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CHANGE OF CIRCUMSTANCES UNDER ETHIOPIAN CONTRACT LAW: A COMPARATIVE ANALYSIS WITH THE APPROACHES OF OTHER JURISDICTIONS

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Abstract

The famous legal maxim- pacta sunt servanda represents the principle of the binding force of a contract, which dictates that the contracting parties are fully bound by the terms and conditions of their contract. In most jurisdictions, less controversial exceptions to the principle of the binding force of a contract have been allowed, such as where the performance of the obligation by a party becomes impossible because of objective circumstances. However, there are ongoing debates as to the measures to be taken where the unforeseen change of circumstances only renders the performance by a party more onerous or cumbersome without making it objectively impossible. This article seeks to examine the varying approaches that the Ethiopian legal system and some selected foreign jurisdictions have adopted to address the controversy. Drawn on comparative doctrinal research methodology, it finds, among others, that the Ethiopian laws unqualifiedly subscribe to the classic thinking of strict enforcements of contracts. With this, the law implies that the effects of a change of circumstances should be regulated by the contracting parties and not by the courts.

Keywords: *change of circumstances, contract, Ethiopia, pacta sunt servanda, ribus sic stantibus*

I. INTRODUCTION

Traditional doctrine in both common law and civil law legal systems have solidly supported the doctrine of pacta sunt servanda- agreements must be kept though the heavens fall. This strict enforcement of contracts presupposes that the law recognizes the binding nature of promises. The foundation of any contractual agreement is deeply embedded in the binding and legally enforceable nature conferred on it by the law. Suppose a promise is without that binding force and a party making that promise can freely renege on its terms without suffering any legal

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consequences. That promise could be anything but not a contractual promise. This implies that all sorts of promises do not qualify as "contracts" and become binding; and only the law can confer that binding nature. Those promises that fulfil the criteria of the law result in valid contracts whose terms and conditions are enforceable as "the law of the parties."

Nonetheless, exceptions have been admitted to the principle of binding force of a contract, particularly where the performance of the obligation becomes impossible because of objective circumstances. This kind of exception seems less controversial as it has acquired almost universal acceptance among most legal systems. Thus, excuses from the performance of a contract in case of objective impossibility based on traditional legal principles such as force majeure can be commonly found under the laws applicable in most jurisdictions.1 But there are still ongoing debates while dealing with the kind of treatments to be accorded to the situations where the unforeseen supervening change of circumstances only renders the performance required from one of the contracting parties more costly or cumbersome, without making it objectively impossible.2 The theoretical argument in favour of making the binding nature of contract absolute is said to be derived from the classical contract theory of the 19th century.3 The principle of binding force of contracts is, therefore, aptly described not only as the legal effect of contracts but also as the expression of the contracting parties' freedom and autonomy of will.

The feature of the law relating to certainty would be better served when recognition is provided to the doctrine of change of circumstances, and the parties are entitled to certain reliefs in the event of unforeseen fundamental change of circumstances. Pertaining to this, a certain writer argued that "business matters could gain more certainty, and security of transactions is more ensured if the parties were certain of being able to obtain an equitable revision of the contract in the case of a really unforeseeable change of circumstance.4

Accordingly, this article seeks to examine the extent to which the Ethiopian law responds to the problem of change of circumstances and how such responses are to be compared and contrasted with solutions provided in other legal systems. A comparative survey is made by relying on the major legal instruments including the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (PICC), and the Draft Common Frame of Reference (DCFR), and the contract laws of England, United States, France and Germany. These jurisdictions are purposively selected because their legal regimes have passed through critical stages of development and could be of immense help in reforming one's own laws. This article is organized into five sections. Section one introduces the subject matter of the discussion and sets the scene. Section two formulates the conceptual basis of the doctrine of change of circumstances and the principle of binding force of contract, and further highlights

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[1] Egidijus Baranauskas & Paulius Zapolskis, *The Effect of Change in Circumstances on the Performance of Contract*, 4(118) JURISPRUDENCE 197-216 (2009) at 198.

[2] *Id*.

[3] M Jude**, "**The Underpinnings of Contractual Relations- when can a promise be broken?" ARELLANO LAW AND POLICY REVIEW, Vol. 8, No. 2: (pp. 99-127), (2007), at 1.

[4] Guiding Principles of European Contracts Law, (2000), at 56.

the major views existing in the literatures regarding the relationship existing between the two theories. Section three dwells on the analysis of the general approaches and the specific solutions that the jurisdictions selected for the survey of this study have adopted in addressing the issues of change of circumstances. The approaches to changes of circumstances under Ethiopian laws are presented under the fourth section. And section five briefly concludes the major findings and recommends the way forward.

II. CONCEPTUAL FRAMEWORKS OF THE PRINCIPLE OF BINDINGFORCE OF CONTRACTS AND EXCEPTIONS

In its early introduction into the civil law, the doctrine of change of circumstances or *clausula rebus sic stantibus* was applied as an implied condition complementing the express terms of contracts, and this reduced contradictions between the doctrine and the other core principle of contract law- *pacta sunt servanda.*[5]

A. The Notion of Pacta Sunt Servanda

The principle Pacta Sunt Servanda is a Latin for "agreements must be kept." In its traditional sense, the term *pactum* (agreement) merely signified a formal redemption from liability for personal injury.[6] This is perhaps because ancient Roman laws lacked a comprehensive contract law regime, and merely embodied various classifications of liability without recognizing a comprehensive system of contractual responsibility.[7] Two sets of agreements were common with different outcomes- a *pactum* proper, which was actionable and enforceable at law and *nuda pacta* ("bare pacts"), which consisted of unsanctioned and non-actionable agreements that were not enforceable at law. The latter category was unenforceable for want of an action at law to make them binding, and were simply thought to be "natural obligations."

Both Canon law and Natural law played significant roles in shaping the principle of *pacta sunt servanda* as it is today.[8] The former supported the binding force of any kind of agreement mainly based on religious and moral considerations. [9] And for the latter, the obligation to perform promises arises from the nature of immutable justice. In this connection, a prominent natural law philosopher Hugo Grotius (1583-1645) wrote: *"good faith was the foundation of justice and that God Himself would act contrary to His nature if He did not make good on His promises."*[10] In the current global economic order, the principle of *pacta sunt servanda* is

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[5] C Tabor, "Dusting Off the Code: *Using History to Find Equity in Louisiana Contract Law*," LOUISIANA LAW REVIEW, Vol. 28, No. 2 (2008), at 555-556. As an implied term, the doctrine embraced the idea that, upon entering into a contract, parties bound themselves to perform, *provided the circumstances existing at the moment of conclusion remained the same.*

[6] I Kull, "*About Grounds for Exemption from Performance under the Draft Estonian Law of Obligations Act*,"JURIDICA INTERNATIONAL, Vol.VI, (2001), at 46.

[7] P Mazzacano, "*Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG"* NORDIC JOURNAL OF COMMERCIAL LAW, Vol. 2 (2011), at 2.

[8] *Id*. At 9.

[9] *Id.*

[10] *Id*. At 10.

categorized as one of the most important legal norms.[11] The principle represents not only natural justice, but also an economic necessity- since commerce would be unthinkable in the absence of enforceable promises. Accordingly, based on this principle, not only the parties to a contract must keep their agreement and be bound to one another but the courts must also uphold the will of the parties to be bound.

