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BREXIT AS A FRUSTRATING EVENT? – REFLECTIONS BY THE DOCTRINE OF FRUSTRATION OF CONTRACT IN ENGLISH LAW

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1. Introduction

On 23 June 2016, a referendum took place in the United Kingdom (and Gibraltar) about the EU membership. 51.9% of voters were in favour of leaving the European Union. On 29 March 2017, the then British Prime Minister, Theresa May, based on the result of the referendum and having the consent of the Parliament, expressed the UK's intention to leave the EU.

Since that time, the withdrawal of the United Kingdom from the European Union has constantly been in the centre of the attention of the representatives of the various fields of law. Experts have been pondering how the leaving would go, will be a deal between the UK and the EU, or a 'no-deal Brexit' will take place, which impact will Brexit have on the labour market and the trade, and so on.[1] Nevertheless, among the mostly public law consequences, relatively little to say about those impacts, which Brexit has on the contractual relationships.

The main aim of the study is to give a respond to the question outlined in the title above. However, answering is not possible without the appropriate knowledge about the doctrine of frustration of contract as it exists in English law. Therefore, in the study, the evaluation of the doctrine of frustration of contract will comprehensively be reviewed, and the landmark cases relating to the topic will shortly be introduced. It should be added that the literature on the frustration of contract is extremely large; that is why the complete elaboration of the topic is not possible within the framework of this stud. There are several essential questions relating to

[1] From the relating literature see for instance Graham GEE–Luca RUBINI–Martin TRYBUS: Leaving the EU? The Legal Impact of "Brexit" on the United Kingdom. *European Public Law*, 2016/1., pp. 51–56.; Adam ŁAZOWSKI: EU Withdrawal: Good Business for British Business*? European Public Law*, 2016/1., pp. 115–129.; Martin GELTER–Alexandra REIF: What Is Dead May Never Die: The UK's Influence on EU Company Law. *Fordham International Law Journal*, 2017/5., pp. 1412–1442.; Lilla Nóra KISS: General Issues of Post-Brexit EU Law. *European Studies*, 2017/4., pp. 220–227.; Lilla Nóra KISS: Certain issues of the withdrawal of a member state: A public law aspect. *Curentul Juridic*, 2017/3., pp. 86–97.; Matthias LEHMANN–Dirk ZETZSCHE: Brexit and the Consequences for Commercial and Financial relations between the EU and the UK. *European Business Law Review*, 2016/27., pp. 999–1027.

frustration (e.g., legal effects of frustration, self-induced frustration, etc.), which have not been elaborated, of necessity, in this work.

After the short review of recent case law on frustration, it will be examined, if Brexit can be a frustration event. Accordingly, a recent English legal case, Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency will be presented, which is still pending, but has particular significance, since the Court of First Instance clearly delineated in its judgment those limits, along with Brexit can be assessed.

2. The theory of frustration of contract

All legal systems have their own solution for the treatment of the essential change of circumstance subsequent to the conclusion of the contract. The demand for treating the effects of the changes of circumstances on the contractual relationship, and for treating the situation evolved due to these changes, arose in the continental law relatively early. Similarly, this demand also appeared in the English law, since the various national legislators intended to react to the same problems, e.g., for the negative impact of the world wars.[2] Nevertheless, it is noteworthy that this demand arose much earlier in the English law, during the 1700s, than in the continental laws. In the judicial practice, the effects of the changes of circumstances can be treated along with the theory known as *frustration of contract*.

The binding force of a contract and its sanctity has practically not been controversial in the English law until the middle of the 19th century. According to the *doctrine of absolute contracts*, contractual duties were regarded as absolute, in the sense that supervening events provided no excuse for non-performance[3], regardless of the nature of the change. It meant that the contractual parties had to fulfil the contract even if changes occurred in the circumstances subsequent to the conclusion of the contract.

The doctrine of frustration of contract had been developed alongside various precedents and had been accepted as we know it now. In the course of this development process, various cases and events were outlined, which cause the essential change of circumstances and thereby lead to the frustration of contract and resolve the contractual parties from the duty to fulfil the contract. Such an event can be the failure of an anticipated event, the outbreak of war, the subsequent illegality and so on.

