Mémoire : le changement de circonstances en droit comparé des contrats

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Suite aux nombreuses demandes par mail je donne ici accès à l'intégralité de mon mémoire réalisé en 2009 à London South Bank University sur le changement de circonstances en droit comparé des contrats.

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Project

Comparative contract law

Subject:

An examination of challenges to the harmonisation of European contract law illustrated by the treatment of change of circumstances

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General Introduction

According to E. McKendrick, “It is often said that English law does not encourage the adjustment of bargains in the event of contractual performance becoming more onerous [in the case of unforeseeable events]. This is not entirely accurate. The issue should not be seen as whether or not English law permits readjustment. The real issue is: who should do the readjusting? Is it the courts or is it the parties? The answer which English law gives is that it is for the parties to do the readjusting. While the courts will not adjust the bargain for the parties, they will be reluctant to place significant obstacles in the way of attempts by the parties to adjust their bargain to meet changing circumstances”[1]. Interestingly the same thing could be said about French law, except the fact that English law considers that the contract must be brought to an end under the doctrine of *frustration* in the case of changing circumstances, whereas French law will bind the parties ‘to make it good’. Both solutions differ from European proposals.

This project studies challenges to the harmonisation of European contract law through the treatment of change of circumstances.

Definitions

For a better understanding, some definitions need to be given. First of all needs to be stressed that all the present work only concerns private contract law. This precision is important because the reasoning wouldn’t have always been the same if dealing with public contract law, notably in French public law, since the case *Cie générale d’éclairage de Bordeaux**[2]*** (1916).

Let us give a definition of a contract. A contract can be defined as a binding agreement between two or more parties that is enforceable by law. A general definition of such an agreement is given by Blackburn J in *Smith v. Hughes* (1871): “If, whatever a man’s real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party’s terms.”[3]

This project mainly deals with contracts in which the parties didn’t insert harshness clauses, saving clauses, renegotiation clauses, unforeseeability clauses or hardship clauses, which are clauses offering a contractual solution to the consequences of a potential future unforeseeable change of circumstances in a contract. We can also consider cases in which the parties didn’t negotiate their contract with the help of experts and in which this kind of clauses can be challenged.

The ‘change of circumstances’ means the happening of supervening events after the conclusion of the contract, which make the performance of the contract manifestly unjust and weren’t reasonably foreseeable at the time of the conclusion of the contract, so that the aggrieved party cannot perform the contract in the conditions that were planned when entering into the contract.

The judicial redrafting power, which is being dealt with in this project, is the one (that would be) given or not to a judge, to modify, end, or enforce the contract in the situation of changing circumstances.

The Pacta Sunt Servanda and *Rebus sic stantibus* principles.

The *Pacta Sunt Servanda* principle is a fundamental principle in contract law. It literally means ‘Pacts must be respected’. It is the basis of any contract. It means that any formed agreement must be enforced according to its terms. The question of changing circumstances is a difficult one mainly because of that principle. Should the contract be enforceable in the case of supervening events? The French solution differs from the English one, and both differ from the European proposals.

According to the philosopher St Thomas of Aquin, there are only two cases in which the *Pacta Sunt Servanda* principle shouldn’t be compulsory: when the promise is made on bad foundations (such as lies and illegal agreements), and when “the real or personal circumstances have changed” [4]. He may not have considered the issue of the change of circumstances in a contractual agreement, but his answer is at the heart of the current questions about a judicial power of redrafting a contract in the case of supervening events. Should his solution be applied?

The *Rebus sic stantibus* principle is the principle according to which a clause of a contract may become inapplicable due to a fundamental change of circumstances. It is often used in international treaties (and more generally in international public law) and means ‘things thus standing’. It was first codified in the 1969 Vienna Convention on the Law of treaties, under the article 62[5]. According to Otto Von Bismarck, all treaties should contain this sentence[6]. Should it be the same in private contract law? Or is it just an exception to the *Pacta Sunt Servanda* principle? This project tries to answer these questions.

The issue raised by the change of circumstances

The question of change of circumstances is a very interesting academic one. Even if contract law books do not go deep into that question, it is however very important, as Carol Xueref, director of Legal affairs of Essilor International, stresses: “the change of circumstances are common in the contracts realised by firms, and so an Act on this question is necessary”[7] adding that “the firms need flexibility as well as it is in their interest to have their contract being performed”, showing an issue between a need of flexibility (arguing in favour of a judicial power to redraft a contract) and a need of contractual security and of specific performance (arguing against). Here, the *certainty* much prised by English law may consist of the certain knowledge that the contract will be at an end in some circumstances, it does not have to cover the certainty of performance (although that is an alternative route to certainty).

The different approaches in the English and the French legal systems

As an introduction of her speech at a Conference in Oxford in 2003, Professor B. Fauvarque-Cosson[8] observed that “A person who fails to perform his contract properly is liable for breach of contract; this is true in English law, as it is in French law. One main difference is that French lawyers tend to consider that *Pacta Sunt Servanda* is better respected through specific performance of the contract, while English lawyers are usually satisfied with damages”[9]. To verify the accuracy of this statement we have to study the French and the English reasonings to compare them.

A Commentary on the French and The English legal reasonings in the French case Canal de Craponne[10] [1876] and the English case Staffordshire Area Health Authority v South Staffordshire Waterworks Co[11] [1978]

The facts in the French case

In this case, agreements concluded in 1560 and 1567 fixed to three monetary units the price of a watering fee that the beneficiary had to pay to the owner of an irrigation canal. But in the middle of the 19th century, the firm in charge of the exploitation of the canal asked for an increase of the fee, considering that it no longer corresponded to the maintenance price. Taking into account the imbalance of the agreements, the French Court of appeal of Aix-en-Provence held on the 31st of December 1873 that the price should from then on increase up to the price had a similar contract be concluded at the date of the judgment, and fixed the amount of this new price. But in 1876 the Cour de cassation (the French highest civil law court) refused this solution and decided the case in favour of the specific performance of the contract.

The facts in the English case

In 1908 a water company proposed to pump water from a well about one mile away from a hospital which had its own well. By the South Staffordshire Waterworks Act 1909 the water company was given statutory authority to pump water from its well subject to providing the hospital with such water as it required, at the rate it would have cost the hospital to operate its own well, if the supply from the hospital's own well was diminished by reason of the water company's operations. Any disputes were to be settled by arbitration. In 1915 the water company began pumping water from its well and by 1918 this had an adverse effect on the supply from the hospital's well. The water company agreed to make up the deficiency from their mains. In 1927 the hospital authorities decided to abandon their well and commenced taking all the hospital's water from the company's mains. In 1929 the hospital authorities and the water company entered into an agreement under seal whereby 'at all times hereafter' the hospital was to receive 5,000 gallons of water per day free and all the additional water it required at the rate of 7d per 1,000 gallons. When

decimal currency was introduced the rate was changed to 2,439p per 1,000 gallons. By 1975 the normal rate charged by the water company was 45p, and on the 30th September 1975 the water company wrote to the hospital authorities giving notice that they intended to terminate the 1929 agreement in six month's time, and that thereafter they would supply 5,000 gallons per day free and any excess at normal rates. The hospital authorities refused to accept the notice as valid and took out an originating summons to establish that it was not. The judge upheld their claim on the ground that the 1929 agreement, being expressed to apply 'at all times hereafter', had been made forever or in perpetuity and therefore the water company could not resile from it.

