IMPOSSIBILITY, HARDSHIP AND EXEMPTION UNDER IBERO-AMERICAN CONTRACT LAW

Edgardo Munoz*

CONTENTS

1 Introduction 175
2 Impossibility 175
3 Hardship 184
4 Impact of Non-Breaching Parties Behaviour 190

1 INTRODUCTION

A party having a contract governed by any of the Ibero-American[1] laws may well be released from performing his contractual obligations when performance becomes impossible or excessively onerous. Practice shows that, on the one hand, impediments or impossibilities can arise from unforeseeable natural events or from acts attributed to third parties (although, these may also be due to the other party's conduct). On the other hand, experience demonstrates what at one point appeared to be feasible performance may later be affected by circumstances that modify the economy of the contract, making performance excessively burdensome to one of the parties. The line dividing impossibility from hardship may not always be clear. This article presents, from a comparative-functional approach, the solutions developed by the Ibero-American laws as a response to the impossibilities and hardships affecting commercial contracts.

2 IMPOSSIBILITY

All the Ibero-American laws recognise the principle under which a party to a contract is released from its contractual obligation to perform, if an impediment or impossibility occurs after the formation of the contract and cannot be considered to be the negligence of the debtor.[2]

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* Attorney at Law, Mexico, *Licenciado* (Iberoamericana), *DEUF* (Lyon III) *LL.M* (Liverpool) *Dr. iur.* (Basel); Research Assistant for the Global Sales Law Project, Basel University.

1 The following countries that are historically considered as Ibero-American: Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Portugal, Spain, Uruguay and Venezuela.

2 See: Argentina Arts. 513, 888 CC; Bolivia Art. 379 CC; Brazil Arts. 234, 248 CC; Chile Art. 1547 (2) CC; Colombia Art. 1604 (2) CC & Art. 930 Com C; Ecuador Art. 1590 (2) CC; El Salvador Art. 1418

2.1 CONTRACT TERMS

Determination of impossibility frequently starts within the specific contractual terms agreed by the parties. In other words, the question of whether one party's duty to perform has become impossible can be answered by looking at the characteristics of the obligations agreed.[3] A contract may call for the goods to have certain characteristics and the seller may fail to meet them because of events beyond his control. A contract could also require payment to be made upon a fixed date and though the buyer is ready to pay, some unanticipated incident may stop him from performing in due time.

The contractual terms are even more relevant with respect to understanding subsequent impossibility and the legal consequences of the impossibility to perform.[4] The default rules of the Ibero-American laws establish what is impossibility and which party will bear the consequences of the impossibility to perform.[5] The rules also acknowledge that the agreement between the parties on this issue is the ultimate law. Such freedom is subtracted from a recurrent provision stating that the party who fails to perform his obligations due to events beyond his control may still be bound to perform or may be liable to pay damages, if that party has agreed to bear the consequences of such events.[6]

In this manner, it is common for the parties to contractually define the impossibility that may discharge them from performance. They may do so by giving examples of specific cases covered by the definition or by excluding other specific cases from the definition. For example, contractual clauses may exclude from the definition of impossibility any action generated from third parties that cannot be reasonably

(2) CC; Mexico Art. 2111 CC; Paraguay Art. 628 CC; Peru Arts. 1314, 1315, 1316, 1317 CC; Portugal Art. 790 CC; Spain Arts. 1.105, 1.184 CC; see also Argentina Borda, G., *Manual de Contratos*, 20a ed., 2004, LexisNexis Abeledo-Perrot, Buenos Aires, at p. 140; Argentina Salermo, M., *Contratos Civiles y Comerciales*, 2007, Editorial de la Universidad Católica de Argentina, Buenos Aires, at p. 237; Argentina Lorenzetti, R., 2004, *Tratado de los Contratos Parte General*, Robinzal- Culzoni Editores, Santa Fe, at p. 598; Brazil Gomes, O., *Contratos*, 2008, 26th ed., Forense, São Paulo, at p. 211; El Salvador, Miranda, A., *Guía Para el Estudio del Derecho Civil III, Obligaciones,* 1996, San Salvador, at p. 156; Spain O'Callaghan, X., *Código Civil Comentado*, 2004, La Ley, Madrid, Art. 1.105, at p. 1075; ICC Final Award Case No. 13967 *Lex Contractus* Bolivian Law and INCOTERMS 2000.

3 See Jones G. H., Schlechtriem P., "Breach of Contract (Deficiencies in a Party's Performance)", in von Mehren, Arthur T., *International Encyclopedia of Comparative Law, Volume VII Contracts*, 1999, Mohr Siebeck, Tübingen, at p. 99, § 158.

4 See Jones G. H., Schlechtriem P., *supra* fn 3, at p. 99, § 158.

5 See below *2.2.1 Notion.*

6 See: Argentina Arts. 513, 889 CC; Bolivia Art. 577 sentence 2 CC; Brazil Art. 393 CC; Chile Art. 1673 CC; Colombia Art. 1732 CC; Ecuador Art. 1716 CC; El Salvador Art. 1543 CC; Mexico Art. 2111 CC; Peru Art. 1317 CC; Portugal Art. 546 part 1 CC; Uruguay Art. 220 (1) Com C; Venezuela Art. 1.344 CC (2 para.); see also ICC Final Award Case No. 12755 *Lex Contractus* Argentinean Law: upholding the validity of a clause in a sales contract preventing one of the parties to invoke the impossibility exemption in monetary obligations originating from the said contract; Mexico Collegiate Tribunals, *Novena Época,* Registry 197163, SJF VII, January 1998, at p. 1069; and El Salvador Miranda, A., *Obligaciones*, at p. 158; Spain O'Callaghan, X., *Código Civil Comentado*, Art. 1.105, at p. 1075.

resisted, including, in this case; strikes, civic demonstrations, acts of the State or others of similar nature that have a direct effect on the performance of the contract.[7]

Parties may also agree on the process and requirements for the termination of the contract on the basis of subsequent impossibility, for example: by requiring the party bearing the impossibility to communicate to the other party within a short period and by fixing the time during which the impossibility should last before a party terminates the contract.[8]

The same applies regarding the allocation of the risk related to the impediment to perform. In most civil law systems, when the object of contract is lost or damaged (this not being attributed to the fault of one of the parties), both parties are released from performing their obligations.[9] That is, damage or complete loss of the object discharges the debtor of the obligation because the impossibility is not due to his conduct and the other party, as a matter of principle, is also discharged from counter-performing.[10] However, this basic legal configuration may be modified by the rules, for instance, on the passing of risk of the goods subject to the sales contract.[11]

Certainly, in the context of sales contracts, the exact time of the passing of risk is of crucial importance because it; determines the party who bears loss of or damage to the goods, which party is discharged from having to perform his obligations and which party remains obliged to perform his obligations.[12] If goods are lost or damaged after risk has passed to the buyer, the seller may be released from having to supply equivalent goods, while the buyer is nevertheless bound to pay the price of the lost goods. On the other hand, if the risk is at the seller's side, the buyer may not pay and the seller will bear the total lost or damage of the goods.[13]

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7 Such a clause was analysed in ICC Final Award Case No. 13967 *Lex Contractus* Bolivian Law and INCOTERMS 2000.

8 *Ibid*.

9 See Argentina Art. 895 CC which states that the debtor shall give back the performance already made by the creditor; see also Jones G. H., Schlechtriem P., *supra* fn 3 at p. 114, § 182.

