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Linklaters Global Guide: Hardship

A comparative review of the concept of hardship and its application in 18 jurisdictions

Introduction

All over the world, the binding force of contracts is a basic principle of contract law ("*pacta sunt servanda*"). In general, each party can rely on the performance of the contractual obligations undertaken by the other party. Yet, unexpected circumstances may occur after the conclusion of a contract which call this principle into question.

This comparative review considers how hardship situations are being dealt with in 18 jurisdictions around the globe. It provides an overview of the possibilities available to the aggrieved party. All the jurisdictions covered in this review have mechanisms in place to handle such situations, but allow interference with the binding nature of a contract only under restrictive conditions. Moreover, there are different ways to address hardship situations:

- Many civil law jurisdictions rely on the codification of the concept of hardship in statutory law or distinct case law which outlines the necessary requirements for invoking hardship. They provide for relief to the aggrieved party by way of renegotiation, termination and/or adjustment of the contract.
- Common law jurisdictions often take recourse to basic doctrines of contract law such as error, constructive interpretation, impossibility or impracticability of performance, *laesio enormis* or good faith to cope with fundamental und unexpected circumstances.

Even though our comparative review revealed that in many jurisdictions – especially those with a common law background – hardship cases appear to play a minor role in court, we do, as a general market trend, expect a serious rise in hardship claims in various sectors:

- Over the next few years we will, for instance, experience significant changes on the energy markets which can be attributed to substantial changes in environmental policies all over the world, e.g. the total phase-out of coal-fired power generators in various jurisdictions, the strong expansion of renewables, the redirection of investments towards sustainable technologies and industries, and the end of financing of projects concerning fossil fuels by certain investors.
- Financial crises and increased inflation may also have an impact on various agreements. They obviously affect credit and real estate agreements, but also construction contracts, where the sudden increase in construction costs (materials and workforce) may lead to claims for revaluing of contract prices set in significantly different market conditions.

Consequently, we observe that more and more companies have an interest in challenging long-term contracts. They strive to alter the underlying conditions of already concluded contracts as a reaction to the subsequent occurrence of fundamental and unexpected changes in circumstances disrupting the equivalence of performance and consideration.

This review is intended to highlight issues rather than to provide comprehensive advice. If you have any particular questions about the concept of hardship, please contact any of the authors of this guide or the Linklaters lawyers you work with.

Alexandros Chatzinerantzis and **Ben Carroll**, Partners

Law stated as at January 2020

Key themes

To compile this comparative review of the concept of hardship we asked each of the 18 jurisdictions the following questions:

- Is the concept of hardship recognised by statutory or case law?
- If so, what are the requirements for a claim based on hardship?
- What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?
- How can a hardship claim be asserted in court?
- Is there a time limitation in respect to the claim of hardship that needs to be considered?

As a result, our comparative review of the concept of hardship has highlighted a number of key themes and issues that the aggrieved party is facing when trying to invoke hardship in one of the covered jurisdictions.

Similarities

All the jurisdictions covered in our review have mechanisms in place to deal with fundamental and unexpected changes of circumstances after a contract was concluded, be it based on a codified doctrine of hardship, on mere case law or on basic principles of contract law. As a general approach in all jurisdictions, it is not an issue of unexpected circumstances if an eventuality materialises that has been reflected in the respective contract, even if the consequences may be burdensome to one party. Also, the concept of hardship refers to events that are typically beyond the specific legal responsibility of either party.

Differences

However, there are differences in the approaches and mechanisms in place, most notably between common law and civil law jurisdictions.

Some civil law jurisdictions follow a restrictive approach and focus on cases where performing contractual obligations has become excessively onerous for one party (e.g. France). Other civil law jurisdictions favour a broader notion of hardship that more generally considers situations where the "basis of the contract" has been destroyed or substantially modified (e.g. Germany, Austria). The English common law approach, on the other hand, stresses that, in hardship situations, the contract must have been "frustrated" due to unexpected circumstances. Whereas the German approach has been particularly influential in many other civil law jurisdictions, like Austria, Italy and Portugal, the English approach influenced other common law-based or common law-inspired jurisdictions, such as Hong Kong, Singapore or the United States.

Common prerequisites

Apart from the fact that approaches and mechanisms of the reviewed jurisdictions vary strongly in detail, we identified three basic prerequisites for the application of the doctrine of hardship:

i. The contract must have been affected fundamentally by a certain event.

ii. The event affecting the contract must not have been provided for in the contract or foreseen by the parties at the time of the conclusion of the contract.

iii. One party cannot be held responsible under any rule for the burden caused by the event.

These requirements can be characterised as "minimum conditions". Even though further restrictions may (and often do) apply in particular jurisdictions, these requirements must in any case be met if the contract shall be challenged.

Key themes

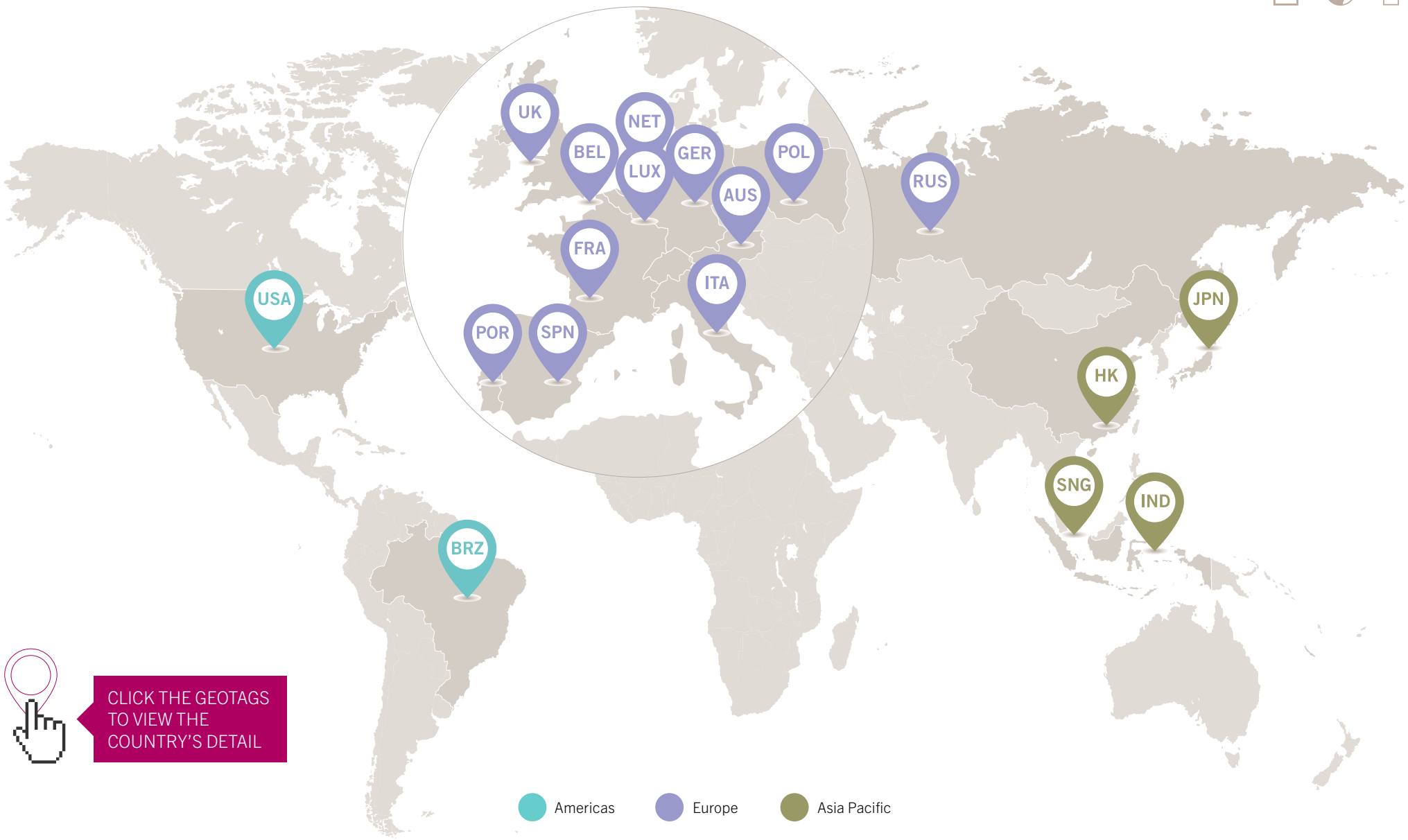
Remedies

As regards the legal remedies in case of a hardship, the remedy of termination is widely available in case of unexpected circumstances in almost all jurisdictions. However, in a large number of cases, termination does not lead to fair results as it distributes the losses arising from the unexpected event arbitrarily to one party. Consequently, a lot of jurisdictions favour the adjustment of the contract in accordance with the unexpected event.

The details of adjustment, however, involve a number of difficult issues that have not been fully resolved in many jurisdictions – e.g. the relation between termination and adjustment (is it possible to object to a request for adjustment and thereby compel termination?), the form of adjustment (only monetary compensation or interference with contractual obligations?), the extent of adjustment (to what extent do the parties have to bear the losses? Will they be equally divided?) and the technical implementation of the adjustment (must an adjustment be specifically requested by the party or can the court determine the adjustment itself?). All the methods of adjustment in the reviewed jurisdictions have in common that they leave wide discretion to the courts determining a fair allocation of risks related to the unexpected circumstances in accordance with the principle of equity. Consequently, the parties have little certainty regarding the outcome of a lawsuit.

Yet, there is another structural source of uncertainty that is particularly important in cases of hardship situations: the lack of reliable precedents in many jurisdictions and the obvious case-by-case assessment and decision of the courts. This will always leave room for diverging judgments.

The issue of legal uncertainty may be solved if the adjustment of the contract is left to a process of renegotiation between the parties. It goes without saying that, in all jurisdictions, the contract can be saved if both parties decide to renegotiate and adjust their contract to unexpected circumstances. The problem with this solution is whether and how a duty to renegotiate can be enforced. Most jurisdictions are reluctant to recognise a duty to renegotiate, because renegotiations can fail even if they are conducted in good faith. Consequently, any provisions allowing a renegotiation of the contract are complemented by rights of termination and (judicial) adjustment.



AUS BEL BRZ FRA GER HK IND ITA JPN LUX NET POL POR RUS SNG SPN UK USA

Austria

Alexandros Chatzinerantzis
Partner
Tel: +49 69 710 03 482
alexandros.chatzinerantzis@linklaters.com

Jan Suschinski
Counsel
Tel: +49 69 710 03 474
jan.suschinski@linklaters.com

Florian Kolodziej
Associate
Tel: +49 69 710 03 225
florian.kolodziej@linklaters.com

Austria

Is the concept of hardship recognised by statutory or case law?

Under Austrian law, the doctrine of hardship ("*Lehre vom Wegfall der Geschäftsgrundlage*") is regarded as the prevailing mechanism to deal with unanticipated changes in circumstances. Although not explicitly dealt with in the Austrian Civil Code (*Allgemeines Bürgerliches Gesetzbuch* – "ABGB"), the doctrine is accepted by Austrian legal scholars and courts alike.

The Austrian doctrine of hardship – in its current form dating back to the year 1934 – is the result of an analogy to multiple provisions of the ABGB, in particular Section 936 and Section 1052. It follows from the rationale of these provisions that a party is no longer bound by a contract if a condition that is typical for the specific kind of contract ceases to exist.

If so, what are the elements and specific requirements for a claim based on hardship?

When the contractual basis ceases to exist, a disruption of the equivalence of contractual performance and consideration can occur making it unreasonable for one of the parties to perform the original contract without any changes.

Basis of the contract

According to the definition applied by the Austrian Supreme Court (*Oberster Gerichtshof* – "*OGH*"), the "basis of a contract" is "*the common idea of all parties to the contract regarding the existence or occurrence of certain circumstances which form the basis for the contractual intention of the parties and become apparent at the conclusion of the contract*" (OGH, 25 September 2014, case 9 Ob 46/14a).

When determining the basis of a contract, both objective and subjective elements are of relevance. Whereas the Austrian doctrine of hardship in its original form solely considered circumstances typically associated with a certain kind of contract (objective basis of the contract), legal scholars and courts have extended the doctrine of hardship over the years by further including the common expectations of the parties at the time of conclusion of the contract (subjective basis of the contract).

However, these expectations are only to be considered, if the parties agreed upon them, be it expressly or implicitly. Therefore, unilateral notions of one of the parties, not agreed upon by the opposing party, are not to be taken into account.

Risk allocation

The aggrieved party cannot invoke hardship, if the change in contractual circumstances originates from its own sphere of risk and responsibility, since occurrences of this kind are subject to the control of the respective party.

Apart from a few clear-cut statutory provisions in respect to the allocation of risk (e.g. Section 1168 ABGB), the respective responsibilities of the parties are subject, *inter alia*, to the contractual arrangements between the parties and, therefore, determined by the courts on a case-by-case basis.

It should be emphasised, in this regard, that a change in the law is in principle irrelevant due to its one-sided risk profile. Pursuant to the established case law of the Austrian Supreme Court, any such change has to be borne by the party whose rights it interferes with (OGH, 29 October 1997, case 7 Ob 232/97m). However, this does not apply if the parties evidently relied on the very existence of a law as the basis of a contract or if an entire contractual relationship was built upon a particular law. Insofar, Austrian judges tend to neglect aspects of risk in cases that – otherwise – justify a termination or adjustment of

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the contract in question.

Unforeseeability

To qualify as hardship, the events leading to the change in circumstances need to be unforeseeable for the aggrieved party. If, on the contrary, a change in circumstances is to be expected, it is up to the parties to take contractual precautions. Failure to do so results in bearing the risk that the foreseen change in circumstances eventually materialises.

Disruption of the contractual equivalence

Furthermore, the change of circumstances must have a substantial impact on the equivalence of contractual performance and consideration. In analogy to Section 934 ABGB, Austrian courts held that an impact on the equivalence of contractual performance and consideration of more than 50% normally constitutes a legally relevant hardship. However, depending on the particular circumstances of the individual case, a smaller impact on the contractual equivalence may be sufficient, or conversely, a more extensive one may be required for an adjustment or termination of the contract in question.

When assessing the equivalence of the contract in dispute, Austrian courts tend to run a reasonability test. The principle of equivalence is interlinked with a criterion of reasonability. If one party is facing the risk of economic ruin, an "unusual" disruption of the contractual equivalence that is generally "arbitrary in size and scope" qualifies as substantial. If, however, a party is merely facing a worsening of its economic situation, the "50% criterion" is applied as a rule of doubt. If, ultimately, the contract in question does not affect the aggrieved party's overall economic situation, the disruption of the contractual equivalence has to be so severe that virtually no consideration is obtained.

Ultima ratio

As it conflicts with the principle that contracts have to be upheld ("*pacta sunt servanda*"), a party can only rely on the doctrine of hardship as a last resort. Accordingly, a recourse is inadmissible if contractual provisions assign the risk of a specific change in circumstances to one of the parties, if dispositive law provides a set of rules to cope with the specific change, or if a complementary interpretation of the contract leads to a solution. In consequence, the doctrine of hardship presupposes the existence of a so-called "double gap" (*Doppellücke*), a gap in the law as well as in the contract.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

Under Austrian law, the doctrine of hardship entitles the aggrieved party to adjust or terminate the contract. Due to the afore-mentioned principle of "*pacta sunt servanda*", the adjustment of the contract is the primary legal consequence and takes precedence over its termination.

That being said, Austrian courts favour the termination of the contract in practice. If the basis of the contract was missing from the outset, the contract is terminated with retrospective effect (*ex tunc*); if the basis of the contract ceases to exist subsequent to the conclusion of the contract, the contract is terminated with *ex nunc* effect. The latter also applies to long-term contracts that have already reached the performance stage.

With regard to the adjustment of the contract, the hypothetical intent of the parties is of paramount importance. The aggrieved party is thus entitled to claim adjustment if both parties would have concluded the contract with a different content had they foreseen the change of circumstances ("hypothesis test" by analogy to Section 872 ABGB).

Austria

How can a hardship claim be asserted in court?

Hardship does not *ipso facto* result in the invalidity of the contract. Rather, the aggrieved party has to invoke hardship by means of legal action or plea of termination or adjustment of the contract respectively.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

With regard to the length of the limitation period, the case law of the OGH – in line with legal literature – distinguishes between initial lack and subsequent change of the contractual basis. Whereas the former cases become time-barred within three years by way of analogy to Section 1487 ABGB, the statute of limitation for the latter is 30 years pursuant to Sections 1478 et seq. ABGB.

> "[T]he aggrieved party has to invoke hardship by means of legal action or plea of termination or adjustment of the contract respectively."

Belgium

Xavier Taton
Partner
Tel: +32 2 501 94 72
xavier.taton@linklaters.com

Bénédicte Deboeck
Senior PSL
Tel: +32 2 501 93 67
benedicte.deboeck@linklaters.com

Guillaume Croisant
Associate
Tel: +32 2 501 93 45
guillaume.croisant@linklaters.com

Belgium

Is the concept of hardship recognised by statutory or case law?

Belgian courts have traditionally rejected the doctrine of hardship. Only a few decisions have applied it in the specific context of international sales contracts or via the use of related concepts. The effects of this doctrine have therefore remained very limited.

However, in the framework of an envisioned reform of the Civil Code, a bill has been submitted to the federal Parliament in order to introduce the doctrine of hardship into statutory law (Article 5.77 of the envisioned Civil Code). Following the 2019 federal elections, and in the absence of a formation of a federal Government since then, the parliamentary works on this bill have been suspended and the status of the reform is currently uncertain. The relevant provision in Article 5.77 would read as follows:

"Each party must perform its obligations even if the performance has become more onerous, either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished.

However, the debtor may ask the creditor to renegotiate the contract in order to adapt or terminate it when the following conditions are met: (1) a change in circumstances makes the performance of the contract excessively onerous so that it cannot reasonably be required to execute it; (2) this change was unforeseeable at the time the contract was entered into; (3) the change is not attributable to the debtor; (4) the debtor has not assumed that risk; and (5) the law or the contract does not exclude this possibility.

The parties continue to perform their obligations during the renegotiations.

In the event of refusal or failure of the renegotiations within a reasonable period of time, the judge may, at the request of a party, adapt the contract in order to bring it into line with what the parties would reasonably have agreed at the time of the conclusion of the contract if they had taken into account the change of circumstances, or may terminate the contract in whole or in part on a certain date and in accordance with procedures set by the judge. The action is formed and instructed in the form of a summary proceeding."

If so, what are the elements and specific requirements for a claim based on hardship?

Current regime

In the absence of a legal recognition of the doctrine of hardship as such, some courts have attempted to use related concepts to move towards an application of hardship:

- **The theory of abuse of rights.** Under this theory, parties are prohibited from exercising their rights in a manner that clearly exceeds the limits of a normal exercise by a prudent and diligent person. Some courts have used this theory to correct a contractual disequilibrium. For example, in a decision of 2014, the Court of Appeal of Ghent considered that the enforcement of a provision in a transport contract was abusive. Under the contractual provision, a textile company was required to use the services of a transport company a minimal amount of times per period. However, due to a crisis in the textile sector, it became hardly feasible for the textile company to meet this minimum set in the contract. In view of the facts of the case, the court considered that requiring a party to comply with its contractual obligation in this crisis context constituted an abuse of rights. According to this case law, refusing to modify a contract can qualify as an abuse of rights in certain circumstances.

> "[A] bill has been submitted to the federal Parliament in order to introduce the doctrine of hardship into statutory law."

Belgium

- **Force majeure.** Under the doctrine of *force majeure*, the debtor of an obligation is relieved from his obligation, when the performance is impossible due to unforeseeable circumstances not attributable to that debtor. Some courts have extended the concept of *force majeure* and considered that the performance of the contract does not have to be totally impossible to fall within its scope. In doing so, the courts therefore brought this concept closer to the one of hardship.
- **Good faith.** Several courts have admitted adjustment of a contract following a change of circumstances during its performance via the concept of good faith. However, the Belgian Supreme Court generally does not approve of this type of reasoning.

That being said, parties can insert a hardship clause in their contract. For instance, it is not unusual in the Belgian market to incorporate mathematical formulae in energy contracts to define what constitutes a hardship.

Envisaged future regime

The future regime reaffirms the basic principle of "*pacta sunt servanda*" and presents the hardship doctrine as an exception to apply only in special circumstances. The provision requires the reunion of multiple conditions: (i) a change of circumstances, (ii) unforeseeable at the conclusion of the contract, (iii) not attributable nor assumed by the debtor and (iv) rendering the contract excessively onerous. Several question marks remain relating to the interpretation of these prerequisites (e.g. what constitutes a change of circumstances? Is there any threshold triggering the application of the hardship theory? Do the circumstances have to be completely external to the debtor or can they be attributable to him to a certain extent?). There is no straightforward answer to these questions, and court decisions will probably shed some light on the new concept in the future.

In any case, the future provision in the draft bill is of supplementary nature. Therefore, parties remain free to either exclude the hardship regime or to insert a contractual hardship clause, define its conditions of application and shape the legal consequences of a change of circumstances.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

Under the proposed Article 5.77 of the Civil Code, the debtor can request from the creditor a renegotiation of the contract in order to adjust or terminate it. However, this renegotiation process is at the discretion of the creditor. If he refuses or if the renegotiation fails, a judge may:

- adapt the contract in order to bring it into line with what the parties would reasonably have agreed at the time of the conclusion of the contract if they had taken into account the change of circumstances (the judge has therefore to reconstitute the hypothetical will of the parties); or
- terminate the contract under conditions set out by the judge.

The role of the judge remains unclear: the legislator did not specify to what extent the adjustment of the contract has priority over termination.

How can a hardship claim be asserted in court?

As indicated above, Belgian law does not recognise the concept of hardship. However, some courts have admitted, in rare cases and under exceptional circumstances, the adjustment of a contract following a change of circumstances via the theory of abuse of rights, the concept of *force majeure* or the concept of good faith.

Belgium

The envisaged regime sets out the conditions under which a claim could be asserted in the future. A hardship claim must be introduced "*in the form of a summary proceeding*". This procedure requires bringing the case before the President of the court in a shortened time period. Urgency is not a condition of admissibility in this type of procedure. The decision is on the merits and constitutes a final judgment possessing the force of *res judicata*.

It remains to be seen whether the reform of the Civil Code envisaged by the previous Belgian government will be further pursued. While the parliamentary discussions on the draft bill have not started yet, several legal scholars have already criticised it for its uncertainty on how the judge should adapt the contract to a change of circumstances.

In future practice, it is likely that courts will thoroughly review the intentions of the parties at the time of execution of the contract. They will focus their analysis on how the parties allocated the risk of an unexpected change of circumstances between each of them. They will also probably look for objective arguments to define how the same contractual equilibrium may be maintained between the parties under the modified circumstances.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

Claims of hardship are contractual claims that are subject to the limitation period of 10 years as laid out in Article 2262*bis* para. 1 of the Civil Code. However, this provision is supplementary and the parties may modify this statutory time limitation as they wish.

> "[S]everal legal scholars have already criticised [the draft bill] for its uncertainty on how the judge should adapt the contract to a change of circumstances."

Brazil

Christian Albanesi
Counsel
Tel: +1 202 654 9216
christian.albanesi@linklaters.com

Marcelo Lopes
Associate
Tel: +1 212 903 9034
marcelo.lopes@linklaters.com

Brazil

Is the concept of hardship recognised by statutory or case law?

Brazilian courts apply the doctrine of hardship. It was first recognised by statutory law in 1990 when it was included in the Consumer Code. In 2002, the doctrine of hardship was incorporated in the new Civil Code. Articles 478 et seq. read as follows:

- Article 478: "*In contracts of continuous or deferred performance, if the performance of one of the parties becomes excessively onerous, with extreme advantage to the other party due to extraordinary and unforeseeable events, the debtor may request the termination of the contract.*"
- Article 479: "*The termination of the contract may be avoided if the defendant offers to equitably modify the terms of the agreement.*"
- Article 480: "*If the contractual obligations are to be performed by only one of the parties, it may request that its performance be reduced or changed in order to avoid the excessive burden.*"

If so, what are the elements and specific requirements for a claim based on hardship?

In 2009, the Brazilian Superior Court of Justice (*Superior Tribunal de Justiça* – "STJ") determined that a claim for hardship must meet the following requirements (Appeal (Recurso Especial) No. 977007 GO – 2007/0189135-0, Terceira Turma, STJ, decided on 24 November 2009):

i. contract of continuous or deferred performance;

ii. extreme advantage by one of the parties and extreme burden to the other party to fulfil the contractual obligations;

iii. extraordinary and unforeseeable event; and

iv. damages exceeding the ordinary scope of the contract.

Contract of continuous or deferred performance

For the doctrine of hardship to apply, the contract must have been negotiated at arm's length and it must involve continuous (e.g. services to be provided for an indeterminate period of time) or deferred (e.g. the acquisition of an object to be delivered in the future) performance. In such types of contracts, the determining element is the time difference between the moment the agreement is entered into and the moment its performance is completed.

Extreme advantage by one of the parties and extreme burden to the other party to fulfil the contractual obligations

The purpose of the doctrine of hardship is to correct disproportionate imbalances that may arise in the economic relationship as initially agreed by the parties. It seeks to protect the fair distribution of risk between the parties regarding future and unforeseeable events.

The requirement of extreme advantage and burden to the parties seeks to limit the applicability of the doctrine of hardship only to the cases in which clearly unbalanced benefits and losses arise. Therefore, when interpreting a contract, courts must consider the contractual balance (or imbalance) and not the parties' intentions before entering into the contract.

Although clear standards for extreme advantages and burdens have not been provided by the courts yet, the concept should be based on the benefits and losses that may be objectively qualified as disproportionate, disregarding the specific and personal conditions of the parties.

Extraordinary and unforeseeable event

According to the Brazilian courts, an extraordinary and unforeseeable event is one that is not identifiable among the inherent risks of entering into a specific agreement. In other words, an event that does not depend on the will of the parties, which could not be foreseen or prevented by them, even with due care and diligence, outside of the

"The purpose of the doctrine of hardship is to correct disproportionate imbalances that may arise in the economic relationship as initially agreed by the parties."

parties' control.

Any circumstance that has been known or foreseeable at the time of concluding the contract shall not trigger the application of the doctrine of hardship, even if it has serious consequences to one of the parties. Moreover, pursuant to the STJ's case law, the negotiation of contractual terms and conditions includes the parties' concerns about future risks.

Damages exceeding the ordinary scope of the contract

Brazilian statutory law and case law have not established a materiality standard to trigger a hardship claim. As clarified by the STJ, and confirmed by legal literature, courts will decide on a case-by-case basis whether the events invoked exceed the ordinary scope of the contract from an objective perspective.

As stated by the STJ in 2003 (Appeal (Recurso Especial) No. 447336 SP – 2002/0083950-0, Terceira Turma, STJ, decided on 4 April 2003), "*if the contractual imbalance – as an objective fact – is the requirement for the judicial intervention, subjective facts, such as financial and economic capacity of the parties or the date the claim was filed in court (i.e., 1 month, 6 months, or 2 years after the event causing the imbalance) must not affect the analysis of the court*".

If the situation invoked is the result of negligence by the party suffering the onerous burden, the doctrine of hardship shall not apply. The frustration of the parties' subjective expectations is also not enough to trigger the application of the doctrine of hardship.

Typically, Brazilian courts do not accept inflation or economic variations as grounds to revise a contract under the doctrine of hardship, as these events are considered foreseeable.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

The Civil Code allows for the termination of the contract, unless its terms are equitably modified. For example, the remedy may include the readjustment of the contract price or the extension of contractual terms. If the unforeseeable event results in an unjust enrichment of one of the parties (thus creating an extreme advantage), the aggrieved party may seek the restoration of the economic balance of the contract.

However, in consumer relations, the Consumer Code provides for the review of the clauses that give rise to the excessive burden, whilst maintaining the contract. Article 6(v) of the Consumer Code stipulates: "*The basic consumer's rights are (…) the modification of contractual clauses providing disproportionate instalments or their revision due to supervening facts that make them excessively burdensome.*"

How can a hardship claim be asserted in court?

A hardship claim may be asserted in court by means of a complaint filed by the plaintiff seeking to terminate the contract (Article 478 of the Civil Code). After the complaint is filed, and in order to avoid the termination of the contract, the defendant may propose to equitably modify the contractual terms pursuant to Article 479 of the Civil Code. However, the Civil Code does not provide for an economic solution by way of continuing the contract, unless the defendant proposes to modify its terms.

Brazil

Although the Civil Code only provides for a termination of the contract, the Federal Justice Council (*Conselho de Justiça Federal*) determined in its Guideline No. 176 that in view of the principle of conservation of the agreement (*conservação do negócio jurídico*), a claim based on Article 478 should allow, whenever possible, a judicial review of the contract and not just its termination. The Guidelines of the Federal Justice Council are not binding for the courts. However, as they are prepared by a group of renowned jurists, they have a *de facto* impact on the decision-making process.

If the option to revise the contract is offered by the defendant under Article 479 of the Civil Code, the court will assess to what extent the interest of the debtor is satisfied whilst respecting the creditor's initial expectations in accordance with good faith standards. The court will seek to maintain the economic and social balance of the contract for both parties.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

There is no specific term or statutes of limitation after the conclusion of the contract for filing a claim for hardship. The only requirement is that the excessive burden occurs during the life of the contract and that the event meets the criteria identified above.

However, the party invoking the doctrine of hardship must file the claim before it fails to perform any of its obligations. Even in cases of hardship, the debtor should not unilaterally stop performing its obligations. The termination of the contract must be determined by the court, following a strict analysis and verification of the requirements for hardship.

> "[T]he party invoking the doctrine of hardship must file the claim before it fails to perform any of its obligations."

France

Roland Ziadé
Partner
Tel: +33 1 56 43 28 34
roland.ziade@linklaters.com

Maria Mitaeva
Managing Associate
Tel: +33 1 56 43 56 18
maria.mitaeva@linklaters.com

France

Is the concept of hardship recognised by statutory or case law?

