HARDSHIP: A REMEDY FOR CHANGED CIRCUMSTANCES IN INTERNATIONAL COMMERCIAL CONTRACTS

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TABLE OF CONTENTS

INTRODUCTION: THE RISKS OF INTERNATIONAL TRANSACTIONS .............................................................. 2
I. HISTORICAL BACKGROUND .................................................................................................................... 3
II. CHANGE OF CIRCUMSTANCES – HARDSHIP ...................................................................................... 4
   A. Origins and development of the theory ............................................................................................... 4
      1. The Gaz de Bordeaux case and the German doctrine of Wegfall der Geschäftsgrundlage ........... 4
   B. Analysis of Requirements .................................................................................................................. 5
      1. Exceptionality of events: Onerous v. Excessively Onerous ............................................................ 6
      2. Beyond the Control of the affected Party ......................................................................................... 6
      3. Supervening .................................................................................................................................. 6
      4. Reasonable Unforeseeability of Events ......................................................................................... 7
      5. Non-assumption of risk ................................................................................................................... 7
   C. Foundations .................................................................................................................................... 8
   D. Legal Consequences .......................................................................................................................... 9
   E. Difference with Force Majeure .......................................................................................................... 9
III. SIMILAR THEORIES DEVELOPED BY DOMESTIC LAW ................................................................. 10
   A. The Business’ Foundation ............................................................................................................... 10
   B. Frustration of Purpose and Impracticability ..................................................................................... 11
   C. Théorie de l’imprévision ................................................................................................................ 13
   D. Excessive Burden ............................................................................................................................. 14
IV. HARDSHIP UNDER INTERNATIONAL LEGAL INSTRUMENTS ....................................................... 15
   A. UNIDROIT Principles ....................................................................................................................... 15
   B. Principles of European Contract Law (PECL) .................................................................................. 17
V. APPLICATION BY ARBITRAL TRIBUNALS ....................................................................................... 19
VI. DRAFTING A HARDSHIP CLAUSE ................................................................................................. 21
CONCLUSION .......................................................................................................................................... 21
BIBLIOGRAPHY ........................................................................................................................................ 22
INTRODUCTION: THE RISKS OF INTERNATIONAL TRANSACTIONS
If a man will begin with certainties, he shall end in doubt; but if he will be content to begin with doubts he shall end in certainties.

Francis Bacon, The Advancement of Learning, Book 1 (1605).

International transactions lawyers have a big obstacle when dealing with drafting or revising international commercial contracts: uncertainty. According to Roland Brand, “[t]he role of a transnational transactions lawyer is to take the doubt and uncertainty in legal relationships and from them create as much certainty as possible.”† In trying to avoid such risks, lawyers must identify them and eliminate or at least reduce its level.‡

Still, eliminating every single risk may not be possible, and more often than not, it won’t. It’s been accurately said that, “[n]o written contract is ever complete; even the most carefully drafted document rests on volumes of assumptions that cannot be explicitly expressed.”** This is mostly because the substantial core of international commercial contracts is non-legal in nature. Business people often prefer to talk business and are not that concerned with putting in writing their assumptions and tacit agreements††, and some even see written contracts as a sign of distrust.

Some experienced business people may be aware of the risks involved in international transaction and so, they will negotiate the inclusion of a clause addressing these risks, trying to anticipate and deal with unforeseen circumstances that fundamentally change the contractual equilibrium of the transaction. However, in most cases, business people are not sufficiently sophisticated, or are too careless of their own interests and either neglect to insert such clauses, or draft the inserted clauses in an unsatisfactory manner, in that the clauses do not cover specific events or situations.‡‡

One of these clauses addressing the risk of changed circumstances is the hardship clause, and while it is a well-known remedy for dealing with those risks, parties to a contract often seem reluctant to include a clause that deals with situations that they hope it won’t occur and don’t even expect to happen. Therefore, this research addresses the need to understand the important role that the hardship doctrine plays in international contracts since it allows those in international businesses and in international law to continue with their business relations despite the occurrence of changed circumstances that disturbs the contractual balance during its performance. The hardship doctrine provides for a pre-established contractual solution to mitigate or eliminate the consequences of such changed circumstances.

§ Id. at 2.
First, this article refers to the historical background that preceded the development of the hardship doctrine. Then there is an explanatory section on how hardship developed as a doctrine, followed by its requirements and adoption by some domestic jurisdictions and international instruments, as well as application by arbitral tribunals. Finally, there is a thorough analysis on the structure of a hardship clause, and what should be considered by business people and their lawyers when drafting the clause.

I. HISTORICAL BACKGROUND

Contract law is governed by a principle known as pacta sunt servanda, which means, “agreements are to be kept by the parties as they were agreed (sanctity of the contract).” Yet, international practice has shown that in many occasions, “the situation existing at the conclusion of the contract may subsequently have changed so completely that the parties, acting as reasonable persons, would not have made the contract, or would have made it differently, had they known what was going to happen.” Long-term contracts, whether for the turnkey construction of a plant or for the periodic supply of goods, frequently face the problem that the economic, political, and/or natural surroundings change far more than the parties contemplated or expected when they signed the contract.

So, in response to those who defend the strict enforcement of contracts, doctrine developed the principle called rebus sic stantibus, which literally means “provided the circumstances remain unchanged”. The origins of this principle can be traced to Roman writers for whom every contract contained “rebus sic stantibus” as an implied term. For example, Marcus Tullius Cicero wrote in his De Officiis that sometimes, when circumstances vary, the duty undertaken may vary as well and therefore, is not the same anymore. Therefore, in the Roman period, parties entering a contract bound themselves to perform provided the circumstances existing at that moment remained the same. Later in time, St. Thomas Aquinas stated in his Summa Theologiae that failure to keep promises was not a sin in the event of a change in circumstances. It is noteworthy that the words “rebus sic stantibus” are just the core of a maxim. The full text reads “Contractus qui habent tractum successivum et dependentiam de futurum, rebus sic stantibus intelligentur”, and may be freely translated as “Contracts providing for successive acts

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90 E.g. inflation.

91 E.g. revolution, war.

92 E.g. floods, earthquakes.


94 Saul Litvinoff, Force Majeure, Failure of cause and Theorie de L’Imprevision: Louisiana Law and beyond, 46 La. L. Rev., 3 (1985). See also Pascal Pichonnaz, From Clausula rebus sic stantibus to Hardship: Aspects of the evolution of the Judge’s role, 17 Fundamina 125, 129 (2011): Roman jurist Venuleius spoke about difficutas dandi, the difficult to perform, in which the performance was, for instance, not fully destroyed or it was too onerous to perform hic et nunc (here and now).


