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Economic/business risk and modification of contracts by the court from comparative aspect

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## **Economic/business risk and modification of contracts by the court from comparative aspect<sup>1</sup>**

*Tekla Papp*

### **Introduction**

With the conclusion of a contract of civil law, the parties may take some reasonably unforeseeable economic risks that might disrupt the synallagmatic character of the contract; therefore, disproportionate, unviable extra burden may appear in the contractual relations on the side of some parties. The sudden increase of inflation or prices, the intense reduction of the purchasing power of wages, the radical changes in the relations between supply and demand, the collapse of the product market, the insolvency of the economic actors (especially in case of a contractual party), the negative changes of the market and financial relations and the production and liquidity problems of the economic sector shall result in this incalculable risk. In case of maintaining the original contractual content, an economic crisis affecting the whole economy and society of one or more countries may cause any or all the parties to bear inequitable and intolerable risks. So in the case of change of circumstances supervening and unforeseen events can hardly affect the performance of the parties' obligations as they agreed at the time of concluding the contract.<sup>2</sup>

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<sup>2</sup> URIBE R. M.: *The effect of a change of circumstances on the binding force of contracts, Comparative perspectives* Cambridge – Antwerpen – Portland, Intersentia, 2011. 11.

## 1. The aspect of the Hungarian Constitutional Court

The Constitutional Court has referred to the risks in permanent legal relations in more of its decisions and it has also drawn the attention the problem that contracts have more characteristics of public law.<sup>3</sup>

When the parties conclude a contract they agree on bearing the reasonable risks of future changes but the conditions can change dramatically. In this case it is not fair to enforce the fulfillment of the contract and maintain the contractual relations as the unforeseen circumstances at the time of conclusion can later change the situation of the parties, the proportion of rights and duties and for one of them the maintenance of the contract or fulfilling the agreement will be problematic or even impossible.<sup>4</sup>

In these extraordinary situation the court can intervene and alter these legal relations based on the § 241 of the Civil Code<sup>5</sup> and it can make the permanent, long term content of the contract adapt to the new circumstances. The court shall find a solution for the new and fair division of the burdens by balancing the problem of one of the parties with the trust of the other party.<sup>6</sup>

The ‘exception clause’ of § 226 (2) of the Hungarian Civil Code<sup>7</sup> is very similar to *clausula rebus sic stantibus* but it’s more general, based on this the rules can exceptionally change the content of the contracts concluded before these rules came into force. The state can only modify the contracts constitutionally if the same conditions apply as those required by the court.<sup>8</sup> The legislator is only entitled to change these permanent, long term contractual relations if, because of a circumstance after the conclusion, they are against the important legal interest of a party, the change of circumstances was reasonably unforeseen and it exceeds the risk of a natural change and if the intervention is need by the society (so it affects a mass amount of contracts).<sup>9</sup> In case of conflict the Constitutional Court is entitled to decide upon the constitutionality of the intervention as in case of exact agreements the court decides by § 241 of the Civil Code.

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<sup>3</sup> 32/1991. (VI. 6.), 1473/B/1991., 43/1995. (VI. 30.), 66/1995. (XI. 24.) AB határozatok (Decisions of the Hungarian Constitutional Court)

<sup>4</sup> 32/1991. (VI. 6.), 66/1995. (XI. 24.) AB határozatok (Decisions of the Hungarian Constitutional Court)

<sup>5</sup> The decisions of the Hungarian Constitutional Court related to the old Civil Code (Act IV of 1959)

<sup>6</sup> 32/1991. (VI. 6.), 66/1995. (XI. 24.) AB határozatok (Decisions of the Hungarian Constitutional Court)

<sup>7</sup> The decisions of the Hungarian Constitutional Court related to the old Civil Code (Act IV of 1959)

<sup>8</sup> 1473/B/1991. AB határozat (Decision of the Hungarian Constitutional Court)

<sup>9</sup> 32/1991. (VI. 6.), 66/1995. (XI. 24.) AB határozatok (Decisions of the Hungarian Constitutional Court)

The Constitutional Court held that bearing the risk covers the modifications made by law or the court because according to the Civil Code it can happen in long term contractual relations.<sup>10</sup> In another decision it held that some % increase in the rate of interest and the domestic debts, the increase of the support of apartments is not so significant which could lead to the application of *clausula rebus sic stantibus*.<sup>11</sup>

