

ENFORCEMENT OF HARDSHIP CLAUSES IN THE FRENCH AND AMERICAN LEGAL SYSTEMS

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INTRODUCTION

Consider the following scenario. A French electric company decides to build a new electric plant. It receives a long-term commitment from an American oil supplier with whom it has a long-standing relationship. The American oil company views the long-term contract as a means to finance an ongoing oil exploration project. However, the oil company is concerned about fluctuation in the price of oil and wants to incorporate some flexibility into the contract. The French electric company is willing to absorb some increase in cost so long as its oil supply is uninterrupted.

How can the American lawyer for the oil company and the French lawyer for the electric company ensure the success of their clients' project? French and American lawyers can avail themselves of a number of methods to insure against unforeseen circumstances. American lawyers can draft flexible pricing clauses, option contracts and clauses limiting liability.¹ French lawyers can draft clauses *de maintien de valeur* (value maintenance), *de hausse et de baisse* (rise and fall), and of course, force majeure clauses.² This article considers an additional option: the hardship clause.

A typical hardship clause has two aspects: (1) a definition of hardship and (2) a method to adapt the contract to accommodate the changed circumstances. Bruno Oppetit offers the following description of a hardship clause:

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1. E. FARNSWORTH, *CONTRACTS* 648 (1982). A flexible pricing clause allows a party to pass additional costs on to the other party. *Id.* An option contract is an irrevocable offer supported by consideration and limited to a specific time. *Id.* at 172-73. Clauses limiting liability limit the remedies available to a party in case of breach. *Id.* at 316.

2. B. OPPETIT, *L'ADAPTATION DES CONTRATS INTERNATIONAUX AUX CHANGEMENTS DE CIRCONSTANCES: LA CLAUSE DE "HARDSHIP"* 794, 795-96 (1972). For an explanation of force majeure, see *infra* note 25 and accompanying text.

A hardship clause may be defined as a clause by which parties will be able to request a rearrangement of the contract that binds them if an intervening change in the initial basis on which they obligated themselves modifies the equilibrium of the contract to the point that one of the parties sustains a hardship.³

Hardship clauses are found in many types of contracts: commercial; construction; insurance; commodities; offshore; license/patent; and international joint ventures. Scholars agree, however, that hardship clauses are most useful in long-term fuel supply contracts.⁴ Fuel supply contracts are subject to a great deal of uncertainty, and this uncertainty is compounded over time. Moreover, fuel supply contracts are often the basis of other contracts (*e.g.*, exploration finance contracts and energy facility construction contracts), and parties would rather integrate some flexibility into their contracts than to terminate a project or breach an agreement.

Thus, hardship clauses have two obvious advantages. First, they afford parties a flexible approach to deal with unforeseen circumstances. Second, they provide a framework for parties to renegotiate. The most common criticism of hardship clauses is that they create instability by inserting ambiguity into contracts.⁵ Such criticism is blunted by the fact that hardship clauses are most often introduced in transactions that are themselves subject to a great deal of uncertainty. Moreover, hardship clauses can be drafted broadly or narrowly to fit the situation.⁶

A more penetrating question is whether hardship clauses accomplish any more than what parties can achieve by postcontractual modification. Both the French and the American legal systems recognize that parties can renegotiate all or part of a contract and alter the terms of a preexisting agreement. Why use a hardship clause? The answer is that absent a hardship clause, parties are not required to modify their contract or even to engage in negotiations to revise the contract.⁷ Furthermore, courts are reticent to engage

3. *Id.* at 797.

La clause de "hardship" peut se définir comme celle aux termes de laquelle les parties pourront demander un réaménagement du contrat qui les lie si un changement intervenu dans les données initiales au regard desquelles elles s'étaient engagées vient à modifier l'équilibre de ce contrat au point de faire subir à l'une d'elles une rigueur ("hardship") injuste.

4. *See infra* notes 5 & 10.

5. *See, e.g.*, UNITED NATIONS COMMISSION ON INTERNATIONAL TRADE LAW [UNCITRAL], Legal Guide on Drawing up International Contracts for the Construction of Industrial Works 241 (1985) [hereinafter UNCITRAL].

6. *See infra* notes 11 & 12.