96 Litvinoff, supra note 13, at 4.

of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same.**

Some opponents to *rebus sic stantibus* argue that the contract is an instrument of foreseeability, and parties are expected to protect themselves from changing circumstances when they enter into a long duration contract, and that the exception may cause insecurity to the contract.††††† Nevertheless, *rebus sic stantibus* has a moral role in the contractual relationship because it rests on the need to maintain both parties in equal conditions, in order to avoid unjust prejudice to one party when the harm is being caused by factors that are beyond his predictability and control.

II. CHANGE OF CIRCUMSTANCES – HARDSHIP

A. Origins and development of the theory

The theory of hardship has its origins in the evolution of Roman law. The general rule is that agreements made in a contract must be kept but, if a fundamental change in the circumstances surrounding the contract renders performance much more burdensome so that continued performance by the affected party would amount to an unjust hardship, then the affected party could invoke the implied principle of *rebus sic stantibus* in order to either terminate the contract or modify its terms. This principle found its way into codifications of private law in the 18\(^{th}\) century, but was subsequently criticized because of its vagueness and lack of clarity and fell out of disfavor in the 19\(^{th}\) century\†††††, when classical contract law, liberal economy, and legal certainty were declared to be of superior value.****** It was resurrected in the 20\(^{th}\) century as a result of the disruptions caused by the First World War (WWI) on the basis of a French administrative court ruling in a dispute between a private company and the City of Bordeaux.

1. The *Gaz de Bordeaux* case and the German doctrine of *Wegfall der Geschäftsgrundlage*

The City of Bordeaux had granted the company *Gaz de Bordeaux* a concession to provide gas lighting to the City of Bordeaux for a fixed price, with an adjustment mechanism beyond a certain range of price fluctuation. In 1916, as a result of WWI, the price of coal, main material used by the company, tripled, making performance too burdensome to *Gaz de Bordeaux*. The French *Conseil d’Etat* decided that the adjustment mechanism in the concession agreement was insufficient under the circumstances such that its economic viability was undermined. *Gaz de Bordeaux* could not be required to perform the services under the original conditions and thus, the *Conseil d’Etat* set out the conditions that would permit a temporary adjustment of administrative contracts, particularly those involving concessions. The event had

** Litvinoff, *supra* note 13, at 4. As explained by Litvinoff, this formulation of the maxim was made by the Romanist school of pot-glossators. Some writers trace the origin of the maxim to Cicero in *De Officiis* (Of Duties); others, to Seneca in *De Beneficiis* (Of Benefits or Gifts).

††††† *Id.*, at 5. Opponents also argue that; a) contracts are made to be fulfilled. Allowing departure from that principle introduces an element of insecurity and instability in the legal relations of the parties; b) strict performance of the agreements is of material importance not only for the law but also for morals, since respect for the pledged word is a matter of honor; and c) the *theorie de l’imprevision* allows the courts a discretion as excessive as it is dangerous, since that theory opens the door to increasing intervention by the state, thereby resulting in progressive reduction of the autonomy of the will of private parties. See also, G. RIPPET, *LA REGLE MORALE DANS LES OBLIGATIONS CIVILES* 152-66 (4\(^{th}\) ed. 1949).


****** Kull, *supra* note 16, at 45. *Pacta sunt servanda* was so strong that the principle was to be followed regardless of any change in circumstances and regardless of cost, effort, or sacrifice to the obligor. See generally Malcolm Sharp, *Pacta Sunt Servanda*, 41 Colum. L. Rev. 783, 792 (1941).
to be unforeseeable and external to the parties, exceed all reasonable expectations and result in a profound unbalancing of the contract. Due to the emphasis on the unpredictability of the event in these elements, the doctrine has come to be known as théorie de l'imprévision (unpredictability theory) in French, referred to as “hardship” in English.

German doctrine also contributed to the development of the hardship theory. After WWI, the German economy was devastated by incredible high scaled inflation. Although “the German Civil Code explicitly granted relief for hardship only in cases of impossibility, the courts ultimately held that they could give relief for hardship as an emanation of the principle of good faith.” In Germany, exceptional relief granted upon hardship is based on the doctrine of Wegfall der Geschäftsgrundlage (frustration of the basis of the contract), which was introduced in legal literature, then recognized by courts and finally codified in the German Civil Code with the reform of the German law of obligations (Schuldrechtsreform) that entered into force in 2002. This doctrine states that the binding character of a contract is suspended if the fundamental expectations of the parties are not fulfilled.

Therefore, hardship takes place whenever circumstances that affect the contract’s economic equation befall, that is, when the balance of the parties’ obligations is disrupted. It’s also a term used to refer to a clause, a provision which can be part of a contract, which is “designed mainly to adapt contractual obligations to an event that changes the contractual equilibrium between the rights and obligations of the parties in such a dramatic way that performance can become ruinous for one of them or cannot reasonably be expected.” There may be times in which the performance of a contract, due to the unexpected change of circumstances around its performance, can become excessively burdensome or onerous to one party but not impossible, and so, parties may want to find a solution other than termination in order to maintain their contractual relation. The solution can be the renegotiation, adaptation, or revision of the contract. In this matter, it will be important for the parties to establish a limited period of time in which negotiations will take part (e.g., 30 days); otherwise the performance of the contract could be stopped for too long, resulting in loss for both parties. If parties do not reach an agreement after the period of time had passed, they can opt either for the submission of the conflict to the courts or arbitration, or to terminate the contract.

B. Analysis of Requirements

A hardship clause serves two functions: it cures and prevents. It cures insofar as it adapts a contract in order to mitigate or eliminate the effects of whatever circumstances are threatening its life. It prevents because avoids the contract from terminate, allowing the legal relation to go on with its purpose.

Provided that pacta sunt servanda is the general rule, the possible renegotiation, adaptation or revision by a judge or arbitrator of a contract under the doctrine of hardship works by way of exception. It is very important that, in order to trigger the hardship clause, all the required elements described in this section are met, so parties don’t use the excuse of changed circumstances in an abusive way, which would expose the contract and any business transaction to uncertainty or even render them impossible.

Fucci, supra note 19.
Ewoud Hondius & Hans C. Gregoire, Unexpected Circumstances in European Contract Law 7 (2011)
Attilio Anibal Alterini, Contratos Civiles, Comerciales, de Consumo 444 (1999)
In this regard, an International Chamber of Commerce (ICC) Award from 1971 rightly and properly stated that:

The principle of *rebus sic stantibus* is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the ‘concept’ of changed circumstances as an excuse for non-performance, they will doubtless agree on the necessity to limit the application of the so-called ‘doctrine rebus sic stantibus’ (sometimes referred to as ‘frustration’, ‘force majeure’, ‘Imprévision’, and the like) to cases where *compelling reasons* justify it, having regard not only to the fundamental character of the changes, but also to the particular type of contract involved, to the requirements of fairness and equity and to all circumstances of the case.

Before addressing the requirements, one must remember that hardship is only relevant with respect to performances still not rendered. Once the party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance it receives as a consequence of a change in circumstances.

