Ius Comparatum – Global Studies in Comparative Law

Başak Başoğlu *Editor*

The Effects of Financial Crises on the Binding Force of Contracts - Renegotiation, Rescission or Revision

Springer

Ius Comparatum – Global Studies in Comparative Law

Volume 17

More information about this series at http://www.springer.com/series/11943

Académie Internationale de Droit Comparé
International Academy of Comparative Law

Başak Başoğlu
Editor

The Effects of Financial Crises on the Binding Force of Contracts - Renegotiation, Rescission or Revision

Springer

Editor
Başak Başoğlu
Istanbul Kemerburgaz University
Istanbul, Turkey

ISSN 2214-6881 ISSN 2214-689X (electronic)
Ius Comparatum – Global Studies in Comparative Law
ISBN 978-3-319-27254-2 ISBN 978-3-319-27256-6 (eBook)
DOI 10.1007/978-3-319-27256-6

Library of Congress Control Number: 2016930394

Springer Cham Heidelberg New York Dordrecht London

Printed on acid-free paper

Springer International Publishing AG Switzerland is part of Springer Science+Business Media (www.springer.com)

Preface

Growing interconnectedness of global economies facilitates the spread of the effects of the financial crises. Financial crises cause severe difficulties for persons to fulfill their contractual obligations. During the financial crises, performance of contractual obligations may become excessively onerous or may cause an extreme loss for one of the contracting parties and consequently destroy the contractual equilibrium and legitimate the interventions to the contract. But who will bear the risk arising from these circumstances?

This question, asked during the uncomfortable economic climate, leads to one of the most controversial dilemmas of the contract law: whether the binding force of the contract is absolute or not. In other words, unstable economic circumstances impose the need to devote special attention to review and perhaps to narrow the binding nature of a contract. Principle of good faith and fair dealing motivate a variety of theoretical bases in order to overcome the legal consequences of financial crises. All these theoretical bases are analyzed in this book with special focus on the available remedies, namely, renegotiation, rescission or revision, and the circumstances that enable the revocation of these remedies.

The legal approaches of various jurisdictions provide different answers and solutions to this problem. These differences seem to be determined predominantly by the frequency and intensity of financial crises in each jurisdiction and also by the influence of the financial, political, and social forces of the respective country.

The chapters in this collection are based on papers originally presented at the XIXth Congress of the International Academy of Comparative Law, held in Vienna, July 2014. I am grateful to all reporters who were willing to reformulate and submit their reports considering the debates, which aroused great interest and appreciation during the session in the Congress.

I would like to express my sincere gratitude to general reporter Prof. Dr. Rona Serozan who provided me the opportunity to edit this book. I also appreciate the unwavering support of my colleague Asst. Prof. Dr. Kadir Berk Kapancı. Also, I would like to thank the organizers of the conference, both at the Paris headquarters of the International Academy of Comparative Law and in Vienna. Last but not least, special thanks are due to Neil Olivier, Diana Nijenhuijzen, and their colleagues from Springer for their professional editorial efforts.

İstanbul 2015 Başak Başoğlu

Contents

Contributors

Mads Bryde Andersen Faculty of Law, University of Copenhagen, Copenhagen, Denmark

Aditi Bagchi Law School, Fordham University, New York, NY, USA

Başak Başoğlu Faculty of Law, Istanbul Kemerburgaz University, Istanbul, Turkey

Başak Baysal Faculty of Law, Istanbul University, Istanbul, Turkey

Rémy Cabrillac Faculté de droit, Université de Montpellier, Montpellier, France

Élise Charpentier Université de Montréal, Montréal, Québec, Canada

Mariana Fontes da Costa Law Department of the Faculty of Economics, University of Porto, Porto, Portugal

Nikolaos A. Davrados Loyola University New Orleans, College of Law, New Orleans, Louisiana, USA

University of Nicosia, Department of Law, Nicosia, Cyprus

University of Athens, School of Law, Athens, Greece

Dumitru Dobrev Legal Research Institute "Acad. Andrei Rădulescu" of Romanian Academy, House of Romanian Academy, Bucharest, Romania

Nataliya Georgievna Doronina Private International Law Department, Institute of Legislation and Comparative Law, Moskow, Russian Federation

Manuel Carneiro da Frada Faculty of Law, University of Porto, Porto, Portugal

Iva Tuhtan Grgić Faculty of Law, University of Rijeka, Rijeka, Croatia

Flora Huang School of Law, University of Leicester, Leicester, UK

Shugo Kitayama School of Law, Seikei University, Tokyo, Japan

Joseph Lookofsky Faculty of Law, University of Copenhagen, Copenhagen, Denmark

Gabrijela Mihelčić Faculty of Law, University of Rijeka, Rijeka, Croatia

Maja Bukovac Puvača Faculty of Law, University of Rijeka, Rijeka, Croatia

Julio César Rivera Faculty of Law, University of Buenos Aires, Buenos Aires, Argentina

Wojciech Robaczyński Faculty of Law and Administration, University of Łódź, Łódź, Poland

Anderson Schreiber Faculty of Law, Rio de Janeiro State University, Rio de Janeiro, Brazil

