

Come rain or shine

Climate change and revision of contract
on account of unforeseen circumstances

UNIVERSITY OF BERGEN



Agenda

- Research question
- Legal backdrop
- Methodology and approach
- Illustration: Charterparties
- Can a contract be «unfair» to the environment, cf. the Contract Act § 36?



Research question



Research question

- «How will the **consequences of climate change** be regulated by the general rules of contract law on **revision of contract due to unforeseen circumstances**, and might these consequences affect what policy considerations [“*reelle hensyn*”] are included in the assessment of whether or not a contractual obligation shall be adjusted?»



Legal backdrop



Doctrine of failed assumptions

- AKA «læren om bristende forutsetninger»
- Windscheid (DE) → Jul. Lassen (DK) → **Ussing** (DK)
- Conditions:
 - Failure of an **assumption**
 - ... which was **motivating** in concluding the contract
 - ... and visible to the counterparty
 - ... and for which the reallocation of risk is **relevant** (i.e. **fair**)
- E.g. Rt-1999-922 (Nordhordland Bridge)



Contract Act § 36

- «An agreement can wholly or partially be set aside or changed insofar as it would be **unfair** or contrary to good commercial practice to invoke it. The same applies to unilaterally binding acts.

In the assessment, consideration is given not only to the contents of the agreement, the position of the parties and the circumstances surrounding the conclusion of the contract, but also **subsequently occurred circumstances and the circumstances otherwise.**

The rules in the first and second paragraph similarly apply when it would be unreasonable to invoke applicable trade practices or other customary contract practices.»



Sale of Goods Act §§ 27 and 40, CISG art. 79

- **SGA § 27: Compensation [for delay]**
«(1) The seller may demand compensation for the loss he suffers due to delay on the part of the seller. This nevertheless does not apply insofar as the seller proves that the delay is caused by impediment beyond his control that he could not **reasonably** be expected to have considered at the time [of the conclusion of] the contract, or to have avoided or overcome its consequences.»
- **SGA § 40: Compensation [for defect]**
«The buyer can demand compensation for the loss he suffers due to a defect of the object, insofar as the seller does not prove that the fact that the delivery is defective, is due to impediment as mentioned in § 27.»
- **CISG art. 79**
«A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not **reasonably** be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.”



BIMCO Force Majeure Clause 2022

- (a) «“Force Majeure” means the occurrence of an event or circumstance as defined in (b) below (“Force Majeure Event”) that prevents a party from performing one or more of its contractual obligations (“the Affected Party”), provided that such party proves:
 - (i) the existence of a Force Majeure Event;
 - (ii) that such Force Majeure Event is beyond its **reasonable** control;
 - (iii) that the Force Majeure Event could not **reasonably** have been foreseen at the time of the conclusion of the contract; and
 - (iv) that the effects of the Force Majeure Event could not **reasonably** have been avoided or overcome by the Affected Party.»



Maritime Code §§ 378 (2) and 394

- **MC § 378 (2)**
«The shipowner is nevertheless not obligated to carry out a voyage that exposes the ship, people on board or the cargo to danger due to war, warlike conditions, ice or other danger or significant inconvenience that the shipowner could not **reasonably** have expected at the time of [the conclusion of] the contract.»
- **MC § 394**
«If the ship is in port or another area where war, warlike conditions or significant increase in risk of war occurs, the shipowner can immediately bring the ship out of the area and to safety.
(...)

If during the chartering period war, warlike conditions or significant increase in risk of war occurs, and this is of significant importance to the performance of the charter, the shipowner as well as the charterer may terminate the agreement without obligation to pay compensation.»



Methodology and approach



Empirical premise: Climate Scenarios

- 6th IPCC report
 - droughts and fires
 - floods and landslides
 - extreme weather
 - resource scarcity
 - increased conflict
 - regulatory measures
 - etc.



Methodology

- Trifold approach:
 - **Doctrinally oriented clarification of applicable law to climate scenarios («stress test»)**
 - Aim: Identifying...
 - potential shortcomings/lacunae
 - Policy considerations determining adjustment
 - **System-oriented comparison of rules:**
 - General vs. specialised contract law
 - **Critical assessment of ability to tackle climate change**
 - Judged according to expressed legislative motivations



Illustration: Charterparties



Maritime Code § 394

- «If the ship is in port or another area where war, warlike conditions or significant increase in risk of war occurs, the shipowner can immediately bring the ship out of the area and to safety.

(...)

If during the chartering period war, warlike conditions or significant increase in risk of war occurs, and this is of significant importance to the performance of the charter, the shipowner as well as the charterer may terminate the agreement without obligation to pay compensation. »



Maritime Code § 394 – prep. works

- «The Committee finds it unsuitable to attempt at drafting a legal definition for the term ‘war’, and neither is it purposeful to define where limit is for the risk an owner must be obligated to subject itself to. This will also depend on whether there already at the time of contract existed a greater or lesser risk of war in the area where the ship was **presumed** to be sailing. The Committee has found it unnecessary to emphasise that the most important factor in determining whether the owner can withdraw the ship from an area, is the **concern for the safety** of the [people] onboard, although the risk of physical harm, seizure and similar will also be of significance.»
 - NOU 1993:36 p. 95.



Maritime Code § 378

- «The shipowner is nevertheless not obligated to carry out a voyage that exposes the ship, people on board or the cargo to danger due to war, warlike conditions, ice or other danger or significant inconvenience that the shipowner could not reasonably have expected at the time of the contract.»



Maritime Code § 378 – prep. works

- «However, it is all the while presumed that it concerns circumstances that the owner could not reasonable have considered at the time of the contract. As the provision has been formulated, **it possibly does not state much more than general rules of contract [law]**». However, the committee finds it appropriate to include the provision *inter alia* because it addresses the owner's need for better protection than would follow from English/American law».
 - NOU 1993:36 p. 86



Pertinent questions

- Specialised rules or examples of broader rules on breach of assumptions and impediments?
- To what extent is safety addressed in the general rules?
 - Augdahl, Hagstrøm seemingly assume general relevance
- Might climate change exacerbate the importance of the safety consideration?
- What is the relationship between mandatory general rules and (non-mandatory?) Maritime Code?



Environmental concerns and the Contract Act § 36



The Contract Act § 36

En avtale kan helt eller delvis settes til side eller endres for så vidt det ville virke urimelig eller være i strid med god forretningsskikk å gjøre den gjeldende. Det samme gjelder ensidig bindende disposisjoner.

Ved avgjørelsen tas hensyn ikke bare til avtalens innhold, partenes stilling og forholdene ved avtalens inngåelse, men også til senere inntrådte forhold og omstendighetene for øvrig.

Reglene i første og annet ledd gjelder tilsvarende når det ville virke urimelig å gjøre gjeldende handels bruk eller annen kontraktrettlig sedvane

An agreement can wholly or partially be set aside or changed insofar as it would be **unfair** or contrary to good commercial custom to invoke it. The same applies to unilaterally binding acts.

In the assessment, consideration is given not only to the contents of the agreement, the standing of the parties and the circumstances at the conclusion of contract, but also to subsequently occurred events and the circumstances otherwise.

The rules in the first and second paragraph apply similarly when it would be unreasonable to invoke applicable trade practices or other contractual customs.



The problems

- A) Can environmental considerations be relevant in addressing unfair contract terms?
- B) Can such considerations be assessed by the judge despite not being invoked by a party to the dispute?



A) Environmental impacts relevant?

- Backer, Konow, Monsen: Quite likely
 - Integration principle
 - Constitution § 112 on the right to environment
 - Natural Diversity Act
 - Neighbor Act §§ 2 and 3
 - Easement Act § 2
 - Housing Construction Act § 7
 - Rt-2006-179 (Boot Heel Case) on choice of remedy
(redelivery vs. repair)



B) Assessing environment *ex officio*

- *Ex officio* environmental concerns in adjacent areas of law:
 - Prep. works for Neighbor Act §§ 2 and 3, Easement Act § 2:
 - “The concern for natural diversity can be invoked by the landowner itself, but **because it is of public interest, the court can emphasise natural diversity without it having been explicitly invoked by the parties to the case**”.
- “In a legal dispute, the court shall give weight to the concern for biological **diversity even if it is not specifically invoked by the parties**, and the court can in that regard collect evidence and information that would be needed for the assessment.” *Ot.prp.nr.51 (2008–2009) 459.*



B) Assessing environment *ex officio*

- Prep. works for Housing Construction Act § 7:
 - “The Committee majority (...) will point out that it is a principal view that environmental concerns and the concern for sustainable development **ought to be integrated in all sectors of society**. The majority is therefore content that the ministry has taken this into consideration in drafting this Act”.

Innst. O. nr. 61 (1996–1997)



B) Assessing environment *ex officio*

- Contract Act § 36: «unfair» – to whom?
 - Wording suggests no limits
 - Prep. works clearly have the parties in mind
 - In particular, the legislative commission “points out that the judge will be bound by the arguments and claims of the parties, and thus cannot assess the fairness of other terms than that which the parties invoke, and neither adjust the term, terms or the agreement beyond or in another way than what the parties argue.”
 - Seems to suggest ex officio assessments as impossible, but is a reference to general civil procedural dispositivity principle



B) Assessing environment *ex officio*

- Civil Procedure Act § 11-4:
 - “In cases of personal status, children’s legal matters pursuant to the Childrens Act, administrative decision on use of force pursuant to chapter 36 and in other cases where public concerns limit the parties’ disposal of the lawsuit, the court is not bound by the parties’ procedural actions beyond it being compatible with the public concerns. The court can nevertheless only decide on the claims raised in the case.”
 - Environmental impact as public concern?



B) Assessing environment *ex officio*

- Norwegian Code 5-1-2: invalidity for contract terms contrary to «Law, or Honourability».
 - Rt-2004-1582 (on property subject to public license)
 - See also: Eldjarn, *Materiell prosessledelse* 217
 - LA-2020-83641 (on illegal tennis court)
 - E.g. invalidity for illegal waste disposal terms in construction contract?
 - Possible § 36-based revision of price for waste disposal where original term invalid?



B) Assessing environment *ex officio*

- Perhaps need for distinctions between
 - Where contract provides for environmental concerns, and/or parties invoke them
 - Where lack of environmental concerns amount to illegality
 - Where lack of environmental concern is detrimental, yet legal (proximity to Neighbor/Easements Act relevant?)
 - Other instances



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