French contract law has recently been reformed by way of Ordinance No. 2016-131 of 10 February 2016, ratified by Law No. 2018-287 of 20 April 2018. The reform has, in particular, overturned the case law of the French Supreme Court (*Cour de Cassation*), established since the *Canal de Craponne* case in 1876, by introducing the doctrine of hardship into French law. Article 1195 of the French Civil Code now provides that:

"*If a change of circumstances which was unforeseeable at the time of conclusion of the contract renders performance excessively onerous for a party which had not accepted to bear that risk, that party may request its co-contracting party to renegotiate the contract. The requesting party shall continue to perform its obligations throughout the renegotiations.*

In case of a refusal or failure of the renegotiations, the parties may agree to terminate the contract on the date and under the conditions which they determine, or jointly request the court to adapt the contract. In the absence of an agreement within a reasonable time period, the court may, at the request of a party, revise the contract or terminate it on the date and under the conditions which it sets."

It is important to bear in mind the following two clarifications.

- First, it should be noted that Article 1195 of the Civil Code is applicable to contracts entered into as from 1 October 2016 and is supplementary in nature. Contracting parties are therefore entitled to mutually agree to exclude or limit its application by including a no-hardship provision in their contract. Alternatively, they may also provide for a contractual hardship provision which refines or modifies the procedure for renegotiations and the role of the court.
- Second, Law No. 2018-287 of 20 April 2018 also introduced a new Article L.211-40-1 in the French Monetary and Financial Code, which specifies that the new Article 1195 of the Civil Code does not apply to "obligations resulting from operations on financial contracts and securities".

If so, what are the elements and specific requirements for a claim based on hardship?

Article 1195 of the French Civil Code applies when three conditions are met. There must be (i) a change of circumstances unforeseeable at the time of conclusion of the contract which (ii) makes performance excessively onerous for a party, provided that (iii) such party had not accepted to bear that risk.

Change of circumstances unforeseeable at the time of conclusion of the contract

The first requirement of Article 1195 of the French Civil Code is that the circumstances that disrupt the contractual equilibrium and result in hardship for one of the parties must have been unforeseeable at the time of conclusion of the contract. This implies, in particular, that parties may not rely on hardship if, through their own negligence, they failed to take into account a change of circumstances which they could have envisioned or foreseen at the time of conclusion of their contract.

Given that Article 1195 does not specify the nature of the change of circumstances which is required, such change of circumstances may be of any kind, i.e. of economic (sudden increase in the price of raw materials), legal (new public policies), technological (development of new technology that makes an object obsolete), or environmental (natural disasters) nature.

The wording of Article 1195 does, however, raise certain questions regarding the manner in which the unforeseeability of the change of circumstances at issue should be assessed, as the provision does not specify this requirement. It can be assumed that such unforeseeability may concern both the occurrence of the event and its magnitude and that, by analogy to the case law related to *force majeure*, it should be assessed *in abstracto*, i.e. by reference to a reasonable person placed in the same circumstances. Courts are likely to conduct a case-by-case analysis on that basis.

> "The reform has overturned … the case law of the French Supreme Court … by introducing the doctrine of hardship into French law."

France

Performance has become excessively onerous for a party

The second requirement of Article 1195 of the French Civil Code is that the unforeseeable change of circumstances must make the performance excessively onerous for a party.

As such, the requirement is not met if the contractual obligation has simply become more difficult to perform. Conversely, Article 1195 does not require that performance becomes impossible, thus implicitly drawing the boundary with *force majeure*. In other words, the performance of the contract must have become economically unbearable for the aggrieved party, without being impossible.

Despite the use of the term "onerous", Article 1195 does not only cover cases in which a contractual obligation becomes economically unbearable by reason of an excessive increase of the costs of performance. It also concerns cases in which performance becomes economically unbearable by reason of an excessive reduction in the value of the consideration paid.

No acceptance of the risk by the aggrieved party

If, at the time of conclusion of the contract, a party agreed to bear the risk of a potential subsequent change of circumstances, it may not rely on the doctrine of hardship if such risk materialises. It should also be noted that, although the provision does not specify this requirement, acceptance of the risk for the purposes of Article 1195 may be implied, for example, by reference to the speculative nature of the contract.

Clauses by which a party agrees, or appears to agree, to bear the risk of a future change of circumstances must thus be carefully drafted. Parties are advised to specify whether they intend to waive the application of Article 1195, either in part or in whole.

What are the rights of the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights available to it?

Article 1195 provides for a tiered system, which favours contractual autonomy: renegotiation, jointly agreed termination of the contract, and only then judicial review of the contract by a court. It should be noted at the outset that the aggrieved party is required to continue to perform its obligations, whatever the consequences, during the renegotiation and the subsequent procedure.

First, the aggrieved party may request its co-contracting party to renegotiate the contract. This provides the parties with an opportunity to find a mutually acceptable solution and avoid judicial intervention. In addition, it appears that the co-contracting party is not obliged to agree to renegotiate the contract, since Article 1195 expressly provides for the case of refusal of renegotiations.

However, given that the new provisions of the French Civil Code are ambiguous in this respect, it will be for the courts to determine whether such refusal should be sanctioned where it appears abusive.

In the event of a refusal or failure to renegotiate, the parties may agree to terminate the contract, on the date and under the conditions which they determine. This is again an application of the well-established principle of *mutuus dissensus*: the parties may always agree to terminate a contract. A claim for hardship may be brought before the courts only after the failure of all consensual alternatives.

"Clauses by which a party agrees, or appears to agree, to bear the risk of a future change of circumstances must … be carefully drafted."

France

How can a hardship claim be asserted in court?

Article 1195 of the French Civil Code provides for two scenarios in which courts may review the contract pursuant to the doctrine of hardship.

First, in the event of refusal or failure to renegotiate, parties may jointly agree to ask the courts to adapt the contract. That said, this first hypothesis may see little use in practice. If the parties were unable to agree to renegotiate the contract or if the negotiations were not successful, it is doubtful that they would jointly agree to entrust the courts with the task of adapting the contract.

Second, if no agreement is reached within a reasonable time, the court may, at the unilateral request of a party, revise or terminate the contract on the date and under the conditions which it determines.

However, the lack of further detail in Article 1195 raises some questions regarding the powers of the courts. First, there is no indication in the provision to what extent adaptation of the contract should be preferred over its termination. Second, there are no restrictions as to the manner in which the courts may adapt a contract. The courts therefore enjoy some discretion in determining the parties' new contractual terms.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

Hardship claims are subject to the general limitation period of five years, pursuant to Article 2224 of the French Civil Code.

"[T]he lack of further detail in Article 1195 raises some questions regarding the powers of the courts."

Germany

Alexandros Chatzinerantzis
Partner
Tel: +49 69 710 03 482
alexandros.chatzinerantzis@linklaters.com

Jan Suschinski
Counsel
Tel: +49 69 710 03 474
jan.suschinski@linklaters.com

Peter Bendel
Managing Associate
Tel: +49 69 710 03 497
peter.bendel@linklaters.com

Germany

Is the concept of hardship recognised by statutory or case law?

The doctrine of hardship has been recognised by German courts for almost a century as part of the principle of good faith. In 2002, the legislator incorporated the judicial principles of the doctrine of hardship into statutory law (cf. Section 313 of the German Civil Code – "BGB"):

"*1. If circumstances which became the basis of a contract have significantly changed since the contract was entered into and if the parties would not have entered into the contract or would have entered into it with different contents if they had foreseen this change, adaptation of the contract may be demanded to the extent that, taking account of all the circumstances of the specific case, in particular the contractual or statutory distribution of risk, one of the parties cannot reasonably be expected to uphold the contract without alteration.*

2. It is equivalent to a change of circumstances if material conceptions that have become the basis of the contract are found to be incorrect.

3. If adaptation of the contract is not possible or one party cannot reasonably be expected to accept it, the disadvantaged party may revoke the contract. In the case of continuing obligations, the right to terminate takes the place of the right to revoke."

If so, what are the elements and specific requirements for a claim based on hardship?

In general, three elements need to be considered: (i) the factual element, i.e. the change in circumstances or the discovery of misconceptions, (ii) the hypothetical element, i.e. the examination of the hypothetical will of the party as to whether the parties would not have concluded the contract or whether they would have concluded it differently if the change had been correctly anticipated, and finally (iii) the normative elements of risk allocation and reasonableness.

The specific requirements that need to be substantiated can be summarised as follows:

Basis of the contract

The changed circumstances must have become the basis of the contract (Section 313 para. 1 BGB). The same applies to conceptions of the parties that prove to be false (Section 313 para. 2 BGB). The contractual basis is to be distinguished from the contractual content, i.e. the circumstances and ideas must not have become part of the contract.

According to the Federal Court of Justice (*Bundesgerichtshof* – "BGH"), the "basis of a contract" is defined as "*the common ideas of both parties existing at the time of conclusion of the contract or the ideas of one of the parties, which are recognisable to the other party but not objected to, about the existence or future occurrence of certain circumstances, provided that the parties' business will is based on this idea.*" Unilateral motives or expectations of one of the parties are never sufficient.

Serious change (para. 1) and material conceptions (para. 2)

German courts are generally reluctant to apply the doctrine of hardship as it interferes with the general principle that contracts must be upheld ("*pacta sunt servanda*"). Not every minor change or deviation from the parties' ideas can trigger a hardship claim. A "fundamental" change (para. 1) or a "material misconception" (para. 2) is necessary. The respective change in circumstances or misconception must have been so significant that – undoubtedly – at least one party would not have concluded the contract if it had known or foreseen the absence or omission of the contractual basis (disruption of equivalence – "*Äquivalenzstörung*").

"German courts are generally reluctant to apply the doctrine of hardship as it interferes with the general principle that contracts must be upheld."

Germany

There are no specific materiality thresholds or materiality quota a claimant can rely on as to what constitutes as "fundamental" change or a "material" misconception. The courts usually determine the materiality threshold according to the type and purpose of the contract as well as the distribution of risk. It is paramount what the parties have contractually determined to be equivalent (subjective equivalence). If only the inherent risk materialises, the change in circumstance is in any case insignificant.

Risk allocation

The allocation of risks is a decisive factor in the assessment of hardship. Risks are uncertainties about circumstances or developments relevant to performance and value. In the absence of contractual provisions, the risk distribution which is typical for the respective contract must be used as a basis for assessing the specific spheres of risk of the parties. Circumstances to be taken into account are the typical nature of the risk, the legal relationship, general practice and business customs. As a general principle, each contracting party is solely responsible for (unilateral) disturbances in motivation or expectation. If the risk is borne by the party invoking hardship in accordance with the agreed or typical content of the contract, Section 313 BGB is inapplicable.

Although Section 313 para. 1 BGB relates to the subjective foresight of the parties ("had foreseen"), the objective predictability of the disruption is often sufficient to deny a fundamental change in circumstances. A party who caused the change cannot rely on it if the materialisation of the risk is attributable to this party and controllable by it.

Therefore, as a general rule, the customer must bear the market risk, such as the risk of devaluation of the contractual service. Whether the parties intended otherwise needs to be verified by way of interpretation, taking into account, *inter alia*, the wording as well as the general risk allocation under the contract in question, the functional connection with the price adjustment mechanism (if any) and, as a general rule, good faith and common practice.

However, according to established German case law, a party may invoke hardship if the equivalence of contractual performance and consideration is disturbed so severely that the limit of risk assumed by one party is exceeded. Legal scholars also recognise that unforeseeable changes of circumstances disrupting the equivalence between performance and consideration may fall out of the scope of the contractual risk allocation and, thus, may justify a claim for adjustment. In particular, the fact that the parties agreed on a fixed contract price does not *per se* exclude an adjustment of the contract price based on the doctrine of hardship.

Unreasonableness

According to a commonly used formula of the courts, a party can only successfully invoke the doctrine of hardship if "*an adjustment of the contract is considered as necessary in order to avoid an unacceptable result which cannot be reconciled with law and justice and thus cannot be reasonably expected of the aggrieved party in good faith*" (BGH, 11 July 1958 – VIII ZR 96/57, NJW 1958, 1772).

This formula highlights the exceptional character of the concept of hardship. It serves the courts to evaluate all individual circumstances in good faith. Thus, the reasonableness test must consider the interests of both parties. However, only contract-inherent criteria can form the basis for the comprehensive evaluation. External, non-contractual related considerations of the parties are not relevant. Public interests are also regularly not to be taken into account.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

Section 313 para. 1 BGB provides for a right to adjust the contract. Section 313 para. 3 BGB grants a right to revoke the contract and – in relation to continuing obligations – a right to give notice of termination.

> "[T]he objective predictability of the disruption is often sufficient to deny a fundamental change in circumstances."

Germany

However, pursuant to Section 313 para. 3 sentence 1 BGB, the remedies of revocation and termination are only considered if an adjustment is impossible or unreasonable. Therefore, a reasonable adjustment of the contract – if possible – always has priority.

The adjustment of the contract only occurs at the request of the party who is entitled to it. The content and scope of the adjustment is primarily based on reasonableness. Thus, the modalities of an adjustment depend on the distribution of risks in the individual case. However, the intervention into the contract must not go beyond what is necessary to mitigate the risk. If there are no other indications of risk sharing, it can be assumed that the respective parties each bear half of the risk.

The contract is revoked by means of a legally binding declaration. The revocation of the contract according to Section 313 para. 3 sentence 1 BGB creates a repayment obligation in accordance with Section 346 BGB.

How can a hardship claim be asserted in court?

Section 313 BGB establishes a claim for adjustment of the contract. Possible adjustments may include, for example, the suspension, the increase/reduction or the termination of a contractual obligation (e.g. duty to pay only a reduced contract price), a substitution of goods to be delivered or a compensation payment.

In case the parties cannot agree on an adjustment, the aggrieved party may claim either approval of the requested adjustment or performance according to the requested adjusted conditions. In case of complex contracts, the claimant may, in accordance with Section 254 of the German Code of Civil Procedure ("ZPO"), on the first stage, demand a comprehensive adjustment of the entire contract with an unspecified application, because he could not specify it properly, and then, on the second stage, precisely quantify and specify an individual claim ("step-by-step action" – *Stufenklage*).

The right to adjust the contract obliges the contracting party benefitting from a change of the basis of the contract to cooperate with the other party to achieve an appropriate adjustment of the contract. The violation of the obligation to cooperate can lead to damage claims, as does the violation of the obligation to agree to the adjustment.

After unsuccessful extrajudicial negotiations of the parties, the adjustment can be made directly by the court. In general, courts only grant an adjustment of the contract for the future. Exceptionally, also a retroactive adjustment is possible. The stronger and more unexpected the retroactive effect on the opposing party is, the less likely the courts will consider a retroactive adjustment of the contract.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The right to adapt the contract according to Section 313 para. 1 BGB is subject to the regular limitation period of three years according to Sections 195, 199 BGB. The limitation period for the right to adapt begins upon the occurrence of the change in circumstances (Section 313 para. 1 BGB) and in the case of para. 2 upon the occurrence of the misconceptions.

> "[A] reasonable adjustment of the contract – if possible – always has priority."

Hong Kong

Andrew Chung
Partner
Tel: +852 2901 5238
andrew.chung@linklaters.com

Oliver Beeley
Associate
Tel: +852 2901 5163
oliver.beeley@linklaters.com

Hong Kong

Is the concept of hardship recognised by statutory or case law?

There is no concept of hardship under Hong Kong law enabling parties to renegotiate or avoid performance of a contract which has become commercially onerous to perform. There are, however, circumstances where a contract may be terminated as a consequence of the doctrine of impossibility or frustration. This doctrine applies where the performance of the contract "*depends on the existence of a particular thing or state of things (and) the failure or destruction of that thing or state of things, without default of either side, liberates both parties*" (Lord Macmillan, Denny Mott & Dickson v Fraser & Co. [1944] 1 All ER).

A contract is not discharged under this doctrine merely because it turns out to be difficult to perform or onerous. In the absence of circumstances meeting the threshold for impossibility or frustration, parties will not be released from their bargain because of price changes, depreciation of currency or unexpected obstacles to the execution of the contract, on the basis that these are ordinary risks of business.

Under Hong Kong law, it is also common that contracts expressly provide that performance can be excused if it is rendered impossible by an unavoidable cause, or upon the occurrence of events as prescribed between the parties, i.e. *force majeure* events. For example, in equity fundraisings, the transaction documentation commonly includes termination rights for *force majeure* events such as changes in national or international monetary, financial, political or economic conditions which are likely to materially prejudice the deal.

Such termination right clauses are effective, provided that they are not uncertain in their terms. They must be construed with regard to the nature and terms of the contract. The clause must have a precise wording and must show that the parties anticipated and made the provision for the event that, later on, actually occurred.

By contrast to the *force majeure* clauses, hardship clauses are not common in commercial contracts governed by Hong Kong law. While parties are free to agree such clauses, the usual rules of contractual formation must be complied with. Thus, the circumstances that will constitute a "hardship" event and the consequences of such event should be clearly specified in the contract.

Careful consideration should also be given to any provision which requires the parties to renegotiate contractual terms. An obligation to renegotiate upon occurrence of a "hardship" event may be unenforceable on the basis that it is an "agreement to agree" and therefore void for uncertainty. Similarly, the Hong Kong courts have been hesitant to recognise an obligation for parties to renegotiate a contract in good faith.

If so, what are the elements and specific requirements for a claim based on hardship?

The Hong Kong courts will not award relief for pure economic hardship in the absence of an express and enforceable contractual provision empowering them to do so. Where the parties have agreed on an express provision which deals with the consequences of a change in economic circumstances, the elements of the claim will depend on the terms of the relevant clause.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

The aggrieved party will have no remedy for pure economic hardship unless otherwise provided in the contract. Where the parties have made provisions for a change of economic circumstances, the remedies which can be sought will depend on the contractual terms and whether those terms are sufficiently certain to be enforceable.

> "There are … circumstances where a contract may be terminated as a consequence of the doctrine of impossibility or frustration."

Hong Kong

How can a hardship claim be asserted in court?

Assuming that the contract contains an enforceable clause that deals with the contractual impacts of a hardship, the claim will be a standard contract claim. There is no specific procedure or regime for this type of claim under Hong Kong law.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

A civil action for breach of a commercial contract must be instituted within six years from the date of breach (Limitation Ordinance (Cap. 347), s.4(1)(a)). As noted above, there is no specific procedure or regime for hardship claims under Hong Kong law.

> “There is no specific procedure or regime for this type of claim under Hong Kong law.”

Indonesia

David Holme
Partner
Tel: +62 21 2995 1509
david.holme@linklaters.com

Arie Priadhi
Managing PSL
Tel: +62 21 2995 1551
arie.priadhi@linklaters.com

Indonesia

Is the concept of hardship recognised by statutory or case law?

Indonesian law does not specifically provide for the concept of "hardship". Nevertheless, the concept is recognised by way of application of the "good faith principle" in relation to the performance of a contract, as stipulated in Article 1338 para. 3 of the Indonesian Civil Code ("ICC").

If so, what are the elements and specific requirements for a claim based on hardship?

The ICC does not stipulate specific requirements for "hardship" and does not provide for any specific rights to the aggrieved party to renegotiate the contract or to request an adjustment of the contractual terms and conditions in case of a change in circumstances.

Article 1338 para. 3 ICC aims at preserving the contract and strives to ensure that the contract is performed with all due appropriateness and fairness. This is in line with the understanding that the "good faith principle" is relevant during the whole execution of the contract. Accordingly, when assessing a potential hardship under Indonesian law, the main criteria are the "appropriateness and fairness" of the contract while executing it. The basic question thus is whether the change in circumstances affected the principles of "appropriateness and fairness" of the contract.

An Indonesian court would have to assess whether there has been a fundamental and unforeseeable change of situation compared to the one when the contract was concluded and that the impact of the change is contrary to "appropriateness and fairness principles". If so, the court is authorised to amend the contents of the contract and adjust it to the current situation so that the future execution of the contract will ensure appropriateness and fairness of the contract.

In case the hardship situation relates to the fundamental change of value of money, Indonesian courts commonly revalue the payment to be paid by a debtor to a creditor based on the current value of gold or otherwise determine an amount that is considered representing the current monetary value. Furthermore, it is deemed appropriate and fair that the risk of inflation is borne by both parties of the contract and not only by the debtor.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

As the rationale behind the "good faith principle" stipulated by Article 1338 para. 3 ICC is to preserve the contract and to ensure that the parties act in good faith, a hardship claim is always based on the further implementation of the contract. Therefore, the content of the contract can be adjusted so that an appropriate further execution of the contract in the current situation is ensured. It is also possible that the parties agree on the termination of the contract following a hardship situation.

How can a hardship claim be asserted in court?

The aggrieved party may file a hardship claim by requesting the court to determine that the further execution of the contract at the current state without any adjustment will contradict the "good faith principle" and to restore the "appropriateness and fairness" of the contract by way of adjusting the current terms and conditions of the contract. The judges will decide on the claim at their discretion.

> "[A] hardship claim is always based on the further implementation of the contract."

Indonesia

It is to be noted that even though the court is authorised to adjust the content of the contract to the current situation, the court cannot amend the principal rights and obligations of the parties or waive such rights and obligations (for example, the court cannot waive payment obligations of the debtor or replace such payment obligation with an obligation to deliver goods). In such a case, the court would adjust the payment and decide which amount of money it deems to be fair and appropriate after the fundamental and unforeseeable change of circumstances.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The hardship claim is subject to the general statute of limitation of 30 years. However, the ICC does not specify when the limitation period shall commence (i.e. whether it commences when the "hardship" event occurs or upon the aggrieved party becoming aware of its right to file such claim). In practice, even though Indonesian judges decide on the commencement of the limitation period on a case-by-case basis, it is generally acknowledged that the limitation period begins when the hardship occurs.

> "[I]t is generally acknowledged that the limitation period begins when the hardship occurs."

Italy

Alessandro Villani
Partner
Tel: +39 02 88 393 5221
alessandro.villani@linklaters.com

Fabrizio Santoni
Associate
Tel: +39 02 88 393 5342
fabrizio.santoni@linklaters.com

Italy

Is the concept of hardship recognised by statutory or case law?

The concept of hardship is regulated by specific provisions of the Italian Civil Code. In particular, the general rules applicable to contracts set forth by Articles 1467, 1468 and 1469 of the Civil Code state that:

"*In contracts with continuous or periodical execution or postponed execution and in case that the obligation of one of the parties has become excessively onerous due to extraordinary and unpredictable events, the party who is obliged to such performance may claim the termination of the contract with the effects laid down in Article 1458. The termination cannot be claimed if the supervening onerousness is part of the normal risk of the contract. The party against which the termination is demanded can prevent this by offering to modify equitably the conditions of the contract*" (Article 1467).

"*In the case set forth by the previous article* [Article 1467]*, if the agreement provides obligations for only one party, the latter may request a reduction of its obligations or an amendment to the modalities of execution, which are sufficient to equalise the agreement*" (Article 1468).

"*The provisions set forth by the previous articles* [Articles 1467 and 1468] *do not apply in case of an aleatory agreement, where the alea depends on the nature of the agreement or on the parties' will*" (Article 1469).

Furthermore, additional provisions of the Italian Civil Code regulating specific kinds of agreements mention the concept of hardship:

- With reference to procurement agreements, Article 1664 of the Civil Code states that "*if, as a result of unforeseeable circumstances, increases or reductions in the cost of the materials or of labour cause an increase or reduction of more than one-tenth of the total price agreed upon, the independent contractor or the customer can request that the price is revised.*" In such cases, the revision may only be granted for the difference exceeding one-tenth. In addition, "*if, in the course of the work difficulties deriving from geological conditions, water, or other similar unforeseeable circumstances occur and render the performance of the contractor considerably more onerous, such contractor may claim a fair compensation.*"
- With reference to loan agreements, Article 1818 of the Civil Code states that "*if things other than money have been lent and repayment has become impossible or very difficult for a reason not attributable to the borrower, the latter is only obliged to pay the value of such things, having regard to the time and to the place where repayment had to be made*".

However, hardship disputes are not very common in Italy. Based on publicly available reports, only a very small number of hardship decisions were issued in Italy in 2019.

If so, what are the elements and specific requirements for a claim based on hardship?

According to Italian law principles and case law, in order to bring a claim based on hardship, the following requirements must be met:

i. there must be a long-term agreement or an agreement providing postponed obligations;

ii. one of the obligations becomes excessively onerous compared to the other, or, in case of an agreement providing an obligation of only one party, such obligation has become excessively onerous;

iii. the obligation regarded as onerous has not already been entirely performed; and

iv. the hardship results from an extraordinary and unpredictable event, in the sense that such event has not been foreseen by the parties or could not have been foreseen at the time the contract was concluded.

According to Article 1467 of the Italian Civil Code, the imbalance between the obligations must be remarkable with regard to the specific agreement to be deemed excessively onerous. This imbalance may be invoked either by an increase of costs of the performance or by the loss of value of the agreed counter-performance.

> "[H]ardship disputes are not very common … ."

Italy

Additionally, the performance must still be excessively onerous by the time the remedy is requested. If the burden diminished or ended before a claim under Article 1467 is asserted, the court will reject such claim.

Italian courts have often applied Article 1467 of the Civil Code to the preliminary sale of apartments to be built, in which – e.g. due to inflation – the building costs materially exceeded the initially agreed price. In cases like these, the test of unforeseeability, which is conducted by the courts on a case-by-case basis, may lead to the conclusion that regular inflation itself does not generally represent an unforeseeable and disrupting event. However, the rate of inflation could be extraordinary and unforeseeable if it rises extremely after the conclusion of the agreement.

Moreover, it is common under Italian law that many long-term supply contracts contain hardship clauses which cover usual contractual risks such as inflation or changes in costs.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

In case of hardship, there are no consequences on the agreement which happen by law and/or automatically. They must be requested by the aggrieved party. This said, rights granted to the aggrieved party in case of bilateral agreements are different from those granted in case of agreements where only one party is obliged (e.g. donation).

In case of a bilateral agreement, the aggrieved party has the right to claim only the termination of the contract, provided that it has not been fully executed and that such party is not in breach of the relevant contractual obligations or has not voluntarily postponed the execution. Furthermore, according to Italian case law, the aggrieved party can neither arbitrarily suspend the execution of the agreement nor request the adjustment of the contractual conditions. Such adjustment can only be requested by the non-aggrieved party.

In case of agreements where only one party is obliged, such party is not entitled to claim the termination of the agreement but can only request a reduction of its obligation or an amendment to the modalities of execution.

How can a hardship claim be asserted in court?

In case a claim based on hardship related to bilateral agreements is brought up before a court by the aggrieved party, the court shall, first of all, ascertain the existence of the requirements for hardship claims set forth by law. If these requirements are met, it may grant the termination of the contract.

Upon request of the non-aggrieved party, the court may grant a fair adjustment of the contract. In this respect, it shall be noted that the non-aggrieved party may propose a specific adjustment or may ask the court to determine the amount and/or the conditions of the adjustment based on the evidence filed in the proceedings.

With specific reference to procurement agreements, the aggrieved party cannot request the court to grant the termination of the agreement but only the adjustment of the relevant value.

In any case, if a claim based on hardship is brought before a court, the aggrieved party has the burden to prove the requirements that constitute a hardship.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The time limitation applicable to hardship disputes is the same as is applicable to ordinary contractual claims, i.e. 10 years. According to Italian case law, the time limitation for hardship disputes commences the moment the obligation becomes excessively onerous for the aggrieved party.

> “[I]t is common … that many long-term supply contracts contain hardship clauses which cover usual contractual risks such as inflation or changes in costs.”

Japan

Hirofumi Taba
Partner
Tel: +81 3 6212 1245
hirofumi.taba@linklaters.com

Mamoru Ikeda
Managing Associate
Tel: +81 3 6212 1251
mamoru.ikeda@linklaters.com

Kana Hayashi
Associate
Tel: +81 3 6212 1238
kana.hayashi@linklaters.com

Japan

Is the concept of hardship recognised by statutory or case law?

The provisions for the law of obligations under the Civil Code (Act No. 89 of 1896) have been under substantial reform and a new Civil Code will come into force on 1 April 2020. During the course of the reform, it has been proposed that the doctrine of hardship and its requirements and consequences shall expressly be stipulated in the Civil Code, namely, the right to terminate a contract, the right to adjust the terms of a contract, and the right to request a renegotiation of the terms of a contract. Although the enactment of the doctrine of hardship was considered, it did not materialise due to concerns about the abuse of the enacted rights.

Even though the concept of hardship as such is thus not expressly codified in statutory law, the principle of hardship is recognised by courts as well as legal scholars.

A concept comparable to the principle of hardship has been recognised by court precedents as "the doctrine of change of circumstances" (*jijo henkou no gensoku*) (the "Doctrine"), which is part of the principle of good faith under Article 1 para. 2 of the Civil Code. Some district courts have applied the Doctrine, but there have been no such precedents from the Supreme Court (under the current constitution of Japan from 1946) to date.

Moreover, the Act on Land and Building Leases (Act No. 90 of 1991) provides the right to request the increase or decrease of land rent or building rent when such land or building rent become unreasonable as a result of the rise or fall of land/building prices or fluctuations in other economic circumstances, etc. This is considered as an explicit statutory embodiment of the Doctrine in the context of the lease of lands and buildings.

If so, what are the elements and specific requirements for a claim based on hardship?

According to court precedents and the majority of legal scholars, the requirements to trigger the Doctrine are: (i) an unforeseen change of circumstances has occurred; (ii) such change was not attributable to the parties; and (iii) a literal interpretation of a contract would result in an unfair outcome for one party in accordance with the principle of good faith.

Unforeseen change of circumstances

The change in circumstances must not be foreseeable at the time of the execution of the contract, in particular for the party asserting the application of the Doctrine. Additionally, the changes must relate to the basis of the agreement which does not need to be expressly agreed upon. A tacit or general assumption for the relevant contracts suffices. The change must also be material, such as a massive increase of rent linked to an enormously risen property tax (Tokyo District Court Judgement, 26 February 1998), although no express standard in this respect has been provided by court precedents yet.

Change is not attributable to the parties

Whether such change is deemed attributable to the parties shall be assessed based on the underlying facts at the time of the execution of the contract.

Unfairness

Unfairness in terms of the concept of hardship is not yet clearly defined by court precedents. Legal scholars refer to three typical scenarios where the unfairness is affirmed:

i. economic impossibility (namely circumstances where it becomes extremely difficult to perform the obligations under a contract as a result of war or natural disaster);

ii. loss of equivalence (e.g. the rapid rise of land price over a period of time); and

iii. impossibility to achieve the purpose of a contract (e.g. the sale of land becomes subject to the approval of the government and such approval cannot be obtained).

> "[T]he principle of hardship is recognised by courts as well as legal scholars."