## **2. The legal reasons of the modification of contracts by the court according to the Hungarian Civil Code<sup>12</sup>**

Based on the § 241. of the Civil Code, the court may modify the contract under three conjunctive conditions: the aim of the agreement must be a persistent legal relation, after concluding the contract the contractual relation must change, therefore, the contract interferes with an important and justified interest of one of the parties.<sup>13</sup> In the judicial practice it occurred several times that the alteration of the contract by the court based on the economic crisis could not be applied in default of one of the conjunctive conditions

- the circumstance itself that some contractual provisions can be mistaken due to the unexpected changes of the market and financial relations, cannot be used as a legal base for the modification of the contract by the court, as an extra condition, the important and justified offense of interests of the party is required;<sup>14</sup>

- in case of a legal action that aims to modify the persistent legal relation, it is not enough to refer to general circumstances (e.g. to changes of the price level) that emerged after the conclusion of the contract, but its influence on the contract has to be specified too.<sup>15</sup> In connection with the modification of the contract by the court, not only the § 241. of the Civil Code was analyzed but the conditions were interpreted too.<sup>16</sup> If the parties considered the future insecurity of the level of production and the way how the profit turned out to be a mutual risk at the time of the conclusion of the contract, the parties had to calculate with these types of changes in the circumstances; in this case the modification

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<sup>10</sup> 32/1991. (VI. 6.) AB határozat (Decision of the Hungarian Constitutional Court)

<sup>11</sup> 66/1995. (XI. 24.) AB határozat (Decision of the Hungarian Constitutional Court)

<sup>12</sup> The old Hungarian Civil Code (Act IV of 1959), which is in force until 15 March 2014.

<sup>13</sup> *A Ptk. magyarázata* The Comment of the Civil Code (The Comment of the Hungarian Civil Code). Budapest, Közlönykiadó, 2007. 319.; *A Polgári Törvénykönyv magyarázata* (The Comment of the Civil Code). Editor: GELLÉRT Gy. Budapest, CompLex, 2007. 905.; *Kommentár a gyakorlat számára* (Comment for the practice). Editor: PETRIK F., Budapest, hvgorac, 2008. 423.

<sup>14</sup> BDT 2007. 1707. (Casebook of the Courts)

<sup>15</sup> BH 1977.118. (Court Order)

<sup>16</sup> BH 1984.489. (Court Order)

of the contract based on important and justified offense of interests cannot be claimed. The alteration of the contract by the court neither can be suggested with reference to the § 241. of the Civil Code, if it is about the widespread consequences of the basic social-economic changes.<sup>17</sup> The inflation and the changes of the relations of supply and demand belong to the economic risk, which shall not entitle any party to suggest the modification and these do not lead to automatic modification of the contract.<sup>18</sup> The ordinary changes of the market cannot be cited as a legal base for the alteration of a unique contract by the court: by concluding a contract both parties take business risk, the alteration of the contract by the court cannot be considered as a possibility to eliminate or redistribute the business risk taken by the parties.<sup>19</sup> In conclusion, the Civil Code does not entitle the courts to alter the unique contracts in case of changes that affect the whole economy or the subjects of agreements that belong to different contractual types:<sup>20</sup> changes in the economic milieu, the collapse of the market of certain products can be considered as a significant change in the circumstances of the conclusion of the contract that cannot be expected at the time of the conclusion of the contract and of which risks have to be borne mutually by the parties.<sup>21</sup>

The Hungarian courts regard the economic-financial crisis as a contractual risk and they use the principle *pacta sunt servanda* instead of a broader sense of the *clausula rebus sic stantibus*. Similarly to the domestic courts, the European Court of Justice – of which judicial practice affects the domestic judicial practice of the member states<sup>22</sup> - also considers the business-financial crisis to be contractual risk and the different actors of the economy shall take the risks in connection with their activity. For in every contractual relation there is a risk that one of the parties may not fulfil the agreement in an adequate way or becomes insolvent, in such a case the parties must reduce the risk suitably in the contract itself.<sup>23</sup>

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<sup>17</sup> BH 1992.123. (Court Order); The Comment of the Civil Code *ibid.* p. 323.; NOCHTA, T. *A gazdasági válság mint szerződési kockázat*. In: Ünnepi tanulmányok Sárközy Tamás 70. születésnapjára, Editor: NÓTARI T. Szeged, Lectum, 2010. 211.