Marketa Selucká Faculty of Law, Masaryk University, Brno, Czech Republic

Natalia Gennadievna Semilyutina Private International Law Department, Institute of Legislation and Comparative Law, Moskow, Russian Federation

Rona Serozan Faculty of Law, Istanbul Bilgi University, Istanbul, Turkey

Marco Torsello School of Law, University of Verona, Verona, Italy

School of Law, New York University, New York, NY, USA

Chang-hsien Tsai Institute of Law for Science and Technology, National Tsing Hua University, Hsinchu, Taiwan

Marilena Uliescu Legal Research Institute "Acad. Andrei Rădulescu" of Romanian Academy, House of Romanian Academy, Bucharest, Romania

Nathalie Vézina Université de Sherbrooke, Sherbrooke, Québec, Canada

Horace Yeung School of Law, University of Leicester, Leicester, UK

About the Authors

Mads Bryde Andersen graduated from the University of Copenhagen in 1981 and practiced law as a Danish advocate in the years thereafter. In 1991, he was appointed Professor of Law at the same university. His authorship comprises contract law, the law of obligations, pension law, IT law, intellectual property law, and the law of advocacy. He defended his Dr.jur. degree in 1989 on the basis of his doctoral dissertation on computer liability issues (1988). He is chairman of the governing board of the Danish Financial Supervisory Authority (FAS) and a frequent arbitrator in domestic Danish and international arbitrations.

Aditi Bagchi is Professor of Law at Fordham University Law School. She teaches in the areas of contract and labor law. Her research concerns the nature of contractual obligation, contract interpretation, and questions in political and moral philosophy as they arise in contract. Professor Bagchi obtained her J.D. from Yale Law School, an M.Sc. in Economic and Social History from Oxford University, and an A.B. in Government and Philosophy from Harvard College.

Başak Baysal is Associate Professor of Civil Law at Istanbul University Faculty of Law. She obtained both her bachelor degree in law and her doctorate in private law from Istanbul University and her LL.M. degree from Paris II Panthéon-Assas. She is member of Executive Committee of International Association of Legal Sciences and member of Association Henri Capitant des amis de la culture juridique française, Société de législation comparé, European Law Institute, and Freunde des Max-Planck-Instituts.

Rémy Cabrillac is Professor at the Faculty of law of the University of Montpellier (France). He has published many books including Law of Obligations, The Codifications, General Introduction at Law, Dictionary of Law, Matrimonial Law, and more than 200 articles. He has participated at many conferences throughout the world about his specialities.

Élise Charpentier is Professor at the Faculté de droit of Université de Montréal. She holds bachelor degrees in civil (LL.B.) from Université de Sherbrooke, a Diplôme d'études approfondies (D.E.A.) in private law from Université Paris 2, and a doctorate (D.C.L.) from McGill University. Her ongoing areas of research include contracts, property, and secured transactions.

Mariana Fontes da Costa is Assistant Lecturer at the Law Department of the Faculty of Economics at the University of Porto and lectures also in postgraduate courses at Porto Business School. She is also a member of the Legal and Economic Centre of the Faculty of Law at the University of Porto (CIJE), researching mainly in the area of contract law.

Nikolaos A. Davrados is Visiting Professor of Law at Loyola University New Orleans College of Law. He also holds a Teaching Fellowship in Law at the University of Athens, Greece, and is Assistant Professor of Law at the University of Nicosia, Cyprus. He teaches and writes in the areas of civil law, conflict of laws, immigration law, and international business transactions.

Dumitru Dobrev is Researcher at the "Andrei Rădulescu" Law Research Institute attached to the Romanian Academy. In 2014, he received his doctoral thesis in private law "Legal Means to Preserve Debtor's Patrimony" at the same institute. Since 1999 he is barrister and IP counsel from 2006. His areas of research include law of obligations, bankruptcy law, commercial law, and intellectual property law.

Nataliya Georgievna Doronina is Vice Director of the Center for Economic and Legal Studies at Private International Law Department of the Institute of Legislation and Comparative Law under the Government of Russian Federation. She obtained her bachelor degree from Moscow State Institute of Foreign Relations (Faculty of Economy) in 1967 and her doctor of law degree from Moscow State Institute of Foreign Relations upon completion of her postgraduate degree in 1996. She worked as a researcher, senior researcher, leading researcher, Chief of Department of Private International Law, and Deputy Director of the Center for Economic and Legal Studies of the Institute of Legislation and Comparative Law under the Government of Russian Federation. Her research focuses mainly on the problems of investment law, foreign investments, private international law relating to the foreign investments regulations, and comparative law.

Manuel Carneiro da Frada is Professor of Law at the Law Faculty of the University of Porto. He has published numerous articles and several books in the fields of civil and commercial law, as well as legal theory, areas in which he mainly focuses his teaching and research activities.

Iva Tuhtan Grgić was born in 1977 in Rijeka. Since 2001, she has been working as a research assistant at the Department of Civil Law within the University of Rijeka Faculty of Law. She defended her doctoral dissertation "Contract of Inheritance" in

2014 at University of Zagreb Faculty of Law. She has published several scientific papers in the field of civil law and presented papers in various national and international conferences.

