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# MODIFICATION OR DISSOLUTION OF CONTRACTS DUE TO CHANGED CIRCUMSTANCES

(CLAUSULA REBUS SIC STANTIBUS)\*\*\*

*Summary:* This paper deals with the influence of hardship (frustration) clause (clausula rebus sic stantibus) on the contract and the possibility of the party affected by changed circumstances to request a judge to modify or terminate the contract. The paper presents a brief historical overview of the institute of clausula rebus sic stantibus in Croatian and some European legal systems. The conditions under which the affected party can make a claim to the court are listed and analyzed in the context of possible solutions *de lege ferenda*. Special attention is given to the scope of this clause, with the emphasis on unilateral contracts. Since case law always had a big impact on this institute, the paper brings numerous court decisions pertaining to modification or termination of contracts due to changed circumstances.

*Keywords:* hardship (frustration) clause (clausula rebus sic stantibus), changed circumstances, contract modification and termination, unilateral contract, aleatory contract

## 1. INTRODUCTION

Law of obligations is based on the principle that legal subjects are free to manage most of their obligations according to their wishes.<sup>1</sup> This principle may be most pronounced in the part

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pertaining to contractual relations, where it is manifested as a freedom to contract.<sup>2</sup> However, if the parties agree to enter into a contract, they are obliged to fulfill their contractual obligations, as is imposed by one of the basic principles of the contractual law, the principle of *pacta sunt servanda*. This principle stipulates that contracts, once entered into, must be fulfilled regardless of the circumstances that might happen later.<sup>3</sup> This principle strengthens trust in contracts and compels contracting parties to comply with it.

There are two sides from which the principle of *pacta sunt servanda* can be observed. It may be considered that the contract is, indeed, sacred and that it becomes the law between the parties, from which they cannot waiver from. However, it might be considered that it should be possible to depart from a given word in some exceptional situations.<sup>4</sup> It seems it is much more reasonable to take the latter view, since the insistence on the principle of *pacta sunt servanda* might sometimes lead to situations that could undermine some other fundamental principles of civil law: the principle of equivalence of obligations, conscientiousness and fairness and equality of parties; which could cause contracting parties more harm than good. One can go even further and say that, by insisting obstinately on application of the principle of *pacta sunt servanda*, the subjects who wish to enter into civil law relations might not be motivated to do so, since they would not have the possibility of terminating or modifying their relationships, which, through no fault of theirs, lost all significance for them.

Sometimes, especially in the case of long term contracts, circumstances that existed at the time of the conclusion of the contract and were crucial for its conclusion, might subsequently change or disappear. Because of that, the fulfillment of contractual obligation can become excessively burdensome or linked to numerous losses for the affected side. As early as the 12<sup>th</sup> century it was recognized that in such cases a certain deviation from the principle of *pacta sunt servanda* should be allowed. Therefore, in many legal systems, a contractual party affected with changed circumstances has at his/her disposal a clause that allows, under certain conditions, modification or termination of contracts due to changed circumstances – *clausula rebus sic stantibus* (frustration or hardship clause).<sup>5</sup>

## 2. A BRIEF HISTORICAL OVERVIEW OF THE *CLAUSULA REBUS SIC STANTIBUS* IN CROATIAN AND COMPARATIVE LAW

*Clausula rebus sic stantibus* did not exist in Roman law, so at that time, the debtor could not be relieved of his obligations if the circumstances that were crucial for the conclusion of

1 Art. 2, Civil Obligations Act (COA), National Gazette 35/2005, 41/2008, 125/2011, 78/2015.

2 Klarić, P.; Vedriš, M, Građansko pravo, Zagreb, Narodne novine, 2014, p. 8.

3 Cf. *ibid.*, p. 381. Also see Art. 9 of the COA: "A participant is obliged to fulfill his obligation and is responsible for its fulfillment."

4 Eraković, A., Raskid ugovora zbog neispunjenja i raskid ili izmjena ugovora zbog promijenjenih okolnosti, Aktualnosti hrvatskog zakonodavstva i pravne prakse, Godišnjak 17, Organizator, 2010, p. 125–126.

5 This ingredient of legal affairs is today in Croatian, and in many other legal systems, a general institute that applies to all contracts, but earlier, until the second half of the 20th century, it could only have an effect if the contracting parties introduced it into their contract in a form of a clause (hence, it was an extraordinary ingredient of legal affairs). That is precisely why it is still called the 'clause' (*clausula*). Nikšić, S., *Clausula rebus sic stantibus* i ekonomska kriza, Zbornik Susreta pravnika Opatija 2016., p. 162.

the contract, changed afterwards.<sup>6</sup> The theory of the influence of changed circumstances on the contract occurred in the 12<sup>th</sup> century because of an unstable medieval economy and the fact that medieval legal thought has developed under the influence of religious teaching and morale, which has led to increasing attention being given to situations when the violation of the equivalence of obligations occurred not only at the time of the conclusion of contract, but also later, due to changes in circumstances.<sup>7</sup>

However, very soon after changed circumstances began to influence parties' positions, opinions about *clausula rebus sic stantibus*' incompatibility with the nature of contractual obligation and the principle of autonomy of parties, began to emerge. For example, in French law of 17<sup>th</sup> and 18<sup>th</sup> century *clausula rebus sic stantibus* only applied to permanent feudal obligations.<sup>8</sup> Accordingly, the *Code Civile* prescribed that a contract becomes the law between contractual parties and it can be changed and terminated only by consent of both of those parties.<sup>9</sup> The editors of *Code Civile* were inspired by the rationalistic and individualist philosophy of 18<sup>th</sup> century, which opposed the acceptance of the theory of changed circumstances. Namely, the supporters of this point of view agreed that the will of the legislator could be equated with the will of the contracting parties and, since the law cannot be changed without the legislator's will, so the contracts should not be changed without the consent of both parties.<sup>10</sup>

6 At that time, only the greater force (*vis maior*) was the reason for which the debtor could be relieved of his obligations. More about other ways of ending obligations in Roman law see Romac, A., *Rimsko pravo*, Narodne novine, Zagreb, 1994., p. 273–283.

7 Petrić, S., *Izmjena ili raskid ugovora zbog promijenjenih okolnosti prema novom Zakonu o obveznim odnosima*, Zbornik Pravnog fakulteta Sveučilišta u Rijeci, Vol. 28, No. 1, 2007, p. 4.

8 *Ibid.*

9 Since the enactment of *Code civile*, up until February 10, 2016 (actually until October 1, 2016 when this change entered into force) this was regulated by Art. 1134: "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. Elles doivent être exécutées de bonne foi."

Today, it is regulated in

Art. 1103: "Les contrats légalement formés tiennent lieu de loi à ceux qui les ont faits."

Art. 1193.: "Les contrats ne peuvent être modifiés ou révoqués que du consentement mutuel des parties, ou pour les causes que la loi autorise."

And

Art. 1104: "Les contrats doivent être négociés, formés et exécutés de bonne foi. Cette disposition est d'ordre public."

Code civile, Ordonnance n° 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, NOR: JUSC1522466R, Version consolidée au 12 février 2016. (dalje u tekstu: Code civile).

Available at: <https://www.legifrance.gouv.fr/affichTexte.do;jsessionid=0D991658CCBCF9C9D2449C788661BA2t;plg=fr37s-3?ci dTexte=JORFTEXT000032004939&dateTexte=20160212> (February 15, 2018).

10 French jurisprudence even then distinguished between civil and administrative law contracts. French administrative courts applied the *theorie d'imprévision* on contracts concluded by public administration bodies with private persons, for example, for supplying the administration bodies with the necessary items and materials; granting concessions for performing various public services (eg. urban transport) or performing public works. The reason for this was the shortage of materials and the rise in prices of goods and services during World War I, which greatly affected many contracts concluded by private persons with public administration bodies. Due to newly emerging circumstances, the position of the parties became more difficult because the concessionaires suffered major losses and sought to change or terminate the contract. Because of this, on March 30, 1916 French *Conseil d'Etat* allowed for modification of such a treaty that was concluded in 1904. Such an attitude was retained later and this resulted in the fact that such contracts in France could be changed if an affected party requested so, in case during its duration there were exceptional events that could not be anticipated at the time of the conclusion of the contract and consequently caused the affected party great losses and damages that largely exceeded reasonable expectations.

On the other hand, with regard to the contracts of civil law, completely opposite attitude was taken. The Court of Cassation has taken the view that in case of civil law contracts *vis maior* could be the only reason for which the debtor should be released from his/her obligations and the contract terminated. If *vis maior* did not exist, so did not the conditions for debtor's release from the contract, which is why he/she had to fulfill his/her obligation, regardless of the fact that its fulfillment has become more difficult due to changed circumstances. Čobeljić, Đ., *Promenjene okolnosti u privrednom i građanskom pravu* (*Clausula rebus sic stantibus*), Savremena administracija, Beograd, 1972, p. 15.

Because courts took this position, the legislator often had to intervene in order to eliminate apparent injustices in certain types of contracts, so after World War II, a series of laws have been introduced that allowed courts to modify certain contracts due to changed circumstances. Over time, the number of such interventions has risen, which was widely criticized suggesting that this creates a parallel legal system that only applies to certain contracts, which leads to legal uncertainty and greatly weakens the binding power of contracts.<sup>11</sup> Until only recently, the French *Code Civile* did not allow changed circumstances to have any impact on contracts, but, as of February 10, 2016, in its Art. 1195, it is stipulated that, if an unforeseeable change in circumstances during the conclusion of the contract makes the execution excessively costly for a party who has not agreed to assume the risk, the latter may request a renegotiation of the contract from the other party. That party must continue to perform its obligations during the renegotiation. In case of refusal or failure of the renegotiation, the parties may agree to terminate the contract, on the date and under the conditions they determine, or ask the court to agree to adapt it. In the absence of agreement within a reasonable time, the court may, at the request of a party, revise the contract or terminate it on the date and on the conditions it determines.<sup>12</sup>

In other parts of Europe, the 19<sup>th</sup> century became the period of rejection of the institute of changed circumstances and numerous other civil law codification also refused *clausula rebus sic stantibus* as a natural ingredient of contracts.<sup>13</sup> It is interesting that German law of the 18<sup>th</sup> century accepted this clause as a general rule in the two important codifications of that time,<sup>14</sup> but abandoned it in the 19<sup>th</sup> century under the influence of the ever-increasing criticisms that the institute allowed many abuses and was incompatible with the principle of party autonomy.<sup>15</sup> Thus, *Bürgerliches Gesetzbuch* from 1900 did not accept *clausula rebus sic stantibus* as a general rule, but allowed it under certain circumstances.<sup>16</sup> However, soon, in Germany many

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One of the more prominent examples is when the Cassation Court in 1876, in the case concerning the amount of compensation for the use of the *Canal de Craponne*, decided there could be no increase in the fee, and by its decision obliged the channel owner to ensure that citizens could irrigate their land almost for free. See more about this case in Krulj, V., *Promjenjene okolnosti i ugovorna odgovornost (nemogućnost ispunjenja, viša sila, klauzula rebus sic stantibus)*, Beograd, 1967., p. 24–25.