<sup>18</sup> BH 1996., 145. (Court Order); BH 1993. 670. (Court Order); *ibid.* p. 325.; Nochta *ibid.* p. 211.

<sup>19</sup> 2003/1. Vb (Arbitration decision); BH 1988.80. (Court Order); BH 1988.80. (Court Order); BH 1985.470. (Court Order)

<sup>20</sup> The Comment of CompLex Legal Database in connection with § 241 of the Hungarian Civil Code

<sup>21</sup> BDT 200.277. (Casebook of the Courts)

<sup>22</sup> GOMBOS K. *Bírói jogvédelem az Európai Unióban* (The judicial legal protection in the European Union). Budapest, CompLex, 2009. 27.

<sup>23</sup> *Masder Ltd. (UK) v the European Communities Committee*, Case C-47/07.

According to the new Hungarian Civil Code<sup>24</sup> for the judicial modification of a contract, the above mentioned regulations require the possibility of any changes in the circumstances not to be foreseen, this change in the circumstances is not due to the parties and it cannot belong to the ordinary business risks of the parties.<sup>25</sup> Analyzing the last condition, there is a possibility to avoid considering the economic crisis and its effects as ‘ordinary business risk’, but it is necessary to change the current judicial practice.

### **3. European overview in respect of the economic/business risk**

In connection with handling the imbalance arisen by the occurrence of some events that were unforeseeable at the time of the conclusion of the contract, the domestic rules of private law of the European countries and the codes (or the draft codes) aiming to integrate the European private law show us different pictures.

The courts should not be allowed to intervene in a contract if the parties can protect themselves by the inclusion of force majeure or hardship clauses which contain mechanisms to adapt the contract to the change of circumstances.<sup>26</sup> The force majeure clause means future events outside the control of the parties and it results the impossibility of the execution of the contract, either temporarily or permanently; from this clause the suspension or the termination of the contract follows.<sup>27</sup> The function of the hardship clause is the prevention of the situation where unforeseen circumstances essentially change the contractual synallagma, rendering the performance of one of the parties definitely onerous or difficult; from this clause the revision of the contract follows, by the parties or by a third person.<sup>28</sup>

“The first limitation to the discretion of the court is the prohibition on redrafting the entire contract or changing its nature. A second general statement is that the purpose of court adaptation is to distribute the losses caused by the unexpected circumstances to the extent that the performance of the contract by the affected party is possible or bearable.”<sup>29</sup>

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<sup>24</sup> Act V of 2013 (entered into force on 15 March 2014) § 6:192.

<sup>25</sup> *Szakértői Javaslat az új Polgári Törvénykönyv tervezetéhez* (Technical Proposal to the draft of the new Civil Code), Editor: VÉKÁS L. Budapest, CompLex, 2008. 845.: ‘The Proposal based on the requirements of the professional economic actors makes it clear that everybody should measure the business risks in connection with the conclusion of the contract on his own and there is no possibility to reduce it in a judicial way.’

<sup>26</sup> URIBE op. cit. 14.

<sup>27</sup> URIBE op. cit. 14.

<sup>28</sup> URIBE op. cit. 14-15.

<sup>29</sup> URIBE op. cit. 253.

The French regulation<sup>30</sup> persists in the principle *pacta sunt servanda*, based on the belief that a judge cannot measure the effect of his judgements on the national economies, therefore, he is not entitled to alter the contract ('modifying the contract entails the risk of threatening the performance of the obligation committed by the other party in connection with another contract, hence, through an unstoppable and unforeseeable chain reaction it results in a general lack of imbalance...').<sup>31</sup> So the Cour de Cassation has rejected the revision of contracts in cases of *imprévision* (hardship). But there is only a duty to renegotiate the contract between the parties under the principles of good faith and fair dealing if the performance of the contract by one party has become expressly difficult and the contractual balance has radically changed.<sup>32</sup>

According to the Dutch, Italian and Serbian rules,<sup>33</sup> there is a difference between the ordinary contractual risk, arisen after making an agreement and originated from the character of the contract, and those changes of the circumstances that are irrespective of the nature of the agreement, as for the latter, the person under an unfair obligation in The Netherlands may ask the court for the modification or termination of the contract, while in Italy and Serbia the party for whom the completion of the contract is more burdensome, can only suggest the court terminate the contract.