Japan

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

The remedies to be granted in favour of the aggrieved party due to the application of the Doctrine are (i) the right to terminate the contract and (ii) the right to adjust the terms of the contract.

The right of termination has been established as a remedy under the Doctrine. As regards the adjustment of the contract, there are conflicting views with respect to (i) what extent the right to adjust the contractual terms should apply and (ii) the priority between the right of termination of a contract and the right to adjust the contractual terms. Some legal scholars argue that an adjustment of a contract should be the primary remedy and that the right for termination of the contract should only be available when an adjustment is not a reasonable remedy for the parties. Some district court precedents and High Court precedents have followed this latter view.

How can a hardship claim be asserted in court?

There are no special provisions for the aggrieved party to invoke hardship. Typically, the aggrieved party refuses the performance of its obligations by invoking hardship and claiming the termination of a contract in the court proceedings. Accordingly, the aggrieved party may also refuse the performance of its obligations by demanding an adjustment to be made to the terms of the contract by way of the Doctrine.

The aggrieved party may also claim monetary compensation, demanding an adjustment be made to the terms of the contract by way of the Doctrine.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The claim of hardship is subject to a general limitation period of five or 10 years, subject to the specifics of the case at hand. If the aggrieved defendant claims hardship in order to refuse the performance of its obligations, no time limitation is to be considered.

Luxembourg

Guy Loesch
Partner
Tel: +352 2608 8212
guy.loesch@linklaters.com

Louis-Eudes Giroux
Associate
Tel: +352 2608 8290
louis-eudes.giroux@linklaters.com

Luxembourg

Is the concept of hardship recognised by statutory or case law?

The concept of hardship is not stipulated in Luxembourg civil law, as the concept is traditionally considered to contradict the principle of *pacta sunt servanda* as set out in Article 1134 of the Luxembourgian Civil Code. In a decision of 2005, the Court of Appeal determined that a judge cannot change the terms of a contract as agreed by the parties, irrespective of the severity a party is suffering from (Court of Appeal, 4 May 2005, n°27034).

However, the legislator has intervened in specific areas of law:

- Article 1152 of the Civil Code grants the judge the power to decrease or increase a penalty clause if the agreed amount is clearly excessive or small.
- Articles 1769 to 1773 of the Civil Code provide for a reduction of the rental price to a farmer in case of fortuitous destruction of all or at least half of a harvest.
- The law on insurance contracts of 27 July 1997 provides for the amendment of an insurance contract in the event of a reduction or aggravation of the insured risk. In the absence of an agreement between the parties on an adjustment of the provisions, the contract may be terminated.

The power of a court to revise a contract has also been recognised by case law in specific construction matters. However, the principle of hardship has never been positively recognised by a Luxembourg court as a general principle of law.

Recent case law of the Court of Appeal seems favourable to the admission of the concept of hardship in the Luxembourg legal system, although the cases mentioned below only deal with construction and sales agreements:

- The Court of Appeal decided in 2010 that the disruption of the contractual balance allows the revision of a construction contract (15 December 2010, n°34297).
- In another decision handed down in 2012, the Court of Appeal (31 October 2012, n°34789) came up with some requirements for the rare cases where the hardship theory could be admitted (see details below).

The ruling of the Luxembourg Supreme Court ("*Cour de Cassation*"), which followed the Court of Appeal's afore-mentioned decision dated 31 October 2012 and dealt with a real estate sale agreement, also seems favourable to the admission of the concept of hardship in the Luxembourg legal system, as it did not generally reject its application. The Supreme Court, while not explicitly accepting the existence of the concept of hardship as such, basically affirmed the Court of Appeal's decision rejecting the hardship claim by expressly stating that the requirements of a hardship – as set out by the Court of Appeal – were not met since the price increase between the conclusion and the execution of the contract was not unforeseeable (Cour de Cassation, 24 October 2013, n°64/13; n°3232).

Following this decision, the majority of legal scholars challenged the rigidity of the principle of *pacta sunt servanda* for reasons of economic efficiency and contractual justice. However, to date, no reform of the Civil Code is intended by the Luxembourgian legislator.

In addition, the parties always have the possibility to agree on and incorporate hardship clauses providing for an adjustment of the contract in the event of economic change leading to an imbalance of the contract. Under the requirement of good faith, the parties will be obliged to make proposals to reach an agreement.

If so, what are the elements and specific requirements for a claim based on hardship?

As the concept of hardship is not entirely recognised by the courts and not yet codified in the Civil Code, the requirements are to be assessed on a case-by-case basis.

> "[T]he majority of legal scholars challenged the rigidity of the principle of pacta sunt servanda for reasons of economic efficiency and contractual justice."

Luxembourg

In the above-mentioned decision on a construction matter from 2010, the Court of Appeal recognised the possibility to deviate from Article 1793 of the Civil Code which prohibits price increases due to a change in construction plans without the written consent of the contracting parties (15 December 2010, n°34297). The court allowed the revision of the construction contract (only) if:

i. the work to be performed is fundamentally different and independent from the work commissioned in the initial contract;

ii. the work to be performed does not have any direct and necessary link with the work set out in the order; and

iii. this causes a disruption of the balance of the contract.

Regarding the last condition, the court decided that an increase of the costs of 17% of the works to be done is not sufficient to cause a disruption of the balance of the contract.

In the afore-mentioned decision of the Court of Appeal (31 October 2012, n° 34789), the court stated that, in order to invoke hardship, the claimant should at least demonstrate:

i. a reciprocal contract

ii. providing for continuous obligations („*contrat à exécution successive*"); and

iii. the occurrence of unpredictable economic changes independent of the will of the parties after the conclusion of the contract, which renders the obligations onerous to a party.

The Court of Appeal concluded that these conditions were not met in the case at hand. The Supreme Court confirmed the decision in 2013 (Cour de Cassation, 24 October 2013, n°64/13; n°3232), without providing any additional information on how those criteria should be assessed.

As there is currently no decision that expressly affirmed a claim based on hardship, the criteria for successfully invoking hardship have not yet been decided. However, it appears that there is a positive evolution of the case law, as the courts do not reject the principle of hardship in general anymore. It can nonetheless be noted at this stage that the above-mentioned conditions for invoking hardship will be affirmed very restrictively by the courts and will practically need to meet the conditions of an event of force majeure (external, irresistible and unpredictable event).

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

If the conditions set out by the court are fulfilled, the courts may revise the contract. In most cases, this would result in a modification of the agreed price to adjust the imbalance in the parties' obligations. In case of a contract containing successive performance obligations („*contrat à exécution successive*"), it would also be possible for the court to terminate the contract. There is no ranking ratio between the modification and the termination of the contractual obligations of rights. What will be granted by the court for the aggrieved party in case of hardship will mainly depend on the claimant's choice.

How can a hardship claim be asserted in court?

In the absence of specific provisions, hardship claims must be filed by means of a classic contractual claim before the Court of First Instance („*Tribunal d'arrondissement*").

Is there a time limitation in respect to the claim of hardship that needs to be considered?

Claims of hardship are subject to the regular limitation period of 30 years according to Article 2262 of the Civil Code. In commercial matters, i.e. in cases where at least one business person is involved, Article 189 of the Commercial Code shortens the limitation period to 10 years. The limitation period starts the day on which the obligation became due by the debtor (Trib. Lux., 13 October 2013, n°103438).

"There is no ranking ratio between the modification and the termination of the contractual obligations of rights."

The Netherlands

Daniella Strik
Partner
Tel: +31 2 0799 6338
daniella.strik@linklaters.com

Marc Noldus
Associate
Tel: +31 2 0799 6237
marc.noldus@linklaters.com

The Netherlands

Is the concept of hardship recognised by statutory or case law?

The concept of hardship is incorporated into Dutch statutory law as a means for parties to demand a contract to be modified or set aside in the event of unforeseen circumstances. The relevant provision, Section 6:258 of the Dutch Civil Code, reads as follows:

"1. Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside, in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.

2. The modification or the setting aside shall not be pronounced to the extent that the person invoking the circumstances should be accountable for them on the basis of the nature of the contract or generally accepted practice.

3. For the purposes of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party."

This provision constitutes mandatory law. This means that the provision applies to the parties' contractual relationship regardless of whether it is expressly included in the contract. Notwithstanding, parties, for example, can include in their contract a clause that states what may constitute (or not) an '(un)forseeen circumstance' and what would be the legal consequence of any 'unforseen circumstance'.

If so, what are the elements and specific requirements for a claim based on hardship?

A Dutch court may modify the effects of a contract, or set it aside, in the event that (i) there has been an occurrence of unforeseen circumstances and (ii) these circumstances are of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form unless (iii) the person invoking the circumstances should be accountable for them on the basis of the nature of the contract or generally accepted practices.

Unforeseen circumstances ...

There is no statutory definition of 'unforeseen circumstances'. According to Dutch legislative history and case law, however, unforeseen circumstances are circumstances which have not been factored into the contract and which have not changed after the conclusion of the contract. These may be circumstances specific to the parties, but also occurring on a regional or global scale (e.g. hyperinflations, natural disasters or regional droughts). Roughly categorised, Section 6:258 of the Dutch Civil Code is applied in cases of a (very) serious distortion of the balance of the respective obligations' value, where the contract has become moot due to the fact that the parties' underlying goal has fallen away, and bordering *force majeure*.

Whether a particular circumstance has been factored into the contract will depend on the interpretation of the contract. In that respect, the terms of a contract must be interpreted in accordance with the meaning that each of the parties, in light of the circumstances of the case, could reasonably attribute to the provisions of said contract and what the parties could reasonably expect from each other in that respect.

In practice, it can be difficult to make a distinction between unforeseen circumstances and those which constitute ordinary commercial risks and have implicitly been factored into the contract. Generally, the more elements of uncertainty or chance are included in a contract, the less likely a circumstance will be considered unforeseen.

If parties contractually agree on the allocation of risk or an obligation to renegotiate the terms of the contract in the event of certain circumstances, such circumstances are generally not considered 'unforeseen' since they have already been factored into the contract.

The Netherlands

… of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form

Only in exceptional cases, unforeseen circumstances are of such a nature that a party may not be expected to perform the contract in its unmodified form. This must be determined in accordance with standards of reasonableness and fairness. The Supreme Court has ruled that this requirement is subject to a high threshold, since standards of reasonableness require first and foremost that parties abide by the terms of the contract in the form originally agreed ("*pacta sunt servanda*").

Dutch courts do not apply specific materiality thresholds or quotas to determine whether standards of reasonableness require that a party may not be expected to perform the contract in its unmodified form. Instead, Dutch courts will take all relevant facts and circumstances into account, in particular the nature and purpose of the contract.

It is important to note that Section 6:258 of the Dutch Civil Code only addresses the unmodified performance of a contract. The occurrence of unforeseen circumstances therefore does not absolve a party from performing only those terms of the contract that are unaffected by the unforeseen circumstances.

… unless the person invoking the circumstances should be accountable for them on the basis of the nature of the contract or generally accepted practices

If the party invoking unforeseen circumstances is accountable for them, it cannot seek application of Section 6:258 of the Dutch Civil Code.

Such accountability may arise if the nature of the contract allocates the risk for the respective unforeseen circumstance to the aggrieved party. For instance, a speculative investment agreement by its nature allocates an investment risk to the investor. Similarly, a contract obtained on the basis of public procurement may, by its nature, crucially limit the possibility to invoke unforeseen circumstances as such contract may, in principle, not be substantially amended. These examples overlap with cases where certain circumstances are already (implicitly) factored into the contract (see above).

Additionally, such accountability may follow from generally accepted practices. Dutch courts typically apply this where the party invoking the unforeseen circumstances has itself caused, or contributed to, their occurrence.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

In case the requirements of Section 6:258 of the Dutch Civil Code are met, a Dutch court may either modify the effects of a contract or set the contract aside at the request of the party asserting the unforeseen circumstances. Such modification or setting-aside occurs expressly by the court and the court may provide that this is subject to certain conditions pursuant to Section 6:260 of the Dutch Civil Code. Parties are unable to affect a modification or setting-aside on the basis of unforeseen circumstances outside of court.

Dutch law does not prescribe a limited set of modifications to be applied by the court. Such modifications may include price modifications, changes to the commitment term, payment extensions or limitations of supply obligations. The court may also modify the contract by making certain additions, such as (conditional) monetary compensation to either party. Separately, a Dutch court may set aside the contract, including specific provisions. Any of the afore-mentioned measures may be applied retroactively.

When deciding to apply either a modification or setting-aside, the Dutch court is in principle limited to the requests set out by the party seeking application of Section 6:258 of the Dutch Civil Code.

"Parties are unable to affect a modification or setting-aside … outside of court."

The Netherlands

Section 6:258 of the Dutch Civil Code does not grant a right to a renegotiation of the contract. However, if a party rejects a reasonable modification to the contract offered by the other party, that party may no longer be able to argue that performance of the contract in unmodified form may not be expected from the other party. In that regard, it may be argued that parties are incentivised to enter into renegotiations where possible prior to asserting Section 6:258 of the Dutch Civil Code.

Nevertheless, parties are free to contractually agree that the terms have to be renegotiated in the event certain circumstances occur. However, this may result in those circumstances no longer qualifying as 'unforeseen', since they are factored into the contract (see above).

How can a hardship claim be asserted in court?

A party to the contract can assert Section 6:258 of the Dutch Civil Code by summoning the other party before the competent Dutch court, together with a claim to the effect that the contract is modified or set aside. As stated above, the court may in principle only modify or set aside a contract as requested by the party asserting Section 6:258 of the Dutch Civil Code. It may not apply such measures *ex officio*.

Dutch courts have applied Section 6:258 of the Dutch Civil Code on relatively rare occasions. It is subject to a high threshold and Dutch courts are generally reluctant to qualify circumstances as not (implicitly) factored into the contract. For instance, Dutch courts have in the past considered that currency fluctuations and economic recessions do not necessarily qualify as unforeseen circumstances resulting in a modification or setting aside of the contract.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

A claim to apply Section 6:258 of the Dutch Civil Code is subject to the general limitation period of 20 years. It is uncertain when the limitation period commences, as this is not stipulated by statutory law. It may be argued that the limitation period commences either on the date the unforeseen circumstance occurred or on the date that the party seeking application of Section 6:258 of the Dutch Civil Code becomes aware of its right to do so.

> "Dutch courts are generally reluctant to qualify circumstances as not (implicitly) factored into the contract."

Poland

Cezary Wisniewski
Partner
Tel: +48 22 526 5022
cezary.wisniewski@linklaters.com

Natalia Mikolajczyk
Senior Associate
Tel: +48 22 526 5043
natalia.mikolajczyk@linklaters.com

Alicja Zielinska-Eisen
Managing Associate
Tel: +48 22 526 5021
alicja.zielinska-eisen@linklaters.com

Poland

Is the concept of hardship recognised by statutory or case law?

The concept of hardship is regulated in Article 357[1] of the Polish Civil Code (the so-called *rebus sic stantibus* clause; the "hardship clause"), which provides:

Article 357[1] Extraordinary change in circumstances

If, due to an extraordinary change in circumstances, a performance entails excessive difficulties or exposes one of the parties to a serious loss which the parties did not foresee when executing the contract, the court may, having considered the parties' interests, in accordance with the principles of community life, designate the manner of performing the obligation, the value of the performance or even decide that the contract be dissolved. When dissolving the contract, the court may, as needed, decide how accounts will be settled between the parties, being guided by the principles set forth in the preceding sentence.