10 See Argentina Lorenzetti, R., *supra* fn 2, at p. 599.

11 See expressly provided in Argentina Art. 889 CC; Costa Rica Art. 459 *chapeau* CC; see also Jones G. H., Schlechtriem P., *supra* fn 3, at p. 114, § 182; Argentina Lorenzetti, R., *supra* fn 2, at p. 599; Brazil Gomes, O., *Contratos*, at p. 212.

12 Roth, P. M., "The Passing of Risk" (1979) 27 *American Journal of Comparative Law* 291.

13 Though in specific cases, the seller must compensate the buyer for the non-delivery, even if the loss was due to unforeseeable events. For example, when the goods have not been yet determined, or identified with distinctive marks or signals which prevent confusion, or when the seller is been already late in delivering the goods, etc, see Argentina Art. 894 CC; Brazil Art. 238 CC; Chile Art. 1670 CC *contrario sensu* & Art. 143 (1) (3) Com C; Colombia Art. 1729 CC *contrario sensu*; Costa Rica Art. 459 (a) (c) Com C; Ecuador Art. 1713 CC *contrario sensu* & Art. 188 (1) (3) Com C; El Salvador Art. 1540 CC *contrario sensu*; Paraguay Art. 632 CC; Spain Art. 334 (1) (3).

2.2 DEFAULT PROVISION

2.2.1 NOTION

Most of the Ibero-American laws rely on the concepts of 'Fortuitous Event' and 'Force Majeure'[14] as the main sources of impediments to perform and which result in the extinction of the debtor's obligation and release him from liability.[15] These two concepts are doctrinally distinguished, depending on the cause that originates the event.[16] However, the definitions provided by Ibero-American authors are not uniform and confusion has been created.[17]

Fortunately, all the laws that rely on these concepts take them as synonyms and define them as a single concept.[18] Other Ibero-American laws base the discharge of the debtor's obligation on the notion of impossibility due to unforeseen and/or inevitable events, with no reference to the concepts of force majeure or fortuitous event.[19] Whatever the case may be, all the Ibero-American laws concur on the necessary elements for the impossibility to discharge the debtor of his contractual obligations. As the Mexican Supreme Court has explained:

> *Irrespective of the doctrinal understanding that may be adopted regarding the concepts of force majeure and fortuitous event, it cannot be denied that their*

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14 Translation of *Caso Fortuito* and *Fuerza Mayor* in Spanish; see Argentina Art. 513 CC. In Portuguese *Caso Fortuito* and *Força Maior*; see Brazil Gomes, O., *supra* fn 2, at p. 212.

15 See *supra* fn 2 for: Argentina Borda, G., , at p. 140 Argentina Salermo, M., at p. 237; El Salvador Miranda, A., at p. 156 and Spain O'Callaghan, X., Art. 1.105, at p. 1075. Also see, Mexico Collegiate Tribunals, *Novena Época,* Registry 197163, SJF VII, January 1998, at p. 1069.

16 Mexico Collegiate Tribunals, *supra* fn 15 which explains how scholars such as Bonnecase, García Goyena, Henri León Mazeaud y André Tunc distinguish three categories of impossibilities (force majeure or fortuitous events) depending on whether such derived from events of the nature, the human beings or government's acts.

17 While some authors consider as Fortuitous Event the unexpected incident that originates from the forces of nature, others define the same concept as events within the debtor's sphere of action that cannot be prevented. Similarly, while Force Majeure is understood to be the obstructive act coming from a third person, others consider the same concept to originate out of the scope of debtor's influence; see Chile Acuña Tapia L., Novoa Muñoz G., *Cambio de Circunstancias en el Contrato*, 2004, Universidad Católica de Temuco, Escuela de Derecho, at p. 7, available at: <http://biblioteca.uct.cl/tesis/luis-acuna/tesis.pdf>; Spain Medina de Lemus, M., *Derecho Civil: Obligaciones y Contratos II, Teoria General Vol. 1*, 2004, Editorial Dilex, Madrid, at p. 145; see also a different definition of Fortuitous Event and Force Majeure in Mexico De Pina, R., *Elementos de Derecho Civil Mexicano, Contratos en Particular*, Vol. IV, 2007, Editorial Porrúa, México, at pp. 342-358.

18 Chile Art. 45 CC; Colombia Art. 64 CC; Ecuador Art. 30 CC; El Salvador Art. 43 CC: "*Force Majeure and Fortuitous Event is the unforeseen event that is impossible to resist, like a shipwreck, an earthquake, the capture of enemies, the acts of authority executed by a government official, etc.*"; Argentina Art. 514 CC: *fortuitous event* is the one that cannot be foreseen, or if foreseen, cannot be evaded; Brazil Art. 393 CC: a fortuitous event or force majeure is an inevitable event, the effects of which were not possible to avoid or prevent: Peru Art. 1315 CC: conjunctively define these concepts as the non-imputable cause, consisting in an extraordinary event, unforeseeable and unavoidable, which impedes the performance of the obligation or causes a partial, delayed or defective breach.

19 Argentina Art. 467 Com C; Bolivia Art. 577 CC; Paraguay Art. 628 CC; Portugal Art. 790 CC; Spain Art. 1.105 CC.

> *essential elements and their effects are the same. They refer to incidents of the nature or human conduct, unknown by the debtor, that affect him in his legal relationships; that prevent him, temporally or definitively, to perform, partially or totally, an obligation; being such fact non-imputable, directly or indirectly, to his fault, and which effects cannot be avoided with the means that his social environment would provide him with, in order to prevent the event or to oppose it and resist it.*[20]

2.2.2 *REQUIREMENTS*

The Ibero-American laws require that the impossibility appear after the formation of the contract and from an unforeseeable event.[21] This can be understood by three limbs: first, if the performance of the obligation was already impossible before the contract's formation, this is a case of initial impossibility that renders the contract void.[22] Second, within the ordinary understanding of an average man, it was not possible to foresee at that time that the event would occur.[23] Third, it must be an event insurmountable or irresistible; meaning, the same event or fact impedes the debtor or any other person to perform under all circumstances.[24] The Supreme Court of Chile has explained that an event is

> *irresistible when it is not possible to avoid its consequences, in a case where any person in the same circumstances could neither have foreseen it nor avoided it.*[25]

On this issue, an ICC Arbitration Tribunal explained that acts of authority, such as the restriction of exports on the type of goods, constitute impossibility when they impede the performance of the obligation. In the present case, the excused seller was further able to prove that he had negotiated, in good faith, a mutually acceptable solution with

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20 Mexico Supreme Court, Séptima Época, Registry 245709, SJF 121-126 Part VII, at p. 81.

21 Brazil Gomes, O., *supra* fn 2, at p. 212; El Salvador Miranda, A., *Obligaciones*, at p. 156; Mexico Collegiate Tribunals, Novena Época, Registry 197'162, SFJ VII, January 1998, at p. 1069.

22 See express reference to this distinction in Brazil Art. 166 (II) CC; Portugal Art. 401 (1) CC; Spain Arts. 1272, 1261 (2) CC; see also Argentina Lorenzetti, R., *Tratado de los Contratos Parte General*, at p. 598; Portugal Antunes Valera, J. De M., *Das Obrigações em Geral*, 10a ed., 2003, Almeida, Coimbra, at p. 404; Spain Supreme Tribunal, 14 May 2009, Id Cendoj: 28079110012009100320; ICC Final Award Case No. 13530 *Lex Contractus* Brazilian Law.

