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**ALTERATION OF THE CONTRACTUAL
EQUILIBRIUM
UNDER THE UNIDROIT PRINCIPLES**

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This paper addresses the principles of hardship and specific performance as being unreasonably burdensome or expensive both in terms of their definitions and legal consequences. This paper argues that, in a situation of hardship, the debtor can choose to invoke either the rules of section 6.2 (hardship) or the defense to specific performance under Article 7.2.2-b of the UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles”). Yet, while in a situation where performance of the contract becomes “unreasonably burdensome or expensive,” the debtor might only invoke the exception to specific performance under Article 7.2.2(b) of the UNIDROIT Principles.

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I. INTRODUCTION

Contingent upon the binding force of the contract, as stipulated in Article 1.3 of the UNIDROIT Principles of International Commercial Contracts (“UNIDROIT Principles”), the creditor may generally request the remedy of specific performance by the debtor whether the latter’s obligation is monetary or non-monetary in nature. However, this implicitly requires that certain important circumstances surrounding the conclusion of the contract must remain unchanged. That is to say, if circumstances radically change, such change shall be taken into consideration when performing the contractual obligations.

The UNIDROIT Principles address this question from different angles: Chapter six (Performance), section two (Articles 6.2.1-6.2.3) regulates the hardship situation under which the balance between the two contract parties becomes out of proportion due to drastic changes in the market; Chapter seven (Non-Performance), section two (Articles 7.2.1-7.2.5) regulates the right to require performance. In particular, Article 7.2.2(b) deals with an exception to the creditor’s right to require specific performance, namely where the performance by the debtor of his obligation is “unreasonably burdensome or expensive.” In addition, Article 7.1.7 of the UNIDROIT Principles deals with *force majeure*, under which performance is rendered impossible.

This paper sets out to analyze the situation in which performance becomes significantly more difficult or burdensome, but falls short of becoming impossible. Sections II and III of this paper discuss the principles of hardship and performance as being unreasonably burdensome or expensive, both in terms of definition and legal consequences. Section IV will examine whether a hardship situation and the exception to specific performance under Article 7.2.2(b) overlap, and if so, what choices are available to the debtor. Section V contains concluding remarks.

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II. HARDSHIP: DEFINITION AND LEGAL CONSEQUENCES

A. Definition of Hardship

The UNIDROIT section on hardship begins with Article 6.2.1, stressing that *pacta sunt servanda* is an underlying principle of the UNIDROIT Principles.¹ Article 6.2.1 states, in part, that “where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations.” Thus, the party cannot get out of the contract simply because it becomes unprofitable to him.² Rather, the contractual obligation must be performed even though a change in the market has caused it to become more onerous for the debtor.³

According to Article 6.2.2 of the UNIDROIT Principles, the party can have the contract adapted or terminated in case of hardship.⁴ Article 6.2.2 defines the hardship event as one that “fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of

¹ Peter Schlechtriem, *Termination and Adjustment of Contracts [Under the UNIDROIT Principles of International Commercial Contracts]*, 1 EUR. J.L. REFORM 305, 314 (1999) available at <http://www.cisg.law.pace.edu/cisg/biblio/slechtriem11.html>; Dietrich Maskow, *Hardship and Force Majeure*, 40 AM. J. COMP. L. 657, 661 (1992); Joern Rimke, *Force Majeure and Hardship: Application in International Trade Practice with Specific Regard to the CISG and the UNIDROIT Principles of International Contracts*, in PACE REVIEW OF THE CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG) 193, 238 (2001), available at http://www.cisg.law.pace.edu/cisg/biblio/rimke.html#*.

² Ole Lando, *The CISG and the UNIDROIT Principles in a Global Commercial Code*, in MELANGES OFFERTS A MARCEL FONTAINE, 451, 465 (2003).

³ Ania Carlsen, *Can the Hardship Provisions in the UNIDROIT Principles Be Applied When the CISG is the Governing Law?* (Dec. 14, 1998) (unpublished essay, on file with the Pace Law School Institute of International Commercial Law), available at http://www.jus.uio.no/pace/can_upicc_hardship_provisions_be_applied_when_cisg_is_governing_law.anja_carlsen/landsc ape.pdf.

⁴ Alexei G. Doudko, *Hardship in Contract: The Approach of the UNIDROIT Principles and Legal Developments in Russia*, UNIFORM L. REV. 483, 483 (2003) (“*pacta sunt servanda*... may be questioned when a substantial change of circumstances leads to unfair contractual disequilibrium.”).

the performance a party receives has diminished." For example, the cost of a party's performance may increase if the price of raw materials or the cost of labor or transportation increases.⁵ In 2001, the ICC International Court of Arbitration decided that when, after a certain period of time, the claimant considerably increased the price of the raw material due to the more stringent conditions imposed upon the claimant by a governmental agency, the good faith principle (also prevailing in international commercial law, e.g. the UNIDROIT Principles Articles 6.2.2 and 6.2.3) imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution in order to ensure that its performance does not cause the ruin of one of the parties.⁶ In 2009, the Court of Cassation in Belgium concluded that if an unforeseen price rise causes a serious imbalance and continued performance at the contractual price would be harmful to the seller (i.e., if a change in circumstances fundamentally disrupts the contractual equilibrium), the seller has the right to request renegotiation of the contract.⁷

The value of the performance a party receives is diminished when the purpose of the transaction is frustrated;⁸ for example, if machines are produced for a factory which has since stopped its production⁹ or if goods are bought for the purpose of export and subsequently cannot be shipped due to an export ban.¹⁰ In a 1990 arbitral award, the Schiedsgericht Berlin – Germany terminated a contract between an importer of the former German Democratic Republic and an eastern European exporter for the delivery of machinery; the machinery in ques-

⁵ E. McKendrick, *Comment to Performance: Arts 6.2.1 - 6.2.3 – Hardship*, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC), 711, 717 (2009).

⁶ Case No. 9994 of 2001, Arbitral Award (ICC Int'l Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1062&step=FullText>.

⁷ Scafom Int'l BV v. Tubes s.a.s., Case No. C.07.0289.N, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1456&step=FullText>.

⁸ Doudko, *supra* note 4, at 495.

⁹ Maskow, *supra* note 1, at 662.

¹⁰ McKendrick, *supra* note 5, at 718.

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tion lost all value when, following the reunification of Germany, Western markets were opened to the enterprises of the former German Democratic Republic; in order to prove the principle that a substantial change in the original contractual equilibrium may justify the termination of the contract is increasingly accepted on an international level, the Schiedsgericht referred to the provisions on hardship contained in the UNIDROIT Principles.¹¹

Obviously, the UNIDROIT Principles recognize hardship as an exception to the general rule of *pacta sunt servanda*.¹²

In a 1996 arbitral award, the ICC International Court of Arbitration, Zürich, stressed that the exceptional nature of hardship requires a fundamental alteration in the original contractual equilibrium.¹³ In other words, the hardship exception clearly requires that the debtor cannot be held to his promise in spite of the possibility of performance;¹⁴ otherwise, this would lead to disruption of the balance between performance and counter-performance.¹⁵ In this regard, the reason of the al-

¹¹ Case No. SG 126/90 of 1990, Arbitral Award, Unif. L. Rev. 2001-1, p. 216, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=627&step=Abstract>.

