutions of contracts. Despite its omnipresence throughout history and its recognition across all jurisdictions, however, the principle of *pacta sunt servanda* has never been conceived as an absolute "rule". Its application has always been made subject to the limiting principles of fairness and other specific exceptions fashioned after various public policy priorities of concerned jurisdictions.

Thus it is to be noted that most civil law jurisdictions have historically admitted various specific exceptions usually traced from the old Roman principle of *impossibilium nulla obligation.* This old concept was premised on the moral philosophy that "ought" implies "can"- and thus it would be absurd for the law to hold a person liable for the non-performance of an obligation that had objectively become impossible to perform. This basic view mainly found its expression under the theory of *force majeure* that generally applied to the cases of supervening impossibility with some variations in its specific formulations among different civil law jurisdictions. In the common law jurisdictions, an exception based on the doctrine of frustration admitted to the principle of binding force of contracts, by departing from the concept of "absolute contracts" that reigned throughout their earliest history. Thus, in almost all legal systems, it has long been clearly settled that the principle of *pacta sunt servanda* may be subject to exceptions, where the performance of contractual obligations becomes objectively impossible after formation of the contracts and without the fault of either contracting party.

But the above describe unanimity is hardly to be observed when it comes to the cases of change of circumstances that cause serious distortions to the original equilibrium of the contracts, without making their performance objectively impossible. The problem of change of circumstances thus generally comprises these cases; in which, the performance of the obligations assumed under the contracts becomes excessively onerous or the value of the

counter-performance to be received becomes severely diminished due to supervening occurrences reasonably unforeseeable at the time of their conclusions. The doctrine of change of circumstances is used as a generic phrase to refer to various concepts and theories based on which reliefs may be provided in such cases.

Thus the cases covered under the problem of change of circumstances have attracted varying responses among different legal systems throughout history. The variations in the responses provided for the problem that existed throughout history and still subsisting among different jurisdictions clearly emerges from the discussions made on the approaches of the jurisdictions surveyed in this study. The attention accorded to addressing the problem has also fluctuated through different historical periods. The doctrine had attracted widespread recognitions during the medieval periods as articulated in the time old concept of *rebus sic sutribus*. But the wide recognition that the doctrine enjoyed in those periods did not survive the hostile theoretical stances taken against its application by the nineteenth-century classical theories of contracts in many jurisdictions.

The classical theories of contract treated the principle of *pata sunt servanda* as the *sine quo none* of insuring respect for the individual autonomy to freely choose his/her means of survival and maintaining the orderly and efficient functioning of the market-based economic system. Precisely due to these reasons, the theories favoured providing nearly absolute enforcement to the principle. Respecting private autonomy and ensuring economic efficiency thus became the ultimate unifying values of contract law. Consequently, the theories made the normative claims, according to which contractual relations should be categorised to strictly belong to the private domain, and the role of the contract law s--hould be barely nothing other than providing enforcements to the 'willed transactions' between private parties. Thus the classical theories asserted that, provided the basic preconditions of formal fairness are insured, i.e., the planed transactions are based on freely provided consents, contract law should occupy no role other than providing the enforcement mechanisms to make sure that those planned transactions are exactly realised.

Consequently, the doctrine of change of circumstances essentially faded away from the legal scene, until it was later called into resurrection due to the effects of the catastrophic social and economic consequences that resulted following World War I and II. This marked the return and continued acceptance of the doctrine in many, if not most, modern legal systems.

The survey made in this study, in fact provides testimony for the growing acceptance that the doctrine is wielding from the legislators of many jurisdictions. This overall trend could be particularly deduced from the incorporation of various specific legal devices meant to address the problem of change of circumstances in majority of the jurisdictions surveyed in this paper, the position of the Ethiopian law being the most atypical example contradictory to this generally identified trend.