B. The Doctrine of Clausula Rebus Sic Stantibus

The first crucial expression that provided the basis for the current idea of the doctrine *rebus sic stantibus* was said to be found in Plato's example that *"a sword does not have to be returned to a depositor who has become insane"*[12] St. Augustine included this example in his teachings; after its affirmation by St. Thomas Aquinas, other natural lawyers also picked up the idea and began to expand it.[13] This expansion resulted in the Romanist writers seeing *rebus sic stantibus* as an implied condition in every contract. The growing popularity of the doctrine, however, was cut short by the rise of the ancient political and economic theories of liberalism and capitalism, both of which were particularly hostile to this equitable notion.[14]

According to earlier writers, private choices matter for the law mainly due to their contents.[15] The substantive contents of the parties' obligations and the purposes in view of which they oblige themselves were treated as legally relevant considerations for determining the contentsand enforceability of contracts. In this view, the justice of contracts does not solely arise from the presence of genuine agreements; particularly, in the case of unforeseen change of circumstances affecting the balance of the parties' obligations, the substantive contents of contract were treated to be relevant for the law. This conception of contractual justice generally fits with the historical application of *rebus sic stantibus* as an implied condition of contracts during its early introduction to civil law.[16]

Some modern theories, however, have tried to explain the way choices matter for the law independent of their objects. These explanations are generally based on two broader classesof theories, which may be referred as: 'autonomy' and 'revealed-preference theories.[17] Theseare the

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[11] The principle of pacta sunt servanda got wider recognition in Public International Law and it binds not only parties to ordinary contracts but also sovereign states. For instance, the principle is recognized under Article 26(1) of the 1969 Vienna Convention on the Law of Treaties.

[12] Tabor, *supra* note 5.

[13] *Id*. St. Thomas Aquinas gives a very clear explanation of the Church's view in his Summa Theologica, stating: A man does not lie, so long as he has a mind to do what he promises, because he does not speak contraryto what he has in mind: but if he does not act to keep his promise, he seems to act without faith in changing his mind. He may, however, be excused **...** if circumstances have changed with regard to persons or the business at hand.

[14] S Litvinoff, "Force Majeure, *Failure of Cause and Théorie de l'Imprévision: Louisiana Law and Beyond,"* LOUISIANA LAW REVIEW, Vol. 46, No. 1(1985), at 46.

[15] J GORDLEY, "CONTRACT LAW IN THE ARISTOTELIAN TRADITION," IN PETER BENSON (ED.), THE THEORY OF CONTRACT LAW: NEW ESSAYS, (2007), at 266.

[16] As noted, before, the theories of *pacta sunt servanda* and *clausula rebus sics stantibus* first emerged out of moral considerations. Thus, during the early medieval period, *rebus sic stantibus* applied as a moral principle that was complementary to the binding nature of contracts in order to address the unfair effects that unforeseen events would cause in the contents of the obligations assumed by contracting parties.

[17] M. EISENBERG, "CONTRACT THEORY," IN PETER BENSON (ED.), THE THEORY OF CONTRACT LAW: NEW ESSAYS, (2007), at 235: but, unlike autonomy theories of contract, which have been explicitly worked out by

normative theories that underpin much of the subsisting oppositions and legal resistance against recognition of the doctrine of change of circumstances. Autonomy theorists have asserted that:

> *[I]t is just the fact that one has voluntarily promised something on certain terms that justifies the law in holding that one is legally obliged to perform. One need not have so promised in the first place. But, once having done so, one cannot reasonably expect the law of contract to allow him/her to escape from the promise, whatever its terms: If it were to do so, the law would fail to seriously take one's moral power to assume self-imposed obligations; it would dishonour one's capacity for autonomy and treat one as an infant.*[18]

According to this conception of "freedom", the opposition against the doctrine of change of circumstances has two major aspects. First, it has been asserted that the doctrine allows courts to exercise a discretion that is not only excessive but could also be dangerous.[19] Second, the concept of freedom has been taken to further justify strict enforcement of promises according to autonomy theories.[20] Thus, strict performance of contract is crucial both for the law and for morals because respect for the pledged word is a matter of honour.

On the other hand, the revealed-preference theories have adopted a goal-based approach in justifying the value of choice. These theories are essentially the applications of normative or welfare economics to contract law.[21] Welfare economics leads naturally to the theory of contracts that posits that contracts are Pareto efficient in the absence of a defect in consent because if both parties did not believe the contract made them better off, they would not have made it.[22] Accordingly, they generally hold that the law enforcers contracts so that people's preferences can be satisfied to the greatest extent possible.

III. CHANGE OF CIRCUMSTANCES IN CONTRACTS: COMPARATIVE ANALYSIS OF SELECTED INTERNATIONAL AND NATIONAL INSTRUMENTS

This part presents the approaches adopted towards the problem of change of circumstances in selected major international instruments such as the UNIDROIT Principles of International Commercial Contracts (PICC),[23] the Principles of European Contract Law (PECL),[24] the Draft Common Frame of Reference (DCFR) and the experiences of some national jurisdictions such as English, U.S, Germany and French laws.

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various commentators, revealed-preference theories of contract tend to be implicit as theories of contract law generally, although they are often relatively explicit in the analysis of individual contract issues.

[18] P BENSON, "THE UNITY OF CONTRACT LAW," IN P BENSON (ED.), THE THEORY OF CONTRACT LAW: NEW ESSAYS, (2007), at 199.

[19] Litvinoff, *supra* note 14, at 5.

[20] However, providing support for the strict enforcements of contracts based on the concept of "freedom" has been regarded as logically absurd. As a certain writer has argued, "the power to promise exists only because, and to the extent that, it enhances our moral lives...the fact that having the power to promise is valuable does not mean that there is value in giving people the power to enslave themselves."

[21] Eisenberg, *supra* note 17, at 236.

[22] *Id*.

[23] UNIDROIT Principles of International Commercial Contracts (2010), (hereinafter referred to as PICC).

[24] O Lando and H Beale (eds.), Principles of European Contract Law Part I and II, (1999), (hereinafter referred to as PECL).

A. UNIDROIT Principles of International Commercial Contracts (PICC): The Doctrine of Hardship

Articles 6.2.1, 6.2.2 and 6.2.3 of the PICC address the problem of change of circumstances under the title of "hardship." As indicated in the official comments, the term "hardship" in describing the problem was said to be mainly inspired by its wider familiarity among international commercial parties, as could be particularly evidenced by the widespread use of the so-called "hardship clauses" in international contracts. Article 6.2.1 provides that "*where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship."* Pursuant to Article 6.2.2, hardship exists *where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.*

The notion of hardship, as recognized under Articles 6.2.2 serves two purposes- it defines the nature of the burden and illustrates other factors that must coexist with the burden to make it a ground of excuse. The practical application of this provision begs addressing the question "when is the equilibrium of a contract fundamentally altered?" Thus, by common sense, one may argue that an alteration amounting to 50% or more of the cost or the value of the performance is likely to involve a 'fundamental' alteration justifying invocation of the doctrine. The events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract and that the disadvantaged party should prove that the events causing it could not have been taken into account at the time of conclusion. Moreover, it must be proved that the hardship events could not reasonably have been taken into account, are not within the party's control, and the risk was not assumed. The parties should address it if the events are foreseeable and within the party's control. Let us assume that the contracting parties agreed for the sale of Wallaga coffee at a fixed price for a four-year term, notwithstanding the acute political tensions in Wallaga zones, the contractual place of performance. A year later, war erupts in all Wallaga zones between the government and armed groups, causing a drastic rise in coffee price. Assuming further that the PICC governs the present case, the seller cannot invoke the doctrine of hardship because "a rise in the price of coffee in times of war was not unforeseeable to a reasonable person."