¹² Maskow, *supra* note 1, at 661; Doudko, *supra* note 4, at 494; Denis Talon, *Hardship, in*, TOWARDS A EUROPEAN CIVIL CODE, 499, 504 (2004).

¹³ Case No. 8486 of 1996, Arbitral Award, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=630&step=FullText>; Case No. 7365.FMS of 1997, Arbitral Award (ICC Int'l Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=653&step=Abstract>.

¹⁴ Indeed, the 1969 Vienna Convention on the Law of Treaties (Article 62) already defines hardship as follows:

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 of 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.

¹⁵ CHRISTOPH BRUNNER, FORCE MAJEURE AND HARDSHIP UNDER GENERAL CONTRACT PRINCIPLES: EXEMPTION FOR NON-PERFORMANCE IN INTERNATIONAL ARBITRATION 391 (2007).

teration of the original contractual equilibrium does not matter,¹⁶ whether it is a change in law, outbreak of war or revolution, earthquake, flooding, exceptional weather conditions, breakdown of economic systems, etc.

In the Arbitral Award of ICC International Court of Arbitration numbered 9479, from February 1999, held that a subsequent evolution of the legislative context of a contract, in this case, the adoption in 1989 of the European Directive on Trademarks (89/104/EEC), does not constitute hardship when it does not destroy the balance of the parties' respective obligations.¹⁷

In another case,¹⁸ a United States oil company entered into a contract with the government of a Newly Independent State formerly belonging to the Soviet Union. The American company was to invest a large amount of money and construct a power station. In return, the company would be granted a long-term contract for the supply of electricity to customers in that State at fixed prices that would be likely to generate a return on the investment. The energy supply system in the State in question was later fundamentally changed by law, which made it impossible for the power station set up by the American company to supply energy at profitable prices. The *ad hoc* Arbitral Tribunal concluded that Articles 1.4, 6.2.2 - 6.2.3 and 7.1.7 of the UNIDROIT Principles are applicable.

Although performance has become excessively harder, such possibility of performance by the debtor generally distinguishes the hardship situation from the *force majeure* situation, where, pursuant to Article 7.1.7 of the UNIDROIT Principles, performance is usually impossible,¹⁹ at least temporarily.²⁰ In addi-

¹⁶ McKendrick, *supra* note 5, at 718.

¹⁷ Case No. 9479 of 1999, 2001-03 UNIF. L. REV. 664 (ICC Int'l Ct. Arb.) (2001), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=680-&step=FullText>.

¹⁸ Arbitral Award, available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=757&step=Abstract>.

¹⁹ Tallon, *supra* note 12, at 499-500; Sarah Howard Jenkins, *Exemption for Non Performance: UCC, CISG, UNIDROIT PRINCIPLES—A Comparative Assessment*, 72 TUL. L. REV. 2015, 2027 (1998); Lando, *supra* note 2, at 466. However, there could be certain situations, particularly in cases of economic impossibility (i.e., a situation, “short of an absolute bar to perform, but

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tion, there can also be a hardship situation where the value of what the debtor is to receive in exchange for his performance has diminished, regardless of his ability to perform.²¹

Whether an alteration of the equilibrium of the contract is fundamental or not in a given case “will of course depend on the circumstances.”²² In all events, fundamental alteration of the contract entails that normal economic risks cannot be considered as hardship;²³ in contrast, exceptional changes in the market that lie far beyond the normal economic development can be.²⁴ The Official Comment on the UNIDROIT Principles, the 1994 edition, adopted a general threshold test. It states: “an alteration amounting to 50% or more of the cost or the val-

imposes what in some legal systems is conceptualized as a ‘limit of sacrifice’ beyond which the obligor cannot be reasonably expected to perform.” CISG-AC Opinion No. 7, cmt. 38, *available at*: <http://www.cisg.law.pace.edu/cisg/CISG-AC-op7.html>). At the same time, these may be considered as cases of hardship and of force majeure. UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 6, art. 7.1.1, cmt. 3 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; Roesler, Hannes, *Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law*, 3-2007 EU. R. OF PRIVATE L. 483-513, 493; Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT’L & COMP. L. 5-28, 21 (1997); Tom Southerington, *Impossibility of Performance and Other Excuses in International Trade*, B:55 FACULTY OF L. UNIV. OF TURKU, n. 4.1 (2001), *available at* <http://www.cisg.law.pace.edu/cisg/biblio/southerington.html>.

²⁰ Roesler, *supra* note 19, at 485; Rimke, *supra* note 1, at 201.

²¹ Southerington, *supra* note 19, at n. 2.4.

²² UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 1 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; Joseph Lookofsky, *Impediments and Hardship in International Sales: Commentary on Catherine Kessedjian’s Competing Approaches to Force Majeure and Hardship*, 25 INT’L REV. L. & ECON., 434, 440 (2005), *available at* <http://www.cisg.law.pace.edu/cisg/biblio/lookofsky17.html>; McKendrick, *supra* note 5, at 719; Brunner, *supra* note 15, at 426; Rimke, *supra* note 1, at 239.

²³ Maskow, *supra* note 1, at 662; Brunner, *supra* note 15, at 416; Carlsen, *supra* note 3, at 3.

²⁴ Doudko, *supra* note 4, at 494; Maskow, *supra* note 1, at 662; Catherine Kessedjian, *Competing Approaches to Force Majeure and Hardship*, 25 INT’L R. L. & ECON. 641(2005), pp. 641-670, 421, *available at* <http://www.cisg.law.pace.edu/cisg/biblio/kessedjian.html>; Schlechtriem, *supra* note 1, at 314.

ue of the performance is likely to amount to a 'fundamental' alteration."²⁵ Due to criticism by some writers, the 2004 UNIDROIT Principles edition did not provide for this general threshold test.²⁶ Nevertheless, if the changed circumstances result in less than fifty percent decrease in value of the performance to be received or less than fifty percent increase in the cost of performance, then the fundamental alteration of the equilibrium of the contract is not realized under Article 6.2.2.²⁷ This is already supported by the international arbitration practice,²⁸ according to which cost increases of thirteen point six percent, thirty percent, forty-four percent, or twenty-five to fifty percent were not considered to be fundamental alterations of the equilibrium of the contracts.²⁹ In contrast, if this percent exceeds fifty, the fundamental alteration of the contract will likely be achieved.³⁰ Arguably, this fifty percent threshold is reasonable in international commercial contracts in which the value is normally high so that any small currency fluctuation could result in a huge loss.³¹

In 2009, the Court of Cassation of Belgium decided a case involving several contracts between a Dutch buyer and French seller entered into several contracts with seller, a French company, for the delivery of steel tubes.³² The unexpected rise in

²⁵ UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 2 (1994).

