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## UNEXPECTED CIRCUMSTANCES IN SHIPPING CONTRACTS

### I. Premises

1. Change of conditions after the conclusion of a contract particularly interests shipping contracts, because of the long-term duration of many of them. The article's aim is to contribute to determine if and to what extent the emerging European Contract or Private Law (PECL, DCFR, *etc*), according to the nature of each set of rules, could govern Maritime Law issues concerning supervening events unbalancing the parties' obligations or making their performance impossible. For this purpose, the speciality and autonomy of Maritime Law and the possible effects of PECL and DCFR on international and national law and case-law should be considered. The topic therefore refers to the exceptions to the principle *pacta sunt servanda* depending on unexpected events that are not within the parties' control and that were not and could not be reasonably foreseen by the parties when negotiating and concluding the contract, but affect the allocation of risks deriving from the contract, making the performance of an obligation impossible or altering the balance between the parties' obligations, or one party's use of the goods or services the contract was concluded for, or however the contract's specific purposes.<sup>1</sup>

2. On the contrary, this article does not deal with issues concerning the formation of the parties' consent and the circumstances according to which it could be considered invalidly developed or a misrepresentation of existing circumstances could entitle to the termination of the contract. The relevance and effects of unexpected circumstances, after the contract was concluded, are not uniformly ruled, depending on the law governing the specific contract. Civil Law and Common Law provide for very considerably different regulation of the effects on the contract's performance of supervening events after its conclusion. Moreover, both among Civil Law Countries,

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<sup>1</sup> E. Hondius, H. C. Grigoleit, 'Introduction: An approach to the issues and doctrines relating to unexpected circumstances', in E. Hondius, H. C. Grigoleit (Eds), *Unexpected Circumstances in European Contract Law* (Cambridge University Press, 2011) 3, 3 f.

from the one hand, and among Common Law ones, from the other, the differences in regulating this issue are still quite remarkable.

3. Supervening events, altering the economical and legal balance between the parties' interests and consideration or causing the impossibility of performance of all or part of a party's obligations, could be regarded as circumstances enabling the party to cancel the specific contract or admitting a re-negotiation of the contract's terms or the Court's adjustment of them. It is therefore necessary to identify the relevant concept of supervening events that could affect the contractual relationship, according to each legal system, and to ascertain which remedies are provided for this case. For example, not all the legal systems expressly admit the termination of the contract or the modification of its terms as a consequence of an event that does not imply that the performance has become impossible, but only that it is suddenly excessively burdensome, because this circumstance is deemed to belong to the original contractual balance the parties freely agreed on.<sup>2</sup>

In addition, whereas the right to terminate the contract seems to be quite well-established among the different legal systems, often no obligation to re-negotiate the contract's terms is provided for.

Moreover, Maritime Law has been developed and is still often considered as a special or even autonomous law with respect to Contract/Private Law, and has developed its own rules governing shipping contracts. Another issue is therefore if the general principles and rules developed within Contract/Private Law could reflect on shipping contracts.

## II. Unexpected Circumstances in Shipping Contracts

4. With regard to the sector in issue, due to its particular features, specific international conventions were concluded, and EU law and often national law (especially for Civil Law Countries) include quite detailed and specific provisions particularly concerning (at least some aspects of) the contracts and the activities that are typical and specific of this sector, determining also the main events that enable each party to be exempted from liability. These international conventions are the result of the negotiations among the different States and categories involved in the operations: therefore they should be better able to correspond to the interests involved in the subject-matters they were drafted to govern, than provisions referring to general situations and prevail over the latter under the principle *lex specialis derogat generali*.

5. More over the parties usually regulate possible supervening events in the contracts they conclude, mainly with the use of forms developed, often at international level, by entrepreneurial organizations or associations. The effects of the clauses and terms included by the parties in their contract however depend on the limits each legal system

<sup>2</sup> F. P. Traisci, *Soppravvenienze contrattuali e rinegoziazione nei sistemi di Civil e di Common Law* (Edizioni Scientifiche Italiane, 2003) 9.

sets for contractual freedom.<sup>3</sup> In each national system the events, concerned by this article, are also governed by Contract or Private Law in general: these rules, which do not specifically concern shipping contracts, but contracts in general, are often applied within legal systems when a matter is not exhaustively governed by Shipping Law provisions or by the parties in their contract.

### III. Unexpected Circumstances Within Forms

6. Specific contract clauses concerning supervening events and frustration or impossibility of performance are often incorporated in contracts, usually consisting of forms developed within the shipping sector.

They could consist in hardship clauses, provided in favour of one party or both, in force majeure clauses, in clauses allocating the risks related to the contract performance, in off-hire clauses included in time charterparties, or in clauses ruling out any possible frustrating or relieving effects of supervening events on the contract for the benefit of one party.<sup>4</sup> Some clauses could refer both to hardship and to impossibility of performance.<sup>5</sup> Hardship clauses, in particular, do not contemplate termination as the direct consequence of the frustrating event, but provide for the parties to re-negotiate the contract's terms and terminate the contract only if they do not reach an agreement or do not confer to a Court or to arbitrators the power to adapt the contract as a consequence of the unexpected supervening event.<sup>6</sup> Usually, events enabling the hardship clause to apply must be 'external, unexpected and frustrating'.<sup>7</sup>

7. Some contracts identify the supervening frustrating events that are put at one party's risk, but also specify that these events extend to 'any other cause preventing the full working of the vessel'.<sup>8</sup> This wording is interpreted as referring to causes of the

<sup>3</sup> Many of the forms that are herein examined are also based on the model of the ICC Force Majeure Clause 2003, ICC Publication No 650, February 2003, Paris.

<sup>4</sup> *Budgett & Co v Binnington & Co* [1891] 1 QB 35; *Larrinaga & Co Ltd v Société Franco-américaine des Phosphates de Medulla* [1923] 14 *Lloyd's Rep* 457; Y. Baatz, 'Charterparties', in *Southampton on Shipping Law* (Informa, 2008) 45, 79; A. Tettenborn, 'Frustration in Voyage Charters – Silted-up Backwater or Vital Navigation Resource?', in R Thomas (Ed), *The evolving law and practice of voyage charterparties* (Informa, 2009) 325 ff. On hardship clauses, also G Giacobbe, 'La presupposizione', in N. Lipari, P. Rescigno (Ed), *Diritto Civile* (vol 3, Giuffrè, 2009) 485, 496.

<sup>5</sup> M. Almeida Prado, *Le hardship dans le droit du commerce international* (Bruylant, FEC, 2003) 165.

<sup>6</sup> M. Almeida Prado (5) 129 ff; Ph. Delebecque, 'Flexibility, foreseeability, reasonableness in shipping contracts: the civil law approach' [2013] *DM* 281, 283 ff.

<sup>7</sup> Ph. Delebecque (6) 283; Ch Arb Paris, 3 February 2010, No 1172; Ch Arb Paris, 3 December 2010, No 1170.

<sup>8</sup> Clause 25 BIMCO Barecon 2001 relates to requisition for hire, compulsory acquisition or requisition for title of the vessel 'by any governmental or other competent authority', putting on the charterers the risks of such event: they shall continue to pay the hire according to the Charter itself until the time it would have been terminated under its own provisions, but any requisition hire or compensation shall be paid to the charterers during the remaining charter period or the requisition for hire period, whichever is the shorter. In Barecon 89, the charterers were liable for the hire during the requisition for hire period only from the time the requisition hire was payable to them [M Davis, *Bareboat Charters* (II

same type of those explicitly listed before, when the word ‘whatsoever’ is not added after ‘any other cause’.<sup>9</sup> Examining some examples of shipping contracts, shipbuilding contracts can be mentioned: referring to the present subject-matter, as for the first type of clauses, the various forms concern the possible variations to the original projects, included those deriving from subsequent orders of Public Authorities, such as the Classification Societies, or depending on materials or technicalities.<sup>10</sup> The forms concern also delays in delivering the built ship, caused by events the contractor is not responsible of. These events are described in detail in the forms and include political, natural and technical causes the contractor must give evidence of. With regard to the latter, they must not depend on the contractor’s organization, but must derive from causes beyond his control. The contractor must timely notify the principal about the event, specifying also the probable delay deriving from it, when possible. In these cases, the contractor has the right to a further amount of time for fulfilling his commitment, but if the delay exceeds the period provided for by the contract, the principal has the right to cancel the contract.

8. Concerning, for example, ship or crew management contracts, many forms rule out any liability of either party for any loss, damage or delay due to the listed events that are considered fitting the concept of force majeure, provided that any of them has prevented or hindered the party invoking it from performing any or all of his obligations under the contract. The party whose obligations are affected by one of the events described in the form must make all reasonable efforts to avoid, minimize or prevent those effects or conditions.<sup>11</sup> The same forms expressly limit the manager’s liability to the owners only to the losses, damages, delays or expenses arising from his negligence, gross negligence or wilful default or those of his employees, agents or of the sub-contractors employed by the manager in connection with the vessel.<sup>12</sup>

Edn, LLP, 2005) 139 f, who suggests to amend this clause, in order to mitigate the charterers’ regime, which otherwise shall remain liable for paying the charter hire even if it exceeds the requisition one and for the ship’s maintenance and insurance, providing that they shall be liable for the charter hire only up to the requisition hire’s level and giving them the option to terminate the contract if the requisition exceeds a certain period].