B. The Draft Common Framework of Reference (DCFR)

The DCFR is another important instrument that originated from the initiatives of European legal scholars. The DCFR addresses the issue of change of circumstances in Article III-1:110. While adopting the doctrine of *pacta sunt servanda*, it recognizes that there can be situations in which, due to exceptional change of circumstances that could not have been reasonably taken into account upon its conclusion, it would be manifestly unjust to hold the obligor to the original terms provided in the contract. In such cases, the court may adapt the terms of the contract to the changed circumstances or terminate it altogether. Thus, as provided in the second paragraph of Article III.-1:110, where *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: (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.[25] Let me illustrate this with example. Let us say the contracting parties agreed to import a commodity where the purchase price is expressed in Ethiopian birr. Let us further say that the value of the Ethiopian birr was depreciating slowly in terms of US dollar prior to contracting. A few months later, the Ethiopian birr is depreciated by 90% following the political crisis in different parts of the country. Assuming that the DCFR is applicable to the present case and *ceteris paribus*, this could allow the court to vary the obligation for the sake of equity or terminate the obligation on terms and conditions it thinks proper.

C. Principles of European Contract Law (PECL)

The PECL incorporates explicit and elaborate rules applicable to address the problem of change of circumstances in its Article 6:111. This provision could perhaps be taken as one particular example reflecting the PECL's aim to facilitate future development of the law. The provision begins by confirming the basic principle of pacta sunt servanda under its first paragraph,[26] before it provides recognition to the exception based on the doctrine of change of circumstances. The first paragraph of Article 6:111 begins by providing confirmation to the cardinal principle of contract law- pacta sunt servanda. However, since the binding force of contracts is recognised as a "principle," and not as an absolute rule, an exception is admitted to it on the ground of a change of circumstances under the second paragraph of the provision. Thus, right next to the principle that a contract should be performed even if performance has become more onerous, the second paragraph of Article 6:111 of the PECL provides that, 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. This provision requires the contracting parties to renegotiate new terms and conditions to address the problems of change of circumstances. Alternatively, the parties are also encouraged to terminate the contract if performance or renegotiation is impracticable. The problem associated with the duty to renegotiate is that there is no exact standard available to define the conduct that is required by the contracting parties. Accordingly, renegotiations may fail because the duty cannot be easily enforced by law.

D. English Law: The Doctrine of Frustration

From historical perspective, it appears that English law has not been largely (if at all) influenced by the medieval doctrine of *clausula rebus sic stantibus*. Prior to the nineteenth century, the debtor's responsibility for non-performance of most contractual promises under English law had

[25] Incidentally, note that Article III-1:110 of the DCFR introduces the possible legal effects of application of thedoctrine of change of circumstances, before it even defines the concept under its third and last paragraph. This is similarly the case for Article 6:111 of the PECL discussed below.

[26] Article 6: 111 (1) of the PECL stipulates 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 receives has diminished."

been based on the rule of absolute liability.[27] This rule began to be relaxed with the case of *Taylor v Caldwell* (1863), from which the modern doctrine of frustration developed.[28] In this case, Caldwell (defendant) owned The Surrey Gardens and Music Hall (hall) and agreed to rent it out to Taylor (plaintiff) for four separate days at a rate of one hundred pounds per day. The parties understood that Taylor wished to host a series of concerts at the hall, and their contract included provisions relating to the provision of concert supplies and equipment. However, before the performance that the music hall was to be used for, there was a fire and the hall was destroyed. The destruction was such that Taylor could not host the concerts there as planned. The claimant sued for breach of contract. Pursuant to the doctrine of *pacta sunt servanda*, the defendant would be liable to the claimant for non-performance. Due to the harshness of the doctrine of *pacta sunt servanda* in that scenario, it was held that the defendant was released from their obligations under the doctrine of frustration. Accordingly, the doctrine of frustration of contract generally concerns the effects that supervening circumstances, unforeseen at the time of contracting, have upon the rights and duties arising from a contractual arrangement. It is a catch-for-all concept that generally deals with cases where unforeseen events, occurring after the time of contracting, render performance illegal, impossible, or destroy the known utility which the stipulated performance had to the parties.[29]

Several cases have confirmed that English law rejects the provision of legal reliefs based on any notion of impracticability or changed circumstances not amounting to impossibility. This position has been plainly stated in *Davis Contractors Ltd v Fareham Urban* DC (1956)[30] in which the House of Lords decided that the events which caused the delays were within the range of changes which could reasonably be expected to happen during the performance of a contract for building houses, and the changed circumstances did not make performance radically different from what was expected. In this particular case, the plaintiff, a building company, contracted to build 78 houses for a local authority. The job was to take eight months, at a price of £94,000. Due to labor shortages, the work ended up taking 22 months and costing the builders £21,000 more than they had planned. The defendant was willing to pay the contract price, despite the delay. As the contract price did not cover their costs, the plaintiff (the building company) sought to have the contract discharged on the grounds of frustration, alleging that the labor shortages made performance fundamentally different from that envisaged in the contract. In fact, the underlying target of the plaintiff was to seek payment on a *quantum meruit* basis to recover its costs.

It was a contract to build houses, and houses were in fact built. The problems encountered by the builder made his performance more burdensome to him, but they did not change the nature of what he was expected to do; therefore, the contract was not frustrated. According to the frequently quoted statements made by Lord Radcliffe in the case: *"It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play; rather*

[27] C. Turner, Contract Law, (2nd ed., 2007), at 185.

[28] R. Stone, The Modern Law of Contract, (8th ed., 2009), at 531-532.

[29] Litvinoff, *supra* note 14.

[30] Contract Law, Cavendish Law Cards Series (4th ed., 2004), at 137. See also, G Samuel, Law of Obligations and Legal Remedies, (2nd ed., 2001), at 379-380.

there must be as well such a change inthe significance of the obligation that the thing undertaken would, if performed, be a differentthing from that contracted for."[31]

E. The United States Law

When it comes to the general structure of the US contract law, there is no unified body of lawfor all member states of the country.[32] This, however, is not without exception. For instance, Article 2 of the Uniform Commercial Code (UCC) which was enacted by the Federal legislator in 1979 that governs the sales of goods is particularly important in discussing issues relating to change of circumstances and contracts in general. Despite the difference with regard to their scopes, the UCC and the Restatement Second provide essentially similar substantive definitions for the doctrine of impracticability. Section 615 of the UCC provides the following definition:

> *Except so far as a seller may have assumed a greater obligation and subject tothe preceding section on substituted performance: (a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made...*

The Second Restatement defines the doctrine in Section 261 in a more concise manner, and provides that: "[W]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary." Pursuant to the definitions enshrined in the above provisions, impracticability may be invoked where performance becomes impracticable without the parties' fault, due to an unexpected event or contingency, the non-occurrence of which was fundamental to the essence of the contract.

Various court decisions also envisage the recognition of the doctrine of commercial impracticability in the United States. The doctrine of commercial impracticability appeared for the first time in *Mineral Park Land Co. v. Howard* (1916), when the Californian Supreme Court extended the doctrine of impossibility and held that performance did not have to be impossible, but merely impracticable, i.e., it could only be done at an excessive and unreasonable cost.[33] Thus the doctrine of impracticability represents a softened approach of the common law's historical requirement of objective impossibility as a ground of excusing non-performance of contracts. The provisions of the Restatement Second and the UCC have welcomed this relaxation of the common law's traditional test of objective impossibility by similarly providing that performanceneed not be actually or literally impossible; rather, commercial impracticability, or unforeseen and unjust hardship, will excuse non-performance.[34]

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[31] G. Treitel, The Law of Contract, (11th ed., 2003), at 881.

[32] R. A. Mann and B.S. Roberts, Essentials of Business Law and the Legal Environment, (12th ed., 2016), at 165.

[33] S W. Hubbard, "*Relief from Burdensome Long-term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment*," MISSOURI LAW REVIEW, Vol. 47, (1982), at 84.