- 11 Zindović, I., *Revizija ugovora zbog promjenjenih okolnosti – usporednopravna rješenja o klauzuli rebus sic stantibus*, Strani pravni život, Vol. 51, No. 3, 2017, p. 38.
- 12 Art.1195, *Code civile* (Ordonnance n° 2016-131 du 10 février 2016 – art. 2): “Si un changement de circonstances imprévisible lors de la conclusion du contrat rend l’exécution excessivement onéreuse pour une partie qui n’avait pas accepté d’en assumer le risque, celle-ci peut demander une renégociation du contrat à son cocontractant. Elle continue à exécuter ses obligations durant la renégociation.  
En cas de refus ou d’échec de la renégociation, les parties peuvent convenir de la résolution du contrat, à la date et aux conditions qu’elles déterminent, ou demander d’un commun accord au juge de procéder à son adaptation. A défaut d’accord dans un délai raisonnable, le juge peut, à la demande d’une partie, réviser le contrat ou y mettre fin, à la date et aux conditions qu’il fixe.”
- 13 Nikšić, S., *Temeljna obilježja instituta izmjene ili raskida ugovora zbog promijenjenih okolnosti*, Liber amicorum Nikola Gavella, Gradansko pravo u razvoju, Pravni fakultet Sveučilišta u Zagrebu, 2007., p. 569.
- 14 Bavarian Civil Code of 1756 and Prussian Civil Code of 1794. More in Zindović, op.cit. 11, p. 39-40.
- 15 Petrić, op. cit. 7, p. 5-6.
- 16 *Bürgerliches Gesetzbuch, Reichsgesetzblatt* 1896, S. 195, Nr. 21, ausgegeben am 24. 8. 1896, in Kraft seit 1. 1. 1900, (further in the text: BGB).  
For example, according to: a) § 321. BGB: “Wer aus einem gegenseitigen Verträge vorzuleisten verpflichtet ist, kann, wenn nach dem Abschlusse des Vertrags in den Vermögensverhältnissen des anderen Theiles eine wesentliche Verschlechterung eintritt, durch die der Anspruch auf die Gegenleistung gefährdet wird, die ihm obliegende Leistung verweigern, bis die Gegenleistung bewirkt oder Sicherheit für sie geleistet wird.” (If a party who first has to fulfill his/her obligation feels that the opposite party will not fulfill his/her obligation, he/she may delay the fulfillment until he/she receives a certain security or the opposite party becomes able to fulfill. This applied to all such contracts.)

contracts become unsustainable as a result of World War I.<sup>17</sup> Due to the lack of legal regulation, the German courts resorted to various interpretations justifying the modification and termination of contracts due to changed circumstances. It remained unchanged until the beginning of the new millennium when, as a general rule, this institute was included in BGB in 2001.<sup>18</sup>

The only exception was the Italian *Codice Civile* of 1942, which, in its Art. 1467 and 1468, adopted, as a general rule, the right to terminate the contract due to changed circumstances.<sup>19</sup> However, although Italy is considered the cradle of recognition of the impact of *clausula rebus sic stantibus*, it should be emphasized that earlier Italian law was also hesitant to accept this clause as a general rule of contract law.<sup>20</sup> However, Italian courts, in spite of those provisions, regularly took into account the impact of changed circumstances on the contract.<sup>21</sup> As was the case in Germany and France, the consequences of the World War I, led to situations where problems of numerous debtors, who were no longer able to fulfill their obligations, needed to be resolved and in 1915 Italy allowed the use of the *clausula rebus sic stantibus*, which was at the beginning limited and temporary,<sup>22</sup> but after adopting new *Codice Civile* in 1942, Italy

And

B) § 610: "Wer die Hingabe eines Darlehens verspricht, kann im Zweifel das Versprechen widerrufen, wenn in den Vermögensverhältnissen des anderen Theiles eine wesentliche Verschlechterung eintritt, durch die der Anspruch auf die Rückerstattung gefährdet wird." (This provision applied only to the loan agreement and allowed withdrawal of the promised loan if the property of the future borrower is so aggravated that the return of the loan is at risk.)

Available at: <http://www.koeblergerhard.de/Fontes/BGBDR18961900.htm> (March, 1, 2018).

- 17 The case law tried to resolve petitions where the contract was disturbed due to substantial changes in circumstances by extending the interpretation of the provision concerning the effect of *vis maior* on the contract. More in Zindović, op.cit. 11, p. 40. Nevertheless, problems arising from the changed circumstances could not be adequately resolved by applying this provision, since in the case of changed circumstances it was not always necessary for the debtor to be released from the obligations and the contract to be terminated, sometimes it would be sufficient to modify it according to the newly created situation, and based on the provisions relating to *vis maior*, that was not possible. Initially, the underlying theory of changed circumstances was the principle of "good faith" (*Trau und Glauben*), which is one of the fundamental principles of German contract law, but since 1922 the courts' intervention in the contract started to be justified by "the disappearance of the basis of legal affair": At the conclusion of the contract, the contracting parties took into account certain circumstances and counted on their duration. That contract would not have been concluded if they knew these circumstances would change or disappear. Accordingly, if "the basis for the legal affair" did not exist, or had disappeared, the debtor should not be required to fulfill the contractual obligation. Čobeljić, op.cit. 10, p. 26-27. More about the theories by which the German case law tried to justify its intervention in the contract in case changed circumstances occurred, see Krulj, at 10, p. 36-45.
- 18 § 313. "(1) Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert und hätten die Parteien den Vertrag nicht oder mit anderem Inhalt geschlossen, wenn sie diese Veränderung vorausgesehen hätten, so kann Anpassung des Vertrags verlangt werden, soweit einem Teil unter Berücksichtigung aller Umstände des Einzelfalls, insbesondere der vertraglichen oder gesetzlichen Risikoverteilung, das Festhalten am unveränderten Vertrag nicht zugemutet werden kann.  
(2) Einer Veränderung der Umstände steht es gleich, wenn wesentliche Vorstellungen, die zur Grundlage des Vertrags geworden sind, sich als falsch herausstellen.  
(3) Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung."  
Gesetz zur Modernisierung des Schuldrechts, 26. 11. 2001 (BGBl. I S 3138), enacted since January 1, 2002.  
Full text available on: <http://dipbt.bundestag.de/dip21/btd/14/060/1406040.pdf> (February 20, 2018).
- 19 Petrić, op.cit. 7, p. 7.
- 20 Zindović, loc.cit. 11, p. 38.  
Thus, the old Italian *Codice Civile* of 1804, which was constructed on the basis of the French *Code Civile*, accepted its solutions regarding the possibility of influence of the changed circumstances on civil law contracts. Therefore, the release of the debtor from his/her obligation was only possible in the event of *vis maior*. *Ibid*; Čobeljić, op.cit. 10, p. 21.
- 21 Krulj, op.cit. 10, p. 75.
- 22 Decrees dated May 27, 1915 and June 20, 1915. More in Zindović, loc.cit. 11, p. 38.

became the first western state which accepted, as a general rule, the possibility of modification or termination of the contract due to changed circumstances in Art. 1467 – 1469.<sup>23</sup>

As far as Croatian legal system is concerned, in relation to e.g. Germany and France, this clause has begun to be accepted relatively early, not much later than in Italy. Namely, in 1955, the provisions of then applicable Inheritance Law defined *clausula rebus sic stantibus* as a natural part of the contract of support for life.<sup>24</sup> At that time, other types of contracts could only be affected by changed circumstances in case parties specifically agreed upon it. This solution remained until 1978, when *clausula rebus sic stantibus* became a natural ingredient of all contracts, after the entry into force of the “old” Law on Obligations.<sup>25</sup>

### 3. *CLAUSULA REBUS SIC STANTIBUS* IN CROATIAN LAW OF OBLIGATIONS *DE LEGE LATA*

In Croatian law of obligations, *clausula rebus sic stantibus* has been, since 1978, a general clause that applies to all contracts, without it having to be included in them, since it is valid even when it is not specifically agreed upon. However, like all other contractual natural ingredients, if the parties do not want it to apply to their contract, they have to explicitly exclude it.<sup>26</sup>

23 Art. 1467 refers to bilateral contracts and gives the affected party the option of terminating the contract, provided that these circumstances do not enter into a regular contract risk, while the other party may prevent termination by offering a fair modification of the contract.

“Contratto con prestazioni corrispettive.

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

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

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

Art. 1468 refers to unilateral contracts where the affected party has the right to reduce its obligation or modify the contract.

“Contratto con obbligazioni di una sola parte.

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

In Art. 1469, aleatory contracts are excluded from the applicatio of *clausula rebus sic stantibus*.

“Contratto aleatorio.

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

Codice civile REGIO DECRETO 16 marzo 1942, n. 262, Approvazione del testo del Codice civile. (042U0262) Gazzetta Ufficiale n.79 del 4-4-1942), (further in the text: *Codice civile*),

Available at: <http://www.gazzettaufficiale.it/anteprema/codici/codiceCivile> (February 8, 2018).

24 Art. 125 and 126 of Inheritance Law, Official gazette 20/55. Later Art. 120, Inheritance Law, Official gazette 52/71, 47/78, National gazette 56/00. Today Art. 584 of the COA.

25 Law on Obligations, Official gazette 29/1978, 39/1985, 46/1985, 57/1989, National gazette 53/1991, 73/1991, 3/1994, 7/1996, 112/1999, 88/2001, (further in the text: “old” Law on Obligations).

26 Today this is prescribed by Art. 372, COA.

In order for one party to have the right to request modification or termination of the contract due to changed circumstances,<sup>27</sup> the prerequisites set forth in Art. 369 of Civil Obligations Act (further: COA) must be met.<sup>28</sup>

These prerequisites are, as follows: a) exceptional circumstances,<sup>29</sup> b) that appeared after the conclusion of the contract, c) which could not have been anticipated at the time of the conclusion of the contract; d) have caused the fulfillment of the obligation for one party to become excessively difficult or caused that party excessive losses.

Although, under (c) it is required that circumstances be objectively unpredictable, paragraph 2 of the same article introduces a subjective component, as it determines that the affected party will not be able to demand modification or termination of the contract if it was bound to take these circumstances into account at the time of the conclusion of contract or could have avoided or overcame them. Thus, the affected party must not passively observe while changed circumstances cause the fulfillment of his/her obligation to become excessively difficult or cause him/her excessive loss.

27 It would appear that in this article the obligation of the contracting parties to resolve their problem by peaceful means could have been prescribed and only if this is not possible within a reasonable time, the affected party should have the right to refer the matter to the court. Also, it might make sense to explicitly prescribe that contractual parties (or affected party) first must try to modify the contract to the newly created situation, and only if it is not possible, request the termination of the contract. The reason for this is that, based on the present formulation art. Article 369 p. 1, one can only speculate whether the legislator opted *in favorem negotiati* (more *infra*, in the part related to the proposals *de lege ferenda*).

28 Since COA was enacted on January 1, 2006, many long-term contracts whose modification or termination is requested due to changed circumstances, have been concluded before that date and as such are subject to the provisions of Art. 133 of the "old" Law on Obligations that somewhat differently regulate this issue:  
Art 133.

