

***Change of Circumstances and Judicial Power:  
A European Perspective of Contract Law***

Emanuele Tuccari, Catholic University of the Sacred Heart, Italy

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**Abstract**

An obligation should always be performed even when performance has become more onerous. However, if performance of a contractual obligation becomes extremely onerous because of an exceptional change of circumstances, the answer must be different. There are two traditional “schools of thought” and, consequently, two visions of court intervention in case of hardship: the first one proposes the execution or the termination of contract; the second one establishes instead a duty for the parties to renegotiate the original contract.

The European “soft law” approach drafts a “third way”: the parties are encouraged to reach an agreement to amend the original contract, but, if the parties fail, the court may (1) adapt the contract in order to make it reasonable and equitable or (2) terminate definitively the original contract. On the one hand, the choice between variation and termination of contract is a fascinating perspective to protect the position of the debtor (and, eventually, to preserve the contract). On the other hand, the combination of the two remedies – placed on the same level – may impose an undue sacrifice on the advantaged party, who would be forced, solely in light of the choice of the other, to either terminate an obligation worthy of being maintained or to bear an excessive economic burden aimed to adapt a contract which would otherwise be terminate. In this new context, emerged also a doctrinal debate in order to understand how the criteria of judicial intervention – based on general clauses and indeterminate notions – can operate in practice.

Keywords: change of circumstances; hardship; renegotiation; judicial power; termination; adaptation

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## 1. Introduction

The need to meet long-term interests increasingly causes economic actors to enter into long-term contracts that span an extended time for performance (Macneil, 1980; Joskow, 1985; Joskow, 1990; Ghestin, J., Jamin, C., Billiau, M., 2001, 355 ff.; Sacco, R., & De Nova, G., 2004, 693 ff.; Macario, 1996, 24 ff.).

Clearly, the longer a contract runs, the higher the risk that unforeseen events may occur in the exercise of the contract, altering the original equilibrium agreed upon by the parties, e.g. in case of hardship.

A well-known legal problem arises as to which of the two parties should bear the risk connected to a change of circumstances during the performance of the contract (Ridder, & Weller, 2014; Hondius, 2015; Dastis, 2015; Philippe, 2015; Lequette, 2015; Cerchia, 2015; Murga Fernández, 2015; Momberg, 2015).

In recent years, a significant international debate has emerged between two contending “schools of thoughts” (Schanze, 1997, p. 156)<sup>1</sup>: the first one – more sensitive to the protection of the original terms of the agreement and, ultimately, of the principle of party autonomy – recommends the execution or the termination of the original contract (Schwartz, 1992; Craswell, 1996; Martinek, 1998; Terré, Simler, & Lequette, 2013, 515 ff.); the second one – by emphasizing the changed equilibrium of the contract and, at the same time, the need to continue the relationship – proposes a *duty for the parties to renegotiate the original contract* (Fontaine, 1976; Schmitthoff, 1980; Horn, 1981; Lüttringhaus, 2013; for an overview of the two schools of thought, Nystén-Haarala, 1998; Momberg, 2011).

This paper examines the doctrine of hardship within the soft law instruments of E.U. harmonisation, by identifying their strengths and weaknesses, to ultimately assess whether the *Principles of European Contract Law* (P.E.C.L.)<sup>2</sup> and the *Draft Common Frame of Reference* (D.C.F.R.)<sup>3</sup> represent a real third “school of thought”<sup>4</sup>.

## 2. Hardship under the P.E.C.L.

Article 6:111 of the P.E.C.L. lays down the general principle that “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

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<sup>1</sup> In particular, Schanze expressly describes “two schools of thought”, corresponding to “two fundamental doctrinal reactions to the visible divergence between a relatively stiff “legal” treatment of discharge by court intervention and the relatively liberal treatment of re-negotiation in contracting practice” (Schanze, 1997, p. 156).

<sup>2</sup> The official version of the P.E.C.L., in English and French, has been published in: Lando, & Beale (Eds.) (2000).

<sup>3</sup> For the full text of the D.C.F.R. and the official notes, cf. von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll (Eds.) (2009).

