CHAPTER X

A SINGLE THEORY OF IMPEDIMENTS UNDER THE CISG: A LATIN-AMERICAN PERSPECTIVE

Sergio García Long (*)

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1. *Chronicle of a unification foretold*

Unexpected circumstances are one of the most fascinating, complex, and non-uniform topics in contract law. Unexpected circumstances deal with any supervening impediment that affects the contract without fault of the parties. Within this subject, innumerable theories have been discussed. From a Latin-American approach and thinking on a transnational contract law, the study of unexpected circumstances includes the following effects: (1) *force majeure*, (2) hardship, and (3) frustration of purpose.

For this study, comparative law is used in order to be aware of the different views that exist in Civil Law and Common Law jurisdictions, but it also takes into account the main international uniform law instruments (soft and hard law) that are the sources of transnational law. This allows us to consider the improvements that have been proposed regarding domestic laws, the consensus achieved at the international level and the trends in the *lex mercatoria*. In this regard, the CISG (1),

(*) Pontifical Catholic University of Peru (summa cum laude). Lecturer in Private and Corporate Law. Assistant professor in Corporate Law at Pontifical Catholic University of Peru. Email: sergio.garcial@pucp.edu.pe.

(1) United Nations Convention on Contracts for the International Sale of Goods.

PICC (2), PECL (3), DCFR (4), PLACL (5), OHADAC Principles (6), TransLex Principles (7), ITC (8) and ICC (9) are considered.

In Civil Law, *force majeure* or supervening impossibility of performance was widely recognized as an exemption from liability of the obligor (*impossibilium nulla obligatio est*), while *rebus sic stantibus* was rejected and found no place in the main civil codifications of the 19th century. Later cases were discussed in which the obligor could still perform but at an unreasonable cost, with great difficulty. Faced with such cases, several theories with different titles began to be proposed, although they all had something in common: to provide a solution for the problem of hardship. While in some cases it was considered that hardship should allow the termination of the contract, in others it was thought that perhaps the best solution would be to adapt the contract with a view to rebalance it (if an imbalance occurs, then the natural solution should be to adapt it and not to terminate it).

On the contrary, in the Common Law no exemption from liability for non-performance was acknowledged. The obligor had to perform the contract in absolute terms unless he had agreed to an excuse, otherwise, he would be responsible even if performance becomes impossible without his fault according to Paradine v. Jane (1647). It was only with Taylor v. Caldwell (1863) that an exoneration from liability began to be accepted: when the underlying subject matter of the contract disappears, whether the thing or the person (if the good perishes without fault or the obligor dies). Thus, a specific case of physical impossibility was created. This was called "frustration of contract" and its legal basis was the "implied terms" doctrine. For this reason, and despite the similarities, in English law there is no French-style doctrine of *force majeure* for cases of impossibility. Later, the cases of the disappearance of the underlying subject matter of the contract were expanded to include situations where what disappears is the "foundation", the "basis", the "state of things", the "purpose" of the contract according

(2) *UNIDROIT* Principles of International Commercial Contracts.
(3) *Principles* of European Contract Law.
(4) *Draft* Common Frame of Reference.
(5) Principles of Latin American Contract Law.
(6) Organization for the Harmonization of Commercial Law in the Caribbean *Principles* on International Commercial Contracts.
(7) Principles on Transnational Law.
(8) International Trade Centre.
(9) *International Chamber of Commerce.*

to the coronation cases, specifically Krell v. Henry (1903). This was called "frustration of purpose". The supervening illegality or legal impossibility according to Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd (1943) was also added as part of the frustration of contract doctrine, as well as cases of "frustration of adventure" (temporary impossibility). Finally, the Law Reform (Frustrated Contracts) Act 1943 dealt with the consequences of a contract being frustrated.

Since frustration refers only to specific cases of impossibility (as a civil lawyer would understand it), English law does not recognize a doctrine of hardship. The increase of costs or economic difficulty is not an excuse for the performance of contract. Not only because of the excuse itself (excessive onerosity that does not result in the destruction of the thing or death of the person), but also due to the English law rejection of any judicial intervention in contracts (to adapt or terminate it) and the distrust of ambiguous and imprecise concepts such as good faith and renegotiation.

American law followed English law by including as specific cases of impossibility of performance the continued existence of the person or thing necessary for the performance of the contract under sections §262 and §263 of the Restatement (Second) of Contracts, respectively, as well legal impossibility under section §264. Furthermore, frustration of purpose was recognized under section §265. However, American law departed from English law by including impracticability (the American hardship) in section §261, and by tying frustration of purpose and impracticability in the notion of "basic assumption", which is different from the English doctrine of "implied terms" (at least in theory). On the UCC ([10]) side, section §2-615(a) regulates impracticability under the heading "Excuse by failure of presupposed condition" (clearly German influenced) and an impossibility rule in section §2-613 under the heading "Casualty to identified goods". The UCC does not recognize frustration of purpose, being a novelty its inclusion in the First and Second Restatement of Contracts.

If we consider Common Law and Civil Law as a whole, we can identify an institution that has caught the attention of civil lawyers: frustration of purpose. *Force majeure* and hardship are widely recognized in civil codifications, and although it seemed that with such a duo

([10]) Uniform Commercial Code.

the cases of exonerations from liability for unexpected circumstances would have being exhausted, the truth is that there was still room for an additional excuse. Civil lawyers looked at frustration of purpose as an innovation, as that piece of the puzzle they were looking for to complete the *troika* that would rule unexpected circumstances. This is why civil lawyers have widely discussed what frustration of purpose is under Civil Law and how it could be imported, which has been studied and debated with greater seriousness and intensity by Ibero-American lawyers in times of the Covid-19 pandemic ([11]).

Despite this non-uniformity in relation to unexpected circumstances, of this tower of babel in domestic laws, the development of transnational contract law can be used to achieve some convergence, surprising as it may seem. Domestic Civil Law jurisdictions were obsessed in making clear differences between *force majeure*, hardship and frustration of purpose. As such, the requirements to invoke them were different since they were based on different theories and with the goal to justify different remedies or consequences (renegotiation,

([11]) In Peru see Eduardo Benavides, *La excesiva onerosidad de la prestación* (Cultural Cuzco 1990); Eduardo Benavides, "Hacia una revalorización de la finalidad contractual" in Alfredo Bullard & Gastón Fernández (eds), *Derecho Civil Patrimonial* (Fondo Editorial PUCP 1997) 169; Juan Espinoza, "La *doctrine of frustration*: ¿es factible su aplicación en el ordenamiento jurídico peruano?" (2018) 49 Actualidad Civil 165; Yuri Vega, "Más allá de la imposibilidad y la excesiva onerosidad. Notas sobre la frustración del contrato y la impracticabilidad comercial" in Manuel Torres, Ever Medina & Diego Pesantes (eds), *Covid-19: su impacto en las relaciones jurídicas privadas* (Gaceta Jurídica 2020) 53; Sergio García Long, "Contratos en cuarentena: pandemia y cambio de circunstancias" in *Derecho de los Desastres: Covid-19* (Volume I, Fondo Editorial PUCP 2020) 151; Hugo Forno Odría, "Frustración en los tiempos de coronavirus: una apología a la frustración del fin del contrato" in *Derecho de los Desastres: Covid-19* (Volume I, Fondo Editorial PUCP 2020) 117; Daniel Ugarte Mostajo & Raúl Zúñiga, "The Impact of the Health Emergency on Contract Law: National Report Peru" (2020) Opinio Juris in Comparatione. Studies in Comparative and National Law. Special Issue: Impact of Coronavirus Emergency on Contract Law 1. In Brazil see Nelson Rosenvald, "O direito como experiência. Dos "coronation cases" aos "coronavírus cases"" (2020) 12 Actualidad Jurídica Iberoamericana 250. In Argentina see Germán Gerbaudo, "La renegociación y la revisión contractual frente a la pandemia Covid-19" (2020) 5 Deconomi 68; José Sahián, "El impacto de la emergencia por pandemia en las relaciones de consumo" in Pascual Alferillo (ed), *La Crisis del Coronavirus y el Derecho Argentino* (Editores Fondo Editorial 2020); Fulvio Santarelli, "La pandemia como elemento de la frustración del fin del contrato" (2019-2020) 50-51 Ius et Praxis 113. In Spain see Sixto Sánchez Lorenzo, "La frustración del contrato en el derecho comparado y su incidencia en la contratación internacional" (2005) Revista de la Corte Española de Arbitraje 45, 54-57; Carmen Jerez, María Kubica & Albert Ruda, "Covid-19, fuerza mayor y contrato, en el amplio panorama del Derecho de los Desastres", in *Derecho de los Desastres: Covid-19* (Volumen II, Fondo Editorial PUCP) 1475.

adaptation, termination and exemption from damages). However, if we look more closely, we will see that the only true distinction is the effect itself, since all of them may be claimed based on the same general requirements and give rise to the same remedy (as a contractual excuse) ([12]). Then there is no major justification for making too many theoretical distinctions between them. In practice, international trade points in this direction: in favor of the unification of *force majeure*, hardship and frustration of purpose.

There is many evidence to defend our case and it is presented in this paper, the most recent being the CISG – AC Opinion 20 on hardship and article 79 CISG. The analysis of the CISG is not only important because it is recent but also because of its contribution to the existence and development of a transnational contract law, uniform over and above national jurisdictions. But even more, and in the face of unexpected circumstances, the CISG not only promotes uniformity but – to be more precise – unification on impediments under article 79 CISG. Although article 79 is an exemption for cases of *force majeure* (under the "impediment" disguise), some experts believe that the term "impediment" is broad enough to include hardship cases. Then, there is no gap in the CISG regarding hardship because article 79 is not limited to *force majeure* events ([13]). To accomplish this goal, the CISG – AC played an

([12]) On excuses see Larry DiMatteo, "Contractual excuses under the CISG: impediment, hardship, and the excuse doctrines" (2015) 27 Pace Int'l L Rev 258; Martin Davies, "Excuse of impediment and its usefulness" in Larry DiMatteo (ed), *International Sales Law. A Global Challenge* (CUP 2014) 295; Alejandro Garro, "*Force majeure*, hardship and other excuses" (2015) 2 Rev droit international et droit compare 217; Tom Southerington, "Impossibility of performance and other excuses in international trade" in Pace Int'l L Rev (ed). *Review of the Convention on Contracts for the International Sale of Goods (CISG) 2002 – 2003* (Kluwer Law Int'l 2004) 249.

([13]) Article 79 CISG has been highly commented by CISG scholars, between those who believe article 79 only deals with *force majeure* cases and those who affirm there is room for hardship. The discussion includes the applicable consequences of successfully invoking hardship under the CISG (exemption from damages, private termination, renegotiation, judicial adaptation and judicial termination), the application of the PICC to supplement the CISG and the *Scafom* case of 2009. See the discussion in Denis Tallon, "Article 79" in Cesare M Bianca & Michael J Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (*Giuffrè 1987*); John O Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention* (4th edn edited and updated by Harry M Flechtner, Kluwer Law Int'l 2009); Michael J Bonell, "«Force majeure» and «hardship» nel diritto uniforme della vendita internazionale" (1990) 4 Dir Comm Int 453; Hans Stoll & Georg Gruber, "Article 79" in Peter Schlechtriem & Ingeborg Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods (CISG)* (2nd edn, OUP 2005); Scott Slater, "Overcome by hardship: the inapplicability of the UNIDROIT

important role. The CISG – AC Opinion 7 explained that *force majeure* and hardship may both be claimed under article 79 CISG (14), while