<sup>9</sup> *The Laconian Confidence* [1997] 1 *Lloyd’s Rep* 139; M Davis (8) 158.

<sup>10</sup> Some of the main forms are the AWES Form, drafted by the Association of West European Shipbuilders, the SAJ Form, by the Shipbuilders’ Association of Japan, the NSA Form of the Norwegian Shipowners’ Association and the Norwegian Shipbuilders’ Association and the Shipbuilding Contract by the Italian Fincantieri. On this topic, F Lorenzon, ‘The European contract law project and maritime law’, in *The Emerging European Maritime Law. Proceedings from the Third European Colloquium on Maritime Law Research, Ravenna, 17 – 18 September 2004* [2005] *MarJus* 330 137, 147 ff, G Boi, *I contratti marittimi. La disciplina dei formulari* (Giuffrè, 2008) 15 ff; S Curtis, ‘Force Majeure Provisions in a Shipbuilding Contest’, in E McKendrick (Ed), *Force Majeure and Frustration of Contract* (Informa Law, 2013) 139.

<sup>11</sup> Cl 14(a) of Crewman A (Cost plus Fee) 2009; Cl 13(a) of Crewman B (Lump Sum) 2009; Cl 17(a) of Shipman 2009.

<sup>12</sup> Cl 14(b) of Crewman A (Cost plus Fee) 2009; Cl 13(b) of Crewman B (Lump Sum) 2009; Cl 17(b) of Shipman 2009.

Charterparties and contracts of affreightment usually contain several clauses concerning frustration, too.<sup>13</sup>

As for charterparties, they usually include terms relating to frustrating delay ruling out the right to demurrage.<sup>14</sup> As it has been above-mentioned, time charterparties usually contain off-hire clauses, providing for the hire to cease to be payable when certain events (such as the breakdown of the vessel's engines, the detention by average accidents, the ship's arrest) prevent the ship's working without any fault of the owner.<sup>15</sup> When the events, an off-hire clause provides for, depend on the charterer's fault, he must compensate the shipowner of the damages he suffered as a consequence. Other clauses, on the contrary, are meant to have the freight payable even when the goods are lost, by making it payable in advance or adding the clause 'ship/goods lost or not lost': therefore in the first case the freight is deemed to have been earned on the goods' shipment instead of on their delivery to destination.<sup>16</sup>

9. Other clauses enable the parties to cancel the contract when any of the events, there listed or identified, occur.<sup>17</sup> Some clauses expressly refer to compulsory orders, recommendations, advices, etc of public Authorities, which are able to affect the contract's performance.<sup>18</sup> Great importance have also the war risk clauses, which allow the party whose performance is affected by this risk to interrupt it or enable either party

<sup>13</sup> For example, they refer also to war (and similar) risks, incorporating clauses on war risks similar to clause 26 of Barecon 2001 [BP Time 3 terms; the Chamber of the Shipping War Risks Clause 1952; the Conwartime 93 terms; Gencon clause 17; clause 35 of Shelltime 4 (1984); Shellvoy 5, para 34; K Michel, 'War, terror, piracy and frustration in a time charter context', in R Thomas (Ed) (4) 199, 207]. Some clauses concern also acts of public enemies and can operate in favour of either party. Others relate, for example, to the unavailability of the vessel, from the one hand (Gencon 94, para 9; Shellvoy 5, para 11; *Jackson v Union Marine Insurance Co Ltd* [1874] LR 10 CP 125), or of the cargo to load, carry or unload, on the other (Gencon 94, para 16; *The Nema* [1982] 2 AC 724; *Budgett & Co v Binnington & Co* [1891] 1 QB 35; *Isles Steam Shipping Co Ltd v Theodoridi & Co* [1926] 24 Lloyd's Rep 362), otherwise the owners or the charterers would be liable (A Tettenborn (4) 325, 327).

<sup>14</sup> Eg: Gencon 1994, clause 7.

<sup>15</sup> Eg: *The Laconian Confidence* [1997] 1 Lloyd's Rep 139; *Nippon Yusen Kaisha Ltd v Scindia Steam Navigation Co Ltd (The Jalagouri)* [2000] 1 Lloyd's Rep 515; *The Mastro Georgis* [1983] 2 Lloyd's Rep 66; *The Apollo* [1987] 1 Lloyd's Rep 200; Y Baatz (4) 76 f. See Baltimore form, clause 11; NYPE 1946, clause 15; NYPE 1993, clause 17; Shelltime 4 form, clause 21.

<sup>16</sup> M N Howard, 'Frustration and Shipping Law – Old Problems, New Contexts', in E McKendrick (Ed) (8) 123, 124.

<sup>17</sup> BIMCO Barecon 2001 concerns also the case of the ship's loss. Clause 28(c) entitles the parties to terminate the contract when the vessel becomes a total loss or is declared as a constructive or compromised or arranged total loss. According to clause 11(e) of the same form, in case the vessel is lost or missing, the hire's payment cease from the date and time it 'was lost or last heard of' and any hire paid in advance must 'be adjusted accordingly'. M Davis (8) 158.

<sup>18</sup> For example, as for compulsory acquisition (requisition for title is disciplined in the same manner), since it deprives the owners of the vessel's ownership, the clauses of bareboat charters provide for the charter's termination, irrespective of the date when those events occur during the Charter Period and the hire shall be 'considered as earned and to be paid up to the date and time of' the event (Ibid). Moreover, clause 26 of BIMCO Barecon 2001 prohibits to load contraband cargo or pass through any blockade whatsoever type it is or purpose it has, or to proceed to an area where it shall be subject to a belligerent's right of search and/or confiscation or is likely to be subject to this right.

to terminate the contract.<sup>19</sup> War risks definition is usually broad, including ‘any actual, threatened or reported: war, act of war, civil war or hostilities; revolution; rebellion; civil commotion; (...) acts of piracy (...); acts of terrorists; acts of hostility or malicious damage; blockades (...)’ by any kind of physical or legal person, including the Government of any State.<sup>20</sup> In order to have relevance, these risks ‘may be dangerous or are likely to be or become dangerous’ to the ship, its cargo, crew or other persons on board.<sup>21</sup>

10. As for the contracts of affreightment, usually forms include clauses referred to impediments beyond the parties’ control that rule out any liability of the party, whose performance is affected by them, for interrupting his performance: as a consequence the cargo’s quantities not carried because of force majeure are deducted from its remaining amount of cargo and its shipment cannot be demanded and neither it can be carried afterwards.<sup>22</sup> Some forms deal more specifically with the issue, explicitly providing that the performance shall not be resumed if it is evident that the hindrance’s effect will not cease until the end of the contractual period and that the party not responsible for the breach of the contract has the right to cancel it, when the hindrance lasts or is evident that will last for more than six months.<sup>23</sup>

The bareboat charterers have the liberty (and – obviously – not the option) to comply with all orders, directions, recommendations or advices concerning, for example, ‘departure, arrival, routes, sailing in convoy, ports of call, stoppages, destinations, discharge of cargo, delivery’ by the Government whose flag the ship is sailing, by any war risks underwriters with the authority to give such orders, etc. according to the war risks insurance, and with the terms of any resolution of the UN Security Council, of the European Community, of any Supranational body that has this authority and with national laws aimed at enforcing the same the owners are subject to. M Davis (8) 146.

<sup>19</sup> As for the first type of clause, according to clause 26 of BIMCO Barecon 2001, the vessel shall not continue to or go through any port, place, area or zone, where it reasonably appears that it, its cargo, crew or other persons on board may be or are likely to be exposed to war risks, according to the owners’ reasonable judgement [M Davis (8) 143]. But, according to some English case-law, the place should be considered dangerous ‘by reference to the standards and circumstances which existed at the date of the charterparty’ [*The Product Star* [1991] 2 *Lloyd’s Rep* 468, especially 478; K Michel (11) 208]. If the vessel is in this kind of place when a war risk occurs and that area becomes dangerous or is likely to become so, the owners have the right to require that it leaves the place. Only owners could consent, in writing, for the ship to continue to or go through such a port, place area or zone.

Eg also Clause 17 of GENCOA, clause 20 of VOLCOA. is a war cancellation clause.

The forms include also war cancellation clauses, providing for the right of either party to cancel the contract in case of the outbreak of war between any two or more of the Countries there listed. This is the case of the clause 26, par (f), of BIMCO Barecon 2001 and of INTERCOA’s clause K.

On this topic, also B Davenport, ‘War Clauses in Time Charterparties’, in E McKendrick (Ed), *Force Majeure and Frustration of Contract* (Informa Law, 2013) 153.

<sup>20</sup> Voywar 2013. Identical definition is in the Conwartime 2013 and very similar definition in clause 26 BIMCO Barecon 2001. On the concepts of wars, terrorism and similar events, eg: K Michel (11) 199 ff.

<sup>21</sup> On the meaning of these expressions, recently *Pacific Basin Ith Ltd v Bulkhandling Handymax AS (The Triton Lark)* [2012] *EWHC* 70 (Comm), that led to a modification of Conwartime and Voywar terms.

<sup>22</sup> Clause 15 of GENCOA, clause 19 of VOLCOA.