"(1) If, after the conclusion of the contract, circumstances arise which make it difficult for one party to fulfill its obligations or if, because of them, the purpose of the contract cannot be fulfilled, and in both cases it is obvious that the contract no longer meets the expectations of the contracting parties and, by general opinion, it would be unfair to keep it in force as it is, a party to whom it is difficult to fulfill an obligation or a party that, because of changed circumstances, can not exercise the purpose of the contract, may require the contract to be terminated.

(2) Termination of the contract may not be required if the party invoking the changed circumstances was obliged to take such circumstances into consideration or to avoid or overcome them at the time of the conclusion of the contract.

(3) A party requesting the termination of a contract shall not be entitled to refer to the changed circumstances which occurred after the expiry of the time limit for the fulfillment of its obligation.

(4) The contract will not be terminated if the other party offers or agrees for the terms and conditions of the contract to be modified fairly.

(5) If the court terminates the contract, it shall, at the request of the other party, impose on the party requesting the termination an obligation to reimburse the other party the fair share of the damage he/she is suffering." (translated by authors)  
That is precisely why there are so many court decisions that have been made relatively recently, but are based on the provisions of the "old" Law on Obligations.

29 What exact circumstances will be relevant to modification or termination of the contract, the COA does not refer to, because this is not important at all. It is possible to deal with different situations – natural events, political and social changes, administrative or other measures of public authority, economic incidents, *etc.* Petrić, *op.cit.* 7, p. 28.

In the field of commercial law, this institute was defined by Customary practices in trade of goods (*Opće Uzance za promet robom*), Official Gazette, 15/1954, 53/1991, in which this issue is regulated differently: in Customary practice... no. 56 these circumstances are explicitly divided into natural events (eg. droughts, floods, earthquakes); administrative measures (eg. ban or restriction of import or export, change of system of prices, tariff changes...) and economic incidents (eg. sudden or severe drop or growth of price).

In the commentary of Customary practice... no. 56 it is also stated that all other events which, by their very nature and the intensity of their operation, cause the contract to be excessively difficult to enforce or because of which, there is an overly large loss for one of the contracting parties, can be taken into account. Kašanin, R.; Velimirović, T., *Opšte uzance za promet robom, sa objašnjenjima i sudskom praksom*, Savremena administracija, Beograd, 1974, p. 117–118.

It should also be emphasized that, although this paper constantly refers to "changed circumstances", in Art. 369, COA it is not expressly stated that the circumstances, which existed at the time of the conclusion of the contract, must in fact have to change – the text of the provision speaks of "extraordinary circumstances" arising after the conclusion of the contract, which could not have been foreseen at that time.

It is possible that the circumstances, after the conclusion of the contract, changed only once, but they may also change several times. In the latter case, the party has the right to request modification or termination of the contract several times, since the fact that the claim for termination of the contract for certain circumstances has been rejected, does not mean that the same person cannot, afterward, file a lawsuit due to subsequently changed circumstances.

“Pravomoćno odbijanje tužbenog zahtjeva da se zbog promijenjenih okolnosti raskine ugovor, nije zapreka da se s istim zahtjevom pokrene nova parnica zbog naknadno promijenjenih okolnosti” (VS, Rev-1281/85, 23. listopada 1985).

“The court’s refusal to terminate the contract due to changed circumstances does not prevent a new lawsuit from being initiated with the same application due to subsequently changed circumstances” (translated by authors).

Of the circumstances that usually cause one of the parties to seek modification or termination of the contract, it seems that the ones most frequently cited are related to changes in the value of money that disturb the equivalence of parties’ obligations. This equivalence can also be disturbed by changes in the interest rate policy; significant increases in the value of debtor’s obligations (without equivalence of obligations being disturbed at the same time); disproportionate difficulties in fulfillment of contract or increases of the costs of fulfillment of contract; complete loss of contractual significance because of changed circumstances *etc.*<sup>30</sup>

Although *clausula rebus sic stantibus* exists to alleviate problems for the party affected by changed circumstances, the opposite party of the contract has to also be taken into account, since he/she is in no way responsible for this new situation. The contract is not terminated because of some of his/her unacceptable behavior, as is the case in termination of contract for one party’s failure to fulfill his/her obligations. For this reason, modification or termination of the contract due to changed circumstances should never go to the detriment of the opposite side.<sup>31</sup> That party can, therefore, pursuant to Art. 369, p. 4, refuse the termination of the contract by offering or agreeing to a fair modification of it. He/she also has the right, in accordance with paragraph 5 of the same article, to demand compensation from the court for the fair share of the damage suffered because of the termination of the contract.<sup>32</sup> Opposite party also has the right to be informed that the circumstances have changed and that the affected party will require modification or termination of the contract. The sanction for not informing opposite party about affected party’s plans can be found in Art. 348 that pertains to all contracts.<sup>33</sup> However, COA specifically states in its Art. 370 that a party affected by changed circumstance

30 Petrić, *op.cit.* 7, p. 28-29.

31 Nikšić believes that this is probably one of the reasons why this institute is not enforced in practice very often. Nikšić, *op.cit.* 5, p. 178.

32 Modification or termination of a contract due to changed circumstances is requested by one contracting party to avoid the adverse consequences that would occur if, despite these new circumstances, it is insisted on the application of the principle of *pacta sunt servanda*. Therefore, the contract is modified or terminated in order to remove the harmful consequences from that contracting party. But if the termination of the contract happens, this often causes the damage to the opposite side and it should be stressed that neither party is responsible for the reason why the contract is being terminated. Slakoper, Z., *Promijenjene okolnosti prema dosadašnjem i novom ZOO-u*, Pravo u gospodarstvu, Vol. 44, No. 5, 2005, p. 35-56, 52.

33 Art. 348 of the COA: A contracting party which is obliged to notify the other party about the circumstances that are important to their mutual relationship, shall be liable for the damage suffered by the other party for failure to be notified in a timely manner.



is liable for the damage suffered by the opposing side, if he/she has not informed the opposite party of its intent to modify or terminate the contract.<sup>34</sup>

Here, the authors wanted to briefly look at the so-called “Swiss franc” case and the possibility of its resolution by applying provisions concerning changed circumstances. *Clausula rebus sic stantibus* is also applied to loan agreements, but no case has been found in Croatia where loan users have taken advantage of the possibility of modifying or terminating loan contracts due to changed circumstances.<sup>35</sup> The strengthening of the Swiss franc exchange rate was certainly unpredictable, not only to creditors, but also to banks, even the International Monetary Fund itself, and could be considered to be extraordinary circumstances that arise after the conclusion of the contract and could not have been anticipated at that time.<sup>36</sup> Due to these circumstances, the fulfillment of the obligation for the borrower has certainly become excessively difficult or caused excessive loss, so it can be concluded that all prerequisites of Art. 369 of COA were fulfilled.

Regardless, loan users did not ask for modification or termination of the loan agreement due to changed circumstances.<sup>37</sup> One of the reasons why this happened can be found in the consequences that *clausula rebus sic stantibus* has. In the first place, a number of disputed loan agreements were concluded before 2006, when the old Law on Obligations was in force, which did not allow the affected party to request the court to modify, but only to terminate the contract.<sup>38</sup> Since the consequence of any termination of the contract is a return to an earlier state (*restitutio in integrum*),<sup>39</sup> both parties would have to return all that they have received from the opposite side, in the total amount, at once. Given that many loans were taken in fairly high amounts, it becomes a little clearer why loan users have not been inclined to take advantage of this opportunity. Also, account should be taken of the right of the opposing party to claim compensation for the fair part of the damage suffered as a result of the change or termination of the contract due to changed circumstances, which will certainly further discourage credit users from trying to solve their problem in this way.

34 Art 370 of the COA: A party that is authorized to modify or terminate a contract due to changed circumstance is obliged to inform the other party, as soon as it becomes aware that such circumstances have occurred, and if it does not, it shall be liable for the damage suffered by the other party for failure to do so in a timely manner.

It appears that this provision could be improved by determining that the affected party, without such notice, can not seek modification or termination of the contract from court (more *infra* in the *de lege ferenda* proposals).

35 Matić, J., *Izmjena ili raskid ugovora zbog promijenjenih okolnosti i ponešto o tzv. slučaju “švicarski franak”*, Informator, 6424, 27-6-2016, p. 2 and Trnavci, G., *Valutna klauzula u švicarskim francima u BiH i region: nametanje dužničkog ropstva ili pošteno bankarstvo?*, Zbornik radova Aktualnosti građanskog i trgovačkog zakonodavstva i pravne prakse, 15/2017, Mostar, 2017, p. 250-252. The only case where the affected party demanded termination of the loan contract due to changed circumstances and succeeded, was found in Serbia in 2016. More from the media: <https://www.tportal.hr/vijesti/clanak/u-srbiji-pravomocno-raskinut-prvi-ugovor-za-kredit-u-svicarcima-20161012/print> (February 25, 2018).

36 Matić, *ibid.*, p. 2-3.

37 *Cf. ibid.*, p. 2-3.

38 Art. 133 of the “old” Law on Obligations.

39 Klarić; Vedriš, *op.cit.* 2, p. 484.

#### 4. CLAUSULA REBUS SIC STANTIBUS IN CASE LAW

Given that this clause is an exception to the principle of *pacta sunt servanda*, it should be treated and interpreted as restrictively as possible, in order not to undermine the binding force of contracts. Therefore, the possibility of a court intermeddling into a contract concluded between two partners, in order to modify or terminate it, should only be allowed in limited situations. That is probably why the prerequisites that must be fulfilled in accordance with Art. 369 of the COA, are set so that they (as will be seen from the case law) cannot easily be fulfilled. Based on the analysis of the available court decisions, it becomes clear that Croatian courts in most cases have come to the conclusion that these prerequisites were not fulfilled in specific cases. Thus, for example, out of about forty analyzed court decisions of different courts in Croatia, made at different times, only two were found in which courts have deemed that the prerequisites necessary for modification or termination of the contract due to changed circumstances, were met.<sup>40</sup>

“Spornim se ukazuje pitanje u kolikoj se mjeri ratno stanje, kako u objektivnom smislu s obzirom na mjesto prebivališta stranaka i mjesto ispunjenja ugovorom preuzetih obveza, tako i na subjektivnom planu, odrazilo na tužitelje odnosno njihove roditelje i s tim u vezi na njihovu (ne) mogućnost ispunjenja ugovorom preuzetih obaveza.

Međutim, kako se sudovi zbog svoje pogrešne ocjene da se ‘situacija nije izmijenila’, nisu bavili i ovim daljnjim pitanjima, to je činjenično stanje relevantno za valjanu primjenu materijalnog prava ostalo nedovoljno utvrđeno. Stoga razloga ovaj sud je prihvatio reviziju tužitelja te pozivom na odredbu iz čl. 395. st. 2. ZPP-a ukinuo presudu suda i prvog i drugog stupnja i predmet vratio sudu prvog stupnja na ponovno odlučivanje” (Vs, Rev 1180/1993-2, 11. studenog 2015).

“The question was raised as to how much the state of war, in objective sense in terms of the place of residence of the parties and the place of fulfillment of the contractual obligations, as well as in subjective sense, influenced prosecutors and their parents in relation to their (un) possibility to fulfill contractual obligations.