The question arising

How different are the decisions taken by the English and the French courts when a contract suffers an unforeseeable change of circumstances?

The French ruling

In the French case, this very important decision was based on the article 1134 of the French Civil Code, which strictly applies the *Pacta Sunt Servanda* principle (‘Pacts must be respected’).

For a better understanding, here is a translation of the article 1134 of the French Civil Code:

“The legally formed agreements must be considered as binding statutory rules to those who made them.

They can only be revoked by their mutual consent, or for causes authorised by law.

They must be executed in good faith.”

The Cour de cassation formally forbad the judges to redraft a contract arguing on the article 1134 of the French Civil Code, which they say “provides a general and absolute rule, and governs contracts which execution spread in time as well as in all the others; and that in any case it is in the power of courts of justice, however fair and equitable their decision may appear, to take into consideration time and circumstances to modify a contract, and to substitute new clauses to clauses that have been freely accepted by the parties”.

That solution, the specific performance of the contract, was a new one in such cases and it ruled against the decision that was held on appeal. This judgment was followed by all the French courts, even if recently this more and more criticised solution suffered some exceptions (on the ground of *good faith* of the article 1134). But this decision was the birth of the French answer on the question of change of circumstances, and since, this decision is generally applied.

The English ruling

In the English case, it was first held, that the fall in the value of money since the agreement was made was due to circumstances “which the parties had not foreseen and in those circumstances it [the contract] was no longer binding on the parties and could be terminated on reasonable notice”.

Secondly, it was decided that in the absence of and express power to terminate the contract, the agreement was not to be construed narrowly (shouldn’t be considered as lasting forever with a fixed price), but had to be construed in the context of the circumstances in which it was made. And so the phrase ‘at all times hereafter’ was to be construed as meaning ‘at all times hereafter during the subsistence of this agreement’.

Thirdly, looking at these two first agreements, the courts agree to entitle the water company to give reasonable notice terminating the agreement.

The question of this case on the change of circumstances was solved by the doctrine of frustration. E. McKendrick gives the following definition of frustration: “A contract is frustrated where, after the contract was concluded, events occur which make performance of the contract impossible, illegal or something radically different from that which was in the contemplation of the parties at the time they entered into the contract”[12]. And so we can see that the doctrine of frustration applies in the case of unforeseeable change of circumstances which cause the effect described by E. McKendrick. We shall already stress a difference between English law, in which a solution applies when the performance of the contract becomes “radically different”, and European proposals[13], which argue for solutions that would apply when the performance of contracts would become “much more onerous” (the solutions of the European proposals has been rejected by the English courts, see for example *Davis Contractors Ltd v. Fareham UDC****[14]***) .

But more precisely, a contract which is discharged on the ground of frustration, is automatically brought to an end by the operation of a rule of law (*Hirji Mulji v. Cheong Yue SS Co****[15]***), irrespective of the wishes of the parties (the fact that the wishes of the parties are not taken into account is interesting when studying European proposals on that matter, as it will be done below).

And on the question of monetary consequences, sums paid prior to the frustrating event are recoverable, sums payable prior to the time of discharge cease to be payable although the payee may be entitled to set off against the sums so paid or payable expenses which he has incurred before the time of discharge in, or for the purpose of, the performance of the contract (S.1(2) of the Law Reform (Frustrated Contracts) Act 1943). In some cases, an action for unjust enrichment may be brought before a court.

However, in English law, the issue of changing circumstances will sometimes be solved under the doctrine of *frustration of purpose*.

Similarities between the English and the French solutions

As we can see, both solutions apply the *Pacta sunt servanda* principle rather than the *Rebus Sic Stantibus* one. It shows the importance of this first principle, and that of the possibility to rely on contracts that have been concluded. Although for example English law and French law differ on the definition of a contract (for example through the doctrine of *consideration* in English law and the doctrine of *cause* in French law), it seems that the importance of a contract (a legally binding agreement) is recognised almost everywhere in the world. The contract and its characteristics are a pillar of our modern society. Its effects are internationally recognised. The invention of the contract is as old as the invention of trade.

Another interesting point is that neither the French judge nor the English judge has a right to redraft the contract if the parties disagree. That is a main point that justifies a comparison between the French, the English, and the European legal reasonings on the question of change of circumstances. In other legal systems, other regimes can be found: the courts are granted powers to readjust the contract when the parties fail to reach an agreement by themselves (See below).

The French judge tried to redraft the contract, on appeal of the case *Canal de Craponne*, which led to the famous decision of the French highest civil law court forbidding the judge to modify an existing contract. We can see, that even though France is not a common law country, the solution of the issue is given by the judge and not by the legislator.

The question of change of circumstances being so important, we can wonder why there is no controlling statute either in French or in English law. We will deal with this question later.

Differences between the English and the French solutions

The English solution evolved during the last two centuries, starting from the French solution (which almost didn't evolve since the nineteenth century), as E. McKendrick relates it "At one point in its history, supervening or unforeseen events were not regarded as an excuse for non-performance because the parties could provide against such accidents in their contract. Once a party had assumed an obligation he was 'bound to make it good' (*Paradine v. Jane* (1647) Aleyn 26, 27). This absolutist approach was gradually relaxed during the latter half of the nineteenth century and, commencing with *Taylor v. Caldwell* (1863) 3 B & S 826 [setting the doctrine of impossibility] and culminating in cases such as *Jackson v. Union Marine Insurance Co Ltd* (1874) LR 10 CP 125 and *Krell v. Henry* (1903) 2 KB 740 (although originally justifying the change of approach to the problem by the fiction of an "implied term" that certain conditions would not change), the courts developed a wider role for the doctrine of frustration and it became significantly easier to invoke the doctrine. Today, the courts have reverted to a more restrictive approach and it is rare to find frustration being pleaded successfully"[16].

We can see that the main difference is that where French law binds the parties to execute the contract, English law allows the contract to be brought to an end.

Frustration doesn't exist in French law. This doctrine seems to play an intermediate role between two French doctrines, the doctrine of f*orce majeure****[17]*** and that of of *révision pour imprévision****[18]*** in public law. *Force majeure* is the French for "superior force". It is a common clause in contracts (widely used in commercial contracts) which essentially frees both parties from liability or obligation when an extraordinary event or circumstance beyond the control of the parties happens. It also prevents one or both parties from fulfilling their obligations under the contract. Frustration is a more flexible notion than *force majeure* but still shares some common features with it. For example it doesn't apply when the frustrating event was foreseeable.