²⁶ BRUNNER, *supra* note 15, at 428.

²⁷ Maskow, *supra* note 1, at 662; Perillo, *supra* note 19, at 22; Jenkins, *supra* note 19, at 2028; Doudko, *supra* note 4, at 495; Rimke, *supra* note 1, at 239.

²⁸ Doudko, *supra* note 4, at 496.

²⁹ *Id.* In the case *Nouva Fucinati S.p.A v. Fondmetall Int'l A.B.*, though it was not concerned with the UNIDROIT Principles, the Tribunale Civile di Monza (Italy) decided, on January 14, 1993, that the price increase between the time of the conclusion of the contract and the time fixed for delivering the goods sold by approximately thirty percent did not amount to hardship; see this decision at: <http://www.unilex.info/case.cfm?pid=1&do=case&id=21&step=Abstract>.

³⁰ McKendrick, *supra* note 5, at 719; Carlsen *supra* note 3, at 3; BRUNNER, *supra* note 15, at 432 (stating that the threshold shall be eighty to one hundred percent decrease in the value received or a corresponding increase in the cost of performance).

³¹ Doudko, *supra* note 4, at 496.

³² Hof van Cassatie [Cass.][Court of Cassation], June 19, 2009, AR C.07.0289, available at <http://www.cass.be> (Belg.).

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the price of the steel by seventy percent was considered a change in circumstances that fundamentally disrupted the contractual equilibrium; thus, the debtor (the seller) had the right to request renegotiation of the contract.³³

In addition to the basic definition of the hardship event³⁴ mentioned above, Article 6.2.2 stipulates further conditions that the hardship event must satisfy. These are as follows:

- a. The event must become known to the debtor after the conclusion of the contract;
- b. The event could not reasonably have been taken into consideration by the debtor at the time of the conclusion of the contract;
- c. The event is beyond the control of the debtor; and
- d. The occurrence of the event was an unassumed risk by the debtor.

With regards to the first condition, it is of no importance whether the event occurred before or after the conclusion of the contract;³⁵ rather, it suffices if the debtor knows such an event after the conclusion of the contract. “If [the debtor] had known of those events when entering into the contract, it would have been able to take them into account at that time and may not subsequently rely on hardship.”³⁶

As for the second condition, even if the event that fundamentally altered the equilibrium of the contract became known

³³ Notably, the law applicable to this contract was CISG. Neither the contract itself includes a price adjustment clause, nor does CISG expressly settle the question of hardship. Thus, the court after pointing out that in order for gaps in CISG to be filled in a uniform manner, regard must be had to the general principles governing the law of international commerce, which includes, among others, the UNIDROIT Principles of International Commercial Contracts.

³⁴ Rimke, *supra* note 1, at 239 (the definition of hardship has “the form of a general description”).

³⁵ Maskow, *supra* note 1, at 662; *contra* Carlsen, *supra* note 3, at 3; Case No. 9029 of 1988, Arbitral Award (ICC Int'l Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=660&step=FullText> (stating that hardship may be invoked in such an event takes place after the conclusion of the contract).

³⁶ UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 2 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversion/principles2004-e.pdf>

to the debtor after the conclusion of the contract, it could *reasonably* have been into account by him at the time the contract was concluded. For example, the following circumstances shall be considered foreseeable: failure of a central bank to grant authorization to pay in foreign currency when foreign exchange control regulations were in place at the time of contracting;³⁷ armed hostilities between countries with a history of antagonism;³⁸ and political or environmental instability in a certain country at the time of conclusion.³⁹ Because such events were foreseeable but the debtor did not take them into consideration when concluding the contract, then the debtor should bear the burden.⁴⁰ Also, if the contract contains a provision on the allocation of risks of certain event, this event is deemed to be clearly foreseen and thus, hardship rules of the UNIDROIT Principles may not be applied.⁴¹ As for the third condition, the UNIDROIT Principles clearly state that the hardship event impeding performance must be external to the party invoking it; the debtor may not rely on self-induced hardship.⁴² That is to say, the difficulties of performance by the debtor may not be the result of its own act or negligence.⁴³

The hardship event is normally beyond the debtor's control when it is a natural event or act of God. Strikes by employees, however, may raise some problems,⁴⁴ if the employees are employed by a third party, the strike will be considered to be beyond the control of the aggrieved debtor. Yet, if they are employed by the aggrieved party himself, then the strike will most likely be within his control because he could have overcome the strike by satisfying the demands of his employees.

³⁷ Frederick R. Fucci, *Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts*, 2006 A.B.A. SEC. INT'L L. REP. at 17, available at <http://www.abanet.org/intlaw/calendar/spring2006materials.html>.

³⁸ *Id.*

³⁹ McKendrick, *supra* note 5, at 721.

⁴⁰ Perillo, *supra* note 19, at 23.

⁴¹ Roesler, *supra* note 19, at 484; Maskow, *supra* note 1, at 663; McKendrick, *supra* note 5, at 713; BRUNNER, *supra* note 15, at 424.

⁴² Doudko, *supra* note 4, at 497.

⁴³ Roesler, *supra* note 19, at 485.

⁴⁴ McKendrick, *supra* note 5, at 721.

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As far as the fourth condition is concerned, there can be no hardship if the debtor has assumed the risk of the change in the circumstances; assumption of the risk by the debtor may be explicit or implicit.⁴⁵ In this respect, the Official Comment on Article 6.2.2 further states:

The word "assumption" makes it clear that the risks need not have been taken over expressly, but that this may follow from the very nature of the contract. A party who enters into a speculative transaction is deemed to accept a certain degree of risk, even though it may not have been fully aware of that risk at the time it entered into the contract.

Thus, as contracts to sell shares of stock on the stock exchange⁴⁶ or insurance contracts⁴⁷ are aleatory in nature (i.e. depending on chance or contingency), the debtor may not be relieved even if unexpected and unforeseeable events disrupted the market.⁴⁸ Furthermore, in the context of a distributorship agreement concerning specific quantities of goods to be delivered, for example, a vegetable grower typically takes on the risk of crop destruction by rainstorms and flooding and cannot therefore invoke hardship.⁴⁹

In another case⁵⁰ where the plaintiff, a Lithuanian company, entered into a contract with defendant, a Lithuanian individual, for the sale of its shares, the defendant, after having

⁴⁵ Maskow, *supra* note 1, at 663. McKendrick, *supra* note 5, at 721.

⁴⁶ Perillo, *supra* note 19, at 14.

⁴⁷ James Gordley, *Impossibility and Changed Unforeseen Circumstances*, 52 AM. J. COMP. L. 513, 525 (2004), available at <http://www.cisg.law.pace.edu/cisg/biblio/gordley1.html>.

⁴⁸ BRUNNER, *supra* note 15, at 424-25; Doudko, *supra* note 4, at 500.