However, as the courts, because of their erroneous assessment of “unchanged situation”, did not deal with these issues, the factual situation relevant to the valid application of substantive law remained insufficiently established. For this reason, this court accepted the revision of the plaintiff and by referring to the provision in Art. 395 (2) of Civil Procedure Act, abolished the verdict of the courts of the first and second instances and returned the case to the court of the first instance” (translated by authors).

“Kako je u postupku utvrđeno da su se u razdoblju od sklapanja ugovora do dospjeća obveze pogođene strane, promijenile okolnosti koje su postojale u trenutku sklapanja ugovora (došlo je do promjene odnosa vrijednosti dugovane činidbe i protučinidbe) i to na nepredvidiv, neizbježan i nesavladiv način u odnosu na tuženike-protutužitelje kao pogođenu stranu, te da su promijenjene okolnosti izazvale tešku povredu ekvivalencije, odnosno uslijed ovih novih iz-

<sup>40</sup> There are probably much more court decisions dealing with this issue, but the authors have stopped at the number of about forty analyzed court decisions. Case law brought about by this paper is mainly downloaded from the web site <http://www.iusinfo.hr/Default.aspx> (February, 20, 2018).

vanrednih okolnosti ispunjenje obveze bi tuženicima-protutužiteljima nanijelo pretjerano veliki gubitak, pravilna je ocjena suda prvog stupnja kako je protutužbeni zahtjev tuženika-protutužitelja usmjeren na raskid predmetnog ugovora osnovan, jer su ostvarene pretpostavke utvrđene odredbom članka 133. ZOO-a (sada čl. 369. ZOO-a)” Županijski sud u Splitu, GŽ-1855/2015, 10. ožujka 2016.).

“As has been established during procedure, from the time of the conclusion of the contract until affected party was due to fulfill contractual obligation, circumstances that existed at the time of the conclusion of the contract have changed (there was a change in the ratio of the amount of obligations). The change was unpredictable, inevitable and impossible to overcome for affected party and caused this party an excessive loss or a serious breach of equivalence. Therefore, the court of first instance correctly assessed that the claim for termination of the contract was justifiable because prerequisites established by Article 133 of the Law on Obligations have been fulfilled (now Article 369 COA)” (translated by authors).

In the remaining decisions that were analyzed, a completely opposite position was assumed (below the authors will only cite some of them). For example, one of the most common reasons for refusing modification or termination of a contract was the fact that the courts have come to the conclusion that the prerequisite found in Art. 369 § 2 were not fulfilled, because the contracting parties could have predicted, avoided or overcame the circumstances for which they later sought termination or modification of the contract.

“Naime, te okolnosti tužitelji su bili dužni uzeti u obzir u smislu čl. 133. st. 2. ZOO-a, kojim je propisano da raskid ugovora ne može se zahtijevati ako je strana koja se poziva na promijenjene okolnosti bila dužna u vrijeme sklapanja ugovora uzeti u obzir te okolnosti ili ih je mogla izbjeći ili savladati” (Vs, Rev 1230/07-2, 28. listopada 2008.).

“Namely, those circumstances were plaintiff’s duty to be taken into account in the sense of Art. 133, p. 2 of the Law on Obligations (now Art. 369 of COA), which states that termination of a contract cannot be asked for, if the party who is invoking changed circumstances was obliged to take into account or to avoid or overcome said circumstances at the time of the conclusion of the contract” (translated by authors).

“(…) a o svim tim okolnostima koje su dakle kod tužitelja postojale i prije zaključenja sporog ugovora tužitelj je trebao voditi računa i kod sklapanja samog ugovora. Stoga i po ocjeni ovoga suda tužitelj neosnovano pozivom na odredbu čl. 133. (…)” (Vs, Rev 2084/1991-2, 12. veljače 1991.).

“(…) when it comes to all of the circumstances that existed for the plaintiff even before the conclusion of the disputed contract, the plaintiff should have taken them into account while concluding the contract. Therefore, according to the judgment of this court, the plaintiff’s reference to the provision of Art. 133 (now Art. 369) is without basis (…)” (translated by authors).

“Naime, odredba čl. 133. st. 2. ZOO-a propisuje da se raskid ugovora (zbog promijenjenih okolnosti) ne može zahtijevati ako je strana koja se poziva na promijenjene okolnosti bila dužna u vrijeme sklapanja ugovora uzeti u obzir te okolnosti ili ih je mogla izbjeći ili svladati” (Vs, Rev-67/01-2, 14. veljače 2001.).

“Namely, the provision of Art. 133 p. 2 of the Law on Obligations (now Art. 369 of COA) provides that the termination of a contract may not be required if the party invoking the changed circumstances was obliged to take such circumstances into account or avoid or overcome them at the time of the conclusion of the contract” (translated by authors).

“(…) tužena (…) trebala je u ugovoru kojeg je sama sačinila i ponudila na potpis tužitelju, u vrijeme sklapanja uzeti u obzir sve mogućnosti koje je morala i izbjeći ili svladati u ugovoru na određeni način” (Vs, Rev-211/1992-2, 8. travnja 1992.).

“(…) the defendant (...) in a contract that she herself has drafted and offered to the plaintiff to sign, should have taken into account all the possibilities that she had to avoid or overcome in a certain way, at the time the contract was concluded” (translated by authors).

Also, there is a considerable number of decisions in which courts have not allowed termination of the contract because changed circumstances occurred after a party that requested termination became late in fulfilling his/her obligation or the obligation was already fulfilled before the change occurred.

“(…) da se strana koja zahtijeva raskid ugovora ne može pozivati na promijenjene okolnosti koje su nastupile nakon isteka roka određenog za ispunjenje njene obveze.” (VS, Rev 1397/12-2, 11. veljače 2005.)

“(…) a party requesting the termination of a contract cannot invoke the changed circumstances that occurred after the expiry of the deadline for fulfilling its obligations” (translated by authors).

“(…) da su promijenjene okolnosti na koje se poziva tužitelj nastupile sredinom 1998. godine, dakle, nakon isteka roka određenog za ispunjenje obveze tužitelja – to su pravilno nižestupanjski sudovi primijenili materijalno pravo kada su odbili tužbeni zahtjev” (VS, Rev 710/03-2, 13. travnja 2005.).

“(…) that the changed circumstances invoked by the plaintiff occurred in mid-1998, that is, after the expiry of the deadline until which the plaintiff had to fulfill contractual obligation – therefore the lower court courts correctly applied substantive law when they rejected the claim” (translated by authors).

“(…) s obzirom na naprijed izneseno da tuženik-protutužitelj ne može tražiti raskid ugovora zbog promijenjenih okolnosti, jer su stranke sadržaj ugovornih obveza već izvršile” (VS, Rev 965/07-2, 8. siječnja 2008.).

“(…) termination of the contract due to changed circumstances cannot be asked for because the parties have already fulfilled their contractual obligations” (translated by authors).

“(…) protutužitelj ne može pozivati na promijenjene okolnosti koje su nastupile nakon isteka roka određenog za ispunjenje njegove obaveze, jer je on već bio u zakašnjenju s isplatom polovice kupoprodajne cijene dana 28. siječnja 1991. godine, a promijenjene okolnosti da su nastupile nakon isteka tog roka” (VS, Rev 1505/02-2, 8. prosinca 2004.).

“(…) the counter-defendant cannot invoke the changed circumstances that occurred after the expiry of the deadline for the fulfillment of his obligation because he was already late with

the payment of half of the purchase price on January 28, 1991 and the changed circumstances occurred after the expiry of that deadline” (translated by authors).

According to one of the decisions, neither prerequisites set in Article 369 paragraph 2, nor those in paragraph 3 were fulfilled:

“Stoga, niti prema odredbi čl. 369. st. 2. ZOO-a tuženik ne bi mogao tražiti izmjenu ili raskid ugovora, budući da je isti ona ugovorna strana koja je bila dužna u vrijeme sklapanja ugovora uzeti u obzir te okolnosti. Pravilno sud drugoga stupnja ukazuje da neosnovanost zahtjeva tuženika proizlazi i iz odredbe čl. 369. st. 3. ZOO-a, prema kojoj stranka koja zahtijeva izmjenu ili raskid ugovora ne može se pozivati na promijenjene okolnosti koje su nastupile nakon isteka roka određenog za ispunjenje njezine obveze. Kako je tuženik u vrijeme nastupa promijenjenih okolnosti već bio u zakašnjenju, za ishod je ovoga spora irelevantno je li tuženik mogao te okolnosti predvidjeti u vrijeme sklapanja ugovora” (VS, Rev 710/13-2, 4. rujna 2013.).

“Therefore, under the provisions of Art. 369 p. 2 of COA, the defendant could not seek modification or termination of the contract, since the defendant was the same contractual party that was obliged to, at time of the conclusion of the contract, take into account those circumstances. Second instance court properly indicated that the defendant’s claim inadmissibility also arises from the provisions of Art. 369 p. 3 of COA, according to which the party requesting the modification or termination of the contract cannot rely on the changed circumstances which occurred after the expiry of the deadline for fulfilling his obligation. As the defendant, at a time of appearance of the changed circumstances, was already late in fulfilling his obligation, for the outcome of this dispute it is irrelevant whether the defendant could have predicted these circumstances at the time of the conclusion of the contract”(translated by authors).

Surprisingly, it was found that in a relatively large number of cases, the affected party believed that, because of the changed circumstances, the contract could be terminated by unilateral declaration of will, which is not possible. Although this kind of termination of contract in legal theory is referred to as unilateral termination under the law,<sup>41</sup> it does not happen by a unilateral declaration of will of the affected party, nor by the fulfillment of certain prerequisites. Also, according to case law, termination of contract cannot be discussed at court as a result of complaint or preliminary issue. It can only be considered if affected party submitted a lawsuit or a counterclaim asking a court to modify or terminate the contract.<sup>42</sup> This derives from the provision of Art. 371 which carries the title “Circumstances Significant for a Court Decision”,<sup>43</sup> and as will be seen from the aforementioned decisions, the jurisprudence has also assumed such an attitude.

“The termination of the contract due to changed circumstances cannot be discussed as a preliminary matter, but only if a lawsuit or counter-claim for termination of the contract has been filed” (translated by authors).

41 Klarić, Vedriš, op.cit 2, p. 481-484.

42 Slakoper, op.cit. 32, p. 47.

43 Art. 371 of the COA: When deciding on modification of the contract or its termination, **the court** will be guided by the principle of conscientiousness and fairness, taking into account in particular the purpose of the contract, the division of risks arising out of the contract or from the law, the duration and effect of the extraordinary circumstances and the interests of both parties.

“Međutim, raskid ugovora zbog promijenjenih okolnosti u smislu odredbe čl. 369 st. 1 ZOO-a, može se zahtijevati samo konstitutivnom tužbom (...), zbog čega jednostrani raskid ugovora zbog promijenjenih okolnosti nema nikakav pravni učinak” (ŽS u Varaždinu, Gž.1597/08-2, 22. prosinca 2008.).

“However, the termination of the contract due to changed circumstances in terms of the provision of Art. 369 p. 1 of COA, may be required only by a claim addressed to court (...), which is why the unilateral termination of the contract due to changed circumstances has no legal effect” (translated by authors).