Principles'hardship provisions to CISG" (1998) 12 Florida J Int'l L 231; Joern Rimke, "Force majeure and hardship: application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts" in Pace Int'l L Rev (ed), *Review of the Convention on Contracts for the International Sale of Goods: 1999-2000* (Kluwer Int'l 2000) 197; Niklas Lindström, "Changed Circumstances and Hardship in the International Sale of Goods" (2006) 1 Nordic J Comm L 1; Alejandro M Garro, "Article 79 CISG–UP" in John Felemegas (ed), *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 236; Dionysios P. Flambouras, "Article 79 CISG–PECL" in John Felemegas (ed), *An international approach to the interpretation of the United Nations Convention on Contracts for the International Sale of Goods (1980) as Uniform Sales Law* (CUP 2007) 499; Ingeborg Schwenzer, "Force majeure and hardship in International Sales Contracts" (2009) 39 Victoria U Wellington L Rev 709; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles. Exemption for Non-performance in International Arbitration* (Wolters Kluwer 2009); Anna Veneziano, "UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court" (2010) 15 Uniform L Rev 137; Denis Philippe, "Renégociation du contrat en cas de changement de circonstances: une porte entrouverte? (note sous Cass., 19 juin 2009)" (2010) 94 Droit des Affaires/Ondernemingsrecht 156; Harry Flechtner, "The exemption provisions of the Sales Convention, including comments on "hardship" doctrine and the 19 June 2009 decision of the Belgian Cassation Court" (2011) 2011 Annals Fac. L. Belgrade Int'l Ed. 84; Julie Dewez, Christina Ramberg, Rodrigo Momberg, Rémy Cabrillac & Lis Paula San Miguel Pradera, "The duty to renegotiate an international sales contract under CISG in case of hardship and the use of the Unidroit Principles" (2011) 19 Eur. Rev. Private L. 101; Joseph Lookofsky, "Not running wild with the CISG" (2011) 29 J L & Comm 141, 156-168; DiMatteo (n 11) 258; Yesim M. Atamer, "Article 79" in Stefan Kröll, Loukas Mistelis & María del Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods (CISG)* (1st edition, C.H. Beck – Hart – Nomos 2011) 1054; A.H. Hudson, "Exemption and impossibility under the Vienna Convention" in Ewan McKendrick (ed), Force majeure and frustration of contract (2nd edition, Informa Law 2013) 267; Peter Mazzacano, *Exemptions for the non-performance of contractual obligations in CISG article 79. The question for uniformity in international sales law* (Intersentia 2014); David Kuster & Camilla Baasch Andersen, "Hardly room for hardship – A functional review of article 79 of the CISG" (2016) 35 J L & Comm 1; Clayton P Gillete & Steven D Walt, *The UN Convention on Contracts for the International Sale of Goods: Theory and Practice* (2nd edn, CUP 2016) 293; Franco Ferrari, Clayton P. Gillette, Marco Torsello & Steven D. Walt, "The inappropriate use of the PICC to interpret hardship claims under the CISG" (2017) 17 Internationales Handelsrecht 97; Yasutoshi Ishida, "CISG article 79: Exemption of performance, and adaptation of contract through interpretation of reasonableness – full of sound and fury, but signifying something" (2018) 30 Pace Int'L L. Rev. 331; Ingeborg Schwenzer & Edgardo Muñoz, "Duty to renegotiate and contract adaptation in case of hardship" (2019) 24 Uniform L Rev 149; Sergio García Long, "Por qué no debemos distinguir entre "caso fortuito" y "fuerza mayor". Reflexiones desde el derecho contractual transnacional" (2021) 93 Gaceta Civil & Procesal Civil 21, 25-27.

(14) CISG-AC Opinion No. 7, Exemption of Liability for Damages under Article 79 of the CISG, Rapporteur: Professor Alejandro M. Garro, Columbia University School of Law, New York, N.Y., USA. Adopted by the CISG-AC at its 11th meeting in Wuhan, People's Republic of China, on 12 October 2007.

Opinion 20 states in more detail the consequences of hardship under the CISG (*force majeure* and hardship are subject to the same general requirements as excuses and have the same consequences, then no renegotiation nor adaptation or termination by court are allowed) (15).

The great contribution of the CISG – AC Opinion 20 is that it privatizes the contractual procedure of hardship in such a manner that the affected party is only excused while the impediment lasts. Renegotiation or judicial intervention to adapt or terminate the contract are not available unless agreed so. Under this scenario there is no major difference between hardship and *force majeure* if both are treated as excuses with no preservative effects on the contract (nor renegotiation neither adaptation). This is a big step towards the unification of impediments in transnational contract law.

But another interesting aspect to highlight in Opinion 20 is that it indicates that frustration of purpose is included in hardship. While it has made clear its position in favor of the unification of *force majeure* and hardship, it has left the table set towards the unification between hardship and frustration of purpose. If this is so, *force majeure*, hardship and frustration of purpose could all be subject to the same general requirements and work as excuses with the same consequences. They would only differ in the effect itself on the contract (impossibility, excessive onerosity and uselessness of the contract) (16).

Maybe after all article 79 is not –anymore and thanks to the CISG – AC– the "Convention's least successful part of the half-century work towards international uniformity" as once professor Honnold assessed (17).

(15) CISG-AC Opinion No. 20, Hardship under the CISG, Rapporteur: Prof. Dr. Edgardo Muñoz, Universidad Panamericana, Guadalajara, Mexico. Adopted by the CISG Advisory Council following its 27th meeting, in Puerto Vallarta, Mexico on 2 – 5 February 2020.

(16) See Jerez, Kubica & Ruda (n 10) 1489-1490 ("Como antes quedó explicado, un acontecimiento que pudo comenzar siendo motivo de fuerza mayor, como han sido las medidas sanitarias impuestas por razón del COVID-19, puede derivar en una desgracia mayor, como la penuria económica ocasionada por el cese de las actividades no esenciales, y desencadenar así escenarios de excesiva onerosidad sobrevenida (con la obligación de las partes de renegociar el contrato, conforme a la buena fe o el criterio de lo razonable), o bien a la frustración del fin del contrato (dando lugar a su resolución o terminación a instancia de uno de los contratantes)... Dado que en la Convención ondea el criterio de lo «razonable» propio del *Common Law* y que viene a coincidir con las soluciones presididas por el principio de buena fe contractual, parece lógico y conforme a la equidad admitir que, si se acoge lo menos (fuerza mayor), deba ser acogido lo más (excesiva onerosidad y frustración del fin contractual)").

(17) See the discussion in Harry Flechtner, "Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach test: The homeward

This unification in transnational contract law is based on the premise that contracts may be affected in a supervening manner by impediments, which are events or consequences that hinder the performance of the contract as agreed upon and without fault of the parties. As such, they function as excuses to performance in favor of the party affected by the impediment, provided that the following general requirements are met: (1) the impediment is beyond reasonable control, (2) the impediment could not have been reasonably foreseen at the time of conclusion of the contract, and (3) the affected party could not reasonably avoid or overcome the impediment or its consequences ([18]). These impediments may cause different effects on the contract. In all cases, the contractual procedure is private without intervention of the courts and the consequence is an excuse. For these purposes an excuse means exemption from damages for non-performance while the impediment lasts and/or private termination of the contract (by the affected party or the other party, as appropriate). Then the preference is for releasing and not preservative effects on the contract.

Sections II, III and IV deals with the interaction between *force majeure*, hardship and frustration of purpose in order to show how in practice they end up being confused, and with that, unified. Finally, section V presents some final reflections.

2. Force majeure

2.1. *Economic impossibility (or becoming hardship)*

Hardship can be seen as an extension of *force majeure* in terms of costs ([19]). If a contract costs too much to perform to the point where

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trend and exemption for delivering non-conforming goods" (2007) 19 Pace International L Rev 29, 50; DiMatteo (n 11) 275.

([18]) Sometimes it is considered as an additional requirement that the risk of the impediment have not been assumed by the affected party, but this requirement is part of the second one (the impediment could not have been reasonably foreseen at the time of conclusion of the contract).

([19]) For instance, see Lindström (n 12) 7 ("The question whether economic difficulties (in the Nordic countries also known as economic force majeure) in exceptional cases could constitute an impediment has been discussed. Schlechtriem asserts that the general view during the preliminary UNCITRAL discussions was that both physical and economic impossibility could exempt an obligor."). In the Law & Economics literature, see the discussion in Richard Posner

it is reasonable to consider that no one would bear that cost, then it can be considered as impossible even though it is not (sometimes also referred as "economic impossibility").

In relation to domestic laws, Germany deals with the concept of impossibility (*Unmöglichkeit*) in § 275(1) BGB and the distinction between "practical impossibility" (*faktische Unmöglichkeit*) (§ 275(2) BGB) and "economic impossibility" (*wirtschaftliche Unmöglichkeit*) or hardship. The classic example of practical impossibility under § 275(2) BGB is the one proposed by Philipp Heck about the ring that falls into the sea and which cost of recovery is exorbitant in relation to the interest of the creditor in the performance. Although this case is intended to explain the logic of section § 275(2) and how it can be distinguished from § 275(1) and § 313 BGB (*Geschäftsgrundlage*) ([20]), this is a peculiarity of German law that is not replicated in transnational contracts. Seen from the outside, the case of the ring would be one of hardship.

In English law, Taylor v. Caldwell (1863) on the destruction of the thing or the person as an exemption could be explained under the logic of economic impossibility. In that case, the theater whose existence was necessary to perform the contract was destroyed before performance. It was physically possible to rebuild the theater and delay the performance of the contract. However, such assumption of costs was considered unreasonable, and as such, it was deemed impossible. Did the contract really become impossible or just excessively onerous? ([21])

In American law we also have some interesting data. The Restatement of Contracts 1932 used the term "impossibility" in an all-encompassing manner to refer to objective and subjective impossibility and also to refer to both impossibility in strict sense and impracticability pursuant to sections § 454, § 455 and § 457. Then, section § 2-615

& Andrew Rosenfield, "Impossibility and related doctrines in contract law: an economic analysis" (1977) 6 JLS 83; Pietro Trimarchi, "Commercial impracticability in contract law: an economic analysis" (1991) 11 Int'l Rev Law & Economics 63; Melvin Eisenberg, "Impossibility, impracticability and frustration" (2009) 1 J Legal Analysis 207; Victor Goldberg, "Excuse doctrine: the Eisenberg uncertainty principle" (2010) 2 J Legal Analysis 359.

([20]) See Reinhard Zimmermann, "Remedies for non-performance" (2002) 6 Edinburgh L Rev 271, 280-283; Hannes Rösler, "Changed and Unforeseen Circumstances in German and International Contract Law" (2008) 5 Slovenian L Rev 47, at 52; Philip Ridder & Marc-Philippe Weller, "Unforeseen Circumstances, Hardship, Impossibility and Force Majeure under German Contract Law" (2014) 22 Eur Rev Private L 371, 376.

([21]) Basil Markesinis, Hannes Unberath & Angus Johnston, *The German Law of Contracts* (Second edition, Hart Publishing 2006), 327.

UCC 1952 was enacted and dedicated to "impracticability". Finally, the Restatement (Second) of Contracts 1981, influenced by the UCC, reversed the terminology used by the first Restatement and now uses the term "impracticable" in an all-encompassing manner to refer to both impracticability and impossibility. Indeed, while section § 261 regulates impracticability, section §262 deals with the death or incapacity of the person necessary for the performance of the contract, section § 263 with the destruction, deterioration or non-existence of the thing necessary for the performance of the contract and section § 263 with legal impossibility, and yet sections § 262, § 263 and § 264 no longer use the term "impossibility" but "impracticable".

The aforementioned is not only a matter of terminology policy. The standard that American courts have imposed for proving the occurrence of impracticability is so high that it is very similar to claiming impossibility ([22]). As stated in the leading case Mineral Park Land Co. v. Howard (1916): "a thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost." ([23])

In transnational contract law there is uniformization on the subject. For example, comment 1 to article 7.1.8 "Impossibility (*force majeure*)" OHADAC Principles refers to economic impossibility from a comparative perspective and points out that it can be considered as hardship or frustration of purpose as appropriate ([24]).

Comment 5 to article 7.1.7 (*Force majeure*) PICC states that *force majeure* and hardship may concur in the same case ([25]). Likewise, comment 6 to article 6.2.2 (Definition of hardship) PICC is clear when it

([22]) See Sheldon Halpern, "Application of the doctrine of commercial impracticability: searching for the wisdom of Solomon" (1987) 135 University of Pennsylvania L Rev 1123; Jennifer Camero, "Mission impracticable: the impossibility of commercial impracticability" (2015) 13 University of New Hampshire L Rev 1.

([23]) At 460.

([24]) "Although economic impossibility is recognised as a case of impossibility in some Caribbean legal systems, especially those inspired by USA law and the notion of impracticability (Section 2: 615 UCC and Section. 261 of the Second Restatement), it is not admitted in civil law systems inspired by French law and, in more widespread opinion, in legal systems inspired in common law either. However, cases of economic impossibility can be considered, depending on circumstances, and have the same effects as hardship or frustration of purpose included in Section 3 of Chapter 6 of these Principles."

([25]) "Force majeure, like hardship, is typically relevant in long-term contracts (see Comment 5 on Article 6.2.2), and the same facts may present both hardship and force majeure (see Comment 6 on Article 6.2.2)".

states that *force majeure* and hardship may arise in the same case, and therefore, it will be up to the parties to choose which one to invoke depending on the remedy that suits them best (26). This precision is made since in the PICC *force majeure* has releasing effects while hardship preservative ones, which represents the trend in Civil Law jurisdictions as opposed to Common Law.