We can draft some main differences between the English and the French solutions. First, English courts do not ask whether the execution of the contract would be more onerous, but if the performance would be "fundamentally different" than what has been agreed, resulting in the achievement of the parties' being "impossible" (of course, it may be the court which determines what the parties' purpose was if this is not clear), (and this differs from the European proposals as we will see). In French law, the doctrine of *force majeure* is subject to three conditions: an event which is external, irresistible, and unforeseeable; but a mere change of circumstances does not make performance impossible but merely much more onerous or radically different, and the doctrine of *force majeure* only applies when the performance is impossible[19]. Moreover, the effects of both doctrines are different, as we saw in the two previous cases. This may be due to the fact that the doctrine of frustration is based on the implied term theory or on equity (maybe it would be more accurate now to say "was" based on implied term, as this has been abandoned in favour of frustration as a stand-alone doctrine having its own force of law without the need to

resort to second-tier reasoning), which could in a way reminds us of the *Rebus Sic Stantibus* principle that French courts never accepted to follow in private contract law.

We should now look at the future to see if national projects exist to review the existing law.

National projects to review the law

First needs to be underlined that nowadays, the French solution is not as strict as the one in the *Canal de Craponne* case. This is linked to the interpretation of the article 1134 of the French Civil Code, which, in its last sentence, states that “They [The agreements] must be executed in good faith”[20]. In 1992, in the case *Huard**[21]*, the operator of a gas station couldn’t stay competitive anymore because of too high prices agreed with his exclusive supplier. The Cour de cassation (highest French civil law court) held that the obligation of good faith obliged the parties to adapt the contract to the new economic situation. This solution was followed in 1998 by another similar case about a commercial agent. And so, the parties were almost forced to agree to a renegotiation of the contract.

But still, the *Pacta Sunt Servanda* principle applies in French law. If the parties agree to it, they can ask for, and get the opening of new negotiations on an existing contract in the case of changing circumstances.

There currently exists in France a project to review the law of contract. In this version of the *projet de réforme du droit des contrats "chancellerie"* the article 136 states:

“If a change of circumstances, unforeseeable and unavoidable, renders the execution excessively expensive for one of the parties which didn’t accept to bear its risk, this party can ask for a renegotiation to its counterparty but must carry on the execution of the contract during the renegotiation.

In case of a refusal or failure of the renegotiation, the judge can, if the parties agree to it, proceed to the adaptation of the contract, or at least end it to the date and the conditions he will have chosen”[22].

As we can see, this solution is limited since the agreement of the parties will always be necessary to allow the redraft of the contract. And it can be strongly criticised.

In English law, there is no national project to review the law. This is an interesting point at first sight, but it doesn’t mean that the issue isn’t seen as less important in English law than in French law, or that the English solution doesn’t need any change. This is partly due to the legal system: because in English law a new solution would certainly come from the judge, there is no project of a bill to modify the existing solution. The solution is to change slowly on a case by case basis. That maybe explains why some English professors like Hugh Beale[23], fear a mandatory European statute, as a kind of European Civil Code, which would modify the solution. The question of European projects will be dealt with later. But first the question of the instigator of the reform must be answered.

The instigator of the reform: the judge or the legislator?

First, we must here keep in mind that under English constitution, judges cannot make law, although they may re-interpret it. According to B. Fauvarque-Cosson, to answer this question for

the French law part:

“Some French authors believe that a reform could only come from the legislator because the economic consequences of such a reform would be so important that it would be too dangerous to leave it to [the] judges. It would open the door to uncertainty and unpredictability in the field of the contract law. I do not share this opinion. In reality, French judges have always been very cautious when using their power to modify the terms of the contract (for instance, the legislator has granted them the power to modify a penalty clause, see the article 1152(2) of the Civil Code and no excess or uncertainty of the law has resulted from this).

Would a legislative reform have greater authority than a mere judge-made reform? Certainly not. It is true that the French, old, traditional way of thinking excludes case law from the major sources of law. But case law is just as binding as statute law. Moreover, all throughout the twentieth century, case law has become a very important source of law in the field of torts and contracts. This is partly due to willingness of the *Cour de cassation* to endorse this creative role, and partly due to the fact that the [French] Civil Code has grown older, and has been outdated, and that there has been no major legal reform in these fields.”[24]

It may appear as obvious that in English law, a reform on the question of changing circumstances would stem from the judge, as, regardless to the economic consequences that such a reform could have, the question is as well a procedural question (about the powers given to judges) as a truly fundamental question (on contracts). The English legislator would certainly leave the question to the courts, as it is not a major topic for politicians but a consequence of what the law of contract is and how it works.

In English law, the judge would have the power to set up a new solution to the question of change of circumstances if needed. Because of the way the English solutions are written (they are made of long descriptions, the different judges can give their different opinions, the cases refer to other relevant cases linked with the case being decided), a solution given by the judge would be clear enough to be applied by lower courts and is binding on them. As the *stare decisis* rule (or binding precedent) is formally recognised in English law, this would never be a problem.

But a reform of French law on the issue of changing circumstances, if it could stem from the *Cour de cassation*, would expose the courts to a problem: it wouldn’t be possible to merely reverse the rule and to assert boldly that the judicial redraft of a contract in the case of change of circumstances should be allowed. To do so, it would be necessary to elaborate all the conditions and rules for the application of the new rule, and the way French decisions are given doesn’t allow such thing to happen. Because French decisions are drafted in a so specific and laconic way (short explanation of the case, no opinions of the judges, only the ruling of the decision in a strict manner) it would be difficult for the *Cour de cassation* to explain the limits in which a redraft in the case of changing circumstances should be enclosed. At least it would need several decisions, which would certainly be vague and too dangerous. In a nutshell, if the *Cour de cassation* has the power to modify the existing solution, it would be on a case by case basis as in English law, but the task would be much more difficult and it is not sure that the French judge will have the audacity to accomplish it.

There exists a last solution that could apply in English law as well as in French law. It is the one, which is adopted by the German courts: “the use of a wide formula (before the legislator actually consecrated the solutions adopted by the judges, in its major reform of the law of obligations which entered into force on January 1, 2002 (§ 313 of the BGB)) : it is always a matter of ‘evaluating the circumstances of the individual case in good faith and equity’ and the release from a contract is

« only justifiable if there is no other way to avoid an ‘intolerable result incompatible with law and justice »[25] However, it is true that such vague formulas lack precision and must be interpreted cautiously. In particular they must not lead to overlook the fact that the rights of the parties must first be judged by reference to the contract they have made.”[26]

Studying the different national solutions, it is important and very interesting to compare these solutions with the projects driven at a European level, which could be an interesting way to find common and powerful solutions to the question of the change of circumstances in contract law.

The European Law: finding a common solution?

According to Magnus G. Graner, the Swedish Justice Secretary of State, the idea of a European Civil Code is not acceptable[27], but it is necessary to have common tools, notably to protect the consumers. The La Haye programme of 2004[28] gave a new opportunity to improve the situation of the European Union in the matter of contract law. In his opinion, three main ideas should be kept in mind. Firstly the idea of (contractual) liberty which is a fundamental element of our modern society: “Does it suffer from differences between the different national legal systems?”[29]. Secondly, the idea of equality: the objective followed by equality is to permit the realisation of the European market, in the respect of the consumers’ rights. Thirdly, the idea of brotherhood: he stresses that the integration of all the members of the European Union requires cooperation by the use of common tools.