⁴⁹ Certified Award (Arbitraje de Mexico, 2006), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1149&step=Fulltext>

("While agreeing that the meteorological events in question had substantially increased the costs of Defendant's performance, the Arbitral Tribunal found that another essential requirement for the occurrence of hardship as defined in Article 6.2.2 of the UNIDROIT Principles was missing, i.e. that the risk of the event fundamentally altering the equilibrium of the contract was not assumed by the disadvantaged party...").

⁵⁰ G.Brencius v. Ukio investicine grupe, (S.C. 2003) (Lithuania), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1183&step=FullText>.

made a down payment of twenty percent of the total price, refused to pay the balance. When the plaintiff sued the defendant demanding the payment of the outstanding sum, the defendant invoked hardship on the ground that the company had become insolvent and, as a result, the value of the shares was considerably diminished. In its decision, the Supreme Court of Lithuania, ruled that defendant was not entitled to invoke the doctrine of changed circumstances or hardship as the latter does not apply to monetary obligations and furthermore, in the case at hand the risk of fluctuations of the price of the shares was deemed to be assumed by the defendant. In this respect the court referred to Article 6.204 of the Lithuanian Civil Code which in substance, according to the court, corresponds to Articles 6.2.1 to 6.2.3 of the UNIDROIT Principles.

Notably, if the first basic condition is met, meaning there has been a change in the market that fundamentally altered the equilibrium of the contract, then all four conditions are met.⁵¹ Once the event disturbs the original contractual equilibrium and becomes known to the debtor after the conclusion of the contract, it is quite clear that the debtor could not reasonably have been able to take it into account, could not preclude or overcome it, and could not assume the risk of its occurrence.

In all events, the debtor may not rely on hardship if he has already performed his obligation; the hardship defense may only be claimed in regards to performance yet to be rendered.⁵² If the fundamental disequilibrium of the contract occurs at a time when performance has been only partially rendered, the hardship defense can only be invoked in regards to the parts of the performance not yet rendered.⁵³

⁵¹ Kessedjian, *supra* note 24, at 421.

⁵² UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 4, available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

(“By its very nature hardship can only become of relevance with respect to performances still to be rendered: once a party has performed, it is no longer entitled to invoke a substantial increase in the costs of its performance or a substantial decrease in the value of the performance it receives as a consequence of a change in circumstances which occurs after such performance.”).

⁵³ *Id.*

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B. Legal Consequences of Hardship

In a situation of hardship, Article 6.2.3 of the UNIDROIT Principles mandate renegotiation between the parties to adapt the contract to the new circumstances; the debtor is "entitled to request renegotiations" of the contract. Article 6.2.3 itself does not oblige the creditor to participate in the renegotiations.⁵⁴ Yet, such a duty results from two other principles set forth in the UNIDROIT Principles:⁵⁵ good faith, Article 1.7,⁵⁶ which is indeed the underlying legal basis of the hardship exemption,⁵⁷ and cooperation, Article 5.1.3.⁵⁸ The principle of party autonomy also supports the duty to renegotiate. It is better that the parties themselves agree upon the alternative contractual terms that deal with the consequences of the hardship event.⁵⁹ The mere fact that either party may resort to court drives the parties to agree on such terms.⁶⁰ In addition, since the provisions of hardship is placed under section six regarding performance of the contract, it follows that the UNIDROIT Principles aim at keeping the contract between the parties in-

⁵⁴ McKendrick, *supra* note 5, at 722.

⁵⁵ *Id.*

⁵⁶ Luke Nottage, *Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice*, 14 *IND. J. GLOBAL LEGAL STUD.* 385, 406 (2007); Perillo, *supra* note 20, at 25; Schlechtriem, *supra* note 1, at 319.

⁵⁷ Tallon, *supra* note 12, at 503; BRUNNER, *supra* note 15, at 480; Doudko, *supra* note 4, at 490; Ministry of Defense and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc., Case No. 7365/FMS of 1997 (ICC Int'l Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=653&step=Fulltext>; Case No. 9994 of 2001 (ICC Int'l Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=1062&step=Abstract>.

⁵⁸ Southerington, *supra* note 19, at n.4.3; Doudko, *supra* note 4, at 502; UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 5 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("Although nothing is said in this Article to that effect, both the request for renegotiations by the disadvantaged party and the conduct of both parties during the renegotiation process are subject to the general principle of good faith (Art. 1.7) and to the duty of cooperation (Art. 5.1.3).").

⁵⁹ BRUNNER, *supra* note 15, at 480.

⁶⁰ Tallon, *supra* note 12, at 504.

tact as far as possible, even in the presence of a hardship event.⁶¹

The debtor must indicate the grounds on which his request for renegotiations is based.⁶² He may not request renegotiations as a purely tactical maneuver.⁶³ He shall also request renegotiations without undue delay⁶⁴ after the time at which the hardship event is claimed to have occurred, meaning at the earliest possible opportunity⁶⁵ under the given circumstances.⁶⁶ Nevertheless, delayed request by the debtor does not exclude his right to request renegotiations;⁶⁷ it may, however, affect the finding as to whether hardship actually existed and, if so, its consequences for the contract.⁶⁸

⁶¹ Ugo Draetta, *Hardship and Force Majeure Clauses in International Contracts*, 3-4 INT'L BUS. L.J. 347, 349 (2002); Perrillo, *supra* note 19, at 15; BRUNNER, *supra* note 15, at 400.

⁶² UNIDROIT PRINCIPLES, art. 6.2.3, cmt.3 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

("Para. (1) of this Article also imposes on the disadvantaged party a duty to indicate the grounds on which the request for renegotiations is based so as to permit the other party better to assess whether or not the request for renegotiations is justified. An incomplete request is to be considered as not being raised in time, unless the grounds of the alleged hardship are so obvious that they need not be spelt out in the request."); McKendrick, *supra* note 5, at 723, BRUNNER, *supra* note 15, at 486; Rimke, *supra* note 1, at 239.

⁶³ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 5 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; Doudko, *supra* note 4, at 502.

⁶⁴ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 2 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

("The request for renegotiations must be made as quickly as possible after the time at which hardship is alleged to have occurred (para. (1)). The precise time for requesting renegotiations will depend upon the circumstances of the case: it may, for instance, be longer when the change in circumstances takes place gradually."); Rimke, *supra* note 1, at 239.

⁶⁵ McKendrick, *supra* note 5, at 722.

⁶⁶ Bunner, *supra* note 15, at 486.

⁶⁷ Rimke, *supra* note 1, at 239.

⁶⁸ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 2 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

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Once the debtor claims the existence of a hardship situation, the creditor cannot simply dismiss this claim.⁶⁹ If the debtor's claim for hardship has a legitimate basis, refusal to renegotiate by the creditor can later be construed by the court or arbitral tribunal to his disadvantage.⁷⁰ The debtor may not, however, claim either damages or termination of the contract due to the creditor's refusal to renegotiate.⁷¹ If the creditor agrees to renegotiate, then he must negotiate in good faith;⁷² furthermore, he may not break off negotiations in bad faith.⁷³

The parties are eventually allocated the responsibility to resolve the disequilibrium of their contract.⁷⁴ In *Lemire v.*

⁶⁹ BRUNNER, *supra* note 15, 485; UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 5 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("both parties must conduct the negotiation in a constructive manner, in particular by refraining from any form of obstruction and by providing all the necessary information.").