This distinction in consequences between *force majeure* and hardship is admitted in Civil Law, whereas in Common Law and transnational contractual law it is preferred for hardship to only have releasing effects with no judicial intervention. If *force majeure* and hardship are similar, the latter being an extension of the former, then it is logical for hardship to work as an excuse as *force majeure* does (an exemption that has effect for the period during which the impediment exists or the private termination of the contract). The CISG – AC Opinion 20 states that under article 79 CISG it is possible to invoke hardship but only as an excuse for the performance of the contract and not to request renegotiation or judicial intervention to adapt or terminate the contract.

As the CISG aims to uniform international sales contracts, it needs to reach certain consensus between Civil Law and Common Law jurisdictions. If Civil Law accepts hardship with preservative effects while Common Law rejects hardship or in any case accepts it with limited application, then the middle ground in international contracts is to allow hardship but only as an excuse and not with preservative effects (nor renegotiation neither adaptation).

2.2. *Unification of requirements*

International practice moved towards unification of *force majeure* and hardship requirements. This means that the occurrence of the same general requirements can trigger both effects. To analyze this

(26) "6. Hardship and force majeure
In view of the definitions of hardship in this Article and force majeure in Article 7.1.7, under the Principles there may be factual situations which can at the same time be considered as cases of hardship and of force majeure. If this is the case, it is for the party affected by these events to decide which remedy to pursue. If it invokes force majeure, it is with a view to its non-performance being excused. If, on the other hand, a party invokes hardship, this is in the first instance for the purpose of renegotiating the terms of the contract so as to allow the contract to be kept alive although on revised terms".

uniformity let us start with the requirements that are usually considered as the one that differentiates *force majeure* from hardship.

"Irresistibility" means that the affected party by the impediment was unable to avoid or overcome the impediment or its consequences, and as such, had no alternative but to default without fault of his own. Thus, irresistibility is considered to be the most important requirement of *force majeure* since it is where the supervening impossibility of performance happens. Then by definition it excludes hardship cases.

However, in transnational contract law the irresistibility requirement is no longer the characteristic that distinguishes *force majeure* from hardship since the latter must also meet this requirement. Clearly this is a different irresistibility. It is not an irresistibility as synonym of impossibility. In hardship, irresistibility means that the affected party could not avoid or overcome the impediment or its consequences that produce excessive onerosity, and as such, he has no alternative but to perform a radically different contract. Precisely because of this he refuses to perform the contract in such circumstances.

The presence of irresistibility in hardship is a consequence of the unification in transnational contract law regarding contractual excuses. As a result, there are common general requirements for both *force majeure* and hardship.

In France *force majeure* had to meet the requirements of exteriority (*extériorité*) or strange cause (*cause étrangère*), unforeseeability (*imprevisibilité*) and irresistibility (*irresistibilité*). The requirement of exteriority or strange cause was then formulated differently by other civilian jurisdictions. On the one hand, Algeria and Egypt formulated it as exceptional (*exceptionnels*) while Italy as extraordinary (*straordinari*).

With the French reform of 2016 and the new article 1218 Code Civil, the aim was to formulate the requirements in a clearer and more precise manner as the main international uniform law instruments do. When requirements are formulated using a single term, it is left to interpretation to define its content and that does not promote legal certainty. In the 2016 reform, the French legislator took the opportunity and specified in greater length the *force majeure* requirements in the new article 1218. French lawyers no longer speak of (1) "exteriority" or "strange cause" but of an impediment that is "beyond the control", (2) "unforeseeability" but of an impediment that "could not reasonably have been foreseen at the time of the conclusion of the contract", and (3) "irresistibility" but of an impediment that "could not

been avoided". In this way, the French legislature adopted the trend of the main international uniform law instruments.

It should be noted that sometimes certain uniform law instruments include a fourth requirement that might not be expressly stated if considered obvious: (4) the risk of the impediment has not been assumed by agreement.

Regarding the first three requirements, see article 79(1) CISG, article 7.1.7 PICC, article 8: 108(1) PECL, article III. – 3: 104(1)(2) DCFR and paragraph 1 of the ICC Force Majeure Clause 2020 (Long Form). On the forth requirement see article 7.1.8(2) OHADAC Principles, article 89 PLACL and article No. VI. 3(a) TransLex Principles.

Now, what are the requirements for invoking hardship? First, it is required that an excessive onerosity occurs, due to a cost increase in the performance or devaluation of counter performance. Since this is an obvious requirement, let us focus on the following.

The uniform law instruments of civilian profile state that the impediment that generates hardship must be (1) supervening or existing at the time of the conclusion of the contract but known afterwards, (2) that could not reasonably have been taken into account at the time of the conclusion of the contract ("unforeseeability"), and (3) that the risk has not been assumed by the affected party. No mention is made to the lack of control of the impediment ("exteriority" or "strange cause") or that it could not reasonably have been avoided or overcome ("irresistibility"). In this sense, see article 6:111(2) PECL, article III. – 1:110(3) DCFR, article 84(1) PLACL and the first paragraph of article 1195 Code Civil. These are the requirements formulated by civil lawyers. But a different story is told in international practice.

The CISG – AC Opinion 20, article 6.2.2 PICC, article No. VIII.1 TransLex Principles and article 6.3.1(2) OHADAC Principles state a forth requirement for hardship: the impediment is beyond the control of the affected party. Likewise, the same requirement is stated in the ICC Hardship Clause 2020 and the hardship clause of the ITC Model Contracts for Small Firms 2010. The ICC even precise that it is beyond "reasonably" control.

Note that the PICC and TransLex Principles use the term "hardship" instead of "change of circumstances". This is because the PICC and TransLex Principles are intended to be recognized as *lex mercatoria* and to be applied to international contracts. As such, they are not limited to the European Union and Civil Law jurisdictions. For this reason, they not only preferred to use the term "hardship" that is

familiar to Anglo-Saxons but also specify that the impediment must be beyond the control of the affected party, as is usually agreed in hardship clauses. Indeed, the term "hardship" and the forth requirement are used in the same manner by the ICC and ITC as evidence of how hardship clauses are agreed in international practice.

On the other hand, pursuant to CISG – AC Opinion 20, article 6.3.1(2) OHADAC Principles and ICC Hardship Clause 2020, hardship has a fifth requirement: the impediment or its consequences could not reasonably be avoided or overcome ("irresistibility").

If we look at the whole picture, we can conclude that there are common general requirements to invoke both *force majeure* and hardship under transnational contract law: (1) the impediment is beyond control, (2) the impediment could not reasonably be expected to have been taken into account at the time of the conclusion of the contract, and (3) the impediment or its consequences could not reasonably have been avoided or overcome. The (4) risk of occurrence of the impediment had not been assumed by the affected party, is already part of requirement (2).

The real difference between *force majeure* and hardship does not lie in their requirements but in the effect itself: in one case the performance of the contract becomes impossible while in the other excessively onerous.

2.3. *The same remedy*

The unification of *force majeure* and hardship has also been verified in relation to the applicable remedy or consequence. At first, civil codifications began to recognize the power of courts to adapt contracts affected by hardship. The logic was that if the contract can be rebalanced, then it is better to adapt it rather than to terminate it. This tendency to preserve the contract was reinforced by certain international uniform law instruments of civilian profile, which indicated that the first step to correct hardship should be through renegotiation as a legal duty upon the parties. This is how civil lawyers preferred a model of hardship with preservative consequences. From this perspective, the distinction between hardship and *force majeure* is clear since the former would allow to preserve the contract while the latter only terminate it. However, this perspective began to change in international contracting.

Anglo-Saxons are reluctant to allow court intervention in a contract, whether to adapt or terminate it. Consequently, there is no doctrine of hardship. In any case, it is possible to include a hardship clause when the contract is subject to English law for instance. However, since the premise is the rejection of hardship, the preference is for a hardship clause with a private contractual procedure without the intervention of the courts and renegotiation as a legal duty. Consequently, only out-of-the-court termination is agreed as a remedy. Over time this hardship model became standardized in international practice.

In fact, the CISG, OHADAC Principles, ICC and ITC recognize hardship as an excuse and through a private contractual procedure with no court intervention. Consequently, it does not allow adaptation or termination by court except if agreed so. In addition, the CISG (according to CISG – AC Opinion 20) and OHADAC Principles do not allow for renegotiation as a legal duty upon the parties, while the ICC hardship clause model does indicate that the parties must attempt to renegotiate the contract before the affected party can terminate it unless judicial adaptation is agreed, but in this case renegotiation makes sense because the affected party have the right to privately terminate the contract, then the other party have real incentives to renegotiate to avoid private termination. Similarly, the ITC hardship model clauses allow for renegotiation but prefer for private remedies with no court intervention. Hardship as an excuse in accordance with transnational contractual law will be discussed in more detail in the following sections.

Thus, if *force majeure* and hardship are excuses and both may be triggered by the occurrence of the same general requirements, the only difference between them is – once again – that in the former the performance of the contract becomes impossible while in the later excessively onerous.

2.4. *The duty of notification*

Another aspect that demonstrate how *force majeure* and hardship have been unified is the duty to notify the occurrence of the impediment. While civil codifications are silent on the duty of notification in *force majeure*, the main uniform law instruments have followed the trend observed in *force majeure* clauses in international contracts and, consequently, state that upon the occurrence of an impediment the affected party must notify the other party of its occurrence. The

purpose of this duty is to mitigate the damages of the counterparty due to the interruption of the contract. Even it is expressly stated that failure or delay in giving notice will render the affected party liable for damages suffered by the counterparty for failure or delay in giving notice. See article 79(4) CISG, article 7.1.7(3) PICC, article 8:108(3) PECL, article III. – 3:104(5) DCFR and article No. VI.3(d) TransLex Principles.

The ICC Force Majeure Clause 2020 (Long Form) contains a more extensive content on the duty of notification which shows how *force majeure* clauses are agreed in international practice and how they are more complex than the regulation found in national jurisdictions and the main uniform law instruments ([27]).

First, notice is a duty on the affected party to communicate to the counterparty the occurrence of the impediment and it has the purpose to mitigate the damages of the counterparty, but notice is also agreed as a burden on the affected party since the impediment will only produce its legal effects from the date of notice. Thus, the lack or delay of notification is prejudicial to the same party that wants to invoke *force majeure*. Second, the affected party must also notify the counterparty when the impediment has ceased, so that he may proceed without delay to perform the contract. Third, the duty to mitigate damages is expressly agreed upon, then there is no need to resort to general and ambiguous clauses such as the duty of good faith or the duty to cooperate. See paragraphs 4, 5, 6 and 7 of the ICC Force Majeure Clause 2020 (Long Form).

While there is consensus between the main uniform law instruments on the existence of a duty of notification in *force majeure*, the same tendency does not exist for hardship in civil codifications or uniform law instruments of civilian profile (PICC, PECL, DCFR, PLACL

([27]) See Christoph Brunner, "Chapter 3. Rules on force majeure as illustrated in recent case law" in Fabio Bortolotti & Dorothy Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts. Dealing with Unforeseen Events in a Changing World* (ICC Dossier, ICC Publishing 2018) 82; Filip De Ly, "Chapter 4. Analysing the ICC Force Majeure Clause 2003" in Fabio Bortolotti & Dorothy Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts. Dealing with Unforeseen Events in a Changing World* (ICC Dossier, ICC Publishing 2018) 113; Klaus Peter Berger, "Chapter 6. Force majeure clauses and their relationship with the applicable law, trade usages and general principles of law" in Fabio Bortolotti & Dorothy Ufot (eds), *Hardship and Force Majeure in International Commercial Contracts. Dealing with Unforeseen Events in a Changing World* (ICC Dossier, ICC Publishing 2018) 113; García Long (n 12) 42-43.

and TransLex Principles). On the contrary, other uniform law instruments of Anglo-Saxon influence and that closely follow international practice do recognize the duty of notification for hardship cases.

Article 6.3.1(3) OHADAC Principles states that the affected party must notify the other party on the occurrence of the event that renders performance excessively onerous and must take the necessary mitigation measures in favor of the counterparty.

> Article 6.3.1
> [...]
> 3. The party claiming an event that renders performance excessively onerous shall notify the other party in writing without delay, together with sufficient evidence of this event certified by a relevant body. This party is obliged to take all reasonable steps to limit the effect of the event invoked on the performance of its contractual duties.