[34] Mann & Roberts, *supra* note 28, at 310.

Although many of the decisions passed by the courts in impracticability cases are said not to have endorsed this position, it is still possible to find decisions in which it has been otherwise endorsed. For instance, in *Asphalt International, Inc v Enterprise Shipping Corp, S.A.,* Asphalt International had chartered the T-2 tanker Oswego Tarmac from its owner, Enterprise Shipping Corporation. While loading asphalt cargo, the vessel was rammed and sustained extensive damage. Because the cost of repair was prohibitive because the ship had been declared a total loss, Enterprise ultimately sold the vessel. Asphalt disagreed with this Enterprise's decision and instituted an action for breach of contract for failure to repair the Oswego Tarmac. The court took the position that an impracticability defence may be upheld even though the event causing the loss was foreseen at the time of contracting, where the magnitude of the loss doesnot indicate that a party has tacitly accepted the risk of that loss.[35] Thus, impracticability may be invoked where unexpected events taking the form of physical or legal impossibility prevent performance of the contract.[36]

There are some decided court cases that provide interesting examples of the situations in which performance may be deemed to be impracticable. For instance, in *Mineral Park Land Co v Howard* (1916), Mineral Park (plaintiff) owned land in a ravine and Howard (defendant) was under contract with the public authorities to construct a bridge over the ravine. The parties concluded a contract in which the defendant agreed to remove all of the gravel and earth necessary to complete construction of the bridge from the plaintiff's property. It was estimated that 114,000 cubic yards would be needed and defendant agreed to a per-cubic-yard payment schedule. Plaintiff brought an action against defendant alleging, *inter alia*, that defendant had not removed from its property any more than 50,131 cubic yards. Defendant admitted that it removed only 50,131 cubic yards because that was all that was available on plaintiff's land. The court, ruling in favor of plaintiff, held that while defendant's removal of the excess 50,131 cubic yards from the plaintiff's site was financially impracticable, it was not impossible. This case was said to provide the earliest common law authority for the doctrine itself, in which impracticability of performance was deemed to be present in case of extreme and unreasonable cost increase.

F. The German Law: The Doctrine of *Störung der Geschäftsgrundlage*

The doctrine of *Störung der Geschäftsgrundlage*, also referred to as the Disturbance of Foundation of Transactions, is one of the cardinal principles of German contract law. The original position of the German law was based on the traditional liberal theory of contract, according to which preserving the justice of contractual relations was assumed to require nothing

[35] In this particular case, the plaintiff chartered a tanker from the tanker's owner. The tanker sustained extensivedamage when it was struck by another vessel. Under the contract, the defendant was responsible for routine maintenance, including minor damage repairs, but there was no allocation of risk for major damage. The cost of repair was $1.5 million, which was twice the pre-collision value of the ship. When the plaintiff instituted a breach of contract claim for failure to repair the tanker, the court held that, although certain risks were allocated by contract, the extensive damage to the tanker was a contingency, the non-occurrence of which was a basic assumption of the parties at the time of contracting. Therefore, the defendant's duty to repair was commercially impracticable. A similar example in which foreseeability of the risk of loss was rejected as a determinative factor to deny impracticability defence could also be found in in *Aluminum Company of America v. Essex Group, Inc. (hereinafter the Alcoa case) (1980)*: See J R Trentacosta, "Commercial Impracticability and Fair Allocation under UCC 2-615," Michgan Bar Journal, (2010), at 43.

[36] M. A. Frey, T.H. Bitting, P. H. Frey, An Introduction to the Law of Contracts (3rd ed., 2000), at 335.

more than ensuring procedural fairness upon its conclusion. Hence, the contents of contracts as such (as long as there is no violation against the relevant provisionsof the law or *bonos mores*) were not regarded to furnish sufficient ground for intervention of the court.[37] The application of the doctrine was recognized as *praeter legem,* before its incorporation in the current Section 313 of the German Civil Code (the *Burgerliches Gesetzbuch*t (BGB).

The German contract law reform carried out in 2002 was said to be the most comprehensive one since the enactment of the BGB. Article 313 of the BGB contains three sub-articles. Situations that may be covered under the scope of application of the doctrine are defined in the first two Sub-articles. Judicial adaptation of the contract also figures out as the principal effect of application of the doctrine from these two sub-articles. The last sub-article recognizes termination as the secondaryeffect of the doctrine to which the court may resort in exceptional and proper cases.

Article 313 (1) of the BGB establishes an objective standard for the purpose of determining the presence of change of circumstances warranting the application of the doctrine. Under the second sub-article of the provision, a subjective evaluation is to be applied for the same purpose. Thus, under this later provision, initial absence or subjective mistaken assumption ofthe parties relating to the motivation or circumstances reasonably forming the basis of the contract may trigger application of the doctrine.

G. The French Law: the doctrine of imprévision

A ground-breaking and radical legal reform has recently been implemented in French law of obligations. The reform has brought considerable changes to the French Civil Code that had been in place for over two hundred years starting from its enactment in 1804. The reform was realised through the enactment of Ordinance Nr. 2016-133 that came into effect on 1st October 2016.[38] In such areas as change of circumstances, new and innovative provisions that brought development of the law to an entirely new stage have been incorporated. The new French Civil Code has opted to expressly regulate the problem of change of circumstances under Article 1195 of the Code. The first sub-article of Article 1195 provides: *"If a change of circumstances that were unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract..."* This provision sets forth three conditions that should be satisfied in order to invoke the doctrine of change of circumstances:

First, there must have been an unforeseen change of circumstances. While this test makes sense, it has been pointed out that the requirement is not sufficiently clear as to the degree of extraordinariness or unexpectedness the change should exhibit to successfully invoke the

[37] B.Markesinis, H Unberath, & A. Johnston, The German Law of Contract: A Comparative Treatise, (2nd ed., 2006), at 46.

[38] S Rowan, "The New French Law of Contract," International and Comparative Law Quarterly (2017, British Institute of International and Comparative Law), available in LSE Research Online at: http://eprints.lse.ac.uk/75815/, at 1.

doctrine.[39] For the purpose of comparison, the doctrine of *imprévision* that has been accepted in the field of administrative contract law required a *disruption of circumstances* and this seems much more restrictive than a mere *change* of circumstances.[40] Second, the unforeseen change of circumstances must render a 'party's obligations under the contract *excessively onerous* to perform. With respect to this element, precisely ascertaining the situations in which performance may be said to have become '*excessively* onerous' would become the real challenge. Third, the party invoking application of the doctrine must not have accepted the risk of the change of circumstances.

The second sub-article of Article 1195 sets out the consequence that would come if the unaffected party refuses the request to renegotiate or if the renegotiation fails to settle the matter. The provision reads:

> *In the case of refusal or the failure of renegotiations, the parties may agree to terminate the contract from the date and on the conditions which they determine or to be determined by court to according to parties' agreement. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.*

According tothis second sub-article, therefore, the parties can also turn to the judge and ask him to adapt the terms of the contract to the changed circumstances. But it is good to emphasis here that the provision requires "common agreement" of the parties before adaptation by the court can be realized.

IV. APPROACHES TO CHANGE OF CIRCUMSTANCES UNDER ETHIOPIAN LAW

The rules applicable to contracts in general are set forth in Book IV, Title XII of the Ethiopian Civil Code.[41] Special rules that will preside over these general rules are further provided with respect to the various types of special contracts particularly regulated in the special parts of the Civil Code. As its general policy orientation, the Ethiopian Civil Code promotes a strict principle of *pacta sunt servanda*. As discussed in the following paragraphs, other than some scattered provisions that may be of relevance, the Civil Code generally does not incorporate a comprehensive rule that expressly limits the principle of binding force of contracts on the ground of change of circumstances. However, important derogations have been introduced to this most celebrated principle of the Code in the area of administrative contracts through incorporation of special theories that are generally inapplicable to private law contracts. Particularly, the French theory of *imprévision* has found its way into the special part of the Ethiopian Civil Code regulating administrative contracts.

