Unexpected Circumstances in European Contract Law

The recent financial crisis has caused many to question whether existing contracts may be adapted, terminated or renegotiated as a result of unexpected circumstances. The question is not a new one. In medieval times the notion of clausula rebus sic stantibus was developed to cope with such situations, and Germany introduced the theory of Wegfall der Geschäftsgrundlage. In England, the doctrine of frustration developed in the coronation cases provided one possible answer.

This comparative study explores the possibility of classifying jurisdictions as ‘open’ or ‘closed’ in this regard.

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The Common Core of European Private Law

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For the transnational lawyer the present European situation is equivalent to that of a traveller compelled to cross legal Europe using a number of different local maps. To assist lawyers in the journey beyond their own locality the Common Core of European Private Law Project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger.

The aim of this collective scholarly enterprise is to unearth what is already common to the legal systems of European Union member states. Case studies widely circulated and discussed between lawyers of different traditions are employed to draw at least the main lines of a reliable map of the law of Europe.
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General editors’ preface

This is the eleventh book in the series the Common Core of European Private Law. This project was launched in 1993 at the University of Trento under the auspices of the late Professor Rudolf B. Schlesinger. The methodology used in the Trento project is novel. By making use of case studies it goes beyond mere description to detailed enquiry into how most European Union legal systems resolve specific legal questions in practice, and leads to thorough comparison between those systems. It is our hope that these volumes will provide scholars with a valuable tool for research in comparative law and in their own legal systems. The collection of materials that the Common Core project is offering to the scholarly community is already quite extensive and will become even more so when more volumes are published. The availability of materials attempting a genuine analysis of how things are is, in our opinion, a prerequisite for a stimulating and critical discussion on how they should be. Perhaps in the future European private law will be authoritatively restated or even codified, as is envisaged in the Draft Common Frame of Reference. The analytical work carried on by the nearly 300 scholars involved in the Common Core project is a precious asset of knowledge and legitimisation for any such normative enterprise.

We must thank the editors and contributors to the results published so far. With a sense of deep gratitude we also wish to recall our late Honorary Editor, Professor Rudolf B. Schlesinger.
Preface

In 1993, the Common Core of European Private Law project was launched. Ever since, three groups convene every year to discuss themes to be taken up. In the group on contract law, the theme of unexpected circumstances was suggested on various occasions. As a matter of fact, one of the hypothetical cases dealt with in the very first theme that led to a published volume was about change of circumstances. In 2001, the general editors of the series, Mauro Bussani and Ugo Mattei, asked Ewoud Hondius, later to be joined by Hans Christoph Grigoleit, to set up a group on this subject. National reporters were then selected, both from within the Trento/Torino participants and from outside the group.

At the group’s first meeting in 2001 reporters for Belgium (Luc Vael), France (Anthony Chamboredon) – both later replaced by Denis Philippe (Belgium) – Germany (Carsten Herresthal), Italy (Francesco Macario), the Netherlands (Mirella Peletier, later replaced by Willem Wiggers), Portugal (Júlio Gomes and Antonio Pinto Monteiro) and Sweden (Bert Lehrberg) discussed a questionnaire to be sent out. During the meeting or at later stages, the charter members were joined by members for Austria (Brigitta Lurger), the Czech Republic (Luboš Tichý), Denmark (Kim Østergaard), England and Ireland (Robert Clark and Cliona Kelly), Greece (Anastassios Valtoudis), Lithuania (Valentinus Mikelenas), Scotland (Laura Macgregor), Slovenia (Matjaž Tratnik) and Spain (Odavia Bueno Diaz and Luz Martinez Velencozo). At various moments, it was also envisaged that national reports from Estonia, Finland, Hungary, Latvia, Luxemburg, Poland, Slovakia, Switzerland and Turkey would be included, but for various reasons these efforts failed to

materialise. From the very start, Francesco Parisi undertook to complete the project with a law and economics approach.

The group then set out to establish a questionnaire. Instead of using an autocratic method, whereby a general reporter comes up with a list of proposals, individual members of the group were invited to submit hypothetical cases, which were then subjected to approval by the group. The group first selected five ‘hard core cases’, which were later joined by ten other hypotheticals. In order not to burden reporters and readers with too many cases, some hypothetical cases were actually set up as combinations of two or more issues. Questions of remedies were not set out in separate hypotheticals, but rather dealt with as side issues in the core cases.

The core of the volume consists of these cases (Part III). They are preceded by an introductory part (Part I) and an overview (Part II) and concluded with an evaluation (Part IV). The introductory part (Part I) begins with a general comparative introduction in Chapter 1. In the history of Roman law and canonical law, the doctrine of rebus sic stantibus has played a role of importance. This is reflected in Chapter 2 of Part I. Chapter 3 of Part I is devoted to a law and economics approach of unexpected circumstances.

In the editing process and in the comparative evaluation of the national reports we have received profound support from Ella van den Brink, at the time a student in the legal research master programme of the University of Utrecht, Tobias Miethaner, public attorney at the District Court of Munich, and Lovro Tomasic, PhD candidate at the University of Munich. In finalising the volume, the editors were furthermore assisted by Paul van Heijnsbroek, at the time a student in the legal research master programme of the University of Utrecht, by Rodrigo Momberg, PhD candidate at the University of Utrecht and by Wolfgang Sigler, candidate of law at the University of Regensburg.

The editors wish to thank the organisers of the annual common core conferences in Trento and Torino, Mauro Bussani and Ugo Mattei, for their intellectual support and Carla Boninsegna and Emanuela Amsler for their administrative assistance, as well as the publishers, in particular Finola O’Sullivan and Sinead Moloney, for their support. The linguistic support of Peter Morris and Kate Ollerenshaw is gratefully acknowledged.

The manuscript was completed in 2009, but an occasional reference to later publications has been added.

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<tr>
<td>DB</td>
<td>Des Betrieb</td>
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<tr>
<td>DCFR</td>
<td>Draft Common Frame of Reference</td>
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<td>DEE</td>
<td>Dilcaio Etairian kai Epichiriseon</td>
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<td>DP</td>
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Pas  Pasicrisie
PECL  Principles of European Contract Law
Pir Nom  Piraiks Namologia
RCJB  Revue critique de jurisprudence belge
RDC  Revue de droit commercial belge
RDM  Revista de Derecho Mercantil
RGDC  Revue générale de droit civil belge
RGLJ  Revista General de Legislación y Jurisprudencia
RGZ  Reichsgericht Entscheidungen
RJ  Repertorio Jurisprudencia Aranzadi
RJC  Revista Juridica de Cataluna
RM  Rättsfall från Mourtärterna
RRD  Revue régionale de droit
RTDCiv  Revue trimestrielle de droit civil
RW  Rechtsgundig weekldad
SC  Sessions Cases
SLT  Scots Law Times
Sou  Statens Offentliga Utredningar
STS  Sentencia del Tribunal Supremo (Supreme Court Judgment)
SZ  Entscheidungen des österreichischen Obersten Gerichtshofes in Zivilsachen
TLR  Times Law Reports
TS  Tribunal Supremo
U  Ugeskrift for Retsvesen
WLR  Weekly Law Reports
WM  Wertpapier Mitteilungen
ZAS  Zeitschrift für Arbeits und Sozial recht
ZBI  Zentralblatt für die juristische Praxis
ZIP  Zeitschrift für Wirtschaftsrecht
ZMR  Zeitschrift für Miet und Rammrecht