Article 79(4) CISG regulates the duty of notification on the party suffering the effects of an impediment, which must be given within a reasonable time, otherwise he will be liable for damages suffered by the other party. In addition, the CISG – AC Opinion 20 confirms that the duty of notification also applies to hardship cases.

> Article 79
> [...]
> (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.

> CISG – AC Opinion 20
> [...]
> 8. The party affected by hardship must give notice to the other party of the circumstances and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party affected knew or ought to have known of the hardship situation, it is liable for damages resulting from such non-receipt.

Unlike other scenarios where the ICC is usually in harmony with the CISG and OHADAC Principles, in this case the ICC Hardship

Clause 2020 does not mention the duty of notification as it does extensively and quite rightly for the ICC Force Majeure Clause 2020. We would expect this to change in a next edition of the ICC model clause for hardship. The ITC hardship model clauses does not mention it either.

If *force majeure* and hardship can occur upon the verification of the same common general requirements and work as an excuse with the same consequences, then the duty of notification, initially standardized for *force majeure* cases, also applies with the same logic to hardship cases. Likewise, the duty of mitigation as well as the liability for damages applies.

2.5. *The list of specific events*

Another fact that demonstrate how *force majeure* and hardship are becoming unified in international practice is the inclusion of a list of specific events that will qualify as hardship.

Usually national jurisdictions and the main uniform law instruments only define the general requirements that must be met for an event to qualify as *force majeure*. In addition, other uniform law instruments that seek to compile international practice not only define the general requirements but also include a list of specific events already standardized which are incorporated in advance into the contract to qualify as *force majeure* events. In this way, the parties no longer have to discuss whether a certain event meets the general requirements. When a specific event is included, it is presumed to be a *force majeure* event, notwithstanding that other events outside the list may occur and qualify as *force majeure* by meeting the general requirements. The inclusion of a list of specific events is advisable since it describes circumstances already standardized in practice as exemptions. This means that the parties agree that they should not perform the contract under certain circumstances, under which it is presumed that the performance of the contract will be impossible.

Paragraph 1 of the ICC Force Majeure Clause 2020 (Long Form) contains the general requirements that an event must meet in order to qualify as *force majeure*, while paragraph 3 includes a list of presumptive *force majeure* events according to international practice. These events are presumed because their inclusion in the clause means that they already meet with two of the three general requirements to

qualify as *force majeure* (the beyond the control and unforeseeability requirements but not the irresistibility of the impediment or its consequences).

This model of *force majeure* clause is interesting and accurate because the mere inclusion of a specific event does not mean that its sole verification will automatically make the contract impossible. If the parties so agree, then the agreement will be respected. But in general, the impossibility of the contract is a fact that is verified on a case-by-case basis. For example, the Covid-19 pandemic affected certain leases (such as bars) but not others (supermarkets). Although the pandemic had general effects on all leases, this did not mean that all leases automatically became impossible ([28]). Therefore, the ICC model is correct when it states that the inclusion of a specific event relieves the affected party from proving that the impediment was beyond its control and that it was not taken into account at the time of conclusion the contract, but still must prove that the affected party was unable to avoid or overcome the impediment or its consequences.

Paragraph (a) of article No. VI.3 TransLex Principles also regulates the general requirements of *force majeure* while paragraph (b) contains a list of specific events that qualify as *force majeure*. Regarding the ITC

([28]) On the effects of Covid-19 in contracts, see generally Klaus Peter Berger & Daniel Behn, "*Force majeure* and hardship in the age of corona: a historical and comparative study" (2019-2020) 6 McGill J Dispute Resolution 78; Guido Alpa, "Remarks on the effect of the pandemic on long-term contracts" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1295; Denis Philippe, "Coronavirus: force majeure? Hardship? Deferral of obligations? Some practical elements. Advice for the analysis and redaction of clauses" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1277; Kenneth A. Adams, "*Force majeure* in the time of coronavirus" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1223; Pietro Sirena, "L'impossibilità ed eccessiva onerosità della prestazione debitoria a causa dell'epidemia di COVID-19" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1325; Carlos Pizarro Wilson, "El "hecho del príncipe" como circunstancia sobreviniente durante la ejecución de los contratos" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1121; Jerez, Kubica & Ruda, (n 10) 1475; Francesca Benatti, "Contrato y Covid-19: escenario posible" in Manuel Torres, Ever Medina & Diego Pesantes (eds), *Covid-19: su impacto en las relaciones jurídicas privadas* (Gaceta Jurídica 2020) 183; Hugh Beale & Christian Twigg-Flesner, "Covid-19 and frustration in English law" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1185; Hector MacQueen, "Coronavirus contract law in Scotland" in *Derecho de los Desastres: Covid-19* (Volume II, Fondo Editorial PUCP 2020) 1201; García Long (n 10) 151; André Janssen & Christian Johannes Wahnschaffe, "COVID-19 and international sale contracts: unprecedented grounds for exemption or business as usual?" (2020) 25 Unif. Law Rev. 466.

Model Contracts for Small Firms 2010, they include *force majeure* clauses that define in a paragraph the general requirements and also list some specific events.

In relation to hardship, civil codifications and the main uniform law instruments do not contain a list of specific events that are presumed to cause hardship. However, an interesting exception is found in the OHADAC Principles. Article 6.3.1 OHADAC Principles contains a general regulation on hardship but also includes four models of hardship clauses that parties may include in their contracts if the contract is subject to the OHADAC Principles, but parties do not agree with article 6.3.1 ([29]).

As indicated in the comments to the OHADAC Principles, the rule is the primacy of the will of the parties, and as such, they can opt for more specific and tailored-made hardship clauses that override the general regulation on hardship under article 6.3.1. The four models of hardship clauses proposed by the OHADAC Principles include a list of specific events (but differ between them if renegotiation and/or judicial intervention is allowed). Clause A, being the first one, includes the list of events that is then replicated in Clauses B, C and D. The inclusion of a list of events is advisable in Anglo-Saxon jurisdictions where a hardship doctrine is not acknowledged or, if it is, where the threshold for invoking it is a very high one. Under this scenario, parties achieve greater certainty if they include specific events that are presumed to cause hardship and thus avoid further discussions.

SPECIFIC HARDSHIP CLAUSES

Even when parties have submitted their contract to the OHADAC Principles on International Commercial Contracts and, failing that, to a domestic law, both the Principles and domestic laws recognise the priority of contractual terms in regulating cases oh hardship. In international trade, there are well-known standardised hardship

([29]) See Sixto Sánchez Lorenzo, "UNIDROIT principles and OHADAC Principles on International Commercial Contracts. Convergences and Divergences" in Stefan Leible & Rosa Miquel Sala (eds), *Legal integration in Europe and America. International contract law and ADR* (JWV Jenaer Wissenschaftliche Verlagsgesellschaft 2018) 69; Sixto Sánchez Lorenzo, "*Hardship* en la contratación internacional: principios comunes para una unificación desde el derecho comparado" in *Soberanía del Estado y Derecho International. Homenaje al Profesor Juan Antonio Carrillo Salcedo* (Secretariado de Publicaciones de la Universidad de Sevilla 2005) 1273.

clauses, such as the ICC Hardship Clause 2003. The International Chamber of Commerce has drafted this model clause that can be incorporated into contract by reference. However, its wording is much more modest than the regulation proposed in the OHADAC Principles themselves.

[...]

1. Determination of the events causing hardship

The hardship rules of the OHADAC Principles may create some interpretative difficulties, particularly when the case is brought before an Anglo-American court or when the contract is governed alternatively by English law. In common law trade practice, the general requirement of precision in contracts advises the parties to include a hardship clause, even by including the exact wording of parts of the article of the OHADAC Principles. In this clause, the events causing hardship may be defined precisely. The first two paragraphs could therefore be written as follows:

Clause A: Termination option

1. A party to this contract is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.

2. Notwithstanding paragraph 1 of this Clause, either party is entitled to terminate the contract if it proves that:

a) the performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract, such as but not limited to:

a') war (whether declared or not), armed conflict or the serious threat of same (including but not limited to hostile attack, blockade, military embargo, hostilities, invasion, act of a foreign enemy, extensive military mobilisation;

b') civil war, riot rebellion and revolution, military or usurped power, insurrection, civil commotion or disorder, mob violence, act of civil disobedience;

c') act of terrorism, sabotage or piracy;

d') act of authority whether lawful or unlawful, compliance with any law or governmental order, rule, regulation or direction, regulation or direction, curfew restriction, expropriation, compulsory acquisition, seizure of works, requisition, nationalisation;

e') act of God, plague, epidemic, natural disaster such as violent storm, cyclone, typhoon, hurricane, tornado, blizzard, earthquake, volcanic activity, landslide, tidal wave, tsunami, flood, damage or destruction by lightning, drought;
f') explosion, fire, destruction of machines, equipment, factories and of any kind of installation, prolonged breakdown of transport, telecommunication or electric current;
g') general labour disturbance such as boycott, strike and lock-out, go-slow, occupation of factories or premises;
and that
b) it could not reasonably have avoided or overcome the event or its consequences;
and that
c) it did not assume the risk of such events.
[...]

This Anglo-Saxon practice is also an important data to take into account when dealing with the unification of *force majeure* and hardship. *Force majeure* and hardship clauses in international contracts are being drafted in the same way. This has a direct impact on the drafting of the main uniform law instruments which, when regulating *force majeure* and hardship, cannot omit what is happening in practice.

3. *Hardship*

3.1. *Many civil models*

Domestic Civil Law jurisdictions presented different solutions for the same problem of excessive onerosity or economic imbalance. For example, if due to unexpected circumstances the contract can only be performed at an excessive cost compared to what was foreseen at the time of conclusion of the contract, a Frenchman would think of *imprévision*, while a German of *Geschäftsgrundlage*, an Italian of *eccessiva onerosità sopravvenuta*, a Dutchman of *omstandigheden onvoorziene*, and an American of impracticability. And this is only the starting point. While some theories allow the contract to be judicially terminated (Italy) or judicially adapted (Peru and Colombia), in some jurisdictions the affected party has the option to request to courts either adaption or termination (Germany and Argentina). In addition, there are also those models that

begin with a renegotiation stage as a preliminary step where the parties themselves may reach an agreement, with preference for the preservation of the contract, otherwise the courts will intervene (France) ([30]).

This tower of babel was well known in Europe and as a response to it a unitary solution was proposed. The main uniform law instruments took the opportunity to create a complex model that would be more attractive to parties in transnational contracts given the complications and differences in national laws. The PICC, PECL, DCFR and Trans-Lex Principles present a model with the following contractual structure: (1) a stage of renegotiation of the contract begins with the aim of giving the parties the possibility of reaching an agreement, (2) in the absence of agreement, the judge or arbitrator will intervene to adapt or terminate the contract, as appropriate, and (3) the preference is for the preservation of the contract ([31]).

These uniform law instruments of civilian profile presented a scheme that is considered as "modern" and "more complex" in relation to the solutions proposed by national laws. However, although such instruments show the position of Civil Law in relation to hardship, in international contracts the preference of the parties is different (Common Law friendly) ([32]) and this is evidenced by the inclusion of hardship clauses. These clauses are intended to privatize the contractual procedure to correct the excessive onerosity and prefer for releasing effects of the contract (exemption from damages and/or private termination). As such, it is presented as an agreement against the models proposed by civilian national laws and civilian uniform law instruments. This is the trend observed in international contracting as a sign of a necessary consensus between civilian parties that accept hardship with conservative effects and Anglo-Saxon parties that reject hardship.

([30]) See Schwenzer & Muñoz (n 12) 149; Ewoud Hondius & Hans Christoph Grigoleit, "Introduction: an approach to the issues and doctrines relating to unexpected circumstances" in Ewoud Hondius & Hans Christoph Grigoleit (eds), *Unexpected Circumstances in European Contract Law* (CUP 2011) 3; Rodrigo Momberg, *The effect of a change of circumstances on the binding force of contracts. Comparative perspectives* (Intersentia 2011); Manuel García Caracuel, *La alteración sobrevenida de las circunstancias contractuales* (Dykinson 2014); Sergio García Long (n 10) 151.

([31]) See Joseph Perillo, "Force Majeure and Hardship under the Unidroit Principles of International Commercial Contracts" (1997) 5 Tulane J Int'l and Comp L 5; Schwenzer (n 12) 709.