1. Exceptionality of events: Onerous v. Excessively Onerous

Hardship doesn’t occur when the performance of one party becomes merely more onerous. It is crucial that the change in the circumstances provokes such a disruption of the contract’s economy that makes performance excessively onerous to the party affected. Therefore, the disturbance in the contractual balance must be of such importance, that the economic health of the aggrieved party will be severely threatened if he continues to perform.

The fundamental alteration in the contractual obligation may manifest itself in two ways. One of them is a substantial increase in the cost of one party’s performance. This party will normally be the one who must perform the non-monetary obligation. The other fundamental alteration can be in the way of a substantial decrease in the value of the performance received by one party, including cases in which the performance has lost all its value for the receiving party. A special feature of the decrease in the value of the performance is that such decrease must be capable of objective measure, because the mere fact that the receiving party thinks that the performance is of no relevance anymore, is not enough.

2. Beyond the Control of the affected Party

In order to trigger the hardship clause, the events must escape the control of the party in disadvantage. If hardship is self-induced, then it is irrelevant. This element can also be addressed as “lack of liability for the occurrence of the events causing the hardship,” meaning that the party claiming hardship must not be accountable or liable for the occurrence of the hardship events.

3. Supernovens

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3. 2010 UNIDROIT Principles on International Commercial Contracts, Comments to Art. 6.2.2.
5. Rimke, *supra* note 8, at 201.
The circumstance in which the hardship is based must occur or become known to the disadvantaged party after the conclusion of the contract. If the circumstances that causes the excessive burden had been happening or been known to the aggrieved party since before the contract was concluded, the party would have been able to take them into account at that time.

4. Reasonable Unforeseeability of Events

Probably the most controversial element, the unforeseeability of the events that causes the excessive burden to the disadvantaged party, is most of the times hard to establish. Long-term contracts involve risks that, more often than not, becomes real, and maybe this is the reason the UNIDROIT Principles establish that the unpredictability must be reasonable, that is, “the events could not reasonably been taken into account by the disadvantaged party at the time of the conclusion of the contract.”

The term “reasonable” is defined by the Black’s Law Dictionary as “[f]air, proper, or moderate under the circumstances.” Therefore, a reasonable unpredictability would be one that is fair and proper under the circumstances in which the contract was concluded. For example, the sale of shares of stock in the stock market it’s a contract of pure risk, since the volatile character of such operation is expected to be considered by the parties and therefore the seller or buyer should not be granted relief in case of total loss. However, in a sale of goods or services, each party knows what they expect to gain for the other party and each party also understands that the other party also expects to gain.

5. Non-assumption of risk

This element goes hand-in-hand with the element of reasonable unpredictability, because if the disadvantaged party enters into a contract in which a certain degree of risk is deemed to be expected (for example a speculative transaction), then it is considered that it had assumed such risk. Also, if the party in disadvantage took a protective measure, such as insurance or a guarantee, then it would not be affected by the changed circumstance and therefore, is not entitled to rely in the hardship remedy. The UNIDROIT Principles establish as a hardship element, that “the risk of the events was not assumed by the disadvantaged party.” Going further, the comments to the UNIDROIT Principles clearly establish

********* Id.
†††††††††† 2010 UNIDROIT Principles on International Commercial Contracts, Art. 6.2.2.(b).
†††††††††† BLACK’S LAW DICTIONARY 1379 (9TH ED. 2009).
§§§§§§§§ In G. Brencius v. Ukio Investicine Grupe, Defendant had bought shares from Plaintiff, making a down payment of 20%. Further in time, Plaintiff went bankrupt and Defendant refused to pay the rest of the price because the shares’ value was considerable diminished due to Plaintiff’s insolvency. Defendant invoked hardship to justify non-payment. The Supreme Court of Lithuania decided that, in the case at hand, the Defendant was not entitled to invoke the doctrine of hardship as it does not apply to monetary obligations and, in any case, in the case at hand the risk of fluctuations of the price of the shares was deemed to be assumed by Defendant. In this respect the Court referred to Article 6.204 of the Lithuanian Civil Code which in substance corresponds to Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles. Available at http://www.unilex.info/case.cfm?pid=2&do=case&id=1183&step=Abstract

§§§§§§§§ Perillo, supra note 22, at 120.
†††††††††† The assessment of the element of risk must be done in a case-to-case basis. For example, in a case before the Mexican Arbitration Center (CAM), one of the parties intended to excuse its non-performance on the ground of hardship, due to unpredictable meteorological events that increased the costs of its performance. However, the tribunal decided that since the affected party was a vegetable grower, whose duty was to grow and deliver vegetable goods, such party had assumed the risk of crop destructions by rainstorms and flooding. Available at: http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=FullText
†††††††††† 2010 UNIDROIT Principles on International Commercial Contracts, Art. 6.2.2.(d).
that “[t]he word ‘assumption’ makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract.”

C. Foundations

Throughout time, the hardship doctrine was built and developed according to the usage and practices of each era. However, it always rested on basic principles such as good faith and equity, discussed below.

According to good faith, contracts must be performed in the way it was intended by the parties. There are trust issues between the parties that must be addressed in long-term contracts, and one of them is the reliance on the other party that the contract’s terms will be renegotiated if a change of circumstances materially affect its performance. If an unexpected change of circumstances materially disrupts the balance of a long-term contract, the good faith principle compels the parties to renegotiate it. In 2001, an Arbitral Tribunal stated that, “good faith imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances . . . in order to ensure that its performance does not cause, especially when the contract . . . is a long-term agreement, the ruin of one of the parties.”

Under the principle of good faith, if there is a chance for the contract to survive, such benefit of the doubt must be given to the contract, a sort of in dubio pro contratto.

While good faith focuses on the behavior expected from the parties if the contract suffers a disturbance in its balance, equity focuses in restoring such balance that was altered. The notion of equity may be understood “as being a prudent moderation of the written law, transcending the exact literal interpretation of the latter.” This is exactly what rebus sic stantibus is: transcending beyond the strict rule of pacta sunt servanda. However, this is not to be misunderstood. Pacta sunt servanda will always be the rule, provided though, that the contractual synallagma is not severely disrupted. In the words of Aristotle, equity is the “correction of mere law, where mere law fails on account of its universality.”

The principle of equity balances the economic equation of the parties’ contractual relationship, resting on the principle that one party should not profit at the expense of the other party’s prejudice.

Additionally, besides good faith and equity, as stated by scholar Joseph Perillo, the hardship doctrine also stems from one of the principal underpinnings of contractual obligations, that is, consent, because it can’t be presumed that an event that was completely outside the contemplation of the parties and that drastically shifts the nature of foreseen contractual risks, was consented by them.