“(…) se raskid ugovora zbog promijenjenih okolnosti ne može dati prostom izjavom kao što to primjerice propisuje institut raskida ugovora zbog neispunjenja, već u slučaju postojanja pretpostavki za raskid ugovora zbog promijenjenih okolnosti stranka može samo od suda tražiti da se ugovor raskine” (Vs Rev 734/2010-2, 6. veljače 2013.).

“(…) the termination of a contract due to changed circumstances cannot be made by a simple statement as is, for example, possible in case of termination of the contract due to failure to fulfill obligations. In the event of the existence of a prerequisites for termination of the contract due to changed circumstances, the party may only request the court to terminate the contract” (translated by authors).

“Prema tome, ugovorna strana koja se poziva na promijenjene okolnosti može zahtijevati da sud donese odluku o tome hoće li se ugovor raskinuti i ugovor se tada raskida (prestaje) odlukom suda – a ne izjavom te ugovorne strane o raskidu” (Vs Rev 19/2006-2, 21. ožujka 2006.).

“Accordingly, a contracting party invoking the changed circumstances may require a court to decide whether the contract will be terminated and the contract shall then be terminated by a court decision and not by a declaration of that contracting party” (translated by authors).

“Isto upravo iz čl. 133. (danas čl. 369.) st 4. i 5. ZOO-a proizlazi da je tužitelj morao pokrenuti postupak radi izmjene ili raskida ugovora, a to nije učinio, već je jednostrano raskinuo ugovor i o tome obavijestio tužitelja” (Visoki trgovački sud, Pž 3308/04-4, 8. svibnja 2007.).

“Art. 133. p. 4 and 5 of the Law on Obligations (now Art. 369) state that the plaintiff had to initiate proceedings for modification or termination of the contract, however, the plaintiff did not do so, but unilaterally terminated the contract and informed opposing party about it”(translated by authors).

“(…) strana koja se poziva na promijenjene okolnosti ne može sama raskinuti ugovor već takav zahtjev može podnijeti sudu koji donosi odluku o ne/osnovanosti tog zahtjeva” (Visoki trgovački sud Pž 4797/04-3, 11. rujna 2009.).

“(…) a party invoking the changed circumstances cannot terminate the contract by himself, but may submit such a request to court which will decide whether such claim is justified” (translated by authors).

“(…) raskid ugovora zbog promijenjenih okolnosti može se zahtijevati samo konstitutivnom tužbom u povodu koje sud može konstitutivnom presudom odlučiti o raskidu tog pravnog odnosa, a tužitelj ovdje nije ustao tužbom na raskid ugovora, već je jednostranim aktom odustao od ugovora (raskinuo ugovor)” (Vs Rev 1190/2007-2, 13. siječnja 2011.).

“(…) the termination of the contract due to changed circumstances may only be demanded by lawsuit on the grounds of which the court may decide to terminate that legal relationship, and in this case, the plaintiff did not initiate lawsuit for termination of the contract, but terminated the contract by a unilateral act” (translated by authors).

## 5. THE SCOPE OF APPLICATION OF *CLAUSULA REBUS SIC STANTIBUS* – *DE LEGE LATA* AND *DE LEGE FERENDA*

The institute of changed circumstances, apart from civil law, can be applied in some other branches of law. For example, changed circumstances have an impact in administrative law concerning administrative acts<sup>44</sup> and on international treaties.<sup>45</sup>

When referring to *clausula rebus sic stantibus* in the context of civil law, it seems that it could also affect property rights by influencing a contract from which property right arises, despite the fact that in this part of civil law, this institute is not known.<sup>46</sup>

44 The adoption of a new administrative act is possible in a situation where the circumstances on which the previous administrative act is based, have changed, as the new circumstances prevent its stay in force. In this case, the so-called “opposite administrative act” must be adopted. This applies to those administrative acts that create certain lasting situations that establish a lasting legal relationships. It should be emphasized that the change of circumstances will not affect the operation of the earlier administrative act because it will be valid until the new (opposite) act is made. More in Đelmo, Z., *Primjena klauzule “rebus sic stantibus” u upravnom pravu*, Uprava, Stručni časopis; Fakultet za javnu upravu, Sarajevo, Vol. 2, No. 3, 2011, p. 47-48.

45 It should be emphasized that the *clausula rebus sic stantibus* in science and practice is a controversial way of terminating the contract in international law. However, it was necessary to allow for the possibility of termination of international treaties because of this reason, as well, since there are situations where the persistence and enforcement of the international treaty would be “inappropriate, unreasonable, unjust and dangerous”. Ibler, V., *Rječnik međunarodnog javnog prava*, 2<sup>nd</sup> ed., Zagreb, 1987, p. 124.

It has to be noted that in international law there are reservations about this clause as it can create a great legal uncertainty. Therefore, when governments invoke *clausula rebus sic stantibus*, the other party often either denies the possibility of its influence on the contract or at least claims that there is no justification for its application to the case in question. Andrassy, J., *Međunarodno pravo*, 9<sup>th</sup> ed., Zagreb, 1987, p. 348.

However, Art. 62. The Vienna Convention on the Law of International Treaties provides for the possibility that, due to the changed circumstances, international agreements cease to exist:

“Fundamental change of circumstances

1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.”

Vienna Convention on the Law of International Treaties, National Gazette, International Treaties, 16/93.

Furthermore, in paragraph 9 of the Explanatory Notes to the Convention, prerequisites under which a contracting party may invoke a change of circumstances as the basis for termination of a contract or withdrawal from the contract, are set. Namely they are as follows: circumstances which existed at the time of the conclusion of the contract must change; this change of circumstances must be important; must be such that the parties could not foresee it; the existence of certain circumstances must be an important basis for the consent of the parties to be bound by the contract and the effect of the change must radically alter the extent of the obligations still to be fulfilled under the contract. More in Kinder, I., *Primjenjivost klauzule Rebus Sic Stantibus na međunarodni ugovor o vojnoj bazi SAD-a u Guantnamu*, Zbornik Pravnog fakulteta u Zagrebu, Vol. 62, No. 4, 2012, p. 1124-1125.

46 According to Stipković, Z., in Gavella, N. et al., *Stvarno pravo*, 2. svezak, Narode novine, Zagreb, 2007, p. 10, based on Art.242 of Law on Property and Other Property Rights, National Gazette 91/1996, 68/1998, 137/1999, 22/2000, 73/2000, 129/2000, 114/2001, 79/2006, 141/2006, 146/2008, 38/2009, 153/2009, 143/2012, 152/2014 that deals with termination of easement.

Except in Art. 369 to 372 of COA, changed circumstances and their impact on binding relationships are explicitly mentioned in several other places of this Act.<sup>47</sup> This is, for example the case with Art. 268 p. 2,<sup>48</sup> Art. 584 p. 1;<sup>49</sup> Art. 640 p. 2,<sup>50</sup>

Case law:

“Predmet ovoga spora je zahtjev tužitelja za raskid ugovora, što ga je on sklopio s tuženikom 20. siječnja 1987. godine, a kojim je osnovana stvarna služnost prolaza i provoza za korist tamo navedenih nekretnina tuženika na teret nekretnina tužitelja iz razloga promijenjenih okolnosti nakon sklapanja tog ugovora, a to sve temeljem odredbe čl. 133. Zakona o obveznim odnosima – dalje: ZOO. Sud prvog stupnja je utvrdio da su stranke sklopile sporni ugovor kojim je osnovana služnost u korist tuženikovih nekretnina i to k.č.br. 978 i 980/1 preko tužiteljeve parcele k.č.br. 979 sve k.o. Biograd, te u korist spomenute tužiteljeve parcele k.č.br. 979 preko tuženikove parcele k.č.br. 980/1.

Taj sud je također utvrdio da je nakon sklapanja tog ugovora tuženik svoju k.č.br. 980/1 darovao sinu B.T., preko koje je nakon toga formiran put pod oznakom k.č.br. 980/6, a koji put je kupio tužitelj, te da je tuženik tužitelju prodao šupu, do koje je također dolazio preko njegove parcele. Nižestupanjski sudovi smatraju da su time nastupile nove okolnosti nakon sklapanja spornog ugovora, koje otežavaju ispunjenje tužiteljeve obveze, odnosno da se zbog njih više ne može ostvariti svrha ugovora, jer više nema potrebe za putnom komunikacijom preko navedenih čestica kako tužitelju, tako i tuženiku, pa da bi bilo nepravično održati na snazi ugovor stranaka, a to na temelju čl. 133. ZOO” (VSRH Rev 3035/2000-2, 24. lipnja 2003.).

“The subject of this dispute is plaintiff’s request to terminate the contract, which he concluded with the defendant on January 20, 1987, and which established the easement of passage and transit for the benefit of the aforementioned property of the defendant and as the burden of the plaintiff’s property, due to changed circumstances after the contract was made, all under the provisions of Art. 133 of the Law on Obligations (today Art. 369, COA).

The court of first instance found that the parties had concluded a disputed contract for establishing the easement in favor of the defendant’s property, c.p. no. 978 and 980/1 through plaintiffs’ property, c.p. no. 979, all in cadastral municipality of Biograd, and for the benefit of the mentioned plaintiffs’ property c.p. no. 979 through the defendants property c.p. no. 980/1.

The court also found that after the conclusion of that contract the defendant had his c.p. no. 980/1 donated to B.T.’s son, through which a path was formed under the marked c.p. no. 980/6, which the plaintiff had bought, and that the defendant sold the prosecutor a shed, to which he also came through his land.

Courts considered that new circumstances have arisen following the conclusion of the contract, which make it difficult for the plaintiff to fulfill contractual obligations and that the purpose of the contract can no longer be fulfilled because there is no longer a need for road communication over the above mentioned property, both to the plaintiff and the defendant, so it would be unfair to maintain the contract according to Art. 133. of the Law on Obligations (now Art. 369 of the COA)” (translated by authors).

However, it should be emphasized that in this particular case the Supreme Court did not find that the new circumstances led to the difficulties in fulfillment of the plaintiff’s obligation, as it determined in the same decision:

“Medutim, ovaj sud ne nalazi da navedene okolnosti otežavaju ispunjenje tužiteljeve obveze u odnosu na stanje u vrijeme sklapanja ugovora s jedne strane (...). U ovom slučaju se zaključuje da tužitelj, koji se poziva na promijenjene okolnosti, tj. promjenu vlasnika nekretnina ne samo da je u vrijeme sklapanja ugovora bio dužan uzeti ih u obzir, već i da ih je uzeo, pa je unatoč tome tražio raskid tog ugovora.”

“However, this court does not find that the mentioned circumstances make it difficult for the plaintiff to meet his obligations in relation to the situation at the time of the conclusion of the contract. (...) In this case, it is concluded that the plaintiff, referring to the changed circumstances, ie. the change of the owner of the property, was not only obliged to take them into account at the time of the conclusion of the contract, but did take them into account, and despite of that, sought the termination of contracts” (translated by authors).

On the other hand, had the Supreme Court found that the presumptions set out in Art. 133, p. 2 (now Article 369, p. 2) have been fulfilled, the changed circumstances would affect the existence of the easement itself by influencing the contract that was the basis of the easement.

- 47 There are also provisions that do not mention the formulation of “changed circumstances”, but it can be deduced from the text that it was what was had in mind. Eg. Art. 626 of the COA refers to the possibility of price changes in a construction contract which is possible if the price of the elements on the basis of which the price of construction is formed, is increased. This, too, is the case of changed circumstances that have an impact on the increase or decrease of the price of the construction, but as such are not explicitly mentioned.
- 48 Art. 268, p. 2: The pre-contract does not bind if the circumstances of its conclusion have so changed that it would not have been concluded if such circumstances existed at that time.  
This article does not mention which circumstances can affect pre-contract, but a pre-contract is to be treated like any other type of contract and as such should be subject to the provisions of the COA relating to other bilateral contracts. The only special feature of this type of contract is that the contracting parties take over the obligation to later conclude the so-called “main contract”. Therefore, as in all other contracts, the provision of Art. 369 (and others detailing changed circumstances) should apply, in relation to modification and termination. More in Pavlović, M., *Predugovor i kada se može smatrati glavnim ugovorom*, Pravo u gospodarstvu, Vol. 12, No. 6., 2011, p. 1229.
- 49 Art. 584, p. 1: General provisions of this Law concerning changed circumstances apply to contract on support for life.
- 50 Art. 640, p. 2: A partner is not obligated to subsequently increase the contracted stake, but if the common goal could not be achieved due to the changed circumstances, the partner that does not want to increase his/her stake may leave the partnership or be excluded from it.



Art. 727 p. 2,<sup>51</sup> Art. 829,<sup>52</sup> Art. 902, p. 5,<sup>53</sup> Art. 903, p. 6,<sup>54</sup> Art. 343<sup>55</sup> and 1096.<sup>56</sup> For this part of the paper some of the most important are Art. 343 and 1096, which relate to liability for damages and Art. 534 which relates to a contract on support for life.

## 5.1. CHANGED CIRCUMSTANCES AND LIABILITY FOR DAMAGES

Except contracts, changed circumstances also affect some non-contractual relationships, such as liability for damages, which is explicitly stated in two places in the COA. Art. 343 determines that the debtor will be free from liability for damages if he proves that he could not fulfill his obligation or that he was late in fulfilling his obligations due to external, extraordinary and unforeseeable circumstances, arising after the conclusion of contract, that he could not prevent, remedy or avoid.

“Dužnik se ne može osloboditi odgovornosti za zakašnjenje u ispunjenju obveze iz ugovora pozivom na okolnosti (odljev radne snage i angažiranje mehanizacije i voznog praka za potrebe obrane) koje je trebao imati na umu pri zaključenju ugovora i utvrđivanju rokova izgradnje, budući da su u to vrijeme ratne operacije već bile u toku” (Žs u Zagrebu, Gž-552/04, 15. veljače 2005.).

“The debtor cannot be released from liability for delay in the fulfillment of the contractual obligation by reference to the circumstances (the outflow of the workforce and the engagement of the mechanization and vehicles for the purposes of defense) which he should have taken into account when concluding the contract and fixing the time limits for construction, since at that time, war operations were already in progress” (translated by authors).

Furthermore, pursuant to Art. 1096, changed circumstances also allow the modification of the compensation in the form of annuity, in the event that the court has determined that the damage is to be repaired in the form of annuity. Specifically, the aforementioned clause provides for the possibility of reducing, abolishing or increasing the remuneration, provided

51 Art. 727, p. 2: If parties agreed upon a place and a way in which to keep objects of bailment, bailee may change agreed upon conditions only if changed circumstances require so, otherwise, a bailee is responsible for accidental ruin or accidental damage to the item.

52 Art. 829: For important reasons, that have to be mentioned, and in particular because of the failure of the other party to comply with the contractual obligation or due to changed circumstances, each party may terminate the contract that was drafted for an indefinite period of time, without notice, or terminate the contract that was drafted for a certain period of time, before that time expires.

53 Art. 902 p. 5: If the organizer has terminated the contract due to the extraordinary circumstances that occurred while he/she was fulfilling his/her contractual obligations, he/she is obliged to return to passengers a difference in price between the contracted and provided services and take all measures necessary to protect the interests of the passengers.

54 Art. 903 p. 6: A passenger is not entitled to compensation for damages referred to in paragraph 4 of this Article if the modifications of essential parts of the contract were due to exceptional external circumstances, which the organizer could not foresee, avoid or eliminate.

55 Art. 343: The debtor shall be released from liability for damages if he/she proves that he/she could not fulfill contractual obligation or was late in fulfilling that obligation due to external, extraordinary and unforeseeable circumstances that happened after the conclusion of a contract, which he/she could not prevent, remedy or avoid.

56 Art. 1096: The court may, at the request of the injured party, increase the amount of compensation in the form of the annuity and may, at the request of the person responsible for damages, lower or abolish it, if the circumstances which the court had had in mind when making the previous decision, significantly changed.

that the circumstances which the court took into account when determining the payment of compensation in this form, have changed significantly, if the injured party or the party that is paying the annuity so requests.<sup>57</sup>

“Samo ako se znatnije promijene okolnosti koje je sud imao na umu pri donošenju prijašnje odluke o visini rente na ime izgubljenog uzdržavanja, sud može na zahtjev oštećenika za ubuduće povećati rentu ili je na zahtjev štetnika smanjiti ili ukinuti (Žs u Bjelovaru, Gž-1297/99, 10. lipnja 1999.).

“Only if the circumstances that the court had in mind when deciding on the amount of annuity due to lost support, significantly changed, the court may, at the request of the injured party, increase the annuity in the future or, at the request of the person responsible for damages, reduce or abolish it” (translated by authors).

“Kad je oštećeniku dosuđena novčana naknada za nematerijalnu štetu u obliku rente, sud može u slučaju znatnijih promjena okolnosti ubuduće povećati rentu” (Vs, Rev-506/91, 4. travnja 1991.).

“When the injured party receives a financial compensation for non-pecuniary damage in the form of annuity, the court may, in the event of significant changes in circumstances, increase the annuity in the future (translated by authors).

“Znatnije izmijenjene okolnosti utječu na mogućnost izmjene visine rente na ime naknade nematerijalne štete jednako kao i na mogućnost izmjene visine rente dosuđene na ime naknade materijalne štete” (Vs, Gzz-28/88, 31. ožujka 1989.).

“Substantially changed circumstances affect the possibility of changing the amount of annuity for the benefit of non-pecuniary damage, as well as the possibility of altering the amount of annuity granted for pecuniary damage” (translated by authors).

“Revident, međutim, s pravom ističe da sudovi nisu ispitali odlučne okolnosti iz kojih se može izvesti zaključak da je došlo do znatnije promjene okolnosti koje je sud imao u vidu pri donošenju prijašnje odluke o renti.

Prema, naime, odredbi čl. 196. Zakona o obveznim odnosima (Narodne novine, broj 53/1991, 73/1991 i 3/1994) sud može na zahtjev oštećenika za ubuduće povećati rentu ako su znatnije promijenjene okolnosti koje je sud imao na umu pri donošenju prijašnje odluke. Je li do toga u konkretnom slučaju došlo kao npr. znatnijeg povećanja štete zbog povećanih izdataka za tuđu pomoć i njegu, sudovi nisu ispitali» (Vs, Rev 3213/1995-2, 12. listopada 1999.).

“The person seeking revision, however, rightly points out that the courts have not examined the decisive circumstances from which it can be inferred that there was a significant change in the circumstances the court took into account when making the previous decision on annuity.

57 Art. 1096 COA

Application of *clausula rebus sic stantibus* will not be possible if the annuity was capitalized, which means that the injured party has received a full amount to which he/she was entitled, which is allowed under Art. 1088 p. 4 and 5 of the COA in the event that the debtor has not provided the insurance that the court ordered, or if there were any other serious reasons for capitalization of the annuity. Crnić, I., *Zakon o obveznim odnosima, Napomene, komentari, sudska praksa i prilogi*, Organizator, Zagreb, 2006, p. 850.

According to the provisions of Art. 196 of the Law of Obligations (Official Gazette 53/1991, 73/1991 and 3/1994) (now Art. 1096 of COA), the court may, at the request of the injured party, increase the annuity in the future, if there is a significant change in the circumstances the court had in mind when making the previous decision. Has this been the case: did, for example, a substantial increase in damages due to increased expenses for someone else's help and care occurred, the courts have not examined" (translated by authors).

## 5.2. CHANGED CIRCUMSTANCES AND ALEATORY CONTRACTS

As far as aleatory contracts are concerned, it is interesting that the Italian *Codice Civile*, in Art. 1469 explicitly states that changed circumstances do not influence aleatory contracts, and some authors who have dealt with this issue also state that the same applies to Croatian law of obligations.<sup>58</sup> However, it should be borne in mind that changed circumstances have a major impact on the contract of support for life, which is an aleatory contract, in its own nature.<sup>59</sup>

Art. 584. of the COA states that the contract of support for life shall be governed by the general provisions concerning changed circumstances. Therefore, the courts may change the recipient's right to support into a lifetime annuity, if it is appropriate for both contracting parties.<sup>60</sup>

Several examples of court decisions have been found, which confirm this:

"Postoji, međutim, mogućnost da se, za slučaj promijenjenih okolnosti nakon zaključenja ugovora, u smislu odredbe iz čl. 120. ZN-a, (sada čl. 584. st. 1. ZOO-a) nanovo urede odnosi između stranaka, a tek ako je to nemoguće, može se raskinuti i ugovor..." (Vs, Rev-x 1006/10-2, 19. siječnja 2011.).

"There is, however, a possibility, in the case of changed circumstances that have occurred after the conclusion of the contract, in the sense of the provision of Art. 120 of Inheritance Act (now Art. 584, p. 1 of COA) to modify contractual relations between the parties, and only if this is not possible, can the contract be terminated (...)" (translated by authors).

"Tužiteljica ni u tužbi, a niti tijekom trajanja postupka pred nižestupanjskim sudovima nije upirala na promijenjene okolnosti kao razlogom raskida ugovora, pa isticanje ovog prigovora tek sada u revizijskom stadiju postupka predstavlja prigovor nepotpuno utvrđenog činjeničnog stanja, a iz kojih razloga izjavljivanje revizije nije dopušteno (čl. 385. st. 3. ZPP-a)." (Vs, Rev-1660/1998-2, 9. svibnja 2001.).

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

59 Čobeljić, op.cit. 10, p. 81; Petrić. op.cit. 7, p. 26-27.

The fact that the contract on support for life is aleatory is extremely important for its validity, because, if it was not aleatory (ie. support provider knew that the recipient will die in a short period of time), contract on support for life would not be valid. In best case, it might be treated as some other type of contract to which provisions relating to the support for life will not be applied. More in Gavella, N., *Nasljedno pravo*, Informator, Zagreb, 1990, p. 369.

60 Everything said for contract on support for life applies to the contract on support until death, in accordance to Art. 589 of the COA.

