

# FORCE MAJEURE AND HARDSHIP UNDER THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

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## I. LEGAL BACKGROUND IN THE CIVIL LAW AND COMMON LAW

A. *A Note on the Terms "Frustration" and "Commercial"*

George Bernard Shaw is reputed to have said that "England and America are two countries separated by a common language."<sup>1</sup> In the United States the term "frustration" is limited to situations where it is possible to perform the contract, but performance would be senseless. The usual illustration is a license for the use of an apartment to view the coronation procession of King Edward VII. Although the coronation was postponed because of the King's illness, it was still possible for the licensee to pay for the use of the apartment and for the licensor to provide the apartment, nevertheless the basic assumption of the parties did not occur. Therefore, the purpose of the contract was totally frustrated, and the contract was discharged. In England, "frustration" is used to cover cases of impossibility of performance as well as cases such as described in the above illustration. I will follow the American usage which separates impossibility cases from frustration cases.<sup>2</sup>

The word "commercial" or some close variation of it is used in many languages. This does not mean that, outside their core meanings, these terms have the same scope, particularly when used in a legal context. The term "commercial contract" has no precise meaning in the English language. It certainly describes more contracts than are covered by the Uniform Commercial Code that is in effect in 49 of the 50 states of the United States. Some jurisdictions have commercial codes of much broader coverage than that of the Uniform Commercial Code.<sup>3</sup> The meaning of "commercial" in the UNIDROIT Principles cannot be based on its meaning in any one legal system; it is best inferred from the illustrations utilized in the Principles. These include, for example, construction contracts,<sup>4</sup> corporate acquisitions,<sup>5</sup> contracts for technical

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1. P.S. Atiyah, *Tort Law and the Alternatives: Some Anglo-American Comparisons*, 1987 DUKE L.J. 1002, 1005 n.14 (citing H. PROCHNOW & H. PROCHNOW, JR., A TREASURY OF HUMOROUS QUOTATIONS 129 (1969)).

2. For English terminology, see G.H. TREITEL, FRUSTRATION AND FORCE MAJEURE §§ 2-044 to 2-050 (1994).

3. See generally Alejandro M. Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 TUL. J. INT'L & COMP. L. 93, 99 n.33 (1995) [hereinafter Garro, *Contribution*].

4. See International Institute for the Unification of Private Law, Principles of International Commercial Contracts, art. 2.4 illus. 2 (1994) [hereinafter UNIDROIT PRINCIPLES]; see also *id.* pmb. ¶ 2.

assistance, and contracts for architectural services.<sup>6</sup> So wide-ranging are the illustrations that there is little room for international noncommercial contracts.

*B. Traditional Doctrine*

Traditional doctrine in both the systems of common law and civil law have solidly supported the doctrine of *pacta sunt servanda*—agreements must be kept though the heavens fall. The major exceptions in civil and common law systems are the doctrines of impossibility of performance, sometimes denominated “force majeure,” and frustration of the venture. In many legal systems this traditional doctrine continues to receive solid support, and relief for hardship is limited to these two doctrines. “Either performance is made impossible by force majeure and the contract disappears or the performance is impossible and the contract has to be performed, at whatever cost.”<sup>7</sup> In others, hardship provides an additional ground for the discharge of a contract or for its adaptation to changed circumstances.

The traditional rule that hardship, short of impossibility, is no excuse for nonperformance of a contract, and the modern rule providing relief on grounds of hardship are not the only solutions employed by legal systems. The United States flirts with a vaguely defined doctrine of impracticability.<sup>8</sup> France refuses relief for hardship as to contracts in the private sector,<sup>9</sup> but gives relief under the doctrine of *imprévision* (the unforeseen) in administrative tribunals for supervening hardship in the performance of government contracts.<sup>10</sup>

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5. See *id.* art. 2.2 illus. 2.

6. See *id.* art. 7.4.2 illus. 6.

7. Denis Tallon, *Imprévision Revisited: Some Remarks on the Consequence of a Change of Circumstances on Contracts*, in *BINDING FORCE OF CONTRACT* 106, 108 (Budapest Institute for Legal and Administrative Sciences of the Hungarian Academy of Sciences, 1991).

8. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 13-9 (3d ed. 1987); E. ALLAN FARNSWORTH, *CONTRACTS* § 9.6, at 710-13 (2d ed. 1990); JOHN EDWARD MURRAY JR., *MURRAY ON CONTRACTS* § 112, at 641-47 (3d ed. 1990).

9. Special legislation to meet special post-war conditions was enacted on Jan. 21, 1918, and April 22, 1949. Where there is impossibility, French law excuses. Where impossibility merely delays performance, the court can extend the contract. If there is partial impossibility, the court can reduce the price. See Pierre Legrand, Jr., *Judicial Revision of Contracts in French Law: A Case-Study*, 62 *TUL. L. REV.* 963, 1038-44 (1988). See also Jean-Louis Baudouin, *Theory of Imprévision and Judicial Intervention to Change a Contract*, in *ESSAYS ON THE CIVIL LAW OF OBLIGATIONS* 151 (Joseph Dainow ed., 1969).

10. See generally Baudouin, *supra* note 9.

England firmly claims to stand on the traditional rule: “A contract will only be [discharged] if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed.”<sup>11</sup> Yet consider the case of *Staffordshire Area Health Authority v. South Staffordshire Waterworks Co.*<sup>12</sup> A waterworks company had agreed to provide a hospital “at all times hereafter” with its requirements of water at fixed prices.<sup>13</sup> Decades later, the other ratepayers were paying a rate that was over 18 times greater than the agreed prices promised to the hospital.<sup>14</sup> The supplier gave 7 months notice of termination of the contract.<sup>15</sup> The Court of Appeal held that the notice effectively terminated the contract.<sup>16</sup> One of the three judges, Lord Denning M.R.,<sup>17</sup> held that even if the contract had been perpetual in duration, the contract should be discharged on grounds of changed circumstances,<sup>18</sup> although this line of reasoning had been disapproved by the House of Lords in *British Movietone News Ltd. v. London District Cinemas*.<sup>19</sup> The other two judges took the path of interpreting the contract as one for indefinite duration, and therefore terminable upon reasonable notice.<sup>20</sup> This approach, however, cannot be taken in England when the contract has a definite period of duration that cannot be interpreted away. Belgium also adheres to the traditional doctrine; force majeure is recognized as an excuse, but unforeseen hardship is neither an excuse nor grounds for revision of the contract.<sup>21</sup> Yet other doctrines have occasionally been employed to redress hardship, and force majeure has been found where performance was possible but extremely costly and strained interpretation has also been employed to redress hardship.<sup>22</sup> The Convention on the International Sale of Goods (Convention or CISG) is

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11. Hugh Beale, *Adaptation to Changed Circumstance, Specific Performance and Remedies Report on English Law*, in *BINDING FORCE OF CONTRACT*, *supra* note 7, at 9, 20.

