Title:
Brunner, Christoph, Force Majeure and Hardship under General Contract Principles - Exemption for Non-Performance in International Arbitration, 2009

Table of Contents:
Chapter 4
Force Majeure Excuse
§ 7 THE FORCE MAJEURE EXCUSE AS A GENERAL PRINCIPLE OF LAW
I SALIENT FEATURES OF THE FORCE MAJEURE EXCUSE UNDER GENERAL CONTRACT PRINCIPLES
Chapter 5
Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract
§ 11 HARDSHIP AS A GENERAL PRINCIPLE OF LAW
I SALIENT FEATURES OF THE ‘HARDSHIP’ DEFENCE UNDER GENERAL CONTRACT PRINCIPLES
A Introduction

Content:

Chapter 4

Force Majeure Excuse

§ 7 THE FORCE MAJEURE EXCUSE AS A GENERAL PRINCIPLE OF LAW

I SALIENT FEATURES OF THE FORCE MAJEURE EXCUSE UNDER GENERAL CONTRACT PRINCIPLES

Under general contract principles, the unitary concept of non-performance is matched by an equally unitary concept of defence arising from an impediment to performance beyond the obligor's control for which the obligor did not assume the risk of its occurrence ('force majeure' excuse or exemption). The excuse may be found in substantially similar terms in Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG), Article 7.1.7 of the UNIDROIT Principles of International Commercial Contracts (UPICC) and Article 8:108 of the Principles of European Contract Law (PECL), as well as in model contract clauses such as the International Chamber of Commerce (ICC) Force Majeure Clause 2003. The UPICC also use the term 'force majeure' as the title of Article 7.1.7, on the ground that 'it is widely known in international trade practice, as confirmed by the inclusion in many international contracts of so-called "force majeure" clauses'. The excuse reads in the wording used by Article 7.1.7(1) UPICC (which is basically identical to Article 79(1) CISG) as follows:

Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it 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.

Since under general principles of liability for non-performance such non-performance does not require a fault of the non-performing party, the force majeure excuse is equally not defined as 'absence of fault', but rather, uses other criteria. The main thrust of the test is that the impediment hindering performance must be beyond the control of the non-performing party and that the non-performing party has not explicitly or implicitly assumed the risk of its occurrence. The requirement that the risk of the impediment must not have been assumed by the obligor is not explicitly stated in Article 79 CISG, Article 7.1.7 UPICC or Article 8:108 PECL, but is generally recognized. Where the non-performing party has guaranteed a certain performance or otherwise assumed the risk of the occurrence of a certain impediment, it will be liable even though it is not at fault, i.e., where it has used its best efforts to achieve the promised result. Thus, while absence of fault is not a relevant criterion for excuse, the existence of fault with regard to the occurrence of an
impediment excludes the application of the exemption. In the case of faulty behaviour by the non-performing party, the impediment is not beyond that party's control, or the impediment may have been reasonably foreseeable, avoidable or superable.\(^{381}\)

Corresponding to the unitary concept of non-performance which does not distinguish between different types of failure to perform such as delay, defective performance or partial or complete impossibility of performance, the force majeure excuse may be applicable to all types of non-performance. It may thus apply to any obligation arising out of the contract, including obligations to pay money\(^{382}\) or obligations of restitution resulting from the termination of the contract.\(^{383}\) In practice, the excuse is most frequently invoked in cases of late performance and complete non-performance.\(^{384}\) It also applies to the delivery of non-conforming goods, but such cases are rare.\(^{385}\) Defects in goods manufactured by the seller are, as a rule, the seller's responsibility. Where the seller bears the procurement risk, as in the case of a sale of generic goods which are available on the market, that risk will usually extend to a strict obligation that the seller will procure and deliver goods free of defects. Furthermore, the scope of the force majeure exemption also extends to situations of economic impossibility, impracticability, unaffordability or hardship. Yet, in those situations, the specific legal consequences of the hardship concept will usually prevail, that is, the obligor will then not simply be released from its performance obligation and damages, but the court or arbitral tribunal will have the power to adapt the contract or terminate it on terms to be fixed.\(^{386}\)

[...]