The Ethiopian law therefore seems to remain strongly faithful to the above highlighted ideas central to the classical theories, more than any of the other jurisdictions surveyed in this paper. The law seems to unqualifiedly subscribe to the classic thinking, through its extreme emphasis on providing strict enforcements to the supposed freely negotiated terms of contracts. Thus ensuring nearly strict adherence to the principle of *pacta sunt servand* seems to reign almost as the absolute goal of the law. This may be specifically observed even from the definitional provision under Article 1675 of the Civil Code. The provision clearly emphasis the consensual basis of contracts not only in relation to acts creating new obligations, but also with respect to those acts intended for bringing the termination or making certain modifications to obligations that are already existing. The basic proposition expressed in this definitional provision has been further consolidate, particularised, or expounded on by other remaining provisions of the Code relating to the issues of variation, termination, and non performance of contracts.

The rejection of the doctrine of change of circumstances in the Ethiopian contract law essentially seems to have been predicated on the underlying assumptions inherent in the classical theories of contracts. The Civil Code apparently attempts to supply some guidance to the contracting parties so that they formulate their own contractual devices to address the possible imbalances that may be caused in their relationships due to supervening change of circumstances. Such attempts could be inferred from various provisions of the Code dealing with issues pertaining to performance, variation, and termination of contracts. For instance, Articles 1749 (2) and 1750 of the Code allow the parties to fix future payments to be made under their contracts in reference to the price of goods, raw materials or services whose prices could be easily ascertained, or in reference to foreign currency. These provisions are clearly aimed to remind and enable the parties (especially parties to long term contracts) to regulate the possible effects of future fluctuations in the nominal values of the local currency on the originally established equilibrium of their obligations. Thus the attempt is in line with the

classical thinking of contracts that generally argues for the substantive contents of contracts to be totally left to the determination of the parties, since this is said to promote private autonomy, efficiency and stability of transactions. On the other hand, intervention of the law in the contents of contracts on account of substantive fairness is rejected primarily because it is supposed to counteract against these values.

As could be generally inferred from the approaches of the foreign jurisdictions surveyed in this paper, the views expressed in the classical thinking, and still remaining strongly endorsed in the Ethiopian law, seem to have lost their initial vigour and a good number of their supporters. All the surveyed foreign systems of contract law have moved beyond the conventional rule of excuse based on objective impossibility, and have recognised the relevance of providing legal remedies for the problem of change circumstances. However, it should be noted here that some marked variations could still be observed among the systems when it comes to the modality and the scope of such recognition.

The comparison between the foreign laws discloses the fact that the English common law provides the least accommodation for the problem of change of circumstances. Thus the approach adopted by the English law could perhaps be regarded as the close relative of the position taken by the Ethiopian law that essentially indorses outright rejection of the problem. In fact, the much reserved and cautious approach adopted by the English law towards the issue of change of circumstances is not a topic of much surprise. This is because the English common law has traditionally been characterised by its strict policy on enforcement of contracts and restrictive incremental reactions to change.

From the international instruments, another ambivalent position towards addressing the problem of change of circumstances is to be found under the CISG. The CISG's approach, though may be regarded to be somewhat akin to the position of the English law, still provides more room for addressing the problem. The CISG recognises the possibility of addressing the problem under the broad concept of "impediment", which is also applicable to the traditional cases of impossibility. Thus, as in the case of the English law, and unlike the case of the other remaining three international and regional instruments of contract law, it does not incorporate separate provisions that clearly regulate the specific standards and remedies applicable for the purpose of addressing the problem of change of circumstances. In fact, the contrast existing between the CISG's approach and the other three international instruments is not without its

foundations, since it may be perhaps explained based on the differences existing with regard to their obligatory force and the times of their adoptions. Unlike the other three instruments, the CISG had to give priority to the attempt of reconciling between divergent positions of domestic laws in order to gain acceptance as a binding international convention. Moreover, the reserved position of the Convention could also be arguably attributable to the fact that the issue of change of circumstances did not gain as much recognitions in legal doctrine at the time of its adoption to be explicitly incorporated in it.