According to the judgments of the Polish Supreme Court, the parties are free to contractually exclude or modify its use or adopt a model hardship clause (e.g. based on the UNIDROIT principles or the ICC model hardship clause).

If so, what are the elements and specific requirements for a claim based on hardship?

Article 357[1] of the Polish Civil Code applies when the following requirements are met: (i) an unforeseen extraordinary change in circumstances occurs, which (ii) renders the performance of the contract excessively onerous or exposes one of the parties to a serious loss. Under Polish civil law, (iii) a causal link between the exceptional change of circumstances and the excessive difficulty of a party or the serious loss must also be proven.

An extraordinary change of circumstances unforeseen by the parties at the time of the conclusion of the agreement

For the hardship clause to apply, the consequences of the extraordinary change of circumstances must not have been foreseen by the parties at the time of the conclusion of the contract. The prevailing view among legal scholars is that this subjective test is sufficient, complimented by the parties exercising due care in foreseeing such consequences.

The extraordinary change of circumstances may consist of the disappearance of the conditions that initially existed, the emergence of new ones or an alteration of the circumstances, which the parties did not foresee at the time of contract formation. What must be extraordinary is the change in the legal relationship between the parties, rather than the event which causes that change (Supreme Court, 9 December 2005, III CK 305/05). In other words, Polish law does not require a natural disaster for the hardship clause to be invoked and accepts that even common events may lead to an extraordinary risk, not common in a given type of contracts.

Typical examples include sudden and unexpected increases in prices (e.g. construction materials or workforce) or drastic changes in the economy. However, a recent case relating to the sudden depreciation in the exchange rate of the Swiss franc demonstrates that such changes (even though sudden and unexpected) do not necessarily constitute an extraordinary change of circumstances. As stated by the Court of Appeal in Katowice, fluctuations of currency exchange rates resulting from varied macroeconomic and geopolitical conditions are common knowledge and thus do not qualify as 'extraordinary'. Likewise, the risk of bankruptcy of a business partner is considered a common contractual risk in Poland. Circumstances concerning the personal life of a party (e.g. illness or death of a close family member) also do not fall under the scope of protection of the hardship clause.

"Typical examples include sudden and unexpected increases in prices … or drastic changes in the economy."

Poland

Contract performance excessively onerous or threat of serious loss by one of the parties

The change in circumstances must lead to a significant contractual imbalance, questioning the economic benefits of the contract and undermining the contractual objectives set by the parties themselves.

Hardship is often invoked by debtors for whom the performance of a contract becomes excessively onerous due to personal or financial difficulties. Such personal difficulties could include a natural disaster in the aftermath of which the performance of the contract by the debtor could endanger his or her life or health. Alternatively, the same natural disaster could result in excessive expenditures and costs, which were not considered by the parties at the time of the conclusion of the contract, and thus cause substantial loss to the performing party.

Whether performance of the obligation subject to the extraordinary change of circumstances would entail a serious loss by one of the parties is assessed by the courts on a case-by-case basis.

Causal link between the extraordinary change in circumstances and the damage

The relationship between an extraordinary change in circumstances and complications in the performance of the obligation (excessive difficulty or threat of recurrent loss) should have the characteristics of an objective causal link.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

Operation of the hardship clause grants the court the authority to (i) designate the manner in which the obligation must be performed, (ii) set the value of the performance of such obligation, or even (iii) decide that the contract be dissolved. In making the assessment, the court must take into account the interests of the respective parties and the principles of social coexistence (*zasady współżycia społecznego*).

The latter is a general principle in the Polish legal system, which is comparable to the concepts of equity, good faith and the prohibition of the abuse of rights.

The commonly accepted view is that if a debtor, despite the significant loss, performs its obligation and such performance is accepted by the creditor, he or she cannot request the court to have that obligation modified or the contract terminated. Likewise, if the contract was fully performed or the obligation has already expired, the underlying legal relationship can no longer be adapted or terminated.

Notably, where the debtor decides to perform the obligation after the contract adaptation/termination request was filed with the court despite the significant loss incurred and only to protect its interest (e.g. avoid excessive contractual penalties), such request remains admissible and may be considered by the court.

Contract modification/alteration

A court's decision which modifies obligations may result either in a change in the manner of its performance or in a change of the contract price. A change in the manner of performance may relate to the place or time of performance, performance of the obligation in instalments, etc. The preliminary view of legal scholars is, however, that the court cannot change the nature of the contractual obligation that must be performed. Thus, in its assessment, the courts must adapt the new manner of the performance of the obligation so that it favours maintaining the parties' agreement in force. This is only possible if the modified performance corresponds to the contract's economic purpose initially set by the parties.

> "[I]f a debtor, despite the significant loss, performs its obligation and such performance is accepted by the creditor, he or she cannot request the court to have that obligation modified or the contract terminated."

Poland

Contract termination

The court's authority to terminate a contract based on the operation of a hardship clause is limited to exceptional cases, where contract modification is impossible or impracticable. The court is to favour contract adaptation (where appropriate) over contract termination even if one or both parties asked for its termination. When dissolving the contract, the court also may, as needed and guided by the afore-mentioned principles of social coexistence and the parties' respective interests, decide how accounts will be settled between the parties.

Importantly, reliance on hardship does not entitle the aggrieved party to ask for specific performance of the contract. The occurrence of the unforeseeable extraordinary circumstances empowers the court only either to amend the legal relationship between the parties so that their agreement remains in force, or to terminate the contract in exceptional situations where no adaptation can ensure the adequate performance of the agreement.

How can a hardship claim be asserted in court?

Where the requirements of Article 357[1] of the Polish Civil Code are met, each party to the agreement can request the court to modify or terminate the agreement. The burden of proof is on the requesting party, which nonetheless does not have to establish that the parties had previously attempted to modify the obligation in question contractually.

The court is not bound by either party's request and retains discretion in whether to modify or terminate the agreement considering the principles of social coexistence and respective interests of the parties. The court is authorised to alter or terminate an agreement, but it cannot create a new obligation between the parties.

Hardship cannot be relied upon as a defence to a claim for performance.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

A party's right to have its legal relationship redefined under a hardship clause is not subject to the statute of limitations as such. However, the court can only modify or terminate a contract that exists and has not been fully performed yet.

> "The court is to favour contract adaptation (where appropriate) over contract termination even if one or both parties asked for its termination."

Portugal

Ricardo Guimarães
Partner
Tel: +35 121 864 0018
ricardo.guimaraes@linklaters.com

Ana Filipa Antunes
Of Counsel
Tel: +35 121 864 0098
ana.filipa.antunes@linklaters.com

Portugal

Is the concept of hardship recognised by statutory or case law?

The concept of hardship is recognised by statutory law in Articles 437 to 439 of the Portuguese Civil Code. Article 437 of the Portuguese Civil Code grants the aggrieved party the right to terminate the contract or to request the adaptation/adjustment of the contract in case of an unexpected and abnormal change of circumstances. More precisely, a party to a contract has the right to terminate the contract or to claim adjustment of the contract under this provision, if (i) an unforeseen event occurs that causes a substantial change to the circumstances that have been taken into account by both parties or by one of the parties when the contract was concluded, (ii) the performance of the contract is affected in such a way that its execution is contrary to the principle of good faith, and (iii) the substantial and unforeseen change in circumstances is not considered as a contractual risk accepted under the contract.

The abnormal and unexpected change of circumstances regime is also applicable to public contracts, but in more limited terms. The Portuguese Code of Public Contracts includes specific regulation on such abnormal change of circumstances that entitles the aggrieved party only to request the modification of the contract. It is not entitled to request termination.

Moreover, Articles 437 to 439 of the Portuguese Civil Code may also apply to framework contracts or standard contract terms (contracts whose terms are not subject to individual negotiation in business-to-business or business-to-consumer contracts) ("*contratos de adesão*"). The Portuguese courts have ruled on the application of this regime namely to provisions included in swap agreements, notably in the ISDA Master Agreement.

It is also possible to mutually agree on a contractual clause that grants a right to terminate or to modify the contract in case of an unexpected and abnormal change of circumstances (hardship clauses).

If so, what are the elements and specific requirements for a claim based on hardship?

To file a claim based on hardship, the relevant change of circumstances must occur during the performance of the contract, as this regime is only applicable to contracts that have not been fully performed.

In addition, pursuant to Articles 437 to 439 of the Portuguese Civil Code, the aggrieved party must fulfil five legal requirements to be entitled to invoke hardship:

Contractual basis is affected

The change of circumstances must affect the contractual basis, meaning the "fundamental grounds" that were expressly or tacitly considered by the parties when the contract was concluded. Fundamental grounds are defined as the circumstances that were presented by both parties or by only one of the parties and were recognised by both parties as decisive at the time of the conclusion of the contract.

Pursuant to Article 437 of the Portuguese Civil Code, the aggrieved party cannot rely on disappointed unilateral expectations and merely subjective motives, particularly if they were not communicated to or known by the other party.

Additionally, for the change of circumstances to be relevant, it is required that, as a consequence of that change, the performance of the contract becomes more onerous, notably because of an increase in costs of such performance.

"Significant" change in circumstances

The change in circumstances must be significant. Articles 437 to 439 of the Portuguese Civil Code do not apply in case of minor changes in circumstances, as the general principle of *pacta sunt servanda* (see Article 406 para. 1 of the Portuguese Civil Code) takes precedence over any request for a unilateral adjustment of a concluded contract.

> "[T]his regime is only applicable to contracts that have not been fully performed."

Portugal

Articles 437 to 439 of the Portuguese Civil Code are thus only applicable if the relevant change of circumstances interferes with the principle of good faith in such a way that the performance of the contractual obligations would be clearly unfair to one of the parties. Hence, it is required that the change deeply affects one party's performance.

The Portuguese Civil Code does not stipulate a specific materiality threshold that triggers a hardship and qualifies a change of circumstances to be "serious" or "substantial". Thus, the significance of a change must be analysed on a case-by-case basis.

"Abnormal" change of circumstances

Article 437 para. 1 of the Portuguese Civil Code also requires an "abnormal" change of circumstances. The term "abnormal" has been interpreted as meaning "unexpected", i.e. the change of circumstances that occurs must not have been foreseen by the aggrieved party or have been objectively foreseeable at the time of the conclusion of the contract.

Risk not allocated to aggrieved party

The aggrieved party shall not benefit from the concept of hardship if it assumed or can be reasonably regarded as having assumed the risk of that specific change of circumstances. As the parties are free to balance their contractual rights and obligations and to allocate the corresponding risks, courts will analyse the underlying contracts in terms of risk allocation.

If the parties did not provide for a clear-cut contractual risk allocation, the determination of the specific contractual risk allocated to each party shall be made in accordance with the common regime set out in Article 796 of the Portuguese Civil Code. The court will take into consideration the nature and purpose of the contract and the characteristics of the parties (e.g. nature and status).

Ex aequo et bono

The concept of hardship under Portuguese law does also provide for an element of equity (*ex aequo et bono*) and shall not be granted if the aggrieved party has faultily delayed the performance of its obligations at the time the unexpected change of circumstances occurs (see Article 438 of the Portuguese Civil Code).

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

Article 437 para. 1 of the Portuguese Civil Code grants two alternative rights to the aggrieved party in case of hardship that are basically of equal rank: (i) the right to terminate the contract and (ii) the right to have the contract changed or modified on the basis of an equity (*ex aequo et bono*) judgment.

Article 437 para. 2 of the Portuguese Civil Code grants, in case the aggrieved party requests the termination of the contract, to the other party the right to oppose that remedy, by accepting the modification of the contract. In this event, the contract shall be adjusted by the court on the basis of an equity judgment (e.g. reduction or increase of the contractual price). In this scenario, the court is not bound to the proposals of the parties. The court will only declare the termination of the contract if it is not possible to adjust the contract.

Portugal

The termination or the adaptation of the contract will be effective, as a general rule, as of the date the abnormal and unexpected change of circumstances occurs, not since the date it has been requested in court by the aggrieved party. Pursuant to Article 439 of the Portuguese Civil Code, in case of the termination of the contract, the common regime applicable to the termination of any contract (see Articles 432 to 436 of the Portuguese Civil Code) shall be applied. Therefore, the termination of the contract will have retroactive effect (see Article 434 para. 1, first part), unless such retroactivity is considered contrary to the intention of the parties or the purpose of the termination (see Article 434 para. 1, second part).

Pursuant to Article 434 para. 2 of the Portuguese Civil Code, the termination of a long-term contract does not affect the obligations already fulfilled. In this scenario, termination is effective only as of the date when the termination was first requested (judicially or extrajudicially) by the aggrieved party. This is a general rule, but it will not be followed if there are grounds for termination in relation to the contractual relationship as a whole; in other words if there are grounds for termination that entitles restitution of all obligations.

How can a hardship claim be asserted in court?

The hardship claim is a judicial procedure in which the aggrieved party requests the court to either declare the termination of the underlying contract or the modification of the contract based on equity (*ex aequo et bono*). The aggrieved party must prove that the abnormal and unexpected change of circumstances affects the balance of the contract agreed upon by the parties in such a way that the contract can no longer be performed because it has become extremely hard and contrary to good faith and the justice. As mentioned before, this can only be evaluated on a case-by-case basis.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

There is no specific time limitation set out in Articles 437 to 439 of the Portuguese Civil Code. Nevertheless, the right to terminate or to request the modification of the contract shall be invoked within the general limitation period of 20 years (see Article 309 of the Portuguese Civil Code) or prior to the full performance of the underlying contract.

“The termination or the adaptation of the contract will be effective, as a general rule, as of the date the abnormal and unexpected change of circumstances occurs.”

Russia

Vladimir Melnikov
Partner
Tel: +7 495 797 9727
vladimir.melnikov@linklaters.com

Irina Zolotukhina
Associate
Tel: +7 495 797 9679
irina.zolotukhina@linklaters.com

Russia

Is the concept of hardship recognised by statutory or case law?

The concept of hardship is recognised by Article 451, Part One of the Civil Code of the Russian Federation ("RCC"), which reads:

"A substantial change of the circumstances, from which the parties have proceeded when concluding the contract, shall be the ground for its amendment or termination, unless otherwise is stipulated by the contract or follows from its substance.

The change of circumstances shall be considered as substantial, if they have changed to such an extent that, in case the parties could have reasonably foreseen it, the contract would not have been concluded by them or would have been concluded on substantially different terms."

In addition to that, Part Two of the RCC, dealing with specific types of contracts, envisages a number of specific cases of hardship (e.g. Article 709 (6) of the RCC deals with a substantial increase in the cost of construction materials, Article 959 of the RCC deals with a substantial change of circumstances communicated to the insurer, Articles 620 (2) and (4) of the RCC deal with a leased property being or becoming unusable).

If so, what are the elements and specific requirements for a claim based on hardship?

A claim based on hardship must fulfil the following requirements:

i. there must be a substantial change of circumstances; and

ii. this must not be prohibited by the contract and other consequences must not follow from the substance of the contract.

There is no specific materiality threshold or materiality quota for assuming that the changes are "substantial" enough to trigger a hardship claim. Instead, as outlined above, the RCC provides that the change of circumstances shall be deemed substantial, if the circumstances have changed to such an extent that, in case the parties could have reasonably envisaged it, the parties either would not have concluded the contract or would have entered into it on substantially different terms.