“The plaintiff, neither in her lawsuit nor during the course of the proceedings before lower courts, did uphold the changed circumstances as the reason for termination of the contract, so making this objection only now, at the audit stage of the proceedings, represents an objection of an incompletely established factual situation, for which reason the revision is not allowed (Art. 385 (3) of the Civil Procedure Act” (translated by authors).

“(…) nisu nastupile promijenjene okolnosti u smislu čl. 120. st. 1. ZN-a (danas čl. 584. st. 1. ZOO-a, op. a.) odnosno nisu ispunjene zakonom propisane pretpostavke za izmjenu sklopljenog ugovora odnosno njegov raskid zbog promijenjenih okolnosti” (Žs u Bjelovaru, Gž 564/2014-2, 27. kolovoza 2015.).

“(…) no changed circumstances have occurred in the sense of Art. 120 p. 1 of the Inheritance Act (now Art. 584 p. 1 of the COA), so the prerequisites for modification or termination of the contract due to changed circumstances have not been fulfilled” (translated by authors).

At this point, it should be emphasized that the possibility of terminating contracts because of the changed circumstances was, for the first time in Croatian legal system, actually introduced in the context of a contract on support for life. This happened much earlier than *clausula rebu sic stantibus* became a natural ingredient of all other types of contracts. The possibility to terminate a contract of support for life has been a natural ingredient of this type of contract since 1955, while for other contracts, it became a natural ingredient twenty years later, after ‘old’ Law of Obligations entered into force in 1978.<sup>61</sup>

At first glance, it is clear why it was necessary to allow the possibility of modification or termination because of the changed circumstances in relation to contract of support for life, despite of the fact (or maybe just because of the fact) that they are aleatory. These contracts are aleatory precisely because they were conceived in such a way that contracting parties never really know how long they will last and parties, also, never know the exact content of the support provider’s obligation, since these elements depend primarily on the length of life of the recipient of support and his health. In view of this, there are many circumstances that can change after contract of support for life is concluded, which might have a significant impact on the ability to fulfill an obligation. Some of these circumstances include, for example, a change in the health or property status of a provider of support or his/her family members, or changes in the property that the recipient of support transfers to the provider as a payment for providing support – for example, destruction or significant damage to the property.<sup>62</sup> Because of that, it is clear why the option of amending or terminating the contract of support for life due to changed circumstances was introduced in inheritance law even then.

Some authors go as far as to state that, although *clausula rebu sic stantibus* is a natural ingredient of all other contracts, it should be an essential ingredient of contracts of support for life and contracts of support until death. As a result, contracting parties should not be allowed, in advance, to waive the right to ask for modification or termination of these contracts due to changed circumstances.<sup>63</sup> The reason for this being certain peculiarities that exist

61 See note 24 and 25. More in Nikšić, op.cit. 5, p. 160.

62 More details in Belaj, V., *Raskid ili izmjena ugovora o doživotnom uzdržavanju zbog promijenjenih okolnosti*, Pravni vjesnik, Vol. 28, No. 3-4, 2001, p. 15-17.

63 More in Crnić, op.cit. 57, p. 494.

on the side of these contracts, which do not exist in any other type of contracts – parties very often live together or at least have close everyday contacts with each other, their relationship can become delicate, there is uncertainty regarding the duration of these contracts and the content of the obligation of the provider of support.

### 5.3. CHANGED CIRCUMSTANCES AND UNILATERAL CONTRACTS

In Croatian legal theory, it is not clear whether *clausula rebus sic stantibus* should apply only to bilateral or whether it might be applied to unilateral contracts, as well. In the COA, this institute is located in the part of the Act that deals with the effects of bilateral contracts, so therefore, most commentators assume that, by putting it in this part of the Act, it is implied that it should be applied only to bilateral contracts. In the literature, it is mainly stated that the reason for the existence of this clause is to protect the equivalence of parties' obligations and (precisely because of that?) it should only be applied to bilateral contracts.<sup>64</sup> Nevertheless, there are opinions that there is no reason for *clausula rebus sic stantibus* not to be applied to unilateral contracts.<sup>65</sup> The reason for this is the fact that one of the reasons for its existence is, among other things, exoneration of the debtor from the negative consequences of the changed circumstances. This is certainly in accordance with the principle of conscientiousness and fairness. Therefore, there should not be a reason not to apply *clausula rebus sic stantibus* to such contracts, since negative consequences of changed circumstances may affect the debtor even in unilateral contracts.<sup>66</sup>

Alo, from the above analyzed provisions, it is clear that *clausula rebus sic stantibus* in Croatian law of obligations applies not only to bilateral contracts but also to liability for damages. Also, its purpose is not always to re-establish the equivalence between obligations, since it also affects certain aleatory contracts in which equivalence between obligations does not exist and which, unlike most other contracts, cannot be annulled because of disrupted equivalence.<sup>67</sup> It is, therefore, unclear: what is the reason for the persistent exclusion of the possibility of application of *clausula rebus sic stantibus* to unilateral contracts? The arguments that this institute in the Law of Obligation is in the part referring only to bilateral treaties, and that it only serves to restore equivalence of obligations, obviously do not stand. This issue is especially evident when we look at the institute of changed circumstances in comparative law, where it is accepted in many European civic codifications that it not only affects bilateral, but also unilateral contracts.

64 Belaj, op.cit. 62, p. 10-11; Nikšić, op.cit. 13, p. 573, 583-584; Petrić, op.cit. 7, p. 23,26; Slakoper, op.cit. 32, p. 39.

65 Nikšić, op.cit. 13, p. 573; Petrić, op.cit. 7, p. 23-27; Slakoper, op.cit. 32, p. 39.

66 Petrić *ibid.*

An example could be a donation contract in which the donor, since *clausula rebus sic stantibus* does not apply to this type of contract, would have to fulfill his/her obligation even when its fulfillment is significantly impeded and he/she is not responsible for the impediment. Of course, there is a possibility of recalling the gift before it is due because of impoverishment of the donor (Art. 492 of the COA), which in any case represents a changed circumstance, but this is certainly not the only circumstance that may happen after the conclusion of the donation contract and before its due date, which could cause difficulties in donor's fulfillment of the contract and cause him/her excessive losses. Nikšić, op.cit. 13, p. 573; Petrić, op.cit. 7, p. 25; Slakoper, op.cit. 32, p. 39.

67 Art. 375 p. 5 of the COA.

For example, the Italian *Codice Civile* in its Art. 1468 stipulates that *clausula rebus sic stantibus* also applies to unilateral contracts, in which case the affected party may not be able to demand termination of such a contract, but may require reduction of the obligation or a change in the manner in which it is fulfilled, which certainly has a significant positive effect on that party's position.<sup>68</sup>

Unlike Art. 1468 of *Codice Civile*, German BGB in its Art. 313 does not precisely state which contracts can be modified or terminated due to changed circumstances, which results in this provision also being applicable to bilateral, as well as to unilateral contracts.<sup>69</sup> Commentators who have studied this issue in German legal theory, also agree with this interpretation.<sup>70</sup>

The Austrian law goes even further, since *clausula rebus sic stantibus* can even be applied to unilateral declarations of will.<sup>71</sup> An example of this is the declaration of will of a patient when expressing his/her wishes regarding medical procedures in the event of loss of ability to reason or express his/her will.<sup>72</sup> Such manifestation will cease to produce legal effects in the event that the state of medical science has changed significantly from the time when it was done, that is, if the circumstances that existed at the time of the declaration were changed.<sup>73</sup> This is seen in §10.1.3 of the Austrian *Bundesgesetz über Patientenverfügungen* which clearly shows that, in Austria, the only ratio of existence of the *clausula rebus sic stantibus*, is not solely to re-establish the equivalence of obligations.

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

69 "Haben sich Umstände, die zur Grundlage des Vertrags geworden sind, nach Vertragsschluss schwerwiegend verändert..." § 313.

70 Nikšić, op.cit. 13, p. 571; Petrić, op.cit. 7, p. 24.

However, it should be emphasized that Article 369 of the COA also does not expressly state which contracts may be modified or terminated due to changed circumstances, but because these provision are placed in the part of the Act relating to bilateral contracts, most authors consider that, for this reason, this clause should be applied only to such contracts.

71 Regarding the legal nature of the patient's consent to medical procedure, there are different opinions. Thus, Gavella thinks that giving consent is a legal affair that operates within the limits of its existence, content and validity, and states that the validity of this statement is judged by the general rules concerning validity of legal affairs (Gavella, N., *Osobna prava*, I. dio, Zagreb, 2000., p. 58 and 88), while Klarić considers that giving consent to a medical procedure can not be considered an ordinary legal affair because its purpose is not the disposition of property. This author thinks that patient's consent has to do with realization of the fundamental personal rights - the right to life and physical integrity, for which there is no need for business capability. Maturity and ability to understand the meaning of a medical procedure (i.e. the ability to reason) is sufficient for patient's consent. (Klarić, P., *Povreda prava na tjelesni integritet u medicini* u: Alaburić, V. et al., *Odgovornost za neimovinsku štetu zbog povrede prava osobnosti*, Narodne novine, 2006, p. 192-193).

As far as comparative law is concerned, German and Austrian law do not regard patient's right to consent to a medical procedure as a legal affair, but as an act similar to legal affair. In Swiss law, it is considered a unilateral contract. More in Nikšić, S., *Ugovor o zdravstvenoj usluzi*, Ph. D. thesis, Zagreb, 2007, p. 371-373.

72 *Bundesgesetz über Patientenverfügungen (Patientenverfügungs-Gesetz - PatVG)*, 8. 5. 2006, §10, 1, 3:

"Eine Patientenverfügung ist unwirksam, wenn (...) der Stand der medizinischen Wissenschaft sich im Hinblick auf den Inhalt der Patientenverfügung seit ihrer Errichtung wesentlich geändert hat." Full text available at:

<https://www.ris.bka.gv.at/Dokumente/RegV/REGV-COO-2026-100-2-137773/REGV-COO-2026-100-2-137773.pdf> (March, 3, 2018).

73 Nikšić, op.cit. 13, p. 573.

## 6. MODIFICATION OR TERMINATION OF THE CONTRACT – SOME SUGGESTIONS *DE LEGE FERENDA*

Regarding the possibilities that exist in the event of a change of circumstances after the conclusion of the contract, Art. 369 of COA is clear: there may be modification or termination of the contract. However, there are certain ambiguities that arise from the omission of regulating certain problems concerning the above mentioned two possibilities in said article.

The contracting parties would certainly be able to modify or terminate the contract by both agreeing to do so and this is, without a doubt, the most desirable solution. However, despite of the fact that the problem would, in that case, be solved in a peaceful manner, the provisions of the COA that deal with changed circumstances do not specifically determine that the contracting parties are obliged (to at least try) to resolve their problem peacefully, before the affected party turns to court for help.<sup>74</sup> The imposition of this obligation on the contracting parties would certainly be in accordance with Art. 186 (a) of the Civil Procedure Act, which prescribes the general obligation to try to settle disputes peacefully, which in turn, leads to the unburdenment of courts since it is possible that, at least in some cases, contracting parties would succeed in agreeing to modify or terminate the contract.<sup>75</sup> Something similar is found in the aforementioned art. 1195 of the French *Code Civile* (amended in 2016), which also requires parties to try to peacefully solve their problem, and only if there is no reasonable agreement within a reasonable time, the court is engaged.