Chapter 5

Hardship (Change of Circumstances): Fundamental Change of the Equilibrium of the Contract

§ 11 HARDSHIP AS A GENERAL PRINCIPLE OF LAW

I SALIENT FEATURES OF THE 'HARDSHIP' DEFENCE UNDER GENERAL CONTRACT PRINCIPLES

A Introduction

Events such as the breakdown of economic systems or other economic disasters, political tensions or upheavals, wartimes or exceptional weather conditions can considerably change the settings under which the parties had calculated their risks, costs and benefits under their contract. Such unforeseen supervening circumstances can distort the balance of performance and counter-performance, as well as their respective values, and thus fundamentally alter the equilibrium of the contract. The question which arises is which party should bear the risk of such a change of circumstances and to what extent. It is generally acknowledged that the question is to be determined by weighing the fundamental principle of sanctity of contracts (\textit{pacta sunt servanda}) against the equally fundamental principle of good faith. On the one hand, the principle of sanctity of contracts suggests that the parties remain bound to the terms of their agreement as long as performance of their respective obligations is still (physically) 'possible'. On the other hand, performance obligations are subject to the 'overriding' principle of good faith.\(^{1962}\) The principle of good faith might be violated by requiring performance of the contract according to its original terms, even when the performances have become excessively burdensome for one side and/or grossly disproportional.\(^{1963}\)

There are basically three different ways of how the above \textit{two principles may be balanced} against each other and how the
risk allocation may be made:

(1) The law may hold the obligor to its obligation despite a subsequent change in circumstances. Courts will choose this solution if performance of the contract has not become sufficiently onerous or where the applicable law, as is traditionally the case in France (for civil, but not administrative law courts), strictly adheres to the principle of *pacta sunt servanda*.

(2) The law may provide for the obligor's exemption due to a change in circumstances and allow for the termination of the contract. Depending on the circumstances, such release may, however, be inequitable inasmuch as it shifts the aggrievement to the other party.

(3) The economic risk of changed circumstances may be apportioned between the parties. This is achieved by conferring the power to adapt (reform) the contract with a view to restoring its equilibrium on courts. Adaptation is generally a less stringent legal consequence than termination of the contract (on terms to be fixed), which is also a possible consequence.

The UNIDROIT Principles of International Commercial Contracts/Principles of European Contract Law (UPICCC/PECL) generally follow the third approach. If hardship is found to exist, the disadvantaged party is entitled to request renegotiations. Upon failure to reach an amicable agreement, the legal consequence is the ‘adaptation’ of the contract in a broad sense. Such an ‘adaptation’ may involve an adaptation or reformation of the contract (in the narrow sense), with the aim of restoring its equilibrium (e.g., a price adaptation or an amendment of other contractual clauses). The adaptation will not necessarily fully reflect the loss sustained by the aggrieved party due to the change in circumstances, since the extent to which that party must bear the relevant risk will have to be taken into account. The contract adaptation in a broad sense may, alternatively, result in an early termination of the contract.1964

The hardship exemption may be considered as a particular group of cases under the force majeure excuse, in which the impediment to performance consists in a change of circumstances resulting in hardship, and there are more flexible legal consequences. The basic requirements of the two exemptions are the same.1965 The key issue of risk allocation is also first of all to be considered in the light of the parties’ explicit or implicit intention, i.e., on the basis of contract interpretation. The main objective inquiry is whether the equilibrium of the contract has been fundamentally altered (required threshold test of the hardship exemption). The hardship exemption is therefore not only based on the central inquiry of whether,

but also of ‘how much risk the disadvantaged party assumed’.1966 In hardship situations, it is typically a question of degree as to whether performance of the contract has become excessively onerous, and whether it is still reasonable to have the obligor (exclusively) carry the risk of changed circumstances. If compared to ‘actual’ force majeure cases, the issue of risk allocation in hardship situations requires a value judgment to a somewhat larger extent as to why the risk of the aggrievement should not be left with the party concerned (exception to the principle that the loss lies where it falls).1967 As for the force majeure defence, the outlines of the hardship exemption are also mainly determined by distinctive groups of cases.1968

In some legal systems (especially in US and German law), the relevant doctrine dealing with hardship is based on the inquiry whether the non-occurrence of the circumstance was a ‘basic assumption on which the contract was made’.1969 However, this language has been described as a ‘somewhat complicated way of putting [the] question of how much risk the promisor assumed’.1970 Under the German doctrine of interference with the basis of the contract embodied in § 313 German Civil Code (BGB), in cases of equivalency distortion or frustration of purpose, the parties' mutually shared assumptions (‘*subjektive Geschäftsgrundlage*’1971) are hardly relevant.1972 The risk allocation is mainly made in light of objective criteria such as the magnitude of the equivalency distortion or the (objective) interpretation of the contract, including its purpose according to the principle of good faith. Yet as seen above, specifically determined assumptions may have an impact on the allocation of risk of changed circumstances, and warrant the application of a somewhat lower standard alteration threshold of the hardship exemption.1973

The legal basis for the hardship exemption is widely considered to lie in the *principle of good faith*.1974 If a change of circumstances results in an excessive disproportion between performance and counter-performance, the insistence of a party on the performance by the aggrieved party strictly in accordance with the terms of the contract may be contrary to the principle of good faith and amount to an abuse of right, always provided that the risk of the change in circumstances
has not been assumed by the aggrieved party.\textsuperscript{1975}