Brief overview of different solutions in other countries

The French and English solutions (no redraft of contracts) appear in Europe rather isolated. They are similar to the ones adopted in Belgium, in Luxemburg (or, outside the European Union, in Quebec). As observed in the Principles of European Contract Law: “The majority of countries in the European Community have introduced into their legal system some mechanisms intended to correct any injustice which would result from an imbalance in the contract caused by supervening events which the parties could not reasonably have foreseen at the time they entered into the contract”[30].

Several countries, whether by case law or by statute law, admit as a general principle that the contract may be renegotiated or modified by the courts when maintaining “the original contract would produce intolerable results incompatible with law and justice”[31]. Some examples:

- The paragraph 313 of the BGB (Bürgerliches Gesetzbuch, the German Civil Code): This article states that, as soon as certain conditions strictly defined are met, the disappearance of the reason for which the contract was made (*Wegfall der Geschäftsgrundlage*) allows the parties to claim for the adaptation, the end or the resolution of the contract.
- The article 6.258 of the new Dutch Civil Code, which now applies the good faith principle to argue in favour of a possible redraft (or the end of the contract): “Due to unforeseeable circumstances of a nature such that, under criteria of reason and equity, the other party cannot expect the contract to be fully maintained”.
- The article 388 of the Greek Civil Code, which gives the judge wide powers to adapt the

contract to new circumstances or to end it altogether.
- We can find this same solution in Portuguese law, in the article 437 of the Portuguese Civil Code.
- In Italian Law, Anna Veneziano, a professor from the University of Teramo, explained at the International Conference on European contract law (23 24 October 2008), that in Italy the judge can choose to modify or to end the contract since 1942 thanks to the article 1467 of the Italian Civil Code. According to this article, the debtor may ask for the contract to be ended if the contract of continued or periodic performance or of deferred performance becomes excessively onerous due to extraordinary and unforeseeable events. The other party may avoid this by an equitable offer to modify the terms of the contract. There is even a specific rule for construction contracts.
- The Spanish case law allows the courts to end a contract if no other less radical way of preserving it can be found.

Looking at all the existing solutions, European academics proposed some projects to have a common view on this question that must now be analysed.

The Principles of European Contract Law and the Draft Common Frame of Reference

The change of circumstances in the UNIDROIT Principles[32]

The UNIDROIT principles are an attempt of the *International Institute for the Unification of Private Law* to make an international codification of contract and commercial law to facilitate trading. A first version was drafted in 1994, a second in 2004, and a third one is currently being discussed. The principle of the mandatory force of contracts is expressed twice in the UNIDROIT Principles. The article 1.3 states that the contract binds the parties once it is correctly formed. As a consequence, it cannot theoretically be modified without the agreement of the parties. In addition, the contract must be executed whatever happens (otherwise there can be sanctions). That is the general rule given by the article 6.2.1. But in the case of change of circumstances (in this case called “hardship”) that substantially modifies the balance of the contract, this rule can be set aside (article 6.2.2). The hardship doesn’t authorise to end the contract (as in English law), but allows the parties to renegotiate for the contract to be balanced again.

This same solution can be found in the Principles of European Contract Law (PECL)[33]. The article 6.111 imposes an obligation to renegotiate to adapt the contract or to end it, if its performance becomes too onerous for one of the parties (due to change of circumstances).

The change of circumstances in The Principles of European Contract Law[34]

The PECL have been drafted by the Commission on European Contract Law, chaired by the professor Ole Lando. Their aim is to offer foundations for European contracts, as a model to the national legal systems, as well as for the European legislator and courts. They may be a link between common law and non common law countries. They are at the root of the Draft Common Frame of Reference, but, unlike it, they only deal with the law of contract, whereas the DCFR also includes consumer protection.

The solution they offer to the question of change of circumstances is quite similar to the oneoffered by the UNIDROIT principles. It can be found in the article 6.111.

The article 6.111 (‘change of circumstances’) states:

- *(1) A party is bound to fulfil its obligations even if performance has become more onerous, whether because the cost of performance has increased or because the value of the performance it receives has diminished.*

(2) If, however, performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or ending it, provided that:

(a) the change of circumstances occurred after the time of conclusion of the contract, and

(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 circumstance is not one which, according to the contract, the party affected should be required to bear.

(3) If the parties fail to reach agreement within a reasonable period, the court may:

(a) end the contract at a date and on terms to by determined by the court; or

(b) adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circumstances.

In either case, the court may award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith.

The change of circumstances in The Draft Common Frame of Reference[35]

According to Lucinda Miller[36], The Draft Common Frame of Reference or (DCFR) aims to be “a toolbox of contract law”. It is born after the European conclusions of 1999, and was revived by the La Haye Programme in 2004. In June 2008, the European Council showed its willing to carry on this project, with the support of the European Parliament (through a resolution, 3 September 2008). The DCFR aims to “enhance the quality and the consistency of the European legislation on contracts”[37], according to Jacques Barrot, vice-president of the European Commission.

The European Commission is currently analysing this DCFR to submit a finalised DCFR, the famous “Toolbox”.

The article III. – 1:110 of the DCFR (‘Variation or termination by a court on a change of circumstances’) states:

- *“(1) An obligation must be performed even if performance has become more onerous, whether because of the cost of the 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."

Comparison between the PECL and the DCFR

First of all, we can see that there is no main difference between the article III. – 1:110 of the DCFR and the article 6.111 of the PECL. These articles are written differently but their content is the same. At least we can observe that the DCFR doesn't state the rights of the courts to award damages "for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith" as it is precised in the PECL. But maybe the interpretation of the DCFR would allow such a power to be implied.

The difference between the DCFR and the PECL concerns the role attributed to the renegotiation by the parties. The article 6:110 of the PECL created a duty of renegotiation by the parties in order to adapt or to end the contract. The third paragraph allows the judge to order the reparation of the damage caused by the other party refusing to renegotiate or being of bad faith. The role of the judge is first to help the parties to renegotiate by themselves. The same idea can be found in the UNIDROIT Principles. But in the DCFR there is not anymore a specified duty of renegotiation.

In fact, looking beyond the issue of the change of circumstances, the main difference between the PECL and the DCFR is a difference of purpose. According to Hugh Beale, professor at Warwick University, the PECL are general rules of contract law for the European Union, whereas the DCFR is a guide for the European legislator, as he considers that the PECL state the fundamental principles, whereas the DCFR drafts an interpretation of these principles. He considers the DCFR as a "multilingual dictionary, a comparative encyclopaedia", even if some authors disagree with him and wish the DCFR to be considered as something more important, enforceable.