12. [1978] W.L.R. 1387 (Eng.).

13. *See* Treitel, *supra* note 2, at § 6-034 & 269 n.11 (quoting *Staffordshire Area Health*, [1978] W.L.R. at 1387).

14. *See id.* § 6-034 (discussing *Staffordshire Area Health*, [1978] W.L.R. at 1387).

15. *See id.* (discussing *Staffordshire Area Health*, [1978] W.L.R. at 1387).

16. *See id.* (discussing *Staffordshire Area Health*, [1978] W.L.R. at 1387).

17. *See id.* (citing *Staffordshire Area Health*, [1978] W.L.R. at 1394).

18. *See id.* (citing *Staffordshire Area Health*, [1978] W.L.R. at 1398).

19. [1952] A.C. 166 (Eng.). *See* Treitel, *supra* note 2, § 6-034 (discussing *British Movietone News Ltd. v. London District Cinemas*, [1951] 1 K.B. 190).

20. *See* Treitel, *supra* note 2, § 6-034 & -270 n.17 (citing *Staffordshire Area Health*, [1978] W.L.R. at 1399).

21. *See* JACQUES HERBOTS, *CONTRACT LAW IN BELGIUM* ¶ 350-55 (1995); Denise Philippe, *Belgian Contract Law: Some Principles*, in *BINDING FORCE OF CONTRACT*, *supra* note 7, at 87, 88.

22. *See* HERBOTS, *supra* note 21, ¶ 350-55; Denise Philippe, *Belgian Contract Law: Some Principles*, in *BINDING FORCE OF CONTRACT*, *supra* note 7, at 87, 88.

silent on the question of hardship. Therefore, the UNIDROIT Principles can be used to supplement the Convention.<sup>23</sup>

C. *Modern Approach to Hardship*

After World War I, the German economy was devastated by inflation of an almost incredible scale; the mark ultimately sunk to one-trillionth of its former value. 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 also found in the German Civil Code. Professor Paul Oertmann developed the theory of the *Wegfall der Geschäftsgrundlage*—disappearance of the foundations of the contract.<sup>24</sup> Germany's high court seized upon this theory and ruled that legal tender no longer had to be accepted in payment of debts, as no debtor could in good faith make such a tender.<sup>25</sup> As the case law has evolved, 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.<sup>26</sup> The changed circumstances must be exceptional and the court must balance

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23. For an argument to the effect that because of the silence of CISG on the subject, the UNIDROIT Principles can be used to supplement the Convention, see Alejandro M. Garro, *The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay Between the Principles and the CISG*, 69 TUL. L. REV. 1149, 1182-84 (1995) [hereinafter Garro, *Gap-Filling*]. On the UNIDROIT Principles, see generally M. JOACHIM BONELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (1994) [hereinafter BONELL, INTERNATIONAL RESTATEMENT]; M. Joachim Bonell, *Unification of Law by Non-Legislative Means: The UNIDROIT Draft Principles for International Commercial Contracts*, 40 AM. J. COMP. L. 617 (1992); Pilar Perales Viscasillas, *UNIDROIT Principles of International Commercial Contexts: Sphere of Application and General Provisions*, 13 ARIZ. J. INT'L & COMP. L. 381 (1996); and Joseph M. Perillo, *UNIDROIT Principles of International Commercial Contracts: The Black Letter Text and a Review*, 63 FORDHAM L. REV. 281 (1994).

24. See John P. Dawson, *Judicial Revision of Frustrated Contracts: Germany*, 63 B.U. L. REV. 1039, 1045-46 (1983) (discussing P. OERTMANN, DIE GESCHÄFTSGUNDLAGE, EIN NEUER RECHTSBEGRIFF (1921)).

25. See *id.* at 1047-48 & n.21 (citing to 107 RGZ 78 and P. OERTMANN, DIE AUFWERTUNGSFRAGE 40 (1924)); see also ARTHUR NUSSBAUM, MONEY IN THE LAW 206-11 (1950); KEITH S. ROSENN, LAW AND INFLATION 84-94 (1982); John P. Dawson, *Effects of Inflation on Private Contracts: Germany 1914-24*, 33 MICH. L. REV. 171 (1935).

26. See Peter Hay, *Frustration and Its Solution in German Law*, 10 AM. J. COMP. L. 345, 360 (1961).

the interests of both parties.<sup>27</sup> Courts of other countries have followed the German lead, including Switzerland,<sup>28</sup> Argentina<sup>29</sup> and Brazil.<sup>30</sup>

Other countries have reached the same result by legislation, Italy in 1942,<sup>31</sup> Greece in 1946,<sup>32</sup> and more recently the Netherlands.<sup>33</sup> The Netherlands Code provides as follows:

1. Upon the demand of one of the parties, the judge may modify the effects of a contract, or he may set it aside in whole or in part on the basis of unforeseen circumstances which are of such a nature that the co-contracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form. The modification or the setting aside of the contract may be given retroactive force.

2. The modification or the setting aside of the contract is not pronounced to the extent that the person invoking the circumstances should be accountable for them according to the contract or common opinion.

3. For the purposes of this article, a person to whom a contractual right or obligation has been transferred, is assimilated to a contracting party.<sup>34</sup>

Thus, the modern trend, exemplified by the Netherlands Code, is to recognize the established doctrines of impossibility of performance and frustration of the venture and to add to them a doctrine of excessive hardship. Under this trend, where, because of changed circumstances, a contract has become excessively burdensome on one of the parties, the party subjected to that burden may request a discharge of the contract, or, alternatively, its modification to reflect an exchange of values in accordance with market values at the time of the changed circumstances.

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27. *See id.*

28. *See* Hans Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 289-96 (1958).

29. *See* KEITH S. ROSENN, *LAW AND INFLATION* 87-88 (1982).

30. *See id.* at 88.

31. *See* CODICE CIVILE arts. 1467-1469 (Italy) (Mario Beltramo et al. trans., 1991).

32. *See* GREEK CIVIL CODE art. 388. An English translation can be found in RUDOLF B. SCHLESINGER ET AL., *COMPARATIVE LAW: CASES—TEXT—MATERIALS* 737 (5th ed. 1988).

33. *See* NEW NETHERLANDS CIVIL CODE Patrimonial Law art. 6:258 (P.P.C Haanappel & Ejan Mackaay trans., 1990); Arthur S. Hartkamp, *The Binding Force of Contract in Dutch Law*, in *BINDING FORCE OF CONTRACT*, *supra* note 7, at 41, 46.

34. NEW NETHERLANDS CIVIL CODE Patrimonial Law, *supra* note 33, art. 6:258.

## II. CONTRACTUAL USAGES IN INTERNATIONAL TRADE

Although many legal systems do not generally give relief to a party who is burdened with excessive hardship, these same systems generally recognize party autonomy to provide for the adaptation of contracts to changed circumstances. Consequently, it is fairly common in contracts dealing with international trade, particularly those that have long durations, to make provision for revision of the contract in case of changed circumstances. Such a clause might read as follows:

At any time during the term of this Agreement the Government and the Company may consult with each other to determine whether in the light of all relevant circumstances the financial or other provisions of this Agreement need revision in order to ensure that the Agreement operates equitably and without major detriment to the interests of either party. Such circumstances shall include the conditions under which the mineral production is carried out such as the size, location, and overburden of mineral deposits, the quality of the mineral, the market conditions for the mineral, the prevailing purchasing power of money and the terms and conditions prevailing for comparable mineral ventures. In reaching agreement on any revision of this Agreement pursuant to this Article both parties shall ensure that no revision of this Agreement shall prejudice the Company's ability to retain financial credibility abroad and to raise finance by borrowing internationally in a manner and on terms normal to the mining industry.<sup>35</sup>

Sophisticated international trade agreements of long duration typically contain a renegotiation or other adaptation clause that provides flexibility to the relationship—so typical as to perhaps rise to the strength of a usage.<sup>36</sup> The absence of such a clause may reflect that such a clause has been rejected by one or both parties, but is more likely to have been overlooked by unsophisticated parties or deliberately omitted by a sophisticated drafter.<sup>37</sup> In the last two cases, the court should consider

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35. MARTIN BARTELS, *CONTRACTUAL ADAPTATION AND CONFLICT RESOLUTION* 59 (1985).

36. See UGO DRAETTA ET AL., *BREACH AND ADAPTATION OF INTERNATIONAL CONTRACTS: AN INTRODUCTION TO LEX MERCATORIA* 170-214 (1992); Norbert Horn, *Standard Clauses on Contract Adaptation in International Commerce*, in *ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE* 31 (Norbert Horn ed., 1985).

37. See Garro, *Gap-Filling*, *supra* note 23, at 1160-63.

the contracts as having an omitted term and fill the gap with the help of the UNIDROIT Principles.<sup>38</sup> As Corbin wrote:

In order to prevent the disappointment of expectations that the transaction aroused in one party, as the other had reason to know, the courts find and enforce promises that were not put into words, by interpretation when they can and by implication and construction when they must. When unforeseen contingencies occur, not provided for in the contract, the courts require performance as men who deal fairly and in good faith with each other would perform without a law suit. It is thus that unanticipated risks are fairly distributed and a party is prevented from making unreasonable gains at the expense of the other. This is not making a contract for the parties; it is declaring what the legal operation of their own contract shall be, in view of the actual course of events in accordance with those business mores known as good faith and fair dealing.<sup>39</sup>

### III. THE UNDERPINNINGS OF THE FORCE MAJEURE AND HARDSHIP EXCUSES

What are the bases of the excuses for impossibility, frustration, impracticability, or hardship? What are the value judgments that have guided legislators and courts in these areas? In the common law systems, contract liability is no-fault liability, yet some leeway for an excuse has been allowed. Although in some civil law countries, fault is perceived to have a greater role in contract liability than in the common law, the discussions of these excuses do not seem affected in any important way by ideas related to fault or its absence.<sup>40</sup>

One trend of thought about the foundations of these excuses stems from one of the principal underpinnings of contractual obligations. Contract liability stems from consent. If an event occurs that is totally outside the contemplation of the parties and the event drastically shifts the nature of foreseen contractual risks, is there truly consent? Under this line of thinking, one can infer that the parties did not intend that performance

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38. See Perillo, *supra* note 23, at 301-02; Garro, *Contribution*, *supra* note 3, at 122-23.

39. ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 541, at 97 (1960).

40. For an explanation of why this is so, see generally Barry Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231 (1979).



would have to be rendered if an unexpected event would create a radical change in the nature of performance. If this inference is sound, one can conclude that the contract did not cover the unexpected event that has occurred. Under this reasoning, the court must then supply a term to cover an omitted case. Thus viewed, relief for impossibility or hardship does not interfere with freedom of contract. If this is so, the next question is how is the court to fill the gap and provide for the omitted case? A useful analogy is cases decided on the basis of mistake of fact. The distinction is that the doctrine of mistake is applicable only if there is a mistake as to a material existing fact, while ordinarily impossibility, frustration, and hardship relate to future events. In cases of mistake, ideas of unjust enrichment are heavily involved. Before applying any relief based on mistake, one must search the facts for unexpected, unbargained-for gain on the one hand and unexpected, unbargained-for loss on the other. Notions similar to that of the civil law notion of *laesio enormis* and common law notions of conscionability are also involved.<sup>41</sup> It is unconscionably sharp practice to take advantage of the mistakes of fact made by the other contracting party. It may equally be deemed unconscionable to take advantage of a mistake as to the course of future events. Public international law has long recognized the principle of *rebus sic stantibus*, an implied term in every treaty that it will cease to be binding when the facts and conditions on which they were based have fundamentally changed.<sup>42</sup> This implied term has its origins in the Roman law of contract. The full Latin text is: *Contractus qui habent tractum succesivum et dependentiam de futurum, rebus sic stantibus intelliguntur*. Freely translated, the phrase is: "Contracts providing for successive acts of performance over a future period of time must be understood as subject to the condition that the circumstances will remain the same."<sup>43</sup>

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41. Some scholars see a distinct link between ideas of good faith and conscionability and rules with respect to force majeure and hardship. See the quotation from Corbin, *supra* text accompanying note 39; see also Hernany Veytia, *The Requirement of Justice and Equity in Contracts*, 69 TUL. L. REV. 1191, 1205-06 (1995). Professor Farnsworth prefers to consider these concepts as distinct. See E. Allan Farnsworth, *Duties of Good Faith and Fair Dealing Under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, 3 TUL. J. INT'L & COMP. L. 47, 60-61 (1994).

42. See, e.g., David Bederman, *The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations*, 82 AM. J. INT'L L. 1 (1988). Civil law writers often invoke the maxim in contract analysis. See, e.g., STEFAN SCHMIEDLIN, *FRUSTRATION OF CONTRACT UND CLAUSULA REBUS SIC STANTIBUS* (1985); Jorge J. Oppenheimer Mendez, *El Rebus Sic Stantibus Como Defensa Dentro del Derecho Puertoriqueno*, 28 REVISTA DE DERECHO PUERTORIQUEÑO 23 (1988).

43. Saul Litvinoff, *Force Majeure, Failure of Cause and Théorie de L'Imprévision: Louisiana Law and Beyond*, 46 LA. L. REV. 1, 4 (1985). Louisiana, to a large extent a civil law

Involved are cultural beliefs about unjust enrichment and unjust impoverishment. These terms engage our cultural values. What may have been deemed unjust in the middle ages, when the very morality of making a profit was questioned, is viewed differently today. Such values differ not only over time, but also over space. The morality and legitimacy of profit are viewed in one light in Beijing and in another in Havana (although both profess Marxism) and perhaps less dramatically, but still differently, in London than in Rome.

All contracts involve risks. Some contracts are almost purely aleatory. If one sells shares of stock on the stock exchange that person does not have, the so-called "short sale," it is a contract of pure risk, and I can conceive no circumstance (absent fraud, duress, or other vitiating cause) in which a court should relieve the seller or buyer from a total loss, even if unexpected and unforeseeable events disrupted the market. On the other hand, in the more typical contract involving the sale of goods or services, or the rental of real estate, each party expects to gain from the contract and each party understands that the other party also expects to gain. In such contracts, neither party expects to gain from the other's loss, although both realize that such an imbalance may occur. In the common law, several kinds of events produce an almost automatic excuse for nonperformance: death of a person who is to personally perform, supervening illegality of a performance, and the destruction of the subject matter. When one goes beyond these three categories, relief is most justified if unexpected events inflict a loss on one party and provide a windfall gain for the other, or where the excuse would save one party from an unexpected loss while leaving the other party in a position no worse than it would have without the contract.<sup>44</sup>

#### IV. THE UNIDROIT PRINCIPLES

##### A. *Force Majeure (Impossibility of Performance)*

This Article will now proceed with a more detailed review of the relevant provisions. First, force majeure will be discussed followed by a discussion of the provisions concerning hardship.

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jurisdiction, does not give relief for hardship. See, e.g., *Hanover Petroleum Corp. v. Tenneco, Inc.*, 521 So. 2d 1234, 1240 (La. Ct. App. 1988).

44. See Mark P. Gergen, *A Defense of Judicial Reconstruction of Contracts*, 71 *IND. L.J.* 45, 55 (1995).

The UNIDROIT Principles deal with force majeure in the chapter on nonperformance.<sup>45</sup> Hardship is dealt with in the chapter on performance.<sup>46</sup> The logic of this divided treatment is clear. If performance is impossible it will not be performed; whether the nonperformance is excused or will be the basis for a money judgment for damages or restitution is a question dealt with under nonperformance. If performance is burdensome, the consequences of the burden are dealt with as an aspect of performance.

The provisions on force majeure<sup>47</sup> are rigid. Nothing less than total impossibility will suffice as a predicate for an excuse. There must have been an “impediment beyond [the party’s] control” and the party “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.”<sup>48</sup> Let us analyze the quoted language.

*“Impediment beyond [the party’s] control”*<sup>49</sup>

Three American cases illustrate this phrase. In *Peckham v. Industrial Securities Co.*,<sup>50</sup> a receiver was appointed to seize the assets of the seller, including goods that were the subject of the contract.<sup>51</sup> The Delaware Supreme Court held that the seller was to be excused only because the appointment of the receiver was wrongful and not due to the seller’s own conduct.<sup>52</sup> In another case, *Lowenschuss v. Kane*,<sup>53</sup> a temporary injunction preventing the delivery of shares of stock was issued against the buyer based on alleged violations of the antitrust and securities laws.<sup>54</sup> The United States Court of Appeals for the Second Circuit held that buyers are to be excused and are not to be held liable for breach if it is

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45. UNIDROIT PRINCIPLES, *supra* note 4, art. 7.1.7.

46. *See id.* arts. 6.2.1-6.2.3.

47. Article 7.1.7 is entitled “Force majeure.” According to Comment 1 thereto, the “article covers the ground covered in common law systems by the doctrines of frustration and impossibility. . . .” In part, the Comment conflicts with the black letter text which speaks of “an impediment” to performance. In frustration cases, as that term is explained in the opening paragraph of this Article, there is no impediment to performance. In the example given there of the canceled coronation, it is merely a hardship on the licensee of the apartment to pay an extravagant fee to view a street on which there would be no coronation procession. Consequently, cases of frustration must be analyzed under the hardship provisions.

48. UNIDROIT PRINCIPLES, *supra* note 4, art. 7.1.7(1).

49. *Id.*

50. 113 A. 799 (Del. 1921).

51. *See id.* at 799.

52. *See id.* at 802.

53. 520 F.2d 255 (2d Cir. 1975).

54. *See id.* at 258-59.

found that there were no such violations.<sup>55</sup> In *Canadian Industries Alcohol Co. v. Dunbar Molasses Co., OFN.*,<sup>56</sup> apparently involving international commerce, a middleman promised delivery to the buyer of one-and-a-half million gallons of blackstrap molasses from a specific sugar refinery.<sup>57</sup> The seller failed to deliver and, in defense of a breach of contract action, argued impossibility, proving that the specified refinery did not produce a sufficient quantity to fulfill the contract.<sup>58</sup> The defense was unsuccessful as the seller failed to show what efforts it had made to attempt to secure a contract for the production and delivery of sufficient molasses from the operator of the refinery.<sup>59</sup>

What if the impediment is caused by the party's financial embarrassment? Neither Article 7.1.7, nor the commentary to it, refers to this kind of impediment. Under American law, it is quite clear that financial impediments provide no excuse; these are regarded as "subjective" rather than "objective" impossibility and there is unanimity in the case law and in doctrine that subjective impossibility provides no excuse, whether or not it was the result of conditions outside the control of the obligor.<sup>60</sup> It is generally believed that the risk of financial ability to perform is such a basic assumption underlying all contracts that it cannot be excused, except by a decree in a bankruptcy proceeding. It is hard to believe that this general belief is suspended in international trade. Consequently, the phrase "beyond [the party's] control" should be given a broad meaning so that it will be deemed that financial health is always within a contracting party's control.

*"[The party] could not reasonably be expected  
to have taken the impediment into account  
at the time of the conclusion of the contract"*<sup>61</sup>

This phrase raises the issue of foreseeability.<sup>62</sup> The question of foreseeability is a difficult one. Anyone who has read a bit of history or who has lived for three or more decades of the twentieth century can

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55. See *id.* at 265-66. See also *Studio #54 Disco, Inc. v. Pee Dee Jay Amusement Corp.*, 439 N.Y.S.2d 395, 397 (App. Div. 1981).