Nevertheless, it is important to note that there is no *numerus clausus*, i.e., the comprehensive classification of frustrating events is not possible. Over time, the number of these events has constantly been changing, sometimes faster, sometimes slower. At the beginning of the development of the theory, there was an extension, i.e., the number of judgments, in which the frustration of contract by a certain event was recognised, increased. Later, the initial frames started to narrow and there were

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2 Cf. Catharine MACMILLAN: English Contract Law and the Great War: The Development of a Doctrine of Frustration. *Comparative Legal History*, 2014/2., pp. 278–302.

3 Edwin PEEL: *Treitel on The Law of Contract*. Sweet and Maxwell, London, 2011, p. 920.

cases where frustration was successfully pleaded, but later, these were overruled.[4] Nowadays, the evolution and alteration of the doctrine are still ongoing, though its pace is much slower. Nevertheless, the question of frustration comes back time and again, which requires the courts to deal with and judge these cases.

3. Landmark cases in the English law relating frustration of contract

In the English law, literature and judicial practice relating to the doctrine of frustration of contract is fairly copious. English jurists prefer dealing with the topic, and the countless judgments, including recent cases, offer an excellent basis for them to do so. In the following, I review the most important cases of the development process of the above mentioned doctrine, since the introduction of all relevant judgment is not possible.

3.1. Declaring the binding force of contract: Paradine v Jane

The approach, which emphasised the binding force of contract, was based on a precedent that originated in the 17th century.

As evidenced by the facts of the case *Paradine v Jane*[5], a building rental contract was concluded between the contractual parties. However, the land was invaded by the enemy of the King and Jane was forced to leave the building. Since Jane could not use the building and could not take benefits, he denied paying the fee to Paradine, who brought an action against Jane and claimed the court to oblige Jane to pay the rent arrears.

As it was stated by the court, where a party creates a duty or charge upon himself by virtue of a contract, he is bound to perform the duty or pay the charge, notwithstanding any event, for which the party could have inserted a clause in the contract, which would prescribe what is to be done in case of an event. The party's duty to fulfil the contract, as well as his liability in case of the infringement of this duty, is absolute in nature.[6] Therefore, the court has held that Jane was bound to pay the fee to Paradine, despite the fact that the land was temporary invaded by the enemy, i.e., Jane was not relieved Jane of his obligation.

Though the court did not expressly deal with the question of impossibility, *William Page* emphasises that the case Paradine v Jane shall undoubtedly be deemed

4 E.g. Carapanayoti & Co. Ltd. v. E. T. Green. Ltd. [1959] 1 Q.B. 131, overruled in Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93.; Government of Ceylon v Société Franco-Tunisienne d1Armement-Tunis ("The Massalia") (No. 2) [1960] 2 Lloyd1s Rep 352, overruled in Ocean Tramp Tankers Corp v V/O Sovfracht ("The Eugenia") [1964] 2 QB 226.

5 Paradine v Jane [1647] EWCH KB J5.

6 Cf. Hugh BEALE: Adaptation to Changed Circumstances, Specific Performance and Remedies. Report on English Law. In: Attila HARMATHY: *Binding Force of Contract*. MTA-JTI, Budapest, 1991, pp. 9–24.

as a milestone of the development process of the English law approach of the impossibility of the contract.[7, 8]

3.2. The first step to loosen the binding force of contract: Tylor v Caldwell

The strict and rigid approach of the courts to the binding force of the contract has seemed to be soften during the 19th century. The first stage of this process was the case of *Taylor v Caldwell* in 1863[9], in which the doctrine of frustration of contract was firstly enunciated. (It is noteworthy, that some authors mentioned it as the doctrine of impossibility of performance.[10])

According to the fact described, the plaintiff, Taylor, hired out the Surrey Gardens and Music Hall from the defendant, Caldwell, to use it for the series of 'grand concerts' enriched by visuals. Taylor took all the risks of organising the concerts, of the signing of the artists and so on. Just prior to the scheduled date for the first concert, the music hall was destroyed by an incidental fire and the concerts planned and already organised by Taylor could not have been held.

Taylor brought an action against Caldwell by reference to a breach of contract. Taylor considered that Caldwell could not fulfil his contractual duty because of the destruction of the building and therefore, he claimed compensation for damages incurred due to the breach of contract.