Conceptually, the problem of change of circumstances may also be understood as an issue of (constructive) contract interpretation.\textsuperscript{1976} The interpretation or gapfilling process has again to be conducted in light of the principle of good faith and all relevant circumstances. As noted above, the question as to whether the disadvantaged party should be held to bear the risk of the changed circumstances by its own or not is primarily to be assessed by way of contract interpretation. However, as it is usually not ascertainable how the parties would actually have dealt with the point at issue if, during the contractual negotiations, some third party had drawn their attention to it, it is thus generally necessary to adopt an objective approach.\textsuperscript{1977} As put by ZWEIGERT \& KÖTZ:\textsuperscript{1978}

The aim is to find out what the relevant commercial interests would regard as the normal and appropriate allocation of risks in contracts of the type in questions (correctly so held in BGHZ 74, 370). The provision on release from liability in Art. 79 CISG rests on this view, (...). The contract is the law adopted by the parties, and it is the contract which the judge must use as a starting-point for his deliberations; if it has a gap, he must fill it in accordance with the standards developed by reputable commercial men for contracts of that type. No doubt this investigation leaves the judge a great deal of room for play, but it remains true that he must take functional and equitable considerations into account only to the extent necessary for the performance of his proper task, namely the discovery of the allocation of risks typical of contracts of the same type.

While the legal basis of the hardship/change of circumstances doctrine can thus be seen in the principle of good faith and the courts' power to fill gaps in the contract by supplying an omitted term, it should be emphasized that hardship is a legal doctrine of its own with its own requirements. It is not equivalent to the general concept of implied terms (supplying an omitted term\textsuperscript{1979}). Indeed, in the absence of hardship, an adaptation or termination clause regarding future events can normally not be implied. The relationship and delimitation between the concepts of implied terms and hardship is further discussed below.\textsuperscript{1980}

\textsuperscript{379}Comment No. 1 on Art. 7.1.7 UPICC.

\textsuperscript{380}See UNCITRAL Digest (2004), Art. 79 para. 6; Zweigert/Kötz at 514: '[The test of Art. 79 CISG] depends on the allocation of risks explicitly agreed on by the parties or inferable from the contract properly construed. The test adopted is one which all legal systems treat as crucial, whether they say so or not, and this explains why the results of decided cases are so often alike.' See also infra p. 112.

\textsuperscript{381}See also supra 70 at n. 358.

\textsuperscript{382}During the drafting process of the CISG, a proposal that the buyer’s obligation to pay the price should be an absolute obligation to achieve a specific result for which no exemption was possible was rejected, on the grounds that exempting impediments such as the outbreak of war or the adoption of exchange control regulations were conceivable (Stoll, in Schlechtriem (1998), Art. 79 CISG para. 13). For impediments concerning money obligations in general, see infra p. 170.

\textsuperscript{383}See Magnus, in Staudinger, Art. 79 CISG para. 11; Stoll/Gruber, in Schlechtriem/Schwenzer, Art. 79 CISG para. 5.

\textsuperscript{384}Cf. Comment No. 1 on the 1985 ICC Force Majeure Clause.

\textsuperscript{385}See infra pp. 189 ff.

\textsuperscript{386}See infra pp. 213 ff.

\textsuperscript{387}See Jones/Schlechtriem, para. 216 (p. 135); see also generally Nassar, 3 ff.

\textsuperscript{388}Jones/Schlechtriem, id.

\textsuperscript{389}For the legal consequences of hardship, see infra pp. 479 ff.

\textsuperscript{390}See infra pp. 397 ff.

\textsuperscript{391}Judge Henry Friendly in United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966) for the doctrine of impracticability under U.S.-American law (supra 96 at n. 497). This statement is also accurate under general contract principles.

\textsuperscript{392}Cf. (for German law) Roth, in Münchener Kommentar, § 313 BGB para. 22.

\textsuperscript{393}Id., at para. 19.

\textsuperscript{394}For U.S.-American law see § 2-615(b) UCC; § 261 Restatement (2d) of Contracts (1981). In English law, the foundation of the contract is also invoked as one possible theoretical basis of the doctrine of frustration (Treitel,
Frustration and Force Majeure, para. 16-010). For German law see § 313(1) BGB, stating as follows: 'If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, (...).' In Italy, the German doctrine of 'Wegfall der Geschäftsgrundlage' was also adopted under the designation 'teoria della presupposizione' even before the entry into force of the Italian Civil Code of 1942. Art. 1467 of this Code deals with the case of 'eccessiva onerosità sopravvenuta' (see Baumann, in Zürcher Kommentar, Art. 2 ZGB para. 471). See also Art. 62 of the Vienna Convention on the Law of Treaties of 1969 (Fundamental change of circumstances), infra p. 412 at n. 2070.

