2 What is Hardship?

2.1 Terminology

Whereas *force majeure* is now considered as an adequate way to designate the complete impossibility situation (even in the English language: see Article 7.1.7. *Unidroit Principles*), there is no generally admitted term in the various European legal system for the hardship situation. This leads to much confusion. In the leading system in this matter, German Law, hardship is referred to as the *Wegfall der Geschäftsgrundlage*, that is to say the disappearance of the basis of the contract. It is the justification of the rule which is used to describe it. In French law, the normal term is imprévision or, to expand the formula, révision pour imprévision: it is the unforeseen character of the event which is stressed. The Italian code speaks of excessive onerosity, that is the effect on the performing party. For *PECL*, it is change of circumstances. *Unidroit Principles* use hardship, both in the English and the French versions (as it also uses *force majeure* in both). Yet the word hardship has no legal meaning in England. The term is mostly used for hardship clauses. It only suggests that performance is ‘harder’. No such word appears in Treitel’s Contract and in Beale, Bishop and Furmston’s Case Book, the expression ‘relief in the case of hardship’ appears in the chapter Discharge by Frustration. But what is the difference between hardship and frustration (or frustration of the purpose, of the venture ....)? And to make things worse, the Americans use the term impracticability. There is a paradox here: the English language, which appears to be the new *lingua franca* for Contract law, has no appropriate word, perhaps because it does not really know the notion.

2.2 A Unique Notion?

Through the centuries, *force majeure* has acquired a coherent aspect, both as to its conditions of existence (with more or less rigour) and its effect: it is *tout ou rien*. Either the obligor is liberated or he has to perform as promised. As Lando wrote, ‘there is a need for a more lenient rule’, when performance is still possible. But there is no general consensus on what this rule should be. A comparative survey shows a variety of solutions. First, the more radical: the contract must be performed, however onerous the performance may be, unless there is *force majeure*. This is the French solution for private (as opposed to administrative) contracts. This strict application of the *force obligatoire du contrat* is of course an incentive for the parties to introduce adequate clauses in their contract: indexation clauses, hardship clauses, or even just a duty to renegotiate the contract. This duty may be considered as imposed by the general obligation of good faith, which is to be found in many systems or even the rarer duty to collaborate, as defined by Article I. 201 *PECL*. But if negotiation fails, the contract stands. As we shall see, renegotiation is a useful preliminary step to a more radical solution. By itself, it is insufficient, even if the party who refuses to negotiate or breaks the negotiation abusively may be liable in damages. Then we have the stranger system - to the foreign observer - of frustration. Frustration, according to Lord Radcliffe ‘occurs when the circumstances in which performance is called for is so different from that which was undertaken by the contract.’ This is not so different from the *Wegfall der Geschäftsgrundlage*, but the result is
not at all the same, for it always leads to the discharge of the contract. It is understandable that the Anglo-American doctrine has some trouble in reconciling the doctrine of frustration or impracticability with that of impossibility or force majeure. Both lead to the disappearance of the contract. The more radical solution is that of German Law; It has been elaborated by the Reichsgericht during the monetary crisis of the twenties. In case of hardship, the court may either terminate the contract or readjust it in order to allocate the unforeseen burden equitably between the parties. This solution has been adopted by many codes (Art. 388, Greek Civil Code, Art. 107 Algerian Civil Code and now by § 313 of the reformed BGB) or by case law (Switzerland, Austria). The Italian Civil Code (Art. 1467), in case of excessive onerosity, says that the judge may terminate the contract but the other party may offer an equitable indemnity in order to save the contract.

We see that apart from the duty to negotiate which may be combined with both, there are three issues: the contract stands, the contract disappears, the contract may be modified. These two last solutions are radically different. The first is a kind of enlarged force majeure, with the same result. In the second, the risk is shared between the parties. It gives the court a pouvoir modérateur in equity. So that the same word, hardship, covers two very different notions, corresponding to two different conceptions of contract and two different conceptions of the function of the judge. In my view, one should only speak of hardship when revision is possible. Same thing with imprévision. But it remains to be seen if such an institution is desirable and ought to be introduced in a European Civil Code.

6Restatement Second, Contracts, §§ 261 ff.
8See for instance the ICC brochure referred to in note 4.
10In Davis Contractors Ltd v. Farenham UDC (1956) 2 All ER 145, HL.; on the English doctrine of Frustration, Mc Kendrick, ed., Frustration and Force Majeure - Their Relationship and a Comparative Assessment, 1991. It has been suggested that the courts also have the power to adapt the contract (Zweigert & Koetz (1996), p. 550), but no example has been given and some judges - such as Lord Radcliffe - have given, obiter, an opposite opinion.

Referring Principles:

VIII.1 - Definition