As *Justice Blackburn* formulated that *"(…) in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance"*. Accordingly, the burning to the ground of the music hall leads to the impossibility of the contract, which excused the contracting parties from performing the contract.[11]

The case Taylor v Caldwell is precedential for the practice of the fulfilment of contractual duties and of the excuse from them, since it derives from the previous, more than two-hundred-old practice. With the application of the fiction of an *implied condition*, Justice Blackburn created an exemption from the binding force of contract declared in Paradine v Jane, without derogating from the previous judicial

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7 William Herbert PAGE: The Development of the Doctrine of Impossibility of Performance. *Michigan Law Review*, 1920/7., pp. 589–614.

8 In the English law, Paradine v Jane was often misunderstood. The negative effects of this misinterpretation on the English law dogmatic was highlighted by *William Wade* in his relating work. See William WADE: The Principle of Impossibility in Contract. *Law Quarterly Review*, 1940/56., pp. 519–556. (hereinafter referred as to WADE [1]), p. 524.

9 Taylor v Caldwell [1863] EWCH QB J1.

10 Cf. Charles G. BROWN: The Doctrine of Impossibility of Performance and the Foreseeability Test. *Loyola University Chicago Law Journal*, 1975/3., pp. 575–593.

11 The doctrine of implied condition arises several theoretical and practical problems, therefore its applicability was hardly criticized not only in the past, but in the contemporary legal jurisprudence. See Leon E. TRAKMAN: Frustrated Contracts and Legal Fictions. *The Modern Law Review*, 1983/1., pp. 39–55.

practice.[12] Nevertheless, it is another question that the exemption had been more broadly interpreted in the judgments after Taylor v Caldwell than it was originally intended.[13] Thus, the scope of the exemption was considerably limited by the judgment in the case Taylor v Caldwell, since the impossibility of contract could have been based only on certain changes of circumstances, like the death or incapacity of the obligor, the occurrence of changes in circumstances, and the destruction either of the subject matter of contract or other thing, which is essential regarding the fulfilment of the contract.[14]

3.3. Krell v Henry

The exemption formulated in Taylor v Caldwell was the base of the judgment held in Krell v Henry 1902[15], which is arguably the best-known among the so-called coronation cases relating to the procession of King Edward VII that was cancelled due to his ill health. It is important to note that all of these cases are landmark cases regarding the evolvement and development of the theory of frustration of performance. [16]

As evidenced by the facts of the case, Henry hired rooms at Paul Krell's flat in Pall Mall, in London, to view from its windows the coronation procession of King Edward VII, which would pass along Pall Mall. After the conclusion of the contract, the king became seriously ill and therefore, the ceremony was cancelled just two days before the coronation. (Coronation was held much later, namely more than one year after the originally scheduled date.)

Henry paid £25 deposit but did not pay the fee for the room, because he could not use the flat. Krell brought an action against Henry and claimed for the outstanding £50. The court decided in favour of Henry and relieved him from paying the rest of the money. As it was stated, the inspecting of the coronation procession was the *foundation of the contract*, though the contract contained no reference to the coronation. At this point, it is worth invoking the stand of Justice Blackburn formulated in Taylor v Caldwell, in which he stated that the object of the contract should permanently exist.

Regarding the facts evidenced in Krell v Henry, it can be stated that the subject matter of contract did not change, inasmuch as the rooms to be hired by Henry still existed, and they were in an unchanged state, i.e. they were identical. In a legal sense, the impossibility of the fulfilment of the contract did not occur. Neverthe-

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12 R. G. McElroy–Glanville Williams: The Coronation Cases I. *Modern Law Journal*, 1941/4., pp. 241–260, p. 242.

13 Ibid.

14 Cf. Appleby v Myers [1867] LR 2 CP 651.

15 Krell v Henry [1902] 2 KB 740.

16 Coronation cases are reviewed and analysed by *McElroy* and *Williams* in their two-part study, in which they pay particular attention to Krell v Henry, Herne Bay Steamboat v Hutton (1903] 2 KB 683), and Chandler v Webster ([1904] 1 KB 493). See McElroy–Williams op. cit. and R. G. McElroy–Glanville Williams: The Coronation Cases II. *Modern Law Journal*, 1941/5., pp. 1–20.

less, the subject matter of the contract, or more precisely, the essential character of the subject matter of contract changed due to the change of circumstances. As *Lord Atkin* explained, "[t]he subject matter of the contract was 'rooms to view the procession', but the postponement mad the rooms not rooms to view the procession".[17] As *Wade* concluded in his referred work, "(…) all points which are within the contract as agreed by the parties are part of the subject-matter of the contract, and all points which are outside of it go at most to motive and are irrelevant".[18]