([32]) On the different perspectives on hardship by Civil Law and Common Law see Flechtner (n 12). For an American lecture on article 79 CISG see Honnold (n 12).

3.2. *Hardship clause*

We can describe three cases where a hardship clause is included in contracts: (1) a hardship clause may be included in a contract under a national law that does not recognize hardship, so a hardship clause fills this gap, (2) a hardship clause may be included in a contract governed by a civilian law that recognizes hardship but a more complex scheme is incorporated that allows renegotiation and judicial adaptation, and (3) a hardship clause may be included that incorporates a private contractual scheme that only allows releasing effects of the contract regardless of the governing law.

The first scenario is clear. For example, Chilean and Venezuelan laws do not recognize hardship in their Civil Codes. One solution is the incorporation of a hardship clause in the contract ([33]). The Spanish Civil Code does not regulate hardship either, but case law openly admits the *rebus sic stantibus* clause ([34]). In that case a hardship clause may clear any doubt. The second scenario is not a new one either. For example, Italian law recognizes hardship to sue for termination of the contract, but the parties may be interested in incorporating a more complex scheme with renegotiation and the possibility to sue for adaptation ([35]).

The most interesting scenario is the third one. In international contracts, parties distrust judicial intervention either to adapt or terminate the contract. On the one hand, international parties know that hardship is a defense that is recognized in most national civilian jurisdictions, but on the other hand, they do not want a third party to define the future of the contract. So, the middle ground is to negotiate

([33]) On Chilean law and hardship see Rodrigo Momberg & Alberto Pino Emhart, "The impact of Covid-19 in Chilean Contract Law" (2020) Opinio Juris in Comparatione. Studies in Comparative and National Law. Special Issue: Impact of Coronavirus Emergency on Contract Law 1. On Venezuelan law and hardship see Claudia Madrid Martínez, "Imprevisión y contratación comercial internacional desde el Derecho internacional privado venezolano" (2021) 2 Revista Internacional de Derecho 23.

([34]) On Spanish law and hardship see Pablo Salvador Coderch, "Alteración de circunstancias en el art. 1213 de la Propuesta de Modernización del Código Civil en materia de Obligaciones y Contratos" (2009) 4 InDret 1; Ángel Carrasco Perera, "Reivindicación y defensa de la vieja doctrina "rebus sic stantibus"" (2015) 98 Revista Cuadernos Civitas de Jurisprudencia Civil 175.

([35]) On Italian law and hardship see Pietro Sirena & Francesco Paolo Patti, "Hardship and renegotiation of contracts. In the prospective recodification of Italian civil law" (2020) Bocconi Legal Studies Research Paper Series, No. 3706159, 1.

the incorporation of a hardship clause but only as an excuse. This is the middle ground.

Hardship as an excuse means that the affected party is exempted from damages for non-performance while the impediment lasts and/or that the affected party or the party may terminate the contract, as appropriate. If hardship exempts performance, then the contract is not yet terminated as the first consequence, except if the impediment does not disappear or amounts to a fundamental breach. If hardship allows only for termination of the contract, then the affected party must continue to perform until he terminates the contract. In both cases, hardship has releasing effects.

This solution is an Anglo-Saxon one, and as such, allows Anglo-Saxon parties, mainly Englishmen, to accept a hardship clause. It is clear to an Englishman that hardship is not part of the doctrine of frustration and that English judges or arbitrators do not have the authority to modify contracts ([36]). Furthermore, English case law is not a fertile ground for the legal recognition of duties of renegotiation and good faith ([37]). So, for an Englishman it may be a deal breaker to incorporate a civilian-style hardship clause with renegotiation and judicial intervention to adapt or terminate the contract. In view of this, the middle ground is for hardship to only have releasing effects through a private contractual procedure and without the intervention of the courts. This hardship model that prevails in international contracting is recognized by the CISG, OHADAC Principles and ICC.

The CISG – AC Opinion 20 has clarified which are the consequences of the occurrence of hardship under article 79 CISG. Since article 79 is an exemption (thought as *force majeure* under the "impediment" disguise), it was considered that a gap existed in the CISG since article 79 does not recognize either renegotiation or judicial intervention to adapt or terminate the contract which are the usual consequences of

([36]) Clive Schmitthoff, "Hardship and intervener clauses" in Chia-Jui Cheng (ed), *Clive M. Schmitthoff's Selected Essays on International Trade Law* (Martinus Nijhoff Publishers 1988) 415; H. Beale, W. Bishop & M.P. Furmston, *Contract. Cases and materials* (5th edn, OUP 2008) 473.

([37]) Michael Bridge, "Doubting good faith" (2005) 11 New Zealand Business Law Quarterly 430; John Cartwright, "Negotiation and renegotiation: An English perspective" in John Cartwright, Stefan Vogenauer & Simon Whittaker (eds), *Reforming the French Law of Obligations. Comparative Reflections on the Avant-projet de réforme du droit des obligations et de la prescription ('the Avant-projet Catala')* (Hart Publishing 2009) 51.

hardship in Civil Law jurisdictions. However, the CISG – AC Opinion 20 stated that hardship under the CISG is only an exemption, and thus, functions in a similar manner as *force majeure*.

> CISG Advisory Council Opinion 20
> [...]
> 10. The exemption due to hardship has effect for the period during which hardship exists.
> 11. Under the CISG, the parties have no duty to renegotiate the contract in case of hardship.
> 12. Under the CISG, a court or arbitral tribunal may not adapt the contract in case of hardship.
> 13. Under the CISG, a court or arbitral tribunal may not bring the contract to an end in case of hardship.

Thus, under the CISG hardship may be invoked through a private contractual procedure without renegotiation and intervention of the courts ([38]). The CISG is based on the premise that the parties are adverse to the intervention of a third party in the contract and that renegotiation only makes sense spontaneously and not as a legal duty upon the parties. Therefore, the effect of hardship is that the affected party is exempted from liability for the duration of the event that causes hardship, that is, the payment of damages (or penalties) and the claim for specific performance while the impediment lasts. This does not preclude any party, as stated in article 79(5) CISG, from asserting another right under the CISG ([39]). In addition, note that the CISG – AC expressly admits that the parties may agree on a different model of hardship if they deem it appropriate. As such, the CISG proposes a hardship model in accordance with international practice.

([38]) This model of hardship was previously explained in Schwenzer & Muñoz (n 12) 149. Later Muñoz was the Rapporteur of CISG – AC Opinion 20.

([39]) Do not forget that Article 79(5) CISG says "Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention". However, if there is an impediment to performance then specific performance should also be precluded while the impediment lasts. In comparison, Article 8:101(b) PECL is better drafted since it says "Where a party's non-performance is excused under Article 8:108 [Excuse due to an impediment], the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages". See Flechtner (n 17); Ishida (n 13).

Article 6.3.1 OHADAC Principles states that once the hardship requirements have been met, the affected party has the right to terminate the contract. There is neither renegotiation nor intervention of the arbitrator to adapt or terminate the contract.

> Article 6.3.1. Hardship
> 1. A party is bound to perform its contractual duties even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
> 2. Notwithstanding paragraph 1 a party is entitled to terminate the contract where this party proves that:
> [...]

Therefore, the default rule in the OHADAC Principles is that hardship has only releasing effects. It should be noted that the OHADAC Principles state that if the parties so wish, they may incorporate a specific hardship clause that includes renegotiation and/or judicial adaptation and/or judicial termination. For this purpose, it presents four models of hardship clauses that derogate the provisions of article 6.3.1. Thus, despite starting from a strictly private and releasing hardship model, it acknowledges the primacy of the will of the parties to incorporate a model that best suits their contracts.

Clause A proposes a hardship model where (1) a list of specific events presumed to cause hardship is included, (2) the remedy is the private termination of the contract, and (3) renegotiation and arbitral intervention are not included.

Clause B proposes a hardship model where (1) a list of specific events presumed to cause hardship is included, (2) a private renegotiation stage is included (unless the parties agree that the renegotiation must be submitted to a third-party intermediary), (3) in the absence of agreement in the renegotiation, the remedy is the private termination of the contract, and (4) arbitral intervention is not included.

Clause C proposes a hardship model where (1) a list of specific events presumed to cause hardship is included, (2) there is no renegotiation, and (3) the intervention of the arbitrator to adapt the contract is agreed, unless this is not possible in which case the arbitrator must terminate the contract.

Clause D proposes a hardship model where (1) a list of specific events presumed to cause hardship is included, (2) a private renegotiation stage is included (unless the parties agree that the renegotiation

must be submitted to a third-party intermediary), and (3) the intervention of the arbitrator to adapt the contract is agreed, unless this is not possible in which case the arbitrator must terminate the contract.

The proposal of the OHAHAC Principles which consists of a general default rule on hardship (article 6.3.1) that may be derogated by the parties with the inclusion of four specific models of hardship clause, represents a more adequate and flexible scheme than the one proposed by the main uniform law instruments of civilian profile which seek to correct the problem through a single solution: it must necessarily be initiated by renegotiation and courts will always intervene to adapt or terminate the contract as appropriate. On the contrary, the preference in international practice is to keep the contractual procedure as a private one and with releasing effects, and in any case, if the parties prefer a different model of hardship they may agree on it. Therefore, it should be understood that the parties must expressly grant powers to the courts to adapt or terminate the contract.

On the ICC side, the preference is for the rejection of judicial intervention as a solution to the occurrence of hardship unless the parties so agree. The ICC scheme is also more flexible than the civilian models.

The ICC Hardship Clause 2003 was a combination of the Italian model and the PICC model. The Italian legislator proposed a model where the affected party has the right to demand the termination of the contract, not the adaptation. On the contrary, the PICC proposed a model that begins with a renegotiation stage, and in the absence of agreement, the court will intervene to adapt or terminate the contract. The ICC 2003 model was one in which if hardship requirements where met, the parties had to renegotiate a solution, and if no agreement was reached then the affected party could privately terminate the contract. There was no judicial intervention. The procedure was strictly private.

Subsequently, the recent ICC Hardship Clause 2020, following the OHADAC Principles, proposes a more complex but also flexible remedial scheme by proposing a third paragraph with three alternatives to be chosen by the parties according to their interests: (1) private termination (3A), (2) adaptation or termination by court (3B), or (3) termination by court (3C).

The ICC starts from the premise that the best solution to the occurrence of hardship is the private termination of the contract, however, it admits that the parties may agree on a hardship model that allows for judicial intervention to adapt or terminate the contract. Notwithstanding the fact that three remedial models are proposed, termination is

present in all three schemes. In the first, the affected party may terminate without the intervention of the courts. In the second, the affected party may go to court and request adaptation or termination. In the third, the affected party may go to court to terminate the contract and avoid further opposition by the counterparty.

Under this pro-releasing scenario, renegotiation within this model makes more sense than when the model has a preference for the conservation of the contract. If the affected party is given the right to terminate the contract if no agreement is reached, then the unaffected party will have incentives to renegotiate the contract. But even if this first stage of renegotiation is not agreed, renegotiation will still happen in practice because the unaffected party knows that the affected party may terminate the contract without consulting him, so it is better to anticipate and propose a renegotiation. Renegotiation only makes sense when parties have incentives to renegotiate. On the contrary, if the remedy granted is judicial adaptation then parties have no real incentive to renegotiate if they can resort to courts to discuss the terms of the adaptation. Then it makes no sense to combine renegotiation with judicial adaptation.

Taking this panorama into account, we see that in international practice there is a preference for hardship clauses with private releasing effects over the civilian model that has a preference for conservative effects of the contract and courts intervention. If in international contracting hardship clauses do not allow judicial intervention or do not combine renegotiation with judicial adaptation, then hardship clauses are agreements against the civilian models, and as such, if hardship will only have private and releasing effects, it will be very similar to *force majeure*. The remedy of judicial adaptation in hardship is no longer a difference with *force majeure*.

4. *Frustration of purpose*

4.1. *The unjustified civilian emotion for frustration of purpose*

Civilians were too excited with frustration of purpose. With *force majeure* and hardship recognized, frustration of purpose was seen as a novelty, as something the civilians did not have but craved to have. After the coronation cases, the aim of civil lawyers was to find the best legal anchor to import this English figure.

This may call the attention of Englishmen as frustration of the purpose is considered to be a rare case of limited application which was recognized in Krell (1903) but was not further developed. Although Krell specifically referred to "foundation", "basis", "condition", "state of things" and "purpose", nowadays the general analysis of frustration of contract focuses on whether performance of contract under the new circumstances would make the contract something "radically different" from what was originally agreed, as ruled by Lord Radcliffe in Davis (1956). So, civil lawyers have remained in 1903 since they still think of frustration of "purpose" as something new while Englishmen barely speak of it.