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[39] B Fauvarque, "*Towards an Important Reform of the French Civil Code*," MONTESQUIEU LAW REVIEW, Issue No.3(2015), at 9.

[40] A Downe, "The Reform of French Contract Law: a Critical Overview," Revista da Faculdade de Direito – UFPR, Curitiba, vol. 61, n. 1, jan./abr. 2016, at 56.

[41] CIVIL CODE OF THE EMPIRE OF ETHIOPIA, Proclamation No. 165/1960, NEGARIT GAZETA 19th year No. 2, 5th May, 1960, Addis Ababa (hereafter "CIVIL CODE").

A. Freedom of Contract vis-à-vis the Principle of Binding Force

The prominence of the principles of freedom of contracts in the Ethiopian Civil Code could be observed from the very definition of "contract" provided in Article 1675 of the Ethiopian Civil Code. This provision states that: "*a contract is an agreement whereby two or more persons as between themselves, create, vary or extinguish an obligation of a proprietary nature."* This essentially indicates the primacy of the consent of the parties in order to create, vary or terminate contractual obligations. The Civil Code further illustrates the basic tenet of the freedom of contracts in Article 1711 by providing affirmation to the private parties' freedom to define the nature and contents of their undertakings subject to the limitations that may be prescribed by mandatory provisions of the law in the interest of public policy. Article 1731 of the Code additionally reinforces this freedom through explicit confirmation for the obligatory nature of lawful contractual terms freely agreed upon as between private parties.[42] Thus, the Civil Code recognizes freedom of contracts and *pacta sunt servanda* as the core principles of the law. The Code also contains provisions that expressly recognize the role of the principle of good faith in relation to various specific aspects of contracts.[43]

B. Relevance of Exceptions Relating to Variation

The provisions of the Civil Code relating to variation of contracts give further specific expressions to the above core principles of freedom of contracts and *pacta sunt servanda*. The provisions embody the basic theme of the classical will theories of contracts that try to explain contracts simply as the expressions of private wills, the modifications of which should also proceed from the same expressions. In this sense, the Ethiopian law seems to implicitly assume that the parties are always in perfect positions to regulate the risk of supervening change of circumstances based on their freedom of contracts to provide contractual terms applicable to that effect. Since the assumption is that the parties are perfectly in a position to regulate the effects of such risks whenever they wish to do so, the law sees no reason to provide authorization for the courts to intervene in determining the manner by which the costs arising from the said risks should be allocated.[44]

Accordingly, in relation to variation, Article 1963 provides that: 'The court may not vary a contract or alter its terms on the ground of equity except in such cases as are expressly provided

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[42] Article 1731 (1) of the Civil Code stipulates*:"[t]he provisions of a contract lawfully formed shall be binding on the parties as though they were law."* According to the Drafter of the Ethiopian Civil Code, the principle contained in the provision "*reaffirms solemnly, in the legal plane, that a man's word is his bond*" This statement of the drafter is further suggestive of the fact that the drafting of the provision was mainly inspired by the classical "will" theories of contracts. See R David, Contracts in Ethiopia (1973), at 36.

[43] Particularly, the role of good faith (and thus considerations of fairness and justice) could be observed in the provisions of the Civil Code -Articles 1713 (in determining the object of the contract) , 1732 (in relation to interpretation), and 1785 (in relation to cancellation of the contract as a consequence of non- performance)

[44] In fact, the drafter the Civil Code, Rene David (hereinafter David), has observed that the traditional approach that provides strict protections for the principles of binding force and freedom of contracts has been consciously adopted in the provisions of the Code. In justifying why, the law has to stick to this traditional position, the drafter discussed the danger of allowing the judiciary to adapt contract due to their general lack of economic knowledge that may be required for properly conducting the task. Overall, the opinion of the drafter expresses the general concerns relating to ensuring security of transactions**:** See David, *supra* note 42, at 52.

by law" and, more importantly, Article 1764(1) of the Code further stresses that, "acontract shall remain in force notwithstanding that the conditions of its performance have changed and the obligations assumed by a party have become more onerous than he or she foresaw" And Sub-Article 2 of the same continues: "the effect of such changes may be regulated by the parties, and not by the court, in the original contract or in a new agreement".

The Civil Code provides that termination of contracts is to be generally based on the consent of the parties expressed in their original or subsequent agreements. Thus, pursuant to Article 1819 (1), the parties are free to conclude subsequent agreements to bring an end to their contractual relationships. They are also allowed, under Article 1824 of the Code, to provide in their original agreement the conditions upon the fulfilment of which one or all of them may exercise the right to declare termination of the contract on notice.

There are some limited situations recognized by the Civil Code to allow variation or termination of a contract unilaterally or by a court of law. Nonetheless, these exceptions could hardly be viewed to represent any direct or explicit compromises admitted by the Ethiopian legislature in the interest of addressing the problem of change of circumstances.But they may still be regarded to manifest the overall concerns existing on the part of the law to insure fairness and justice in contractual relationships. Accordingly, the Civil Code anticipates the possibility of judicial variation in cases where injustice may be expected to result due to the existence of a special confidential relationship affecting how the parties deal with each other. Thus, pursuant to Article 1766 of the Civil Code, *'the court may vary a contract where the parties do not agree and a family or other relationship giving rise to special confidence exists between the parties and compels them to deal with each other in accordance with equity.'* In commenting on the essence of this exception, the drafter of the Ethiopian Civil Code wrote that:

> *[t]his provision must be seen together with Article 1705(1), which deals with circumstances where false statements made in bad faith might result in invalidation of the contract. The notion is that if there is a special relationship between the two parties where false statements made in bad faith could void the resulting contract, then in the same relationship courts would have the power to vary the terms of the contract if because of unforeseen circumstancesthe balance of the contract is distorted.*[45]

It has to be noted that the *special confidential relationship* should exist between the parties prior to the conclusion of the contract to compel them to equitably deal with each other.[46] The rational of this particular exception is thus based on the need of addressing injustice that may be caused to one party due to the abuse or unfair exploitation of the *special confidential relationship* that was present at the time of formation of the contract by the other party. This exception to some extent expresses the recognition given by the law to the relational and cooperative aspects

[45] David, *supra* note 42, at 53.

[46] Incidentally, *"special confidential relationship"* should be distinguished from the other type of "special relationship" provided in Article 1823 of the Civil Code to allow judicial termination. In the case of the latter provision, the special relationship arises from the nature of the contract itself; it provides for the right to request judicial termination in case of contracts requiring special confidence, cooperation or community of views between the parties, where such requirements are no more present.

of contractual relationships. It may also be viewed as protective measure aimed at facilitating the exchange of freely expressed consents between the parties and protecting freedom of contracts, thus squarely fitting into the readily admitted role of the law pursuant to the classical theories.

Article 1767 provides the second exception that opens the possibility for variation of terms ofa contract made with administrative bodies. This seems to address cases where the obligations originally assumed by a party contracting with a public administration is renderedmore onerous or impossible as the direct consequence of the changes introduced through official decisions of the latter. This generally compromises situations in which acts of government cause disturbance to the original balance of a contract and consequently entitle the party contracting with the administration to request its restoration by the court of law.[47]

It has to be stated here that some digressions from the strict principle of *pacta sunt servanda* in favour of equitable construction of the 'debtor's obligations could be found in relation to gratuitous contracts. Accordingly, gratuitous contracts may be terminated by the courts for a good cause at the request of the party who gratuitously undertook the performance of an obligation.Thus, pursuant to Article 1824 of the Code, *a person obligated by a contract for the exclusive advantage of the other party may require the judge to be freed from such contract for good cause*.

In this connection, some of the decisions passed by the Federal Supreme Court Cassation Division in cases involving donation, provide some particularly interesting insights into the special place allowed for the working of equitable considerations in deciding the enforcementof gratuitous contracts. In one case,[48] an elderly lady voluntarily relinquished her rural farm land holding of about 1.64 hectares in favour of a young fellow to whom she had no blood relation. As she could not exploit the farm land by herself due to her old age, she transferred the farm land to the young fellow with the hope of getting material supports from him out of the yields he makes through exploitation of the land. But this intrinsic expectation did not find its expression in the contract made concerning transfer ofthe land, and it was merely based on an informal oral promise allegedly given by the young man in their local church yard. When the young man changed his initial friendly gestures and backed on his alleged oral promises later on, the old lady brought action reclaiming her holding, asserting that she had somehow been tricked into the unscrupulous arrangement.

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[47] Articles 3190-3193 of the Civil Code enshrine the French theory of Act of Government (or *theorie de Fait duPrince***)** this theory is concerned with the situations in which the economic basis of a contract concluded betweena private party and government department is upset by the act of the latter. Accordingly, unless the governmental act constitutes a generally applicable public policy decision emanating from some general legislation affecting all citizens equally, the contractor may be entitled to a monetary indemnity or to increase the charge to the consumer. Thus, the cross-reference made by Article 1767 of the Civil Code seems to extend the application of this theory to contracts concluded with government organs regardless of the fact that such contracts may be non-administrative in nature: See G Krezeczunowich, Formation and Effects of contracts in Ethiopia, (Faculty of Law, Addis Ababa University), (1983), at 124-125.

[48] Emahoy W /Gabriel v. Dereje Dessaleng, (Federal Supreme Court Cassation Division, April 14, 2007 E.C.), Federal Supreme Court Cassation Division Decisions, Vol.17, at 121-123.

The trial court decided against the old lady by stating that there were no sufficient and relevant facts to support commission of any fraudulent act by the defendant young fellow to challenge validity of the donation contract by which the farm land was transferred to him. The appellate court confirmed the decision of the trail court, and the old lady finally brought her petition before the Federal Supreme Court's Cassation division. The Federal Supreme Court's Cassation division examined the case based on Articles 2458(1), according to which the court stated that the one who benefits from the benevolent act of another and to whom a property had been donated, shall have the duty to provide material support to the donor. The duty to support, according to the court, exists notwithstanding that it had not been specified in the contract. The court observed the petitioner in this particular case had found herself in a very desperate situation as she could not earn anything to live due to her old age and there were no other relations to whom she could possibly turn in order to seek support. The court asserted the young fellow had shown his ungratefulness towards the generous act of the old lady through denial of his support in times of her serious needs. Thus, the court concluded that it would be outrageously contradictory to equity and reasonable conscience to uphold validity of the donation contract and to let the young fellow keep the piece of land transferred to him on the basis of that contract. Accordingly, the court declared cancelation of the contract by further invoking Article 2464 (1) of the Civil Code in supporting its decision.

In another case,[49] a subsequent birth of a child to the donor after conclusion of a donation contract was raised as unforeseen supervening change of circumstances that constituted a valid ground to challenge enforcement of the contract. But the court rejected the request made for cancellation of the contract, by invoking Article 2450 of the Civil Code and stating that a donation contract was not to be subject to cancellation *ipso jure* on the ground that the donor had a child subsequent to its conclusion unless an indication to the same effect could be inferred from the terms of the contract itself.

C. Non-performance and Impossibility in General

Under the Ethiopian Civil Code, non-performance of contract covers various situations in which the debtor fails to fully and properly discharge his obligations. It is not used only to refer to the debtor's total and irreversible failure to perform, but extends to cases where the same offers defective, partial, or untimely performance. The provisions of the Code provide forced performance, cancellation and damages as the three basic remedies of non-performance, with no need for the complex approach that provides remedies classified by the types of breach committed by the debtor.

In Ethiopian law, specific performance is a remedy that can only be provided by the court. The court may order forced performance of the contract where it does not affect the personal liberty of the debtor, and the creditor shows a special interest in getting actual performance of the contract. This appears to indicate that the Ethiopian Civil Code adopts the approach of the

[49] Meymuna Hassen et al Vs Haleha Hassen et al (Federal Supreme Court Cassation Division, June 26, 2009 E. C.), Federal Supreme Court Cassation Division, Vol. 20, at 207-211.

common law legal systems, making specific performance an exceptional remedy less frequently available than cancellation.

The remedy of forced performance cannot also apply to cases where the performance of obligations assumed by the debtor no more remains possible. Ethiopian law generally recognizes two broad types of impossibility: initial and supervening impossibility. Initial impossibility generally comprises cases in which one or both parties assume the performance of obligations that are impossible at the time of conclusion of the contract. These cases are dealt with by the rules of the Civil Code applicable to formation of contracts. The cases of supervening impossibility, in which performance of the obligations becomes prevented after formation of the contract, are nevertheless subject to the rules of non-performance. Accordingly, cancellation is the remedy normally applicable to such cases of impossibility.

As a matter of principle, cancellation as a remedy for non-performance of contracts is to be granted by the court in Ethiopian law. However, the law also provides some specific circumstances in which it may be exceptionally declared by the party aggrieved by the non-performance of contracts. Supervening impossibility is one of the circumstances specified by the Civil Code to fall under these exceptional situations. Thus, the contract may be unilaterally declared cancelled by the creditor if the debtor's performance of his obligations proves to be impossible after its conclusion. This is particularly true where the debtor's performance of his obligations has become absolutely and totally impossible. Unilateral cancellation also seems possible in cases of partial impossibility or delay of performance obviously affecting the very basis of the contract. The fundamentality of the breach resulting from the partial impossibility or delay of performance will be determined by the court in disputed cases.

In the aforementioned cases, cancellation of the contract is merely grounded on the impossibility of the performance of the debtor's obligations. Cancellation may be invoked irrespective of the causes behind the impossibility and it is still available regardless of the fact that it was not due to the debtor's fault, or was caused by a *force majeure*.

D. The Strict Liability Rule and Exceptionality of the Requirement of Fault

Article 1791(1) of the Civil Code provides that *the party who fails to perform his obligations shall be liable to pay damages notwithstanding that he is not at fault*. This provision clearly reveals that the Ethiopian Civil Code, in principle, adopts the principle of strict liability for determining liability for non-performance damages and proving a fault is an exception. In explaining why, the approach of the continental traditions was not favoured, the drafter of the Code provided the following explanations:

> *The approach of the continental legal systems (such as the German and Swiss Codes) was avoided because of a fear that it would encourage the courts to be lax... A rule of strict liability seemed necessary; in principle, the Code favors the party who does not receive what was promised over the party who cannot do what he has promised to do. In using the stricter approach, the Code has tried to increase the responsibility of the debtor and make it more difficult for him to escape liability when he has not properly performed his obligations....by very narrowly defining*

> *the bases for his discharge, which is in conformity with a policy also followed in the common law.*[50]

The drafter's comments make it clear that the common law principle of strict liability was adopted as a matter of consciously made public policy choice at the time of the codification in order to narrow down the debtor's escape route from his liability of paying damages in cases of non-performance. However, it is also possible to identify some limited instances in which the law has exceptionally recognized the relevance of the debtor's fault in determining such liability. The first relates to obligations of diligence, where the debtor merely undertakes the obligation to do his best without promising to procure a definite result. Application of this exception may be implied from the nature the debtor's obligation, the terms of the contract, orby special provisions of the law. The second situation in which the concept of fault may be exceptionally called into application is in case the debtor's failure to perform is related to gratuitous contracts.[51]

E. Definition, Application and Effects of the *Force Majeure* Defence under the Civil Code

Article 1792 of the Civil Code defines force *majeure generally* by owing reference to the nature of its cause and the effect it finally produces on performance of the debtor's obligations. The first Sub-article of the provision supplies a positive definition of the concept and states that: *[Force majeure results from an occurrence which the debtor could normally not foresee and which prevents him absolutely from performing his obligations.* Thus pursuant to this provision a supervening event that impedes the debtor's performance qualifies to be a *force majeure* upon satisfying two cumulative elements: a) The event could not have "normally" been foreseen by the debtor (an *average* person would not have foreseen it), *and;* b) The event must have "absolutely" prevented the debtor from performing his obligations *(the event must have been absolutely* insurmountable that no one in place of the debtor could have overcome it to perform the obligations).[52]

The two requirements enshrined in this provision are cumulative- both the reasonable foreseeability and absolute insurmountability should be satisfied to successfully invoke *force majeure*. This has been further clarified by the negative definition additionally provided in the second Sub-article. Accordingly, neither foreseeable events making performance of the debtor's obligations absolutely impossible nor unforeseen events that only increase the difficulty and costs involved in the performance of such obligations, without making them absolutely impossible, constitute a force majeure.

The restrictive definition of *force majeure* in the above provision obviously indicates the utmost care that the Ethiopian law has taken to ensure certainty of transactionsthrough upholding almost absolute adherence to the principle of binding force of contracts. Further attentions given

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[50] David, *supra* note 42, at 69.

[51] Note that the Ethiopian law does not require consideration (unlike in most common law legal systems) for validity of contracts. Thus, pursuant to Article1796 of the Ethiopian Civil Code, a person would be liable only in case of his fault for the non-performance of contractual obligations that he has gratuitously undertaken without deriving reciprocal benefits.

[52] G Krezeczunowich, *supra* note 47, at 152-153.

to ensuring certainty of transactions are further manifested in Articles1793 and 1794 of the Civil Code that provides specific cases in which the application of the defence may be upheld or is subject to outright exclusion by virtue of the law.[53]

Article 1793 of the Code supplies illustrations of events which may or may not be treated as cases of force majeure.[419] It is therefore important to note that this provision does not make any change to the law, since it merely aims to list examples ofthe occurrences that may be treated as *force majeure*. Depending on the illustrative cases provided in this provision, it is possible to evaluate the applicability of *force majeure* to the typical cases of supervening impossibility in which the debtor may be excused for the performance of his obligations in other legal systems. Accordingly, let us try to closely evaluate the applicability of the defence of *force majeure* in the following typical situations:

1. Destruction of the Subject Matter of the Contract:

Performance may become impossible when the specific thing to be delivered according to the contract is no more in existence or in a condition required for its delivery to the creditor (e.g., the ox to be delivered dies or a cargo to be delivered sinks). The specific thing to be delivered may be subject to total destruction due to: *unforeseeable act of a third party for whom the debtor is not responsible,* or a *natural catastrophe such as earthquake, lightning, or floods*- as respectively specified in Sub-articles (a) & (c) of Article 1793.

2. Death or Incapacity of the Debtor

Pursuant to Article 1793 (e) *force majeure* may also arise due to the death or a serious accident or unexpected serious illness of the debtor - This applies to contracts that provide for obligations requiring personal performance of the debtor.[426] For instance, when the debtor has undertaken to personally perform a certain work, such as to paint a portrait, write a book or repair a watch.

3. Legal Impossibility

Force majeure may also be invoked in cases provided in Article 1793 on the ground of supervening legal impossibility arising from *official prohibitions preventing the performance of the contract*: For instance, if the importation of the goods to be delivered is prohibited by a mandatory law that was unexpected at the time of the contract and that became effective without leaving reasonable time limit.

4. Impossibility of Method of Performance

Pursuant to Article 1793 (d) of the Civil Code, *international or civil war* that unexpectedly occurs and causes interruption in the means of transportation available, and thereby absolutely prevents undertaking the carriage of the goods to be delivered may be considered as to force *majeure*. And this has to be weighed in light of the two cumulative conditions under Article 1792

[53] In order to make it very clear what is meant by force majeure, Article 1792 defines it twice, first in a positive formulation and then in a negative one. The general formula of Article 1792 is supplemented by the two following Articles. Article 1793 suggests certain situations that, according to the circumstances, may or may not be cases of force majeure. Article 1794, on the other hand, enumerates various· situations and states that in no case may any of them ever be considered to constitute force majeure.

of the Civil Code, i.e., first, the supervening occurrence resulting in impossibility of the method should be unexpected or normally unforeseeable by the debtor; and second, the said unexpected or unforeseen occurrence must have prevented the debtor *absolutely from performing his obligations.*

F. Change of Circumstances in Ethiopia

Article 1794 of the Civil Code provides certain occurrences that shall not be deemed cases of force majeure. It provides that, *unless expressly agreed otherwise, the following occurrences shall not be deemed cases of force majeure:*

> *(a) A trike or lock-out taking place in the undertaking of a party or affectingthe branch of business in which he carries out his activities;*
> *(b) An increase or reduction in the price of raw materials necessary for theperformance of the contract;*
> *(c) The enactment of new legislation whereby the obligation of the debtorbecome more onerous.*

The exclusions contained in sub-articles (b) & (c) do not seem to bring any change in the law, since these occurrences do not satisfy the very definition of *force majeure* provided in Article 1792 of the Code.[54] However, these exclusions represent the utmost caution taken by the legislature to foreclose any judicial attempts that might be later made to incorporate the doctrine of change of circumstances into the law. Thus, unforeseen supervening events that excessively increase the costs and difficulties involved in the performance of his obligations, without making it absolutely impossible, do not entitle the debtor to invoke the defence of *force majeure*. It seems that the exclusions are aimed at safeguarding the predictability of business transactions. These exclusions, however, do not restrict the contracting parties to vary the terms and conditions of their contract by virtue of the party autonomy.

G. Overview of the Application of *Force Majeure* in the Decisions of the Cassation Division

As already noted, the defence of *force majeure* seems to be the main legal principle explicitly recognized under the Ethiopian Civil Code to provide the debtor an escaping routefrom the harsh rule of strict liability. The stringent requirements attached to the application of the defence by the Code provisions, are said to have been taken to their most extreme level of strictness by the approaches generally adopted by the courts in interpreting those requirements.

In *Ethiopian Oil Co. v. Comet Transport Co. et al.*,[55] a vehicle that was carrying refined petroleum oil from the port of Djibouti to Bahir Dar city was crushed while it tried to avoid running over a pedestrian who accidentally got into its way. All the oil that was being transported by the liquid truck was lostdue to the damage caused to its tanker during the crush. When the owners of the oil brought their action claiming compensation for the loss of the oil, the

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[54] Perhaps these clear exclusions merely signify lack of confidence in the courts' proper application of the general principle under Article 1792: Krezeczunowich, *supra* note 47, at 155.

[55] Ethiopian Oil Co. *V.* Comet Transport Co. et al, (Federal Supreme Court Cassation Division, July 29, 1997 E.C.), Federal Supreme Court Cassation Division Decisions, Vol.1, at 26.

carrier invoked the defence of *force majeure.* Both the trial and appellate courts upheld the *force majeure* defence invoked by the carrier and released the same from its liability for the loss of the oil.

The Federal Supreme Court's Cassation Division overturned this decision for fundamental error of law. The court first noted that the liability of the carrier is to be determined in accordance with Articles 590 and 591 of the Commercial Code. The court stated that Article 590 imposes liability of the carrier for partial or total loss of the goods, or for any damage thereto or delay in the conveyance thereof. Article 591 of the code, however, recognises *force majeure* as one of the grounds for excusing the liability of the carrier. Noting that the Commercial Code does not provide definition for *force majeure,* the court asserted the applicability of the definition contained in the Civil Code. The court attached much emphasis and a very strict connotation to the requirement of "foreseeability" as an essential constitutive element of the definition enshrined in Article 1792. In this connection, the court stated that: "*To say the debtor's non-performance was caused by a force majeure, the occurrence that prevented performance of his obligations must prove to be something absolutely beyond his reasonable expectations and bounds of imagination.*"

In another similar case,[56] the Supreme Court reversed the decisions of the lower courts in which they released the carrier on the ground of *force majeure,* when goods being transported were lost together with the lorry undertaking the transportation by a fire caused due to a technical failure of the vehicle's electrical and mechanical system. In reversing the decision, the court noted that:

> *[t]he carrier had the opportunity to ensure the technical reliability and suitability of the lorry for the particular topographic and climatic conditions before buying it; once bought, it has also the opportunity to periodically checkto ensure that it continues to be reliable. A fire caused by technical failure in the electrical and mechanical system of the lorry is something that can normally be foreseen by the carrier at the time of the contract, and hence it cannot be considered as force majeure.*[57]

The way the Supreme Court construed the requirement of un-foreseeability in the above and many other cases, appears to be very harsh in the context of the usual reality of life in which contracts operate. In many cases, the events that cause disruption to the performance of contracts are not totally hidden from foresights. But the parties are usually in the dark as to whether, when and where such events would actually hit. It may be correct to hold that one who takes the wheel as a driver should not always expect that others on the road would reasonably behave; he should also expect unreasonable behaviours and accordingly apply the required care.

When it comes to administrative contracts, Article 3132 of the Civil Code provides the criteria for distinguishing such contracts from other types of contracts. Expounding on the criteria contained in this provision and by referring to other relevant laws, the Federal Supreme

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[56] *Global Insurance S.C. v. Nib Transport S.C.* [2007], Federal Supreme Court, Cassation File No. 26565, Discussed in Mulugeta Ayalew, 'Ethiopia'. In *International Encyclopedia of Laws*: *Contracts*, edited by J. Herbots. Alphen aan den Rijn, NL: Kluwer Law International, 2010, at 124.

[57] *Id*.

Court Cassation Division has stated that a contract may be deemed an administrative contract where: the law or contractual provisions inserted by the parties clearly qualifies it as such, or where sufficient indications to the same effect may be found from the nature, objective, and identity of the parties to the contract.[58] From this, some contracts that may be concluded by the public authorities are directly qualified by the law, *ipso jure*, as administrative contracts pursuant to Art 3132 (a).[59] Absent such direct qualification by the law, relatively higher and direct involvement of the general public interest in performance of the contract is said to be the most decisive criterion of distinguishing administrative contracts from other ordinary civil and commercial contracts that are primarily subject to the ordinary rules of the Civil and Commercial Codes.[60]

In another case,[61] which was examined by the Cassation Division of the Federal Supreme Court, a private contractant had undertaken to supply a specified number of breads on daily basis and at a fixed price to the student dining service of the University of Gondar. But later on, the price of flour, which is obviously the primary raw material for producing bread, became doubled due to a nationwide and officially recognized inflation.

After making several complaints about the losses being sustained due to the inflation and failing to persuade the University to make adjustments to the contract price, the contractor finally notified its plan to suspend the supply. Soon after this notification, the University commenced an urgent bidding procedure that culminated in a new contract made for the samesupply, but which was concluded with another contractor and based on modified price terms.

The former supplier sued the University as a plaintiff for breach of contract, asserting that the latter should have cooperated with its repeated requests to modified price terms of their former contract before deciding to make the new allocation. The Supreme Court did not accept the argument on which the plaintiff's allegation was based. Instead, the court observedthat the University had all the rightful reasons for allocating the contract to a new supplier (in the face of the clear notification provided by the petitioner to discontinue the supply). The court emphasised the absolute necessity involved in ensuring uninterrupted supply; noting that, the suspension of the supply, even for a single day, would have had very fateful consequences for the University's operation. Thus, the court stated the petitioner should not have even considered suspension of the supply as one of the available options; instead, it should have sought the court's aid to enforce the remedies provided pursuant to Articles 3181 and 3189 of the Civil Code.

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[58] Woira Wood and Metal Works Plc. V. Addis Ababa City Administration Trade and Industry Development Bureau, (Federal Supreme Court Cassation Division, Dec 16, 2005 E.C.), Federal Supreme Court Cassation Division Decisions, vol 14, at 106-109.

[59] The types of contracts that are recognised as administrative contracts and regulated in the Civil Code: government concession contracts (Articles 3207- 3243), public construction contracts (Public works contracts) (Articles 3244- 3296), and government supplies contracts (Public supply contracts) (Articles 3297-3306).

[60] See Tekle Hagos, "Adjudication and Arbitrability of Government Construction Disputes," Mizan Law Review, Vol. 3 No.1, (2009), at 6-7.

[61] Hilala Suleiman vs Gonder University (Federal Supreme Court Cassation Division File No. 69797, December 4, 2005 E.C.), Federal Supreme Court Cassation Division Decisions, Vol..8, at 13-19.

V. CONCLUSION AND THE WAY FORWARD

This article has assessed a number of jurisdictions in order to highlight the approaches of dealing with changes of circumstances in contract. As articulated in the paper, each of the studied legal instruments has its own peculiar feature. For instance, the English common law provides the least accommodation for the problem of change of circumstances. Thus, the approach adopted by the English law could perhaps be regarded as a close relative of the position taken by the Ethiopian law that essentially endorses exclusion of the problem. In fact, the much reserved and cautious approach adopted by the English law towards the issue of change of circumstances is not a topic of much surprise.

The Ethiopian general contract law therefore seems to remain strongly faithful to the above highlighted ideas central to the classical theories more than any of the other jurisdictions surveyed in thispaper. The law seems to unqualifiedly subscribe to the classic thinking, through its extreme emphasis on providing strict enforcements to the supposed freely negotiated terms of contracts. Thus, ensuring nearly strict adherence to the principle of *pacta sunt servanda* seems to reign almost as the absolute goal of the law. This may be specifically observed even from the definitional provision under Article 1675 of the Civil Code. The provision clearly emphasizes the consensual basis of contracts not only in relation to acts creating new obligations but also with respect to those acts intended for bringing the termination or making certain modifications to obligations that already exist.

The rejection of the doctrine of change of circumstances in the Ethiopian contract law essentially seems to have been predicated on the underlying assumptions inherent in the classical theories of contracts. The Civil Code apparently attempts to supply some guidance to the contracting parties so that they formulate their own contractual devices to address the possible imbalances that may be caused in their relationships due to supervening change of circumstances. Such attempts could be inferred from various provisions of the Code dealing with issues pertaining to performance, variation, and termination of contracts.

Therefore, future amendments to Ethiopian contract laws should require that the change of circumstances cause a fundamental imbalance in the original equilibrium of the contract. This requirement is first met in cases where the obligation assumed by one of the parties becomes not merely onerous but "excessively onerous" as the result of the change of circumstances. In addition, a clear indication of the fact that the change of circumstances should occur after the conclusion of the contract and that it was not reasonably foreseeable at the time.

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