Therefore, there is an issue of fact whether the parties, at the moment of conclusion of the contract, freely consented that it should be performed under any circumstances, even under circumstances far beyond their expectations, and that is a fact that cannot be conceived, because neither

************ 2010 UNIDROIT Principles on International Commercial Contracts, Comments to Art. 6.2.2(d).
************ JOWITT’S DICTIONARY OF ENGLISH LAW, VOL. 1, Equity 712 (2nd ed. 1977) (Eng.)
************ Perillo, supra note 22, at 118.
party would agree to the performance of a contract regardless of the changing circumstances that could damage their economic interests.

D. Legal Consequences

A justified hardship situation can result in the renegotiation, adjustment or termination of the contract. Once the unforeseeable, supervening, excessively onerous and beyond control circumstance is verified, the hardship clause is triggered and usually, its first effect is for the revision or renegotiation of the contract terms by the parties. If no agreement can be reached, then it may provide for either the adjustment of the contract by a third person (e.g. arbitrators) or the termination of the contract.

It must be understood that, where a duty to renegotiate is recognized, such duty does not imply uncertainty or reduction of contractual stability. On the contrary, it provides flexibility for the parties to seek a better adaptation of the contract to the new and unforeseen circumstances. The renegotiation must be seen as a means of stabilizing the relationship between the parties because it reduces the likelihood of a dispute between them.

When renegotiation fails, the outcome can be either the adaptation of the contract by courts or arbitrators or termination. Termination is the easiest and most drastic of solutions, however, it may not be the most appropriate for the interests of the parties, particularly if both want to preserve their relation or third parties’ interests are involved, and therefore they might resort to the adaptation of the contract by courts or arbitrators.

The adaptation of a contract “implies the modification of the obligations of one or both parties, at the extent that the performance of the contract by the affected party is possible or bearable, with the aim to restore their equilibrium when it has been severely disrupted by unexpected events.” This allows for the “survival” of a contract, but in its adjusted terms.

However, in several jurisdictions, the only remedy for unexpected change of circumstances is the discharge or termination of the contract, as it is addressed further in chapter III.

E. Difference with Force Majeure

Another major doctrine that deals with changed circumstances is the Force Majeure doctrine; therefore, a proper differentiation with hardship must be drawn because, as much as the purpose of both of them might look similar, they are not the same.

Force Majeure provides for certain requirements to be met in order to be fairly triggered, and these requirements are a bit similar to the ones for hardship: (1) the event must be external or beyond the control of the party invoking it, (2) the event must be reasonably unforeseeable at the moment of the

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MONBERG URIBE, *supra* note 46, at 231.

*Id.* at 238.

*Id.* at 239.
conclusion of the contract, (3) it must be unavoidable for the affected party, and (4) it must render the performance impossible.

Like hardship, the elements of unpredictability and lack of control to avoid the circumstance are present; however, non-performance is not exempted when the circumstance falls under the definition of hardship, as it would be if it falls under Force Majeure.

As a definition, “[f]orce majeure occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it impossible.”

Therefore, Force Majeure does relate to hardship, since they both deal with the situation of unexpected change of circumstances. However, while hardship addresses circumstances in which the performance becomes more difficult, but not impossible, Force Majeure addresses just that, the impossibility of performance, at least temporarily, due to the occurrence of unexpected circumstances. Moreover, there is a functional difference between the two concepts: Hardship, first of all, does not exempt the disadvantaged party from performance and if proved, will probably end in the revision or adaptation of the contract, that is, its survival. Force Majeure on the other hand, is situated in the context of non-performance and its effects will probably render the suspension or termination of the contract. Furthermore, “[f]orce majeure relates to the question of responsibility,” or in other words, liability for breach, because force majeure provides that the party who fails to perform due to an impediment that meets all the requirements is not liable for damages.

Is not by chance that the UNIDROIT Principles puts its hardship provisions under the chapter on “Performance” and the Force Majeure under the chapter of “Non-Performance”.

III. SIMILAR THEORIES DEVELOPED BY DOMESTIC LAW

After reviewing the origins and working aspects of the hardship doctrine, this chapter addresses the doctrine of change of circumstances under some similar theories developed by domestic laws.

A. The Business’ Foundation

The theory of the Business’ Foundation was developed by German scholar Paul Oertmann, in his treatise Die Geschäftsgrundlage, in which he introduced the concept of Geschäftsgrundlage. After WWI, performance of certain contracts became extremely onerous in Germany, due to the shortage of goods and

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However, if the parties do not reach an agreement, and neither want to go to court or arbitration, they may decide to terminate the contract, but the main purpose of the hardship doctrine is for contracts to survive the consequences of changed circumstances. Also, the court or arbitral tribunal may find that the termination of the contract is the best solution.


Liu, supra note 25, at §2.7.2. 705.


the galloping inflation. The theory introduced by Oertmann was soon adopted by courts in several judgments in order to mitigate such problems arisen by the changed circumstances, and in 2002, the reform of the law of obligations finally introduced the concept of Wegfall der Geschäftsgrundlage (§313 of the German Civil Code), which can be described as “an equitable relief that allows the courts to adapt or terminate a contract if the factual framework diverges fundamentally from the parties’ expectations.”

In German law, every contract has a basic aim and emanates from a basic intention of the parties which cannot be achieved or realized in the absence of an existing environment; and there are three situations commonly accepted as typical cases of Geschäftsgrundlage: (1) cases in which the equivalence of the exchange is fundamentally distorted, (2) cases in which one party’s purpose as to the contractual subject matter is substantially affected, and (3) cases in which the parties share a grave error.

The legal consequence for Geschäftsgrundlage is the adjustment of the contract terms and only if adjustment is unpractical or impossible, then termination will be the outcome.

B. Frustration of Purpose and Impracticability

The doctrines of frustration of purpose and impracticability are the doctrines that address the change of circumstances in common law countries. Although similar, they are not identical.

The doctrine of frustration of purpose, adopted by English law and similar jurisdictions such as Australia and Ireland, establishes that parties are discharged from future performance when the purpose that drove the parties to sign the contract disappears because of unexpected changed circumstances. Before the development of this doctrine, courts made rigid interpretations of contracts, like the one made in Paradine v. Jane (1647), where the King’s Bench held that, “[w]hen a party . . . creates a duty . . . upon himself, he is bound to make it good . . . notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.”

HONDIUS, supra note 23, at 62.
Id. at 55.
Puelinckx, supra note 51, at 60.
See e.g., case No. SG 126/90 from the German Court of Arbitration [Schiedsgericht Berlin] from 1990, between a company from the German Democratic Republic (importer) and a company from another East European country (seller), in which the Arbitral Tribunal decided that radical change in circumstances can justify the termination of the contract. The agreement was regarding the delivery of machinery. Following the reunification of Germany, western markets were opened to the companies of the former G.D.R., and so, the machinery in question lost all value for the German importer and so, invoking the radical change of circumstances existing at the time de contract was concluded, refused to take delivery of the goods and to pay the price. The Arbitral Tribunal decided that there was a substantial change in the original equilibrium of the contract and such change may justify the termination of the contract, citing to the provisions of the UNIDROIT Principles of International Commercial Contracts. Available at http://www.unilex.info/case.cfm?pid=2&do=case&id=627&step=Abstract.