<sup>4</sup> The analysis presented in this paper does not consider: the “UNIDROIT Principles”, which are not aimed to harmonise EU contract law but, more generally, international commercial contracts; the “Acquis Principles”, which are now substantially integrated in the D.C.F.R.; the *Common European Sales Law* (C.E.S.L.), which is limited to contracts of sale and few other types of contracts (e.g. “digital” contracts), without regulating all other long-term relationships. On the recent transfusion of part of the previous “soft law” projects into the “reductive” and “short-sighted” proposal of the C.E.S.L., cf. Castronovo, 2015, 283 ff.; Castronovo, 2013.

receives has diminished". However, in case of hardship as a result of a change of circumstances, the parties *are bound to enter into negotiations with a view to adapting the contract or terminating it*, if: 1. the change of circumstances occurred after the conclusion of the contract; 2. the change of circumstances could not have been reasonably foreseen at the time of conclusion of the contract, and; 3. the risk of this change would go beyond what can reasonably be expected to be borne by the contracting parties.

Following renegotiation, if the parties reach an agreement to amend the original contract, the problem of hardship is finally overcome.

Conversely, if the parties fail to reach agreement within a reasonable period, the P.E.C.L. provide for the possibility for the court to: 1. *terminate* the contract and determine timelines and terms; 2. *adapt* the original contract to distribute in a just and equitable manner the losses and gains due to the supervening events.

In either case, together with the termination or adaptation of the original contract, the court may award *damages* to be borne by the party that has not fulfilled the duty to renegotiate, by either refusing to negotiate or breaking off negotiations contrary to good faith and fair dealing.

## **2.1. The duty to renegotiate**

In regulating changes of circumstances, Article 6:111 P.E.C.L. recalls conditions well known to most European legal systems, outlining, at the same time, a particularly complex system of remedies.<sup>5</sup>

In fact, the conditions of hardship, unforeseeability of events at the conclusion of the contract, change of circumstances after the conclusion of the contract and exceedance of a certain threshold of contractual risk are not new, for example, to the Italian, Dutch or German lawyer.

By contrast, the complex remedial system deserves more attention.

In particular, the P.E.C.L. appear to establish a two-level remedial system.

The first level introduces a real *duty for the parties to renegotiate* in order to reach an agreement for either the termination or adaptation of the contract.

Two specific cases of unfulfillment of this obligation are provided: *refusal to negotiate* and *unjustified rupture of negotiations*. In this view, under Article 6:111, c.

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<sup>5</sup> The majority of the EU legal systems knows the same conditions of Article 6:111 PECL (e.g., Paragraph 313 of the German Civil Code, Article 6:258 of the Dutch Civil Code, Article 1467 of the Italian Civil Code, Article 388 of the Greek Civil Code, Article 437 of the Portuguese Civil Code, Paragraphs 936, 1052, 1170a of the Austrian Civil Code and Article 3571 of the Polish Civil Code). Conversely, no specific norm on hardship is provided for in the English, Scottish, Irish, French, Belgian, Czech and Slovak legal systems.

3, P.E.C.L., the party who refuses to negotiate or breaks off negotiations abusively is liable for damages due to the loss suffered by the other<sup>6</sup>.

## 2.2. The powers of the court under the P.E.C.L.

If the parties fail to reach an agreement within a reasonable time, starts the second-level remedy: upon request of the parties, the court may *adapt* or *terminate* the original contract, determining each time the terms of the adaptation or termination of the contractual relationship<sup>7</sup>.

The court is thus vested with *very broad powers* to be exercised under *general criteria*.

Given the overall attempt to continue the contract – as confirmed by the duty to renegotiate –, the adaptation criteria should be considered first.

Specifically, the P.E.C.L. provide that the court may “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”.

The formulation, based on general clauses, allows the court to evaluate all the circumstances of the *specific case* and to distribute each time differently the losses and gains between the parties.

