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International Commercial Transactions

**Force majeure and Hardship clauses in International Commercial Contracts**

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**Introduction**

In times were the GATT conferences have became headlines on the general news, and are not only reserved to the specialised news, no one cannot be aware that exchanges tend to become global. This globalisation concerns several fields: human first of all, there is no need anymore of a recession or a famine to justify the fact that people cross borders; cultural of course, many people in the world have been able to read the book of the 2000 Nobel prize in Literature Gao Xingjian whereas this book is illegal in his own country; and based upon all of that trade. This tendency is surely not going to stop, even less to reverse, especially now that there is no need anymore to physically cross borders thanks to information technology.

As any relation now tends to become a legal relation, international contracts, that the French courts defined as a contract where there are an ebb and flow across a border, have increased as well. Moreover, with the setting aside of long relationships, long-term contracts, or which at least exist over a substantive period, have especially increased. International trade transactions generally imply a greater element of uncertainty due to the fact that they are subject to political and economic influences in foreign countries. Then, the main difficulty of this kind of contracts is that the circumstances under which they were concluded may well change, and so their performance may be more difficult, for one or more parties.

When such a problem arise, reference is often made to one of the main principles in international law, which is "*pacta sunt servanda*". It means that once the contract is signed, the parties have to respect it and so to perform it. If one or more party fail to do so, he would be held responsible for this non-execution. This principle has a great importance, as the contract can so be considered as a reliable promise. Indeed, for the effectiveness of economic activities, it shall be avoided that one of the parties signs the contract with a genuine bad faith, without any intention to fulfil his obligation. This principle aims natural justice, as the person is so bound by his promise.

Yet, this aim may be perverted, and even lead to unfairness, when the situation existing at the conclusion of the contract 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. This situation is of course less likely to arise if short-term contracts are concerned, or contracts with a rather easy structure, where non-performances are usually exchanged against money. In international trade, however, many contracts are of a more complicated structure.

Nevertheless, some solutions may be found in national laws.

For instance, French law provides that any non-performance of an obligation to do or not to do, do not give right to damages in the case of *force majeure.* Yet, the courts have applied those provisions in a very strict way, as the application of this provision requires four conditions to be fulfilled simultaneously:

* the event must be "irresistible"
* the event must be unforeseeable.
* the event is to be an outside one.
* the event should be unavoidable and absolutely beyond the control of the debtor.

The Common Law has a wider view and considers the theory of frustration: a contract is said to be frustrated by physical or legal impossibility or by the occurrence of a radical change of circumstances so that the foundation of the contract has gone. The contract is then discharged.

The German approach to the problem is much more flexible. The debtor does not have to fulfil his obligation when it became impossible to perform anymore, as soon as the reason of such an impossibility (*Unmöglichkeit*) is beyond his control, and so not due to his fault or negligence. This impossibility can be physical or legal (such as the compulsory purchase order of an estate). These provisions are quite similar to the Swiss ones.

The Italian theory of the *Presupposizione* is also close to the German one: the contract can be discharged when the situation of the contract becomes, beyond the control of the parties, different to the one that was expected to be.

Yet, some of these solutions happen to be too strict and then not adapted to international trade. Above all, they are not harmonised at all, so there would be too much differences from one situation to another, and so constitute a deterrent to contracting under the law of some countries.

So, from these rules have been created and developed two theories: *force majeure* and hardship. These concepts both deal with the change of circumstances arising after the conclusion of a contract, and seem to be an efficient way to react to the unforeseeability of some events. What is particularly interesting is that these concepts have first been developed by the observance and development of practical rules, before being consecrated by official and legal documents.

1. **Two different approaches...**
2. The concept of *force majeure*.
   * 1. 1) Origin of the concept

The concept of *force majeure* was a creation of the Roman law. In the Romanian Empire, so vast, so varied and so... changing, there were indeed many reasons that a contract could not be performed: wars, changes of sovereignty, natural cataclysm... Such a notion seemed then obviously needed, and quickly became a main and useful innovation of the Romanian contract law. This classical notion has been implemented in many of the contemporaneous Romanian legal systems, but then did not exist in all the legal systems.

