

CCBE remarks on change of circumstances legislation

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The Council of Bars and Law Societies of Europe (the CCBE) represents the bars and law societies of 45 countries, and through them more than 1 million European lawyers. The CCBE responds regularly on behalf of its members on policy issues which affect European citizens and lawyers.

1. BACKGROUND

- A) The COVID-19 pandemic has dramatically affected the economic situation in the European Union and therefore also the contractual relations between the different social actors. As regards the implications of the COVID-19 crisis on contractual relationships between entrepreneurs and consumers (“B2C relationships”), it seems that the European Union is showing interest¹.

However, that is not the only type of contractual relationship that should be of concern. Contractual relationships between entrepreneurs (“B2B”) are essential for the smooth running of the economy. As a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance may have become excessively difficult and/or the cost of performance may have risen significantly.

Many companies, especially SMEs, are therefore unable to fulfill contracts on the agreed terms. On the other hand, other companies might go into bankruptcy if the agreed terms are respected. The European Union should avoid the disappearance of thousands of companies (and millions of jobs) not because of its economic inefficiency but because of the exceptional and absolutely unforeseen circumstances that have affected the whole world. Furthermore, there is a risk of a second wave of COVID-19 that can further deteriorate the current economic situation.

- B) In some Member States, there are specific legal rules (known as change of circumstances, disappearance of the basis of the transaction, hardship or “*rebus sic stantibus*” legal rule) for situations where the equilibrium of the contract or the basis of the contract has been radically altered by supervening circumstances. This is the case, for example, in Germany (§ 313 BGB, “*Störung der Geschäftsgrundlage*”)², Italy (Articles 1467-12468 Codice Civile, “*Dell'eccessiva*

¹ See: [“The New Consumer Agenda: open public consultation”](#).

² § 313 BGB states:

“(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.

onerosità”³ and France (Article 1195 Civil Code)⁴, as well as in the Netherlands (Article 6:258 BW)⁵. As a consequence of such a legislation, a party, under very strict requirements, is entitled to ask the other party a renegotiation of the terms of the contract. If an agreement to amend the contract (new deadlines, moratorium on regular payments, price reduction, etc.) cannot be reached by both parties, the affected party is entitled to claim the amendment of the contract (or even, under much more strict requirements, the termination of the contract) before the court.

In other Member States – for instance, in Denmark, Finland, Sweden, or in Spain – a change of circumstances can form the basis of a modification of the contract accepted by courts. Also, in Luxembourg – although the law does not contain any specific written provision concerning the change of circumstances – the Luxembourg Court of Appeal seems to have decided (in its

(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.

(3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung.”

³ Art. 1467 Codice Civile states:

“Nei contratti a esecuzione continuata o periodica, ovvero a esecuzione differita, se la prestazione di una delle parti è divenuta eccessivamente onerosa per il verificarsi di avvenimenti straordinari e imprevedibili, la parte che deve tale prestazione può domandare la risoluzione del contratto, con gli effetti stabiliti dall’art. 1458.

La risoluzione non può essere domandata se la sopravvenuta onerosità rientra nell’alea normale del contratto.

La parte contro la quale è domandata la risoluzione può evitarla offrendo di modificare quamente le condizioni del contratto.”

Art. 1468: *“Nell’ipotesi prevista dall’articolo precedente, se si tratta di un contratto nel quale una sola delle parti ha assunto obbligazioni, questa può chiedere una riduzione della sua prestazione ovvero una modificazione nelle modalità di esecuzione, sufficienti per ricondurla ad equità.”*

Art. 1469: *“Le norme degli articoli precedenti non si applicano ai contratti aleatori per loro natura o per volontà delle parti.”*

⁴ Article 1195 Civil Code : *“Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l’exécution excessivement onéreuse pour une partie qui n’avait pas accepté d’en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.*

En cas de refus ou d’échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu’elles déterminent, ou demander d’un commun accord au juge de procéder à son adaptation. A défaut d’accord dans un délai raisonnable, le juge peut, à la demande d’une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu’il fixe.”

⁵ Article 6: 58 Burgerlijk Wetboek:

1. *“De rechter kan op verlangen van een der partijen de gevolgen van een overeenkomst wijzigen of deze geheel of gedeeltelijk ontbinden op grond van onvoorziene omstandigheden welke van dien aard zijn dat de wederpartij naar maatstaven van redelijkheid en billijkheid ongewijzigde instandhouding van de overeenkomst niet mag verwachten. Aan de wijziging of ontbinding kan terugwerkende kracht worden verleend.*

2. *Een wijziging of ontbinding wordt niet uitgesproken, voor zover de omstandigheden krachtens de aard van de overeenkomst of de in het verkeer geldende opvattingen voor rekening komen van degene die zich erop beroept.*