23 Spain O'Callaghan, X., *Código Civil Comentado*, Art. 1.105, at p. 1075; Chile Supreme Court, RDJ, Vol. 46, S. 1, at p. 533: sustained that an event is fortuitous when there is no grounded reason to believe it will occur; El Salvador Supreme Court, Cass civ, Kereitz Medrano v. Liceo Centroamericano, S.A. de C.V., 11-C-2007, 17 November 2008: there is no force majeure when the debtor could have 'reasonably' foreseen the event.

24 See *supra* fn 2: Argentina Lorenzetti, R., , at p. 598; Brazil Gomes, O., at p. 212; El Salvador Miranda, A., at p. 156; Spain O'Callaghan, X., Art. 1.105, at p. 1075.

25 Chile Supreme Court, RDJ, Vol. 46, Sec. 1, at p. 533.

the buyer and that he had assisted with efforts to provide substitution of the goods to the buyer.[26]

In another ICC arbitration governed by the Bolivian Law, a Bolivian seller was released from his obligation to deliver a type of hydrocarbon extracted from crude oil known by the name of "condensado" to a Brazilian buyer on the grounds of subsequent impossibility. In the case at hand, the seller stopped the delivery of *"*condensado*"* due to a Governmental Order requesting any national producer to furnish a compulsory quota of crude oil to the Bolivian refineries for the production of diesel oil for domestic consumption. The Government Order did not restrict the export of *"*condensado*"* but rather imposed great fines to those crude oil producers that did not comply with the Order. The Arbitral Tribunal found that the seller was able to prove that he did not have the crude oil production capacity to fulfil both his contractual obligations and the Government Order. Further, even if by paying the fine the impossibility could have disappeared, the huge amount of the fine (US$ 1,000,000.00 per day) rendered impossible the equilibrium of the contract.[27]

In summary, a debtor may only be discharged from his duty to perform and be released from his liability for breach of contract if the impossibility has the mentioned characteristics. However, a debtor would still be liable for non-performance if he has agreed to bear the consequences of the impossibility.[28]

2.2.3 LIMITS & BURDEN OF PROOF

If the impossibility originates after the agreed time of performance, that is, during the time when the debtor is already in delay; he shall be accountable for the consequences of the non-performance,[29] unless the impossibility would still occur (e.g. despite the goods being already delivered).[30]

In the context of sales contracts, many Ibero-American laws contain the basic rule under which the debtor shall be released from his obligation to deliver ascertained and identified goods if such are lost due to events beyond his control.[31] That said, if the obligation consists of the delivery of generic goods, only ascertained on its type, the

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26 ICC Final Award Case No. 13385 *Lex Contractus* Argentinean Law: In February 2004, the Argentine Ministry of Energy issued several resolutions with respect to natural gas distribution. In May 2004, respondents decided to suspend gas exports, alleging force majeure, based on the resolutions of the government.

27 ICC Final Award Case No. 13967 *Lex Contractus* Bolivian Law and INCOTERMS 2000.

28 See above *2.1 CONTRACT TERMS*.

29 See Spain Art. 1.182 CC *contrario sensu*; Uruguay Art. 220 (3) Com C; Venezuela Art. 1.344 CC; see also *supra* fn 2: Brazil Gomes, O., , at p. 213; El Salvador Miranda, A., at p. 157; and Spain O'Callaghan, X., Art. 1.105, at p. 1075.

30 Chile Arts. 1547 (2), 1672 CC; Colombia Arts. 1604 (2), 1731 CC; Ecuador Arts. 1590 (2), 1715 CC; El Salvador Arts. 1418 (2), 1542 CC; Uruguay Art. 220 (3) Com C; Venezuela Art. 1.344 CC.

31 Argentina Arts. 890, 893 CC; Brazil Art. 238 CC; Chile Art. 1670 CC; Colombia Art. 1729 CC & Art. 930 Com C; Ecuador Art. 1713 CC; El Salvador Art. 1540 CC; Paraguay Art. 632 CC.

performance will never be considered to be impossible and the debtor may be liable for damages caused by breach of contract.[32]

In addition, the debtor may still be liable for damages and loss of profits if the impossibility is caused by his negligence.[33] Some laws expressly define negligence as the omission of those diligences that are required by the nature of the obligation according to the personal circumstances, the time and the place.[34] The Bolivian and the Spanish Civil Codes add that when no level of diligence has been agreed to perform the obligation, it shall be required a level of diligence corresponding to that of the 'bonus pater familias'.[35] As noted by a scholar, the issue is not about the psyche of the debtor but about his conduct that deviates from the standard required by the law.[36]

Many Civil Codes expressly state that the onus is on the debtor to prove that he has acted with care and diligence, so that no negligent conduct can connect him with the events.[37] If for instance, the goods subject to a sales contract are lost in the seller's possession, it is presumed that such is due to his conduct or negligence.[38] Similarly, the burden of proving the impossibility is on the debtor who claims it has been prevented to perform.[39] The debtor must also prove that the goods would have still been lost, due to unforeseeable events, even if he had performed on time.[40]

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32 Argentina Art. 894 CC; Brazil Art. 238 CC; Chile Art. 1670 CC *contrario sensu* & Art. 143 (1) (3) Com C; Colombia Art. 1729 CC *contrario sensu*; Costa Rica Art. 459 (a) (c) Com C; Ecuador Art. 1713 CC *contrario sensu*; El Salvador Art. 1540 CC *contrario sensu*; Paraguay Art. 632 CC.

33 Argentina Arts. 513, 888, 889 CC & Art. 467 Com C; Brazil Art. 248 CC; Chile Art. 1547 paras. 1, 2 CC; Colombia Art. 1604 paras. 1, 2 CC & Art. 930 Com C; Ecuador Art. 1590 paras. 1, 2 CC; El Salvador Art. 1418 paras. 1, 2 CC; Mexico Art. 2111 CC; Peru Arts. 1317, 1321 CC; Portugal Arts. 546 part 1, 801 CC; Spain Art. 1.104 CC; Uruguay Art. 220 (2) Com C; Venezuela Art. 1.271 CC; see also *supra* fn 2: Argentina Borda, G., at p. 140: noting that in Argentina the negligent debtor may be released from performing due to the impossibility but he is liable for damages and loss of profits; Argentina Lorenzetti, R., *supra fn* 2at p. 599: same opinion; Brazil Gomes, O., *supra fn* 2, at p. 213 same opinion; El Salvador Miranda, A., *supra fn* 2, at p. 157; Portugal Antunes Valera, J. De M., *Das Obrigações em Geral*, at p. 403: in addition, the creditor has a right to avoid the contract; El Salvador Supreme Court, *Cass civ, Kereitz Medrano v. Liceo Centroamericano, S.A. de C.V.,* 11-C-2007, 17 November 2008: the alleged impediment should not result of the negligent conduct of the debtor.

34 Argentina Art. 512 CC; Peru Arts. 1319, 1320 CC; Spain Art. 1.104 CC; Uruguay Art. 221 Com C.

35 Bolivia Art. 302 (I) CC; Spain Art. 1.104 *in fine* CC; see also Bolivia Castellanos Trigo, G., Auad La Fuente, S., *Derecho de las Obligaciones en el Código Civil Boliviano*, 2008, Tarija, Bolivia, at p. 48; Spain O'Callaghan, X., *supra* fn 2, Art. 1.105, at p. 1075.