Flora Huang is Lecturer in Commercial Law at the School of Law, University of Leicester. Prior to that, she was Lecturer in International Business Law in the University of Hull. She completed her doctorate at the School of Oriental and African Studies (SOAS), University of London. She has worked in international organizations such as the Basel Convention in Geneva and the Office of Legal Affairs of the United Nations Headquarters in New York. She was also a legal consultant in a Chinese bank.

Shugo Kitayama is Professor of Law at Seikei University Law School in Tokyo. He teaches in the areas of contract law and other law of obligations. His research concerns especially the practical and philosophical problems of the revision of long-term contracts after the conclusion of contracts and the area of medical law. Professor Kitayama obtained his M.L. from University of Tokyo, an M.A. on International Relations from International University of Japan, and a B.L. from University of Tokyo.

Joseph Lookofsky first studied law at New York University (J.D. 1971). He is a Member of the New York State Bar and was in-house legal counsel for United Artists Corporation. He later studied Danish law at the University of Copenhagen (Cand.jur. 1981; Dr.jur. 1989) and joined the Law Faculty there in 1981. His principal areas of research and teaching are contractual obligations, sales law (domestic and international), comparative law, and private international law. He serves as Denmark's Correspondent for UNCITRAL and is a Titular Member of the International Academy of Comparative Law (Académie Internationale de Droit Comparé).

Gabrijela Mihelčić is Assistant Professor of Civil Law at the Faculty of Law, University of Rijeka. Her principal research interest is property law. She has published several scientific papers and chapters in books in the field of civil law. She presented papers in various national and international conferences in Croatia and neighboring countries.

Maja Bukovac Puvača is Associate Professor of Civil Law at the Faculty of Law, University of Rijeka. Her principal research interest is tort law. She has published several scientific papers and chapters in books in the field of civil law. She presented papers in various national and international conferences in Croatia and neighboring countries.

Julio César Rivera is a regular member of the Academia Nacional de Derecho de Buenos Aires as of November 1999; correspondent member of the Academia Peruana de Derecho; former president of the Argentine Comparative Law

Association; former president of the Capítulo Rioplatense del Club Español del Arbitraje and member of the ICC Latin America Group; vice-president at Centro de Mediación y Arbitraje Comercial (CEMARC) – (Commercial Arbitration Centre); correspondent member of the International Institute for the Unification of Private Law (UNIDROIT – Rome); and member of the Asociación Internacional de Juristas Andrés Bello (París).

Wojciech Robaczyński is member of Faculty of Law and Administration of University of Lodz. He is the author of numerous publications on the civil, commercial, and financial law. He is particularly interested in the change of contractual relations and public procurement. He gives several lectures and seminars, also on the contractual law.

Anderson Schreiber is Professor of Civil Law at the State University of Rio de Janeiro (Brazil). He is a Doctor (Ph.D.) in Comparative Private Law at the Università degli studi del Molise (Italia); master in Civil Law at the State University of Rio de Janeiro. He is Public Attorney for the State University of Rio de Janeiro and Partner of the law firm Schreiber Domingues Cintra Lins e Silva Advogados. He is author of The Prohibition of Contradictory Behaviour (Venire Contra Factum Proprium), 2005, New Paradigms for Civil Liability (2007), Rights of Personality (2011), and Civil Law and Constitution (2013). He is also a legal expert and arbitrator in judicial and arbitration proceedings in Brazil and abroad.

Marketa Selucká is Associate Professor at the Department of Civil Law, Faculty of Law of Masaryk University in Czech Republic. She focuses mainly on consumer protection and lease. She has published many articles and textbooks on consumer protection, leases, and other civil law issues.

Natalia Gennadievna Semilyutina is Director of the Center of Comparative Legal Studies at the Private International Law Department of the Institute of Legislation and Comparative Law under the Government of Russian Federation. She obtained her bachelor degree in Law (with honors) in 1987, her postgraduate degree in 1989, and her doctorate of law degree in 2005 from Moscow State Institute of Foreign Relations. She worked as a lecturer at the chair of private international law in the Moscow State Institute of Foreign Relations. Between 1994 and 2010, she worked as an adviser, vice-chief of the Law Department of the Moscow Interbank Currency Exchange. In 2010, she joined the Institute of Legislation and Comparative Law under the Government of Russian Federation and she is working as chief of the Foreign Legislation Department – director of the Centre for Comparative Legal Studies since 2015. Her main area of research is the problems of investment law, foreign investments, financial market regulations, private international law relating to the foreign investments regulations, and comparative law.

Rona Serozan is Professor of Civil Law at Istanbul Bilgi University School of Law since 2007 and emeritus Professor of Civil Law at Istanbul University School of

Law. He holds his bachelor degree in law from Istanbul University and his doctorate degree from Tubingen University. He published several books and articles in Turkish, German and English.

Marco Torsello is Professor of Comparative Private Law at Verona Law School and currently Hauser Global Visiting Professor at NYU, School of Law. His previous appointments include the Research Professorship at Bologna Law School and Visiting Professorships at NYU, Sciences Po, Fordham, Columbia University, University of Pittsburgh, and several others in Italy and abroad. His research interests and teaching activities focus on comparative business law and international business transactions, and he is the author of several books and articles in English and Italian.