Briefly, in Krell v Henry the contract did not become impossible, but the purpose of the contract was frustrated, for which the contract was concluded. In this sense, the doctrine of frustration of contract was more broadly interpreted.[19]

It is also important that frustration covers both the frustration of performance of contract and the frustration of purpose (of contract) in English law. Conversely, the examined expression means only the frustration of purpose in the American law, i.e., it has a narrower interpretation, at which the commercial impossibility and impracticability appear as an independent category.[20] [21]

4. The theory of frustration from the 20th century

As it was previously emphasized, the above mentioned precedents are definitely landmark cases in the course of the development of the doctrine of frustration of contract. However, treating the impacts of the changes of circumstances arises time and again. New situations arise, and new judgments were born, by which even the LRA contains provisions, the original doctrine has further been refined and shaded.

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17 William WADE: *Consensus* Mistake and Impossibility in Contract *The Cambridge Law Journal*, 1941/3., pp. 361–378 (hereinafter referred as to WADE [2]), p. 366.

18 Ibid.

19 The Krell v Henry was elaborated by *Zoltán Csehi* in his work relating to impossibility. See Zoltán CSEHI: 'A király megbetegedett': a szerződés lehetetlenül. Az idő dimenziója a lehetetlenülés körében – az időszakos lehetetlenülés problémája. In: *Emlékkönyv Lontai Endre egyetemi tanár tiszteletére*. ELTE-ÁJK–Gondolat Kiadó, Budapest, 2005, pp. 37–52.

20 Rodrigo Uribe MOMBERG: *The effect of a change of circumstances on the binding force of contracts. Comparative perspectives*. Intersentia, Cambridge–Antwerpen–Portland, 2011, p. 139.; Arthur L. CORBIN: Recent Developments in the Law of Contracts. *Harward Law Review*, 1937/1., pp. 449–475., pp. 464–466.; Arthur ANDERSON: Frustration of Contract – A Rejected Doctrine. *DePaul Law Review*, 1953/1., pp. 1–22.; Steven W. HUBBARD: Relief from Burdensome Long-term Contracts: Commercial Impracticability, Frustration of Purpose, Mutual Mistake of Fact, and Equitable Adjustment. *Missouri Law Review*, 1982/1., pp. 79–111, pp. 83–84.; Melvin EISENBERG: Impossibility, Impracticability and Frustration. *Journal of Legal Analysis*, 2009/1., pp. 207–261., p. 210. and p. 233., footnote 52.

21 In this context see Paula WALTER: Commercial Impracticability in Contracts. *St. John's Law Review*, 1987/2., pp. 225–260.; Richard A. POSNER–Andrew M. ROSENFIELD: Impossibility and Related Doctrines in Contract Law: An Economic Analysis. *The Journal of Legal Studies*, 1977/1., pp. 83–118., and Myanna DELLINGER: An „Act of God" – Rethinking Contractual Impracticability in an Era of Anthropogenic Climate Change. *Hastings Law Journal*, 2016/6., pp. 1551–1620.

The doctrine of frustration of contract got a different, but also exact description in case *Davis Contractors v Fareham Urban UDC*[22].

According to the fact described, Davis Contractors agreed with Fareham Urban District Council to erect 78 houses within a period of eight months, at a price of £92,425. The work started in June 1946, but due to various reasons (e.g., a serious shortage of skilled labour and materials in the industry), it took not eight but 22 months and was completed only in May 1948. Moreover, the completion of the work was much more expensive than anticipated. Davis Contractors were paid the contractually agreed price but bought an action arguing for more money based on the fact that the contract had become frustrated and therefore, they were entitled to further payment based on a *quantum meruit* basis.

The court recognised that the obligor's duty to perform the contract became more difficult do to the changes in circumstances, i.e., the lack of skilled labour and materials. However, it formulated that the contract was not frustrated. At this point, the opinion of *Lord Radcliffe* shall be highlighted, in which he attempted to define the frustration of contract in the following way: *"(...) frustration occurs whenever the law recognises that, without the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which performance is called for would render it a thing radically different from that which was undertaken by the contract*. [23]*"* This approach was later confirmed by other judgments, for instance in *National Carriers Ltd v Panalpina (Northern) Ltd*[24] and in *Tsakiroglou & Co Ltd v Noblee Thorl GmbH*[25]. In the former case, it was held that the doctrine of frustration is also applicable to leases in exceptional circumstances, although lease is more than a simple contract.