The other remaining foreign jurisdictions surveyed in this paper, on the other hand, more or less explicitly recognise and try to provide responses that are particularly tailored to reconcile or strike the balance between the conflicting values of the law to maintain justice and uphold the binding nature of contracts. They explicitly provide defined exceptions to the principle of binding force of contracts and incorporate specific remedies applicable for addressing the problem of change of circumstances. Thus the approach favoured by majority of the legal systems surveyed in this paper stand in sharp contrast to the Ethiopian law that seems to adopt the most conservative policy towards addressing the problem of change of circumstances. The rejection of the problem, however, seems to be challenging to be fully upheld in the face of the modern thinking of contracts that gives recognition to their public aspects and the concerns relating to inuring their substantive fairness. The recognition of the problem of change of circumstances thus generally represents the compromises made between the conflicting objectives of the law in protecting contractual freedoms of private parties and safeguarding security of transactions on one hand, and preserving minimum scores of fairness and justice in private relationships on the other hand. In view of these competing considerations in the modern law of contracts, some broad prescriptions that may be helpful to bring improvements to the current status of the Ethiopian law will be forwarded in the form of recommendations under the next sub-section.

6.2. Recommendations

Based on the approaches of the jurisdictions surveyed in this paper and the views already reflected in this study, the writer forwards the following recommendations that he believes to be helpful in improving the current approach of the Ethiopian law in responding to the problem of change of circumstances:

- First and for most, the writer indicates his preference for the approach of the legal systems that incorporate specific doctrines to recognise the problem of change of circumstances by explicitly providing exception to the principle of *pacta sunt servanda*, and that further clearly set forth the specific legal remedies applicable for the purpose of addressing the problem.
- The specific doctrine providing express recognition of the problem should, as far as possible, clearly define the basic standard to be used in order to suspend the binding force of contracts and decide in favour of applicability of the doctrine. At its very minimal, this basic standard should clearly address the following specific elements:

    a. Firstly, it should provide for the requirement that the change of circumstances should cause fundamental imbalance in the original equilibrium of the contract. This requirement is first met in cases where the obligation assumed by one of the parties becomes not merely onerous, but "excessively onerous" as the result of the change of circumstances. Alternatively, the requirement is also fulfilled where the counter-performance a party expects to receive from the other party totally or substantially loses its value due to the change. Thus the doctrine does not normally apply mere on the ground of the fact that the contract has become less profitable than originally anticipated or even resulted in certain losses generally not regarded to be excessive.
    b. Secondly, a clear indication of the fact that the change of circumstances should occur after conclusion of the contract and that it was not reasonably foreseeable at the time. This element excludes the cases subject to other traditional theories generally relating to the formation of contracts, including the rules on mistake and perhaps also those relating to initial impossibility.
    c. Thirdly, the basic standard should explicitly state the non-applicability of the doctrine to cases where the risk arising from the change of circumstances has

already been impliedly or expressly allocated to one of the parties, by specific legal provisions or the terms contained in the contract. This element unequivocally indicates that the recognition of the doctrine is only meant to give its application a residual or subsidiary role. Thus recognition of the doctrine in no way empowers the courts to tamper with the risks of supervening changes already allocated by relevant provisions of the law or the terms explicitly or implicitly found in the contract itself.

d. Finally, the obvious fact that the change of circumstances or its consequences must not be attributed to the fault of the party seeking remedy on the basis of the doctrine should be stated. This last element may be compared with the requirements relating of giving notification and rendering faultless provided with respect to the party seeking application the defence of *force majeure.*

- Once the doctrine has defined the basic standards that must be attained in order to grant its application, the next essentially remaining task is to clearly state the specific types of remedies that may be awarded in case of such applications. This, as far as possible, should further include defining the specific conditions and criteria pertaining to the application of each remedy. In this regard, it appears reasonable to impose renegotiation as the real obligation for both parties. In case the renegotiations between the parties fail to produce mutually agreed solutions for addressing the effects of the change of circumstances within reasonable period of time, the courts should be allowed to intervene either to adapt the terms of the contract or declare its termination altogether. Regarding the choice between the two remedies, the court should be instructed to give priority to adaptations over declaring termination of the contracts. However, the decision as to the proper remedy to be specific cases is still subject to broad discretions of the courts, provided that the remedy they select to apply does not cause losses or exceptional inconveniences for the non-affected party. This is because such party should not suffer, since none of the parties is responsible for the imbalance caused in the equilibrium of the contract due to change of circumstances. Regarding the content of the adaptation itself, it should be clearly indicated that it merely aims at reasonable allocation of the losses arising from the change of circumstances, and that the affected party should continue to bear part of the losses that are regarded reasonable and fair in the circumstances of the case.

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