7. Richard Speidel observes:

in modification that was not agreed upon by the parties at the time of contracting.⁸

This line of questioning reveals that hardship clauses are superior to normal postcontractual modification only to the extent that they are enforceable. The purpose of this article is to discuss the enforceability of hardship clauses. The article answers two major questions: (1) what is a hardship clause? and (2) what happens if parties cannot agree upon a solution to the hardship?

I. WHAT IS A HARDSHIP CLAUSE?

Unlike force majeure in French law and impossibility in common law, hardship is not a legal concept. It is a descriptive phrase for an event that befalls one of the parties. While the French use the word "hardship" for lack of a better term,⁹ Americans prefer the phrase "gross inequity" clause.¹⁰

Because it is not a legal concept with a fixed meaning, hardship can be defined narrowly¹¹ or broadly.¹² While often framed in

Assume that after changes occur which upset the balance struck ex ante in a long-term contract, the disadvantaged party initiates negotiations and ultimately proposes an adjustment in the price term. What should the advantaged party do? Under the efficiency analysis and traditional contract law, he may refuse to negotiate or adjust without legal consequences. No duties are imposed upon the advantaged party in the ex post bargaining process.

Speidel, *Court Imposed Price Adjustments in Long Term Supply Contracts*, 76 Nw. U.L. REV. 369, 404 (1981).

8. *Id.* at 408.

9. See Fontaine, *The Hardship Clause*, 2 DROIT ET PRATIQUE DE COMMERCE INTERNATIONAL [DR. PRAC. COM. INT'L] 51, 53 (1976). Fontaine argues that none of the suggested translations (e.g., *clause d'imprévision* (unforeseeability clause), *clause de sauvegarde* (safeguard clause), and *clause de révision* (revision clause)) accurately describe the hardship clause.

Nonetheless, French attorneys should be aware that such clauses are often, in essence, hardship clauses. In 1 DR. PRAC. COM. INT'L 512 (1976), Fontaine lists a number of clauses with various names, all calling for renegotiation and all triggered by a hardship. Thus lawyers searching for models should consider many clauses, not merely those entitled "hardship clauses."

10. See generally Young, *Construction and Enforcement of Long-Term Coal Supply Agreements*, 27A ROCKY MTN. MIN. L. INST. 127 (1982); Scott, *Coal Supply Agreements*, 23 ROCKY MTN. MIN. L. INST. 107 (1977).

Gross inequity clauses appear in the following cases: *Tennessee Valley Auth. v. Exxon Nuclear Co.*, 753 F.2d 493, 495 (6th Cir. 1985) (supplier of uranium sues T.V.A. for compensation for increased production costs); *Cleveland-Cliffs Iron Co. v. I.C.C.*, 664 F.2d 568 (6th Cir. 1981) (railroad sues ICC for increased freight rates); *Iowa Power & Light Co. v. Burlington N., Inc.*, 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982) (holding that an established railroad tariff rate approved by the ICC does not prevail over a rate enumerated in a preexisting contract with a gross inequity clause); *Southwestern Elec. Co. v. Burlington N., Inc.*, 475 F. Supp. 510 (E.D. Tex. 1979) (upholding rate negotiated by preexisting contract with a hardship clause where ICC neither approved nor disapproved of rate).

11. An example of a narrowly drawn clause is: "[S]i le prix du fuel subissait une hausse ou une baisse de plus de 6 francs à la tonne, les parties se rapprocheraient pour

terms of economic consequences, hardship clauses can take into account noneconomic eventualities as well.¹³ American and French clauses often require an element of unforeseeability. In addition, French clauses include an element of *exteriorité* (the event be beyond the parties' control).¹⁴ Bruno Oppetit notes that French hardship clauses often resemble French force majeure clauses.¹⁵

The most common means to adapt the contract in both French and American clauses is by an agreement to renegotiate. There is, however, a great deal of variation in how the duty to renegotiate is articulated. Sometimes the duty is broad, other times it is narrow.¹⁶ Nonetheless, it is this duty to renegotiate that distinguishes hardship clauses from normal force majeure clauses, which provide for termination of the contract.