36 Argentina Lorenzetti, R., *supra* fn 2, at p. 603.

37 Chile Art. 1547 (3) CC; Colombia Art. 1604 (3) CC; Ecuador Art. 1590 (3) CC; El Salvador Art. 1418 (3) CC.

38 Chile Art. 1671 CC; Colombia Art. 1730 CC; Ecuador Art. 1714 CC; El Salvador Art. 1541 CC; Spain Art. 1.183 CC; see also Argentina Lorenzetti, R., *supra* fn 2, at p. 602.

39 Chile Arts. 1547 (3), 1674 CC; Colombia Arts. 1604 (3), 1733 CC; Ecuador Arts. 1590 (3), 1717 CC; El Salvador Arts. 1418 (3), 1544 CC; Portugal Art. 799 (1) CC; Spain Art. 1.183 CC; Venezuela Art. 1.344 CC (3); see *supra* fn 2: Argentina Lorenzetti, R., at p. 602 and Spain O'Callaghan, X., Art. 1.105, at p. 1075; ICC Final Award Case No. 12755 *Lex Contractus* Argentinean Law.

40 Argentina Art. 892 CC; Chile Art. 1674 CC; Colombia Art. 1733 CC; Ecuador Art. 1717 CC; El Salvador Art. 1544 CC.

2.2.4 EFFECTS & STANDARDS

Under the Ibero-American laws, the effect of a 'legitimate' impossibility discharges the debtor of his obligation to perform. The impossibility extinguishes the contracted obligations and releases the debtor from any liability for breach of contract;[41] including the agreed or legal liability for damages and lost profits.[42] On the basis of a contractual relationship, the unwinding of the contract operates automatically and retroactively. The restitution of the already performed obligations is then due and subject to the rules on unjustified enrichment.[43] Judicial intervention only takes place if one of the parties refuses to give back the received performance.[44]

In cases where the impossibility only affects part of the debtor's overall obligations under the contract, the question arises on, whether the creditor is aggrieved only with respect to that part of the performance or whether the entire obligation, which may have already been performed in part, is affected by the partial impossibility.[45] Some Ibero-American laws present an express solution to this problem. In cases of partial impossibility to perform, the debtor of the obligation may be released by performing the part of the obligation still possible,[46] when the creditor of the obligation manifests his will to receive the partial performance.[47] In Costa Rica, Spain and Brazil, if the goods have been lost only in part (due to unforeseeable events borne by the seller) the buyer may opt to claim the delivery of the remaining goods or may decide to avoid the

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41 See expressly stated in Argentina Art. 895 CC & Art. 467 Com C; Bolivia Art. 379 CC; Brazil Art. 248 CC; Chile Art. 1567 (7) CC; Colombia Art. 1625 (7) CC & Art. 930 Com C; Ecuador Art. 1610 (8) CC; El Salvador Art. 1438 (6) CC; Peru Art. 1316 sentence 1 CC; Portugal Art. 790 CC; Spain Arts. 1.182, 1.105, 1.184 CC; Venezuela Art. 1.272 CC; ICC Final Award Case No. 13967 *Lex Contractus* Bolivian Law and INCOTERMS 2000; ICC Final Award Case No. 13530 *Lex Contractus* Brazilian Law; Mexico Supreme Court, *Séptima Época, Tercera Sala,* SJF 139-144, Part 4, at p. 80; Bolivia Castellanos Trigo, G., Auad La Fuente, S., *supra* fn 35, at pp. 235-236; Jones G. H., Schlechtriem P., *supra* fn 3, at p. 114, § 182; Portugal Antunes Valera, J. De M., *supra* fn 33, at p. 402; Spain O'Callaghan, X., *supra* fn 2, Art. 1.105, at p. 1075.

42 See Costa Rica Baudrit Carrillo, D. *Los Contratos Traslativos del Derecho Privado- Principios de Jurisprudencia*, 2a ed., 2000, Juricentro, San José, pp. 44-48: discussing a Supreme Court judgement upholding this effect; Mexico Art. 1847 CC: a penalty clause cannot be enforced, and other damages cannot be claimed, when the debtor was unable to fulfil his obligations under the contract due to fortuitous events or insurmountable force; confirmed by Jurisprudence Mexico Collegiate Tribunals, *Novena Época,* Registry 173722, SJF XXIV, December 2006, at p. 1378; see also Bolivia Castellanos Trigo, G., Auad La Fuente, S., *supra* fn 35, at pp. 237-238; Spain O'Callaghan, X., *supra* fn 2, Art. 1.105, at p. 1075.

43 Expressly stated in Argentina Art. 895 CC: stating that the debtor shall give back the performance already made by the creditor; Bolivia Art. 577 CC: same; Portugal Art. 795 (1) CC: subject to the rules on unjustified enrichment; Portugal Antunes Valera, J. De M., *supra* fn 33, at p. 402; ICC Final Award Case No. 13530 *Lex Contractus* Brazilian Law.

44 Brazil Gomes, O., *supra* fn 2, at p. 213; Portugal Art. 795 (1) CC: through an action for unjust enrichment; ICC Final Award Case No. 13530 *supra* fn 43.

45 See Jones G. H., Schlechtriem P., *supra* fn 3, at p. 103, § 163.

46 See Bolivia Art. 832 CC: including defective performance; Paraguay Art. 630 CC; Portugal Art. 793 (1) CC.

47 Bolivia Arts. 382, 578, 600 CC.

contract.[48] The CISG embodies the same rule in its Article 51, according to which if the failure to make delivery completely amounts to a fundamental breach, the buyer may declare the contract avoided.[49]

As noted by some authors,[50] the decisive criterion is whether or not the creditor has an interest in partial performance. The Peruvian and the Portuguese Civil Codes expressly establish an objective criterion: the whole obligation extinguishes if partial performance is not useful to the creditor or if he would not *justifiably* have interest in the partial performance.[51]

A temporary impediment may also temporarily discharge the debtor from his obligation to perform.[52] When the impossibility ceases, the debtor may be called to perform unless time was of the essence and the creditor of the obligation had opted to abandon the contract.[53] The creditor of the obligation may *justifiably* lose interest in the contract, in cases where it can be inferred that the exact performance was relevant to satisfy the creditor's interest.[54]

2.2.5 THIRD PERSON

According to Art. 73 (2) of the CISG, if the party's failure is due to the failure of a third person who was engaged to perform the whole or a part of the contract, that party is exempt from liability only if he and the third person would be exempted under the Convention. The same principle can be deduced from Ibero-American law. For example, a rule among the provisions on lawful impossibility to perform states that "in the performance or negligence of the debtor, it is included the performance and the negligence of those for who he will be responsible"[55]. In Peru's Civil Code a similar

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48 Brazil Art. 235 CC; Costa Rica Art. 471 Com C; Spain Art. 1460 CC.

49 See Art. 51 (2) CISG. A similar provision is embodied in Bolivia's Art. 572 CC: dictating that there is no ground for the avoidance of the contra if the breach by one of the parties is of little gravity or little importance considering the interest of the other party.

50 Jones G. H., Schlechtriem P., *supra* fn 3, at p. 104, § 163; Argentina Salermo, M, *supra* fn 2, at p. 237: noting that in case of death of the debtor, the creditor may declared the contract avoided for the remaining performances if the debtor's identity was of fundamental importance for the contract; Brazil Gomes, O., *supra* fn 2, at p. 212: noting that the creditor can have an interest in contracts that have as its object the performance of multiple-principal obligations or of a principal obligation with multiples accessories.

