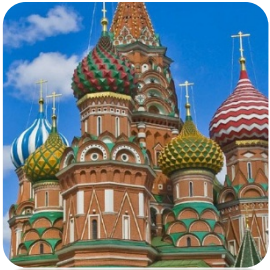


# HARDSHIP CLAUSES: any added value?

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- l Roman Legacy: *pacta sunt servanda* vs. *impossibilium nulla est obligatio* vs. *rebus sic stantibus*
- l Approaches to Hardship in legal systems:
  - l some are silent on Hardship: an extreme of no recognition (France);
  - l many fully recognise Hardship as a separate legal concept (the Scandinavian countries, Germany, Netherlands);
  - l Hardship is not recognised per se, though replaced with a concept of impossibility/impracticability/frustration of contract

## l Perspective on Hardship through *force majeure*:

- l ‘hardship should not be viewed separately’ from *force majeure* rather as a category of instances or events adding up to *force majeure*
- l no major difference in the core criteria for invoking of any of the two concepts, circumstances must be:
  - l UNFORCEABLE
  - l UNAVOIDABLE

## Paragraph 2

[...]where a party to a contract proves that:

[a] the continued performance of its contractual duties (1) *has become excessively onerous* due to an (2) *event beyond its reasonable control* which it (3) *could not* reasonably have been expected to *have taken into account* at the time of the conclusion of the contract; and that

[b] it (4) *could not reasonably have avoided or overcome* the event or its consequences,

[...]

[...] the parties are bound, within a reasonable time of the invocation of this Clause, to (1) *negotiate alternative contractual terms* which reasonably allow for the consequences of the event.

### Paragraph 3

Where paragraph 2 of this Clause applies, but where alternative contractual terms which reasonably allow for the consequences of the event are not agreed by the other party to the contract as provided in that paragraph, (2) *the party invoking* this Clause *is entitled to termination of the contract*.

## Key Practical Considerations

- l how ‘*excessively onerous circumstances*’ are determined? can a threshold be established? by whom?: (1) the claiming party, (2) agreement of the parties, (3) independent arbitrator
- l what is the *timeframe*? is it possible to set any wait-time before “going hardship”?
- l what should be the *effect of invoking a hardship* clause: any practical sense (?); terms can be re-negotiated or contract terminated by the parties at any time as needed, otherwise, it is a matter of resolving differences
- l is it the *hardship clause or a threat* of invoking hardship that makes people negotiate?



Is it relevant?



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