II. WHAT HAPPENS IF PARTIES CANNOT AGREE UPON A SOLUTION TO THE HARDSHIP?

This is a complex question which is best divided into three issues: (1) how would a court interpret a hardship clause? (2) what is the "duty to renegotiate," and what happens if a party breaches that

examiner les modifications à apporter au contrat. . ." ("If the price of fuel sustains a rise or fall of more than 6 francs a ton, the parties shall come together to examine the modifications to be brought to the contract.") See E.D.F. c. Sté. Shell Française, Cour de cassation [Cass.], La Semaine Juridique [J.C.P.] II No. 18810 (1976) note J. Robert. This case is discussed more fully *infra* notes 86-96 and accompanying text.

12. An example of a broadly drafted clause is: "[A]ny gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may be corrected by mutual consent. . . ." Georgia Power Co. v. Cimarron Coal Corp., 526 F.2d 101, 103 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976).

13. For example: "[d]ans le cas de la survenance d'événements politiques extérieurs ou intérieurs" ("[i]n the case of supervening foreign or domestic political events"). Fontaine, 2 DR. PRAC. COM. INT'L, *supra* note 9, at 64.

14. The elements of unforeseeability and *exteriorité* are included in the following hardship clause: "Les conditions de la présent convention pourront être revues de commun accord si un événement imprévisible et étranger aux parties. . . ." ("The terms of the present agreement may be reviewed by mutual agreement if an unforeseeable and external event") 1 DR. PRAC. COM. INT'L 512 (1976).

15. B. OPPETIT, *supra* note 2, at 802. French and American attorneys should be wary of drafting hardship clauses merely by repeating the formulae of force majeure clauses. This may lead to a "conflict of clauses" in which one party argues that a certain event triggers termination under the force majeure clause while the other party argues that the event triggers renegotiation under the hardship clause.

16. Compare "[l]es parties auraient à se mettre d'accord sur une adaptation du prix" ("the parties would have to agree to an adjustment of the price"), with "[l]es parties se consulteront afin de trouver en commun des ajustements équitables à cet accord" ("the parties will consult for the purpose of finding together equitable adjustments to this agreement"). The former clause requires parties to renegotiate the price while the latter clause can involve revision of the entire contract.

duty? and (3) what happens if parties cannot agree to a modification?

A. *How Would A Court Interpret a Hardship Clause?*

This problem of interpretation troubles French and American scholars.¹⁷ However, in the French and American cases cited above, the courts were not forced to wrestle with the issue of whether hardship occurred.¹⁸ The meaning of hardship would obviously be a question of contract interpretation. To interpret a hardship clause, French and American attorneys need to know both the rules of contract interpretation used in the common law and French legal systems; and common law and French understanding of force majeure and impossibility.

Since hardship is not a legal concept, courts will analogize to force majeure or impossibility for guidance in interpreting a hardship clause.¹⁹ Although this practice is tempting, courts are urged not to replace a sophisticated analysis of the meaning of hardship with a facile recapitulation of the factors required for force majeure and impossibility. While force majeure and impossibility

17. See UNCITRAL, *supra* note 5.

18. See cases cited *supra* notes 10 & 11. The meaning of "hardship" was disputed in the English case, *Superior Overseas Development Corp. v. British Gas Corp.*, [1982] 1 Lloyd's Rep. 262 (C.A.). The case involved a long-term natural gas supply agreement that included a hardship clause triggered in the event of "substantial economic hardship." The lower court held: "[t]he adjustment of the price should only be such as to remove the substantial element of any substantial hardship and thus reduce any substantial hardship to mere hardship. The adjustment should not go further and remove all hardship." *Id.* at 262.

The Court of Appeals reversed, stating that all hardships should be compensated. The court began by defining "substantial economic hardship": "A substantial change in economic circumstances means something more than ordinary everyday variations which were current in the late '60s. 'Substantial hardship' must mean something more than difficulties arising from day to day economic variations. It must have a real impact and not be a mere transient effect." *Id.* at 266. The court then proceeded to explain why all hardships should be compensated:

Having found that the party was suffering from substantial hardship, it is next necessary to determine what adjustment to the price is justified to 'offset or alleviate the said hardship.' In my opinion the said hardship refers to the substantial hardship mentioned earlier in the clause, and offsetting or alleviating refers to a condition of normality, that is to say without hardship, not merely without the substantial part of the hardship.