51 Peru Art. 1316 last para., CC; Portugal Art. 793 (2) CC.

52 Expressly in Bolivia Art. 380 CC; Paraguay Art. 628, para. 2 CC; Peru Art. 1316 part 2 CC; Portugal Art. 792 (1) CC; Liberal interpretation of the following provisions (the creditor may claim the delivery of goods that had suddenly disappeared but were subsequently found): Bolivia Art. 381 CC; Chile Art. 1675 CC; Colombia Art. 1734 CC; Ecuador Art. 1718 CC; El Salvador Art. 1545 CC; Paraguay Art. 629 CC; see also Jones G. H., Schlechtriem P., *supra* fn 3, at p. 112, § 177; Argentina Lorenzetti, R., *supra* fn 2, at p. 600.

53 See Art. 79 (3) CISG; expressly in Bolivia Art. 380 CC; Paraguay Art. 628 para. 2 CC; Peru Art. 1316 part 2 CC.

54 Expressly in Bolivia Art. 380 CC; Paraguay Art. 628 para. 2 CC; Peru Art. 1316 part 2 CC; Portugal Art. 792 (2) CC; see also *supra* fn 2: Argentina Lorenzetti, R., at p. 600 and Brazil Gomes, O., at p. 212.

55 Chile Art. 1679 CC; Colombia Art. 1738 CC; Ecuador Art. 1722 CC; El Salvador Art. 1549 CC.

provision dictates that if the debtor engages third parties to perform his obligation, he shall be liable for their negligent conduct, unless otherwise agreed.[56]

Accordingly, if the debtor is liable for the deficient performance or the fault of those persons under his supervision, the debtor may also be released of any duty to perform or liability for breach of contract due to unexpected events which have impeded, to these same persons, the performance of related duties.

2.2.6 NOTICE TO OTHER PARTY

None of the Ibero-American laws contain a duty to give notice to the other party of the events that impede him to perform, as it is established under the CISG.[57] Nevertheless, similar liability derives from the Ibero-American laws' duty to inform the other party of any circumstances that may be relevant to such party. The duty to act in good faith[58] comes together with the duty to inform.[59] The good faith principle includes every sort of values embraced by justice and which shall be protected by the parties to a contract.[60]

3 HARDSHIP

In Ibero-American laws, one of the general principles of contracts is that the circumstances that modify the economy of the contract do not affect its validity or enforceability.[61] In other words, the parties are bound by the obligations agreed upon during and until the complete fulfilment of the contract, irrespective of any change of the circumstances. The rule is taken from the inherited Roman law principle of 'pacta sunt servanda',[62] which is deeply rooted in countries like Mexico.[63]

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56 Peru Art. 1325 CC; similarly Portugal Art. 791 CC.

57 Under CISG Art. 79 (4), the debtor of the obligation must give notice to the other party of the events that impede him to perform. If the debtor fails to do so within a reasonable time after he knew or ought to have known of the impediment, he shall be liable for any loss derived from his failure to give notice.

58 Argentina Art. 1198 CC; Bolivia Art. 465 CC & Art. 803 Com C; Brazil Art. 422 CC; Chile Art. 1546 CC; Colombia Art. 1603 CC & Art. 863 Com C; Cuba Art. 6 CC; Ecuador Art. 1589 CC; El Salvador Art. 1417 CC; Guatemala Art. 17 CC; Mexico Art. 1796 CC; Paraguay Art. 689 CC; Peru Art. 1362 CC; Portugal Art. 227 CC; Spain Art. 1258 CC & Art. 57 Com C.

59 Argentina Alterini, A., *Contratos civiles, comerciales, de consumo*, 1998, Abeledo-Perrot, Buenos Aires, at p. 330; Chile Lopez Santa Maria, J., *Los Contratos: Parte General*, Vol. 2, 4a ed., 2005, Editorial Jurídica de Chile, Santiago, fn 598; Oviedo Albán, J., *La Formación de Contrato: tratos preliminares, oferta, aceptación*, 2008, Temis, Bogota, at p. 17.

60 A duty inferred from Argentina Art. 1056 CC according to Argentina Lopez de Zavalia, F., *Teoria de los Contratos*, Vol. 1, 4a ed., 2003, Zavalia Editor, Buenos Aires, at p. 299.

61 The principle derives from the following provisions: Chile Art. 1545 CC; Colombia Art. 1062 CC & Art. 4 Com C; Costa Rica Art. 470 Com C; Ecuador Art. 1588 CC; El Salvador Art. 1416 CC; Mexico Art 1796 CC & Art. 78 Com C; Paraguay Art. 557 CC; Peru Arts. 1353, 1356 CC; Portugal Art. 4 Com C; Peru Supreme Court, *Sala civil transitoria,* Resolution 002752-2006, 17 October 2006: the contract was the law for the contractors and as such the contract had a primary position before the law.

62 See for example Costa Rica Supreme Court, Judgement 108, 18 July 1989: the contract is the law for the parties which are bound by the terms expressed in it.

However, a group of Ibero-American legal systems have integrated into their provisions on contracts, an exception to this general principle commonly known as 'rebus sic stantibus' clause.[64] In Argentina, Bolivia, Brazil, Paraguay and Peru, as well as under Colombia, El Salvador and Guatemala B2B contracts, a contract may be adjusted or avoided by a court when an extraordinary and unforeseeable event makes one of the party's obligations to become excessively onerous.[65] Similarly, the Spanish Jurisprudence has also acknowledged the possibility of adjusting or avoiding the contract under the 'rebus sic stantibus' doctrine.[66]

3.1 NOTION

Hardship can be distinguished from objective impossibility, as already reviewed in this article: a 'force majeure' or fortuitous event absolutely impedes the performance, while hardship or subsequent excessive onerosity only makes performance difficult.[67] In practice, the line dividing the two notions is not always clear. Often both will apply. As noted, many times the answer will reside in an objective evaluation as to whether the change of circumstances has been relevant and important enough to cause a real impossibility to perform or whether, simply grave difficulties to perform have arisen.[68] As stated by an Arbitration Tribunal,[69] even grave difficulties imposed by free market competition rules or control measures in the currency exchange market may not constitute impossibility to perform.

Hardship also distinguishes from gross disparity because excessive onerosity originates after conclusion of the contract, while gross disparity is previous or

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63 See for example Mexico Art. 1796 CC & Art. 78 Com C; All negating the applicability of the doctrine of hardship in national contracts: Mexico Supreme Court, *Séptima Época, Tercera Sala,* Registry 240782 SJF 139-144, part 4, at p. 29; Mexico Collegiate Tribunals, *Novena Época,* Registry 195622, SJF VIII, September 1998, at p. 1217; Mexico Collegiate Tribunals, *Novena Época,* Registry 195621, SJF VIII, September 1998, at p. 1149.

64 Brazil Gomes, O., *supra* fn 2, at p. 214.

65 Argentina Art. 1198 part 2 CC; Bolivia Arts. 581-583 CC; Brazil Arts. 478-480 CC; Paraguay Art. 672 CC; Peru Arts. 1440-1444 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Guatemala Art. 688 Com C; ICC Final Award Case No. 13347 *Lex Contractus* Brazilian Law: noting that the interested party on the revision shall prove: 1) the excessive onerosity of the obligations owed; 2) the casual link between the excessive onerosity and the subsequent events to the conclusion of the contract; 3) the unforeseeablility of such events for both of the parties; 4) that the cause of the event is not attributable to him.