Upon a claim by the aggrieved party, the court may terminate the contract if the following requirements are met (or amend the contract under further requirements, see below):

i. At the moment of contract formation, both parties assumed that no such change of circumstances will happen.

ii. The aggrieved party cannot overcome the causes for the change of circumstances having used the degree of care and circumspection that can be expected due to the nature of the contract and business conditions.

   The latter makes a hardship claim similar to a *force majeure* claim and requires the aggrieved party to take actions aimed at overcoming the causes for the change of circumstances. It does not matter whether the impossibility to overcome such causes is due to objective or subjective reasons, but the aggrieved party is required to display an adequate degree of care and circumspection.

iii. The performance of the contract without amending its provisions would (a) overturn the balance of the parties' financial interests corresponding to the contract, and (b) entail such a loss for the aggrieved party that this party would substantially be deprived of what it relied on when concluding the contract.

   This requirement contains several terms that are open to interpretation (such as the balance of the financial interests of the parties, substantial deprivation of what the party relied on when concluding the contract) which makes it hard to apply the hardship concept envisaged by Article 451 of the RCC.

iv. It follows neither from the customs nor from the substance of the contract that the risk involved in the change of circumstances shall be borne by the aggrieved party.

Russia

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

In case of hardship, the aggrieved party has either the right to demand renegotiation of the contractual terms in order to bring the contract into correspondence with the substantially changed circumstances, or to demand termination of the contract. The amendment or termination does not occur automatically, but only at the request of the party who is entitled to it. If the parties fail to reach an agreement extrajudicially, the aggrieved party may take its claim to court.

If all the above-mentioned requirements are met, the general rule is that the court will terminate the contract. The amendment of the contract by the court in connection with a substantial change of circumstances is admitted in extraordinary cases, when the termination of the contract either

i. contradicts public interests or

ii. entails losses for the parties substantially exceeding the expenses which are necessary for the performance of the contract on the terms amended by the court.

Apart from these rules, there is no general approach as to how exactly the contract will be amended or whether the contract will be terminated. Everything depends on the particular circumstances of the case.

In practice, Russian courts amend contracts on the basis of a substantial change of circumstances with the same frequency as they terminate them. They are generally reluctant to apply the concept of hardship as such and, for the claimant, it is generally difficult to prove the existence of all four requirements of a claim based on hardship.

How can a hardship claim be asserted in court?

As outlined above, the aggrieved party should first try to renegotiate the terms of the contract with the other party or to reach an agreement on its termination. If this is unsuccessful, the aggrieved party may file a claim requesting an amendment or a termination of the contract, provided that all four requirements described above are met. There are no other specific procedural requirements or conditions to invoke hardship.

As mentioned above, Russian courts are generally reluctant to apply the doctrine of hardship as it interferes with the general principle that contracts must be upheld. However, the Russian courts have accepted claims based on hardship in various instances. They often mix the hardship concept with other concepts that provide for potential grounds for termination or amendment of contracts (e.g. *force majeure*, impossibility to perform, error, breach of contract, good faith), and often refer to Article 451 of the RCC (envisaging the hardship concept) along with other Articles of the RCC with the purpose to provide more grounds for the termination or amendment of contracts. They rarely solely apply Article 451 of the RCC.

If the contract is amended or terminated by a court based on a substantial change of circumstances, this, as a general rule, has effect from the moment the relevant court decision enters into force. This means that the amendment or termination generally does not have retrospective effect. The aggrieved party still has to adhere to its contractual obligations until the court has made a final decision.

If the contract is terminated by a court on the basis of a substantial change of circumstances, the court will, upon the claim of any one of the parties, define the consequences of such termination by justly distributing the expenses of the parties in connection with the performance of the contract.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The RCC does not provide for any specific time limitation in respect to a hardship claim. Therefore, a general time limitation (i.e. three years from the moment when the aggrieved party has known or should have known the substantial change of circumstances) applies.

> “[T]he general rule is that the court will terminate the contract.”

Singapore

Jelita Pandjaitan
Partner
Tel: +65 6692 5881
jelita.pandjaitan@linklaters.com

Hansel Ng
Managing Associate
Tel: +65 6692 5886
hansel.ng@linklaters.com

Singapore

Is the concept of hardship recognised by statutory or case law?

Similar to most common law jurisdictions, Singapore law does not recognise a general concept of "hardship" enabling parties to renegotiate or avoid performance of a contract which becomes commercially onerous to perform. However, in limited circumstances, parties can be released from their contractual obligations where performance is prevented by an unforeseen supervening event under the doctrine of frustration.

In *Glahe International Expo AG v ACS Computer Pte Ltd and another appeal* [1999] 1 SLR(R) 945, the Singapore Court of Appeal held that a contracting party did not automatically gain a right to revoke a contract simply because it was no longer profitable. However, according to the Court of Appeal, the doctrine of frustration can be relied upon where performance of the contract is prevented by supervening events beyond the contract's contemplation and the parties' control. The Court of Appeal applied the principles set out in the leading English authority, *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696.

As explained by the House of Lords in *Davis v Fareham*, the impact of the supervening event must be sufficiently significant to render the obligation under the contract radically different to what had originally been contemplated. In the case of *Lim Kim Som v Sheriffa Taibah bte Abdul Rahman* [1994] 1 SLR(R) 233, the Singapore Court of Appeal stated that "*frustration depends … not on adding any implied term, but on the true construction of the terms … . The question is whether the contract, which [the parties] did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end.*"

The Singapore courts have acknowledged that a contract may only be discharged due to frustration in exceptional circumstances. Consequently, a plea of frustration is rarely successful. One such case related to a contract to supply Indonesian sand in Singapore, which was held to have been discharged by frustration due to a ban on the export of Indonesian sand (*Alliance Concrete Singapore Pte Ltd v Sato Kogyo (S) Pte Ltd* [2014] SGCA 35). A key feature of the Singapore Court of Appeal's reasoning was that the parties had specifically contemplated Indonesia as the source of the sand. The contract might not otherwise have been frustrated, since it would then have been open to the supplier to source the sand from elsewhere.

Economic hardship is not in and of itself a ground for frustration. The court in *Glahe v ACS Computer* noted that, in certain circumstances of extreme hardship and unprofitability, the doctrine could apply, but only where it rendered the parties' obligations under the contract radically different to those originally contemplated. That case concerned a contract to import computers into Russia. The supplier refused to continue the supply due to hyperinflation and increased tax obligations which rendered supply significantly more onerous. The Court of Appeal held that these were not frustrating events, as they did not render the obligation wholly different or impossible.

As there is no general relief from hardship and the scope of the doctrine of frustration is very limited, parties would typically agree on contractual provisions to account for a change in circumstances, such as through the use of *force majeure* or renegotiation clauses. It is possible to draft a *force majeure* clause to cover "hardship" events and the courts would recognise it. However, precise language would need to be used. In *Holcim (Singapore) Pte Ltd v Precise Development Pte Ltd* [2011] 2 SLR 106, the Singapore High Court considered the threshold set by a *force majeure* clause which was drafted to be triggered if the supervening event "disrupted" or "hindered" performance of the contract. It held that these words meant that an increase in costs or prices would, in and of itself, not suffice to trigger *force majeure* under the contract. However, it also noted that an assessment of whether a "disruption" had occurred would take into account what was commercially practicable in the circumstances. This constitutes a lower threshold than under the common law doctrine of

> "[P]arties can be released from their contractual obligations where performance is prevented by an unforeseen supervening event under the doctrine of frustration."

Singapore

frustration.

As for renegotiation clauses, while the traditional common law position is that agreements to negotiate are not enforceable, the Singapore courts have given effect to contractual obligations to renegotiate an existing contractual arrangement, so long as the terms are sufficiently certain such as to be capable of enforcement. In *HSBC Institutional Trust Services (Singapore) Ltd v Toshin Development Singapore Pte Ltd* [2012] 4 SLR 738, the Court of Appeal enforced a clause which required parties to a pre-existing contract to periodically negotiate the price of rent in good faith, on the basis that such a negotiation clause was sufficiently certain to be capable of enforcement.

If so, what are the elements and specific requirements for a claim based on hardship?

As explained above, there is no relief for pure economic hardship in the absence of an express contractual provision.

There is no case law which specifically deals with the enforceability of a renegotiation clause in an event of economic hardship. However, it is likely that Singapore courts will enforce such a clause provided that it does not fall foul of the above-mentioned certainty requirement per *HSBC v Toshin Development Singapore*.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

Once a court determines that a contract is frustrated, the contract is automatically discharged at common law and parties are released from their future obligations under the contract.

Under the Singapore Frustrated Contracts Act (Cap 115, 2014 Rev Ed), which governs the effects of a frustrated contract, an aggrieved party may seek remedies in respect of moneys paid or payable prior to the discharge of the contract. However, the Frustrated Contracts Act only applies where the parties have not made any contractual provision to the contrary.

Where parties have made provisions for a change of economic circumstances, the remedies which can be sought will depend on the specific contractual terms and whether those terms are sufficiently certain to be enforceable. In that regard, there is a clear distinction between pure hardship clauses, which typically provide for the renegotiation of a contract when prevailing circumstances have changed, and *force majeure* clauses, which suspend the performance of a contract on the occurrence of supervening events beyond the parties' control.

How can a hardship claim be asserted in court?

Assuming there is a hardship clause in the contract which can be relied on, the claim will be a standard contract claim. There is no specific procedure or regime for this type of claim under Singapore law.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

Any contractual rights will need to be enforced in accordance with any contractual time limits. Typically, contractual claims in Singapore have a six-year limitation period.

> "[T]here is no relief for pure economic hardship in the absence of an express contractual provision."

Spain

Borja Fernandez de Troconiz
Partner
Tel: +34 91 399 6020
borja.ftroconiz@linklaters.com

Gonzalo Sánchez del Cura
Managing Associate
Tel: +34 91 399 6018
gonzalo.sanchezdelcura@linklaters.com

Spain

Is the concept of hardship recognised by statutory or case law?

The Spanish Civil Code does not provide for a concept of hardship that enables parties – in contrast to the principle of "*pacta sunt servanda*" – to renegotiate or avoid performance of a contract which has become commercially onerous to perform (although local legislation for the region of Navarra does).

However, Spanish courts have – on various occasions – applied the *rebus sic stantibus* doctrine, enabling contracts to be adapted or terminated when supervening events mean that the obligation no longer makes sense as it was contemplated between the parties at the conclusion of the contract.

Spanish legal scholars also took up this legal topic and worked on European model texts as well as the best-known soft law texts (Principles of International Commercial Contract – "PICC", Principles of European Contract Law – "PECL", Draft Common Frame of Reference – "DCFR") to try to base the principle on more solid grounds.

Following these endeavours, the Spanish Ministry of Justice issued a draft bill to change the Spanish Civil Code that reflects the influences of comparative law:

"Proposal to modernise the Spanish Civil Code with regard to obligations and contracts

On extraordinary changes in the fundamental circumstances of contracts

If the circumstances that were the basis for the contract have changed in an extraordinary and unforeseeable way, whereby performance of the contract has become excessively onerous for one of the parties, or the purpose of the contract has been frustrated, the contracting party which, given the circumstances of the case and particularly the contractual or legal division of risks, cannot reasonably be demanded to remain subject to the contract may seek its revision. If revision is not possible or cannot be imposed on one of the parties, that contracting party may seek its termination.

The motion to terminate may only be upheld where the proposed revision(s) offered by each of the parties do not enable a solution that restores reciprocity of interests under the contract."

Although this draft bill has been around for several years, there is no indication that it will come into force soon.

If so, what are the elements and specific requirements for a claim based on hardship?

The *rebus sic stantibus* principle is fully recognised by Spanish courts, even though the courts traditionally do only apply the principle in exceptional circumstances and in a very restrictive manner. This principle may be applied when circumstances that were the basis for the contract have fundamentally changed in an extraordinary and unforeseeable way after the contract was concluded, so that a contractual obligation of a party has become excessively onerous leading to an imbalance of the contractual obligations or to the frustration of the purpose of the contract. The requirements for the doctrine to apply are as follows:

Continuing obligations

In any event, the contract at issue may not be terminated. The fulfilment of the contractual obligations must still be pending when the party invokes the doctrine. The unforeseeable and exceptional circumstances must occur at a point in time between the conclusion of the agreement and its performance.

"[T]he Spanish Ministry of Justice issued a draft bill to change the Spanish Civil Code that reflects the influences of comparative law."

Spain

Exceptional and unforeseeable change of circumstances

The events that caused the change in circumstances after the conclusion of the contract must be both exceptional and unforeseeable.

In case the risk that led to the change in circumstances is inherent in the specific type of contract and/or is allocated to one party expressly or impliedly (e.g. specific penalty clause or condition), the change in circumstances is not exceptional and unforeseeable. The *rebus sic stantibus* principle does not apply. The Supreme Court (judgments 597/2012 of 8 October 2012 and 820/2013 of 17 January 2013, among others) also held that it is very difficult for the requirement of unforeseeability to be met when the party that is relying on the doctrine acted in a speculative manner or in the situation where the party, as an expert in the field in which the agreement is made, should have been able to foresee what led to the change in circumstances.

Following this approach, the Supreme Court (judgment 1048/2000 of 15 November 2000) rejected the application of this doctrine when invoked by a purchaser of a plot of land after that land was reclassified for planning purposes. The court argued that the fact that the purchaser is a construction company in the property business (i.e. an expert in that field) means that such a change cannot be categorised as unforeseeable. However, if the purchaser was a consumer and the seller a real estate company, courts tend to impose a different risk distribution and protect the consumer.

The Supreme Court also stresses the exceptional character of a change of circumstances in its judgment 336/2009 of 21 May 2009. Hence, the incident at issue may not be common in the sense of occurring on a regular basis in economic life. Consequently, the Supreme Court held that a sharp increase in house prices in Spain could not be considered as exceptional.

Change of circumstances must affect the basis of the contract

Pursuant to the judgments of Spanish courts, e.g. the judgment of the Supreme Court 333/2014 of 30 June 2014, and in line with Spanish legal scholars, the change of circumstances must affect the basis of the contract, namely the set of underlying circumstances at the time when the contract was entered into and which ensures the fulfilment of the purpose of the contract. The basis of the contract can be assessed from an objective as well as a subjective perspective.

The Spanish Supreme Court held that the objective basis of a contract is affected

- when the economic purpose of the contract becomes unachievable, as the economic context in which an agreement was made must be considered as part of its contractual basis, and
- when the equivalence of performance and consideration is affected so that one party is excessively burdened, which is leading to an inequilibrium of the contract.

The subjective basis of a contract is affected when the financial purpose of the transaction for one of the parties, not expressly stated but known and not rejected by the other, becomes unachievable. The change of circumstances may not relate to purely subjective purposes of the parties. It must occur outside their area of control, so that it cannot be attributed to them. For instance, the debtor cannot rely on a default invoking the doctrine if he gave reason for the default in the first place.

It is to be noted that the change in circumstances may not be so severe or of such a quality that the performance of the contract is legally impossible. Impossibility is a different legal concept with differing legal consequences.

> “[T]he Supreme Court held that a sharp increase in house prices in Spain could not be considered as exceptional.”

