Title:
VIII.1 - Hardship: Requirements

Content:
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Any event of legal, economic, technical, political, financial or similar nature

i) which is beyond the typical sphere of control of the disadvantaged party, and

ii) which occurs after the conclusion of the contract and whose effects could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract, or

iii) which existed at that time but was not known by the disadvantaged party and could not have been recognized by a reasonable person of the same kind as the disadvantaged party in the same circumstances, and

iv) which causes a fundamental alteration of the equilibrium of the contractual obligations, thereby rendering the performance of the contract excessively onerous for that party, and

v) for which the disadvantaged party did not assume, explicitly or implicitly, in the contract or otherwise, the risk of its existence or occurrence.

classifies hardship.

Commentary:
1 The Principle constitutes an exception to the fundamental Principle of sanctity of contracts ("pacta sunt servanda"). In spite its pivotal importance, that principle of sanctity of contracts is not without exceptions. The principle of hardship ("clausula rebus sic stantibus, "Wegfall der Geschäftsgrundlage","frustration of purpose") provides that the continued enforceability of a contract is always subject to the continued existence of those circumstances which prevailed at the time of contracting and which formed the basis for the parties' bargain. The pacta principle, properly understood, means the inviolability, but not the unchangeability of contracts. This understanding of the pacta principle is derived from equity and good faith ("pacta sunt servanda in bona fide"). However, since the principle of sanctity of contracts is the rule, the hardship defense is available only in exceptional circumstances. It is for this reason that subsection iii) requires a "fundamental" alteration of the economic equilibrium of the parties' contractual obligations. Such a fundamental, i.e. truly exorbitant alteration may result from an increase of the costs of performance of the party invoking the hardship defense or from a decrease in value of the performance to be rendered by the other party.

2 This hierarchy also follows from the Principle of the presumption of professional competence. In international contracts, which are usually comprehensive, detailed and all-embracing contractual frameworks, there is a presumption that absent an adaption clause in the contract, the Principle of sanctity of contracts prevails since it cannot be assumed that the parties were unaware of possible risks related to a change in the value of the parties' performance.

3 The question whether a "fundamental" alteration of the economic equilibrium of the contractual obligations of the parties has occurred cannot be determined with respect to abstract figures like an increase of costs of 100 or 200% as compared to the initial contractual cost/profit calculations. That question can only be answered against the circumstances of each individual case, including the nature of the contract, its subject matter and the conditions of the market in which that contract was concluded. In a highly volatile market with sharp and constant price fluctuations, a substantial increase in the cost of performance will be more acceptable than in markets with relatively stable price structures. It is essential for the hardship principle to apply that performance of the contract has not just become "more costly". Such increases of costs are part of commercial reality and must usually be borne by the performing party. Instead, performance must have become excessively more onerous, so that it would appear to be against good faith to force the aggrieved party to perform as initially agreed in the contract.

4 The hardship defense is not available if the party invoking the defense has, unilaterally or by agreement with the other side, assumed the risk for the events on which the hardship defense is based.