Id.

19. In *Superior Overseas Development Corp.*, for example, Lord Justice Waller found the hardship clause contained an element of unforeseeability even though the clause itself did not specify this element: "It seems probable, therefore, that cl. 7 [the hardship clause] is designed to adjust the price to avoid substantial economic hardship to any party which might arise as a result of substantial economic change which might arise over a period of 25 years and which could not be foreseen at the time of making the agreement." *Id.* at 265. Unforeseeability is an important characteristic of common law impossibility. See E. FARNSWORTH, *supra* note 1, at 686.

have fixed legal requirements, hardship is a more flexible concept that generally applies when a change of circumstances makes performance of a contract grossly inequitable.

1. French Law

a. Rules of Interpretation. The interpretation of contracts in French law is governed by articles 1156-1164 of the *Code civil*. The centerpiece is article 1156, which provides that courts should take into account the “common intention of the parties.”²⁰ This statute can be the basis for a broad interpretation of a hardship clause.

Consider a seller whose performance becomes onerous due to a change in import quotas, and assume that the hardship clause speaks only of “hardship by a change in economic circumstances.” The seller could cite article 1156 and argue that the purpose of a hardship clause is to integrate flexibility within a contract, requiring the court to consider substantial changes in political circumstances as well as economic circumstances.

Balancing a broad interpretation under article 1156 is the doctrine of *clause claire et précise*.²¹ This doctrine states that a clear and precise clause is interpreted by its plain meaning. *Clause claire et précise* may be employed by a buyer to achieve a narrow interpretation of a hardship clause. Suppose the seller’s costs rise three percent beyond the costs foreseen by an indexation clause, and the hardship clause speaks only of a hardship beyond a five percent rise in costs calculated by the indexation clause. The buyer would argue that the hardship clause is a *clause claire et précise*, triggered only by a five percent increase in cost.

Like common law, French law recognizes certain preferences in interpreting contracts. For long-term sales contracts the most significant rule is article 1602, which states that vague and ambiguous

20. CODE CIVIL [C. CIV.] art. 1156 (Dalloz ed. 1982). Article 1156 states, “On doit dans les conventions rechercher quelle a été la commune intention des parties contractantes, plutôt que de s’arrêter au sens littéral des termes.” (“One must, in contracts, seek to determine the common intention of the contracting parties, rather than stop at the literal sense of the terms.”)

21. Alex Weill describes the doctrine thus: “Lorsqu’une clause a été valablement acceptée par les deux parties et qu’elle est claire et précise, elle doit être appliquée telle quelle, à moins qu’elle ne soit illicite. En principe il n’y a pas de place pour l’interprétation d’un contrat révélant par sa lettre et son esprit la commune intention des contractants.” (“Once a clause has been validly adopted by the two parties and it is clear and precise, it must be enforced as is, unless it is unlawful. In principle there is no place for the interpretation of a contract which reveals by its letter and spirit the common intention of the contracting parties.”) A. WEILL, LES OBLIGATIONS 404 (1980).

phrases will be construed against the seller.²² This creates difficulty for the seller who, more often than not, is the party claiming hardship.²³ The seller's attorney must skillfully draft a clause broad enough to encompass all aspects of conceivable hardship, but narrow enough to avoid invoking article 1602.

b. Force Majeure. The French law of force majeure is based on article 1148.²⁴ The classical requirements of force majeure are enumerated by Jean Carbonnier: "An event only constitutes a force majeure if it presents the threefold quality of being 1) insurmountable, 2) unforeseeable (which is expressed more specifically by fortuitous circumstance), and 3) beyond the parties' control (this is how the force majeure is an external cause)."²⁵

Hardship clauses often include the requirement of *imprévisibilité* (unforeseeability). The rationale for requiring *imprévisibilité* is that if an occurrence is foreseeable, then the party should take precautions to avoid it.²⁶

22. C. civ. art. 1602 (Dalloz ed. 1982). Article 1602 states: "Le vendeur est tenu d'expliquer clairement ce à quoi il s'oblige. Tout pacte obscur ou ambigu s'interprète contre le vendeur." ("The seller is obliged to explain clearly that which he obligated himself to do. All obscure and ambiguous agreements are to be interpreted against the seller.")