56. 179 N.E. 383 (N.Y. 1932).

57. See *id.* at 383-84.

58. See *id.* at 384.

59. See *id.* at 384-85.

60. See JOHN D. CALAMARI & JOSEPH M. PERILLO, *THE LAW OF CONTRACTS* § 13-15 (3d ed. 1987).

61. UNIDROIT PRINCIPLES, *supra* note 4, art. 7.1.7(1).

62. For use of word "foreseeable," see *id.* art. 7.1.7 illus. 1(3).

foresee, in a general way, the possibility of war, revolution, embargo, plague, terrorism, hyper-inflation and economic depression, among the other horrors that have afflicted the human race. If one reads science fiction, one learns of the possibility of new terrors that have not yet afflicted us, but involve possibilities that are not pure fantasy. The following notion of unforeseeability seems sound—an event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have would be of such magnitude that the parties would have negotiated over it, had the event been more likely.<sup>63</sup> An Italian text summarizing some of the Italian cases states:

As to a contract made in 1914 to last 60 years, the outbreak of a war (or better, of a certain number of wars) was foreseeable and also foreseeable was the development of aerial arms and the resort to aerial bombardments. . . . As to a contract made during the second world war, the protracted duration of that war was not foreseeable, nor were the proportions of its consequences measurable.<sup>64</sup>

One can reflect on the soundness of such distinctions of fact made by the Italian courts. Similarly, one can reflect on the soundness of decisions of American courts to the effect that American participation in the second World War was foreseeable,<sup>65</sup> despite the fact that the Japanese attack on Pearl Harbor found their armed forces totally unprepared. Yet, American merchants were supposed to foresee the onset of American participation in the War. Also, the American courts ruled consistently that the closing of the Suez Canal in 1956 was foreseeable to merchants who relied on the canal route.<sup>66</sup> It was again foreseeable in 1967 when the second canal closing took place.<sup>67</sup>

It is difficult to believe that judges in reviewing the “factual” question of foreseeability can refrain from taking into account the larger consequences of a finding of foreseeability. If, in one case, American entry into the second World War had been declared to be unforeseeable,

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63. See Pietro Trimarchi, *Commercial Impracticability in Contract Law: An Economic Analysis*, 11 INT'L REV. L. & ECON. 63, 65 n.4 (1991).

64. RODOLFO SACCO & GIORGIO DE NOVA, *IL CONTRATTO* 675 (Torino, UTET 1993).

65. See *Lloyd v. Murphy*, 153 P.2d 47, 50-51 (Cal. 1944).

66. See *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 318 (D.C. Cir. 1966).

67. See *American Trading and Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939, 941, 943 (2d Cir. 1972).

how many thousands, or tens of thousands of contracts would have to be dissolved because of impossibility or frustration? How many shipping and sales contracts would have been thwarted by the Suez closings? How broadly would international trade be disrupted and how much uncertainty would be injected into domestic and international trade? I suggest that it is no accident—and I speak of the American and English cases only as I have not made a sufficient study of others—that the courts are more willing to find an excuse where the supervening event has drastic consequences only for one contract<sup>68</sup> or a small number of contracts than where the supervening event affects an enormous number of transactions.

“or to have avoided or overcome  
it or its consequences”<sup>69</sup>

Using the case *International Paper Co. v. Rockefeller*<sup>70</sup> as an example, we find that if a party has breached by delay and an impediment arises thereafter, the impediment will not excuse the nonperformance.<sup>71</sup> Much of the discussion concerning the phrase “beyond [the party’s] control” also applies here.

### B. *Temporary Force Majeure*

Article 7.1.7 of the Principles provides that “[w]hen the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.”<sup>72</sup> The doctrine of impossibility, temporary or otherwise, does not inhibit the other party’s ability to cancel the contract, it merely forgives damages.<sup>73</sup> Temporary impossibility gives rise to prospective inability to perform.<sup>74</sup> Although the obligor may be excused by temporary impossibility,<sup>75</sup> the prospective inability will normally give the obligee a power to suspend performance and demand assurance of due performance. However, if the obligor is not able to

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68. See, e.g., *Northern Corp. v. Chugach Elec. Assoc.*, 518 P.2d 76, 85 (Alaska 1974).

69. UNIDROIT PRINCIPLES, *supra* note 4, art. 7.1.7(1).

70. 146 N.Y.S. 371 (App. Div. 1914).

71. See *id.* at 374-75.

72. UNIDROIT PRINCIPLES, *supra* note 4, art. 7.1.7(2).

73. See *id.* art. 7.1.7 cmt. 2.

74. See RESTATEMENT (SECOND) OF CONTRACTS § 269 cmt. a (1981) [hereinafter RESTATEMENT (SECOND)]; see also *id.* §§ 237 (Effect on Other Party’s Duties of a Failure to Render Performance) & 238 (Effect on Other Party’s Duties of a Failure to Offer Performance).

75. See, e.g., *Colorado Coal Furnace Distribs. v. Prill Mfg.*, 605 F.2d 499, 504 (10th Cir. 1979).

provide assurance of due performance, the obligee may cancel the contract despite the impossibility that may provide a defense in an action for damages.<sup>76</sup>

If the obligee is not justified in canceling the contract or chooses not to, what rules govern the conduct of the obligor? Obviously the obligor may suspend performance. When the impossibility ceases, the obligor is usually expected to perform in full and is entitled to an appropriate extension of time for performance.<sup>77</sup> This is not, however, a universal rule. When the delay will make performance substantially more burdensome, the rules on hardship must be consulted.<sup>78</sup> If the impediment relates to the payment of money, as by governmental currency controls, interest accrues on the debt, the payment of which is impeded.<sup>79</sup>

An illustration will serve to clarify these rules.<sup>80</sup> Madame Poussard promised to sing the leading female role in a new opera being produced by *B*. The first performance was to take place on November 28th. On November 23rd, Madame Poussard became ill during a rehearsal. At this time the length of her illness was indefinite and unknown. *B* hired the only other available substitute performer to take Madame Poussard's place. The substitute insisted on being hired for the entire performance and was so hired. Madame Poussard was ready to perform on December 4th at which time she tendered her services, which were refused. The jury found as a fact that the engagement of the substitute was reasonable.

It is clear that Madame Poussard's illness was a defense to any action for breach of contract that *B* might bring relating to the period of illness. *B* undoubtedly could suspend performance during the period of illness. However, *B* did more than suspend performance, *B* chose to terminate the contract. The question was whether *B* was justified. In doctrinal language there was a finding that there was serious prospective inability to perform which justified *B*'s cancellation of the contract. The result probably would be different if Madame Poussard were able on

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76. See UNIDROIT PRINCIPLES, *supra* note 4, art. 7.3.4; see also *id.* art. 7.1.7(4) ("Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.").