66 Spain Supreme Tribunal, 15 March 1994, *Id Cendoj:* 28079110011994101643; ICC Final Award Case No. 11317 *Lex Contractus* Spanish Law: The Arbitral Tribunal noted that in the light of Spanish case-law on the so-called *rebus sic stantibus* clause, a contract may be terminated on the grounds of imbalance of the contractual services supplied. However, in the instant case, the required conditions were not met for terminating or revising the contract.

67 See *supra* fn 2: Argentina Lorenzetti, R., at pp. 518, 519 and Brazil Gomes, O., at p. 214.

68 Argentina Borda, G., *supra* fn 2, at p. 158.

69 ICC Final Award Case No. 12755 *Lex Contractus* Argentinean Law.

simultaneous to the formation of the contract.[70] Also, in the case of gross disparity there exists a subjective element i.e., the conduct of one of the parties that disrupted the equal relationship under the contract, an element which must not exist in subsequent excessive onerosity.[71]

3.2 SCOPE & REQUIREMENTS

The scope of the application of the provisions on excessive onerosity is mostly the same in the Ibero-American laws. The adjustment of the contract because of excessive onerosity only applies to, first; contracts of deferred, periodic or continued execution;[72] though Peru's Civil Code expressly extends its application to contracts of immediate execution when the performance was deferred by events which are not attributable to the debtor.[73] Second, it only applies to bilateral commutative contracts, such as sales or services contracts.[74] Third, Argentina, Bolivia, Brazil, Paraguay and Peru apply the exception to both C2C and B2B contracts, as the provisions not establish a different treatment, while Colombia, El Salvador and Guatemala apply it only to B2B sales.

Moreover, the requirements for the adjustment or avoidance of the contract are not so different. First, the event must be an extraordinary one in contrast to ordinary events that would be expected to occur.[75] Second, the event must be an unforeseeable one.[76] An event is unforeseeable when the parties have been unable to foresee it, even if acting with due diligence. Foreseeability is determined according to the information

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70 See element of gross disparity Argentina Art. 954 CC; Bolivia Art. 561 CC; Brazil Art. 157 CC; Honduras Art. 753 CC; Mexico Art. 2228 CC; Paraguay Art. 671 CC; Peru Art. 1447 CC; Portugal Art. 282 CC.

71 Argentina Lorenzetti, R., *supra* fn 2, at pp. 518, 519.

72 Argentina Art. 1198 part 2 CC; Bolivia Art. 581 (1) CC; Brazil Art. 478 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Guatemala Art. 688 Com C: for the same sort of contracts only permits the avoidance and not the adjustment; Paraguay Art. 672 CC: only mentions "contracts of deferred execution"; Peru Art. 1440 CC.

73 See, Peru Art. 1440 (1) CC.

74 Argentina Art. 1198 part 2 CC; Bolivia Art. 581 (1) CC; Brazil Art. 478 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Paraguay Art. 672 CC; Peru Art. 1440 CC; However, the Argentinean, Brazilian, Bolivian, Paraguayan and Peruvian Civil Codes expressly state that such provision may also apply to unilateral onerous contract and random contracts in special cases, see Argentina Art. 1198 CC; Bolivia Arts. 582, 583 CC; Brazil Art. 480 CC; Paraguay Art. 672 CC; Peru Arts. 1441 (2), 1442 CC.

75 Argentina Art. 1198 part 2 CC; Bolivia Art. 581 (1) CC; Brazil Art. 478 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Guatemala Art. 688 Com C; Paraguay Art. 672 CC; Peru Art. 1440 CC; see also Brazil Gomes, O., *supra* fn 2, at p. 215; Spain Supreme Tribunal, 15 March 1994, *Id Cendoj:* 28079110011994101643; ICC Final Award Case No. 13518 *Lex Contractus* Argentinean Law by operation of the Conflict of Law Rules in Argentina's civil code.

76 Argentina Art. 1198 part 2 CC; Bolivia Art. 581 (1) CC; Brazil Art. 478 CC; Paraguay Art. 672 CC; Peru Art. 1440 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Guatemala Art. 688 Com C; see also Brazil Gomes, O., *Contratos*, at p. 215; Spain Supreme Tribunal, 15 March 1994, *Id Cendoj:* 28079110011994101643.

available at the time of contract conclusion and according to the concrete capacity of the parties to forecast.[77]

Third, the event must provoke the excessive onerosity of the performance.[78] The question arises as to whether the modification of the obligation should be considered from the perspective of the debtor or, whether the objective imbalance between the mutual performances should solely be considered?[79] As noted by some authors, [80] the extraordinary and unforeseeable event causes an excess in the onerosity of one of the performances, only if, measured against the counter-performance; such is an objective relation. Thus, the economic situation of the affected party ought not to be solely taken into consideration. The value of the performance in itself is not as crucial as is the relation of equivalence *vis à vis* the counter-performance; equivalence lost by the alteration of the basis of the business.[81]

3.3 EFFECT

The effect of a judicially established excessive onerosity or hardship are almost identical. Six of the eight Ibero-American laws contemplate the avoidance of the contract by the competent court acting *ex parte*, as the principal effect.[82] Although, an ICC Arbitral Tribunal[83] applying Argentina's law has admitted the revision of the contract as the primary effect, as such was established in a hardship clause agreed by the parties. It should be mentioned that the avoidance of the contract does not affect the obligations already performed by the debtor, but only applies to the obligations still pending and that have legitimately become excessively onerous.[84]

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77 Argentina Lorenzetti, R., *supra* fn 2, at p. 521; ICC Final Award Case No. 11317 *Lex Contractus* Spanish Law: the Tribunal considered that the devaluation of the Brazilian currency was not an unforeseeable event, given that, in the situation under consideration, the parties had made express provision in their contract for suitable measures to mitigate the impact of such events, including amending the method of making payments, deducting from the total amount to be paid a sum to which the respondent was entitled by virtue of contract, should the revenue from passengers be lower than that forecast.

78 Argentina Art. 1198 part 2 CC; Bolivia Art. 581 (1) CC; Brazil Art. 478 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Guatemala Art. 688 Com C; Paraguay Art. 672 CC; Peru Art. 1440 CC; Spain Supreme Tribunal, 15 March 1994, *Id Cendoj:* 28079110011994101643.

79 Argentina Lorenzetti, R., *supra* fn 2, at p. 521.

80 See *supra* fn 2: Argentina Lorenzetti, R., at p. 522 and Brazil Gomes, O., at p. 214.

81 Argentina National Civil Chamber, *Sala E*, Rep L L, XXXVIII-397, sum. 127 cited in Argentina Lorenzetti, R., *supra* fn 2, at p. 522; Brazil Gomes, O., *supra* fn 2, at pp. 214, 215.

82 Argentina Art. 1198 CC; Bolivia Art. 581 (I) (IV) CC; Brazil Arts. 478, 479 CC; Paraguay Art. 672 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C; Guatemala Art. 688 Com C.

83 ICC Final Award Case No. 13518 *Lex Contractus* Argentinean Law by operation of the Conflict of Law Rules in Argentina's civil code.

84 Expressly stated in Argentina Art. 1198 CC; Guatemala Art. 688 para. 2 Com C; Peru Art. 1440 *in fine* CC; Argentina Lorenzetti, R., *supra* fn 2, at p. 525. See also Bolivia Art. 581 (II) CC: it is for that reason that some laws expressly provide that the provisions on excessive onerosity do not apply to cases where the excessively onerous obligation has already been executed.