23. Hardship clauses are often referred to as "sellers' clauses." Yet this is not always the case. In the event of a plunge in the market price of a necessary raw material, or a sharp decline in demand for the buyer's finished product, the buyer will find a hardship clause a valuable instrument for renegotiation.

In the context of international construction contracts, however, the UNCITRAL Legal Guide concludes that hardship clauses are more advantageous to contractors than to purchasers:

A hardship clause may have particular disadvantages for a purchaser. While the purchaser has usually to perform only a single principal obligation (i.e., to pay the price), the contractor has to perform a number of obligations in the course of constructing the works. The contractor, therefore, will potentially have more opportunities to invoke the hardship clause than the purchaser. Accordingly, before agreeing to the inclusion of a hardship clause in the contract, the purchaser should carefully consider the possible adverse effects to him of that clause.

UNCITRAL, *supra* note 5, at 243.

24. C. civ. art. 1148 (Dalloz ed. 1982). Article 1148 states: "Il n'y a lieu à aucune dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit." ("There will be no place for an award of damages, if by a force majeure or a fortuitous circumstance the obligor was prevented from giving or doing that which he was obligated, or did that which he was forbidden to do.")

25. J. CARBONNIER, *LES OBLIGATIONS* 290 (1985). "Un événement ne constitue une force majeure que s'il présente le triple caractère d'irrésistibilité (à quoi fait plus proprement allusion l'expression force majeure, vis major), d'imprévisibilité (ce qu'exprime plus spécialement cas fortuit), d'extériorité (c'est en quoi la force majeure est une cause étrangère)."

26. Jean Carbonnier observes:

Il n'y a de force majeure qu'autant que l'obstacle échappait, lors de la conclusion du contrat, à des prévisions humaines. Car, s'il était prévisible, le débiteur avait le devoir de prendre le surcroît de précautions qui auraient pu l'éviter; à la limite, il devait s'abstenir de contracter plutôt que de braver le risque.

(There can only be force majeure to the extent that an obstacle is beyond human

This standard for *imprévisibilité* was strictly applied by the *Cour de cassation*²⁷ in *Société Air Nautique c. ISSA*.²⁸ An Israeli student organization contracted for flights to Israel with an air charter company in February 1965. That summer, the French Transport Ministry halted flights to Israel, and the Israeli student group sued the charter company for breach of contract. The *Cour de cassation* upheld the claim, stating that it was foreseeable that flights would be suspended, and that the charter company bore the risk of damages.²⁹

Another common requirement in French law is *extériorité* (beyond a party's control). The rationale for this requirement is that force majeure precludes finding either party at fault, and therefore the superseding event must be beyond the control of the parties.³⁰ Thus French courts hold that the obligation to pay on a certain date is not avoided simply because the obligee is too sick to make the closing.³¹ However, when a strike within a company is traceable to national labor unrest, French courts have held that the event is beyond the employer's control and may be grounds for force majeure.³²

expectations at the time of the conclusion of the contract. Because if it was foreseeable, the obligor had the duty to take the additional precautions in order to evade it; taken to its logical conclusion, the obligor must abstain from contracting rather than confronting the risk.)

J. CARBONNIER, *supra* note 25, at 291.

27. The *Cour de cassation* is the highest court in France. Generally, the *Cour de cassation* does not decide a case on its merits, but reviews the judgment rendered by the lower court, to ensure it is in accord with the law. O. KAHN-FREUND, C. LÉVY & B. RUDDEN, *A SOURCEBOOK ON FRENCH LAW 275-76* (1979).

28. Judgment of Dec. 1, 1970, Cass., 1970 Bulletin des arrêts de la Cour de cassation, première section civile [Bull. Civ. I.] no. 320.

29. *Id.*

30. Jean Carbonnier observes:

L'événement empêchant l'exécution n'est libératoire qu'à la condition de se produire en dehors de la sphère dont le débiteur doit répondre. Ainsi, la défaillance du matériel ou du personnel qu'un contractant emploie à l'exécution du contrat peut bien être irrésistible et imprévisible pour lui; mais comme elle est survenue à l'intérieur de son entreprise, il ne peut s'en prévaloir comme d'une force majeure.