Is important to understand, as it was well explained by Joseph Perillo (supra note 21 at 132), that compelled renegotiation and judicial reformation of the bargain are not in the mainstream of Common Law. The cases of Aluminium Co. of Am. v. Essex Group Inc., 499 F. Supp. 53 (1980), and In re Westinghouse Elec. Corp. Uranium Contracts Litigation, 517 F. Supp. 440 (E.D. Va. 1981), in which courts decided for reformation and compelled renegotiation respectively, have served as raw materials for serious scholarly works urging more of the same. As explained by Richard Speidel [Court-Imposed Price Adjustments under long-term Supply Contracts, 76 Nw. U. L. Rev. 369 (1981)], when a long-term supply contract is disrupted by changed conditions, at minimum, the advantaged party should have a legal duty to negotiate in good faith. At a maximum, he should have a legal duty to accept an “equitable” adjustment proposed in good faith by the disadvantaged party.

Only in 1863, Blackburn J., in the case *Taylor v. Caldwell*, introduced to English law the doctrine of frustration, holding that, “in contracts where 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.”

The doctrine of frustration is based on the real intention of the parties. English courts analyze whether the changing circumstances were sufficient to establish that the contract has become impossible or impracticable to fulfill in the way it was originally envisioned. So, the doctrine of frustration “applies when supervening events make performance by one party useless to the other or, in other words, reduce completely the value of such performance for the recipient.” It is not the case that the performance of the contract became impossible, but instead, its performance became pointless.

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The coronation cases are, perhaps, the better illustrators of this approach. In one of these cases, *Krell v. Henry* (1903), Henry rented a room to see the coronation of King Edward VII. The sudden illness of the King made the coronation to be postponed and therefore, the purpose for which Henry had rented the room had disappeared. The postponement of the event was held to have frustrated the contract, and so the parties were released from their obligations.

The doctrine of frustration of purpose in English law has the effect to terminate the contract from the moment the frustrating event had occurred. Therefore, English law does not provide for the adjustment of the contract in case of frustration. The doctrine’s purpose is to kill the contract and discharge the parties from any future obligations.

The United States adopts the doctrine of impracticability of performance, which has its source on the common law doctrine of impossibility of performance. Impracticability can be defined as an excused performance by the party that suffers extreme, unreasonable and unforeseeable hardship due to an unavoidable event or occurrence.

The American doctrine of impracticability is regulated by section 2-615(a) the Uniform Commercial Code (U.C.C.) and by the not formally binding, but highly influential, section 261 of the Restatement (Second) of Contracts (1981). Section 2-615(a) of the U.C.C. is confined to the contracts for the sale of goods; however, the Restatement does not limit the doctrine of impracticability of performance to a particular type of contract, giving a more concise formulation of the doctrine:

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Rimke, supra note 8, at 203.
Momberg Uribe, supra note 46, at 147.
Id. at 147.

A set of English cases in the early 1900s that arose out of contracts that were made for accommodation for viewing the coronation of King Edward VII. See also *Herne Bay Co. v. Hutton* (1903) 2 K.B. 683, in which the court preserved the binding character of the contract. In this case, a boat was hired to see the royal review of the fleet. The royal review did not take place, but the fleet could still be seen, and so the contract remained binding. The distinction with *Krell* is a very narrow one. In *Krell* the court looked beyond the words of the contract to establish the common motives of the parties. In *Herne Bay*, the fleet could be seen, and so, the motive of the contract was not frustrated.

Litvinoff, supra note 13, at 6.
Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption, on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Although the rule stated in section 261 “is sometimes phrased in the terms of ‘impossibility,’ it has long been recognized that it may operate to discharge a party’s duty even though the event has not made performance absolutely impossible.” Here we have a first glimpse of resemblance to the hardship doctrine, which is triggered when performance is not impossible but very difficult and burdensome. Another similarity is the fact that under the doctrine of impracticability the mere fact that performance becomes more difficult or expensive does not excuse the aggrieved party. The change in the degree of difficulty or expense must be well beyond normal range, because a party is expected to use reasonable efforts to surmount obstacles to performance and a performance is impracticable only if it is so in spite of such efforts.

Even though the doctrine of impracticability has been recognized by vast scholarly work, American courts are still reluctant to concede relief on the grounds of impracticability unless the situations meet the strict requirements of impossibility. However, a persuasive new trend may have been started in the decision rendered in Aluminum Co. of America v. Essex Group, in which the U.S. Court for the District of Pennsylvania modified the terms of a contract through an equitable adjustment. It held that “an adjustment was the suitable legal remedy since it came closest to the intentions and expectations of the parties and avoided inequities.”

Finally, it is worth noting that the U.C.C. also allows a party to excuse its performance under any other common law doctrine besides impracticability, such as frustration, under section 1-103.

C. Théorie de l’imprévision

The Théorie de l’imprévision or Theory of Unforeseeability, was developed by French law, and it refers to “cases in which unforeseen economic circumstances become apparent after a contract has been concluded and which make its performance extremely difficult or much more costly, but do not render it


Aluminum Co. of America v. Essex Group, Inc., 499 F. Supp. 53 (1980). In this case, Aluminum Co. of America (“ALCOA”) had entered into a long-term supply contract for the conversion of minerals into aluminum. The contract contained a price-adjustment clause for the alteration of non-operational related production costs, with an index rate to be used as a measure for adjustment. The oil crisis of 1973 plus the issuance of environmental protection measures, greatly increased ALCOA’s electricity costs, increasing its non-operation related costs, which exceeded the index rate. In absolute figures, the price increase was of 500%. For positive receptions of the ALCOA case and the concept of reformation on the grounds of impracticability, see Friedco of Wilmington v. Farmers Bank, 529 F. Supp. 822 (1981), and McGinnis v. Cayton, 312 S.E. 2d 765, 770 (1984).

U.C.C. § 1-103 (1996): “Unless displaced by the particular provisions of this Act, the principles of law and equity . . . shall supplement its provisions.”
impossible.” The Imprévision doctrine was established in the famous decision rendered by the French Council of State (Conseil d’État) in the Gaz de Bordeaux case, in which the administrative court allowed a concession contract to be renegotiated due to unexpected circumstances.

However, the Imprévision doctrine under French law is only applicable in administrative contracts, based on the necessity of assuring a public service. French courts will not modify a contract except under such necessity. Yet, in spite of the strict application of Article 1134 of the French Civil Code, which “lays down the principle of the immutability or sanctity of contracts”, French civil courts are taking into consideration changing circumstances that renders performance of the contract excessively onerous by giving the parties an incentive to renegotiate the terms of their agreement.

Similarly to the hardship doctrine, Imprévision will only apply if the changed circumstance is an unforeseeable, irresistible, external, actual, and supervening event that causes to the aggrieved party an excessive burden if performance is continued, and provided that the aggrieved party does not assume the risk of the changed circumstance.

D. Excessive Burden

Following the doctrines of Imprévision and Geschäftsgrundlage, many civil law jurisdictions adopted such doctrine in their civil codes, with very similar drafts, such as Argentina (art. 1198), Brazil (arts. 478, 479 and 480), Paraguay (art. 672), and Italy (art. 1467), among many others. The above mentioned countries have general rules on their civil codes regarding the excessive burden.

The rules of excessive burden states that if the performance of one party to a long-term contract turns to be too burdensome because of extraordinary and unforeseeable events, such party may request for the termination of the contract. However, the termination can be avoided by the other party if he offers an equitable modification of the conditions of the contract.

Furthermore, there are specific requirements that must be met to trigger the rules of excessive burden: (1) the contract must be of continued performance, and the excessively onerous obligation must not have been performed yet; (2) the performance must become “excessively burdensome” as to disrupt the contract balance, that is, an increase of the cost of performance or the loss of value of the agreed counter-performance; (3) the changed circumstances must be the consequence of an extraordinary and unforeseeable event, that is, the parties could not have, reasonably,
taken into account the occurrence of such circumstances; (4) the supervening burden must exceed the normal risk of the contract; and (5) the debtor must not be in default with his duties under the contract.

As to the effects established in the rules for excessive burden, they differ from those of the doctrines of Imprévision and Geschäftsgrundlage, which provides primarily for the adjustment of the contract. The excessive burden rules included in the civil codes of Argentina, Brazil, Paraguay, and Italy, provide for the termination or the revision of the contract in a tiered-like mechanism, that is, the damaged party can demand only for the termination of the contract, and if the other party wants to avoid the termination, it can offer an equitable modification of the contract. Therefore, the aggrieved party wouldn’t have the right to demand simply the adjustment of the contract, only termination. However, dominant doctrine and jurisprudence had sustained that the damaged party can demand the adjustment of the contract instead of its termination, as long as the adjustment would have a truly equitable result.

In this matter, it is worth noting the adoption made by the Italian legislator in article 1664, but only for hardship in the performance of building contracts, which allows both parties to request the adjustment of the contract price, if the cost of raw material or workmanship increases more than 10% of the agreed cost, due to unforeseen circumstances.

IV. HARDSHIP UNDER INTERNATIONAL LEGAL INSTRUMENTS

The relationship between the sanctity of contracts’ principle and its exceptions is yet to be fully developed and worked out; however, a number of international organizations, in their attempt to harmonize commercial usage into legal instruments, have recognized the necessity to address these exceptions, including Hardship, and so they provide mechanisms and solutions for unforeseeable change of circumstances. The most influential legal instruments in this sense are the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law (PECL), and the United Nations Convention on the International Sales of Goods (CISG).

A. UNIDROIT Principles

In 1994, the Government Council of the International Institute for the Unification of Private Law (UNIDROIT) published what is now considered one of the most influential instruments of soft

*************** HONDIUS, supra note 23, at 122.
*************** ALTERNINI, supra note 24, at 455.
*************** Códice civil [C.c.] [Civil Code] art. 1664 (It.)
*************** HONDIUS, supra note 23, at 125.
*************** BRUNNER, supra note 52, at 1.
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regarding the harmonization of international commercial law: The UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles).

As to date, the UNIDROIT Principles already have three editions, being the 2010 the current one, and despite its non-binding character, it has an overwhelming moral authority. Within the first two years of its publication, “more than 2500 copies have been sold worldwide,” the main source of orders being among “international law firms, corporate lawyers, chambers of commerce, arbitration courts and the like, which are the kind of potential users to whom the Principles are mainly addressed.” The objective of the UNIDROIT Principles, as stated in the Introduction of the 1994 edition, “is to establish a balanced set of rules designed for use throughout the world irrespective of the countries in which they are to be applied.”

Hardship is regulated by the UNIDROIT Principles in its Chapter 6, related to the performance of contracts, under Section 2. It dedicates three articles to the subject in a thorough manner.

First, article 6.2.1 reaffirms the principle *pacta sunt servanda*, making it clear that contracts are to be performed even when performance has become more onerous to one party, but not impossible. Performance of the contract must be rendered as long as it is possible, regardless of the burden it may impose on the performing party.

Then, article 6.2.2 defines hardship, by stating that “[t]here is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party’s performance has increased or because the value of the performance a party receives has diminished,” provided that the events meet the following requirements: (1) events must have occurred or become known after the conclusion of the contract, (2) events could not reasonably have been taken into account by the disadvantaged party, (3) events must be beyond the control of the disadvantaged party, and (4) the risks of the contract must not have been assumed by the disadvantaged party. It is important to note that the changed circumstance must meet all of the requirements set forth in article 6.2.2 in order to be characterized as a hardship situation.

Finally, article 6.2.3 provides for the remedies available to the parties in the event hardship is proved. The different solutions are provided in a priority order. First, entitles the disadvantaged party to request, without unduly delay, the renegotiation of the contract’s conditions. If such negotiations should fail, then either party may resort to court or arbitration, in which judges or arbitrators may either terminate or adapt the contract to restore its equilibrium.

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As defined by Timothy Mayer, *soft law* are “those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law.” Timothy Mayer, *Soft Law as Delegation*, 32 Fordham Int’l L.J. 888, 890 (2009).


For detailed explanation and illustrations of each of the hardship requirements under the 2010 UNIDROIT Principles, see [http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/403/chapter-6-performance-section-2-hardship/1058-article-6-2-2-definition-of-hardship](http://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2010/403/chapter-6-performance-section-2-hardship/1058-article-6-2-2-definition-of-hardship).
B. Principles of European Contract Law (PECL)

The PECL have its origins in a symposium on “New Perspectives for a Common Law of Europe”, held in 1976, in which Ole Lando launched the idea of drafting a European Commercial Code.

Although it presents many similarities with the UNIDROIT Principles, the PECL is both broader and more limited than the UNIDROIT Principles. It is broader because, while “[t]he UNIDROIT Principles relate specifically to international commercial contracts, [the] European Principles are intended to apply to all kinds of contracts, including transactions of a purely domestic nature.” However, is more limited because, “while the territorial scope of the UNIDROIT Principles is universal, that of the European Principles is formally limited to the member States of the European Union.”

In the PECL, hardship is addressed in Article 6:111, under the title of “Changed Circumstances”. Like the UNIDROIT Principles, this section starts with article 6:111(1) confirming that pacta sunt servanda is the rule, and then article 6:111(2) provides for the exception by establishing that whenever performance of the contract becomes excessively onerous because of a change of circumstances, the parties are bound to enter into negotiations with a view to adapting the contract or terminating it. Here article 6:111(2) differs from article 6.2.3 of the UNIDROIT Principles, because establishes that the parties “are bound to enter into negotiations” in the event of changed circumstances, that is, parties must negotiate first and then resort to courts or arbitration. The UNIDROIT Principles do not oblige the parties to negotiate, only entitles the disadvantaged one to request for the adaptation.

Then article 6:111(2) continues by providing the requirements to be met by the changed circumstances, which are identical to the ones established in article 6.2.2 of the UNIDROIT Principles, except for the fact that the PECL does not require that the changed circumstance must be beyond the control of the disadvantaged party, however, it is understood that it must.

Finally, article 6:111(3) establishes the intervention of courts if, within a reasonable period of time, the parties do not reach an agreement as stated in article 6:111(2). In this case, the court may terminate the contract or adapt it in a just and equitable manner. In either case, the court may award damages against the party that refuses to negotiate or breaks off negotiations contrary to good faith and fair dealing.

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Bonell, supra note 98, at 232.
Id. at 245.
Id.

The CISG is perhaps the most important international treaty regarding the international sale of goods. Unlike the UNIDROIT Principles and the PECL, the CISG is enforceable law in the countries in which their legislative body had sanctioned it as law.

The CISG contains no express provision governing the effects of hardship. Article 79 grants an exemption for non-performance, to both buyer and seller, under the circumstance of an “impediment” beyond the control of the affected party, which he could not reasonably be expected to have taken into account at the time of the conclusion of the contract. Thus, only if hardship situations can fall under the scope of an impediment in the sense of article 79, then hardship would be governed by the CISG.

As stated before, hardship covers situations that make performance much more difficult, but not impossible. Therefore, “the issue is to determine if anything short of ‘impossibility’ [of performance] will suffice as an impediment under Article 79 [of the CISG]. That is the only logical way to determine if hardship is covered or not under the CISG article 79.

In the way article 79 is drafted, it should not be considered that hardship falls under its scope, since article 79 is an exemption for non-performance, while hardship is a remedy to restore a contract’s balance, when its performance by one party had become extremely burdensome, but not impossible. However, courts and scholars are yet to reach an agreement in this matter. According to Joern Rimke, “[t]he legislative history of Article 79 indicates that the promisor cannot claim relief on the ground that performance has become unforeseeably more difficult . . . The majority of commentators, however, want to allow those changes in circumstances to be seen as impediments in serious cases.” The bottom line is that, if article 79 is to be applied to hardship situations, such application must be consistent with the general principles applicable to article 79: (a) the exemption is only for the delivery or payment of the goods, since the CISG applies to the sale of goods; and (b) the impediment that results from economic difficulties must constitute a barrier to performance that is comparable to other types of exempting causes. It is right to say that article 79 has a more flexible standard than that of force majeure, but it is stricter than hardship.

Not many cases have addressed the issue whether hardship falls under the scope of the CISG. However, it is worth mentioning the case of Scafom International BV v. Lorraine Tubes S.A.S., in which a French company (seller) requested the renegotiation of the agreement made with a Dutch company (buyer) for the delivery steel tubes. At a certain moment during performance of the contract, the price of

In 1980 the United Nations Commission on International Trade (UNCITRAL) submitted a draft convention on the international sale of goods to a diplomatic conference in Vienna, which later was unanimously endorsed by all the participants in such conference. The CISG entered into force October 9, 1985, and as of September 26, 2014, 83 States have adopted the CISG as part of their national legal system, being Guyana the latest to adopt it.


CISG article 79 is related to a “failure to perform”, while hardship is related to an “extreme difficulty to perform.”

Rimke, supra note 8, at 222.

Id. at 223.

the steel rose, unexpectedly, by 70%, and the contract did not contain a price adjustment clause. The contract was governed by the CISG, however, the Belgium Court of Cassation considered that there was a “gap” in the CISG concerning hardship, and therefore, held that according to articles 7(1) and 7(2), the CISG was to be interpreted having regard to its international character and the need to promote uniformity, and so, the gaps had to be filled on the basis of “the general principles which govern the law of international trade, and only absent such principles on the basis of the domestic law applicable in accordance with the relevant of private international law.” The court concluded that under such principles of international trade that where laid down, among others, in the UNIDROIT Principles, if a change of circumstances fundamentally disrupts the balance of a contract, such party had the right to request for the renegotiation of the contract.

It is clear that article 79 of the CISG does not address hardship, however, since it does not expressly excludes the term, it’s a controversial point that remains still unresolved by scholars, judges and arbitrators. Yet, international practice shows that when international contracts governed by the CISG face a hardship situation, the mechanism of article 7 expressly provides for the adoption of rules and principles of international commercial law such as the UNIDROIT Principles; and even though the UNIDROIT Principles where drafted after the CISG, some scholars have concluded that the UNIDROIT Principles’ provision on hardship can be applied to contracts governed by the CISG, because of the gap-filling role of the UNIDROIT Principles, which aims to supply to interpreters and judges/arbitrators, a set of rules that they may not be able to find, expressly or impliedly, in some international uniform law instruments.

V. APPLICATION BY ARBITRAL TRIBUNALS

When negotiating an international commercial contract, parties will often be advised by their lawyers to include an arbitration clause in the final contract draft, meaning that, when conflicts arise from the interpretation and performance of the contract, the decision of such conflict is entrusted to one or more arbitrators, whose powers derives not from the State, but from the agreement of the parties.

The application of the hardship doctrine by arbitrators will depend on whether the parties inserted or not a hardship clause in their contract. In the absence of a hardship clause, arbitrators often feel reluctant to apply the doctrine of change of circumstances. On the contrary, if there’s a hardship clause

Article 7 reads: (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade. (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the law applicable in accordance with the relevant of private international law.

Id.

In a completely opposite decision to that of Scafom’s case, the District Court of Aachen [Landgericht Aachen], Germany, held that Wegfall der Geschäftsgrundlage, the German equivalent for hardship, was exhaustively covered by article 79 of the CISG. Available at http://www.unilex.info/case.cfm?id=1&do=case&id=23&step=Abstract

* This gap-filling role of the UNIDROIT Principles’ hardship provision vis-à-vis the CISG is not 100% accepted. Common law jurisdictions may be reluctant to apply UNIDROIT’s hardship provision to contracts governed by the CISG because of the civilian character of such provision. See generally, Slater, supra note 108.


‡ PHILIPPE FOUCHARD, EMANUEL GAillard & BERTHOLD GOLDMAN, INTERNATIONAL COMMERCIAL ARBITRATION 25 (1999).
inserted in the contract, arbitrators will usually enforce it based not on *rebus sic stantibus*, but on the clause, which is presumed to have been freely negotiated by the parties.