Furthermore, an interesting doctrinal debate emerged about what could be considered “*just and equitable*” *ex art. 6:111 P.E.C.L.*: on the one hand, this expression draws criticism from *common lawyers*, who do not admit any external review of the contractual terms originally agreed upon by the parties (Teubner, 1998; McKendrick, 1999)<sup>8</sup>; on the other hand, the wording used causes the reaction of *civil lawyers*, always ready – especially in recent years – to adapt the contractual agreement by resorting to external factors other than the will of the parties (the so-called “hetero-integration”), e.g. the European common market or the principles of equality, solidarity and other fundamental rights recognized under the Treaty on European Union, the Charter of Nice or the Treaty of Lisbon (M. Barcellona, 2002; M. Barcellona, 2006, 124 ff., 253 ff.; Navarretta, 2005)<sup>9</sup>.

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<sup>6</sup> Art. 6:111 P.E.C.L. is considered, in this sense, as a part of the second “school of thought” (cf. *supra* § 1): see, among others, Schanze, 1997; M. Barcellona, 2006, 209 ff.

<sup>7</sup> According to Mazeaud, 2007, p. 2693, the court’s power to adapt the original contract in the light of supervening circumstances demonstrates that “pour le «législateur européen» le contrat n’est pas seulement la chose des parties, soumis en tant que tel à leur volonté autonome, seule habilitée et apte à anticiper et aménager les risques susceptibles d’intervenir au cours de l’exécution du contrat”.

<sup>8</sup> The concerns of the English lawyers in permitting an external control on the adaptation of the contract other than the will originally expressed by the parties were also recently confirmed by the observations of the Law Society of England and Wales with reference to the doctrine of hardship under the new proposal of the C.E.S.L.: “*The starting point should always be that if a party has undertaken to perform, it should do so. That party has accepted the risk that it may be impeded in its performance. Just because circumstances have changed should not excuse performance. We therefore consider that Article 89 (C.E.S.L.) should be deleted. It is productive of uncertainty and unpredictability of outcome*” (Law Society of England and Wales, 2012, 50, § 284).

<sup>9</sup> For the purposes of this paper, two different methods are combined here for purely expository reasons: one seems to outline an external control *ex fide bona* on the contractual settlement to take account of market values in the contract; the other seems to resort to values such as equality, solidarity

An intermediate position seems to be proposed by those who interpret the norm in the light of the good faith and seek to reach an implicit settlement of the interests based on what the parties themselves, faced with the change of circumstances unforeseen by contract, should have done (the so-called “auto-integration”). In this context, the equitable power of the court to distribute between the parties the consequences of the supervening circumstances must be exercised in compliance with the projection in good faith of the contractual *equilibrium* already reached by the parties on the situation yet to be settled. This position thus seeks to combine the principle of the will of the parties (and, therefore, of party autonomy), highly appreciated by “common lawyers”, and court intervention aimed at adapting the original contract, as favoured by “civil lawyers” (Castronovo, 2001a; Castronovo, 2001b).

Similar considerations (and distinctions) can be made with reference to the other option provided for in Article 6:111 P.E.C.L., i.e. termination of the contract “at a date and on terms to be determined by the court”. In this case, the court is only entrusted with the power to determine the conditions for the termination of the contract without predetermined criteria.

### **3. The evolution of the E.U. “soft law” approach: hardship under the D.C.F.R.**

Article III-1:110 D.C.F.R. opens by stating that “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”.

However, after confirming the general principle on the performance of the obligations, the D.C.F.R. addresses the problem of hardship by granting broad powers to the court.

To cope with the occurrence of hardship as a result of exceptional and unforeseeable events, Article III-1:110 D.C.F.R. provides that, after attempting to reach an agreement in good faith to amend the original contract, the debtor may request the court to either: 1. adapt the contract in order to make the obligation “reasonable” and “equitable” in the light of the supervening circumstances, or 2. terminate the original contract, fixing the date and terms of termination.

#### **3.1. From the duty to renegotiate to renegotiation as a precondition for judicial proceedings**

The most significant innovation introduced by Article III-1:110 D.C.F.R. as compared to Article 6:111 P.E.C.L. undoubtedly relates to renegotiation of the original contract between the parties<sup>10</sup>.

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and fundamental rights (recognised at E.U. level by the Treaty on European Union, the Nice Charter and the Treaty of Lisbon) in the adapted contract. On the former, cf. M. Barcellona, 2002 (and now in M. Barcellona, 2006, 124 ff., 253 ff.). On the latter, cf. Navarretta, 2005.