(The event preventing performance does not release the parties except under the condition that it occurs outside the sphere to which the obligor must respond. Thus, the failure of material or personnel that a contractant employs for the performance of the contract may well be insurmountable and unforeseeable; but as it happens within the confines of his business, he can not invoke it as a force majeure.)

J. CARBONNIER, *supra* note 25, at 291.

31. A. WEILL, *supra* note 21, at 477.

32. *Id.* at 460.

2. Common Law

a. Interpretation of Contracts. French lawyers will recognize that many of the difficulties of contract interpretation that arise in French law also arise in the American legal system. Applying objective or subjective interpretation creates as much tension in common law as in French law.³³ Like French courts, American courts look at trade usage, course of dealing, course of performance and all circumstances surrounding the contract to interpret terms within the contract.³⁴

Furthermore, the common law tradition contains several maxims of interpretation. The most relevant maxim is *contra preferentum*.³⁵ Since it is often the seller who drafts the clause and declares hardship, this maxim has the same effect as article 1602 of the *Code civil*, which states that ambiguous clauses are construed against the seller.³⁶

However, there are also idiosyncracies in the common law system which the French attorney should appreciate. The first is the parole evidence rule. This rule states that if a contract is fully integrated (i.e., self-contained), the court will not look at precontractual negotiations in determining the duties of the parties in a contract.³⁷ Moreover, courts will enforce merger clauses, which are clauses in a contract stating in essence that the contract is fully integrated.³⁸ Nevertheless, in interpreting ambiguous phrases such as "hardship" and "gross inequity," courts will permit evidence of precontractual negotiations, usage, course of dealing and other surrounding circumstances.³⁹

Another complicated area is whether interpretation will be effected by the judge or the jury. In general, questions of law are decided by the judge and questions of fact are decided by the jury.⁴⁰ Interpreting an ambiguous phrase, such as "hardship" or

33. See generally E. FARNSWORTH, *supra* note 1, at 113-16. The basic conflict is whether to interpret the contract objectively, according to the contract language and the actions of the parties, or whether to interpret the contract subjectively, according to what each party intended the contract to mean.

34. *Id.* at 492.

35. E. Allan Farnsworth defines the maxim thus: "[i]f language supplied by one party is reasonably susceptible to two interpretations, one of which favors each party, the one that is less favorable to the party who supplied the language is preferred." *Id.* at 499.

36. See *supra* note 22 and accompanying text.

37. E. FARNSWORTH, *supra* note 1, at 452.

38. *Id.* at 457-58.

39. *Id.* at 492-93.

40. See FED. R. EVID. 1008.

“gross inequity,” that has differing reasonable inferences will normally be a question for the jury. However, if the evidence before a court indicates a meaning different from the literal one, some courts treat this as a question of law for the judge to decide.⁴¹

b. Impossibility. The way the law of force majeure appears in the Restatement (Second) of Contracts⁴² and in the Uniform Commercial Code (U.C.C.) may appear alien to French lawyers.⁴³ The phrase “contingency the non-occurrence of which was a basic assumption on which the contract was made” contains no references to either *imprévisibilité* or *extériorité*. Nevertheless, these two notions are subsumed within the common law of impossibility.

American courts consider foreseeability to be an important requirement for impossibility. In *Eastern Airlines v. Gulf Oil Corp.*,⁴⁴ the Southern District of Florida wrestled with a classic hardship fact pattern. Gulf Oil declared force majeure and breached a contract on the ground that the energy crisis had caused a rise in the price of foreign crude oil such that its performance was no longer commercially practicable.

The court rejected Gulf’s defense on the ground that political instability in the Middle East at the time of contracting made the energy crisis legally foreseeable. The court stated in dicta:

[E]ven if Gulf had established great hardship under U.C.C. § 2-615, which it has not, Gulf would not prevail because the events associated with the so-called energy crisis were reasonably foreseeable at the time the contract was executed. If a contingency is foreseeable, it and its consequences are taken outside the scope of U.C.C. § 2-615, because the party disadvantaged by fruition on the contingency might have protected himself in his contract.⁴⁵

American courts also refuse to find impossibility if the superseding event was within a party’s control. This was the rationale behind the famous opinion of Chief Judge Cardozo in *Canadian In-*

41. E. FARNSWORTH, *supra* note 1, at 517.

42. RESTATEMENT (SECOND) OF CONTRACTS § 261 (1979), states: “Where, after a contract is made, a party’s performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.”