Indeed, as Lord Wright described in Maritime National Fish Ltd. v. Ocean Trawlers Ltd. (1935), the decision in Krell "is certainly not something that should be expanded: it is particularly difficult to apply where ... the possibility of the event considered as a frustration of the adventure ... was known to both parties when he entered into the contract, but the contract entered into was absolute in terms of that known possibility" ([40]). Lord Wright's decision demonstrate the exceptionality of this doctrine which has not been further developed. Above all, it should be remembered that in 1903-1904 three coronation cases were decided with similar facts, but despite this, the rulings were different.

While in Krell (1903) frustration of the lease of the balcony to be used to view the coronation was admitted, in Herne Bay Steamboat Co v. Hutton (1903) frustration of the lease of a vessel to be used to view the coronation naval celebrations was not accepted. Furthermore, in Chandler v. Webster (1904) frustration of the lease was upheld but without release of performance. In this case, the tenant had paid an advance and a balance was outstanding. Although there was frustration, the court pointed out that this did not affect the benefits performed or already accrued and pending performance. Consequently, the landlord kept the advance and the tenant had to pay the balance even though the lease had been frustrated. In contrast, in Krell the tenant had left a deposit and the rent remained unpaid. The court upheld frustration of the lease and released the tenant from paying the outstanding rent. The landlord kept the deposit since the tenant gave up his request for its return. Taking into account that these three coronation cases were

([40]) AC 524, at 529.

resolved differently despite having very similar facts, it is considered that frustration of purpose is exceptional and rare. Even recently in *Canary Wharf (BP4) T1 Ltd and others v European Medicines Agency* (2019), the Brexit was not considered as an impediment enough to frustrate a lease contract.

In American law, the limited application of frustration of purpose has also been observed. Frustration of purpose was recognized in section §288 of the Restatement of Contracts 1932 and in section §265 of the Restatement (Second) of Contracts 1981. Despite this express recognition, American doctrine has pointed out over the years that frustration of purpose is a myth since there is no leading case that has developed the English doctrine ([41]).

In Scottish law, frustration of purpose is also limited. As MacQueen explains:

> On this subject, modern Scots law, having started from a general position that a contract was unaffected by its ceasing to be capable of performance, has now very largely adopted from English law its doctrine of frustration of contract. It has also followed the narrow approach of the English courts in its application [...].
> But there are some differences or uncertainties about this subject in Scots law. It is not clear how accepted if at all is the idea of 'frustration of purpose' as first developed in the English 'Coronation cases', especially *Krell v Henry*. ([42])

The main difficulty in invoking an excuse for frustration of purpose is that the purpose that is frustrated supposed to be a principal purpose and common to both parties, which is odd in practice. As Beale and Twigg-Flesner explain:

> It is important to appreciate that the purpose must be common to both parties and not merely the purpose of one of the parties. As

([41]) See William Conlen, "The doctrine of frustration as applied to contracts" (1922) 70 U Penn L Rev 87; Jay Leo Rothschild, "The doctrine of frustration or implied condition in the law of contracts" (1932) 6 Temple Law Quarterly 337; Arthur Anderson, "Frustration of Contract – A Rejected Doctrine" (1953) 3 DePaul L Rev 1; T. Ward Chapman, "Contracts: Frustration of Purpose" (1960) 59 Michigan L Rev 98; Nicholas Weiskopf, "Frustration of contractual purpose – Doctrine or myth?" (1996) 70 St. John's L Rev 239.

([42]) MacQueen (n 24) 1211.

> Donaldson MR observed in *Congimex v Tradax*, «frustrated expectations and intentions of one party to a contract do not necessarily or indeed usually lead to the frustration of that contract». Students may no longer require accommodation near their university and therefore their purpose for entering into a tenancy agreement has fallen away, but landlords let properties for the purpose of generating an income and that purpose will continue. It is clear, therefore, that it does not suffice if one party's circumstances have changed unexpectedly so as to no longer need the contract. For another example, take a hotel booking, but the guest is taken ill. The guest no longer needs the hotel room so the purpose for which the room was booked is no longer relevant; however, this does not affect the purpose for which the hotel entered into the contract, which is to rent out the room for payment. This contract would therefore not be frustrated. (43)

When speaking of "common purpose", a civil lawyer would immediately think of the *cause* of the contract, the civilian consideration. Civil Law jurisdictions that are truly "causalists" (44) might import and expressly recognize by statute an action for "frustration of the *cause*" as equivalent to frustration of purpose (as Argentina does and then inspired the PLACL). Meanwhile in Germany there is no major concern on frustration of purpose since the basis of the contract (*Geschäftsgrundlage*) is broad enough to include hardship and frustration of purpose (45). In any case, while this may sound good in theory, in practice it will be difficult to conclude that –for example– Krell's purpose was that Henry could see the coronation as to condition the contract to the fulfillment of that purpose. The true is that any purpose cannot be considered a principal and common purpose of both parties.

Krell was in the business of renting balconies and his performance was accomplished with the delivery of the property in return for a

(43) Beale & Twigg-Flesner (n 24) 1194-1195.

(44) France was "causalist" according to the original article 1108 Code Civil that mentioned the "*cause licite*" as a requirement to form a valid contract but then deleted than reference after the 2016 reform according to the new article 1128 Code Civil that no longer speaks of "*cause licite*" but "*contenu licite et certain*", and Italy which article 1325 Codice Civile still mentions "*la causa*". Some Peruvian scholars consider that the *cause* is recognized in article 140 Código Civil where it says "*fin lícito*". Other scholars even affirm that no express mention is needed since the *cause* is structural to the law of contract. We cannot agree with this last one.

(45) Markesinis, Unberath & Johnston (n 13) 319; DiMatteo (n 11) 263.

payment. Even if it had been left in writing that Henry was renting the balcony "to view the coronation", this would not mean that Krell made Henry's purpose his own and thus became a common purpose, and not only just a common purpose but the foundation of the contract on which the parties agreed to conclude it. Then a mere mention is not enough. In any case, if the coronation was so important and the only reason Henry rented the balcony was to view the coronation, then he should have expressly agreed to an exit in his favor in the contract. In general, it is questionable that if something is so important to be catalogued as the main and common purpose of the contract, it needs no trace in the contract but at the same time may implicitly follow from the circumstances of the case. In reality, what happened in Krell was that Henry's individual purpose was imposed on Krell, and this cannot be allowed as a rule in contract law.

The logic that what is important is obvious and, as such, does not need to be in the contract should not apply. Otherwise, any purpose could be claimed as important. For example, in corporate and financial contracts where a representation and warranty clause is included, civil lawyers sometimes agree that the validity of the representations and warranties made by one party in favor of the other is a fundamental reason for the conclusion of the contract, which is accepted by both parties, and that in case of breach the affected party may terminate the contract ([46]).

The law cannot come to the rescue when the parties themselves have not expressed their interests in the contract, and the rule is that the law of contracts only protects what is expressed in black letter, not what remains in the internal sphere or conscience of the parties. The law cannot become a life jacket when parties consider they have made a bad deal.

Civil lawyers, used to start from a contextual reasoning not limited to the four corners of the contract (unlike common lawyers) ([47]), got excited about frustration of purpose to the point that they tried to import the English doctrine even with a wider scope of application (which is not desirable). For example, a typical case of frustration of

([46]) See Sergio García Long, *Un big MAC, por favor: la cláusula MAC en fusiones y adquisiciones* (Fondo Editorial PUCP 2016).

([47]) See Filippo Viglione, *Metodi e modelli di interpretazione del contratto. Prospettive di un dialogo tra common law* e *civil law* (G. Giappichelli Editore 2011).

purpose for civil lawyers is the wedding case ([48]). If a bride rented a dress and the wedding is canceled with no fault of her own, the bride is said to be able to terminate the contract because she would no longer need the dress, or if she hired a service for the wedding (such as catering) and the wedding is canceled without her fault, then she could also cancel such service. These are very different cases from the Krell case. In that case there was nothing Henry could do to prevent the cancellation of the coronation or having canceled it to hurry the king's recovery or the rescheduling of the coronation at a not-too-distant date. In this case the impediment was external to the parties, which means that none of them could avoid or overcome the impediment or its consequences. On the contrary, if the wedding has an impediment the bride will always be able to reschedule the wedding at short notice. The impediment does not make the bride unable to marry or somehow "unmarriable". If every case is evaluated on the basis of the wedding case, all contracts will easily be considered frustrated. This is a mistake made by civil lawyers: to consider that every contract has a main and common purpose whose frustration frees the parties and ignore the possibilities of avoiding or overcoming the impediment.

Sometimes the novelty blinds us and leads us to think we need something when, in fact, we do not need it for the simple reason we already have it (but do not realize we do). In this case, civil lawyers did not realize it because they have not understood what frustration of purpose really is, or perhaps because they have missed how *force majeure* and hardship interact and overshadow frustration of purpose.

Indeed, most civil codifications do not recognize frustration of purpose with some exceptions such as Argentina pursuant to article 1090 of the Commercial and Civil Code of the Nation. The main uniform law instruments do not recognize frustration of purpose either except article 85 PLACL ([49]). In general, it can be observed that frustration of purpose is not legally recognized in Civil Law jurisdictions, and this is so because already exist other civilian institutions that cover the factual case of frustration of purpose. However, there are still discussions about the eventual

([48]) Alejandro Freytes, *La frustración del fin del contrato* (Ediciones de la Academia Nacional de Derecho y Ciencias Sociales de Córdova 2010) 137-138; Santarelli (n 10) 113.

([49]) Article 6.3.2 OHADAC Principles also deals with frustration of purpose but it´s not taken into account because article 6.3.2 just states that frustration of purpose may be claim under the regulation of hardship (article 6.3.1). Then frustration of purpose really does not exist on its own.

importation of frustration of purpose in civilian jurisdictions, especially in Latin America. This shows that despite being a 1903 case, frustration of purpose is still not really understood by some civilian lawyers.

4.2. *The interaction between* force majeure *and frustration of purpose*

Let us recall that the doctrine of frustration of contract was initially formulated for the disappearance of the thing or death of the person, to then be extended to cases of the disappearance of the purpose of the contract. So, for a civil lawyer, it should not be strange to find similarities between impossibility and frustration of purpose, as indeed is recognized in certain civil codifications and uniform law instruments.

The rule is that *force majeure* releases the obligor when it is definitive. In this case the analysis focuses on the obligor and its performance which becomes impossible. On the contrary, when *force majeure* is temporary or partial, the immediate effect is not extinction, and consequently, special rules arise that focus on the obligee and his interest. Such rules allow the obligee, by virtue of his interest, to consider the temporary or partial *force majeure* event as a definitive one if it deprives him of the substance of what he expected under the contract. This in practice functions as a frustration of purpose in favor of the obligee.

In Argentina temporary *force majeure* benefits the obligee when his interest is irreversibly frustrated. Indeed, Article 956 of the Civil and Commercial Code of the Nation of Argentina states the following:

> Article 956. temporary impossibility
> The supervening, objective, absolute and temporary impossibility of the performance **has extinctive effect** when the term is essential, or **when its duration frustrates the interest of the creditor in an irreversible way**.

In Italy the temporary *force majeure* benefits the obligee when the impediment persists in such a manner that it causes the obligee to lose interest in receiving performance pursuant to article 1256 of its Civil Code:

> Art. 1256. Definitive impossibility and temporary impossibility
> The obligation is extinguished when, for a cause not attributable to the obligor, performance becomes impossible. If the impossibility is only temporary, the obligor, as long as it lasts, is not liable for the delay in

performance. However, **the obligation is extinguished in the impossibility lasts until**, in relation to the title of the obligation or the nature of the object, the obligor can no longer consider itself bound to perform the obligation or **the obligee no longer has an interest in obtaining it**.

In Bolivia the temporary *force majeure* extinguishes the obligation when the obligee loses interest in performance pursuant to article 380 of its Civil Code:

Art. 380. Temporary impossibility
In case of temporary impossibility, the obligor is not liable for the delay in performance as long as it lasts. But the obligation is extinguished if the impossibility lasts until such time as the obligor, according to the title of the obligation or the nature of the object due, can no longer be considered obliged to perform, or **the obligee loses interest in the performance**.

In Portugal the temporary and partial *force majeure* allows the creditor to terminate the contract when its interest is affected pursuant to articles 792 and 793 of its Civil Code.