3. *Voor de toepassing van dit artikel staat degene op wie een recht of een verplichting uit een overeenkomst is overgegaan, met een partij bij die overeenkomst gelijk.”*

decision of 31 October 2012, confirmed by the Luxembourg Supreme Court on 24 October 2013) to keep the possibility of admitting the existence of a change of circumstances in order to restore a balance between the parties if one of them has to face unforeseen circumstances (*théorie de l'imprévision*) and if certain cumulative conditions are fulfilled.⁶ In Belgian law, the theory of unforeseeability (*théorie de l'imprévision*) has not been expressly recognised to date, but it was recognised on the basis of the theory of abuse of rights in a judgment of 14 October 2010⁷. Moreover, a draft reform of the law of contractual obligations, introduced in Parliament, recognises the unforeseeability in Article 5.77.

Moreover, at the supranational level (as soft law), very relevant legal texts contain a specific legal rule on the change of circumstances, such as: Article 6:111 of the Principles of European Contract Law ("PECL")⁸; Principles, Definitions and Model Rules of European Private Law – Draft Common Frame of Reference ("DCFR") (Article III. – 1:110)⁹; 2016 UNIDROIT Principles

⁶ According to [this decision](#), the following conditions have to be fulfilled:

- i) existence of a continuing performance contract (*contrat à obligations successives*);
- ii) existence of a contract providing for reciprocal obligations between the parties,
- iii) occurrence of a substantial overturning of the conditions which were existing when the contract was concluded (*bouleversement de l'économie du contrat*);
- iv) unforeseeability of these new circumstances, and
- v) absence of any liability of a party for the occurrence of these changes.

However, it must be noted that after listing these cumulative conditions to be fulfilled in order to recognise the *théorie de l'imprévision*, the Luxembourg Court of Appeal held that the conditions were not met in this specific case and rejected this legal argument.

⁷ Case *G./L.*, Cass., 14 octobre 2010, [C.09.0608.F.](#)

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

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

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

(b) the possibility of a change of circumstances was not one which could reasonably have been taken into account at the time of conclusion of the contract, and

(c) the risk of the change of circumstances is not one which, according to the contract, the party affected should be required to bear.

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

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

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

In either case, the court may award damages for the loss suffered through a party refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing."

⁹ "(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.

(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may:

of International Commercial Contracts (article 6.2.3)¹⁰. More recently, the so-called Principles for the COVID-19 Crisis that include an express reference to hardship and its consequences (Principle 13 (2))¹¹ were adopted by the European Law Institute.

- C) It is important to note that the legal rule on change of circumstances does not imply derogation from the rule of intangibility of the contract (*"pacta sunt servanda"*). It is only an exceptional mechanism to maintain the contract, by readjusting it in the interest of both parties, instead of letting a chain of contractual breaches occur (without negligence or willful misconduct) which could prevent the common purpose from being achieved.

2. PROPOSAL OF THE COUNCIL OF BARS AND LAW SOCIETIES OF EUROPE (CCBE)

- A) Taking into account the above-mentioned background, the Council of Bars and Law Societies of Europe (CCBE) kindly asks the European Commission to invite the Member States to carefully assess the convenience of including a specific legal rule on change of circumstance in the B2B contractual relationships in connection with the crisis driven by COVID-19 in their national legislations (where such a rule is not already included).
- B) It should be highlighted that the aim is not to seek any harmonisation on this issue. On the contrary, each Member State – bearing in mind the features of its legal system and its economic and social situation due to COVID-19 – should assess: (i) whether to include a specific legal rule on change of circumstances in its legal system; (ii) if the Member State in question considers that a change of circumstances legal rule is suitable for its legal, social and economic situation, the next step should be to decide which requirements should be met to apply such legal rule, and what the consequences of its application would be (renegotiation duty, potential role of the judge, etc.). Member States should, however, give priority to the

(a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or

(b) terminate the obligation at a date and on terms to be determined by the court.

(3) Paragraph (2) applies only if:

(a) the change of circumstances occurred after the time when the obligation was incurred;

(b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;

(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and

(d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation."

¹⁰ *"(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.

(4) If the court finds hardship it may, if reasonable,

(a) terminate the contract at a date and on terms to be fixed, or

(b) adapt the contract with a view to restoring its equilibrium."

¹¹ *"Where, as a consequence of the COVID-19 crisis and the measures taken during the pandemic, performance has become excessively difficult (hardship principle), including where the cost of performance has risen significantly, States should ensure that, in accordance with the principle of good faith, parties enter into renegotiations even if this has not been provided for in a contract or in existing legislation."*

renegotiation of contracts¹², which is the best solution to adapt the contract in consideration of the will of the contracting parties. In any case, even if a Member State would decide to include a change of circumstances legal rule in its national legislation, such legal rule should be non-mandatory.

¹² The renegotiation of contracts is also recommended in the [ELI Principles for the COVID-19 Crisis](#) (see: page 6).