43. U.C.C. § 2-615 (1978), relates to impossibility and the non-delivery and tardy delivery of goods: “[d]elay in delivery or non-delivery in whole or part by the seller . . . is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made. . . .”

44. 415 F. Supp. 429 (S.D. Fla. 1975).

45. *Id.* at 441.

*B. What is the "Duty to Renegotiate" and What Happens
When a Party Breaches that Duty?*

A major difference between a hardship clause and voluntary modification of a contract is that a hardship clause creates a duty to renegotiate.⁵¹ The power of a hardship clause is proportional to the scope and enforceability of the duty to renegotiate. A clause that enumerates specific duties, calling for money damages or specific performance in the event of breach, can induce an evasive party to come to the bargaining table.

Only a few French or common law cases discuss a breach of the duty to renegotiate under a hardship clause or a gross inequity clause.⁵² Yet this possibility is not difficult to imagine. In the event of an oil crisis, a buyer who has an assured supply of oil at a low price will be reticent about renegotiating. The seller will be very eager to revise the contract and may sue the buyer for breach of the duty to renegotiate. Alternatively, in the event of a plunge in the price of oil, the buyer will be eager to revise the contract and may end up suing the seller for breach of the hardship clause.

The actual wording of the hardship clause may help to clarify the duty to renegotiate. For example, some clauses are mandatory (e.g., "shall negotiate") while other clauses are permissive (e.g., "may negotiate"). However, given the vagueness of most hardship clauses, it is likely that the wording will cause disagreement.

1. Duty to Renegotiate

a. Common Law. The sole duty to renegotiate case involving a gross inequity clause is *Southwestern Electric Power Co. v. Burlington Northern, Inc.*⁵³ Burlington Northern (a railroad company) entered a twenty-five year coal shipment contract with Southwestern Electric Power Corporation (SWEPCO). The contract contained an escalation formula and a gross inequity clause.

Approximately four years after performance commenced, Burlington Northern sought to adjust its tariff pursuant to the gross inequity clause, and the parties entered into negotiations. SWEPCO rejected the railroad's proposal, but Burlington Northern went ahead and published a new rate. SWEPCO first went to

51. See *supra* notes 5 & 10.

52. See, e.g., E.D.F. c. Sté. Shell Française, Cass., J.C.P. II No. 18810 (1976); *Southwestern Elec. Power Co. v. Burlington N., Inc.*, 475 F. Supp. 510 (E.D. Tex. 1979).

53. 475 F. Supp. 510 (E.D. Tex. 1979).

the Interstate Commerce Commission (I.C.C.), then to federal district court and sued for breach of contract.

The Eastern District of Texas held:

Under the tariff and rate schedule agreed to by the parties, should the railroads feel that the rate specified as escalated is not adequately compensatory, the Defendant railroads can rely on the gross inequity provision and negotiate with Southwestern Electric Power Company for a mutually agreeable higher rate. . . . By announcing an intention to publish a rate that was not acceptable to Southwestern Electric Power Company, the Defendant railroads acted in violation of the agreed-to-procedures, and it is the intent of this court to prevent such breach from occurring.⁵⁴

Southwestern Electric holds that it is a breach of the duty to renegotiate for a party to unilaterally impose new rates. However, it does not lay out a general standard that identifies when contracting parties must renegotiate. Nonetheless, it is clear that the court was not happy with Burlington Northern's negotiation methods which the I.C.C. labeled "bait and switch tactics."⁵⁵ Thus, the case implies a duty approaching a "good faith" standard.

A "good faith" standard was adopted for precontractual negotiations in *Itek Corp. v. Chicago Aerial Industries*.⁵⁶ In this case, Itek sued Chicago Aerial Industries (CAI) for breach of a promise to buy Itek's assets. CAI, after receiving a more favorable offer, telegraphed Itek that it would not proceed with the transaction.