77. See RESTATEMENT (SECOND), *supra* note 74, § 269 cmt. a.

78. See *infra* text accompanying notes 96-149.

79. See UNIDROIT PRINCIPLES, *supra* note 4, art. 7.1.7(4).

80. The following illustration is derived from the facts of *Poussard v. Spiers & Pond*, 1 Q.B. 410 (Eng. 1876). While the case did not involve a commercial contract, it beautifully illustrates the points made here.

November 23 to give assurances that the illness would have lasted only two or three days.<sup>81</sup> The rules stated here are over-riden if one party has assumed the risk in question by agreement or otherwise.<sup>82</sup>

C. *Governmental Licenses and Permits*

Four articles of the Principles and extensive commentary are devoted to the obtaining of governmental permissions, certainly an important topic in domestic trade and a more complex one in international trade. Permits may be needed from more than one State or there may be licensing requirements of which one or both parties may be unaware. The burden of applying for any necessary governmental approval is cast on the party who has its place of business in the State whose approval is required, but only if the other party has no place of business in the State.<sup>83</sup> In any other case, for example, when neither party has, or both parties have, a place of business in the State, the party whose performance requires permission must take the necessary measures.<sup>84</sup> Where both parties' performances are subject to the same approval requirement,<sup>85</sup> and neither or both parties have a place of business in the State, the provisions are silent on the question of who must apply for the necessary permission.

The party who has the duty to apply for the approval must exercise best efforts by applying without undue delay and, if reasonable, exercise available processes for appeal if the approval is not obtained.<sup>86</sup> As elsewhere in these Principles, there is an emphasis on communication.<sup>87</sup> Unless information regarding the need for approval is generally accessible, the existence of the need for permission must be disclosed by the party whose duty it is to obtain it.<sup>88</sup> Failure to disclose is a breach of the obligation of good faith inherent in all negotiations.<sup>89</sup> Similarly, if the approval is granted or denied, this party must, without

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81. *See, e.g.*, *Bettini v. Gye*, 1 Q.B. 183 (Eng. 1876).

82. *See* RESTATEMENT (SECOND), *supra* note 74, § 269 cmt. a.

83. *See* UNIDROIT PRINCIPLES, *supra* note 4, art. 6.1.14(a).

84. *See id.* art. 6.1.14(b).

85. *See, e.g.*, *Oak Bee Corp. v. N.E. Blankman & Co.*, 551 N.Y.S.2d 559, 561 (App. Div. 1990).

86. *See* UNIDROIT PRINCIPLES, *supra* note 4, art. 6.1.14 cmt. 4; *see also id.* art. 6.1.16 cmt. 1.

87. *See id.* art. 6.1.14 cmt. 2.

88. *See id.*

89. *See id.* art. 2.15(a). The obligation of good faith and cooperation in performance may also be implicated. *See id.* arts. 5.2, 5.3.



undue delay, notify the other.<sup>90</sup> Failure to notify constitutes a breach of contract.<sup>91</sup>

What are the consequences of refusal of an approval that has been diligently sought? The text is not totally clear. One reading is that if the contract is subject to governmental approval, it is as though no contract ever came into being.<sup>92</sup> This makes governmental approval similar to the often criticized common law concept of a condition precedent to the existence of a contract.<sup>93</sup> If, however, the lack of approval makes the contract impossible to perform, for example, if a building permit is denied, the rights of the party are governed by the rules governing contractual breaches, including the defense of force majeure.<sup>94</sup> If only a term of the contract fails to receive approval, the contract as a whole survives if it is reasonable to excise the offending term and regard the balance of the contract as a transaction the parties would have agreed to if they knew of the impediment.<sup>95</sup>

#### D. *Hardship*

The provisions on “hardship” contained in the chapter on performance<sup>96</sup> should be compared with the provision on “force majeure,” contained in the chapter on nonperformance.<sup>97</sup> The rule of force majeure is draconian and unforgiving. Nothing short of total impossibility will excuse nonperformance or partial nonperformance.<sup>98</sup> Impracticability will not suffice as an excuse. Rather, impracticability as well as hardship far short of impracticability must be tested under the hardship articles. Hardship alone never forgives nonperformance. It instead compels renegotiation and authorizes courts to “adapt” (revise) the contract to take the hardship into account.<sup>99</sup> Nonetheless, the hardship provision starts with the caption: “Contract[s] to be observed.”<sup>100</sup> Article 6.2.1 provides that “[w]here the performance of a contract becomes more onerous for one of the parties, that party is

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90. *See id.* art. 6.1.15(2).

91. *See id.* art. 6.1.15 cmt. 5.

92. *See id.* art. 6.1.17(1).

93. *See, e.g.,* CORBIN, *supra* note 39, § 589.

94. *See* UNIDROIT PRINCIPLES, *supra* note 4, art. 6.1.17 cmt. 2(b).

95. *See id.* art. 6.1.17 cmt. 2(a).

96. *See id.* art. 6.2.1-6.2.3.

97. *See id.* art. 7.1.7.

98. *See supra* Part IV.A.

99. *See* UNIDROIT PRINCIPLES, *supra* note 4, art. 6.2.3.

100. *Id.* art. 6.2.1.

nevertheless bound to perform its obligations subject to the following provisions on hardship.”

*Hardship: The Factual Predicate*

The definition of hardship, which appears in Article 6.2.2, is complex, because it not only defines the nature of the burden, but also other factors that must coexist with the burden to make it legally relevant. As a predicate to legally relevant hardship there must have been “the occurrence of events fundamentally alter[ing] 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. . . .”<sup>101</sup> When is the equilibrium of a contract fundamentally altered? “[A]n alteration amounting to 50% or more of the cost or the value of the performance is likely to involve a ‘fundamental’ alteration” justifying invocation of the doctrine.<sup>102</sup> Thus, one illustration involves a ten-year contract for the sale of uranium at fixed prices in U.S. dollars payable in New York. The currency in the buyer’s country declines to 1% of the value that it had at the time of contracting. The buyer cannot invoke force majeure.<sup>103</sup> Similarly, if the price is increased tenfold because some Texans have almost cornered the market, force majeure is not present.<sup>104</sup> Nonetheless, the buyer may have redress under the hardship provisions. As a factual matter, hardship exists if the “equilibrium of the contract” is “fundamentally altered” by events that occur or become known after contracting.<sup>105</sup> As with the case of impossibility, hardship as a fact does not automatically trigger the juridical concept of hardship. In addition, it must be shown that the events could not reasonably have been taken into account, are not within the party’s control, and the risk was not assumed.<sup>106</sup> Consequently, in the two illustrations just described, a prima facie claim of hardship is made out.<sup>107</sup> The following example of hardship-in-fact is given in illustration

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101. *Id.* art. 6.2.2.