In virtue of the Greek civil law regulation<sup>34</sup> and the draft of the common frame of reference<sup>35</sup> (in this case only under conditions) – the same solution is implemented in the Rumanian civil law<sup>36</sup> -, the modification or termination of the contract because of extraordinary changes in the circumstances that affect the contract are allowed irrespectively to the relation of the risk factors to the contract.

The German Civil Code<sup>37</sup> provides the possibility of modifying a contract if - after its conclusion - an unforeseen change occurred according to which the contract would have not been concluded or it would have been concluded with different content and one of the parties cannot be expected to maintain this agreement in the same way. If the modification

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<sup>30</sup> Code Civil Art. 1148, Art. 1134.

<sup>31</sup> BDT 2004.959. II. (Casebook of the Courts)

<sup>32</sup> Uribe *ibid.* pp. 46., 55., 57.

<sup>33</sup> KADNER-GRAZIANO T. – BÓKA J. *Összehasonlító szerződési jog* (Comparative contract law). Budapest, CompLex, 2010. 425-429.; Burgerlijk Wetboek § 6:258.; Codice Civile § 1467.; Zakon o obligacionim odnosima §§ 133-136.

<sup>34</sup> § 388., KADNER-GRAZIANO – BÓKA *op. cit.* 428.

<sup>35</sup> *Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference*, Munich, Sellier, 2008. III-1. 110.

<sup>36</sup> Codul civil Art. 1.271; VERESS E. *Új román Polgári Törvénykönyv, szerződések és a gazdasági válság* (The new Rumanian Civil Code, contracts and the economic crisis), Cluj Napoca, Korunk (Our time) 2012.

<sup>37</sup> Bürgerliches Gesetzbuch § 313 Störung der Geschäftsgrundlage (disturbance of the contractual basis)

of the contract is not possible or it cannot be reasonably expected from the party, the one in a disadvantaged situation may rescind (or in case of permanent obligation he may cancel it).

The Project of Contractual Civil Code of Gandolfi,<sup>38</sup> the Principles of European Contract Law<sup>39</sup> and the Principles of International Commercial Contract<sup>40</sup> urge the parties to negotiate again in connection with the contract in case of the occurrence of events that cannot be foreseen at the time of conclusion of the contract and that can cause contractual imbalance. If the parties cannot make an agreement in a reasonable time,<sup>41</sup> they can ask the court for alteration or termination.

#### **4. The English legal instruments in connection with the change of circumstances of contracts**

In connection with the unforeseen events happening after the conclusion, the English law introduced the legal terms ‘frustration’ and ‘hardship’. In order to solve the economic-financial crisis, the following preferences have been defined: principally, the parties should create adequate provisions in their own contract (*‘hardship clauses’*), in absence of these, there is a possibility to modify or terminate the contract by the court (*‘intervener clause’*).<sup>42</sup> “As a general rule, there is no inherent (implied) duty of good faith, loyalty or co-operation between the parties negotiating for a contract and the parties cannot even create an express legal obligation to conduct their negotiations in good faith.”<sup>43</sup> The English common law considered renegotiated contracts to be invalid due to a lack of consideration when the result of the renegotiation is that one party merely promised to perform what he was already bound to do under the original agreement.<sup>44</sup>

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<sup>38</sup> European Contract Code 2001 (Academy of European Private Lawyers) Articles 97., 157.

<sup>39</sup> Principles of European Contract Law 1995-2002, § 6:111.

<sup>40</sup> Principles of International Commercial Contract (UNIDROIT Convention, Rome, 2004) §§ 6.2.1., 6.2.2., 6.2.3.

<sup>41</sup> 3 or 6 months according to the Civil Code of Gandolfi

<sup>42</sup> MCKENDRICK E. *Contract Law*, London, McMillan Law Masters, 197. 255-256., 266-271., 282-284.; KADNER-GRAZIANO – BÓKA op. cit. 438-439.

<sup>43</sup> CARTWRIGHT J. *Negotiation and renegotiation: an English perspective* In: Reforming the French law of obligations, comparative reflections on the Avant-Projet de Réforme du Droit des Obligations, eds.: Cartwright, J. – Vogenauer, S. – Whittaker, S., Oxford, Hart Publishing, 2009. 52.; URIBE op. cit. 155-156.

<sup>44</sup> *Stilk v. Myrick* 2 Camp 317, 6 Esp 29 (1809); URIBE op. cit. 157.

In English common law the frustration terminates the contract: if a contract is frustrated, each party is released from any further obligation to perform.<sup>45</sup> The present form of frustration was established in 1863 in *Taylor v Caldwell*,<sup>46</sup> and it currently operates within rather narrow frames.<sup>47</sup> In *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*<sup>48</sup> Bingham L. J. set out the following five propositions which describe the essence of the doctrine of frustration:

- the doctrine of frustration has evolved “to mitigate the rigour of the common law’s insistence on literal performance of absolute promises”;
- frustration operates to “kill the contract and discharge the parties from further liability under it”;
- frustration brings a contract to an end “forthwith, without more and automatically”;
- “the essence of frustration is that it should not be due to the act or election of the party seeking to rely on it” and it must be some “outside event or extraneous change of situation”;
- a frustrating event must take place “without blame or fault on the side of the party seeking to rely on it”. The “frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.”<sup>49</sup> The common types of frustrating events can be the following: subsequent legal changes, supervening illegality, other war-time restrictions, exercise of statutory power, outbreak of war and accrued rights.<sup>50</sup> Thus, at the frustration there must be a radical change in the obligation, the contract must not distribute the risk of the event occurring, and the occurrence of the event must not be due to either party.<sup>51</sup> “The data for decision are, on the one hand the terms and construction of the contract, read in the light of the then existing circumstances, and on the

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<sup>45</sup> BEALE H. G. – BISHOP W. D. – FURMSTON M. P. *Contract, Cases and Materials* London, Butterworths, 2001. 482.; URIBE op. cit. 150.; TAYLOR R. – TAYLOR D. *Contract Law, Directions* Oxford, Oxford University Press, 2011. 265.

<sup>46</sup> (1863) 3 B&S. 826

<sup>47</sup> „not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains” In: *Chitty on Contracts*, General Editor: BEALE H. G., London, Sweet&Maxwell, 2012. 1636.

<sup>48</sup> [1990] 1 Lloyd’s Rep. 1.

<sup>49</sup> Lord Radcliffe, House of Lords in *Davis Contractors Ltd v Fareham U. D. C.* [1956] A. C. 696

<sup>50</sup> *Chitty* op. cit. 1646-1652.; STONE R. *The modern law of contract* London and New York, Routledge, 2013. 414.; MURRAY R. *Contract Law, The Fundamentals* London, Sweet&Maxwell, 2011. 299-304.

<sup>51</sup> O’SULLIVAN J. – HILLIARD J. *The Law of Contract* Oxford, Oxford University Press, 2010. 366.; STONE R. – DEVENNEY J. – CUNNINGTON R. *Text, Cases and Materials on Contract Law* London and New York, Routledge, 2011., 501-509.



other hand the events which have occurred. It is the court which has to decide what is the true position between the parties. The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is matter of law. Whether, there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'.<sup>52</sup> The frustration can be also generated by legal impossibility (the law may prohibit the performance undertaken in the contract),<sup>53</sup> by physical impossibility (death, incapacity in personal service contracts, destruction of the subject matter of the contract by fire or earthquake, failure of supplies, delay and hardship)<sup>54</sup> and by impossibility of purpose (very exceptionally the non-occurrence of an event which constitutes the basis of the contract can frustrate a contract, in: *Krell v Henry* [1903] 2 K. B. 740,<sup>55</sup> or frustration of common venture).<sup>56</sup> Frustration is sometimes termed "subsequent" or "supervening" impossibility so as to distinguish it from "initial" impossibility or common mistake.<sup>57</sup> The courts adopt multi-factorial approach in connection with frustration; the following: "the terms of the contract itself, its matrix or context, the parties' knowledge, expectations, assumptions and contemplations, in particular as to risk, as the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties' reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances."<sup>58</sup> The courts have preferred to see the doctrine of frustration as one of the last mean which should be used rarely and with reluctance,<sup>59</sup> in other words, the traditional principles of freedom and sanctity of contract still hold firm.<sup>60</sup>

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<sup>52</sup> Lord Wright in *Denny, Mott and Dickson Ltd v James Fraser & Co Ltd* [1944] AC 265, in: FURMSTON M. P. *Cheshire, Fifoot & Furmston's Law of Contract* Oxford, Oxford University Press, 2007. 725.

<sup>53</sup> For example: trading with enemy in *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (1943), deprive a party of control over the subject matter of contract in *Baily v De Crespigny* (1869), *Bank Line Ltd v Arthur Capel & Co* (1919), *BP Exploration Co (Libya) Ltd v Hunt (No 2)* (1979); HALSON R. *Contract Law* Harlow, Pearson, 2013. 423-425.