⁷⁰ BRUNNER, *supra* note 15, at 483; Fucci, *supra* note 38, at 30.

⁷¹ BRUNNER, *supra* note 15, at 481-82.

⁷² Lando, *supra* note 2, at 467.

⁷³ The UNIDROIT Principles explicitly state:

- (1) A party is free to negotiate and is not liable for failure to reach an agreement.
- (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party.
- (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party.

UNIDROIT PRINCIPLES, art. 2.1.15 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

⁷⁴ Jenkins, *supra* note 19, at 2028.

Ukraine,⁷⁵ the International Centre for the Settlement of Investment Disputes (“ICSID”) endorsed the settlement agreed upon by the parties after negotiation.

In addition, the hardship event does not automatically result in an exemption from non-performance.⁷⁶ Indeed, the second paragraph of Article 6.2.3 of the UNIDROIT Principles explicitly states that the request for renegotiation does not, in itself, entitle the debtor to withhold performance.⁷⁷ This is also supported by case law; an Arbitral Tribunal rejected a defendant’s argument that his liability for non-performance was excluded on the ground of hardship, stating that even if the events were to be considered a case of hardship, the effect would not be the exclusion of the defendant’s liability for its non-performance, but only the right to ask for renegotiation of the distributorship agreement with a view to adapting it to the changed circumstances.⁷⁸

⁷⁵ *Lemire v. Ukraine, (U.S. v. Ukr.)*, ICSID ARB(AF)/98/1 (Mar. 20, 2000), *available at*: <http://www.unilex.info/case.cfm?pid=2&do=case&id=962-&step=Abstract>.

In this case, a national of the United States and the Government of the Ukraine entered into an investment agreement concerning the establishment by the former of broadcasting stations in the Ukraine. The parties submitted their dispute as to the proper performance of the agreement to the International Centre for the Settlement of Disputes (ICSID). After the commencement of the arbitral proceedings the parties entered into negotiations that resulted in a settlement agreement between them, which contained provisions taken literally, with a few minor adaptations, from the UNIDROIT Principles, particularly from Articles 6.2.1, 6.2.2, 6.2.3 dealing with hardship and its consequences. *Id.*

⁷⁶ Southerington, *supra* note 20, at n. 4.1.

⁷⁷ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 4 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> (“Para. (2) of this Article provides that the request for renegotiations does not of itself entitle the disadvantaged party to withhold performance. The reason for this lies in the exceptional character of hardship and in the risk of possible abuses of the remedy. Withholding performance may be justified only in extraordinary circumstances.”).

⁷⁸ Arbitral Award of Centro de Arbitraje de México (CAM), Nov. 30, 2006, *available at* <http://www.unilex.info/case.cfm?pid=2&do=case&id=1149-&step=Abstract> (the UNILEX database does not supply the party names or a case identifier for this particular arbitration). However, the present writer does not agree with the Arbitral Tribunal that the only remedy available to the debtor in cases of hardship is “to ask for renegotiation of the ... agreement with a view to adapting it to the changed circumstances.” *Id.* It is true

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Nevertheless, withholding may, follow from the severe impact of the hardship event.⁷⁹ Pursuant to the Official Comment and Illustration number four on Article 6.2.3 of the UNIDROIT Principles, withholding of performance by the debtor may be justified in the following situation:

A enters into a contract with B for the construction of a plant. The plant is to be built in country X, which adopts new safety regulations after the conclusion of the contract. The new regulations require additional apparatus and thereby fundamentally alter the equilibrium of the contract making A's performance substantially more onerous. A is entitled to request renegotiations and may withhold performance in view of the time it needs to implement the new safety regulations, but it may also withhold the delivery of the additional apparatus, for as long as the corresponding price adaptation is not agreed.

It should be noted that the debtor, when requesting renegotiations, may either claim adaptation or termination of the contract.⁸⁰ Nevertheless, there is no duty on the parties to necessarily achieve a settlement.⁸¹ Therefore, if the parties cannot agree on termination or adaptation of the contract within a "reasonable" time, regardless of the cause of their failure to reach such an agreement,⁸² either party may resort to court.⁸³

that the debtor has, first of all, to request renegotiations. But, if the parties do not agree to a settlement, either of them can resort to the court which in turn might, inter alia, terminate the contract. Moreover, termination may be requested from the early beginning by the debtor if the changed circumstances so require. That is to say, nothing in the Unidroit Principles precludes the parties from agreeing on termination without resorting to the court.

⁷⁹ McKendrick, *supra* note 5, at 723.

⁸⁰ BRUNNER, *supra* note 15, at 508; Lando, *supra* note 2, at 467.

⁸¹ BRUNNER, *supra* note 15, at 485.

⁸² McKendrick, *supra* note 5, at 723.

⁸³ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 6 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

"If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, para. (3) of the present Article authorises either party to resort to the court. Such a situation may arise either because the non-disadvantaged party completely ignored the request for renegotiations or because the renegotiations, although conducted by both parties in good faith, did not achieve a positive outcome.

How long a party must wait before resorting to the court will depend on

In any event, the debtor is not entitled to declare termination of the contract of its own accord.⁸⁴ It is worth mentioning that the debtor may not resort to court without having previously made a request for renegotiations;⁸⁵ otherwise, the court should suspend the proceedings for a reasonable period of time to enable the parties to renegotiate.⁸⁶ The term "court" should be understood to mean the dispute resolution mechanism agreed upon by the parties to the contract,⁸⁷ whether it is a state court or an arbitral tribunal.⁸⁸

According to Article 6.2.3 and the Official Comment thereon, the court, - if it finds a hardship situation, is authorized to grant four possible options of relief:⁸⁹ (1) terminate the contract at a specified date and on terms to be fixed;⁹⁰ (2) adapt the contract with a view to restoring its equilibrium;⁹¹ (3) direct the

the complexity of the issues to be settled and the particular circumstances of the case." *Id.*

⁸⁴ Case No. 10021 of 2000, (ICC Int'l. Ct. Arb.), *available at* <http://www.unilex.info/case.cfm?pid=2&do=case&id=832&step=FullText>.

⁸⁵ Lando, *supra* note at 2, 466; Case No. 10021 of 2000, (ICC Int'l. Ct. Arb.), *available at* <http://www.unilex.info/case.cfm?pid=2&do=case&id=832&step=FullText>.

⁸⁶ BRUNNER, *supra* note 15, at 489.

⁸⁷ Kessedjian, *supra* note 24, at 422.

⁸⁸ UNIDROIT PRINCIPLES, art. 1.7 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("In these Principles – 'court' includes an arbitral tribunal.").

⁸⁹ Jenkins, *supra* note 19, at 2029.

⁹⁰ This relief is expressly provided in UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 7 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("A first possibility is for it to terminate the contract. However, since termination in this case does not depend on a non-performance by one of the parties, its effects on the performances already rendered might be different from those provided for by the rules governing termination in general (Arts. 7.3.1. et seq.). Accordingly, para. (4)(a) provides that termination shall take place 'at a date and on terms to be fixed' by the court."); Case No. 7365/FMS of 1997, (ICC Int'l. Ct. Arb.), *available at* <http://www.unilex.info/case.cfm?pid=2&do=case&id=653&step=FullText>; 1999-4 UNIF. L. REV. 11014, 1014-15 (1999). 1015.

⁹¹ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 7 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium (para. (4)(b)). In so doing the court will seek to make a fair distribution of the losses between the parties."); McKendrick, *supra* note 5, at 724; Rimke, *supra* note 1, at 240; Case

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parties to resume negotiations to reach an agreement adapting the contract;⁹² or (4) confirm the terms of the contract as originally agreed.⁹³ All options stand on equal footing;⁹⁴ there is no preference for any particular option.⁹⁵

The court may not terminate or adapt the contract on its own.⁹⁶ Rather either party shall request such a relief before the court. The court may declare termination *ex nunc* (for the future) or *ex tunc* (with a retroactive effect).⁹⁷ When terminating the contract, the court may do so upon conditions it determines, such as the payment of compensation.⁹⁸ When adapting the contract, the court may increase or reduce the price or quantity, extend or alter the period of performance, or order compensation.⁹⁹ The court may not, in any event, impose a new con-

No. 7365/FMS of 1997, (ICC Int'l. Ct. Arb.), available at <http://www.unilex.info/case.cfm?pid=2&do=case&id=653&step=FullText>; 1999-4 UNIF. L. REV. 1014, 1015-15 (1999).

⁹² UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 7 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; Rimke, *supra* note 1, at 240.; McKendrick, *supra* note 5, at 724.

⁹³ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 7 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("Para. (4) of this Article expressly states that the court may terminate or adapt the contract only when this is reasonable. The circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand."); McKendrick, *supra* note 5, at 724.

⁹⁴ *But see* Doudko, *supra* note 4, at 504 ("Though the Principles do not expressly prefer the adaptation remedy it is nevertheless, regarded as the backbone principle of its hardship provisions.").

⁹⁵ Roesler, *supra* note 19, at 505; BRUNNER, *supra* note 15, at 407, 409-510.

⁹⁶ BRUNNER, *supra* note 15, at 511; Doudko, *supra* note 4, at 504.

⁹⁷ BRUNNER, *supra* note 15, at 511.

⁹⁸ *Id.* at 512.

⁹⁹ UNIDROIT PRINCIPLES, art. 6.2.3, cmt. 7 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> ("This may or may not, depending on the nature of the hardship, involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.").

tract upon the parties.¹⁰⁰ Taking into account that judges in some countries are not allowed to adapt the contract, the guidance of paragraph four of Article 6.2.3 will be extremely difficult to follow by all courts around the world.¹⁰¹ Furthermore, judges are not always specialized or aware of economic relations and conditions.¹⁰² Thus, the decision to adapt the contract may be more easily determined by an arbitral tribunal than by a state court.

In addition, the court may order renegotiations as the only possible solution when it becomes obvious that the court's intervention to adapt or terminate is not reasonable. As for the last option of relief, it would obviously lead to a situation in which the debtor has to continue to carry the burden of hardship, which seems to be contrary to the rationale of hardship under the UNIDROIT Principles.¹⁰³ Notably, the most current case law available, shows that tribunals, do not refuse to revise the contract by a declaration that the contract be performed as originally agreed.

III. SPECIFIC PERFORMANCE IS UNREASONABLY BURDENSOME OR EXPENSIVE: DEFINITION AND LEGAL CONSEQUENCES

A. *When Specific Performance is Unreasonably Burdensome or Expensive*

Specific performance is dealt with differently among the major legal systems in the world.¹⁰⁴ Whereas common law jurisdictions consider it as an exceptional remedy, most civil law systems treat it as a primary remedy.¹⁰⁵ Thus, the

¹⁰⁰ Doudko, *supra* note 4, at 505.

¹⁰¹ Kessedjian, *supra* note 24, at 422; BRUNNER, *supra* note 15, at 401.

¹⁰² Kessedjian, *supra* note 24, at 422.

¹⁰³ Draetta, *supra* note 61, at 350.

¹⁰⁴ Ingeborg Schwenzer, *Specific Performance and Damages According to the 1994 UNIDROIT Principles of International Commercial Contracts*, 1-3 EUR. J. L. REFORM 289-303, 290 (1999) available at: <http://www.cisg.law.pace.edu/cisg/biblio/schwenzer1.html>.

¹⁰⁵ UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 1 . (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversion/principles2004-e.pdf> (“[E]ach party should as a rule be entitled to re-

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UNIDROIT Principles has sought a compromise: the UNIDROIT Principles establish on the one hand the right to performance as a general rule,¹⁰⁶ like civil law systems;¹⁰⁷ on the other hand, the UNIDROIT Principles also include numerous exceptions, which in turn resemble the more restrictive approach of common law systems.¹⁰⁸

The UNIDROIT Principles make a clear distinction between specific performance of monetary and non-monetary obligations. With regard to monetary obligations, Article 7.2.1 of the UNIDROIT Principles recognizes specific performance completely,¹⁰⁹ without exceptions.¹¹⁰ The Official Comment clearly states the right of the creditor to require repair or re-

quire performance by the other party While this is not controversial in civil law countries, common law systems allow enforcement of non-monetary obligations only in special circumstances.”); H.Schelhaas, *Comment to Non-Performance in General, Arts. 7.1.1 - 7.1.7*, in COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 728-76, 783-84 (S. Vogenauer & J. Kleinheisterkamp eds., 2009).

¹⁰⁶ Schwenger, *supra* note 104, at 296; John Felemegas, *The Right to Require Performance: Comparison between the provisions of the CISG (Arts. 28, 46, and 62) and Counterpart Provisions of the UNIDROIT Principles (Arts. 7.2.1 – 7.2.5)*, in AN INTERNATIONAL APPROACH TO THE INTERPRETATION OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (1980) AS UNIFORM SALES LAW 143-63, 155 (John Felemegas ed., 2007).

¹⁰⁷ Mahdi Zahraa & Aburima Ghith, *Specific Performance in the Light of the CISG, the Unidroit Principles and Libyan Law*, 2002-3 REV. DR. UNIF. 751-74. 758 (2002).

¹⁰⁸ *Id.* at 759-60; Schwenger, *supra* note 104, at 292.