Spain

Inequilibrium of obligations

Ultimately, the change in circumstances affecting the basis of the contract must lead to an inequilibrium of the contract or must frustrate the economic purpose of the contract. The parties are free to agree on contractual terms that entail a certain inequality for one party when the contract is concluded. The courts will consider whether the original balance of obligations has been altered subsequently because of a change in circumstances and became too one-sided when the contract is performed. An extreme imbalance of obligations implies that the change of circumstances is particularly burdensome for one party because the equivalence in the agreement has been seriously affected, either because it has to incur higher costs to fulfil its obligation or because the unfulfilled obligation has lost value.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

In Spanish case law, the *rebus sic stantibus* doctrine is only applied on an exceptional basis. In those cases, the courts show a clear preference for adapting contracts as a legal remedy. Contracts are only revoked exceptionally, when adaptation to the new circumstances is not possible or appropriate.

However, it is important to note that the court can only adjust the contract if the party seeking to apply the *rebus sic stantibus* principle specifies in its application what has to be done to restore the equilibrium of the contract.

How can a hardship claim be asserted in court?

In case an amicable renegotiation of terms is not feasible, as one party is not willing to negotiate and adapt or terminate the contract, the party suffering from the fundamental change in circumstances must initiate court proceedings via common procedural channels or must bring forward hardship as a defence responding to the statement of claim and invoking the *rebus sic stantibus* doctrine.

It is highly advisable for the respective party to submit a reasonable proposal to restore the equilibrium of the contract, so that it shows it is acting in good faith and is not just trying to maximise its own gain. If, despite the change in circumstances, the debtor has continued fulfilling the obligation originally accepted in the agreement, it can ask for restitution of what it has paid in excess.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

Considering that the *rebus sic stantibus* doctrine is only applicable to pending obligations, there is no time limit for asserting this doctrine in court. However, the requirements of good faith and the prohibition of abusing rights have to be taken into account. Pursuant to Spanish law, the doctrine cannot be applied in cases where the party relying on the doctrine unduly delayed the proceedings so that the other party could objectively and reasonably trust that the doctrine will not be invoked anymore.

> “It is highly advisable for the respective party to submit a reasonable proposal to restore the equilibrium of the contract.”

United Kingdom

Ben Carroll
Partner
Tel: +44 20 7456 5406
ben.carroll@linklaters.com

Adrien Canivet
Managing Associate
Tel: +44 20 7456 2590
adrien.canivet@linklaters.com

United Kingdom

Is the concept of hardship recognised by statutory or case law?

There is no English law concept of hardship enabling parties to renegotiate or avoid performance of a contract which has become commercially onerous to perform.

One of the leading authorities on the issue of hardship is the judgment of the House of Lords in *Davis Contractors Ltd v Fareham Urban District Council* [1956] AC 696, a case involving the construction of houses for a local authority. Even though an unexpected turn of events had delayed the project and rendered the contract more onerous to perform than had been contemplated, the court held this was not a ground for relieving the contractors of their obligations.

Under the common law doctrine of frustration, parties may cease to be bound by a contract where performance is prevented by supervening events beyond their contemplation and control. However, as the House of Lords put it in *Davis v Fareham*, "*it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for*".

The absence of relief for pure economic hardship was reaffirmed in more recent cases. For example:

- In *Thames Valley Power Ltd v Total Gas & Power Ltd* (2006) 1 Lloyd's Rep. 441, the High Court held that, although a sharp increase in market prices had made a gas supply contract significantly less profitable for the supplier, it did not render its performance impossible. On that basis, the supplier was not entitled to suspend performance until the price fell.
- Similarly, in *Tandrin Aviation Holdings Ltd v Aero Toy Store LLC* [2010] EWHC 40 (Comm), a case involving the sale of a jet aircraft, the High Court held that a change in economic or market circumstances, affecting the profitability of the contract or the ease with which the parties' obligations could be performed, could not be regarded as being a *force majeure* event.

Although there is no general concept of hardship under English law, the English courts will enforce contractual clauses designed to accommodate supervening events provided they are clearly defined and sufficiently certain. Whilst the courts will do their best to give effect to the parties' intentions even where there are difficulties of interpretation, there should be a reasonable degree of certainty in respect of the events triggering the right to renegotiate contract terms.

Traditionally, the English courts have refused to enforce pure obligations to negotiate commercial terms in good faith because they are "*inherently repugnant to the adversarial position of the parties when involved in negotiations*" (*Walford v Miles* [1992] 1 All E.R 453). However, they have taken a slightly more flexible approach when the obligation to renegotiate is part of an agreement which has already been performed.

For example, in *Associated British Ports v Tata Steel UK Limited* [2017] EWHC 694 (Ch), the parties to a 25-year licence agreement to use harbour facilities had agreed that "*in the event of any major physical or financial change in circumstances affecting the operation*" of Tata's work or the operation of the harbour, either party could require the terms of the agreement to be renegotiated and refer the matter to arbitration if no agreement was reached within six months. Many years after the contract was concluded, Tata sought a reduction in the licence fee due to challenging market conditions in the UK steel industry. The court rejected ABP's argument that the clause was void for uncertainty. Despite recognising that the circumstances which would trigger the operation of the clause may be difficult to identify, the court held that the clause was sufficiently certain to create a binding obligation on the parties to refer a dispute to arbitration.

> "Under the doctrine … of frustration, parties may cease to be bound by a contract where performance is prevented by supervening events beyond their contemplation and control."

United Kingdom

If so, what are the elements and specific requirements for a claim based on hardship?

As explained above, there is no relief the English courts will award for pure economic hardship in the absence of an express contract provision empowering them to do so. When the parties have made express provision for a change of economic circumstances, the elements and specific requirements of the claim will depend on the terms of the relevant clause. For example, it is common for parties to:

- specify time-limits within which requests for revision or renegotiation may be brought;
- impose requirements as to the content of such requests, including details on the terms which are sought to be renegotiated and the reasons for such renegotiation; and
- specify periods within which parties should attempt to renegotiate the relevant terms before the matter can be referred to a court, an expert or an arbitral tribunal.

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

The aggrieved party will have no remedy for pure economic hardship unless otherwise provided in the contract.

When the parties have made provisions for a change of economic circumstances, the remedies which can be sought will depend on the contract terms and whether those terms are sufficiently certain to be enforceable. In that regard, there is a clear distinction between pure hardship clauses, which typically also provide for the renegotiation of a contract when prevailing circumstances have changed, and *force majeure* clauses, which suspend the performance of a contract on the occurrence of supervening events beyond the parties' control.

How can a hardship claim be asserted in court?

Assuming there is a hardship clause in the contract which can be relied on, the claim will be a standard contract claim. There is no specific procedure or regime for this type of claim under English law.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The general limitation period for contract claims is six years from the date on which the cause of action accrued. This would apply in respect of a claim based on a hardship clause contained in a simple contract, unless the contract specified a shorter period.

> "[T]here is a clear distinction between pure hardship clauses, which typically also provide for the renegotiation of a contract when prevailing circumstances have changed, and force majeure clauses, which suspend the performance of a contract on the occurrence of supervening events beyond the parties' control."

United States

Brenda DiLuigi
Partner
Tel: +1 212 903 9080
brenda.diluigi@linklaters.com

Menaka Nayar
Associate
Tel: +1 212 903 9374
menaka.nayar@linklaters.com

United States

Is the concept of hardship recognised by statutory or case law?

Most contracts are governed by state common law (i.e. case law). However, all 50 states have codified the Uniform Commercial Code (UCC), which governs contracts in commercial transactions related to the sale of goods, leases, negotiable instruments, bank deposits, funds transfers, letters of credit, documents of title, investment securities, and secured transactions.

While neither common law nor the UCC recognise the precise concept of "hardship" that is recognised in other jurisdictions, the closest analogy to this concept exists in the common law doctrine of impossibility and the UCC (and Restatement) concept of impracticability, as explained further below (see *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309; 3 B & S 826 (establishing the doctrine of impossibility in common law); UCC § 2-615 (setting out the concept of impracticability)).

Accordingly, depending on the type of contract at issue, either the common law doctrine of impossibility or the UCC concept of impracticability may be invoked, with the legal consequence that performance of the obligation is fully excused or – in rare situations – that the terms of the contract are adjusted by the court.

If so, what are the elements and specific requirements for a claim based on hardship?

Parties are generally free to agree on contract provisions that address the conditions of their performance. For example, *force majeure* clauses relieve parties from performing their contractual obligations when certain circumstances beyond their control arise, making performance commercially impracticable, illegal or impossible. Parties may tailor these clauses to protect against the risk of supervening events which would otherwise implicate the doctrines of impossibility or impracticability.

As there is no statutory concept of hardship, in the absence of a specific contractual hardship clause, parties to a contract may in "hardship cases" only rely on the doctrine of impossibility or the doctrine of impracticability:

Doctrine of impossibility

The doctrine of impossibility excuses a party's performance when an unanticipated event results in the destruction of the subject matter of the contract or the means of its performance and makes performance objectively impossible (see *Taylor v. Caldwell* (1863) 122 Eng. Rep. 309; 3 B & S 826). However, for the doctrine to apply, the risk of the unanticipated event must not have been allocated in the contract or by custom (*Transatlantic Fin. Corp. v. United States*, 363 F.2d 312 (D.C. Cir. 1966)). Generally, the application of the doctrine is limited to "*the destruction of the means of performance by an act of God, vis major, or by law*" (*407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.*, 23 N.Y.2d 275, 281 (1968)).

The defence of impossibility is rarely successful. Because contract law is intended to allocate risks, courts are generally reluctant to excuse performance based on the doctrine of impossibility (*Kel Kim Corp. v. Cent. Mkts.*, 70 N.Y.2d 900, 902 (1987)). Unexpected financial difficulty or economic hardship rarely suffice to excuse performance. In addition, for the defence to be successful, the party pleading impossibility generally must take every step within its power to attempt performance.

Impracticability (UCC/Restatement of Contracts)

Commercial impracticability is a doctrine similar to impossibility but generally is more flexible in its application. The Restatement (Second) of Contracts § 261 (1981) (Discharge by Supervening Impracticability) articulates this concept as follows:

"Parties are generally free to agree on contract provisions that address the conditions of their performance."

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Section 2-615 of the UCC incorporates a similar concept of commercial impracticability, which applies as a defence if the agreed performance has been made impracticable by the occurrence of a contingency that alters "*the essential nature of the [contract]*" (UCC § 2-615 cmt. 4). To assert the defence, a party must demonstrate that (i) an event made the performance impracticable, and (ii) the party's actions or inactions did not cause the event, (iii) the non-occurrence of the contingency was a basic assumption of the parties when the contract was formed, and (iv) the risk of the event occurring was not allocated to the party seeking excuse.

While commercial impracticability is a more flexible standard than the doctrine of impossibility, courts are generally conservative in applying the doctrine. For example, price changes or other events must be such that performance would create "*extreme and unreasonable difficulty expense or injury*" and it will not suffice to show that "*performance is merely more difficult or costly than contemplated when the agreement was executed*" (*UPS Store v. Hagan*, No. 14-CV-1210, 2016 WL 690918, at *3 (S.D.N.Y, Feb. 11, 2016)) (internal citations and quotations marks omitted); see also UCC § 2-615 cmt. 4 (noting that increased cost or market shifts do not meet the standard unless "*the rise in cost is due to some unforeseen contingency which alters the essential nature of performance*").

Indeed, price increases of as much as 58% have been held by federal and state courts to be insufficient to excuse performance based on impracticability (see *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F. Supp. 129 (N.D. Iowa 1978), rev'd on other grounds, 603 F.2d 1301 (8th Cir. 1979) (rejecting as insufficient a 50-58.4% increase); see also *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 U.C.C. Rep. Ser. 989 (E.D. Pa. 1975) (rejecting assertion that an increase in the "*cost per gallon of Ethanol [. . .] from 21.2 cents a gallon in 1973 to 37.2 cents a gallon*" rendered performance impracticable); *Maple Farms Inc. v. City School Dist. of Elmira*, 352 N.Y.S. 2d 784 (Sup. Ct. 1974) (same, for a 23% increase); *Am. Trading & Prod. Corp. v. Shell Int'l Marine Ltd.*, 453 F.2d 939 (2d Cir. 1972) (same, for an increase of "*less than one-third*")).

The rare instances where courts have applied the impracticability doctrine to excuse performance tend to include unique circumstances or extreme and unforeseen financial hardship. For example, a federal district court in *Aluminum Co. of America v. Essex Group*, Inc., 499 F. Supp. 53 (W.D. Pa. 1980) ("Alcoa") held that the doctrines of impracticability, frustration of purpose, and mutual mistake applied in a contract where a party's loss was "*more than a thousand times greater*" than the other party's loss due to OPEC-driven increases in energy costs and where "*the circumstances surrounding the contract show a deliberate avoidance of abnormal risks*" (id. at 75; but see *Golsen v. ONG W., Inc.*, 756 P.2d 1209,1222 (Okla. 1988), noting that the Alcoa decision has been "*soundly criticized*" by subsequent courts). Further, while "*loss, destruction or a major price increase of fungible goods will not excuse the seller's duty to perform, the rule is different when the goods are unique, have been identified to the contract or are to be produced from a specific, agreed-upon source. In such a case, the nonexistence or unavailability of a specific thing will establish a defence of impracticability*" (*Specialty Tires of Am., Inc. v. CIT Grp./ Equip. Fin., Inc.*, 82 F. Supp. 2d 434, 439–40 (W.D. Pa. 2000) (citing sources)).

What kind of rights are granted for the aggrieved party in case of hardship and is there a ranking ratio between the different kind of rights?

When a defence of impossibility or impracticability is asserted successfully, courts generally excuse performance of the obligation. As such, the doctrines are often all-or-nothing in terms of loss allocation; either the party is fully excused or fully obligated.

United States

The UCC, which tends to relax certain strict common law standards, allows for certain situations in which a court may grant contract adjustments instead of total relief (UCC § 2-615 cmt. 6). Specifically, in situations where neither "*sense or justice*" is served by posing the relief in black-and-white terms of excuse or no excuse, adjustments to the contract can be made with "*equitable principles in furtherance of commercial standards and good faith*". Still, despite this more open-ended standard, courts rarely elect to adjust the terms of the contract.

How can a hardship claim be asserted in court?

Claims of impossibility or impracticability may be raised either as a defence in a pending proceeding or via a declaratory judgment action, where the party asserting impossibility or impracticability seeks a ruling on the issue of whether contract performance is required or excused.

Is there a time limitation in respect to the claim of hardship that needs to be considered?

The applicable statute of limitations for contractual claims depends on which state's laws govern the contract. For example, under New York law, contractual disputes are subject to a statute of limitations of six years (N.Y. C.P.L.R. 3211(a)(5)). The statute of limitations begins to run at the time of breach (*Ely-Cruikshank Co. v. Bank of Montreal*, 81 N.Y.2d 399, 402 (1993)). However, if a contract has imposed a duty of continuing performance over a period of time, each successive breach renews the statute of limitations (*Guilbert v. Gardner*, 480 F.3d 140, 150 (2d Cir. 2007)).

The defences of impossibility and impracticability generally are asserted at the early stages of litigation (for example, in a motion to dismiss a complaint for breach of contract or as an affirmative defence incorporated into the answer to a complaint).

> "[W]here neither "sense or justice" is served by posing the relief in black-and-white terms of excuse or no excuse, adjustments to the contract can be made."

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