The words themselves appeared more recently, in the French “*Code Napoleon*” enacted in 1806. The French Civil Code defined, and these provisions are still enforceable now, *force majeure* as an outside, irresistible and unbearable event which prevent one party from performing his obligation.

Very quickly, the concept of *force majeure* seemed as being the only one able to describe, in a way that can be worldwidly accepted, situations beyond the control of the parties that prevent the contract from being performed. Yet, the definition that is commonly used worldwide is not quite the same as the French one. Indeed, this definition seemed too strict to be used in such a flexible field as international contracts.

* + 1. 2) Definition of *force majeure*

As this notion does not exist in all the legal system, nearly all *force majeure* clauses have to give a definition of what is a *force majeure* event. If not, such a definition has to be found in accordance with the law under which the contract is concluded.

Usually, contracts provide that *force majeure* is any event that is not foreseeable and is beyond the control of the parties. So, the important point is that the party is unable to avoid the occurrence of an event that was not contemplated by the parties when the contract was made.

If no definition is given, or even in this case, in order to be as accurate as possible, clauses will give examples of *force majeure* or list situations that can be considered as such. There is not a universal and limited list of events, as to the standard events constituting *force majeure*. This list, limited or unlimited, can be very accurate as to the description of such situations, or just list general categories of events. Events that are commonly referred to in force majeure clauses are:

natural cataclysm, such as earthquakes, fires, storm, tempest, flood, landslides, Act of God (or Act of elements in the contracts concluded with communists countries),

armed conflicts such as fire, perils and dangers or accidents of the sea, war, warlike operations, civil war, riot, civil commotion,

Acts of Government (also called “*Fait du Prince*”) such as prohibition of export, impossibility to get the needed permit from the authorities...

Social conflicts such as strikes, lockout....

* + 1. 3) Consequences of *force majeure*

In order for the contract to be discharged, the *force majeure* situation must be recognised by all the parties. So, one of the main characteristics of the *force majeure* regime is that, when such an event occurs, a notice must be made by one party to the other one that he considers this event as being one within the field of the *force majeure* clause. Usually, and this is quite a useful point, clauses providing this notice usually provide as well the form and delay in which it has to be made. Sometimes, these clauses also provide the types of evidences that have to be shown in order to prove that the event involved can be considered as a *force majeure* event. Anyway, the lack of notice can of course be punished, the party can even not be able to use the *force majeure* excuse anymore.

Besides, the clause must provide for the consequences of such a situation on the future of the contract, and for the performance of the contract during the *force majeure* situation. Of course, the debtor of the non-performable obligation will not be liable if this non-performance is due to a *force majeure* event, but what need to be sorted out is what will happen to the contract: is it still performable, or is it considered as void? Usually, as a consequence of a *force majeure* event, the contract will be suspended. A question that then may arise is the one concerning the termination of the contract, especially if the date of the termination occurs within the period when the contract is suspended. In this case, the date of termination has to be changed.

Very often, *force majeure* clauses provide that the debtor of the non-performed obligation will have to make every thing which is possible to him in order to be able to perform his obligation as soon as possible. He will then have to give a notice to the other party when the *force majeure* event has stopped.

Of course, the contract can only be suspended in a temporary way. The party was suddenly unable to perform his obligation, the other party cannot wait indefinitely for this obligation to be performed. So, the contract must provide a period of suspension. When this period expires, either the contract is discharged or the parties have to renegotiate it. When such an event is not provided by the contract, the first solution is usually chosen, after six months to one year.

The concept of hardship

* + 1. 1) Origin of the concept

The concept of hardship appeared after World War I, when the German economy was devastated by inflation of an incredible scale. So, many contracts stipulated in Mark were unbearable for the parties. Yet, the performance of such contracts could not be avoided. Indeed, the German Civil Code granted relief for hardship only in strict cases of impossibility. In reaction to such an unbearable situation, the courts held that they could give relief for hardship on the ground of the principle of good faith also found in the Code. From these rulings and based upon this principle was developed the theory of the *Wegfall der Geschäftsgrundlage*.

The High Court of Germany's consecrated this theory by ruling that the party who is unduly burdened because of changed circumstances may obtain a discharge of the contract, or the court can adapt the contract to changed circumstances if both parties want the contract to continue. The changed circumstances must be exceptional and the court must balance the interests of both parties. Courts of other countries followed the German view, such as Switzerland, Argentina and Brazil.

As many legal systems were still reluctant to accept this theory, hardship clauses have been implemented in international contracts by practitioners who have quickly been well aware of the interest of such a theory, and soon became very common. These clauses have been especially implemented during the seventies, when the economic and monetary system appeared to be not as reliable as expected. Now, these clauses happen to be found very frequently in long-term contract, such as contracts relating to the supplying of raw material.

* + 1. 2) Definition of hardship.

The hardship clause has to contemplate circumstances that have determining consequences as to the economy of the contract. The circumstances can be contemplated in a more or less accurate way, but they will usually be linked to the subject matter of the contract. For instance this situation could be, in a contract on the supply of raw materials, the increase of the price of these raw materials.

In order to be considered as hardship, a situation usually has to incorporate three elements. First of all, it must have arisen beyond the control of either party. Secondly, it must be of fundamental character. And thirdly, it must be uncontemplated and unforeseeable, in the meaning of the probability that such a situation occurs was impossible to assess. Therefore, one difference between an hardship event and a *force majeure* event is that, according to the hardship theory, the performance of the contract does not have to be impossible, it just have to be more onerous, burdensome. However, even if the difference seems obvious, sometimes *force majeure* clauses are drafted in way such as being less demanding of the condition of the impossibility of performance.

* + 1. 3) Consequences of hardship.

The main difference between the two concepts lies in their consequences. Indeed, the aim of the *force majeure* theory is to settle the situation, by suspension or by discharge of the contract, whereas the aim of the hardship theory is to enable the adaptation of the contract to the new circumstances.

The hardship situation has to be noticed by both parties. If some difficulties then arise, the intervention of an arbitrator may be contemplated. Once the hardship event has been noticed, there can be renegotiations between the parties themselves, yet the help of a third party, an arbitrator or a mediator, will often be needed.

Whatever happens then, the situation of the contract during the renegotiations period has to be contemplated as well. Usually, the performance of the contract will, when possible, be suspended.

If the case where the parties cannot reach to an agreement, hardship clauses will usually provides sanctions, as the advantage of the hardship theory over the *force majeure* is to strongly aim this adaptation. One party can then be found liable of the failure of the negotiations. Concerning the contract itself, if nothing is provided in the contract, it has to be maintained. However, hardship clauses usually provide that in this case, the contract will be discharged, suspended, or that the intervention of a third party will be needed.

Although they both deals with the change of circumstances within the period of performance of the contract, these two types of clauses can, theoretically, easily be differentiated. However, years of practice of international contracts have helped to reduce these differences.

**...Consecrated by practice**

Consecration by non binding documents

In order to avoid the difficulty of dealing which such complex concepts and moreover as a mean of harmonisation of the different practices, draftsmen of contracts can choose to refer to some helpful existing documents, such as standard clauses which may as well lie in standard form of contracts. These forms are usually the result of what is practised in a field of activity. Also, in a more general but also very useful way, guidelines such as the UNIDROIT Principles can be referred to.

* + 1. 1) Standard clauses or contracts

The International Chamber of Commerce has published a standard *force majeure* clause, which not only facilitates the work of the draftsmen but also helps to mitigate the defects of article 79 of the CISG, which can sometimes lack precision. Such a standard clause has not been published for the hardship clause, as it seemed impossible to draft a general clause on such a variable concept. However, the ICC has published a list of advises in order to draft such a clause.

Also, in drafting construction contracts can be used the FIDIC Conditions of Contracts for Works of Civil Engineering Construction, published by the Fédération Internationale des Ingénieurs Conseils. What is interesting is that these conditions do not use the wording *force majeure* but their definition of impossibility of performance is quite close to this concept: they define it as a circumstance beyond the control of the parties which makes the contract impossible to perform or unlawful. Indeed, this writing is strongly inspired from the standard clause of *force majeure* as enacted by the ICC, in the fact that in order to be considered as *force majeure*, an event has to be beyond the control of the parties. The FIDIC Conditions also list such events, which would be considered as *force majeure* events: wars, riots, natural disasters etc...

On the contrary, the FIDIC Conditions of Contract for Electrical and Mechanical Works do not hesitate to use the term of *force majeure.* They define it as a «  any circumstances beyond the control of the parties ». This definition is followed by a short but not limited list of examples, in order to help the drafter of the contract in determining what could be an uncontrollable situation. This list is similar to the one in the FIDIC Conditions.

The main consequence of a *force majeure* event is that the party, usually the builder, will not be liable in case of impossibility of performance due to *force majeure*. The discharge of the contract is only contemplated when the *force majeure* event is a war. If the contract is discharged when the *force majeure* event is not a war, the builder is entitled to ask the payment for the work that has already be done. Although there must be an express reference to these conditions in the contract in order for them to apply to this country, they can be considered as a usage in this matter.

* + 1. 2) Unidroit principles

What can also be considered as becoming a usage in their field are the UNIDROIT Principles. These Principles were published in 1994 by the Rome-based International Institute for the Unification of Private Law (Unidroit). They result of more than thirty years of comparative research and worldwide discussion about international contract law. Although not binding, the Principles have been applied by arbitrators in a growing number of cases. These principles consider *force majeure* as well as hardship situations.

The provisions on *force majeure* are quite similar to what is commonly used in international trade. So, the definition given is nearly the same as the one given by the Vienna Convention in its article 79. Though, this definition is very general, and would probably have to be more accurate in the contract. The Principles also provide that the debtor has to give notice to the other party that there is a *force majeure* situation. As regards to the consequences of a *force majeure* event, the parties can either suspend or discharge the contract.

The most audacious provisions are the ones on hardship. Indeed, they provide that there can be a non-contractual hardship. They give a definition of hardship, which is a situation where the occurrence of events fundamentally alters the equilibrium of the contract. The event has to occur after the conclusion of the contract, to be beyond the control of the party and to be impossible to take into account by the parties, and the risks must not have been assumed by the party. This disruption of balance can lie in an increase of the cost of a party’s performance, or in the diminution of the value of the performance received. The main issue there is to determine whether the equilibrium of the contract is fundamentally altered. The Officials Comments on this Article provide that would be considered as a fundamental alteration an alteration of more than 50% of the value or the cost of the performance. Yet, according to arbitral practice, even if this condition has to be observed, it has never been merely sufficient to justify hardship, and arbitrators will then consider the situation in its whole.

The consequences of a hardship situation are quite similar to what has commonly being used in international trade. Under the Principles, if there is hardship, the party can request renegotiations. This request has to be made without undue delay. The party suffering from the non-performance cannot, in return, refuse to perform his own obligation If the renegotiations fail, either party can ask courts or arbitrators either to terminate the contract or to adapt the contract in order to restore the balance. Arbitrators have usually been willing to adapt the contract. However, some courts such as those of England and Belgium, will refuse to adapt the contract.

The UNIDROIT Principles can so be considered as a very useful addition to the existing law of international contracts. Indeed, they are very used by the practitioners, and courts and arbitrators already rely on them to interpret internationals contract. Yet, as not binding, these principles and the other non-binding guidelines to the drafting of these contracts cannot replace binding legal documents such as International Conventions.

Consecration by International Conventions

Conventions aimed to harmonise the law of contract have been enacted in several fields. Yet, the one which can be considered as the more efficient regarding to international trade is the Convention related to the sale of goods. In a very close area, the Conventions related to the carriage of goods are quite useful too.

* + 1. 1) Conventions on sale of goods.

The first major legal document to be enacted in this field was the Uniform Law for the International Sale of Goods (ULIS), which has been drafted by the International Institute for the Unification of Private Law (UNIDROIT). Article 74 of this law provided an exemption from liability in case of circumstances that the party was not supposed to take into consideration. The main default of such a drafting was that it was then very easy for one party to escape from the performance of the contract as this provision could apply to situation which were not making the contract impossible to perform, but just make it more difficult to perform as what was expected. Anyway, this Convention had a limited success, as only nine countries have ratified it. Therefore, the United Nations Commission on International Trade Law decided to draft a new convention, in order to unify the law governing the international sale of goods.

The Convention on Contracts for the International Sale of Goods (CISG) was finalised at a diplomatic conference in Vienna in 1980 and entered into force in 1988. It has been ratified since then by more than fifty countries, among them major trading nations. There can be no doubt on the significance of this Convention, and of its impact on international sales contract.

Article 79 of the CISG deals with situations of changed circumstances. The draftsmen of the Convention strongly wanted such a wide provision, so that there would be no express reference to concepts already related to some national legal systems. This article provides as such:

“A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:

(a) he is exempt under the preceding paragraph; and

(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him.

(3) The exemption provided by this article has effect for the period during which the impediment exists.

(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

(5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.”

This article does not differ entirely from article 74 of the ULIS, it is yet more accurate. It lists the conditions necessary in order to avoid liability for a “failure to perform”, this term being considered in its broadest meaning and then concerning total as well as partial non-performance for instance; moreover it applies to non-performance that may have occurred at any time, even before the conclusion of the contract, as soon as it was unknown to both parties. These conditions do not really differ from the traditional ones required for a situation of *force majeure*, as the event has to be beyond the control of the party, unforeseeable at the time of the conclusion of the contract and reasonably impossible to overcome.

When these conditions are fulfilled, the party will then not be liable for this non-performance.

The main issue arisen after the enactment of the CISG was to know whether the situation of hardship was contemplated or not. No rule contained in the CISG seems to refer to these situations. Indeed, the case law on this issue seems to consider that the situations of hardship are not within the scope of the convention. The *Tribunale Civile di Monza* , in a case were a seller did not deliver the goods subject-matter of the contract because the price of these goods had increased of over 30% between the date of signature of the contract and the date on which the delivery was scheduled, ruled that under the CISG, which was not applicable to this case, the party could not have invoked a situation of hardship as this remedy was not provided by the Convention, neither in the article 79 nor in any other provision. However, this decision might be tempered by the fact that the UNIDROIT Principles, published after the CISG, provide the remedy of hardship.

* + 1. 2) Conventions on carriage of goods

Regarding the contracts of carriage of goods, the 1924 Brussels Convention on Carriage of Goods by Sea provides several cases in which the carrier can avoid liability. First of all, he will not be liable in the occurrence of « fortune de mer », which are abnormally unbearable events due to perils and dangers or accidents of the sea. For instance, an exceptionally violent wind, which leads to the wreck of the ship, will be considered as such an event. Also, the carrier can avoid liability in case of pre-existing defects of the carried goods predisposing their damage, such as, for the carriage of grapefruits from the United States of America to France, a disease common to the citrus fruits of Florida. The carrier’s liability will also be avoided in case of negligence of the person in charge of the loading of the goods, or in case of act of Government, such as an irregular seizure made by the authorities of a country.

In a quite similar type of contracts, the 1956 Geneva Convention on Carriage of Goods provides that the carrier can avoid liability in case of negligence of the sender or of the receiver of the goods, or of their agents.

**Conclusion**

Although their field of application and their legal consequences are theoretically very different, and that according to the theories from which the concepts of *force majeure* and hardship have been developed, modern practice, embodied in official documents, have make these two notions evolve in a way that these differences have diminished. Anyway, what has not changed is that the aim of these two clauses is to deal with the changes of circumstances arising within the performance of a contract.

These two types of clauses have a crucial role, especially in long-term contracts. Indeed, they seem to be a very efficient remedy to a strict application of the principle *pacta sunt servanda* which may lead to unbearable consequences.

Yet, such clauses can always be very difficult to apply. Paradoxically, they may lead to the same insecurity than the one they were supposed to fight, as they are suppose to foresee what is defined as unforeseeable. Nevertheless, while encouraging a more and more accurate drafting, the practice has been able to diminish such a risk and then lead to a nearly optimal application of these essential theories.

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