The same legal systems establish as secondary effect, the revision or adjustment of the contract at the option of the creditor who may be interested in the continuation of the contract.[85] In such a case, the question arises as to whether the debtor can file a request for the adjustment of the contract in order to keep the contract alive. In a literal interpretation of the provision, the Argentinean Supreme Court has negated the possibility of the debtor to autonomously file an action for the revision or adjustment of the contract.[86] Notwithstanding, the majority of scholars[87] consider that it is unreasonable to deprive the debtor (affected by hardship) from his interest to continue with the contract once the inequality is eliminated. A Brazilian scholar[88] supports this view showing that other provisions of Brazil's Civil Code expressly allow the debtor to claim the adjustment of the contract.

Further, an ICC Arbitral Tribunal[89] applying the Argentinean law admitted the adjustment of the contract as requested by the debtor, based on the contractual hardship clause which granted such possibility to both parties. In contrast, under Peru's Civil Code and Colombia's Code of Commerce, the primary effect is not the avoidance rather, the revision and adjustment of the contract derived from the debtor's request seeking to cease the hardship. Only when such is not possible due to the nature of the obligation, the circumstances or because the creditor has so requested, the judge may declare the termination of the contract.[90] Such is also the approach followed by the UNIDROIT PICC for cases falling under the scope of their hardship provisions.[91]

Regarding the adjustment of the contract, an ICC Arbitral Tribunal[92] applying the Argentinean law has explained that the adjustment should not be arithmetically made. That is, the revision of the price should not seek to overcome all the prejudices caused by the unforeseeable events. Instead, it should seek to release the contract from any unfair situation, in terms that the debtor should not become the beneficiary of the unforeseeable events and the creditor's profits should not result in being abusive.

Whether the parties can agree in advance to renounce the default remedies of hardship is under discussion in some jurisdictions. The Peruvian Civil Code expressly declares that renunciation to the remedy for excessive onerosity of the obligation is inadmissible under the law.[93] In Argentina, the doctrine has discussed the issue

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85 Argentina Art. 1198 CC; Bolivia Art. 581 (I) (IV) CC; Brazil Arts. 478, 479 CC; Paraguay Art. 672 CC; Colombia Art. 868 Com C; El Salvador Art. 994 Com C.

86 Argentina Supreme Court, *Kamestein, Victor y otros v. Fried de Goldring*, cited in Argentina Lorenzetti, R., *supra* fn 2, at p. 527, fn 46.

87 See *supra* fn 2, Brazil Gomes, O., at p. 215 and Argentina Lorenzetti, R., at p. 527, fn 48.

88 Brazil Gomes, O., *supra* fn 2, at p. 216: Brazil Arts. 317, 620, 770 CC.

89 ICC Final Award Case No. 13518 *Lex Contractus* Argentinean Law by operation of the Conflict of Law Rules of Argentina's Civil Code.

90 Peru Art. 1440 CC; Colombia Art. 868 Com C.

91 See for example Arts. 6.2.1, 6.2.2, 6.2.3 of the UNIDROIT PICC.

92 ICC Final Award Case No. 13518 *Lex Contractus* Argentinean Law by operation of the Conflict of Law Rules of Argentina's Civil Code.

93 Peru Art. 1444 CC.

concluding that renunciation of the hardship remedy is valid in contracts with parties of equal conditions, as the provisions of the Civil Code grant a right and not an obligation, thus, susceptible to be modified by the parties' agreement.[94] The Guatemala's Code of Commerce expressly confers such possibility as it negates the avoidance when the contract is aleatory, this is, when the parties have taken the risk of the subsequent excessive onerosity of the performances.[95]

Finally, under the Peruvian law, the limitation period to raise the hardship exemption is three months from the date the events altering the balance of the respective performances occurred.[96] However, as supported by the Peruvian Supreme Court, in order to raise the hardship exemption the event that produces the change of the circumstances should be sufficiently identified so that the beginning of the limitation period of the hardship action can be established.[97]

3.4 ARGENTINA'S LAW NO 25.561 PESIFICATION

In Argentina, an emergency legislation was enacted to face the economic crisis of 2002. This established that the monetary obligations in foreign currency contracted before January 6, 2002, should be paid in Argentinean pesos at the rate of exchange of US$ 1 = 1 Peso.[98] It also stated that the parties should, by mutual negotiation, adjust the amount of the converted payment obligations.[99] Failing an agreement by the parties, the new amount should be established by courts.

An ICC Arbitral Tribunal, after examining the several criteria set forth by the legislation (i.e., principle of shared effort, equity, replacement value for imported goods) and their application in the Argentinean case law, decided for example: that respondent should support 85% of the difference between the current values of 1 Peso and 1 US Dollar, which amounts to 90% of the original US Dollar amount.[100] As a result, the respondent was ordered to pay to the claimants an amount of Pesos equivalent to US$ 28,371,361.48, at the sales rate of exchange quoted by the Bank of Argentina on the day before the payment date, plus V.A.T.

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94 Argentina Lorenzetti, R., *supra* fn 2, at p. 529.

95 Guatemala Art. 688, para. 3 Com C.

96 Peru Arts. 1445, 1446 CC.

97 Peru Supreme Court, *Sala civil transitoria*, Resolution 002924-2003, 16 December 2003.

98 Argentina's Law No. 25.561 of 6 January 2002 as amended by Decree No. 214/02, the Decree No. 320/02, Decree No. 410/02 and Decree No. 704/02.

99 See for example ICC Award by Consent No. 13242 *Lex Contractus* Argentinean Law: respondent paid the contractual price in Argentinean pesos at the conversion rate of Argentinean peso per US dollar as provided by the Emergency Law. The Claimant requested for the equitable readjustment, allowed by the Law. After parallel negotiations to the proceedings, the parties requested the arbitral tribunal to render an Award by Consent based on the agreements reached in the said negotiations.

100 ICC Final Award Case No. 11949 *Lex Contractus* Argentinean Law, Seat of Arbitration Buenos Aires, Argentina; ICC Final Award Case No. 12755 *Lex Contractus* Argentinean Law.

4 *IMPACT OF NON-BREACHING PARTIES BEHAVIOUR*

In the Ibero-American legal systems, as under the CISG,[101] the rule of mutual release to perform in the event of the debtor's legitimate impossibility is modified in cases where the creditor has caused the impossibility and the debtor is successful in showing the causal link between his failure to perform and the creditor's conduct.[102] The clearest enactment of such a rule is found in the Portuguese Civil Code according to which if the impossibility to perform is attributable to the creditor, the obligation is considered to be fulfilled, unless the debtor prefers to perform an alternative obligation and to be compensated by the damages he has suffered due to the creditor's attributable conduct.[103]

Following is a provision of the Mexican Civil Code which establishes that a penalty clause cannot be enforced when the debtor was unable to fulfil his obligations due to the creditor's conduct.[104] Similarly, another group of provisions require, to the extent that the contractual condition is not fulfilled, the creditor to refrain himself from all acts intended to prevent the obligation from being fulfilled correctly.[105] These provisions have been interpreted by a Mexican Tribunal in the context of 'avoidance clauses' expressly agreed upon by the parties, which lead to the automatic avoidance of the contract as soon as a breach occurs.[106] According to the Tribunal, these provisions impose upon the parties the obligation of cooperating, by not impeding or obstructing the performance of the other party's obligation, since contrary conduct can cause the avoidance of the contract in favour of the latter.[107] More examples on the impact of non-breaching parties' behaviour can be found throughout the civil codes;[108] one such being Peru's Civil Code which dictates that the debtor is still in delay, when

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101 See Art. 80 CISG: a party may not rely on the other party failure to perform, to the extent that such failure was caused by the first party's act or omission.