Chang-hsien Tsai, LL.B., LL.M. (National Taiwan University), LL.M. in Corporate Law (New York University), J.S.D. (University of Illinois), is an Associate professor of Law and Business at Institute of Law for Science and Technology, College of Technology Management, National Tsing Hua University, Taiwan (NTHU). His research interests are in the areas of corporate law, securities regulation, and financial market regulations. Many of his research results have been published in renowned academic journals in Taiwan and the United States, such as National Taiwan University Law Journal, Academia Sinica Law Journal, and Syracuse Journal of International Law and Commerce. He joined the NTHU faculty in 2010 and was granted New Faculty Research Award in 2013.

Marilena Uliescu is Professor and Honored scientific researcher, former head of the Private Law Department of the Legal Research Institute within the Romanian Academy, former head of the National Institute of Magistracy and associated member of the International Academy of Comparative Law.

Nathalie Vézina has been a Professor at the Faculté de droit of Université de Sherbrooke, Québec, Canada, since 1992. She holds bachelor degrees in civil and common law (B.C.L., LL.B.) from McGill University, a Diplôme d'études approfondies de droit privé from Université Robert Schuman – Strasbourg III, and a Doctorat de droit comparé from Université Panthéon Assas – Paris II. She specializes in the fields of obligations and civil liability, comparative law, and higher education pedagogy.

Horace Yeung is Lecturer in Commercial Law at the School of Law, University of Leicester. He was Lecturer in Law at the School of Law, University of Exeter between 2010 and 2012, after reading accountancy and law at the Chinese University of Hong Kong, Lancaster, and Oxford. He is author of *Chinese Companies and the Hong Kong Stock Market* (Routledge, 2014, with Flora Huang). He was a Sir Edward Youde Scholar and recipient of the Confucius Institute Highly Commended Prize.

Abbreviations

ADR	Alternative Dispute Resolution
AJDA	Actualité juridique de droit administrative (France)
Art.	Article
Art.	Article (s)
BAROC	The Bankers Association of the ROC
B.R.	Cour du Banc du Roi du Québec OU/OR Recueil de la Cour du Banc du Roi
Bs. As.	City of Buenos Aires
c.	Contre
C.A.	Cour d'appel du Québec OU/OR Recueil de la Cour d'appel (Soquij)
CC	Civil Code
C.c.B.C.	Code civil du Bas Canada
CCP	The Taiwanese Code of Civil Procedure
C.c.Q.	Code civil du Québec
C. de D.	Cahiers de droit (Québec)
CE	Conseil d'etat (France)
ch.	Chapter/Chapitre
CNCiv.	National Civil Court of Second Instance (Argentina)
CNCom.	National Commercial Court of Second Instance (Argentina)
CNFed.	National Federal Court of Second Instance (Argentina)
CPA	The Consumer Protection Act
C.Q.	Cour du Québec
C.S.	Cour supérieure du Québec OU/OR Recueil de la Cour supérieure (Soquij)
CSN	National Supreme Court of Justice (Argentina)
D	Recueil Dalloz
DL	Decreto-Lei
Doc. Jud.	Judicial Doctrine Magazine [Revista Doctrina Judicial]
ED	El Derecho Magazine [Revista El Derecho]

éd.	Édition
EU	European Union
EUR	Euros
FCPA	The Financial Consumer Protection Act (Taiwan)
FSC	The Financial Supervisory Commission (Taiwan)
GBP	British sterling pounds
GDP	Gross domestic product
GFC	The Global Financial Crisis
HBOS	Halifax Bank of Scotland
JA	Jurisprudencia Argentina Magazine [Revista Jurisprudencia Argentina]
JCP	Juris-Classeur périodique (Semaine juridique)
J.E.	Jurisprudence Express (Soquij)
Lehman Bros.	Lehman Brothers Holdings Inc.
LL	Argentine Legal Magazine La Ley [Revista Jurídica Argentina La Ley]
L.R.C.	Lois révisées du Canada
MOF	The Ministry of Finance
no.	Number
NTD	New Taiwan Dollar
QCCS	Décision de la Cour supérieure du Québec en libre accès (www.jugements.qc.ca)
RBS	Royal Bank of Scotland
R.C.S.	Recueil de la Cour suprême du Canada
RDC	Revue Des Contrats
R.D.I.	Recueil de droit immobilier (Soquij)
R.D. McGill	Revue de droit de McGill (Université McGill)
RDPyC	Communitarian and Private Law Magazine [Revista De Derecho Privado y Comunitario]
R.G.D.	Revue générale de droit (Université d'Ottawa)
RIDC	Revue internationale de droit comparé
R.J.Q.	Recueil de jurisprudence du Québec (Soquij)
R.L. / R.L.n.s.	Revue légale / Revue légale nouvelle série (Wilson et Lafleur)
RLDC	Revue Lamy Droit Civil
RLRQ	Recueil des lois et des règlements du Québec
ROC	Republic of China (Taiwan)
RTDCiv.	Revue Trimestrielle de Droit Civil
SCJ Mendoza	Supreme Court of Justice of the Province of Mendoza (Argentina)
SFIPC	The Securities and Futures Investors Protection Center
Soc. lég. comp.	Société de législation comparé
STJ	Portuguese Supreme Court of Justice
t.	Tome
TRC	Coimbra Court of Appeal
TRG	Guimarães Court of Appeal
TRLx	Lisbon Court of Appeal

TRP	Porto Court of Appeal
UK	United Kingdom
US	United States
USD	United States dollars
vol.	Volume
WWII	The Second World War

Part I
General Report and Original Questionnaire

Chapter 1
General Report on the Effects of Financial Crises on the Binding Force of Contracts: Renegotiation, Rescission or Revision

Rona Serozan

Abstract Upon the outbreak of financial crises, financial assets suddenly lose a large part of their value. The collapse of financial institutions, insolvencies of companies, liquidity bottlenecks, not repaid credits, immensely rising interest rates cause severe difficulties for persons to fulfill their contractual obligations and destroy the equilibrium of the mutual obligations established initially in the contract. The frequency and intensity of financial crises and their negative repercussions on the traditional binding force of contracts are really immense. They evidently motivate the search for juridical solutions of the problem. While the economists search for economic precautions against and solutions for the financial crisis, the jurists look after juridical precautions and solutions. There are two dominant respective golden rules on the legal ground to be applied during financial crises. These rules are "pacta sunt servanda" and "nominalism". The difficult mission of the jurist is to find the ideal proportion between two extreme poles. The options are whether to stick on the principles of "pacta sunt servanda" and "nominalism" or to respect the principle of loyalty (fairness), which is also considered as sacred. This chapter aims to analyze 20 impressive national reports from Argentina, Brazil, Canada (Québec), Croatia, the Czech Republic, Denmark, France, Germany, Greece, Italy, Japan, Poland, Portugal, Romania, Russia, Singapore, Taiwan, the United Kingdom, the United States and Turkey with regard to the effects of financial crises on the binding force of contracts: renegotiation, rescission or revision.

This article is also published in the book "Turkish National Reports to the XIXth Congress of the International Academy of Comparative Law" edited by Rona Serozan and Başak Başoğlu, and published by Vedat Kitapçılık upon whose approval, was updated later by the author.

R. Serozan (✉)
Faculty of Law, Istanbul Bilgi University, Istanbul, Turkey
e-mail: rona.serozan@bilgi.edu.tr

B. Başoğlu (ed.), *The Effects of Financial Crises on the Binding Force of Contracts - Renegotiation, Rescission or Revision*, Ius Comparatum – Global Studies in Comparative Law 17, DOI 10.1007/978-3-319-27256-6_1

1.1 Introduction: The Weight of Financial Crises and Their Legal Repercussions

A financial crisis means *in concreto* the collapse of financial institutions, the tightening of access to credit, insolvencies of companies, liquidity bottlenecks, devaluation of the purchasing power of money, increase of product costs, uncovered credits, suddenly and extremely rising interest rates on loans.

These unfortunate manifestations of financial crises cause severe difficulties for persons to fulfill their contractual obligations and disturb the equilibrium of the obligations established initially in the contract.

The frequency and intensity of financial crises and their negative repercussions on the traditional binding force of the contracts evidently stimulate the search for juridical solutions of the problem. While the economists search for economic precautions against and solutions for the financial crisis, the jurists look after juridical precautions and solutions.

The fact that explicit contractual "force majeure" and "hardship" – clauses of adjustment like resolutory and suspensive conditions or *ad hoc* indices like "*echelle mobile*" provisions as a remedy against such unexpected crises are not so often taken into account, intensifies the problem even to a higher degree.

Recently, the problem and its possible alternative means of solution are literally booming. Thus, the choice of "the effects of financial crises on the binding force of contracts" as a topic for the 19th Congress of the International Academy of Comparative Law is meaningfully important.

Within this framework, the "Questionnaire" presented to the national reporters exposes the actually booming problem in detail. The national reporters were invited to answer in their reports, as far as possible, the listed questions, within the understanding, that they, if they wish, may address also additional issues linked to the theme.

1.1.1 Questionnaire

1. Does your national law take into consideration the effects of financial crises on the contracts or does it strictly adhere to the principle of "pacta sunt servanda"?
2. If the effects of financial crisis on the contracts are taken into consideration, what is the theoretical basis for the acceptance: (1) the principle of loyalty and good faith? (2) the "clausula rebus sic stantibus" theorem? (3) complementary interpretation of the contract based on the hypothetical intentions of the parties? (4) the doctrine of the cessation of the basis of the contract "Wegfall der Geschäftsgrundlage"? (5) the idea of frustration of the contract? (6) the theory of unpredictability (imprévision)?
3. According to your national law what are the conditions in order to accept such an exceptional fact: (1) extraordinariness? (2) unforeseeability? (3) not being

obliged to carry the burden of risk of crisis according to the legal or contractual risk allocation? (4) not having caused the unfavourable circumstances? (5) not having performed the obligation yet or at least performed it with reservation?
4. What are the appearances of exceptional circumstances, which could justify an intervention on the frustrated contract according to your national law: (1) excessive onerousness (hardship)? (2) distortion of the equivalence of exchange? (3) any other appearance?
5. What would be the legal consequence in such a case under your national law: (1) revision (adjustment) of the contract? (2) termination of the contract? (3) renegotiation? (4) any other remedy? (5) is there any priority between these remedies? (6) is it necessary to apply to the court in order to benefit from these remedies or not?
6. In case the contract is adjusted or terminated can the counter-party who is injured by these measures claim any indemnity of equity (Aufopferungsanspruch) according to your national law?