102. *Id.* cmt. 2; *see also* art. 6.2.3 illus. 1.

103. *See id.* art. 7.1.7 illus. 1(1). This is not a draconian result if the buyer can pass the inflationary costs onto the ultimate consumer.

104. *See id.* art. 7.1.7 illus. 1(3).

105. *See id.* art. 6.2.2.

106. *See id.*

107. My conclusion about the currency collapse case is supported by illustration 3 to article 6.2.2 where on similar facts hardship is said to exist. However, a similar currency example exists in illustration 1(1) to article 7.1.7 dealing with force majeure. This second illustration concludes that the parties have allocated the risk by the payment terms. The two illustrations seem to contradict each other on the question of what is an assumed risk.

1 of article 6.2.2 of the Principles. A dealer in the former German Democratic Republic contracts to buy electronic goods from a seller in another former Communist country. Prior to delivery, the German Democratic Republic is unified with the Federal Republic of Germany. There is no market for the kinds of electronic goods produced by the seller. Unless other factors dictate a contrary conclusion, the buyer may invoke the doctrine of hardship.<sup>108</sup>

It has been suggested that greater hardship would be needed to trigger the hardship provisions if the obligation is an obligation to achieve a specific result than where the obligation is to exercise best efforts.<sup>109</sup>

*“The events could not reasonably have been  
taken into account by the disadvantaged party  
at the time of the conclusion  
of the contract. . . .”*<sup>110</sup>

As is the case with allegations of force majeure, foreseeability is a central concern in hardship cases. The general notion is that if an event is foreseeable, the parties should deal with it in the contract; otherwise, the party disadvantaged by the event should bear its burden. Yet, as stated above,<sup>111</sup> almost everything that ever happens is in some sense foreseeable. Again, the question is whether the event was so outside the bounds of probability that reasonable parties would not provide for it. The Principles give two illustrations of the foreseeability issue. The first involves a contract for the purchase of crude oil at a fixed price for a five-year term from country X, “notwithstanding the acute political tensions in the region.”<sup>112</sup> Two years later, war erupts in neighboring countries, causing a world energy crisis and oil prices rise drastically.<sup>113</sup> The seller cannot invoke the doctrine of hardship because “a rise in the price of crude oil was not unforeseeable.”<sup>114</sup> The second illustration involves a contract for sale where the price is expressed in the currency of country X.<sup>115</sup> This currency was depreciating slowly prior to contracting. One

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108. See *id.* art. 6.2.2 illus. 1. For a discussion of cases of force majeure and hardship related to the collapse of East Germany, see Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 665-69 (1992).

109. See Veytia, *supra* note 41, at 1205-06.

110. UNIDROIT PRINCIPLES, *supra* note 4, art. 6.2.2(b).

111. See *supra* text accompanying note 63.

112. See UNIDROIT PRINCIPLES, *supra* note 4, art. 6.2.2 illus. 2.

113. See *id.*

114. *Id.*

115. See *id.* art. 6.2.2 illus. 3.

month later the currency depreciated by 80% in the aftermath of a political crisis.<sup>116</sup> If other circumstances do not dictate a contrary result, this constitutes legally relevant hardship.<sup>117</sup>

*“The events are beyond the control  
of the disadvantaged party. . . .”*<sup>118</sup>

The Principles give no illustration of this subdivision. I will construct a hypothetical. A middleman contracts to deliver goods in the future that he does not have and has no contract with a supplier for the acquisition of them. He could immediately contract for the goods from a manufacturer at a price that would make the resale profitable. Instead, speculating that the manufacturer will lower its price, the middleman takes no action to secure the goods. Because of changing market conditions, the manufacturer raise its prices dramatically. The middleman can only fulfill its contract at a considerable loss. Hardship cannot be invoked, because the reseller could have avoided the loss by promptly entering into a contract with the manufacturer.

*“The risk of the events was not assumed  
by the disadvantaged party.”*<sup>119</sup>

The contract may expressly allocate the risk of supervening hardship, in which case the contract itself supersedes the rules of hardship in the Principles. However, it is clear from the nature of the hardship doctrine, that, unlike American law,<sup>120</sup> the mere fact that the contract contains a fixed price does not allocate that risk. The allocation must be express, or be inherent in the nature of the contract. Thus, if the contract is aleatory, such as a contract of insurance, the obligor cannot complain that the risk has occurred, even though the occurrence far exceeded what had been foreseen. Thus, if an insurer writes a policy covering the risks of war and civil insurrection, it must honor the policy even if war and civil insurrection breaks out in three countries in the same region.<sup>121</sup>

The Principles allow the parties broad autonomy to determine the terms of their relationship. The grounds for invoking hardship may be

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116. *See id.*

117. *See id.*

118. *Id.* art. 6.2.2(c).

119. *Id.* art. 6.2.2(d).

120. *See, e.g.,* Northern Ind. Pub. Serv. Co. v. Carbon County Coal Co., 799 F.2d 265, 275 (7th Cir. 1986).

121. *See* UNIDROIT PRINCIPLES, *supra* note 4, art. 6.2.2 illus. 4.

broadened or reined in by the terms of the contract.<sup>122</sup> Indeed, as the chairman of the working group that drafted the Principles has noted, “parties are expected to specify in more detail . . . the contingencies which justify invoking hardship and force majeure, not the least because the consequences deriving from them are fundamentally different.”<sup>123</sup>

#### *E. The Effects of Hardship*

If performance has become excessively onerous, the party so burdened is entitled to request negotiations to adapt the contract to the changed circumstances.<sup>124</sup> The request should be made without “undue delay,”<sup>125</sup> but a delayed request is not automatically excluded.<sup>126</sup> Again, the Principles stress communication, therefore, it is important that the request state the grounds for the request, unless those grounds are obvious.<sup>127</sup> If the hardship claim is justified, the other party is obligated to negotiate in good faith to adapt the contract to alleviate the burden. “[A] party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.”<sup>128</sup> In the event the parties do not reach agreement, either party may apply to the court.<sup>129</sup>

An important question is whether the party who claims hardship may suspend performance until the contract is modified by agreement or by the court. The black letter text states that “[t]he request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.”<sup>130</sup> The commentary is consistent with the text in stating that suspension of performance is permissible “only in extraordinary circumstances.”<sup>131</sup> However, the illustration consists of an ordinary kind of hardship in a construction case.<sup>132</sup> New safety regulations require the

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122. *See id.* art. 6.2.2 cmt. 7.

123. BONELL, INTERNATIONAL RESTATEMENT, *supra* note 23, at 119.

124. *See* UNIDROIT PRINCIPLES, *supra* note 4, art. 6.2.3(1).

125. *Id.*

126. *See id.* cmt. 2.

127. *See id.* cmt. 3.

128. *Id.* art. 2.15(2); *see also id.* arts. 1.7 (general duty of good faith) & 5.3 (duty of cooperation).

129. *See id.* art. 6.2.3(3). Of course, by agreement of the parties expressed in the original contract or at the time of the alleged hardship, the matter may be taken to arbitration. *See generally* INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ARBITRATION AND RELATED SERVICES OFFERED BY THE INTERNATIONAL CHAMBER OF COMMERCE—CENTRE FOR TECHNICAL EXPERTISE—ADAPTATION OF CONTRACTS—CONCILIATION (1983).

130. UNIDROIT PRINCIPLES, *supra* note 4, art. 6.2.3.

131. *Id.* cmt. 4.

132. *See id.* cmt. 4, illus. 4.

installation of additional equipment.<sup>133</sup> The illustration indicates that the contractor may “withhold the delivery of the additional apparatus, for so long as the corresponding price adaptation is not agreed.”<sup>134</sup> Assuming, absent the hardship defense, the contractor is obligated to install the apparatus, the circumstances do not seem very “extraordinary.”

If the court finds that legally redressable hardship exists, it can terminate the contract, or revise it to restore the equilibrium of the contract.<sup>135</sup> The commentary indicates that the court has great flexibility in its power to terminate or revise.<sup>136</sup> The termination may be on such terms as the court deems just.<sup>137</sup> It should be noted that in many cases, the reliance interest of the party not burdened by hardship ought to be redressed. Revision need not always be a price adjustment. An illustration suggests that the place of delivery could be changed.<sup>138</sup> Of course, there is a strong possibility that a court will refuse to revise the contract by a declaration that the contract be performed as originally agreed.

#### F. Common Law Comparisons

Compelled renegotiation and judicial reformation of the bargain are not in the mainstream of the Common Law.<sup>139</sup> One case of reformation<sup>140</sup> and one case of compelled renegotiation<sup>141</sup> have been the raw materials for serious scholarly urging of more of the same.<sup>142</sup> In a well-argued article, Professor Speidel has concluded that when a long-term supply contract is disrupted by changed conditions, “[a]t a

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133. *See id.*

134. *Id.*

135. *See id.* art. 6.2.3(4).

136. *See id.* art. 6.2.3(4) cmt.7.

137. *See id.*

138. *Id.* art. 6.2.3 cmt. 7, illus. 5. An American lawyer would most likely see this illustration as a case of impossibility caused by supervening legal prohibition.

139. The U.S. government has intervened to pressure financial institutions to revise loan contracts with foreign governments. *See* Philip J. Power, *Sovereign Debt: The Rise of the Secondary Market and its Implications for Future Restructuring*, 64 FORDHAM L. REV. 2701 (1996).

140. *Aluminum Co. of Am. v. Essex Group, Inc.*, 449 F. Supp. 53 (W.D. Pa. 1980).

141. *In re Westinghouse Elec. Corp. Uranium Contracts Litigation*, 517 F. Supp. 440 (E.D. Va. 1981), further proceedings 597 F. Supp. 1456 (E.D. Va. 1984), *aff'd in part, rev'd in part*, 826 F.2d 239 (4th Cir. 1987), *cert. denied*, 485 U.S. 102 (1988).

142. *See generally* Richard M. Buxbaum, *Modification and Adaptation of Contracts: American Legal Developments*, in ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 31 (Norbert Horn ed., 1985) [hereinafter ADAPTATION AND RENEGOTIATION]; Richard Speidel, *Court-Imposed Price Adjustments Under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1981).

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."<sup>143</sup> His conclusion approximates the law in countries such as Argentina,<sup>144</sup> Germany and Italy,<sup>145</sup> and the provisions of the Principles. Professor Spiedel's solution does not receive a great deal of support from American case law or scholarly literature.<sup>146</sup> One reason for the difference between the common law and the modern civil law approach is that the leading common law countries have not suffered from the unmanageable inflation that has ravaged much of the civil law world, but American law should realize that international trade is different from domestic trade and the modern civil law solution formulated in the Principles deserves respect. It should also be noted that there is a trend beyond the UNIDROIT Principles to the effect that excessive hardship is a ground for relief. The Commission on European Contract Law has formulated a rule that is basically the same as UNIDROIT's.<sup>147</sup> In England, perhaps the staunchest bastion of *pacta sunt servanda*, the Law Commission's proposed "Contract Code,"<sup>148</sup> contains a comparable

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143. Speidel, *supra* note 142, at 404-05.

144. See Haracio A. Grigera Naón, *Adaptation of Contracts: An Argentine Substantive and Private International Law Outlook*, in ADAPTATION AND RENEGOTIATION, *supra* note 142, at 55, 58 (describing the doctrine of *imprévision*).

If an unforeseen and extraordinary change of circumstances takes place such that the performance of a party's obligations becomes excessively burdensome, such party may sue to obtain the contract's termination. The other party thus sued may try to avoid such a termination by offering at his expense an adequate economic improvement of the obligations; however, it shall be up to the judge to finally decide the issue.

*Id.*

145. See Norbert Horn, *Changes in Circumstances and the Revision of Contracts in Some European Laws and in International Law*, in ADAPTATION AND RENEGOTIATION, *supra* note 142, at 15, 22-23.

146. One leading American scholar favors adaptation under carefully circumscribed circumstances. See generally Robert A. Hillman, *Court Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1967 DUKE L.J. 1. Another commentator finds the UNIDROIT Principles on hardship to be a "significant advance." See Barton S. Selden, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, 2 ANN. SURVEY OF INT'L & COMP. L. 111, 123 (1995).

147. See COMMISSION ON EUROPEAN CONTRACT LAW, PRINCIPLES OF EUROPEAN CONTRACT LAW art. 2.1117 (Ole Lando & Hugh Beale eds., 1995).

148. See HARVEY MCGREGOR, CONTRACT CODE DRAWN UP ON BEHALF OF THE ENGLISH LAW COMMISSION (1993).

provision.<sup>149</sup> Should we doubt that these documents show the direction of the law of the next century?

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149. Circumstances have radically changed where it would be unfair for one contracting party to require the other to perform; and in determining whether it would be unfair, account shall be taken of whether one contracting party has made a reasonable offer to modify the terms of the contract in the light of the changed circumstances and of the other party's response to that offer. *See id.* § 595.