Regarding all the above mentioned facts, that there are cases, when the literal compliance of contract conditions (e.g., contractual price) would be unfair for both parties in light of the new (changed) circumstances, therefore the law relieves both contractual parties from the duty to perform the contract.[26]

Relating the doctrine of frustration of contract, *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*[27] is also a landmark case.

According to the facts described, the defendant, Wijsmuller agreed to transport the plaintiff's large and heavy drilling rig, named Dan King, from Japan to the Rotterdam area of the North Sea, using a transportation unit, described as Super Servant One or Super Servant Two. These were large, self-propelled, semi-submersible barges built for carrying large loads such as this rig. Under the contract, the defendant

22 Davis Contractors Limited v Fareham Urban District Council [1956] AC 696.

23 Davis Contractors Limited v Fareham Urban District Council [1956] AC 696. Cf. Hugh COLLINS: *The Law of Contract*. Cambridge University Press, 2003, p. 298.

24 National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675.

25 Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93.

26 A. B. Menezes CORDEIRO: Brexit as an Exceptional Change of Circumstance?, In: Nazaré da Costa CABRAL–José Renato GONÇALVES–Nuno Cunha RODRIGUES (eds.): *After Brexit. Consequences for the European Union*. Palgrave Macmillan, Cham, 2017, pp. 147–163, p. 154.

27 J. Lauritzen AS v Wijsmuller BV (The Super Servant Two) [1990] 1 Lloyd's Rep 1.

could replace the transportation unit by other means of transport or cancel the contract on grounds determined in the contract. Such events were the force majeure, Acts of God, perils or danger and accidents of the sea, acts of war or warlike-operations, acts of public enemies, blockade, strikes, etc., which reasonably may impede, prevent or delay the performance of this contract.

In January 1981, several months before Dan King was due to be tendered for carriage, Super Servant Two foundered and became a total loss in the course of off-loading another drilling rig in the Zaire River. Wijsmuller informed Lauritzen, that they would not carry out the transportation of the rig with either Super Servant One or Super Servant Two. Wijsmuller alleged that Super Servant Two would have been used for the Dan King carriage contract. It was added, that the other vessel, Super Servant One, had been scheduled to carry, and did carry, cargo under two other contracts spanning the expected period of performance under the Dan King contract.

Wijsmuller and Lauritzen entered into new negotiations, which led to a further agreement in April 1981 under which the rig was transported by Wijsmuller between July and October by barge and tug. This different method got carriage caused both of the parties' loss or increased expense, therefore both parties claimed for the loss it has suffered. In the action, Lauritzen claimed damages for breach of the Dan King carriage contract, while Wijsmuller pleaded that the contract had been frustrated and claimed for the extra costs arisen by the performance of the contract.

The court of first instance ruled in favour of the plaintiff, who appealed to the Court of Appeal. The appeal was dismissed by *Lord Justice Bingham*. In his judgment he resumed the essential elements of the frustration contract and defined its special conditions in the given case. According to the judgment, the contract was not frustrated, because Wijsmuller's chance to perform the carriage contract physically still remained after the sinking of the Super Servant Two. Anyway, Wijsmuller put its own interests above the other party's, when considering economic and business policy aspects, decided to perform another existing contract, and, with this act, booked the other, in the carriage contract also specified vessel which would also be suitable for transporting Lauritzen's rig. In the judgment it was stated that the frustration of contract could occur only in case of a certain external event or change in circumstances, i.e., frustration cannot base on the conduct or the choice of the party claiming frustration. Moreover, this party cannot contribute to the occurrence of the frustrating event.[28] [29]

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[28] The case was reviewed and criticised by *Steve Hedley*. See Steve HEDLEY: Carriage by Sea. Frustration and Force Majeure. *The Cambridge Law Journal*, No. 2 (1990), pp. 209–211.

[29] The contribution of the party claiming frustration to the occurrence of the frustrating event was also examined by the court in *DGM Commodities Corporation v Sea Metropolitan SA.* As it was formulated in the findings of the judgment, the party's contribution shall be interpreted broadly; it does not require the party's wrongful conduct, but the active conduct of the party or of other person representing the party is enough to state the contribution. See DGM Commodities Corporation v Sea Metropolitan SA [2012] EWHC 1984.

The frustration of contract was also examined by the court in *Gamerco SA v ICM/Fair Warning (Agency) Ltd*.[30] Gamerco, a Spanish company, agreed with the corporate persona of the American rock band, Guns N' Roses to organise a concert to the stadium Atletico Madrid. Above the concrete organising tasks, Gamerco also agreed on the previous promotion of the event. A few days before the concert, engineers reported the venue was structurally unsound and the competent authorities banned its further use pending further investigations. At the same time, Gamerco's license to use the venue was revoked. Since there was no chance to use another appropriate venue, the concert finally was cancelled. Gamerco brought an action against the band and claimed the recovery of the sum of 412,500 dollars, which was previously paid by Gamerco. In its judgment the court stated that the contract was frustrated because the performance of the contract became incapable due to the revocation of the permit by the competent authority. Therefore, the band was obliged to recover the sum paid.

In *Sea Angel*[31], the frustration of the contract also was stated by the court. As evidenced by the facts of the case, in the summer of 2003, the Tasman Spirit, a tanker loaded with light crude oil, ran aground and was broken in two, near the port of Karachi, Pakistan. Due to the accident, large quantities of crude oil spilled from the tanker, causing significant marine oil pollution.

Tsavrilis, a group dedicated to saving life and property at sea and to protecting the marine environment from accident-related pollution, concluded a contract with the owners of the Tamsan Spirit to assist in the salvage operation concerning the tanker. In order to perform the contract, Tsavrilis concluded further contracts and hired several vessels. One of them, the Sea Angel had the task to act as a shuttle tanker and to carry the oil from the damaged Tasman Spirit to a larger tanker. The Sea Angel was hired for twenty days, but the vessel arrived at the location about three months after the expiry of the contract. The delay was due to the fact that the vessel was withheld by the authorities in the port of departure. (As it was later proved, the authorities' conduct was unlawful.) Tsavrilis denied paying the fee for the time after the expiry of the contract.

The claimants took legal action to recover the hire fees. The Queen's Bench ruled in favour of the claimants and stated that the contract was not frustrated. On the one hand, the risk of detention is well-known and typical in the salvage industry, and it is inherent in such contracts, therefore Tsavrilis should have taken it into account as reasonable risk, i.e. this risk was foreseeable. On the other hand, the risk of delay falls within the scope of contractual risks, which should be taken by the hirer, Tsavrilis. Tsavliris appealed to the Court of Appeal, which dismissed the appeal.

[30] Gamerco SA v ICM/Fair Warning (Agency) Ltd [1995] 1 WLR 1226.
[31] The Sea Angel [2007] EWCA Civ 547.

5. Brexit as a frustrating event?

The political changes of the last few years showed several examples, which evaluation as a frustrating event is controversial at present.

Among these examples, the Brexit, i.e., the withdrawal of the United Kingdom from the European Union, has special importance. Brexit can have several impacts on contracts and their performance. Thus, after the occurrence of Brexit exchange rate changes can occur or various taxes and duties can be introduced, due to which the profitability of the previously concluded (i.e., at the time of Brexit already existing) contracts can decrease. Accordingly, neither the actual date of Brexit nor its conditions are foreseeable, which made the assessment of the situation particularly difficult.

Moreover, the fact that the fundamental freedoms guaranteed by EU law, such as the free movement of goods and services, will no longer prevail, causes further difficulties in the case of the performance of existing contracts. There may be cases where due to Brexit, the performance of the contract becomes impossible or the maintenance of the contract is no longer in the interest of either or both of the parties. According to *Lehmann* and *Zetzsche*, such a situation would arise, when an English law firm provides advisory services regarding EU subsidies for an investment in the UK. Since these subsidies will no longer be available after Brexit, the service promised will become aimless.[32]

Nevertheless, in the majority of cases, Brexit makes the performance of the contract more difficult but does not make it impossible. When evaluating the impacts of Brexit, we need to be aware of the fact that not every contract is equally effected by Brexit, but its impact depends on the type of the given contract.[33] Accordingly, taking the findings of the previous judgments[34] into account, referring to Brexit as frustrating event can be successful very rarely, only in those cases, when Brexit actually causes the essential and radical change of the duties to be performed upon an existing contract.[35] Nevertheless, it cannot be excluded that in certain cases, Brexit gives rise to the early, impossibility-based termination of a given contract.[36]

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[32] Matthias LEHMANN–Dirk ZETZSCHE: Brexit and the Consequences for Commercial and Financial relations between the EU and the UK. *European Business Law Review*, 2016/27., pp. 999–1027, p. 1007.