The DCFR is based on the PECL and the principles of *acquis communautaire*, especially for the formation of contract. It gathers comparative law and European community law. Dr. Reiner Schulze, from the Westfälische Wilhelms Universität in Munster, agrees that the text may be discussed. It is supposed to only clarify the existing European community law, not to modify it. But more than the PECL, the DCFR deals with consumer law, and some authors think it should not. Should consumer law be removed from the DCFR? No, according to him, as consumer law is important in community law and moreover is a part of contract law. In addition, it was a wish of the

European commission. In fact, it depends on what is expected from consumer law and the DCFR.

In a nutshell, we can say that this debate is partly a political and an academic one. These projects can bring very important changes. As an example, on the conclusion of the contract in the DCFR: it is the *agreement* which is considered for the contract to exist. No need for *consideration* as in English law, as well as no need for the French doctrine of *cause*. But this doesn't mean that English and French doctrines are not important in the DCFR.

As a conclusion, in a European law of contract, the question of change of circumstances will certainly be answered in the way the PECL and the DCFR do it. The English and the French solutions are bound to change in the future. But as we see, such changes are difficult to make.

Arguing for a new solution in French and English laws?

The UNIDROIT Principles, the Principles of European Contract Law (PECL) and the Draft Common Frame of Reference (DCFR) have recently paved the way for a reversal of the French and English prohibition of the *révision pour imprévision* (judicially redrafting the contract in the case of changing circumstances). Therefore, the current debate in France focuses on one particular question: should French law follow the model found in the Principles of European Contract Law and confer broader powers on the courts, not only in relation to the circumstances in which they can intervene but also in terms of their remedial powers when they do intervene? Interestingly, the very same question has been formulated by Ewan McKendrick as regards English law[38].

If in France the theory of *révision pour imprévision* in public contract law exists, in private contract law the doctrine argues today in favour of the notion of good faith to plead in favour of renegotiation. Today and according to the French project of reform, the French judge can modify a contract only if the parties agree to it; this last condition making the whole rule useless. And here we can stress that the article III 1:110 of the DCFR modifies the PECL on the question of renegotiation.

In France, the necessity of the agreement of the parties to renegotiate should be abandoned in order to allow the courts to impose the renegotiation to the parties. Before the issue comes in front of a court this would have a psychological effect on the parties. If the question still goes in front of a court, this would allow the judge, more than obliging the parties to renegotiate, to terminate the contract or to bind the parties to the specific performance of the contract.

Or at least, a solution should be found through the contractual duties of solidarity and good faith: the judge would be able to see that the negotiations have been broken without solution and so he would end the contract or, in case of bad faith or in the absence of negotiations, grant damages and interests. And so, there would be a new legal situation, the *change of circumstances*, which wouldn't be *force majeure*, nor *frustration*. On some extreme cases, the parties would have a power to choose either for the doctrine of *frustration* (or *force majeure* in French law), or the new doctrine of *change of circumstances.* That would be the end of conservatism: change is definitely needed. To a special issue, a special remedy is needed. Some other countries already accepted it in their legal system.

Despite European projects that would partly solve the problem, some questions remain and still need answers. They will have to be dealt with in the near future. Here are some examples:

- The question of the legality of clauses which divide the risk of change of circumstances between the parties.
- The example of an international distribution contract which is executed through time (in which the performance is not one single and short action): after the conclusion of the contract, its cost may increase due to a new tax imposed by the government. There is here an economic change of circumstances. The Common Frame of Reference would here confirm the general principle of *Pacta Sunt Servanda*, 'binding contracts' (which corresponds to the article 1134 of the French Civil Code) but allow the contract to be modified in such a case through the paragraph 1 of the DCFR (III. – 1:110 (1)), which brings together the PECL and the UNIDROIT principles. And a question could raise: should the judge be able to modify the contract only when the supervening event is caused by the government and not just by the economic situation (the judge wouldn't therefore be able to modify the contract in other circumstances)? Some economists argue in favour of such a solution, which would approximately be applying the French remedy of *révision pour imprévision* available in public law into private contract law. But this argument has never been taken into account to solve the issue and it seems to be complicated: what would the solution be if the change of circumstances had come from an economic situation that would be induced by the government?
- What about the questions of solidarity, good faith, and binding contracts? As A. Veneziano stresses, if parties can integrate *hardship* clauses in the contract but don't, we could consider that the judge shouldn't intervene. It recalls the English solution, which was applied until the second part of the nineteenth century. In fact even these clauses are sometimes very difficult to interpret. Consequently the DCFR provides rules for cases, the situations of which are "manifestly unjust"[39], which means exceptional, unforeseeable and insurmountable. The UNIDROIT Principles precise the necessity of a truly change of circumstances, when the situation is of an absurd exceptionality. Could these clauses be set aside by the courts under certain circumstances?
- Should a right of damages based on the English solution (end of the contract, but grant of damages through for example an action for unjust enrichment) exist in European Law? According to A. Veneziano[40], this too wide duty should be rejected if considered as the only solution to the issue.

But anyway, as A. Veneziano says, "A European Contract Law must have rules on the change of circumstances which will contain a duty to renegotiate the contract and a judicial power to redraft a contract"[41]. And so, both French and English solutions would be changed.

Conclusion

The necessity of a European debate

According to Diana Wallis, vice-president of the European Parliament, The « academic DCFR » is today a success and a great toolbox. A member of the Commission said that it was a "non binding legislative aid"[42]. But now the academic DCFR has been drafted and political discussions are needed because civil law is first a political matter. As Diana Wallis continues about the political discussions on the DCFR, "There is a chance for Europe to have now a common view, which is at the ground of everything, and maybe if we don't take this chance, we do more damages"[43].

If the academics debate a lot on the question, the politicians' advice needs to be taken into

account: the European Commission, the European Parliament and The European Council agreed to make the DCFR a priority, but don't know what point of view should be adopted. The French, Slovene, Czech and Swedish presidencies have been working hard on the question.

Some questions still need to be solved, such as that of the translation, which is at the root of the interpretation of the law. We can also wonder how to obtain a common European interpretation of the law. And on a long term basis, are we heading to a European common Contract law enforceable in all European countries? This idea is maybe in all European professors' minds, as a dream or a hope, but nowadays, nobody dares to envisage it (it is too complicated and the resistances are too numerous). But national laws (and especially national contract laws) are undoubtedly getting closer and closer. A bright future is clearly promised to a precise European law in the future.

To sum up the European debate, we can say that some professors argue in favour of a European Civil Code[44], but this idea is currently commonly rejected. Some others, like Hugh Beale (Warwick University) or Hans Schulte-Nölke (Institute for Law in Europe, Osnabrück University), think that the DCFR and the PECL should be used as an encyclopaedia and a dictionary, as we have already seen. According to J. Ghestin (University Paris II), they are truly a common frame of reference, created from the different national civil laws, and which should be used as a basis to inspire the European legislator.

But things must move on. And so, the DCFR must take an important part in a unified contract law, and not only be a "toolbox". As Denis Mazeaud, a French professor of the University of Paris II Panthéon-Assas, says, "The DCFR should be considered as a 'toolbox', but do we unite peoples with Do-it-yourself?"[45].