<sup>23</sup> Cl 19 of VOLCOA.

Unexpected circumstances, enabling the parties to terminate the contract without any liability, have been considered occurred, even when not explicitly mentioned by the contract, for example, in case of adventures concerning trades with alien enemies.<sup>24</sup>

#### IV. National Law. English Law

11. As it has been above mentioned, the consequences of unexpected circumstances on shipping contracts are, first of all, dealt with by the relevant international conventions the single State is bound to. In the following paragraphs the domestic law of some Countries is briefly examined, starting with English law.

##### 4.1. *The doctrine of frustration*

12. Common Law provides for the general rule of the strict duty of performing an obligation, despite of supervening events.<sup>25</sup> With regard to English law an exception to this rule is the doctrine of frustration, which is considered to apply also to charterparties and to other shipping contracts, such as towage.<sup>26</sup> This doctrine is based on at least five theories, the most renowned of which is the ‘test of a radical change in the obligation’, according to the parties’ intentions, objectively construed and ‘in the light of the circumstances existing when [the contract] was made’. The change must occur to the extent that the obligation falls outside the contract’s scope, in its true construction.<sup>27</sup> Therefore, the event must affect the whole contract altering its commercial basis, so that it becomes a different contract, being irrelevant events that have simply made one party’s performance more burdensome.<sup>28</sup>

<sup>24</sup> M Davis (8) 147.

<sup>25</sup> The first case where this principle was stated is considered to be *Paradine v Jane* [1647] Aleyn 26, mentioned by W Swadling, ‘The Judicial Construction of Force Majeure Clauses’, in E McKendrick (Ed) (8) 3. L J Bingham, in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 *Lloyd’s Rep* 1 [mentioned by E McKendrick, ‘Force Majeure and Frustration – The Relationship and a Comparative Assessment’, in E McKendrick (Ed) (8) 33, 37] referred to ‘the rigour of the common law’s insistence on literal performance of absolute promises’.

<sup>26</sup> *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; R Shaw, M Tsimplis, ‘The Liabilities of the Vessel’, in *Southampton on Shipping Law* (Informa, 2008) 155, 179. The doctrine could apply both to time charters and voyage charters, even if for the latter it could be more difficult [A Tettenborn (4) 319].

<sup>27</sup> *Davis Contractors Ltd v Fareham UDC* [1956] AC 696; *Sir Lindsay Parkinson & Co Ltd v Works & Public Buildings Comrs* [1950] 1 All ER 208; *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675; *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 *Lloyd’s Rep* 1; M Davis (8) 241 f; Y Baatz (4) 63 ff; A Tettenborn (4) 323; E Hondius, H C Grigoleit (1) 3, 7.

<sup>28</sup> *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435; M Davis (8) 142; Y Baatz (4) 64; K Michel (11) 209; A Tettenborn (4) 319 ff, 323; S Baughen, *Shipping Law* (Routledge, 2012) 255. US law, on the contrary, admits commercial impracticability within the scope of the doctrine of frustration: C Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-performance in International Arbitration* (Wolters Kluwer, 2009) 93.

13. The circumstance altering the contract must be unforeseen and unforeseeable by the parties when they stipulated the agreement and must not depend on the default of the party seeking for enforcing the doctrine of frustration or on one party's action.<sup>29</sup> It is questioned if the doctrine of frustration is ruled out in case of events falling within the scope of the party's organization of personnel and means or work.<sup>30</sup>

More over this doctrine does not concern excepted perils or other situations where a party's liability is excluded according to the provisions of international conventions or other relevant law. This could be the case of restraint of princes, which could indeed entail to consider the contract frustrated, but in any case is also the basis for excluding the owners' liability without any necessary reference to the doctrine of frustration.<sup>31</sup>

14. The actual existence of all the requirements for the doctrine of frustration to be enforced to each single case is also a matter of facts, which must be assessed by the Court, on the basis of what the parties knew or ought to know and should reasonably expect at the time of the event.<sup>32</sup> According to English case-law, frustration must be narrowly interpreted because it determines the contract's termination.<sup>33</sup> Under English law, the subject-matter is governed also by the Law Reform (Frustrated Contracts) Act 1943, which supplemented and partly superseded the doctrine of frustration.<sup>34</sup> It expressly applies to time charters<sup>35</sup> and charters by demise, but not to voyage charters or contracts for the carriage of goods by sea.<sup>36</sup>

<sup>29</sup> *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524; *Monarch SS Co Ltd v A/B Karlshamns Oljefabriker* [1949] AC 196, HL; *Imperial Smelting Corporation Ltd v Joseph Constantine Steamship Line Ltd* [1940] 2 KB 430; *Tsakiroglou & Co Ltd v Noble Thorl GmbH* [1962] AC 93; *The Eugenia* [1964] 2 QB 226; *The Evia (No 2)* [1983] 1 AC 736, HL; *The Captain George K* [1970] 2 Lloyd's Rep 21, QB; *Hyundai Merchant Marine Co Ltd v Furness Withy (Australia) Pty* [2006] 2 Lloyd's Rep 175 (CA); A Tettenborn (4) 328.

<sup>30</sup> *Davis Contractors Ltd v Fareham UDC* [1956] AC 696; *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1; A Tettenborn (4) 328. With regard to the case the vessel is lost or missing, the doctrine of frustration shall apply (when the situation is not provided for in the contract such as in the Barecon 2001) if the event occurred without any party's fault, thus not in case it derives from unseaworthiness or negligence of one party [*Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154; *Monarch Steamship Co, Ltd v Karlshamns Oljefabriker (A/B)* [1949] AC 196]. Other examples of frustration are, especially for voyage and time charters, delay or strikes not depending on one party or supervening illegality in English law or in the law of the place of performance (*Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260; *Foster v Driscoll* [1929] 1 KB 470; *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287), but it is believed that supervening illegality in the law of the Country where one party resides or is national is not ground for frustration [M Davis (8) 248].

<sup>31</sup> *Nobel's Explosives Co v Jenkins & Co* [1896] 2 QB 326; *The Lefthero* [1991] 2 Lloyd's Rep 599; A Tettenborn (4) 326.

<sup>32</sup> *Tamplin Steamship Co. v Anglo-American Petroleum Products Co Ltd* [1916] 2 AC 397 and *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435; *Universal Cargo Carriers v Pedro Citati* [1957] 1 Lloyd's Rep 174, in particular 192; *Edwinton Commercial Corporation, Global Tradeways Ltd v Tsavlis Russ (Worldwide Salvage & Towage) Ltd* [2007] Lloyd's Rep 517, which concerned also cl 9 (iii) of the SCOPIC clause.

<sup>33</sup> *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

<sup>34</sup> M Davis (8) 243.

<sup>35</sup> Disagreeing: A Tettenborn (4) 329.

<sup>36</sup> S 2(5). M Davis (8) 17 and 242; S Baughen (28) 258; M N Howard (14) 123.

The Act refers to contracts that became ‘impossible of performance or [have] been otherwise frustrated’.<sup>37</sup>

English law enables the parties to rule out the doctrine of frustration through a sufficiently detailed clause, in other words ‘in such a way as shows that it is provided for, only for the purpose of dealing with one of its effects and not all’.<sup>38</sup> Through a hardship clause, the parties can provide for the renegotiation of the contract’s content, in order to re-balance their obligations, because, even when the performance is still possible, the doctrine of frustration and the Law Reform (Frustrated Contracts) Act 1943 imply the automatic termination of the contract, irrelevant of the parties’ awareness and willingness of it.<sup>39</sup>

15. The 1943 Act and the doctrine of frustration shall consequently apply only when consistent with the contract’s provisions, but for this purpose force majeure clauses are usually strictly and narrowly interpreted.<sup>40</sup> S 1(2) of the Law Reform (Frustrated Contracts) Act 1943 provides for the recovery of ‘all sums paid or payable in pursuance of the contract before the time when the parties were so discharged’, because of the frustrating event. Moreover, the same section enables the Court, taking in consideration all the circumstances, to allow the party, who received the above-mentioned sums, to retain or recover any or part of them up to the amount of the expenses incurred before the time of discharge in, or for the purpose of, the performance of the contract.

<sup>37</sup> S 1(1).

<sup>38</sup> *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, in particular 456; *Bremer Handelsgesellschaft mbH v Vanden Avenne-Izegem PVBA* [1977] 1 *Lloyd’s Rep* 133; M Davis (8) 247 ff; A Tettenborn (4) 324 *et seq.*; S Baughen (28) 256; E McKendrick (25) 34.

Therefore, a force majeure clause does not rule out in itself the enforcement of the doctrine of frustration, depending on its content. For example, in a case of a charter providing for the charterers’ option to terminate the contract if the vessel was not timely delivered or if it was commandeered by the government during the charter period, the House of Lords decided, by majority, that these sorts of clauses did not rule out the doctrine of frustration (*Bank Line Ltd v Arthur Capel & Co* [1919] AC 435). According to some Authors, BIMCO Barecon 2001’s clause 25(a) should be sufficiently clear to exclude the doctrine of frustration to apply, but it is still discussed, whereas clause 26 is deemed not to preclude its operation [M Davis (8) 142, 249 ff; S Baughen (28) 255, mentioning some examples of war and acts of war which caused frustration, such as the First World War, the war between Israel and Egypt, the 1980 war between Iran and Iraq; K Michel (11) 199 ff, mentioning also the First Gulf War, the wars between China and Japan in 1894 and in 1937, between Turkey and Greece in 1912 and the 1936 Spanish Civil War].