[33] LEHMANN–ZETZSCHE op.cit. p. 1010.

[34] Relating to the closure of Suez Canal in 1956, some judgments were born, in which the court held that the Suez Crisis shall not be deemed as frustrating event, since the existing contracts were finally performed with significant time delays. See Albert D. Gaon & Co. v. Societé Interprofessionelle des Olégiaux Fluides Alimentaires [1959] 2 Lloyd's Rep. 30; Société Franco Tunisienne D'Armement v. Sidermar S.P.A. [1960] 3 W.L.R. 701; Tsakiroglou & Co Ltd v Noblee Thorl GmbH [1962] AC 93. About the facts, the findings of judgments and the legal arguments see Michael FURMSTON: Contract Frustrated. Then Performed! *The Modern Law Journal*, 1961/1., pp. 173–178.

[35] CORDEIRO op. cit. p. 161.

[36] In its relating work, *Catharine MacMillan* examines the effects of Brexit upon English contract law. See Catharine MACMILLAN: The Impact of Brexit upon English Contract Law. *King's Law Journal*, 2016/3., pp. 420–430.

It should also be noted that in the English contract law practice, more and more contract is supplemented in the last few years by a hardship clause in the event of Brexit. By the insertion of a so-called Brexit clause into the contract, parties can provide about the functioning of their contractual relationship after Brexit. Parties may, for instance, determine either the automatic changes (e.g., termination of contract) or a procedure whereby discussions are held with a view to changing the contract, due to Brexit. Inserting a Brexit clause means security for the contractual parties. Nevertheless, in all other cases where parties do not insert such a clause, the impact of the Brexit on the existing contractual relationship will be examined and assessed, and legal consequences will be applied by courts on a case-by-case basis.

With regard thereto, *Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency*[37], shall be mentioned.

According to the facts of the case, the European Medicines Agency (hereinafter referred as to EMA), after multiannual negotiations, entered into a lease for a term of 25 years in 2014 with the Canary Wharf Group (hereinafter referred as to CW) to secure premises for its headquarters in London. In August 2017, EMA informed CW that having considered the position under English law they intend to treat Brexit as a frustrating event. The EMA stated that after the United Kingdom's withdrawal from the European Union, the EMA should re-locate away from the UK. As the EMA stated, "[i]t would be unprecedented and incongruous for an EU body (…) to be located in the UK and continue to pursue its mission in London after the UK has left the EU".[38] Although Brexit has not occurred yet, in 2018, the EU passed a Regulation that relocated the EMA headquarters from London to Amsterdam. CW brought a claim against the EMA and disputed that Brexit would be a frustrating event. The EMA argued that the contract was frustrating on the grounds of *supervening illegality* since it would not be legally possible for it to continue with its headquarters in London as it did not have the legal capacity to hold or deal with immovable property outside the EU. On the other hand, EMA also it also relied upon the *frustration of a common purpose*.

The court decided in favour of CW and found that the lease would not be frustrated by Brexit, either because of supervening illegality or frustration of a common purpose. As it was stated, English contract law did not take into account supervening illegality arising under foreign law (e.g., EU law) when determining whether a contract had been frustrated. Therefore, though EU law may be relevant to the capacity of EMA to enter into the lease, it was not relevant to the question of whether subsequent illegality had caused the lease to be frustrated.

It is important to note that prior to this judgment, it was suggested that a 'no-deal Brexit' may constitute the kind of *unexpected and serious event* that would be classified as a frustrating event. Nevertheless, in spite of the clear reasons of the judgment, far-reaching conclusions must not be drawn, since the case is to be con-

[37] Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency [2019] EWHC 335 (Ch) (20 February 2019).

[38] Quotation from the EMA's letter of 2 August 2017.

tinued before the Court of Appeal, as the EMA appealed against the judgement. Anyway, the final judgment of the Court of Appeal could be a landmark case in the future regarding the assessment of Brexit. At the same time, it shall be seen that the United Kingdom's withdrawal from the European Union shall be examined by the court case-by-case, taking all special circumstances, conditions and features of the given case into consideration.