Furthermore, not only does COA not determine that the contracting parties have to try to resolve their issues peacefully, but the affected party may submit a request for modification or termination of the contract to the court, even without having to give notice to opposing party, since such notice is not one of the prerequisites set out in Art. 369 of COA. It has previously been mentioned that the affected party will be liable for the damages caused to the opposing party, if he/she suffers damages because he/she was not informed of the affected party's intent to seek modification or termination of the contract. However, in case the opposing party does not suffer any damages, there is no motivation for the affected party to notify him/her. It appears that it would be judicious to impose on the affected party the obligation to notify the opposing party by making this notification one of the prerequisites that need to be fulfilled in order for affected party to turn to court for help. In that way, without this notification, it would not be possible to ask the court to modify or terminate the contract in question. This would certainly be in accordance with the earlier proposal and also with Art. 5 of COA, which prescribes the duty of co-operation for contractual parties, and could, consequently, lead to a peaceful solution to the problems arisen because of changed circumstances, without the involvement of the court.

Also, from the analysis of the Art. 369, p. 1, it could be concluded that the legislator went *in favorem negotiatioi*, since it determined that the affected party: "(...) may require that the contract be amended or even terminated (...)" which might indicate that the termination of

74 Šafranko, Z., *Rebus sic stantibus*, Pravo u gospodarstvu, Vol. 49, No. 5, 2010, p. 1294.

75 Civil Procedure Act, National gazette, 53/1991, 91/1992, 58/1993, 112/1999, 88/2001, 117/2003, 88/2005, 2/2007, 84/2008, 123/2008, 57/2011, 148/2011, 25/2013, 89/2014.

contract is the last resort, only if modification is not possible.<sup>76</sup> However, if the legislators really wanted this provision to be *in favorem negotii*, it is unclear why did they simply not explicitly specify by this article the order in which the affected party can relieve consequences of changed circumstances – termination of the contract only if its modification is not possible (as is done, for example, in §313 (3) of German BGB).<sup>77</sup>

There is also a problem with what the opposite party wants in case of termination or modification of the contract. If the affected party decides to ask for modification of contract due to changed circumstances, it may not be in accordance with what the opposing party wants, so the question arises: can the contract be changed in that case? Here, opinions differ, but most commentators agree that the contract can be modified without the consent of the opposite party.<sup>78</sup> The reason for this is the text of Art. 369 of the COA which entitles the affected party to request either termination or modification of a contract, but in none of the paragraphs of the said Article is it stated that the consent of the opposing party is required for the amendment. That party would, therefore, not have the right to refuse modification of the contract, provided that the modification is possible and, with it, the purpose of the contract could be fulfilled, regardless of the fact that such modification may, for some reason, not be what he/she wants.

Conversely, if the affected party, instead of modification, decides to request termination of contract and submits such a request to the court, the termination will not occur if the opposing party offers or agrees to fair modification of the contract.<sup>79</sup> So, now the situation is reverse – this time the will of the affected party is not taken into account, to whom termination of the contract might be more suitable. Both of these cases may cause violation of the principle of equality laid down in Art. 3 of the COA, because they lead to modification of contract based on the will of only one contracting party. It seems that this problem, at least in part, could be resolved if the COA determined that the contractual parties first have the obligation to try to modify the contract, and only in the event that modification is not possible, could they

76 Eraković, op.cit. 4, 135; Golub, A., *Pravne posljedice raskida ugovora*, Aktualnosti hrvatskog zakonodavstva i pravne prakse, Godišnjak 23, Zagreb, 2016, p. 560; Slakoper, op.cit. 32, p. 48; Šafranko, op.cit. 74, p. 1295.

77 § 313 (3): "Ist eine Anpassung des Vertrags nicht möglich oder einem Teil nicht zumutbar, so kann der benachteiligte Teil vom Vertrag zurücktreten. An die Stelle des Rücktrittsrechts tritt für Dauerschuldverhältnisse das Recht zur Kündigung."

78 Golub, op.cit. 76, p. 561; Petrić, op.cit. 7, p. 4-43; Slakoper, op.cit. 32, p. 49; Šafranko, op.cit. 74, p. 1295.

79 Art. 369 p. 4 COA.

According to Art. 133 p. 1 i 4 of the 'old' Law on Obligations the affected party could not have sought modification of the contract, but only its termination, which would not occur if the opposing party offered an amendment. See also case law:

"Dakle, određenoj stranci i pod određenim pretpostavkama pripada pravo da ugovor raskine, ali ne može tražiti, bez valjanog pristanka protivne strane, izmjenu ugovornih uvjeta" (VS, Rev 2439/1993-2, 4. studenoga 1993.).

"Thus, a certain party has the right to terminate a contract under certain circumstances, but cannot seek, without the express consent of the opposing party, its modification" (translated by authors).

"(...) tuženikovo je pravo bilo sudskim putem zahtijevati raskid ugovora, dok izmjenu ugovornih odredbi može zahtijevati samo uz pristanak suprotne ugovorne strane kako to propisuje odredba čl. 133. st. 4. ZOO-a. Dakle, nije moguće tužitelja kao suprotnu stranu siliti na izmjenu ugovornih odredbi, već je tuženikova mogućnost bila zahtijevati raskid ugovora, ako su nastupile takve okolnosti, što sve tuženik nije dokazao tijekom postupka pa je stoga pravilno prvostupanjski sud te prigovore ocijenio neosnovanim" (VTS, Pž-2815/07-4, 27. travnja 2010.).

"(...) the defendant has the right to ask the court to terminate a contract, while its modification may be requested only with the consent of the opposing party, as is prescribed by the provision of Art. 133 p 4 of Law on Obligations. Thus, it is not possible to compel the plaintiff, who is the opposing party, to accept modification, it is only possible for the defendant to seek termination of the contract if such circumstances have arisen, which was not proven by the defendant during the proceedings, and therefore the court of first instance was right while considering those objections to be unfounded" (translated by authors).



terminate it. The court should be involved only in case contracting parties could not reach an agreement about modification or termination, within a reasonable time.

## 7. CONCLUSION

As stated above, it is possible to assume that contracts must be fulfilled at all costs and insist, without exception, on the application of the principle of *pacta sunt servanda*. However, this would, in some cases, be contrary to certain fundamental principles of civil law, since the contracting party whose fulfillment of contract had become overly difficult or would have caused him/her an overwhelming loss, would be required to remain faithful to such a contract. Therefore, Croatian, and many other legal systems, have argued that one should strive to fulfill the contract whenever possible, but if the relevant circumstances have changed significantly and certain prerequisites are fulfilled, the affected party should be allowed to seek modification or termination of the contract. From analyzed case law it is clear that, regardless of the fact that *clausula rebus sic stantibus* is a natural ingredient of all contracts, it is interpreted in an exceptionally restrictive way, as it may seriously undermine trust in the binding force of contracts.

In regard to the provisions of the COA that pertain to changed circumstances, this paper outlines the ways in which these provisions could be improved *de lege ferenda* on the basis of certain solutions that exist in comparative law and in the way that these provisions would be more in line with other provisions of the COA itself, but also with some other Croatian provisions and also with some of the basic principles of civil law and law of obligations. First of all, it should be considered to extend the application of the *clausula rebus sic stantibus* to unilateral contracts. The prevailing arguments for why this clause cannot be applied to these types of contracts is that in Croatian law of obligation it only applies to bilateral contracts and that its purpose is re-establishment of the equivalence of obligations. But after analyzing the provisions of the COA pertaining to this institute, it becomes clear that this clause applies also to the non-contractual relationship - liability for damages, and also to contracts of support for life and contract of support until death, that are aleatory, and because of that not affect by disturbance of equivalence of obligations. It is, therefore, unclear why *clausula rebus sic stantibus* does not extend to unilateral contracts. This is particularly the case when this clause is observed in the light of comparative law, where Austria, Italy and Germany (expressly of not) allow its application to unilateral contracts.

Moreover, it seems questionable that COA has not explicitly stipulated that the contracting parties have a duty to cooperate in resolving the newly established situation. This could at least try to solve some of the problems that may occur. First of all, it would be desirable for the contracting parties first to try to resolve the situation in a peaceful manner, and only if they do not succeed, could they resolve it through court. This would certainly be in accordance with the provisions of the Civil Procedure Act concerning the peaceful settlement of disputes and the unburdenment of courts. Furthermore, the co-operation of the contracting parties would in particular make sense if the COA explicitly prescribed the order of possible solutions to the problems arising from the changes in circumstances – first, attempt to modify the con-

tract, if it is possible and feasible, while the termination should be the last resort. This would be in accordance with the principle of *in favorem negotii*, which should always be the aim of law of obligations. That way, *clausula rebus sic stantibus* would not excessively undermine the trust in the binding force of contracts.

The next problem was found in the fact that if the affected party requests modification of the contract due to changed circumstances, the opposite party will be forced to do so, although he/she does not want modification, and *vice versa*: if the affected party requires for a termination, the opposing party can prevent it by offering or agreeing to modification of the contract, which is contrary to the principle of equality. This problem too could be resolved, in a number of cases, if it was prescribed that the contracting parties must try to resolve the new situation by agreement, because, in that case there would be a real chance for them to agree about modification or termination of the contract.

The last problem that was found could also be resolved if contracting parties had to cooperate in resolving the issue. The affected party should be obliged to notify the opposite party about his/her intentions to ask for modification or termination of the contract. That notification should be one of the prerequisites that have to be fulfilled before the affected party requests from court to modify or terminate the contract. Not informing the opposite party would certainly be in contradiction with Art. 5 of the COA, which determines that contractual parties have the duty to co-operate in contractual relations. This, and most other above-mentioned problems, would be prevented if it was determined that the contracting parties have the obligation to primarily try to solve their problem in a peaceful manner.

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## IZMJENA I RASKID UGOVORA ZBOG PROMIJENJENIH OKOLNOSTI (*clausula rebus sic stantibus*)\*\*\*

### Sažetak

Rad se bavi utjecajem promijenjenih okolnosti na ugovor te mogućnošću pogođene ugovorne strane da od suda zahtijeva izmjenu ili raskid ugovora. U radu se nalazi kratki povijesni pregled instituta klauzule *rebus sic stantibus* u hrvatskom i odabranim europskim pravnim sustavima; navedene su pretpostavke koje prema našem ZOO-u moraju biti ispunjene kako bi pogođena strana mogla svoj zahtjev uputiti sudu te su iste analizirane u kontekstu mogućih poboljšanja *de lege ferenda*. U radu je posebna pozornost posvećena području primjene klauzule *rebus sic stantibus*, s naglaskom na njezinu moguću primjenu i na jednostranoobvezne ugovore. S obzirom na to da je sudska praksa oduvijek imala veliki utjecaj na formiranje ovog instituta, rad također donosi brojne primjere sudskih presuda koje se odnose na izmjenu ili raskid ugovora zbog promijenjenih okolnosti.

*Ključne riječi:* *clausula rebus sic stantibus, promijenjene okolnosti, izmjena i raskid ugovora, jednostranoobvezni ugovori, aleatorni ugovori*



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