102 See ICC Final Award Case No. 12035 *Lex Contractus* Mexican Law: in the case at hand the claimant failed to demonstrate that his delay in performing was due to the respondent's delay in providing some drawings since "[I]n any event, even if some drawings should have been delivered later than contractually agreed (which is not established), [respondent] would not be in a position to rely on these delays since the witnesses at the hearing testified that in fact [respondent] always had more drawings than it needed in order to continue the work on an uninterrupted basis".

103 Portugal Arts. 547, 795 (2) CC; Portugal Antunes Valera, J. De M., *supra* fn 33, at p. 403.

104 Mexico Art. 1847 CC; A similar provision is found in Peru Art. 1343 CC.

105 Mexico Arts. 1940, 1942, 1945 CC; see also ICC Final Award Case No. 10299 *Lex Contractus* Chilean Law: by reference to Chile Arts. 1485, 1481 CC the Tribunal explained that if the seller wants to succeed on the merits, this is, to be paid at the price he alleges the contract determined, the seller must establish either that the condition has occurred or, if such condition has not arisen, that the buyer directly or indirectly made the condition to fail.

106 See S. 53, C.

107 Mexico Collegiate Tribunals, *Novena Época,* Registry 179'354, SJF XXI, February 2005, at p. 1661.

108 See for example Bolivia Art. 348 CC: concurrent negligence of the creditor; Bolivia Castellanos Trigo, G., Auad La Fuente, S., *supra* fn 35, at pp. 163-165.

the creditor's notice to trigger the delay was not possible due to an act attributable to the debtor.[109]

Under the same logic, the mere delay in the performance of obligations having a fixed date is insufficient to place the debtor in delay. It is required that such delay is attributed to the debtor's conduct.[110] For example, the seller's failure to collect the price at the agreed, or default, place or time, may prevent the seller from claiming the interest due in case of delay and the avoidance of the contract. More precisely, an ICC Tribunal has denied interest, as compensation for delay in payment, because the only reason why payment was not made to the seller within thirty (30) days of the respective bill of lading due dates, was its own failure to draw down the letters of credit that the buyer had posted. The right to interest can only be relied upon where handling and collection charges arise as a result of the buyer's wrongful conduct and not where the failure to collect the amounts owing was entirely due to the fault of the seller.[111]

Likewise, the Paraguayan Supreme Court has explained that there is no ground for compensation, through the payment of interest, if the parties had agreed that the seller would deliver the goods once the buyer so required by a notice addressed to the seller, and the buyer had failed to send the notice to the seller's address indicated in the contract.[112] Hence, a party's liability disappears when the breach was due to an act or conduct of the other party. On this issue, the Argentinean National Civil Chamber explained that the buyer can request the exact compliance of the obligation assumed by the seller, provided that the buyer did not acted negligently and could not have been aware of the non-conformity of the goods by taking the necessary due diligence.[113] In Chile, Colombia, Ecuador and El Salvador, the principle can be deduced from a provision in their Civil Code which states:

> *the destruction of the goods in the debtor's hands, after he had delivered the goods to the creditor and during the delay in taking delivery by the creditor, does not make the debtor liable.*[114]

In addition, the non-breaching party behaviour has an impact on the amount of recoverable damages. Since only the loss that is necessary and inevitably the

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109 Peru Art. 1333 (4) CC.

110 See Argentina Art. 509 CC; ICC Final Award Case No. 12755 *Lex Contractus* Argentinean Law; Mexico Collegiate Tribunals, *Novena Época,* Registry 201'660, SJF IV, August 1996, at p. 642: upholding that a buyer cannot be considered to be in delay when he was ready to pay but the seller failed to collect payment at the agreed place.

111 ICC Final Award Case No. 13478 *Lex Contractus* Venezuelan Law.

112 Paraguay Supreme Court, 22 July 1999, *Jorge Ruckelshaussen v. Wilhelm Albrecht*.

113 Argentina National Civil Chamber, *Sala* F, *González, Roberto v. Sáez, Federico C*, 7 November 2003, Lexis No. 1/1000184.

114 Chile Art. 1680 CC; Colombia Art. 1739 CC; Ecuador Art. 1723 CC; El Salvador Art. 1550 CC.

consequence of the breach can be compensated,[115] regard has to be made for the aggrieved party's conduct.[116] This element is closely related to the mitigation duties of the suffering party in all Ibero-American laws.[117] An ICC Arbitral Tribunal[118] applying the Chilean law, explained that in synallagmatic contracts "la mora purga la mora" (when the aggrieved party is also in breach), it cannot get compensation for the other party's breach, assuming that this breach is the result of contractual negligence.

Conversely, another ICC Arbitral Tribunal,[119] referring to Art. 945 of Brazil's Civil Code and the Brazilian doctrine, explained that the above-mentioned principle requires an assessment between the faults of both the author and victim of the damage. Thus, in applying the principle of joint negligence, it is essential to identify the causal link between the author of the conduct, the act and the assessment of the contribution of the victim to the damage occurred. Finally, the principle of good faith in contract performance is still present in the Ibero-American legal systems in order to balance the liability of the parties in a breach of contract.[120]

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115 Argentina Supreme Court, *Hotel Internacional Iguazú S.A. v. Estado Nacional,* 10 December 1987; Mexico Supreme Court, *Quinta Epoca, Tercera Sala*, SJF XCVI, at p. 951: stating that the damages that the party in breach of the contract shall compensate are those that necessary had to suffer the other party.

116 Brazil Art. 945 CC: if the victim has negligently participated to the event that caused the damage, the damages' compensation will be determined considering the seriousness of its negligence compared to the negligence of the author of the damage; Mexico Art. 1847 CC: a penalty clause cannot be enforced when the debtor was unable to fulfil his obligations under the contract due to the conduct of the creditor; Peru Art. 1343 CC; ICC Final Award Case No. 10299 *Lex Contractus* Chilean Law: explaining that in order to determine contractual liability the aggrieved party must prove that the breach is not an excusable breach and is imputable to the breaching party.

117 Bolivia Art. 348 CC; Peru Art. 1327 CC; see also Bolivia Castellanos Trigo, G., Auad La Fuente, S., *supra* fn 33, at pp. 163-165; Spain Soler Presas, A., *La Valoracion del Daño en el Contrato de Compraventa*, 1998, Aranzadi Editorial, Pamplona, at p. 45; Mexico Supreme Court, *Quinta Época, Tercera Sala*, SJF XCVI, at p. 951.

118 ICC Final Award Case No. 9984 *Lex Contractus* Chilean Law.

119 ICC Final Award Case No. 13870 *Lex Contractus* Brazil by operation of the Conflict of Laws Rules in Brazil's Introductory Law to the Civil Code.

120 Argentina Art. 1198 CC; Bolivia Art. 803 Com C; Brazil Art. 422 CC; Chile Art. 1546 CC; Colombia Art. 1603 CC & Art. 863 Com C; Cuba Art. 6 CC; Ecuador Art. 1589 CC; El Salvador Art. 1417 CC; Guatemala Art. 17 JOL; Mexico Art. 1796 CC; Paraguay Art. 715 CC; Peru Art. 1362 CC; Portugal Art. 762 CC; Spain Art. 1258 CC & Art. 57 Com C.