Therefore, if a conflict arises due to an unexpected change of circumstances, arbitrators will pay strict attention to the parties’ intention, that is, they will take into serious account whether the parties included or not a hardship clause. In this sense, in 1972 an ICC arbitral tribunal stated that, “international commercial arbitrators tend to reject any automatic monetary adjustment when such adjustment was not expressly included in the contract [however], this same line of though leads them to recognize the effectiveness of adjustment guarantees established by the parties.”

International practice confirms the fact that, if parties agree to a hardship clause for dealing with changed circumstances, then such agreement must be honored and enforced.

Still, notwithstanding the inclusion or not of a hardship clause and focusing more on its nature, arbitral awards addressing change of circumstances “show a trend towards acceptances of a rule according to which an agreed equilibrium should be maintained in long-term contracts.” In the ICC Case No. 2291, the arbitral tribunal held that, “every commercial transaction is based on the [economic] balance between the respective obligations of the parties.” It also held that the duty to renegotiate the contract in order to overcome unforeseen difficulties is a rule of *lex mercatoria*, and so, it would be against good faith not to renegotiate the conditions. In *Chevron Co. & Texaco P. Co. v. Ecuador*, an *ad hoc* tribunal held that, “the doctrine of force majeure, like the doctrine of hardship and other related concepts, is designed to distribute between the parties in a just and equitable manner the losses and gains resulting from an unforeseeable event,” referring to articles 7.1.7, 6.2.2 and 6.2.3(3)(b) of the UNIDROIT Principles, as well as to article 6:111(3)(b) of the PECL.

The flexibility arbitrators normally have to issue their awards, as in the possibility to address several sources and principles of international law often lead them to apply the hardship doctrine, especially if they must rule in equity, in which “[s]ome arbitrators . . . consider that their *amicable compositeur* status allows them to attenuate the overly harsh consequences of a strict application of the contract.”

Arbitration is regarded as the best mechanism to address conflicts arising from international commercial contracts, due to the proven neutrality, flexibility, impartiality and specialization of arbitrators. Moreover, the international institutions, treaties, and conventions related to international arbitration guarantee the legal certainty of the awards and their enforceability, being the most important

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† Frick, *supra* note 123, at 220.
‡ Case No. 2291 of 1975 (ICC Int’l Ct. Arb.)
§ Frick, *supra* note 123, at 220.
†‡ E.g. International Chamber of Commerce (ICC), London Court of International Arbitration (LCIA), International Centre for Settlement of Investment Disputes (ICSID), Stockholm Chamber of Commerce (SCC), International Center for Dispute Resolution (ICDR), Singapore International Arbitration Centre (SIAC), Inter-American Commercial Arbitration Commission (IACAC).
the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, ratified by more than 130 countries.

VI. DRAFTING A HARDSHIP CLAUSE

After reviewing the theoretical and practical features of the hardship doctrine, this section focus on the drafting of a proper, yet not complicated hardship clause. The hardship clause consists of mainly two parts: the hypothesis when the clause applies, and the effects of the hardship clause, that is, what happens if the hypothesis is fulfilled.****

As to the hypothesis, the wording of the clause is crucial. The more specific the clause is the better. Therefore, a specified set of circumstances that would amount as to a “hardship” situation would be preferred, such as economic, financial or political circumstances.†††† Plus, it must be provided that these changed circumstances are “reasonably unforeseeable by the time the contract is concluded,” resulting in an “important disruption on the contractual balance.”‡‡‡‡ Nevertheless, the hypothesis part must always provide that the list of circumstances is not limitative and therefore, any other circumstances not listed that comply with the hardship requisites would be considered as such.

After setting out the circumstances to be considered as hardship, the second part of the clause must address the remedy for such changed circumstances, that is, the renegotiation of the contract. It is recommended to set out an objective criterion, by providing, for example, that the contract’s balance be restored as it was at the time of the conclusion of the contract.§§§§

Finally, it must be a requirement that the request for renegotiation be made specifying the grounds on which is requested and without delay, in order to avoid an abusive use of the hardship remedy.*****

CONCLUSION

International commercial transactions involve many risks. Long-term developments of any kind are almost always subject to many factors that simply cannot be envisioned or foreseen at the time the contract is formed.††††† Thus, in dealing with such risks and unforeseeable factors, legal scholars developed the hardship doctrine through the practice of international customs, usage, and trade, which later was embodied in highly influential harmonizing instruments, such as the CISG, UNIDROIT Principles, and PECL.

Yet, despite the high risks involved in international transactions, parties do not always wish to introduce a clause for events that they hope will not occur and that they cannot even expect.‡‡‡‡‡ Such a way of thinking is understandable. Even courts –domestic and arbitral– are sometimes reluctant to apply the hardship doctrine because of its exceptional character and because there is a “presumption that those who practice international trade are professionally competent and aware of the risks they take.”§§§§§ On the

**** Haerynck, supra note 45 at 235.
†††† Id. at 237.
†††‡ As established before, the disruption of the contractual balance can mean an increase on the cost of a party’s performance, or a decrease on the value of the performance.
§§§§ Haerynck, supra note 45, at 238.
***** For a well drafted hardship clause, see the ICC Hardship Clause 2003, available at file:///C:/Users/Raul%20Pereira-/Downloads/PUB650E%20ebook.pdf.
††††† Frick, supra note 123, at 145.
‡‡‡‡‡ Id.
other hand, international business transactions are no longer a relation of antagonism between two parties in which each one seeks to impose its rules; instead, they are partners seeking for their projects to succeed. Parties now negotiate their transactions in order to fulfill their interests.

Establishing a contractual mechanism to address unforeseeable change of circumstances can save the parties substantial amounts of money in litigation. So, parties may feel reluctant to include a provision that addresses the possibility of adverse situations affecting the performance of the contract, but such provision, if carefully negotiated, can be part of a well-built legal vehicle that will make the business flow like a river.

Finally, when drafting their international agreements, parties must not forget to designate the law governing the contract, which subsequently will govern the hardship clause. The UNIDROIT Principles or the PECL are recommended when choosing the law governing an international commercial contract because they specifically address the issue of hardship and more often than not, they offer a more effective solution than those of domestic law. Additionally, if combined with an arbitration clause, the chances of having the hardship provision applied efficiently are greater, since arbitrators will fully recognize the validity of a hardship clause and, if renegotiation is justified, they will enforce it.

Business people and transactional lawyers must understand that international commercial contracts that are expected to be performed over several years are subject to many risks, and therefore, they must be negotiated and written with the recognition that they may be renegotiated or even rewritten in the future. To assess the risk of changed circumstances, international practice has demonstrated the effectiveness of the hardship doctrine as a mechanism to alleviate, or even eliminate, the adverse effects that changed circumstances might have upon a contract.

***** RALPH H. FOLSON, MICHAEL WALLACE GORDON, JOHN A. SPANOGLIE & MICHAEL P. VAN ALSTINE, INTERNATIONAL BUSINESS TRANSACTIONS IN A NUTSHELL 38 (9th ed. 2012).