Art. 792. Temporary impossibility
1. If the impossibility is temporary, the obligor is not liable for delay in performance.
2. **The impossibility is only considered temporary as long as, taking into account the object of the obligation, the interest of the obligee is maintained**.

Art. 793. Partial impossibility
1. If performance proves to be partially impossible, the debtor exonerates himself by performing what is possible, in which case the counter performance to which the other party is obliged must be reduced proportionately.
2. However, **the obligee who does not have a justified interest in the partial performance of the obligation may terminate the contract.**

In Peru when a temporary or partial *force majeure* event occurs the obligee may terminate the contract when the impediment causes him to lose interest in the performance or it is no longer useful pursuant to article 1316 of its Civil Code:

> Article 1316. The obligation is extinguished if the performance is not made for a cause not attributable to the obligor.
> If such cause is **temporary**, the obligor is not liable for the delay as long as it lasts. However, **the obligation is extinguished if the cause that determines the non-performance persists until** the obligor, according to the title of the obligation or the nature of the performance, can no longer be considered obliged to perform it, or until **the obligee justifiably loses interests in its performance or it is no longer useful to him**.
> An obligation that can only be **partially performed is also extinguished if it is not useful to the obligee or if the latter has no justified interest in its partial performance**. Otherwise, the obligor is obliged to perform it with a reduction of the counter performance, if any.

In relation to the main uniform law instruments there is a similar approach. For instance, article 79 CISG have its general regulation on exemptions, which paragraph 5 states that nothing prevents the parties from exercising any right under the CISG. In turn articles 49(1) and 64(1) states that the buyer and seller, respectively, can terminate the contract if the breach amounts to a fundamental breach, while article 25 indicates that there is a fundamental breach "if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract".

Likewise, article 7.3.1 PICC states that a party may terminate a contract if "the non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract" or "strict compliance with the obligation which has not been performed is of essence under the contract".

Article 8:108(2) PECL states that if the impediment is temporary, the obligor is excused for the duration of the impediment, however, if the impediment extends until it becomes a fundamental non-performance then the obligee may treat it as such. Article 8:103 PECL indicates when a fundamental non-performance is configured, while article 9: 301(1) states that a fundamental non-performance is ground for the termination of the contract. Among the cases that constitute fundamental non-performance are where "strict compliance with the obligation is of the essence of the contract" or when "non-performance substantially deprives the aggrieved party of what it was entitled to expect under the contract". Then, if the temporary impossibility

produces a fundamental non-performance, the obligee may terminate the contract. Likewise, article 9:302 indicates that if there is a partial breach, the obligee "may terminate the contract as a whole only if the non-performance is fundamental to the contract as a whole".

Article No. VI.3(c) TransLex Principles states that if *force majeure* is temporary, the obligor is not liable for the duration of the impediment, but "If the period of non-performance becomes unreasonable and amounts to a fundamental non-performance, the other party may claim damages and terminate the contract". Article 90 PLACL states that if *force majeure* is temporary, the obligee may suspend the counter performance, and if it is partial, it may reduce it proportionally, "unless, as a consequence of the impossibility, it is deprived of what it could substantially expect at the time of the conclusion of the contract". Also, article 7.1.8(5)(6) OHADAC Principles state that temporary and partial *force majeure* allows the obligee to terminate the contract when it "significantly deprives one party of its reasonable expectations".

Finally, the ICC Force Majeure Clause 2020 (Long Form) contains a more comprehensive regulation on the effects of temporary *force majeure* that is intended to be in the interest of both parties and not just the obligee. Under paragraphs 5, 6 and 8 of the ICC model, if the impediment is temporary it excuses performance of the contract for the duration of the impediment, but "Where the duration of the impediment invoked has the effect of substantially depriving the contracting parties of what they were reasonably entitled to expect under the contract, either party has the right to terminate the contract by notification within a reasonable period to the other party. Unless otherwise agreed, the parties expressly agree that the contract may be terminated by either party if the duration of the impediment exceeds 120 days".

Thus, although the general rule in *force majeure* is that the obligor is released from performing his obligation as long as the impediment is definitive, the rule changes in the case of temporary or partial impediment, since the analysis shifts from the obligor and its performance to the obligee and his interest or contractual expectation. This change of approach makes the *force majeure* analysis to take into account the loss of the contract's utility for the obligee, and as such, enables the obligee to terminate the contract. For practical purposes, temporary or partial *force majeure* operates as a frustration of purpose in favor of the obligee.

This connection between *force majeure* and frustration of purpose is stronger in cases of legal impossibility or supervening illegality.

Restrictions imposed by Covid-19 is a clear example of this. If a quarantine or lock down is declared and the opening of restaurants and service to the public are prohibited, this will affect the performance of commercial leases. The fact that the tenant cannot use the property to conduct his business is not a case of physical impossibility or hardship (as cost increase in the performance), but it may be a case of legal impossibility or illegality supervening by a *fait du prince* (mandatory act of government). This works as frustration of purpose: the tenant can no longer use the property for its commercial purpose, and as such, the contract becomes useless for the duration of the legal prohibition.

In conclusion, if frustration of purpose is subsumed in different cases of *force majeure* (temporary, partial and supervening illegality), then frustration of purpose is unnecessary in a Civil Law jurisdiction with a broad regulation on *force majeure*. Then, the main uniform law instruments only have *force majeure* and hardship.

4.3. *The interaction between hardship and frustration of purpose*

Now, if *force majeure* and frustration of purpose have a close relationship, there is an even more intimate connection between frustration of purpose and hardship which limits even more the scope of application frustration of purpose could have in Civil Law jurisdictions. In general, the usefulness of frustration of purpose is null in civil national laws with extensive regulations on *force majeure* and hardship.

It is widely recognized in Civil Law that hardship may arise from an increase in the cost of the performance or a devaluation of the counter performance (also known as "reverse hardship"). See article 6.2.2 PICC, article 6:111(1) PECL, article III. – 1:110(1) DCFR and article 84(1) of the PLACL.

Likewise, the CISG – AC Opinion 20 specifies in its paragraph 5 that hardship includes the devaluation of the counter performance:

> CISG Advisory Council Opinion No. 20
> [...]
> 5. Such hardship may arise when the cost of performance has increased **or the value of the performance has diminished**.

Finally, paragraph iv) of article VIII.1 TransLex Principles speaks of a fundamental alteration of the contractual equilibrium that causes

excessive onerosity, while comment 1 to article VIII.1 specifies that a "fundamental alteration" may result "from an increase of the costs of performance of the party invoking the hardship defense or from a decrease in value of the performance to be rendered by the other party".

It is due to this broad and well-established recognition of devaluation of the counter performance as part of hardship cases that frustration of purpose is not needed in Civil Law jurisdictions. Consider Krell v. Henry. The tenant could have alleged that the landlord's counter performance diminished in value because the balcony was worth more when it served to view the coronation. If the king became ill, then the balcony does not have the added value that justified its rental. If the judge had been a civilian one, he would have resolved the case by applying hardship by devaluation of the counter performance, without creating a new doctrine. On the contrary, an English judge did have to "create" a new doctrine or "extend" or "accommodate" que existing one because hardship was not accepted while frustration of contract was limited to cases of impossiblity as understood by civil lawyers.

The link between hardship by devaluation of the counter performance and frustration of purpose is stated by comment 2 to article 6.2.1 PICC ([50]) and comment 2(b) to article 6.2.2 PICC ([51]), which explains how frustration of purpose is part of hardship.

([50]) "2. Change in circumstances relevant only in exceptional cases

The principle of the binding character of the contract is not however an absolute one. When supervening circumstances are such that they lead to a fundamental alteration of the equilibrium of the contract, they create an exceptional situation referred to in the Principles as "hardship" and dealt with in the following Articles of this Section.

The phenomenon of hardship has been acknowledged by various legal systems under the guise of other concepts such as frustration of purpose, *Wegfall der Geschäftsgrundlage*, *imprévision*, *eccessiva onerosità sopravvenuta*, etc. The term "hardship" was chosen because it is widely known in international trade practice as confirmed by the inclusion in many international contracts of so-called "hardship clauses".

([51]) "2. Fundamental alteration of equilibrium of the contract

[...]

b. Decrease in value of the performance received by one party

The second manifestation of hardship is characterised by a substantial decrease in the value of the performance received by one party, including cases where the performance no longer has any value at all for the receiving party. The performance may relate either to a monetary or a non-monetary obligation. **The substantial decrease in the value or the total loss of any value of the performance may be due** either to drastic changes in market conditions (e.g. the effect of a dramatic increase in inflation on a contractually agreed price) or **the frustration of the purpose for which the performance was required** (e.g. the effect of a prohibition to build on a plot of land acquired for building purposes or the effect of an export embargo on goods acquired with a view to their subsequent export).

Similarly, CISG – AC Opinion 20 (paragraph 0.3) indicates that hardship, although not expressly recognized in English law, may be found in some cases. While an Englishman considers that frustration of contract does not include hardship, it is easy for a civil lawyer to disagree and highlight the similarity between frustration of purpose and hardship.

> 0.3. Today, many civil law jurisdictions accept the theory of hardship. The most recent acknowledgement by statute can be found in France. **English law seems to reject any notion of relief for changed circumstances that do not amount to impossibility. However, an exception may be granted to this general rule under the doctrine of "frustration of contract" if the performance of the contract is rendered useless by the change of circumstances**. In the United States a party may be exempted if as a result of supervening events, performance of the contract, though remaining physically possible, has become severely more burdensome for that party.

This comparison between frustration of purpose and hardship is also found in paragraph 2.3 of the CISG – AC Opinion 20, when it indicates that a national notion of hardship is found in English law with frustration of purpose (something an English lawyer will strongly disagree).

> 2.3. Accordingly, there are no legal grounds to resort to **domestic concepts of hardship**, as there is no gap in the CISG regarding the debtor's invocation of economic impediments. If one were to hold otherwise, **domestic concepts such as frustration of purpose**, rebus sic stantibus, fundamental mistake or Wegfall der Geschäftsgrundlage would all have to be considered, which would undermine unification of the law of sales in a very important area.

Finally, when the CISG – AC notes which cases have been reviewed for Opinion No. 20, it lists CISG – online Case No. 1067 (based on frustration) in footnotes 16 and 81.

Naturally the decrease in value of the performance must be capable of objective measurement: a mere change in the personal opinion of the receiving party as to the value of the performance is of no relevance. As to the frustration of the purpose of the performance, this can only be taken into account when the purpose in question was known or at least ought to have been known to both parties."

Although the CISG – AC does not expressly pronounce on the unification of hardship with frustration of purpose, it can be considered that such unification does exist by virtue of the above.

More clearly, article 6.3.2 OHADAC Principles recognizes frustration of purpose but does not give it autonomy since it states that frustration of purpose may be claimed under article 6.3.1 dedicated to hardship.

> Article 6.3.2: Frustration of the purpose of the contract
> The rule of the preceding article will also be applied to the cases where the events in question lead to a substantial frustration of the contract's purpose, when both parties have assumed such purpose.

The commentary to article 6.3.2 OHADAC Principles indicates that frustration of purpose is within hardship:

> Moreover, **frustration of purpose actually implies, as hardship, the loss of economic expectations for one of the parties** that is an unexpected and extreme cost; that is why to some extent **it can be considered as a hardship case that will result in the termination of the contract.**

Also comment 1 to article 7.1.8 (*force majeure*) OHADAC Principles indicates that economic impossibility might have the same effects as hardship or frustration of purpose:

> Although economic impossibility is recognised as a case of impossibility in some Caribbean legal systems, especially those inspired by USA law and the notion of impracticability (Section 2: 615 UCC and Section. 261 of the Second Restatement), it is not admitted in civil law systems inspired by French law and, in more widespread opinion, in legal systems inspired in common law either. However, **cases of economic impossibility can be considered, depending on circumstances, and have the same effects as hardship or frustration of purpose** included in Section 3 of Chapter 6 of these Principles. ([52])

([52]) See also DiMatteo (n 11) 259 who seems to consider *force majeure*, impossibility and frustration of purpose as synonyms ("The question posed in this analysis is whether the word "impediment" relates only to the occurrences of force majeure, impossibility and frustration of purpose events or if it also includes changed circumstances, impracticability and hardship events. For purposes of simplicity, the first set of excuse or exemption

Note that while the CISG option is to state that *force majeure* and hardship are unified and may both be invoked under the same article 79 CISG, the OHADAC Principles state that hardship and frustration of purpose are unified and may both be invoked under the same article 6.3.1 OHADAC Principles. Then eventually, the global picture is to considerer that *force majeure*, hardship, and frustration of purpose may all be invoked under the same rule.