<sup>54</sup> CHEN-WISHART M. *Contract Law* Oxford, Oxford University Press, 2010. 318.; KOFFMAN L. & MACDONALD E. *The Law of Contract* Oxford, Oxford University Press, 2010. 514-522.; ELLIOTT C. – QUINN F. *Contract Law* Harlow, Pearson Education Limited, 2011, 305.; TREITEL G. *An outline of the Law of Contract* Oxford, Oxford University Press, 2004. 352-356.

<sup>55</sup> CHEN-WISHART op. cit. 324.; POOLE J. *Contract Law* Oxford, Oxford University Press, 2010. 470-478.

<sup>56</sup> SMITH S. A. *Atiyah's Introduction to the Law of Contract* London, Clarendon Press, 2005. 184.

<sup>57</sup> DUXBERRY R. *Contract Law* London, Sweet & Maxwell, 2011. 241.

<sup>58</sup> *Edwinton Commercial Copr, Global Tradeways Limited v Tsavlis Russ (Worldwide Salvage & Towage) Ltd (The 'Sea Angel')* [2007] EWCA Civ 547; [2007] 2 Lloyd's Rep 517, [111] In: MCKENDRICK E. *Contract Law* Houndmill, Palgrave Macmillan, 2011. 256.

<sup>59</sup> MULCAHY L. *Contract Law in Perspective* London and New York, Routledge Cavendish, 2008. 127.

<sup>60</sup> BROWNSWORD R. *Smith & Thomas: A Casebook on Contract* London, Sweet & Maxwell, 2009. 701.

The force majeure clauses, hardship and intervener clauses are frequently inserted into commercial contracts.<sup>61</sup> The clause must be capable of dealing with any form that the contingency may take, no matter how serious, otherwise it will not prevent the operation of the doctrine of frustration.<sup>62</sup> The effect of these clauses to reduce the practice significance of the doctrine of frustration because, where express provisions has been made in the contract itself for the event which has actually occurred, then the contract is not frustrated.<sup>63</sup> Frustration is concerned with unforeseen, supervening events, not events which have been anticipated and provided for in the contract itself, by force majeure, hardship and intervener clauses. It is for a party relying upon a force majeure clause to prove the facts bringing the case within the clause<sup>64</sup> and that he has been prevented, hindered or delayed from performing the contract by reason of that events.<sup>65</sup> The party must further prove that his non-performance was due to circumstances beyond his control and that there were no reasonable steps that he could have taken to avoid or mitigate the event or its consequences.<sup>66</sup> The application of force majeure clause has more advantages:

- the force majeure clause provides for the suspension of the contract for a limited period of time on the occurrence of a force majeure event;<sup>67</sup>
- the force majeure clause give the parties the opportunity to escape from the narrowness of the doctrine of frustration;

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<sup>61</sup> For example: „If either party is by reason of force majeure rendered unable wholly or in part to carry out any of its obligations under this agreement then upon notice in writing of such force majeure from the party affected to the other party as soon as possible after the occurrence of the cause relied on the party affected shall be released from its obligations and suspended from the exercise of its rights hereunder to the extent to which they are affected by the circumstances of force majeure and for the period during which those circumstances exist.”; „In this standard condition 'force majeure' means any event or circumstances beyond the control of the party concerned resulting in the failure by that party in the fulfilment of any its obligations under this agreement and which notwithstanding the exercise by it of reasonable diligence and foresight it was or it would have been unable to prevent or overcome. Without limitation to the generality of this standard condition it is acknowledged that any event or circumstances which qualifies as force majeure under the supplier's carriage agreement with British Gas shall be deemed to be a force majeure hereunder. In assessing the circumstances of force majeure affecting the customer, the price of gas under this agreement shall be excluded.” In: *Thames Valley Power Ltd v Total Gas&power Ltd* [2005] EWHC 2208 (Comm), [2005] All ER (D) 155 (Sep.)

<sup>62</sup> *Jackson v Union Marine Insurance Co. Ltd* (1874) LR 10 CP 125, in: RICHARDS P. *Law of Contract* Harlow, Pearson Longman, 2009. 377.

<sup>63</sup> Chitty op. cit. 1636.