The assessment of Brexit and deeming it as an exceptional event is an important question not only from the English law but all Member States of the EU; both representatives of the literature and legal practice are concerned about the question. Relying on Brexit as a frustrating event can marginally be successful by English law. Nonetheless, there can be another approach outside the UK, in case of cross-border contractual relationships not governed by English law, since the change of circumstances and the supervening of special events are regulated b law in several states in the European continent.

In connection with the withdrawal of the United Kingdom, *Cordeiro* concluded that Brexit could be considered as an essential change of circumstances, which can be the basis for the amendment or termination of the contract, according to the provisions of the given national (German, French, Italian, etc.) laws.

At the same time, a contrary view seems to emerge in Germany. The representatives of this approach compare Brexit to the German reunification in 1990 and, by invoking the contemporary German judicial practice, does not consider the Brexit as an event, which would base, in general, the amendment and adaptation of contract to the changed circumstances. Instead of this, it is held that the impacts of Brexit should be assessed in the relationships between British and German business partners case-by-case and in full knowledge of the facts and circumstances. [39]

As it can be seen, Brexit can be assessed by the various national laws in different way. However, the examination of this question goes beyond the applicability of the civil law provisions of the various states, since a prior question, namely the question of the applicable law has to be answered. Thus, contractual parties have the right to choose the law to be applied for the given contract. Nevertheless, the Brexit also impacts international private law relations[40, 41], which also shall be taken into account.

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[39] Cf. David PAULUS: Der "Brexit" als Störung der "politischen" Geschäftsgrundlage? Privat- und Wirtschaftsrecht der Europäischen Union. In: Malte KRAMME–Christian BALDUS–Martin SCHMIDT-KESSEL: *Brexit und die juristischen Folgen*. Nomos Verlag, Baden-Baden, 2017, pp. 101–127.; Barbara MAYER–Gerhard MANZ: Der Brexit und seine Folgen auf den Rechtsverkehr zwischen der EU und dem Vereinigten Königreich. *Betriebs Berater*, 2016/30., pp. 1731–1740. (https://www.fgvw.de/files/brexit_160725_bb.pdf, date of download: 9 April 2019)

[40] Cf. Andrew DICKINSON: Back to the Future: The UK's EU Exit and the Conflict of Laws. *Journal of Private International Law*, 2016, pp. 204–205.; Johannes UNGERER: Consequences of Brexit for European Private International Law. *European Papers*, 2019/1., pp. 395–407.

[41] Cf.: The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations, 2019, No. 834 (draft).

6. Conclusion

After the brief review of the relating precedents, it can be stated that English law recognises the effect of the change of circumstance, the supervening of a certain event, on the contractual relationship, by the application of the theory of frustration of contract.

However, as it was previously mentioned, the number and the classes of the frustrating events are not closed, but the scope of these events constantly changes. New cases arise, while others are overruled. Some questions have to be assessed in the same way for hundreds of years, while others need for new approach regarding the development of law and the economic and political changes all over the world.

There are events, which "frustrating effect" depends on the actual facts and circumstances of the given case. For instance, as *Lord Roskin* explained in National Carriers Ltd v Panalpina[42],

"(…) inflation, sudden outbreaks of war in different parts of the world, are all recent examples of circumstances, in which the doctrine [of the frustration of contract] has been invoked, sometimes with success, sometimes without."

Although the theory of frustration of contract is a relatively old doctrine in English law, it is still shaping, since the new events arise new questions to be answered, new situations sometimes require a new solution.

The assessment of Brexit is inevitable. Nevertheless, Brexit is difficult to assess, since there is only one case in which Brexit was invoked as a frustrating event. Based on the only, not yet final, judgment is known so far, Canary Wharf (BP4) T1 Ltd & Ors v European Medicines Agency, Brexit does not cause supervening illegality, due to which the contract in question would be frustrated. As it was previously indicated, the case is pending and the parties are waiting for the decision of the Court of Appeal if it agrees or not with the grounds of the Court of First Instance. Whether it does or not, the judgment undoubtedly will be a milestone in the course of the recent development of the doctrine of frustration of contract.

[42] National Carriers Ltd v Panalpina (Northern) Ltd [1981] AC 675.