Clauses 28 and 11(e) of BIMCO Barecon 2001 provides for the termination of the contract in case of a constructive, compromised or arranged total loss.

When such clause is not incorporated in the contract, especially for voyage charter, the doctrine of frustration could however hardly apply, but it is not excluded (*Texas Co v Hogarth Shipping Corp’n* [1921] 256 US 619; *Ellamar Mining Co v Alaska SS Co* [1925] 5 F.2d 890).

<sup>39</sup> *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] AC 497; *Blane Steamships v Minister of Transport* [1951] 2 *Lloyd’s Rep* 155; *Atlantic Maritime Co v Gibbon* [1954] 1 QB 88; *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 *Lloyd’s Rep* 1; M Davis (8) 243. Frustration’s consequences are the parties’ discharge of any further obligation and their duty to return what has been performed until the frustrating event where here has been a total failure of consideration, with no right to damages [A Tettenborn (4) 315; S Baughen (28) 255].

<sup>40</sup> S 1(3); *Metropolitan Water Board v Dick Kerr & Co* [1918] AC 119; *The Playa Larga* [1983] 2 *Lloyd’s Rep* 171, both mentioned by E McKendrick (25) 35 f.

16. The 1943 Act provides for another mean to recover the expenses met in or for the performance of a charter falling within its scope: s 1(3) enables the Court to decide that a party, having obtained a valuable benefit (other than a payment of money) ‘by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract’, before its discharge, shall pay to the other party a suitable ‘sum, not exceeding the value of the said benefit’.<sup>41</sup> On the contrary, according to the previous case-law, especially with regard to voyage charterparties, no payment in part could be made.<sup>42</sup>

17. The above-mentioned provisions of the Law Reform (Frustrated Contracts) Act 1943 are considered still not easy to interpret, since there is not much case-law concerning charterparties.<sup>43</sup> However, according to some case-law, s 1(3) implies a three-step approach: identifying the valuable benefit (which could consist in the end product or the services themselves<sup>44</sup>) valuating it and deciding about the award of a just sum.<sup>45</sup>

This approach is somewhat similar to the Italian provisions concerning unjust enrichment, according to Article 2041 and 2042 of the Civil Code, but it should be noted that some English case-law has rejected the statement that the Court’s aim should always be the ‘prevention of the unjust enrichment of the defendant at the plaintiff’s expense’, because each judge can decide what is just.<sup>46</sup>

Finally, another important provision of the 1943 Act is its s 2(4), according to which the Court has the power to sever part of a contract from the others and consider that part as not having being frustrated.<sup>47</sup>

#### 4.2. *The doctrine of impossibility of performance*

18. A brief reference should be done to the doctrine of impossibility of performance, which some Authors distinguish from that of frustration: the latter should refer to frustration of purpose, whereas the former to supervening impossibility of performance, which can occur only if unexpected contingencies determining the performance’s impossibility have not been dealt with by the contract or by usages.<sup>48</sup> Other Authors do

<sup>41</sup> The benefit is assessed taking into consideration the party’s position after the frustrating event [*BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783; S Baughen (28) 258].

<sup>42</sup> *St. Enoch Shipping Co Ltd v Phosphate Mining Co* [1916] 2 KB 624; A Tettenborn (4) 329 f.

<sup>43</sup> M Davis (8) 245 f.

<sup>44</sup> In a bareboat charter, it could consist in the services performed by the owner to make the ship available for the charter and their value could be assessed according to the hire’s contractual rates [M Davis (8) 246].

<sup>45</sup> *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1979] 1 WLR 783.

<sup>46</sup> Court of Appeal on *BP Exploration Co (Libya) Ltd v Hunt (No 2)* [1983] 2 AC 352, mentioned by M Davis (8) 246.

<sup>47</sup> S Baughen (28) 258, who takes as an example the case of a twelve-month charter frustrated in the sixth month, whose performance during the first five months could be considered not frustrated.

<sup>48</sup> G Treitel, *Frustration and Force Majeure* (Sweet & Maxwell, 1994) 231; M D Bayles, *Principles of Law: A Normative Analysis* (Kluwer Academic Publishers, 1987), 193 and 357.

not separate the two doctrines: in this sense they refer also to the case-law where impossibility of performance is considered one of the basis – and the first developed by Courts – for deeming a contract frustrated. The doctrine of impossibility is therefore sometimes considered the precursor of the frustration's one.<sup>49</sup>

## V. Unexpected Circumstances in Civil Law

### 5.1. *Shipping law*

19. Civil Law legal systems often have special provisions concerning shipping contracts and expressly identifying the consequences of certain supervening events affecting their performance and the parties' powers thereof. For example, in Belgium, France, Germany, Spain and Sweden specific provisions govern Maritime Law and shipping contracts, too (along with – of course – specific international conventions): they could just be a part of the Civil or Commercial Code or consist in a separate law.<sup>50</sup>

Italy is an interesting case where two distinct sets of rules exist, with the consequent question related to their relation. Shipping contracts are governed by the international and EU law on the contract of carriage of passengers and goods and by the Navigation Code.<sup>51</sup> Many provisions of this Code are based on Common Law and international forms. More over some provisions enable the parties to terminate the contract because of unforeseeable supervening impediments, not depending on the fault of the party seeking for the enforcement of this right.<sup>52</sup> Other provisions enable the party to refuse the performance because of supervening circumstances involving risks for the vessel or the

<sup>49</sup> *Taylor v Cadwell* [1863] 3 B & D 826, 833; T Southerington, 'Impossibility of Performance and Other Excuses in International Trade', in M Maggi (Ed) *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2002–2003* (Kluwer Law International, 2004) 249, 308; C Castronovo, S Mazzamuto, *Manuale di diritto privato europeo* (2nd Vol, *Proprietà, obbligazioni, contratti*, Giuffrè, 2007) 526 ff; Y Kwon, 'Judicial Modification of Contract in Relation to the Change of Circumstances', in G Duttge, S W Lee (Eds), *The Law in the Information and Risk Society* (Universitätsverlag Göttingen, 2011) 69.

<sup>50</sup> In Belgium, the subject matter is mainly governed by the Commercial Code (*Code de Commerce*), II Book, also known as *Loi Maritime*, but it is going to be reformed with the proposed enactment of a Maritime Code ([www.droitmaritime.be/](http://www.droitmaritime.be/); E Van Hooydonk (Dir), *Livre Vert. Nouvelle Loi Maritime Belge* (Association belge de droit maritime Institut européen de droit maritime et des transports (Université d'Anvers) Anvers, October 2007). With regard to France, the subject-matter is mainly governed by the Transports Code (*Code des Transports*), enacted on the 3<sup>rd</sup> November 2010, V Part, IV Book. In Germany, a new Maritime Law entered into force on the 25<sup>th</sup> April 2013. As for Spain, recently was enacted the Law No 14 of 24 July 2014, on the Maritime Navigation (*Ley 14/2014, de 24 de julio, de Navegación Marítima*), in BOE, 25 July 2014. Similarly, in Sweden, Maritime Law is governed by the Maritime Code and by special Acts.

<sup>51</sup> Eg: The Hague-Visby Rules on the bill of lading, the 1978 Hamburg Rules, Regulation (EU) No 1177/2010 of the European Parliament and of the Council of 24 November 2010 concerning the rights of passengers when travelling by sea and inland waterway and amending Regulation (EC) No 2006/2004, OJ L 334/2010 1.

<sup>52</sup> Eg: Article 348 ff; 382, 400 ff, 427 ff.

persons on board.<sup>53</sup> Other articles govern the consequences of temporary impediments to performance.<sup>54</sup> More over other provisions rule out any frustrating nature of an event.<sup>55</sup> The articles often govern the consequences of the events there described.

20. For the aspects not expressly dealt with by the Navigation Law, the relation between it and Private/Contract Law in the Italian legal system is discussed. Italian law, in fact, splits the main provisions on the contracts of transport and those related to the transport sector in the Civil Code and the Navigation Code. Whereas the Italian Civil Code rules the transport contract of persons and goods in general, the Italian Navigation Code governs the maritime and air contracts of carriage and charters, along with other sectoral issues.<sup>56</sup> The main issue is therefore if Navigation Law's speciality – to the extent that it is covered by a specific and distinct code – makes it an autonomous sector of law, with the exclusion of the application of Civil Code's provisions for complementing Navigation Law before the interpretation according to the analogy criterion.<sup>57</sup> Some Authors believe that, under Article 1 of the Navigation Code, the rules concerning the contracts of voyage and time charters and the contract of carriage should prevail over the Civil Code's articles.<sup>58</sup> The Italian case-law and legal literature disagreeing with this theory believes, on the contrary, that the aspects not explicitly governed by the Navigation Code should be governed by the compatible provisions of the Civil Code. This is the case, for example,

<sup>53</sup> Article 388(1) enables the owner to refuse to operate a voyage involving risks for the vessel or the persons on board, which where unforeseeable when the contract was concluded.

<sup>54</sup> Article 391 relates to temporary impediments in time charters: this provision is similar to off-hire clauses within international forms. A Lefebvre D'Ovidio, G Pescatore, L Tullio, *Manuale di diritto della navigazione* (XII edn, Giuffrè, 2011) 408. With regard to carriage of goods, Article 428 relates to a temporary impediment in the departure or during the voyage, not depending on the carrier, ruling out any termination of the contract.

<sup>55</sup> Article 429.

<sup>56</sup> Article 1 of the Italian Navigation Code expressly provides that the Civil Code applies to the maritime and air transport sectors only for those cases not regulated by the Navigation Code itself, the special law on maritime and air navigation, the customs and through their application by analogy. Similarly, article 1680 of the Italian Civil Code states that maritime and air transports are regulated by the Italian Navigation Law and the special law (including international Conventions in force in Italy) governing the maritime and air sector and the shipping and air industry and that the Civil Code's articles on the contract of transport would apply only on topics not specifically covered by the above-mentioned sources of law. Therefore, the Civil Code provisions concern mainly the contract of transport by road.

<sup>57</sup> On the issue concerning the Navigation Law's autonomy or its merely speciality within the Italian legal system, S M Carbone, 'L'internazionalità e la specialità delle fonti del diritto della navigazione nel terzo millennio', in A Antonini (Ed) *Trattato breve di diritto marittimo* (I vol, *Principi – Soggetti – Beni – Attività*, Giuffrè, 2007) 15.

<sup>58</sup> L Tullio, 'I contratti di utilizzazione della nave e dell'aeromobile', in *Studi per Romanelli* (Giuffrè, 19979) 1195, 1208. Disagreeing: Cass, 21 December 1953, No 3804 [1954] *Riv Dir Nav* II 183, with comment of G Riccardelli, 'Locazione di nave e noleggio'; S Ferrarini, *I contratti di utilizzazione della nave e dell'aeromobile* (Foro Italiano, 1947) 23; E Spasiano, 'I contratti di utilizzazione della nave: note per la revisione della disciplina attuale' [1977] *GI IV* 49, 301; C Tosoratti, 'La locazione di nave', in A Antonini (Ed) (57) 1; D Ragazzoni, 'La locazione di nave', in F Morandi (Ed), *I contratti del trasporto* (I vol, Zanichelli, 2013) 397.

of ship chartering, whose provisions are complemented with the Civil Code's articles on the contract of lease.<sup>59</sup>

21. Articles 1 of the Navigation Code and 1680 of the Civil Code are applied as source for identifying the law governing some aspects not covered by the former code, such as the multimodal transport contract, through the application of the Civil Code's articles on the contract of transport of goods.<sup>60</sup> This interpretation is based also on Article 1680's reference to the Navigation Code and the special law on maritime and air transport, with the consequence of ruling out provisions applied through the analogy criterion.<sup>61</sup>

22. Another example could be shipbuilding contracts, because the Italian legal system provides for only some limited aspects, making in general reference to the Civil Code provisions concerning, in particular, the contract for the provision of work and materials or of services (*appalto*).<sup>62</sup> This reference is indeed very interesting, because for this contract Italian law provides for the right of both the parties to demand a modification of the contract's price. Article 1664(1) of the Civil Code entitles, respectively, the contractor or the principal to demand such a modification when the costs for the materials or the personnel augmented or decreased and the difference exceeds the ten per cent of the initial price. But the revision can affect only the amount exceeding the ten per cent. The second paragraph of the same article sets the contractor's right to demand an equitable fee in case of unforeseen (and unforeseeable) difficulties for the contract's performance, deriving from by geological, hydro-geological and similar causes, making his accomplishment considerably more onerous.

<sup>59</sup> S Bonduà, 'Applicabilità delle disposizioni sull'affitto alla locazione di nave' [1942] *DM* 66, 170; A Graziani, 'Locazione di nave e noleggio' [1950] *RTDPC* 155, 156; E Spasiano (62) 296. Disagreeing: S Ferrarini (62) 23; A Fiorentino, *I contratti navali: locazione di nave e di aeromobile, noleggio, trasporto di persone e di cose, rimorchio* (II Edn, Jovene, 1956) 4; G Romanelli, *La locazione di nave e di aeromobile* (Giuffrè, 1965) 95 ff. See also: A Lefebvre D'Ovidio, G Pescatore, L Tullio (55) 385 f.

<sup>60</sup> Articles 1678 and 1683–1702 of the Italian Civil Code. Recently, Cass 6 August 2013, No 18657 [2013] *DM* 861–867, with comment of F Tajani. See also Cass, 6 May 1956, No 656, with comment of S Ferrarini, 'Trasporto misto terrestre-marittimo' [1956] *DM* 197; Cass, 17 November 1978, No 5363 [1979] *Porti, mare e territorio* 5 92, with comment of E Turco Bulgherini, 'Trasporto combinato delle merci'; Cass, 14 January 1986, No 887 [1987] *DM* 290, [1998] *Dir Trasp I* 120, with comment of N Adragna, 'Qualificazione del trasporto ed individuazione del termine di prescrizione applicabile'; Cass, 8 July 1993, No 7504; Cass 26 May 1994, No 5156 [1995] *DM* 1012; Cass, 14 February 2005, No 2898 [2007] *DM* 1115; Cass 2 September 1998, No 8713 [2000] *DM* 1349, with comment of L Ravera, 'Trasporto multimodale: un preoccupante vuoto normativo'; CA Genoa, 8 March 2002 [2002] *Contr* 907, with comment of M Ruggeri, 'La disciplina applicabile al contratto di trasporto multimodale'; Trib Gorizia, 28 May 2003 [2005] *Dir Trasp* 755; Trib Genoa, 11 April 2005 [2006] *DM* 1300, [2007] *Dir Trasp* 627; Trib Avellino, 1 June 2005 [2006] *Dir Trasp* 931. Disagreeing: G Romanelli, *Il trasporto aereo di persone. Nozione e disciplina* (CEDAM, 1959), 16; G Righetti, *Trattato di diritto marittimo* (II vol, Giuffrè, 1990), 84, n 36; G Caturani, A Sensale, *Il trasporto*, Jovene, 1960, 101.

<sup>61</sup> Another example is the above-mentioned ship charter contract, whose law, according to some case-law and legal literature, can be complemented by the Civil Code's provision on the contract of lease.

<sup>62</sup> Articles 1655–1677 of the Italian Civil Code.

23. It is questioned if Article 1664 of the Civil Code could apply also to the contract of carriage, which falls within the general category of contracts for the provision of services: some Italian case-law and legal literature has tried to figure out a possible extension of some provisions concerning the latter contract to the former, especially when the contract of carriage concerns more transport services.<sup>63</sup> The consequence would be that the sets of rules on contracts for the provisions of services should complement the provisions on the contract of carriage. One of the objections to this interpretation is the relation between the two sets of provisions, because that concerning the contract of carriage should supersede the other, according to the principle *lex specialis derogat generali* and the absence of certain provisions, unlike the service agreements' discipline, should be deemed not as a gap but as intentional.<sup>64</sup> The Italian case is therefore an example of how Maritime Law developed as an autonomous system, where great importance have forms drafted by the trade and maritime sector, and of the issue concerning its relation with general Contract Law, in particular on the possibility for the latter to complement the former.

## 5.2. General contract/private law

### 5.2.1. Italian law: the juridical and economical balance of the parties' obligations

24. According to Article 1372 of the Italian Civil Code, the contract is as binding between the parties as law and can be terminated only when both the parties agree or a party has a right to withdraw from it<sup>65</sup> or in the cases the law provides for. Supervening unexpected and unforeseeable events can affect the economic and juridical balance between the parties' obligations in contracts with obligations of both the parties (*causa*) or their content (*oggetto*).<sup>66</sup> The remedies the Italian Civil Code sets for the cases of imbalance of the parties' obligations due to these events are various.

25. First of all, the Italian law provides for the termination of the contract either because the performance of at least one party has become impossible after its conclusion

<sup>63</sup> G Romanelli (60) 564 ff; L Murtas, 'Il contract of affreightment: problemi di qualificazione' [1988] *Dir Trasp* 173; G Vermiglio, 'L'appalto di servizi di trasporto', in G Silingardi, A Antonini, F Morandi (Eds), *Dai tipi legali ai modelli sociali nella contrattualistica della navigazione* (Giuffrè 1996) 393 ff; M Brignardello, 'Vecchia e nuova ipotesi di disapplicazione delle tariffe a forcella' [2000] *DM* 1456; N Callipari, *Il contratto di autotrasporto di merci per conto terzi* (Giuffrè, 2009), 97 ff; Corte Cost, 5 November 1996, No 386 [1997] *Dir. Trasp* 463, with comment of C Tincani, 'Applicabilità delle tariffe a forcella all'appalto di servizi di trasporto'; Cass, 30 November 2010 No 24265; Cass, 13 September 1997, No 9128; Cass, 25 May 1986, No 3581 [1986] *I FI* 2137. On the matter, also S Busti, *Contratto di trasporto terrestre* [A Cicu, F Messineo, L Mengoni (past Dirs), P Schlesinger (Dir), *Trattato Diritto Civile e Commerciale*, XXVI vol, Giuffrè, 2007], 45 ff; E G Rosafio, *Il trasporto aereo di cose: riflessioni sul nuovo regime legale* (Giuffrè, 2007), 261 ff.

<sup>64</sup> L Tullio, 'Una fattispecie improponibile: l'appalto di servizi di trasporto' [1993] *Dir Trasp* 89, 92 ff; M Riguzzi, *Il contratto di trasporto* [M Bessone (Dir), *Trattato di diritto privato, I contratti speciali*, vol 14, Giappichelli, 2006] 22 ff.

<sup>65</sup> The general provision is Article 1373 of the Italian Civil Code.

<sup>66</sup> Articles 1325, No 3, and 1346–1349 of the Italian Civil Code.

(*risoluzione per impossibilità sopravvenuta*) or because it has become excessively onerous after the contract was stipulated (*risoluzione per eccessiva onerosità*). Both the cases refer to contracts where both the parties are bound to perform obligations, which are deemed to have been originally balanced in the contract's content according to the parties' intent.

The first case concerns an event altering the contract's content: the performance of a party becomes impossible contrary to Article 1346 of the Civil Code. According to Article 1463, when the performance became completely and definitively impossible, without any fault of the disadvantaged party, this party loses its right to the other party's performance and must return what he have already received. When the performance becomes impossible only in part, the other party has the right to have his performance proportionally diminished (with regard to its economic value) or can withdraw from the contract if he has no more considerable interest on its partial performance.<sup>67</sup>

26. The other case relates to contracts for continuous or periodic performance or for deferred performance: according to Article 1467, when the performance of a party suddenly becomes excessively burdensome because of extraordinary events, that party may ask for the contract's termination. Hence, the unexpected circumstances must not fall within the usual risks the parties (also implicitly) accept when concluding the contract.<sup>68</sup> This case therefore concerns the alteration of consideration. The other party can avoid the contract's termination, offering to equitably modify its content.

27. When only the disadvantaged party is bound to performance according to the contract, he has the right to ask for an equitable reduction of his obligation's content or an equitable variation of its performance.<sup>69</sup>

Other remedies provided by the Italian legal system refer to the general principles of good faith and fair dealing, which deeply permeate juridical relationships according to Italian law.<sup>70</sup>

On the principle of good faith is founded the doctrine of *presupposizione*, developed by the case-law and the legal literature with regard to supervening unforeseeable events depriving the contract of its actual purposes according to the inner reasons that induced a party to conclude it and that were known to the other party, taking into consideration the circumstances existing at that time, without affecting the other elements of the contract, which is still formally valid.<sup>71</sup>

<sup>67</sup> Article 1464 Civil Code.

<sup>68</sup> Consequently, according to Article 1469 Civil Code aleatory contracts cannot be terminated under Article 1467.

<sup>69</sup> Article 1468 Civil Code.

<sup>70</sup> The general principles are expressed in Articles 1175 and 1375 of the Code, but also Articles 1337, 1338, 1358, 1366 provide for them with regard to specific issues, such as the interpretation of contract clauses, the behaviour of the parties while a condition precedent or subsequent is pending, but also during the negotiations before the (possible) conclusion of a contract.

<sup>71</sup> This could, for example, be the case of a person who is going to work in another city and for this reason rents a house, if the landlord knows about it. Other famous cases concerned the rent of balconies in a particular street to see the coronation march, which subsequently changed route or did not happen on the day the balcony was rent for. In English Law the latter cases fall within the doctrine of frustration,

28. When those circumstances radically change as to deprive the contract of any interest for the disadvantaged party, the parties are free to renegotiate the contract's content, but if they do not reach any agreement, the party, to the detriment of whom the unexpected event occurred, can ask for its termination, provided that the other party knew or ought to know the reasons that induced him to conclude that contract. According to some Authors, the principle of good faith would more over entail a duty to renegotiate the contract's content because of supervening events altering the balance between the parties' obligations.<sup>72</sup>

29. It is also discussed if the principle of good faith could imply a duty of cooperation in the other party's performance. This duty is admitted by the prevalent case-law and legal literature for certain cases, as a consequence of the content of the specific contract and of the parties' obligations,<sup>73</sup> or as the result of the prohibition of abusing of his own rights (*abuso del diritto*). The latter has been established as a general rule and concerns the prohibition of exercising his own rights in a manner exceeding reasonableness and aimed to the other party's detriment. This duty is considered as having a general scope and is based on express provisions of the Civil Code concerning the property and similar rights.

However, some authors and case-law interpret the duty of co-operation as consisting not only in avoiding all those behaviours or omissions that can impede the debtor's performance, but also in cooperating with him.

30. Finally, it must be noted that the disadvantaged party could not avail himself of the unjustified enrichment (*arricchimento senza giusta causa*) under Articles 2041 and 2042 of the Civil Code, for governing cases of supervening imbalance of contractual obligations, because it concerns a subsidiary remedy for cases where the party has no other claim found on another title, such as a contract.<sup>74</sup>

when all its requirements are met. In the case *Chandler v Webster* [1904] 1 KB 493, the Court rejected the plaintiff's claim, because the obligation was considered to have arisen before the frustrating event and was not affected by it. According to M Davis (8) 243 f, these cases contributed to the drafting of the Law Reform (Frustrated Contract) Act 1943. Now the issue is governed also by s 1(2) of the Act. In Italian law some authors disagree on the reference to the inner reasons, the contract's conclusion was based on, for *presupposizione*, such as, recently, F Macario, 'La risoluzione per eccessiva onerosità', in N Lipari, P Rescigno (Eds), *Diritto Civile* (vol 3, Giuffrè, 2009) 1175, 1177 ff.

<sup>72</sup> R Sacco, *Il contratto* [in R Sacco, G De Nova (Dir), *Trattato di diritto civile*, I vol, *Le fonti delle obbligazioni*, UTET, 2004], 686; F Macario, *Adeguamento e rinegoziazione nei contratti a lungo termine* (Jovene, 1996), 293 ff, 316 ff. Other Authors, such as P Barcellona, *Profili della teoria dell'errore nel negozio giuridico* (Giuffrè, 1962), 216 and 225 ff; C Castronovo, S Mazzamuto (49) 531 ff, disagree.

<sup>73</sup> Cass, 4 August 2000, No 10261; Cass, 24 May 2007, No 12079; Cass, 15 February 2013, No 3830; Cass, 15 May 2014, No 10702; G D'Amico, 'Mancata cooperazione del creditore e violazione contrattuale' [2004] RDC 1.

<sup>74</sup> Articles 1:101 and 2:101 DCFR use the word 'unjustified' instead of 'unjust'; V Gorla, F Silva 'La causa come elemento essenziale del contratto: assente o solo "nascosta"?', in C Marchetti (Ed), *Il DCFR: lessici, concetti e categorie nella prospettiva del giurista italiano* (Giappichelli, 2012) 127, 135 f.

### 5.2.2. French law

31. French law is based on the strict principle of the contract's binding force, under Article 1134 of the Civil Code, which admits derogations only in case of the parties' agreement or in the cases the law provides for.<sup>75</sup> One of them is the supervening impossibility of the obligation due to unexpected and unavoidable circumstances with the requirements of *force majeure* and *cas fortuit*.<sup>76</sup> On the contrary, with regard to commercial contracts, according to the prevailing but not uniform case law and literature, French law does not provide for any right of termination or re-negotiation when, after the conclusion of the contract, an obligation or its performance has become unexpectedly excessively burdensome with regard to the original contractual balance, with the exception of specific cases identified by the law or case law.<sup>77</sup>

According to the above-mentioned article, contracts must be performed in good faith, which is interpreted by case-law as the loyal performance of a contract, too: in French law, a duty of cooperation in the other party's performance of his own obligations is still discussed.<sup>78</sup>

### 5.2.3. *Wegfall der Geschäftsgrundlage* and the doctrine of assumption (Germany, Denmark and Sweden)

32. In Germany the principle of good faith (*Treu und Glauben*) originally applied only for the cases expressly providing for it, but according to some Authors, through the doctrines developed in German case-law and legal literature, it has acquired ample importance in Contract Law.<sup>79</sup> German law was recently interested by a reform of the obligations law, the *Schuldrechtsreform*, expressly introducing the concept, already developed by the case-law and the legal literature, of *Geschäftsgrundlage*.<sup>80</sup> According to this doctrine, the contract's binding nature is suspended when the parties' fundamental expectations are not fulfilled.<sup>81</sup> This doctrine provides for separate rules concerning supervening impossibility of the obligation, from the one hand, and the excessive burden

<sup>75</sup> M Almeida Prado (5) 14.

<sup>76</sup> Article 1148 of the French Civil Code.

<sup>77</sup> The so-called *théorie de l'imprévision* could apply only to contracts concluded with Public Authorities. M Almeida Prado (5) 14, 16 ff, 30 ff; F P Traisci (2) 11; C Castronovo, S Mazzamuto (49) 527; Y Kwon (49) 68.

<sup>78</sup> The doctrine of *solidarisme contractuel*/contractual solidarism, opposed to that of the *autonomie de la volonté*/contractual freedom based on the will of the parties. Ph Delebecque (6) 283 ff. Also Prof. Delebecque's lecture *Foreseeability, flexibility and reasonableness in shipping contracts: a civil law approach*, on the 7<sup>th</sup> April 2014, as Visiting Professor at the Alma Mater Studiorum – University of Bologna, Italy.

<sup>79</sup> L Antonioli, 'General Duties', in L Antonioli, A Veneziano (Eds), *Principles of European Contract Law and Italian Law* (Kluwer Law International, 2005) 49; C Castronovo, S Mazzamuto (49) 499.

<sup>80</sup> C Castronovo, S Mazzamuto (49) 527; E Hondius, H C Grigoleit (1) 7 and 'Overview: concepts dealing with unexpected circumstances', in E Hondius, H C Grigoleit (Eds), *Unexpected Circumstances in European Contract Law* (Cambridge University Press, 2011) 55.

<sup>81</sup> E Hondius, H C Grigoleit (1) 7 f and (81) 55.

of performance, from the other. Like the doctrine of frustration, this remedy applies only if the matter is not already and fully provided for in the contract or in other law provisions.

German law contemplates the Court's power to re-balance the contractual obligations (under a specific request of the party) or enable a party to terminate the contract.<sup>82</sup>

33. In Danish and Swedish legal systems, the doctrine of assumption has strong resemblances with German law. The assumption must be material and perceived by the other party.<sup>83</sup> The party can ask for the contract's termination, but in Sweden and other Countries, such as the Netherlands, the Court could also adapt the contract to the new circumstances.

## VI. Unexpected Circumstances in PECL, DCFR and UPICC

34. The emerging EU Private and Contract Law deals also with the change of circumstances after the conclusion of a contract. Both the Principles of European Contract Law (PECL)<sup>84</sup> and the Draft Common Frame of Reference (DCFR)<sup>85</sup> confirm the principle that parties are bound by the obligations undertaken with the contract, even if they became more onerous, 'whether because the cost of performance has increased or because the value of what has to be received in return has diminished'.<sup>86</sup> According to both of them the relevant change of circumstances cannot exist when the contract was concluded, as on the contrary in German law, but must unexpectedly arise after that moment, in other words it could not have been reasonably foreseen when the contract was negotiated and concluded, taking into consideration the contract's nature and market's conditions.<sup>87</sup> Another issue both of them deal with is subsequent unexpected impossibility of performance not depending on the debtor.

35. With regard to the first case, Article 6:111 PECL relates to Change of Circumstances and applies when the contract's performance has become excessively onerous because of a change of circumstances and two conditions are met, in other words the supervening event could not be reasonably taken into account at the time the contract was concluded and such a risk is not one that must be borne by the disadvantaged party according to the contract. Therefore, it is not sufficient that performance merely became more onerous. In this sense, Article III-1:110 DCFR, which is based in part on PECL<sup>88</sup> but applies also to

<sup>82</sup> Ibid; Y Kwon (49) 68.

<sup>83</sup> This prerequisite is similar to the Italian doctrine of *presupposizione* and the Portuguese *presuposição* [E Hondius, H C Grigoleit (1) 8].

<sup>84</sup> O Lando, H Beale (Eds), *Principles of European Contract Law, Parts I and II combined and revised* (Kluwer Law International, 2000).

<sup>85</sup> C von Bar, E Clive, H Schulte-Nölke, H Beale, J Herre, J Huet, M Storme, S Swann, P Varul, A Veneziano, F Zoll (Eds), *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)* (Outline Edition, Sellier, 2009).

<sup>86</sup> Article III.-1:110(1) DCFR.

<sup>87</sup> C Castronovo, S Mazzamuto (49) 540.

<sup>88</sup> C von Bar, E Clive, H Schulte-Nölke, H Beale, J Herre, J Huet, M Storme, S Swann, P Varul, A Veneziano, F Zoll (Eds) (86) 30.

obligations arising from unilateral juridical acts, confirms that an obligation must be performed notwithstanding any increase of its burdensomeness, because of the increased costs for its performance or because of the decrease of the value of the other party's performance. The same article provides for an exception to this principle for the case of a change of circumstances after the time the obligation was incurred: if performance becomes so onerous that it would be manifestly unjust to hold the debtor to it, provided that the debtor himself did not and could not reasonably take into account 'the possibility or scale of that change of circumstances' and did not assume or cannot be reasonably considered as having assumed the risks of such supervening events.

36. The drafters of the two Soft Law instruments chose to conjugate two methods that emerge from some EU member States' legal systems: the renegotiation of the contract's content and the right to terminate it if no agreement is reached. According to Article 6:111 PECL, the parties are bound to enter into negotiations with a view to adapting the contract or end it, if the above-mentioned conditions occur. The same article provides that, in case the parties do not reach an agreement within a reasonable period, the Court may end the contract at a date and on terms determined by the Court itself or adapt it and may also award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing, hence resorting to the principles, typical of Civil Law, of good faith and fair dealing.

The ways chosen by Article III-1:110 DCFR, with regard to supervening events altering the burden over one party or the balance of value between the performances, are, first of all, negotiations: the debtor must try, 'reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation'. When he does not succeed, he can sue the other party before the Court having authority over the case, which may 'vary the obligation in order to make it reasonable and equitable in the new circumstances', or 'terminate the obligation at a date and on terms to be determined by the Court' itself. PECL and DCFR refer both to the principles of reasonableness and good faith with regard to the assessment of the debtor's behaviour. Reasonableness and equity are the criteria, the modification of the more onerous obligation must be based on.

37. Under Article 1:201 PECL, 'each party must act in accordance with good faith and fair dealing'. Therefore, in the drafters' view, good faith and fair dealing not only are expressly mentioned in some provisions of PECL, but are general principles, according to which PECL articles must be interpreted, 'in order to enforce community standards of decency, fairness and reasonableness in commercial transactions'.<sup>89</sup> According to some Authors, this article implies also a principle of mutual consideration, in other words each party 'must show due regard for the interest of the other party, particularly in the case of subsequent contingencies which were not contemplated in their contract'.<sup>90</sup> More over,

<sup>89</sup> O Lando, H Beale (Eds) (85); L Antonioli (79) 49.

<sup>90</sup> L Antonioli (79) 50.

under Article 6:102, good faith and fair dealing are considered the basis for complementing the contract with implied terms.

38. DCFR has expressly introduced the principles of good faith and fair dealing both as general principles and in provisions related to specific matters, too.<sup>91</sup> According to Article I-1:103, these principles refer ‘to a standard of conduct characterized by honesty, openness and consideration for the interests of the other party to the transaction or relationship in question’. They inform DCFR’s interpretation and promotion, the negotiation between the parties, the contract’s stipulation and interpretation.<sup>92</sup>

39. When setting the requirements for their provisions on change of circumstances to apply, the above-mentioned articles make reference also to the criterion of reasonableness for assessing the parties’ behaviour. According to Article 1:302 PECL reasonableness is based on the behaviour of ‘persons acting in good faith and in the same situation as the parties would consider to be reasonable’, having regard to ‘the nature and purpose of the contract, the circumstances of the case, and the usages and practices of the trades or professions involved’. Under Article I-1:104 of DCFR, reasonableness must be objectively ascertained, taking into consideration ‘the nature and purpose of what has been done’, ‘the circumstances of the case’ and ‘any relevant usages and practices’.

40. Both PECL and DCFR expressly set a duty of cooperation with the debtor in his performance. According to Article 1:202 PECL ‘each party owes to the other a duty of co-operation in order to give full effect to the contract’. As for DCFR, their third Book, s 1, not only provides for both the debtor and creditor ‘to act in accordance to good faith and fair dealing’ in performing an obligation, in exercising a right to performance, in pursuing or defending a remedy for non-performance, or in exercising a right to terminate an obligation or contractual relationship’, but also for an explicit duty of cooperation ‘when and to the extent that this can reasonably be expected for the performance of the debtor’s obligation’.<sup>93</sup>

41. The origins of this duty are indeed the doctrines developed in some Civil Law Countries: the intent of PECL and DCFR seems to express them as a general principle of law, as an effect of the importance they confer to the above-mentioned principles.

42. With regard to temporary or definitive subsequent impossibility of performance, both Article 8:108 PECL and Article III-3:104 of DCFR enable a debtor having breached his obligation to excuse himself when that breach is due to an impediment beyond his control and, with regard to contracts, he could not reasonably be expected to have taken

<sup>91</sup> C von Bar, E Clive, H Schulte-Nölke, H Beale, J Herre, J Huet, M Storme, S Swann, P Varul, A Veneziano, F Zoll (Eds) (86).

<sup>92</sup> Articles I-1:102, II-3-301, II-1:106, II-9:101: II-8:101, B II, s 4.

<sup>93</sup> Articles III-1:103 and 1:104.

into account it at the time when the obligation was incurred and to have avoid or overcome it or its consequences. When the excusing impediment is only temporary, the excuse's effect is limited to its duration and the creditor is enabled to treat the delay as a fundamental non-performance, if so provides the contract or the law governing it. The permanent excusing impediment entails the extinction of the obligation, together with that of any reciprocal obligation.<sup>94</sup> According to Article III-3:101 of DCFR, when non-performance is excused, the other party cannot demand specific performance and damages.