<sup>64</sup> *Channel Island ferries Ltd v Sealink U. K. Ltd* [1988] 1 Lloyd's Rep. 323, 327

<sup>65</sup> P. J. Van der Zijden *Wildhandel NV v Tucker&Cross Ltd* [1975] 2 Lloyd's Rep.240, 242; *Tradax Export SA v André et Cie* [1976] 2 Lloyd's Rep. 109, 114; *Agrokor AG v Tradigrain SA* [2000]1 Lloyd's Rep. 497, 500; *Dunavant Enterprises Inc v Olympia Spinning&Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep. 619 at [18], [32]; ANDREWS N. *Contract Law* Cambridge, Cambridge University Press, 2011. 446.

<sup>66</sup> Chitty op. cit. 1089.

<sup>67</sup> MULCAHY op. cit. 133.

- the force majeure clause has remedial flexibility: the contracting parties have possibility to decide the consequences which are to follow from the occurrence of a force majeure event.<sup>68</sup> Most force majeure clauses are drafted in two parts: a list of specified events and by this the parties condescend general terms with all other causes howsoever arising.<sup>69</sup> The advantage of a hardship clause<sup>70</sup> is that is designed to enable the relationship between the parties to continue on different terms (the courts at common law have no power to adapt the terms of contracts to the changed circumstances).<sup>71</sup> The hardship clause generally defines what constitutes ‘hardship’ and lays down a procedure to be adopted by the parties in the event of such hardship occurring. Thus, this clause imposes an obligation on both parties to renegotiate the contract under the principle of good faith in order to alleviate the hardship which has arisen.<sup>72</sup> The intervener clause is similar to hardship clause except that it gives to a third party such as an arbitrator the authority to resolve the dispute which has arisen between the parties; it is a sanction if the parties fail to negotiate the way out of a hardship event.<sup>73</sup>

If the contract contains express provisions which indicate the consequences that are to result, the parties’ rights will be regulated by the express terms, then there will be no room for the operation of the doctrine of frustration. But the contractual provisions which would otherwise be effective to exclude the operation of the doctrine of frustration is not enforceable if contrary to public policy.<sup>74</sup> Thus, the illegality frustrated the contracts, notwithstanding the suspensory terms, either because the terms did not extend to the event

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<sup>68</sup> MCKENDRICK E. *Force Majeure Clauses: The Gap between Doctrine and Practice* In: *Contracts Terms*, The Oxford-Norton Rose Law Colloquium, ed.: Burrows A. – Peel. E., Oxford, Oxford University Press, 2007. 241-242.; *Thomas Borthwick (Glasgow) Ltd v Faure Fairclough Ltd* [1968] 1 Lloyd’s Rep 16 (QB) 28 In: CARTWRIGHT J. *Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* Oxford and Portland, Oregon, Hart Publishing, 2013. 260.

<sup>69</sup> WHEELER S. – SHAW J. *Contract Law; Cases, Materials and Commentary* Oxford, Oxford University Press, 1994. 758.

<sup>70</sup> Example for hardship clause: „If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and (notwithstanding the effect of the other relieving and adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic hardship then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanism contained in the contract... are justified in the circumstances in fairness to the parties to offset or alleviate the said hardship caused by such change.” In: MULCAHY op. cit. 136.

<sup>71</sup> MCKENDRICK E. *Contract Law, Text, Cases and Materials* Oxford, Oxford University Press, 2012. 402.

<sup>72</sup> MCKENDRICK (2011) op. cit. 257.; BEALE H. G. – BISHOP W. D. – FURMSTON M. P. *Contract, Cases and Materials* Oxford, Oxford University Press, 2008. 493.; *Superior Overseas Development Corporation v British Gas Corporation* [1982] 1 Lloyd’s Rep 262, 264-65, CA In: BURROWS A. *A Casebook on Contract* Oxford and Portland, Oregon, Hart Publishing, 2013. 707.

<sup>73</sup> MCKENDRICK (2011) op. cit. 257.

<sup>74</sup> *Select Commodities Ltd v Valdo SA, The Florida* [2006] EWHC 1137 (Comm) at [8], [2007] 1 Lloyd’s Rep 1 at 5, [2006] 2 All ER (Comm) 493.

which had occurred or, if they did, because they were contrary to public policy and unforceable.<sup>75</sup>

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<sup>75</sup> *The Law of Contract* General editor: FURMSTON M., Butterworths Common Law Series, London, LexisNexis, 2010. 1680.; PEEL E. *The Law of Contract* London, Sweet&Maxwell, 2007. 984-987.