Briefly, the Questionnaire was focused on (1) searching the means for harmonizing the contradictory principles of "pacta sunt servanda" and "fairness", (2) listing the theoretical instruments for intervention into the contract, (3) framing the typical appearances of the exceptional circumstances, (4) classifying the conditions and (5) finally determining the legal consequences (remedies) for contracts, destabilized due to financial crises.

Upon this questionnaire, we have received 20 impressive national reports from Argentina, Brazil, Canada (Québec), Croatia, the Czech Republic, Denmark, France, Germany, Greece, Italy, Japan, Poland, Portugal, Romania, Russia, Singapore, Taiwan, Turkey, the United Kingdom and the United States. Here, once more, we would like to express our deepest gratitude to the authors for their excellent reports comprising illuminating contributions for the solution of the actually booming problem.

A sincere thanks goes to my young colleague, Assistant Professor Dr. Başak Başoğlu who assisted me during the most difficult task to synthesize the reports.

Nota bene: It must be acknowledged that if the farsighted parties include in their contracts an explicit clause of adaptation like resolutory and suspensive conditions or ad hoc indexes, the problems to be discussed will not arise; they will be solved peacefully according to the voluntary clauses of adaptation.

1.2 Essential Rules Related to the Problem: Principles of Pacta Sunt Servanda, Nominalism and Guarantee Liability for Money Debts

During financial crises, one of the most controversial problems arising in the framework of the Law of Contract is whether this Law can still be governed by the three respective golden rules: (a) pacta sunt servanda, (b) nominalism and (c) guarantee

liability of the debtor of monetary obligations or can an intervention into the contract be approved according to the general rules of discretion referring to contractual solidarity, reasonableness and good faith.

While adding nominalism and guarantee liability to the golden rule of pacta sunt servanda, we assume that financial crises have their negative effects mostly on the debtor of "monetary" obligations.

The classic principle of pacta sunt servanda means that the provision of the agreements must be kept. In other words, obligations arising from a contract must be performed at any cost.

This principle insists on the literal performance of contracts in spite of the fact that events occurring after the conclusion of the contract have caused heavy burdens for one party to fulfill his/her obligations or disturbed the initial equivalence of the mutual obligations.

The principle of pacta sunt servanda is based on the view that once the risks have been allocated by the parties during the conclusion of the contract, they should, as a general rule, not be reallocated in a different manner later.

The allocation of the risk that the financial basis may change in the future, burdens on the obligor. With a French proverb expressed; "contracter c'est prévoir."

The principle is strict: The contract is binding and it must be performed in accordance with its terms. Performance must be rendered as long as possible, regardless of the burden that may impose on the performing party.

Unless an impossibility of performance in the true sense of the word occurs, no obligor may refuse to fulfill its obligations invoking the subsequent change of financial circumstances.

The sanctity of this "contract strictness" (stare pactis) is emphasized in the French Civil Code in a well-known formula: "Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise." The well-known formula of the Code Civil.

As in its English translation: "Lawfully formed contracts have the force of law as between the parties. They may be revoked only by mutual consent, or for causes authorized by law."

Besides the French Civil Code, the same wording appears in the article 1372 of the Italian Civil Code, and with similar statutory formulation in Croatia (article 9 of Civil Obligations Act), Denmark (section 1 and DL 5-1-1- Contracts Act), Japan (article 9 of Civil Code), Poland (article 354 of Civil Code), Portugal (article 406 of Civil Code), Romania (article 1271 of Civil Code), Russia (article 309 of Civil Code) and Québec (article 1439 of Civil Code).

Even in jurisdictions where there is no explicit statement in connection with the principle of pacta sunt servanda, it is recognized as a judicial tradition in those jurisdictions, such as Argentina, Brazil, the Czech Republic, Germany, Taiwan and Turkey. Likewise, in common law countries (the United Kingdom, the United States and Singapore), the principle of pacta sunt servanda is accepted as a judicial tradition that is recognized as the principle of "sanctity of contracts".

The second golden rule is the principle of nominalism. According to this principle, the contractually fixed amount of debt remains constant despite of the change of the purchasing power of money. This principle rooted in common usage is equally regarded as sacred.

The principle of nominalism is based on the denomination of the currency, but not on its value. Simply, the principle of nominalism disregards the change of value of the currency.

The Code of Québec formulates the principle of nominalism succinctly in art. 1564:

> Where the debt consists of a sum of money, the debtor is released (only) by paying the nominal amount due in money which is legal tender at the time of payment.

The third golden rule refers to the rigid guarantee liability of the debtor of monetary obligations which burdens all the risks arising from financial turbulences on the debtor. In other words, a debtor of money guarantees "ex lege" the payment.

According to this strict guarantee liability, money, as a subject of an undetermined "obligation in kind", cannot perish. Genus non perit! For the debtor of money there is no excuse of impossibility. Money has to be obtained at any cost. According to a German proverb: "Geld muss man haben!"

As mentioned in the German report, the principle according to which "one has to possess money" implements that every debtor is responsible for his financial means to be sufficient in order to fulfil his obligations.

Noticeably and consequently, in many countries an obligation for the debtor of money to pay an interest is provided even in case of excused delay.

As emphasized in almost all national reports, all these principles are fundamental principles of the Law of Contracts that are rooted lastly in the basic idea of legal security.

Even though, these three golden rules may very well be outshined by the general rules of discretion regarding contractual solidarity, good faith, fairness and reasonableness, which are referred to an equally important basic idea of the Law of Contracts, namely the idea of justice, equity and solidarity, as we shall acknowledge soon.

1.3 Concessions from the Golden Rules for the Sake of Loyalty and Fairness

During the financial crises, although no fault falls on his part, one of the contracting parties may find himself bound with a contract, which has become entirely disadvantageous or even burdensome for him.

Thus, compromising solutions and respectively exceptions to the principles of pacta sunt servanda, nominalism and guarantee liability seem necessary as a result of the financial crisis in the light of the overwhelming general rule of good faith and fairness.

Like many other legal principles, the principles of pacta sunt servanda, nominalism and guarantee liability are not taken into consideration as an absolute value against the principles of good faith, fairness and reasonableness. After all even the French Civil Code stipulates the fact that "Les conventions doivent être exécutées de bonne foi" (The contracts must be performed in good faith) in the same provision, where it sanctifies the principle of pacta sunt servanda.

Three reform projects (Catala - art. 1135 -, Terré - art. 92 -, Chancellerie - art. 136 -), interestingly in France, where the most conservative attitude towards the possibility of intervention into the contract due to financial crises was asserted, show clearly the change of course towards the possibility of intervention into the contract.

Also in Québec, which has so far been overly conservative in this matter, many jurists argue forcefully in favour of admitting a pragmatic intervention into the contract.

Undoubtedly, it is a difficult task for the jurists to find the ideal balance and harmony between the necessity of sticking to the principles of "pacta sunt servanda", "nominalism" and "guarantee liability" on one hand and respecting the principles of "contractual solidarity", "good faith", "fairness" and "reasonableness", on the other hand.

Essentially, the topic of this report is concerned with the struggle of finding such a middle course; in other words to reach the golden medium (aurea mediocritas).

1.4 Appearances of Subsequent Impairments Justifying an Intervention into the Contract

The jurists, both in national and international level, have sought to find a balance between the binding force of contract and the necessity to protect reasonableness in the process of performing contractual obligations.

In extreme situations where the financial crisis fundamentally alters the equilibrium of the contract in an unacceptable measure or oversteps the limits of foreseeable sacrifice for the debtor, an intervention into the binding force of the contract appeared inevitably on the agenda of the jurists.

It is difficult to reach to a compromising solution between the two contradictive poles, namely "pacta sunt servanda" and "fairness".

The generally accepted criterion while searching for a compromising solution between the contradictory poles can be underlined as follows:

When a financial crisis reaches up to an extent at which:

(a) the performance of the contract goes over the limit of foreseeable sacrifice and causes an excessive onerousness on the debtor,
or,
(b) the equivalence of the reciprocal accomplishments of the contracting parties is destroyed in an extremely high degree,

Only then an intervention into the contract (namely an adjustment or termination of the contract) may be taken into consideration.

Particularly, to insist on the binding force of contract in such extreme situations, which may cause several difficulties on the disadvantaged party is judged as obviously unfair.

These "shocking cases", to use the wording in the American report, which justify an intervention, correspond in last instance to the severe cases (cas criant) qualified as "a manifest abuse of a right".

In this sense, the contract is considered as binding only as long as the initial circumstances remain reasonably similar. But whenever a fundamental change in the recent circumstances alters the essential basis of the contract and radically transforms the scope of the parties' performances, then an intervention into the contract is justified.

The harmonic balance between the antagonistic principles of "pacta sunt servanda at any cost" and "performance only in the limits of equity" is herewith successfully established.

Nota bene: Exceptional circumstances which could justify an intervention into the contract may also arise due to non – financial reasons: (a) The case of excessive onerousness due to moral reasons. (For example the difficulty to cohabit with a partner after separation.) (b) The cease of the main purpose of a contract (For example the cancellation of an event exclusively for which a tenancy agreement was concluded.).

These cases however were not treated here, because they could not be related to financial crises.

1.5 Theoretical Instruments Activated for an Intervention into the Contract on the Ground of Fairness

Various juridical concepts evolved in favour of the disadvantaged party reveal how different, difficult and simultaneously sophisticated jurists establish their concessions from the principles of pacta sunt servanda, nominalism and guarantee liability.

The sophisticated theoretical instruments mobilized for achieving an ideal compromise about the critical balance between the binding force of contract and fairness, respectively for justifying an exceptional intervention to the contract can be lined up in an overall view as follows:

Right at the beginning it must be pointed out that all the theoretical instruments overlap with each other. It is difficult to make a clear distinction between these overlying implements.

(a) Principle of loyalty and good faith,
(b) Clausula rebus sic stantibus,

(c) Assumption of such a clause by the means of complementary interpretation of the contract,
(d) Theory of the cessation (lapse) of the basis of the contract (Wegfall der Geschäftsgrundlage),
(e) Idea of frustration of the contract,
(f) Théorie de l'imprévision.

Undoubtedly, the principle of loyalty and good faith or fairness well reasoned placed at the top is the fundamental point of origin, in other words, the umbrella of all the legal instruments activated to justify an intervention.

The British concept of "reasonableness (appropriateness) and the German concept of "Zumutbarkeit" of the fulfilment of the obligation correspond widely with this concept of loyalty, good faith and fairness.

The constitutional dimension of the omnipotent principle is unmistakable. It is after all rooted in the basic principles of almost all the Constitutions. This is a good example for the influence of human rights and basic constitutional rights on private law.

The overwhelming role of the principle of loyalty and good faith is underlined in the national report of Canada (Québec) as the rationale invoked by those who favour the recognition of an obligation to cooperate and to renegotiate as a way to curtail the traditional application of pacta sunt servanda. Moreover the Taiwanese national report emphasizes that prior to incorporating a special provision on changed circumstances to the civil code in 1999, the courts applied the rule of loyalty and good faith without any reservation.

It is interesting to observe that according to the Greek report, the judges sometimes prefer to apply directly the general principle of loyalty and good faith, although there exists a special and detailed provision dealing with the unforeseeable change of circumstances.

Evolving from the principle of loyalty and good faith, the classic theorem of "clausula rebus sic stantibus" seems to be the most popular instrument and in the meantime the final resort for an intervention into the contract due to changed circumstances.

"Clausula rebus sic stantibus" is in reality an assumed (implied) tacit clause according to which the contract is binding as long as the circumstances existing at the stage of the conclusion of the contract remain substantially the same. If the assumption fails the contract is to be revised.

It is constructed upon the basic idea that a contract is legally binding unless there is a fundamental change in the circumstances considered by the parties at the time of the conclusion of the contract. In other words the binding force of contracts persists only to the extent that the basic presuppositions of the contract remain unchanged.

Thus, if in case of a fundamental change in circumstances after the conclusion of the contract, the essential basis of the parties' consent to be bound by the contract is totally altered and the extent of the parties' performances under the contract is radically transformed, the contract can be adjusted or terminated.

The doctrine of clausula rebus sic stantibus, originally produced in connection with the conflicts in the sphere of International Law of Treaties focuses on extraordinary and unforeseen circumstances that may arise after the formation of the contract.

This doctrine is especially applied in cases where the performance of the contractual obligation has become extremely burdensome or where the balance of mutual obligations has been fundamentally disturbed.

The concept of assumed (implied) clausula rebus sic stantibus, after all the product of the rule of loyalty and good faith, is, as mentioned before, the mostly favoured and mobilized theoretical instrument to justify an intervention into the contract. Almost all national reports refer to this theorem as a final resort of justification for intervention.

"Complementary interpretation of the contract" on the basis of hypothetical intention of the parties in favour of the disadvantaged party is, as a matter of fact, a modern version of the theorem of clausula rebus sic stantibus.

In Japan and Turkey, the technique of complementary contract interpretation replaces the clausula rebus sic stantibus doctrine. Particularly, the Turkish doctrine follows this sophisticated way of interpretation obviously influenced by the closely related Swiss doctrine and jurisdiction.

The jurists choosing this technique of interpretation admit frankly that they operate in reality with a fiction of intention just like the "clausula rebus theoreticians" do.

Nota bene: In Inheritance Law the unforeseeable change of circumstances occurring after the testamentary disposition are considered exclusively in the framework of complementary interpretation on the basis of the implied (fictitious) intention of the testator.

According to this approach, the precise content of the contract is to be determined in line with the rules of interpretation, which refer to the parties' mutual wills to be found implicitly.

If the mutual wills cannot be derived from the contract, the contractual gaps (loopholes) shall be filled (completed) upon reconstructing their hypothetical wills in the light of the principle of good faith by complementary interpretation.

Nota bene: If it is assumed that the possibility of intervention is founded on the complementary interpretation, that is on the parties' intention, then this possibility may be voluntarily excluded in the framework of free disposal, derived from the freedom of contract. In legal alternatives founded on the violation of imperative principles like loyalty and good faith however, such a voluntarily exclusion shall inevitably not be admissible.

A concept developed in Germany also from the theorem of clausula rebus sic stantibus is the doctrine of the cessation (the lapse) of the basis of the contract (Wegfall der Geschäftsgrundlage), which was first introduced by Oertmann, afterwards developed by Larenz, then accepted by the legal doctrine as well as the jurisdiction and finally regulated under § 313 BGB upon the reform of German Law of Obligations in 2002.