¹⁰⁹ Lando, *supra* note 2, at 468. Notably, according to the Official Comment on Article 7.2.1, this rule is adopted in order to “reflect the generally accepted principle that payment of money which is due under a contractual obligation can always be demanded and, if the demand is not met, enforced by legal action before a court.” UNIDROIT PRINCIPLES, art. 7.2.1, cmt. 1 . (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

¹¹⁰ UNIDROIT PRINCIPLES, art. 7.2.1, cmt. (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>

(“Where a party who is obliged to pay money does not do so, the other party may require payment.”). In exceptional situations however, “the right to require payment of the price of the goods or services to be delivered or rendered may be excluded. This is in particular the case where a usage (Article 1.9 UP) requires a seller to resell goods which are neither accepted nor paid for by the buyer.”)

Id.

placement of the payment of money by the debtor. For instance, in the case of an insufficient payment, payment in the wrong currency, or to an account different from that agreed upon by the parties.¹¹¹

Article 7.2.2 of the UNIDROIT Principles recognizes the claim for specific performance of non-monetary obligations in general; however, specific performance is excluded in several special situations.¹¹² Admittedly, the right to specific performance is in accord with the principle of *pacta sunt servanda*,¹¹³ that is, the binding force of contractual obligations underlying the UNIDROIT Principles Article 1.3.¹¹⁴ In addition, specific performance by the debtor gives the creditor to the greatest extent possible what is due to him under the contract.

Article 7.2.3 of the UNIDROIT Principles applies the aforesaid general principles (Articles 7.2.1 and 7.2.2) to the defective performance.¹¹⁵ Article 7.2.3 confirms that the right to require specific performance in such a case includes the right of the party who has received a defective performance to require “repair, replacement, or other cure of defective performance;” for example, the removal of the rights of third persons over goods or the obtaining of a necessary public permission.

¹¹¹ UNIDROIT PRINCIPLES, art. 7.2.3, cmt. 2 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; *see also* Schwenzer, *supra* note 104, at 293.

¹¹² Contrary to CISG (Article 28), the Unidroit Principles do not treat the right to require performance as a discretionary remedy that depends on domestic law and the rules of the forum; the court must grant the aggrieved party specific performance of non-monetary obligations, unless one of the exceptions enumerated in Article 7.2.2 applies. UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 2 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>; Felemegas, *supra* note 106, at 155; Schwenzer, *supra* note 104, at 292; Lando, *supra* note 2, at 469-90.

¹¹³ Schelhaas, *supra* note 105, at 784.

¹¹⁴ UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 1 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf> (“In accordance with the general principle of the binding character of the contract (see Art. 1.3), each party should as a rule be entitled to require performance by the other party.”)

¹¹⁵ UNIDROIT PRINCIPLES, art. 7.2.3, cmt. 1 (2004), *available at* <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

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Among the exceptions to the specific performance of the non-monetary obligation is the situation in which “performance or, where relevant, enforcement is unreasonably burdensome or expensive,” as stated in Article 7.2.2(b). Clearly, the general principle of reasonableness underlying the UNIDROIT Principles is the basis of this exception.¹¹⁶ Exclusion of specific performance in “this [situation] could also be seen as an extension of the operation of the principle of good faith.”¹¹⁷ With regard to this exceptional situation, the Official Comment on Article 7.2.2 of the UNIDROIT Principles further states: “particularly when there has been a drastic change of circumstances after the conclusion of a contract, performance, although still possible, may have become so onerous that it would run counter to the general principle of good faith and fair dealing (Art. 1.7) to require it.”¹¹⁸

According to this exception, performance cannot, therefore, be required if it would involve the debtor in unreasonable effort or expense due to a drastic change of circumstances after the contract conclusion.¹¹⁹ The question is when is effort or expense unreasonable? One author suggests a comparative economic assessment: The economic costs and benefits of the performance shall be balanced against each other; that is to say, the court shall weigh up both parties’ interests against the possibility of specific performance.¹²⁰

First, considerations as to the reasonableness of the trans-

¹¹⁶ Felemegas, *supra* note 106, at 155.

¹¹⁷ Schelhaas, *supra* note 105, at 789; Zahraa & Ghith, *supra* note 107, at 760; Chengwei Liu, *Specific Performance: Perspectives from the CISG, UNIDROIT Principles, PECL and Case Law 29* (2005), available at <http://www.cisg.law.pace.edu/cisg/biblio/chengwei3.html> (quoting Jarno Vanto, *Remarks on the Manner in which the Principles of European Contract Law May be Used to Interpret or Supplement Article 46 of the CISG*, PRINCIPLES OF EUROPEAN CONTRACT LAW, <http://www.cisg.law.pace.edu/cisg/text/peclcomp-46.html>).

¹¹⁸ UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 3 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

¹¹⁹ Zahraa & Ghith, *supra* note 107, at 760.

¹²⁰ Schelhaas, *supra* note 105, at 790.

action itself or of the appropriateness of the counter-performance are irrelevant in this context.¹²¹ Likewise, specific performance will not be excluded merely because damages might be an adequate remedy.¹²² Also, specific performance will normally be granted in cases in which the subject matter of the contract is something unique and/or irreplaceable in nature; that is, something not easily available elsewhere.¹²³

In contrast, specific performance will not be ordered if the performance would be quite different to the original obligation; for example, a lessee who has carelessly burned down the leased premises will not be ordered to re-build them.¹²⁴ In many cases involving small, insignificant defects, both replacement and repair may involve unreasonable effort or expense and are therefore excluded. In addition, the wording "where relevant, enforcement," contained in Article 7.2.2(b) of the UNIDROIT Principles, takes into account the following fact:

[I]n common law systems it is the courts and not the [creditors] who supervise the execution of orders for specific performance. As a consequence, in certain cases, especially those involving performances extended in time, courts in those countries refuse specific performance if supervision would impose undue burdens upon courts.¹²⁵

B. Legal Consequences of Specific Performance Being Unreasonably Burdensome or Expensive

One of the consequences that arise from the exception stated in Article 7.2.2(b) of the UNIDROIT Principles is clearly the exclusion of specific performance of the obligation. Unlike the case of hardship where the contract is terminated and con-

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 790-91; Zahraa & Ghith, *supra* note 107, at 769.

¹²⁴ Liu, *supra* note 117, at 29.

¹²⁵ UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 3 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversion/principles2004-e.pdf>; see also Schelhaas, *supra* note 105, at 792; Schwenzer, *supra* note 104, at 297.

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sequently the obligation as a whole, including eventual damages, comes to an end,¹²⁶ Article 7.2.2(b) only brings the enforced performance of the obligation to an end. This means, in such an exceptional situation, other remedies, especially damages,¹²⁷ are more adequate remedies for the creditor¹²⁸ unless the debtor proves the existence of an impediment according to Article 7.1.7.¹²⁹ In appropriate cases, however, the debtor may also request termination of the contract.¹³⁰

If this exception only applies to a part of performance, for example, the delivery of part of the goods sold is unreasonably burdensome or expensive, then specific performance of this part only is excluded. Thus, the rest of the contract must be performed unless the obligation itself is indivisible.

IV. CHOICE BY THE DEBTOR BETWEEN HARDSHIP RULES AND EXCEPTION OF SPECIFIC PERFORMANCE

Hardship normally applies to duration contracts, for example, “where the performance of at least one party extends over a certain period of time.”¹³¹ The nature of the obligation arising from the contract is irrelevant, whether it is to deliver something or to do or abstain from doing something. By contrast, specific performance is particularly important “to contractual obligations to do something or to abstain from doing something.”¹³² It can also be required by the creditor, regardless of whether the contract at issue is long-term or not. Moreover, hardship applies to both monetary and non-monetary obligations, while specific performance can only be excluded under Article 7.2.2(b) of the UNIDROIT Principles with regard

¹²⁶ Schwenger, *supra* note 104, at 296.

¹²⁷ Schelhaas, *supra* note 105, at 787; Lando, *supra* note 2, at 471.

¹²⁸ Southerington, *supra* note 19, at n. 4.1.

¹²⁹ *Id.*; Carlsen, *supra* note 3, at 13.

¹³⁰ Liu, *supra* note 117, at 29.

¹³¹ UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 5 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

¹³² UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 1 (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversionprinciples2004-e.pdf>.

to the non-monetary obligations.

The parties are usually expected to have taken into consideration events that might affect the equilibrium of their contract.¹³³ Therefore, under Article 6.2.1 of the UNIDROIT Principles, “[w]here the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.”

Under Article 6.2.2, there is a hardship situation where the balance between the two parties of the contract has been disrupted due to drastic changes in the market after conclusion that fundamentally altered the equilibrium of the contract.

Article 7.2.2(b) of the UNIDROIT Principles entails that performance cannot be required if changes in the circumstances after the conclusion of the contract make it unreasonably onerous or expensive to enforce the contract. Therefore, this exception is not limited to the kind of supervening event cases covered by the “hardship.”¹³⁴ Indeed, the extent of alteration of the contractual equilibrium shall not be so fundamental like the hardship situation.¹³⁵ Whether all conditions that the hardship event has to satisfy under Article 6.2.2 are met is not considered when invoking the defense of specific performance under Article 7.2.2(b). For example, specific performance should be excluded in cases in which such performance becomes unreasonably onerous or expensive due to an event that was not beyond the control of the debtor.¹³⁶

Moreover, as the Official Comment on Article 7.2.2 of the UNIDROIT Principles makes a cross-reference to the hardship provisions in Articles 6.2.1 – 6.2.3,¹³⁷ hardship can obviously be

¹³³ Kessedjian, *supra* note 24, at 416.

¹³⁴ For a different opinion, see Carlsen, *supra* note 3, at 8 (“the requirements for applying Article 7.2.2(b) are the same as the requirements under Article 6.2.”).

¹³⁵ Schwenger, *supra* note 104, at 296, (“the requirements for the exclusion of the right to performance should not be as high as those for hardship.”).

¹³⁶ *Id.*

¹³⁷ UNIDROIT PRINCIPLES, art. 7.2.2, cmt. 3-b (2004), available at <http://www.unidroit.org/english/principles/contracts/principles2004/integralversion/principles2004-e.pdf> (“As to other possible consequences arising from drastic changes of circumstances amounting to a case of hardship, see Arts.

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applied as a defense against specific performance.¹³⁸ Since the hardship provisions are placed under section 6 of the UNIDROIT Principles regarding performance of the contract, it follows that it was intended as a defense against specific performance.¹³⁹

It is worth mentioning that the cross-reference to hardship is made by the Official Comment on Article 7.2.2 that deals with performance of non-monetary obligation. With regards to performance of monetary obligations, by contrast, there is no cross-reference to hardship in the Official Comment on Article 7.2.1. However, the Official Comment on Article 6.2.2 (definition of hardship) states, "[t]he performance may be that either of a monetary or a non-monetary obligation." Thus, the hardship defense would apply as a defense against specific performance of both monetary and non-monetary obligations.¹⁴⁰

By contrast, where performance of the contract becomes "unreasonably burdensome or expensive," the debtor might only invoke the exception to specific performance under Article 7.2.2(b). As the alteration of the contractual equilibrium is not so fundamental, and consequently there is no hardship situation, the debtor cannot invoke the rules of section 6.2 (hardship) of the UNIDROIT Principles. This is emphasized by the fact that the Official Comment on Article 6.2.2 of the UNIDROIT Principles does not make any cross-reference to the specific performance exception in Article 7.2.2. Rather, the cross-reference was made to Article 7.1.7 on *force majeure*.¹⁴¹

6.2.1 et seq.").

¹³⁸ Schelhaas, *supra* note 105, at 791; Zahraa & Ghith, *supra* note 107, at 760, n. 69.

¹³⁹ Carlsen, *supra* note 3, at 8.

¹⁴⁰ *Id.*

¹⁴¹ In this respect, it is further noted in the Official Comment that in view of the respective definitions of hardship and force majeure (see Art. 7.1.7) under these 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. UNIDROIT PRINCIPLES, art. 6.2.2, cmt. 6 (2004), available at <http://www.unidroit.org/eng->

If hardship and performance being unreasonably burdensome or expensive overlap, it must be decided which one has priority over the other in application. According to an opinion, hardship calls for more specific rules that prevail over the exception stipulated in Article 7.2.2(b).¹⁴² It is argued, however, that the debtor shall choose which doctrine he wants to rely on, the hardship doctrine or the doctrine relating to performance as unreasonably burdensome or expensive¹⁴³. This is made clear by the cross-reference by the Official Comment on Article 7.2.2 of the UNIDROIT Principles to the hardship provisions in Article 6.2.

V. CONCLUSION

In conclusion, it is worth emphasizing the hardship event fundamentally alters the original contractual equilibrium; it must also satisfy certain conditions, mentioned in Article 6.2.2 of the UNIDROIT Principles. Once there is a hardship situation, the contract can be adapted or terminated by the parties or the court. The court may also direct the parties to resume negotiations to reach an agreement adapting the contract or confirm the terms of the contract as originally agreed. In contrast, if performance of the obligation by the debtor is unreasonably burdensome or expensive, specific performance may not be claimed by the creditor or granted to him. Instead, the creditor may claim damages. Here, the conditions of Article 6.2.2 of the UNIDROIT Principles must not be satisfied.

Therefore, it is obvious that, in a situation of hardship, the debtor can choose to invoke either the rules of section 6.2 (hardship) or the defense to specific performance under Article 7.2.2(b) of the UNIDROIT Principles. In contrast, where performance of the contract becomes “unreasonably burdensome or expensive,” the debtor might only invoke the exception to specific performance under Article 7.2.2(b) of the UNIDROIT Principles.

lish/principles/contracts/principles2004/integralversionprinciples2004-e.pdf.

¹⁴² Liu, *supra* note 117, at 30.

¹⁴³ Schelhaas, *supra* note 105, at 792.