43. Finally, it could be interesting to examine Unidroit Principles of International Commercial Contracts, which face the issue of supervening hardship of a contract, too. Their Article 6.2.1 binds the parties to observe the contract, even in case it became more onerous for one of them, but in this case their relationship is subject to the following articles, concerning hardship, which can occur only in case of a fundamental alteration of the contractual equilibrium either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished and the requirements set by Article 6.2.2 are met. The event must happen after the conclusion of the contract, when it was not reasonably foreseeable. Moreover, the occurrence must be beyond the disadvantaged party's control, which must not have assumed its risks.

44. Article 6.2.3 of Unidroit Principles provides for the consequences of hardship, enabling the disadvantaged party to demand renegotiations without undue delay and specifying its grounds. This request, however, does not entitle the disadvantaged party to withhold performance. If renegotiations fail, after a reasonable time, either party can sue the other before the Court with authority to hear the case, which could 'terminate the contract at a date and on terms to be fixed', or adapt its content 'with a view to restoring its equilibrium', according to what appears the more reasonable solution.

45. Unidroit Principles provide for a duty to act according to good faith and fair dealing in international trade, too.<sup>95</sup> These principles operate to such an extent that Article 5.1.3 sets a duty of cooperation with the other party in performing the latter's obligation, too, when this cooperation may be reasonably expected. Unidroit Principles not only make reference to exemption clauses, but also to force majeure for excusing one party's non-performance of its own obligations.<sup>96</sup> The requirements are similar to those provided for by PECL and DCFR.

46. In order to try to infer what could be the actual outcome of PECL, DCFR and similar Soft Law instruments, it is fundamental to identify their nature. PECL, like Unidroit principles, were born, first of all, as a collection and elaboration of the alleged common traits of the existing national Contract Law by a group of renowned experts,

<sup>94</sup> Articles 9:301(1) and 9:501(1) PECL, III-3:104(4) and III-3:101(2) DCFR.

<sup>95</sup> Article 1.7.

<sup>96</sup> Article 7.1.6 and 7.1.7.

with no intent of repealing national law.<sup>97</sup> They are indeed not limited to a mere anthology of national provisions, since their articles sometimes go further, providing for new rules, also on the basis of the theories that have been developed within national law.<sup>98</sup> They can be chosen by the parties as the law governing the contract and in so far as they do not contrast with mandatory provisions of international or national law, they shall apply.

DCFR's main purpose was 'to serve as a draft for drawing up a 'political' Common Frame of Reference (CFR)'.<sup>99</sup>

## VII. Conclusions

47. The above outlined brief framework shows that, even where the approach is somewhat similar, the dogmatic basis, the regulation of supervening unexpected events affecting the contract and their possible consequences could differ considerably among the different national legal systems, especially with regard to hardship.<sup>100</sup>

On this regard, no legal system prevents the parties from spontaneously re-negotiating the contract's content (and thus concluding a different contract, when the previous one is to be considered terminated), but in many of them there is no duty of doing so.<sup>101</sup> More over only few national laws contemplate the Court's power to adapt the contract as a consequence of the supervening event.

48. Therefore, parties seeking one of these solutions in case of unexpected supervening circumstances, should be very accurate in providing for it in the contract, for example through hardship clauses.

But, if the parties do not reach any agreement and they had not, for example, conferred the power of balancing the frustrated contract to a Court or to arbitrators or the law governing the contract does not provide for it, the contract itself shall be terminated according to the applicable law or the terms set by the parties.

49. In this sense, another important difference among the legal systems, especially between those of Common Law, from the one hand, and those of Civil Law, from the other, is the principle according to which the rules concerning supervening events are enforced: Common Law is mainly based on the principle of reasonableness, whereas

<sup>97</sup> L Valle, 'Prospettive per la realizzazione di un diritto comune europeo dei contratti' [2000] *Contratto e Impresa* – EU 683; F P Traisci (2) 25 ff.

<sup>98</sup> F P Traisci (2) 9.

<sup>99</sup> *Introduction to C von Bar, E Clive, H Schulte-Nölke, H Beale, J Herre, J Huet, M Storme, S Swann, P Varul, A Veneziano, F Zoll (Eds) (86) 4.*

<sup>100</sup> Notwithstanding these differences, some Authors observed that the actual final outcomes of supervening unexpected circumstances on the contract's sort are not very dissimilar [L Antonioli (79) 49; Ph Delebecque (6) 283 ff. I would like to refer also to Prof Delebecque's lecture '*Foreseeability, flexibility and reasonableness in shipping contracts: a civil law approach*', on the 7<sup>th</sup> April 2014, as Visiting Professor at the Alma Mater Studiorum – University of Bologna, Italy].

<sup>101</sup> Where Civil Law governs the contract, the re-negotiations must usually be conducted according to the principle of good faith.

Civil Law is mainly based on the principles of good faith and fair dealing, which do not exist in Common Law, even if many international forms concerning shipping contracts mention good faith in their clauses as the principle the parties must conform to and their behaviour must be assessed according to, for the issues those terms refer to.<sup>102</sup>

50. The above examined Soft Law instruments have adopted the principles of good faith and fair dealing as the main ones the parties' conduct must conform to.<sup>103</sup> The concept of good faith expressly extends to burdening the creditor with a duty to cooperate with the debtor in order to enable the latter to perform his obligation. This duty of co-operation, which is expressly provided for in the domestic law of some EU member States, is on the contrary unknown and in certain cases incompatible with the relevant law of other Countries, such as English law, according to which the main forms of the shipping sector are drafted and construed. Therefore, a problem of compatibility of the emerging EU Contract Law and the shipping contracts arises.<sup>104</sup> As it has been already mentioned above, often shipping contracts are governed by international conventions or by the contract clauses agreed by the parties, with the forms developed within their sector, and by national rules, when the latter are compulsory or for the aspects the parties did not provide for in their contract.<sup>105</sup>

51. DCFR and PECL could affect shipping contracts in two main manners: if they will be enacted as EU Hard Law or if they could apply according to a governing law clause, which could expressly choose one of them to govern the contract or refer to the 'principles developed in international law'.<sup>106</sup> In the first case, in other words if DCFR – or even PECL – will be enacted as EU Hard Law, according to my opinion, despite the specialty of Maritime Law, the incidence of a new European Contract or Private Law on shipping contracts should not be ruled out to the extent that it concerns mandatory principles and general duties of the contract parties, such as good faith and fair dealing and the subsequent duty of co-operation, or could complement contractual provisions, when the parties did not explicitly allocated contractual risks,<sup>107</sup> and does conform to the contract's construction.<sup>108</sup> However, their actual outcomes must be assessed with regard to each single case, also according to the contract's structure, framework and aim.

<sup>102</sup> Ph Delebecque (6) 281 ff; *Davis Contractors Ltd v Fareham UDC* [1956] AC 696. For example, no obligation of good faith has the charterer when making a nomination [R Thomas, 'The evolving flexibility of voyage charterparties', in R. Thomas (Ed) (4) 9 ff].

<sup>103</sup> Along with that of reasonableness for certain situations.

<sup>104</sup> On this topic, also F Lorenzon (8) 137.

<sup>105</sup> According to G Boi (8) 8, the reason is the absence of any need at the international level of superseding contractual autonomy and the rules provided for by the forms developed within trades.

<sup>106</sup> In this case the issue is whether this clause can be interpreted as referring to the EU Contract Law, instead of the above-mentioned Unidroit Principles.

<sup>107</sup> F P Traisci (2) 10.

<sup>108</sup> For example, some German case-law, when deciding cases concerning contracts based on English-law forms, but providing for German law as the law governing the contract, applied English principles to the contract for ruling out some German law provisions.

52. It is my opinion that the specialty of Maritime Law, where it is admitted, could be preserved, first of all through contractual freedom, as nowadays happens: both international conventions and almost all national law admit contractual autonomy with ample extent even if within different limits, as PECL and DCFR do, probably because it can better govern the parties' relationship according to their intent.<sup>109</sup>

The room for Contract/Private Law would be limited to those aspects not explicitly or implicitly governed by international conventions, whose mandatory provisions, to be systematically interpreted according to their purposes, rule out any other different provision: therefore Private or Contract Law could complement the provisions of international conventions within such limits. In the case of commercial practices that fulfil the requirements for being considered as usages binding the contract's parties, including widely known practices regularly observed in international trade, they should supersede contrasting provisions of law, when the latter are not mandatory.

53. Already nowadays, in many national law, both of Civil Law and of Common Law, Contract/Private Law provisions are already the grounds for deciding matters not (entirely) governed by the contract or Maritime Law. In this case a problem of construction of the contract could emerge, insofar as the parties use forms based, for example, on English law, whose regulation of supervening unexpected events is funded on the principle of reasonableness instead of good faith. The same problem, i.e. construction of the contract, could arise when the parties choose for governing the contract a law that has principles unknown or even not compatible with the law according to which the form was drafted.

In order to avoid possible outcomes the parties did not desire, the contract should be as detailed as possible in regulating their commitments, rights and duties, but, according to my personal opinion, this risk could not be entirely avoided.<sup>110</sup>

<sup>109</sup> G Boi (8) 2 f.; F Lorenzon (8) 156 f.

<sup>110</sup> F Lorenzon (8) 157, similarly, evidenced this risk.