Similarly, it should be noted that the distinction proposed between common lawyers and civil lawyers is made especially for the sake of exposition, without any pretension to drawing an absolute (and Manichaeian) separation of the representatives of the different legal traditions of the western world. On this, cf. Brownsword, 2006, 53 ff., 69, 111 ff.; Whittaker, Zimmermann, 2000, 15 ff.

<sup>10</sup> As outlined above, the conditions for the application of the rules of the D.C.F.R. basically coincide with those of the P.E.C.L. The only (minor) difference between these two “soft law” instruments has

In particular, it rejects the “first level” of remedies provided for by the P.E.C.L., by removing the obligation for the parties to renegotiate.

Even the editors of the D.C.F.R., in their official notes, emphasize that “*the present Article [...] does not impose an obligation to renegotiate but makes it a requirement for a remedy under the Article that the debtor should have attempted in good faith to achieve a reasonable and equitable adjustment by negotiation*”. In this respect, “*there is no question of anyone being forced to negotiate or being held liable in damages for failing to negotiate*” (von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll, Eds., 2009, p. 713)<sup>11</sup>.

The position of the D.C.F.R. therefore differs from the remedial provisions of the P.E.C.L., as it renders the attempt in good faith to adapt the contract a mere precondition for court proceedings, without providing either a real *general duty to renegotiate* or *special remedies in case of unfulfillment of the obligation*<sup>12</sup>.

### **3.2. The powers of the court under the D.C.F.R.**

The provisions of the D.C.F.R. thus mark the transition from a complex two-level system of remedies to a single level.

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been identified in the explicitation of a precondition under Article III-1:110 D.C.F.R. which was already deemed necessary, though implicitly, in Article 6:111 P.E.C.L.: more specifically, it provides that “the change of circumstances must be *exceptional*” (von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll, Eds., 2009, p. 713). The intention was probably to limit the scope of applicability of the norm and, consequently, the power of the court in modifying the contract originally agreed upon by the parties.

<sup>11</sup> In the official notes, with reference to the Unidroit Principles, it is added that: “*The Unidroit Principles (art. 6.2.3.) adopt a similar basic approach but use a slightly different drafting technique. They provide that in case of hardship the disadvantaged party is entitled to request renegotiations and that only if there is a failure to reach an agreement within a reasonable time may the party resort to the court. However, as a matter of drafting there seems to be no need to provide that a party is entitled to request renegotiations. A party to a contract is entitled to request renegotiations at any time*” (von Bar, Clive, Schulte-Nölke, Beale, Herre, Huet, Storme, Swann, Varul, Veneziano, & Zoll, Eds., 2009, p. 713).

<sup>12</sup> In the opposite direction appears to be Article 89 of the recent proposal for a C.E.S.L., which would introduce a duty to renegotiate in case of hardship: “*1. A party must perform its obligations 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. Where performance becomes excessively onerous because of an exceptional change of circumstances, the parties have a duty to enter into negotiations with a view to adapting or terminating the contract. 2. If the parties fail to reach an agreement within a reasonable time, then, upon request by either party a court may: (a) adapt the contract in order to bring it into accordance with what the parties would reasonably have agreed at the time of contracting if they had taken the change of circumstances into account; or (b) terminate the contract within the meaning of Article 8 at a date and on terms to be determined by the court. 3. Paragraphs 1 and 2 apply only if: (a) the change of circumstances occurred after the time when the contract was concluded; (b) the party relying on the change of circumstances did not at that time take into account, and could not be expected to have taken into account, the possibility or scale of that change of circumstances; and (c) the aggrieved party did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances. 4. For the purpose of paragraphs 2 and 3 a 'court' includes an arbitral tribunal*”. The proposal, which would only apply to few contracts to be performed over a period of time (cf. *supra* § 1, fn. 5), has been heavily criticized, as we already mentioned here (cf. *supra* § 2.2., fn. 9), also by the Law Society of England and Wales.

Nevertheless, while differing with respect to renegotiation of the original contract, both the D.C.F.R. and the P.E.C.L. appear to show a strong continuity in entrusting the court with broad powers in case of hardship.

Like in Article 6:111 P.E.C.L., Article III-1:110 D.C.F.R. enables the court to *adapt* or *terminate* the original contract in case of hardship. However, the inevitable considerations already raised with reference to the P.E.C.L. are applicable here, because, once again, the broad powers granted to the court do not seem to be paralleled by specific criteria for adaptation and termination of the contract.

In particular, Article III-1:110 D.C.F.R. enables the court to amend the contract “in order to make it *reasonable* and *equitable* in the new circumstances”. Worded in a similar way to Article 6:111 P.E.C.L. (“in order to distribute between the parties in a *just* and *equitable* manner the losses and gains resulting from the change of circumstances”), the text of the Article III-1:110 D.C.F.R. substantially recalls the three hypotheses outlined above with reference to the adaptation criteria under the P.E.C.L. (on a position favourable to integrate the original contract with external values other than the parties’ will, Navarretta, 2012; Hesselink, 2008; differently, Eidenmüller, Faust, Grigoleit, Jansen, Wagner, & Zimmermann, 2008; McKendrick, 2013)

Similarly, the criteria for the termination of the contract provided for under the D.C.F.R. make reference – in this case, literally – to the formulation already used in the P.E.C.L. (“at a date and on terms to be determined by the court”); hence, the different cases outlined above with reference to the powers of the court to amend the contract can also apply here.

#### **4. Conclusions**

The analysis of the Article 6:111 P.E.C.L. and of the Article III-1:110 D.C.F.R. seems to suggest a third option in the context of hardship.

The new model represents the expression of a real third school of thought, which differs from both the first, only providing for execution or termination of the contract, and the second, imposing a legal duty for the parties to renegotiate. While encouraging the parties to reach an agreement to amend the originally agreed upon contract, the European “soft law” approach entrusts the court with the power not only to terminate, but also to adapt the contract<sup>13</sup>.

As a result, *very broad judicial powers* are recognised in terms of termination and adaptation of the contract, ensuring greater protection of the debtor who may always choose between termination or adaptation of the contract.

Nevertheless, the combination of the two remedies, placed on the same level, may lead to serious inconsistencies because, by removing any hierarchy and typological distinction in the treatment of contracts with prolonged or deferred performance, it eventually places the onus on the debtor to choose between termination and

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<sup>13</sup> In fact, a precursor of the “third way” of European “soft law” seems to be Article 6:258 of the Dutch Civil Code (1992), which also granted the court, in case of hardship, not only the power to terminate but also to adapt the original contract (Hartkamp, 1992).

adaptation of the contract. An undue sacrifice may thus be imposed on the advantaged party, who would be forced, solely in light of the choice of the other, to either terminate an obligation worthy of being maintained or to bear an excessive economic burden aimed to adapt a contract which would otherwise be terminated<sup>14</sup>.

Finally, as outlined in this paper, both the *Principles of European Contract Law* and the *Draft Common Frame of Reference* propose criteria – based on general clauses and indeterminate notions (such as “equity”/“reasonableness”) – for adaptation and termination of the original contract: a rather lively debate is going on among European lawyers in an attempt to find an interpretative solution able to ensure clear rules for judicial intervention on the originally agreed contract<sup>15</sup>.

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<sup>14</sup> In this perspective, the solution outlined in paragraph 313 of the B.G.B. appears more acceptable. While it allows for the possibility to either terminate or adapt the contract, the paragraph 313 B.G.B. sets up a “hierarchy of contractual remedies” whereby the debtor may only choose to terminate the original contract if an adaptation is not possible or cannot be requested by either party.

<sup>15</sup> In general, on the use – and abuse – of general clauses and undetermined notions in the European contract law and in the E.U. projects for harmonisation, cf., among others, Troiano, 2005; Troiano, 2009; Troiano, 2013; S. Patti, 2012a (also published in S. Patti, 2012b); S. Patti, 2013; Collins, 1994; Piraino, 2014; Piraino, 2015; Hesselink, 2004; Eidenmüller, Faust, Grigoleit, Jansen, Wagner, & Zimmermann, 2008; Busnelli, 2001.

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**Contact mail:** emanuele.tuccari@unicatt.it