To better understand the importance of a European contract law, let stress the main arguments in its favour:

- The history of the European Union is and has always been for its main part a legal alliance between European countries.
- A harmonisation on European Contract law could be used as a tool for the protection of consumers (according to Hugh Beale).
- It is in the interest of the common market (it is in favour for international contracts, and on a long term, we can even consider that a practical common contract law will benefit to all and create jobs, according to G. Graner).
- That may be an improvement in the respect of liberties and equality.

But on what has already been achieved, The Draft Common Frame of Reference goes beyond international contract law as its finality is more general (to a European Civil Code?), and its approach is wider than that of the Principles of European Contract Law. For some, the DCFR needs to recover its main aim: the contract (in French, it needs to be "*recontractualisé*"). And the debate is very strong between academics.

Moreover, another question needs to be answered: what should be the role of the European judge? If these academic works will give him tools, his presence is not wide enough in the different national laws to allow him to be the builder of a European contract law which would end up in replacing the existing national rules. And moreover, the differences between countries of civil law tradition and countries of common law tradition are too big for the gap to be reduced so quickly.

"Impossible diversity in unity", sums up Ole Lando, chairman of the PECL (and professor of comparative law at the Copenhagen Business School). According to Judith Rochfeld (French professor of private law, University Paris I Panthéon-Sorbonne), the difficulty countries are facing

today is the question of the disappearance of the national laws of contract. Is it a simplification of the existing law?

Different systems: to a common solution in the future?

Lucinda Miller, in her article in the Journal of Business Law June 2007, 378 41, *The common frame of reference and the feasibility of a common contract law in Europe*, studies the proposal of the European commission with a critical point of view. She affirms that such a harmonisation would require much more than the techniques needed to elaborate common rules. She justifies it by showing the difficulties caused by the different legal systems in member States. These systems are so different that even the definition at a European level of a 'contract' is a problem. She takes example on the differences that exist on the interpretation by the European Parliament under the Directive 1999-44 and the interpretation by French and English legal systems as regard to the 'non performance' and the 'non conformity' (but it doesn't need to be developed here). It shows the difficulties that exist in France and in England on the creation of a European Contract law, and eventually of a European Contract Law Code.

Lucinda Miller tries to demonstrate in her article, that despite all the economic, political or legal objections and reservations, the key problem is to know whether the interpretation of such a system is really 'feasible' from a practical point of view. If the complexity of creation of identical terms and rules at a European level is undeniable; the true question is to know whether this complexity is insurmountable or not. First needs to be recognised that a strong connexion exists between each country's contract law and its economy, its politics, its philosophy, its social choices and its traditions. Indeed legal concepts are only well understood in the context in which they are localised. These elements make the author say that the harmonisation must go far beyond the construction of simple rules. The harmonisation also concerns an application and an interpretation of rules in order to find the elements that can be the objects of a community work.

Nowadays, all these difficulties prevent the finding of a common solution. And to conclude, we can sum up all the theories that exist on the change of circumstances:

- In French Law the solution is given by the *Canal de Craponne* case. This solution doesn't allow the judge to redraft a contract. In the case of changing circumstances, the parties are bound to perform the contract. This solution dates from the second part of the nineteenth century and has suffered little changes and exceptions. It is now outdated and it definitely needs an update.
- In English law, the doctrine of frustration gives a solution. But this solution is not fair for two reasons. First, the contract is brought to an end automatically. Secondly the solution only concerns change of circumstances that substantially modify the contract (contrary to most other solutions in which it is the fact for the contract to become more onerous which is taken into account). This solution evolved in the nineteenth century, but still needs substantial changes. For instance by allowing the judge to modify the contract, or at least, by authorising the judge to force the parties to renegotiate the contract. But that wouldn't apply anymore to situations others than change of circumstances, in which the doctrine of frustration already applies. This English solution lets the question of who should do the readjusting, asked by E. McKendrick in the introduction, without any satisfactory answer.
- In some other countries, others solutions can be found, generally allowing the judge to modify a contract or to force the parties to renegotiate.
- At a European level, several projects were very well drafted on the question of changing circumstances, allowing the judge to modify the contract or to terminate it when the change

of circumstances renders the performance of the contract too onerous. But the issue is that these proposals are not only about the change of circumstances but about all European Contract law, and as a result, it is difficult for them to come into force.

The question of the change of circumstances finds its best answer in the European proposals (DCFR and PECL). Only these solutions would improve the question of changing circumstances in English and French laws. And so, these proposals should be applied in English and French laws according to one of the following two solutions: both countries could decide to apply the proposals in their own legal system (by a change on a case by case basis in English law and by a change by the Legislator in French law as was studied above), or they could wait for the European proposals to come into force but the time that it would take is today unknown.

The very best solution, would maybe be the one given by the article III-1.110 of the DCFR, which, according to A. Veneziano: “is a reasonable and useful disposition on which a common rule can be built in a future European contract law, whatever the function given to the DCFR by the European Institutions”[46].

A European common law of contract is currently moving from dream to reality, and it is now in the hands of the politicians to take their responsibilities. Here is where we are today. That’s why it was important to study the European proposals while looking at comparative law of contract on the question of change of circumstances: the future of the rules on supervening events seems certainly to be found at a European level. But the question of a European Contract Law goes much further than on the only question of change of circumstances.

“Europe will not be built in one day, or without clashes. Its building will follow the path of minds. Nothing more sustainable is accomplished with ease. Europe is already working and beyond the existing institutions, the European idea, the spirit of community solidarity have taken root.”

"L'Europe ne se fera pas en un jour, ni sans heurts. Son édification suivra le cheminement des esprits. Rien de plus durable ne s'accomplit dans la facilité. Déjà l'Europe est en marche et par-delà les institutions existantes, l'idée européenne, l'esprit de solidarité communautaire ont pris racine."

Robert Schuman

Number of words: 9,800

Appendix

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Main documents

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        - McKendrik, *Contract Law*, 3rd edition, p. 849.
        - *Pensée juridique française et harmonisation européenne du droit*, Société de Législation Comparée

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- Marie-Agnès Madec, *Correction*
- Prof. Anna Veneziano, *University of Teramo, Italy*

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COURT OF APPEAL, CIVIL DIVISION

LORD DENNING MR, GOFF AND CUMMING-BRUCE LJJ

21, 24, 25, 26, 27 APRIL, 2 MAY 1978

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

In 1908 a water company proposed to pump water from a well about a mile away from a hospital which had its own well. By the South Staffordshire Waterworks Act 1909[a] the water company was given statutory authority to pump water from its well subject to providing the hospital with such water as it required, at the rate it would have cost the hospital to operate its own well, if the supply from the hospital's own well was diminished by reason of the water company's operations. Any disputes were to be settled by arbitration. In 1915 the water company began pumping water from its well and by 1918 this had an adverse effect on the supply from the hospital's well. The water company agreed to make up the deficiency from their mains. In 1927 the hospital authorities decided to abandon their well and commenced taking all the hospital's water from the company's mains. In 1929 the hospital authorities and the water company entered into an agreement under seal whereby 'at all times hereafter' the hospital was to receive 5,000 gallons of water per day free and all the additional water it required at the rate of 7d per 1,000 gallons. When decimal currency was introduced the rate was changed to 2·439p per 1,000 gallons. By 1975 the normal rate charged by the water company was 45p, and on 30 September 1975 the water company wrote to the hospital authorities giving notice that they intended to terminate the 1929 agreement in six month's time, and that thereafter they would supply 5,000 gallons per day free and any excess at normal rates. The hospital authorities refused to accept the notice as valid and took out an

originating summons to establish that it was not. The judge upheld their claim on the ground that the 1929 agreement, being expressed to apply 'at all times hereafter', had been made forever or in perpetuity and therefore the water company could not resile from it. On appeal, […].

Civ. 6 March 1876, *De Gallifet v Cne de Pelissanne (affaire du Canal de Craponne)*: GAJC, 11e éd., n°163 ; DP 1876. 1. 193, note Giboulot ; S. 1876. 1. 161

Arrêt du Canal de Craponne

French Cour de Cassation

March 6, 1876

LA COUR; - Sur le deuxième moyen: - Attendu qu'il résulte des déclarations de l'arrêt attaqué que les travaux qu'il prescrit doivent être exécutés dans l'intérêt dés parties, afin, d'une part, de mesurer, la quantité d'eau que les hoirs de Galiffet doivent livrer aux arrosants, et, d'autre part, de remédier à, des abus de jouissance commis par ceux-ci; - Que la moitié de la dépense totale mise à la charge de chacune dés parties représente donc, dans l'apréciation souveraine de la cour d'appel, le montant des frais qui incombent à cette partie pour l'exécution de ses obligations personnelles; et non une portion des frais dont est tenu son adversaire; - D'où il suit qu'en faisant masse de toutes les dépenses nécessaires pour rétablir respectivement les parties dans leurs droits et en les condamnant à payer ces dépenses par égale portion, la cour d'Aix n'a commis aucun excès de pouvoir, et n'a violé ni l'art. 1134, ni l'art. 1135 c. civ.; - Rejette ce moyen;

Mais, sur le premier moyen du pourvoi: - Vu l'art. 1134 c. civ.; - Attendu que la disposition de cet article n'étant que la reproduction des anciens principes constamment suivis en matière d'obligations conventionnelles, la circonstance que les contrats dont l'exécution donne lieu au litige sont antérieurs à la promulgation du code civil ne saurait être, dans l'espèce, un obstacle à l'application dudit article; - Attendu que la règle qu'il consacre est générale absolue, et régit les contrats dont l'exécution s'étend à des poques successives de même qu'à ceux de toute autre nature; - Que, dans aucun cas, il n'a tient aux tribunaux, quelque équitable, que puisse leur paraître leur décision, de prendre 'en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants; - Qu'en décidant le contraire et en élevant à 30 centimes de 1834 à 1874; puis à 60 centimes à partir de 1874, la redevance d'arrosage, fixée à 3 sols par les conventions de 1560 et 1567, sous prétexte due cette redevance n'était plus en rapport avec les frais d'entretien du canal de Craponne, l'arrêt attaqué a formellement violé l'art. 1134 ci-dessus visé; - Par ces motifs, casse, dans la disposition relative à l'augmentation: du prix de la redevance d'arrosage, l'arrêt rendu entre les parties par la cour d'appel d'Aix le 31 déc. 1873.

Du 6 mars 1876. - Ch. Civ. - MM. Devienne, 1er pr.-Goujet, rap.-Bédarrides, 1er av. gén., c. conf.-Bosviel et R. de Saint-Malo, av.

WHICH EUROPEAN CONTRACT LAW FOR THE EUROPEAN UNION?

23 and 24 October 2008, Paris La Sorbonne

Thursday October 23rd 2008

8h30 ***Welcoming and accreditations***

9h 45 ***Opening speech***

n *Mme Rachida DATI, Ministre de la justice, France*

n *M. Lovro STURM, Ministre de la justice, Slovénie*

n *M. Tomas BOCEK, Vice-Ministre de la justice, République tchèque*

n *M. Magnus G. GRANER, Secrétaire d'Etat à la justice, Suède*

n *M. le Bâtonnier CHARRIÈRE-BOURNAZEL, Barreau de Paris*

10h 45 ***Roundtable : General introduction to European Contract law and the common fra***

Prof. Ole LANDO, Professeur de droit comparé à la Copenhagen Business School

Prof. Hugh BEALE QC FBA, Université de Warwick

Prof. Bénédicte FAUVARQUE-COSSON, Université Panthéon-Assas, Paris II

Prof. Dr. Hans SCHULTE-NÖLKE, Institut pour le droit en Europe, Université d'Osnabrü

Thursday October 23rd 2008

11h30 ***Roundtable : The elaboration of the common frame of reference : methods and po obstacles***

*Représentants de la Commission européenne**

Prof. Simon WHITTAKER, Professeur de droit comparé européen, Université d'Oxford

Prof. Jacques GHESTIN, Professeur émérite de l'université Panthéon-Sorbonne Paris I

Modérateur : Claudine JACOB, Conseiller justice, Représentation permanente de la Fra l'Union européenne

12h30 ***Lunch***

14h 30 ***Roundtable : The political common frame of reference : the perspective of the Eur institutions***

Diana WALLIS,Vice-présidente du Parlement européen

Jacques TOUBON, Député européen

Jacques BARROT, Vice-président de la Commission européenne

Meglena KUNEVA, Commissaire européenne chargée de la protection des consommate

Pascale FOMBEUR, Directrice des affaires civiles et du Sceau

Modérateur : Marc PAOLONI, Journaliste

16 h 30 ***Roundtable : What legal policy for the common frame of reference ? Illustration : p principles***

Prof. Dr. Nils JANSEN, Westfälische Wilhelms - Universität Münster

Prof. Dr. Christian VON BAR, Institut pour le droit en Europe, Université d'Osnabrück

Guido ALPA, Avocat au barreau de Gênes, Président du Consiglio Nazionale Forense

Leena Linnainmaa, Directrice des affaires juridiques, Chambre de commerce de Finland (EUROCHAMBRES)

Modérateur : Me Michel BENICHOU, Barreau de Grenoble, chef de la délégation françai CCBE

Horaire Friday October 24th 2008

09h30 Roundtable : formation of a contract : negotiations, conditions of validity

Prof. Judith ROCHFELD, Professeur de droit privé, Université Paris 1-Panthéon-Sorbon

Prof. Dr. Reiner SCHULZE, Westfälische Wilhelms-Universität Münster

Me Bernard VATIER, Barreau de Paris

Prof. Dr Peter LIMMER, Notaire à Würzburg

Johan GERNANDT, Avocat associé chez « Gernandt and Danielsson », Stockholm

Modérateur : Jean-François GUILLEMIN, Secrétaire général de BOUYGUES

11h ***Coffee break***

11h 30 Roundtable : Contents and performance of the contract : change in circumstances, unfa
obligations

Prof. Anna VENEZIANO, Université de Teramo

Prof. Claude WITZ*, Professeur de droit privé à l'université de la Sarre

Me Marc FRILET, Barreau de Paris, expert français auprès du comité « droit européen c
CCBE

Mark LANE, Avocat associé chez « Pinsent Masons », Londres

Modérateur : Graff VON WESTPHALEN, Avocat au barreau de Cologne, Président du c
européen des contrats » au CCBE

13h ***Lunch***

14h 30 ***Roundtable : Breach and remedies : limited liability provisions, foreseeability of d performance***

Prof. Lubos TICHY, Université Charles, Prague

Damjan MOZINA, Professeur assistant à l'université de droit de Ljubljana

Prof. Eric CLIVE, Université d'Edimbourg

Fernando POMBO, Avocat au barreau de Madrid, Président de l'International Bar Assoc

Sabine LOCHMANN, General Counsel, Johnson & Johnson*

Modérateur : Lord MANCE, House of Lords

16h ***General synthesis of works :*** *Denis MAZEAUD, Professeur à l'université Panthéon-As*

Interventions from the Swedish and Czech Presidencies: *Tomas BRICHACEK, Mini justice tchèque, Prof. Jan KLEINEMAN, Université de Stockholm*

Ending speech: *Pascale FOMBEUR, Directrice des affaires civiles et du Sceau, Domin VOILLEMOT, Président de la Délégation des Barreaux de France à Bruxelles*

Les intervenants et les participants pourront s'exprimer à leur choix en français, en anglais ou en allemand. L'ensemble des présentations et des discussions feront l'objet d'une traduction simultanée dans ces trois langues.

[1] E. McKendrick, *Contract Law*, 7th Edition, p. 311

[2] *Cie générale d'éclairage de Bordeaux*, CE 30 March 1916, an unforeseeable increase in the price of coal (due to the war) modified the balance of a concession contract. The court recognised the right to damages (and modified the contract) from the public authority (party to the contract).

[3] Blackburn J in *Smith v. Hughes* (1871) LR 6 QB 597

[4] *Summa Theologica*, IIa-IIae, q. 110, art. 3, ad. 5.

[5] Vienna Convention, 1969, Article 62 : *Fundamental change of circumstances*

[6] It must be underlined here, that treatises are part of public law, which is not dealt with in this project. This approximation to public law is only for the theoretical issues to be raised.

[7] International Conference, 23 24 October, Paris: *Which European contract law for the European Union?* Organised by the French Presidency of the European Union.

[8] B. Fauvarque-Cosson, University Paris II and General Secretary of the Société de Législation Comparée

[9] Oxford Conference, 2003

[10] Civ. 6 March 1876, *De Gallifet v Cne de Pelissanne (affaire du Canal de Craponne)*: GAJC, 11 e éd., n°163 ; DP 1876. 1. 193, note Giboulot; S. 1876. 1. 161.

[11] *Staffordshire Area Health Authority v South Staffordshire Waterworks Co*, [1978] 3 All ER 769, Court of Appeal, Civil Division, Lord Denning MR, Goff and Cumming-Bruce LJJ, 21-24-25-26-27 April, 2 May 1978

[12] E. McKendrick, *Contract Law*, 7th edition

[13] *UNIDROIT Principles*, *Principles of European Contract Law* and *Draft Common Frame of Reference*, see below

[14] *Davis Contractors Ltd v Fareham UDC* [1956] AC 696

[15] *Hirji Mulji v. Cheong Yue SS Co* (1926) AC 497

[16] E. McKendrick, *Contract Law*, 7th Edition, p. 311

[17] Article 1148 of the French Civil Code “Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.” (No damages are granted when, due to a superior force or an unforeseeable situation, the debtor is prevented to give or do what he was imposed to, or did what he was forbidden to do)

[18] Explained in the introduction with the case: *Cie générale d’éclairage de Bordeaux*, CE 30 March 1916, an unforeseeable increase in the price of coal (due to the war) modified the balance of a concession contract. The court recognised the right to damages (and modified the contract) from the public authority (party to the contract).

[19] Some French writers had suggested expanding the concept of *force majeure* so as to include the change of circumstances, but this path has not been followed. It is therefore important to distinguish the *force majeure* and the mere change of circumstances.

[20] French Civil Code, art. 1134 al. 3

[21] Cass. com. 3 November 1992. Sté française des pétroles BP c. Huard.

[22] "*Si un changement de circonstances, imprévisible et insurmontable, rend l’exécution excessivement onéreuse pour une partie qui n’avait pas accepté d’en assumer le risque, celle-ci peut demander une renégociation à son cocontractant mais doit continuer à exécuter ses obligations durant la renégociation. En cas de refus ou d’échec de la renégociation, le juge peut, si les parties en sont d’accord, procéder à l’adaptation du contrat, ou à défaut y mettre fin à la date et aux conditions qu’il fixe*."

[23] From 1987-1999 he was a member of the Commission on European Contract Law and with the founder of that group, Ole Lando, he edited the Principles of European Contract Law: Parts I &

II (2000). He is a member of the Study Group on a European Civil Code and heavily involved in the preparation of a draft Common Frame of Reference as part of the European Commission's Action Plan of a European Contract Law.

[24] Oxford Conference, 2003

[25] Zweigert and Kötz, p. 534.

[26] B. Fauvarque-Cosson, Oxford Conference, 2003

[27] International European Conference, 23 24 October 2008: ‘Which European contract law for the European Union ?’, Paris

[28] Programme by the European Council with as an aime the improvement of common capacities at a European level on matters related to law

[29] International European Conference, 23 24 October 2008: ‘Which European contract law for the European Union ?’, Paris

[30] PECL, p. 323

[31] BGH (Bundesgerichtshof, highest German civil court), 25 May 1977

[32] The UNIDROIT principles are an attempt of the *International Institute for the Unification of Private Law* to make an international codification of contract and commercial law to facilitate trading. A first version was drafted in 1994, a second in 2004, and a third one is currently being discussed.

[33] See below

[34] The PECL have been drafted by the Commission on European Contract Law, chaired by the professor Ole Lando. Their aim is to offer foundations for European contracts, as a model to the national legal systems, as well as for the European legislator and courts.

[35] The DCFR is born after the European conclusions of 1999, and was revived by the La Haye Programme in 2004. In June 2008, the European Council showed its willing to carry on this project, with the support of the European Parliament (through a resolution, 3 September 2008). The DCFR aims to “enhance the quality and the consistency of the European legislation on contracts”

[36] Lucinda Miller, Journal of Business Law June 2007, 378 41, « The common frame of reference and the feasibility of a common contract law in Europe »

[37] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.

[38] E. McKendrick, *Contract Law*, 7th edition, p. 849.

[39] DCFR, III. – 1:110 (2)

[40] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.

[41] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.

[42] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.

[43] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.

[44] For more information on this question, see *Pensée juridique française et harmonisation européenne du droit*, Société de Législation Comparée

[45] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.

[46] International Conference, « Which European contract law for the European Union? », 23 24 October 2008, Paris.