If hardship includes the devaluation of the counter performance and frustration of purpose is already subsumed in it, it is understood why, despite the doctrinal debates, national civil laws and the main uniform law instruments do not recognize frustration of purpose, and this is because they do not need it. There are already broad theories on hardship that include cases of frustration of purpose.

For example, German lawyers do not speak of *imprévision* or *eccessiva onerosità sopravvenuta* but of *Geschäftsgrundlage* (basis of the contract) according to section 313 BGB ([53]). In such a case the impediment arises when the basis of the contract is altered, which could lead to hardship or frustration of purpose. The broad formulation proposed by the German doctrine has inspired others to follow a similar model. For example, article 62 of the Vienna Convention on the Law of Treaties speaks generally of a "change of circumstances" and an "essential basis" whose effect "radically transforms the extension of the obligations" ([54]), without further reference to the type of effect, which makes

doctrines will be analyzed under the heading of "impossibility" and the second set will be discussed under the heading of "hardship". The key issue to be explored in this article is the distinction between excuse requiring impossibility or frustration of contractual purpose and hardship as it relates to Article 79 of the CISG.").

([53]) "Section 313

Interference with the basis of the transaction

(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."

([54]) "Article 62

Fundamental change of circumstances

it possible to include both hardship and frustration of purpose, unlike the PECL, DCFR and PLACL which use "change of circumstances" as synonym of hardship. More clearly, in Spain article 1213 of the Proposed Draft Bill for the Modernization of the Civil Code on Obligations and Contracts (2009) ([55]), used the broad notion of "basis of the contract" and specifies that a change of circumstances could cause hardship or frustration of purpose.

Despite of the above, there is still a strong enthusiasm for frustration of purpose in Latin America. For instance, it is considered that hardship as cost increase in the performance or devaluation of the counter performance may coexist with frustration of purpose. Although in theory they may be distinguished, in practice this distinction disappears, creating significant complications and inconsistencies. How do we distinguish hardship by devaluation of the counter performance from frustration of purpose? What justifies that different and contradictory remedies may arise under the same factual situation? This does

1. **A fundamental change of circumstances** which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:

(a) the existence of those circumstances constituted an **essential basis** of the consent of the parties to be bound by the treaty; and

(b) the effect of the change **is radically to transform the extent of obligations** still to be performed under the treaty.

2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:

(a) if the treaty establishes a boundary; or

(b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

([55]) "Chapter VIII

Of the extraordinary alteration of the basic circumstances of the contract

Art. 1213

If the circumstances that served as the **basis of the contract** have changed in an extraordinary and unpredictable manner during its performance in such a manner that it has become **excessively onerous** for one of the parties or the **end of the contract has been frustrated**, the contractor to whom, taking into account the circumstances of the case and especially the contractual or legal distribution of risks, it is not reasonably required that it remain subject to the contract, it may seek its review, and if this is not possible or cannot be imposed on one of the parties, it may request its termination.

The claim for termination may only be estimated when the proposal or proposals for revision offered by each of the parties do not obtain a solution that restores the reciprocity of interests of the contract."

not create legal certainty ([56]). Once again, the main uniform law instruments do not have frustration of purpose.

In Argentina, frustration of purpose was imported and anchored in the concept of *cause* under article 1090 of the Argentine Civil and Commercial Code ([57]). To understand this importation, articles 281 ([58]) and 1013 ([59]) must also be taken into account. On the other hand, article 1091 ([60]) regulates hardship but does not mention expressly the devaluation of the counter performance as a case of hardship, although the Argentine doctrine has always considered both cost increase in the performance and devaluation of the counter performance as hardship cases ([61]).

([56]) It might make sense for civil lawyers to have hardship and frustration of purpose if both apply to different cases and have different consequences. Hardship would allow the contract to be judicially adapted in case of cost increase in performance while frustration of purpose would terminate it privately in case of devaluation of counter performance. However, if there is no difference between hardship by devaluation of the counter performance and frustration of purpose, then it makes no sense to allow different consequences for the same factual situation.

([57]) "Article 1090. frustration of the purpose

The definitive **frustration of the purpose of the contract authorizes the aggrieved party to declare its termination**, if it is caused by an extraordinary alteration of the circumstances existing at the time of its conclusion, beyond the control of the parties and exceeding the risk assumed by the affected party. **The termination is operative when this party communicate its extinctive declaration to the other party**. If the frustration of the purpose is temporary, there is a right to termination only if the timely performance of an obligation whose time of performance is essential is prevented."

([58]) "Article 281. Cause

The cause is the **immediate purpose** authorized by the legal system that has been **determinant of the will**. The cause also includes the **externalized motives** when they are lawful and have been **expressly incorporated** into the act, or **tacitly if they are essential for both parties**."

([59]) "Article 1013. Necessity

The cause must exist at the formation of the contract and **during its conclusion and subsist during its execution**. **The lack of cause gives rise**, as the case may be, to the nullity, adequacy or **termination of the contract**.

([60]) "Article 1091. Hardship

If in a commutative contract of deferred or permanent performance, the performance of one of the parties becomes **excessively onerous** due to an extraordinary alteration of the circumstances existing at the time of its conclusion, due to causes beyond the control of the parties and the risk assumed by the affected party, the latter has the right to raise out of court, or request before a judge, by action or as an exception, **the total or partial termination of the contract, or its adaptation.** The same rule applies to the third party to whom rights have been conferred, or obligations assigned, resulting from the contract; and to the aleatory contract if the performance becomes excessively onerous for causes outside its proper sphere."

([61]) See Luis Moisset de Espanés, "Imprevisión. Legislación de América del Sur" in Jorge Oviedo Albán & César Carranza Álvarez (eds), *Estudios de Derecho Privado Contemporáneo. Contratos (Teoría General, Contratación Predispuesta, de Consumo y Financiera)* (Volume I, Editorial Industria Gráfica 2005) 1147.

Subsequently, the Argentine civil codification inspired the PLACL to include frustration of purpose under the *cause* of contract (article 85), in addition to hardship (article 84), unlike the CISG, PICC, PECL, DCFR and TransLex Principles that only regulate hardship (and *force majeure*). Even the PLACL do expressly mention the devaluation of counter performance as hardship.

> Article 84. Change of circumstances
> (1) If, after its conclusion, the performance of the contract becomes excessively onerous **or its usefulness decreases significantly**, due to a change of circumstances whose occurrence or magnitude could not reasonably have been foreseen and whose risk was not assumed by the affected party, the latter may request the other party to renegotiate the contract.
> [...]

> Article 85. frustration of the cause of the contract
> **The definitive frustration of the cause** by a change of the circumstances existing at the time of the conclusion of the contract, unforeseeable and exceeding the risk assumed by the party, **authorizes it to terminate the contract**.

In Peru, it is also considered that frustration of purpose can be anchored in the concept of *cause*. In this regard, article 1372-A of the Preliminary Draft of the Reform of the Civil Code (2019) proposed the importation of frustration of purpose. However, the Peruvian Civil Code already recognizes in its article 1440 hardship by devaluation of the counter performance when it states that the obligor may demand the judicial adaptation of the contract either to decrease the performance or increase the counter performance. Considering that article 1440 already exists, the proposal of article 1372-A is unnecessary. Its incorporation will allow the affected party to request judicial adaptation (for hardship) or private resolution (for frustration) based on the same factual event. A better option would be to modify article 1440 so that the obligor may choose between resolution or adaptation (as other models of hardship do), instead of importing a foreign figure that is not necessary.

> Article 1440
> In commutative contracts of continuous, periodic or deferred performance, if the performance becomes **excessively onerous** due to

extraordinary and unforeseeable events, **the aggrieved party may request the judge to reduce it or increase the counter performance**, so that the excessive onerousness ceases.
If this is not possible due to the nature of the performance, the circumstances or if requested by the defendant, the judge shall decide to terminate the contract. The termination does not extend to the services performed.

Article 1372-A. frustration of the purpose of the contract
1. If the **common purpose pursued by the parties** to the contract is definitively frustrated for reasons not attributable to them, the contract is **terminated by operation of law**, unless otherwise agreed.

2. If the frustration is temporary, the contract shall be terminated by operation of law only if such temporariness prevents the timely performance of an obligation of an essential nature.

While there is no need to have both hardship and frustration of purpose in Civil Law jurisdictions, they may coexist together in Common Law jurisdictions due to their model of hardship. In Civil Law hardship involves cases of cost increase in the performance and devaluation of the counter performance, while in Common Law hardship is limited to cases of cost increase, then frustration of purpose can deal with the devaluation of counter performance. And unlike Civil Law where hardship allows for adaptation by court, in Common Law hardship and frustration of purpose have releasing effects. Thus, frustration of purpose should only coexist with hardship if the latter is limited to cases of cost increase in the performance, so frustration of purpose is not redundant. It is important to keep those two models in mind to avoid theoretical confusion.

American law has impracticability and frustration of purpose pursuant to sections § 261 and § 265 of the Restatement (Second) of Contracts, respectively, where impracticability only consists of cost increase in the performance and not devaluation of the counter performance, which corresponds to frustration of purpose. Therefore, under this scenario it does make sense for American law to have frustration of purpose and hardship (impracticability), but both excuses work alike and are based on same doctrine (bassic assumption).

Likewise, the OHADAC Principles regulate hardship without mentioning the devaluation of counter performance as is expressly

stated in the CISG, PICC, PECL, DCFR, PLACL and TransLex Principles, which does make sense for the OHADAC Principles because it also has frustration of purpose. The OHADAC Principles point out in article 6.3.1(2)(a) that a party may invoke hardship when "the performance of its contractual duties has become excessively onerous".

Similarly, paragraph 2 of the ICC Hardship Clause 2020 does not refer expressly to the devaluation of the counter performance but only to excessive onerosity when it says that a party may resort to the hardship clause if he proves that "the continued performance of its contractual duties has become excessively onerous". The ICC model makes sense from an international perspective since hardship is an excuse that is applied in Civil Law jurisdictions and also in Common Law (but only focused on the cost increase in the performance), while frustration of purpose has not had a major impact on international contracting. A "frustration of purpose clause" has not been standardized in international trade as has occurred with *force majeure* and hardship clauses (62).

So, this gives an interesting reflection from a comparative and transnational perspective. Civil Law does not need frustration of purpose because hardship is broad enough. On the contrary, in Common Law it would make sense to have frustration of purpose because hardship is limited to cases of cost increase in the performance. In spite of this, civil lawyers are the most enthusiastic to import frustration of purpose although they do not need it, while Anglo-Saxons who might need it do not use it because it is considered an exceptional and rare doctrine.

As we can see after this tour, there is no room left for frustration of purpose in Civil Law jurisdictions, and therefore, it is striking that frustration of purpose is still being discussed as a figure that needs to be imported into Civil Law jurisdictions when civil lawyers already have the tools to terminate the contract when its purpose disappears. Gladly the same discussion does not exist regarding the main international uniform law instruments, being the CISG its more important reference with its unified regulation on impediments under article 79.

(62) For instance, Jerez, Kubica & Ruda (n 10) 1484-1485 recommend to include frustration of purpose when drafting *force majeure* clauses.

5. *Concluding remarks*

Force majeure, hardship and frustration of purpose are unified in transnational contract law. There is no single model to understand them all from domestic laws, but a trend is being developed in international practice. *Force majeure* and hardship can both be claimed as excuses under the same general requirements and have releasing effects without renegotiation or judicial intervention. The CISG has been the main character of this unification.

Frustration of purpose has no autonomy of its own due to the broad regulation on *force majeure* and hardship. Temporary or partial *force majeure*, supervening illegality and the devaluation of the counter performance are cases of frustration of purpose. If this is the case, then frustration of purpose will have the same consequences as *force majeure* and hardship, and therefore, it is not needed. Recently the CISG AC – Opinion 20 considered frustration of purpose as part of hardship. For Civil Law jurisdictions, this means there is no need to keep discussing on frustration on purpose and how to import it. For Common Law jurisdictions, there is nothing to worry about.

If *force majeur*e and hardship are united, and frustration of purpose has no autonomy, we can think of a single theory to explain all kind of impediments as excuses with the same consequences. Article 79 CISG and the CISG AC – Opinions 7 and 20 made it possible. After 40 years the CISG not only accomplished uniformity on impediments but also unity. These are important lessons for Latin-American lawyers.