Judge Henry Friendly, supra n. 1965.

See infra p. 405 at n. 2030.

See Heinrichs, in Palandt, § 313 BGB para. 7; Roth, in Münchener Kommentar, § 313 BGB para. 50.

See supra pp. 239 ff.; infra p. 432.

For a comparative law analysis see Abas (1993); for German law see Roth, in Münchener Kommentar, § 313 BGB para. 17 ff.; Zimmermann, in Saggi, Conferenze e seminari 48 (2002), 13 ('The rules on change of circumstances have, under the old law, been worked out and generally recognized under the auspices of the general good faith rule of § 242 BGB and they have thus constituted one of the most famous examples of a judge-made legal doctrine; they have now found their statutory home in § 313 BGB'); for Swiss law see Bischoff (Diss. Zürich, 1983); Burkhardt (1996); Merz, in Berner Kommentar, Art. 2 ZGB paras 188 ff.; Baumann, in Zürcher Kommentar, Art. 2 ZGB paras 444 ff.; Wiegand, in Basler Kommentar, Art. 18 CO para. 95 ff.

For Swiss law see BGE 97 II 390, 398 (1971); for German law see BGH 25.05.1977, NJW (1977) 2262, 2263 ('to maintain the original contract would produce intolerable results incompatible with law and justice'); see also BGH 13.11.1975, NJW (1976): 565, 566; Schmidt, in Staudinger (13th ed. 1995), § 242 BGB para. 838 and references there. For Dutch law see Art. 6:258(1) NBW ("... the judge may modify the effects of a contract, or he may set it aside (…) on the basis of unforeseen circumstances which are of such a nature that the contracting party, according to criteria of reasonableness and equity, may not expect that the contract be maintained in an unmodified form"). This provision was already 'applied' by the Dutch courts under the former Code's good faith rule before the new provision came into force in 1992 (Lando/Beale, Note No. 1 on Art. 6:111 PECL [at p. 328]). Under the English frustration of contract doctrine, the prevailing test is - at least in abstract terms - quite similarly stated as follows: 'If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken?' (McKendrick, in Chitty on Contracts, para. 24-012; supra p. 90).

For comparative law see Zweigert/Kötz, 535-36; cf. also Nassar, 171 ff.; for English law see Treitel, Frustration and Force Majeure, para. 16-007 (implied term theory in its objective sense); for Swiss law see, e.g., Kramer, in Berner Kommentar, Art. 18 CO paras 274 ff.; Jäggi/Gauch, in Zürcher Kommentar, Art. 18 CO para. 572; Wiegand, in Basler Kommentar, Art. 18 CO para. 98. Under German law it has been stated that the borderline between constructive contract interpretation and § 313 BGB governing hardship is fluent, and that the issue of delimitation may be left open if the results of adaptation are - as is usually the case - the same under § 313 and § 157 BGB (Heinrichs, in Palandt, § 313 BGB para. 6). But see Restatement (2d) of Contracts, Introductory Note to Ch. 11 (Impracticability of Performance and Frustration of Purpose): 'The rationale behind the doctrines of impracticability and frustration is sometimes said to be that there is an "implied term" of the contract that such extraordinary circumstances will not occur. This Restatement rejects this analysis in favor of that of Uniform Commercial Code § 2-615, under which the central inquiry is whether the non-occurrence of the circumstance was a "basic assumption on which the contract was made."'

See also the comments made by English legal commentators regarding the implied term test above text p. 89 at 453 and Treitel, Frustration and Force Majeure, para. 16-007 ("This theory [the implied term theory] would clearly be untenable if it were interpreted in a purely subjective sense, i.e., as giving effect to the actual intentions of the parties."). In other words, not the actual but the reasonable hypothetical intention of the parties may have to be determined, that is, the intention that reasonable persons of the same kind as the parties would have had in the same circumstances (see Art. 8(2) CISG). Yet to be sure, in the absence of specific indications as to the parties' reasonable intentions, the role of the parties' intentions disappears and is replaced by purely objective criteria, i.e., the individual requirements of the hardship exemption (cf. also Treitel, id., at paras 16-007, 16-013"ff.). As nicely put by Lord Radcliffe in Davis Contractors ([1956] A.C. 696, 728): 'By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.'

At pp. 353-36. See Art. 4.8 UICC; Art. 6:102 PECL.

At pp. 421 ff.

Referring Principles: