HARDSHIP PROVISIONS & HARDSHIP CLAUSES
IN INTERNATIONAL BUSINESS CONTRACTS

A paper co-authored by the members of the
EUROJURIS INTERNATIONAL CONTRACTS & LITIGATION Group

July 2016

As an introduction, it seems interesting to remind the reader of the definition of force majeure" and of the difference between force majeure and hardship.

Force majeure is an unforeseeable event which prevents a party from fulfilling its contractual obligations or fulfill them on time and excuses such non-performance or delay.

Hardship refers to a change in economic circumstances which prevents no party from fulfilling its contractual obligations, but makes performance of the whole contract much less profitable for this party – or even costly for this party, with the latter actually losing money because of the contract.

The new French contract law which will come into force on 1 October 2016. This reform gives our EUROJURIS INTERNATIONAL CONTRACTS & LITIGATION Group members the opportunity to share their experience and update their expertise in this field.

New Art. 1195 of the French Civil code provides for the following definition:

> *"If, due to a change of circumstances which couldn't have been foreseen upon conclusion of the contract, performance becomes excessively costly for a party which didn't accept to bear the related risk, then this party may request its contracting party to re-negotiate the contract. The requesting party shall keep performing its obligations throughout this new round of negotiations.*
>
> *If the requested party refuses to renegotiate the contract or if the parties fail to reach a new agreement, then they may either jointly decide to terminate the contract on mutually acceptable effective date and conditions, or request the judge, by mutual agreement, to adapt the contract. If no agreement is reached within a reasonable period, the judge may, if so requested by either party, revise the contract or declare contract termination and set the effective date and conditions for such termination."*

Under French law, this provision is not of public order, but it is a default provision, which means that it will apply if the parties don't decide to exclude it.

We find similar provisions in other national laws:

- In **Italy**, the parties may insert a clause defining the circumstances of hardship and, more specifically, what a change in economic circumstances could be.

- In **England and Wales**, it is possible to provide for a change in circumstances, which could not have been foreseen and, if those circumstances apply, then the party providing

the goods or services is excused from performing the contract.

There is little distinction in practice between force majeure, which applies automatically in appropriate cases, and providing for a hardship clause in the contract. The hardship clause simply makes the position clearer and spells out in advance what will happen if an unforeseeable situation arises.

- Art. 353^1 of the **Polish** Civil code introduces contractual freedom regarding all actions taken by the parties, which are allowed to modify the relationships between them as long as the contractual provisions are not against the nature of the contractual relationship, legislation, and the principle of social coexistence. That is why the parties are allowed to introduce a hardship clause in their contract in accordance with the above-mentioned conditions.

- **Belgian** case-law allows hardship clauses. However, when such a clause is not provided for in a contract, the judge cannot change the obligations of the contractors in the event of changed circumstances, which makes it more difficult (but not impossible) for the debtor to achieve the result to which he has committed himself.

- **Dutch** law includes a provision on unforeseeable events (art. 6.258 DCC) and on force majeure, but these rules have a very limited effect because they are construed in a narrow manner.

- Under **German law**, it is possible to include a hardship clause in the contract, but subject to close control. Furthermore, the parties to a contract for the performance of a continuing obligation can under Section 3.1.3 BGB demand alteration or termination of the contract if facts that were relevant for the basic concept of a contract have changed significantly since the contract was entered into. This also includes force majeure events such as a change in economic, political or social conditions and circumstances.

- **Mexican** law provides that, if no agreement is reached by the parties, the affected party may claim before a court of law that compensation should be adjusted in proportion to the hardship event. The Judge will rule after hearing the arguments of both parties. However, the right to terminate the agreement by any of the parties relying on the hardship clause may be challenged by the other party, which may set ground for litigation.

- In the **USA** (New Jersey), in theory, hardship clauses are acceptable. However, from a practical standpoint, it is difficult to establish the hardship if the triggering event is too vague, for example “excessively onerous”; technical, business, financial or legal changes. So force majeure, combined with the requirement to first settle or renegotiate in the event of any dispute or disagreement largely accomplish what a hardship clause could have provided.

- Hardship clauses are widespread contractual practice, and even highly recommended, in **Japan**.

How to draft a hardship clause?

Even if we can refer to some standard form, which you can find in the UNIDROIT principles, ICC rules, CMAP rules, or in the European Principle – Definition and model rules of European private law (DCFR or Lando), it is highly recommended to be more accurate in the definition of the hardship events and how they will trigger the clause.

It is worth being highly specific in the change in certain circumstances.

One can include a list of change in circumstances; this list can be limitative or not, but should state out clearly whether it is important to define legal circumstances, change of law, or political, financial, personal (*intuitu personae*), or technological change, and what kind of event could trigger the clause.

If hardship is excluded from the contract, the drafter must ensure it doesn't create any imbalance between the parties which should be contrary to the applicable law.

Defining the consequences of the hardship clause is important as well:

- renegotiation or not?
- intervention of the Judge? Can he/she change the rules?
- state courts or arbitration?

All these examples show that the parties should be careful to write this clause as accurately as possible.

AS A CONCLUSION:

Hardship clauses are common in most national legal frameworks.
The drafter must decide if it applies to the seller only, which in most cases bears the risk related to the cost of the products, or to the buyer as well, which could have interest to maintain good relationships with the seller.

In any case, it is crucial to include a list of all events which would trigger the clause, and to formally document almost all scenarios to limit the Judge's scope of action (regardless of whether State courts or arbitration courts have jurisdiction).

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