The legal controversy focused on a letter of intent confirming the terms of the proposed sale of assets:

Itek and CAI shall make every reasonable effort to agree upon and have prepared as quickly as possible a contract providing for the foregoing purchase by Itek and sale by CAI . . . embodying the above terms and such other terms and conditions as the parties shall agree upon. If they fail to agree upon and execute such a contract they shall be under no further obligation to one another.⁵⁷

Itek sued CAI for breach of contract, but the trial court granted summary judgement for CAI. The court relied on the language

54. *Id.* at 521.

55. *Id.* at 515.

56. 248 A.2d 625 (Del. 1968). For an informative up-to-date analysis of the duty to negotiate in precontractual contexts, see Farnsworth, *Precontractual Liability and Preliminary Agreements: Fair Dealing and Failed Negotiations*, 87 COLUM. L. REV. 217, 263-69 (1987).

57. *Itek Corp. v. Chicago Aerial Indus.*, 248 A.2d at 627.

above, stating that the parties agreed to release themselves from all further obligations if they could not come to an agreement.

The Supreme Court of Delaware reversed, reasoning that:

[I]t is apparent that the parties obligated themselves to ‘make every reasonable effort’ to agree upon a formal contract, and only if such effort failed were they absolved from ‘further obligation’ for having ‘failed’ to agree upon and execute a formal contract. . . . CAI willfully failed to *negotiate in good faith* and to make ‘every reasonable effort’ to agree upon a formal contract, as it was required to do.⁵⁸

b. French Law. French case law has not clarified when parties have a duty to renegotiate. Thus, it is especially important for attorneys to pay attention to the particular wording of the hardship clause they are interpreting. The criteria for renegotiation varies from contract to contract.⁵⁹

Scholars offer several ideas concerning the duty to renegotiate. Bruno Oppetit opines that the parties must renegotiate in good faith.⁶⁰ Indeed, the standard of good faith is a notion that underlies all contract performance in French law. Article 1134 of the *Code civil* provides: “Legally formed agreements become the law that governs those who have made them. . . . They must be performed in good faith.”⁶¹

Michel Fontaine offers a different opinion. He writes that the duty to renegotiate can be considered an *obligation de moyens* (duty of means).⁶² The *obligation de moyens* requires a party to take measures which a *bon père de famille* (the French reasonable person) would take to achieve the purpose of the contract. The classic example of an *obligation de moyens* is the obligation owed by a

58. *Id.* at 629 (emphasis added).

59. Compare “the parties will use their best endeavors to agree to such an action as may be needed” with “les parties se doivent de rechercher en commun les moyens aptes à remédier à la situation préjudiciable.” (“The parties must together search for the appropriate means to remedy the prejudicial situation.”) The former clause sets down a “best endeavors” standard while the latter clause is ambiguous.

60. See B. OPPETIT, *supra* note 2, at 807.

61. C. CIV. art. 1134 (Daloz ed. 1972). “Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites . . . Elles doivent être exécutées de bonne foi.”

62. See Fontaine, 2 DR. PRAC. COM. INT’L, *supra* note 9, at 75. French law distinguishes between an *obligation de moyens* (duty of means) and an *obligation de résultat* (duty of result). An *obligation de moyens* merely requires that a party meet a standard of performance, while an *obligation de résultat* requires that a party actually complete performance. An example of an *obligation de moyens* is the seller’s duty to care for goods before shipment. An example of an *obligation de résultat* is the buyer’s duty to pay for goods received. See B. NICHOLAS, FRENCH LAW OF CONTRACTS 49-50 (1982); A. WEILL, *supra* note 21, at 442-47.

doctor to his patients. He is not obligated to cure each and every patient, but he is obligated to exercise due diligence.⁶³

Thus, in Michel Fontaine's opinion, the duty to renegotiate in French law is higher than the good faith standard in common law. While this may cause some consternation, it is likely to have little practical effect. In most instances, both parties will present different proposals and apply the greatest leverage possible. One party's claim for breach of the duty to renegotiate will often be equally as valid as the other party's counterclaim.

2. Remedies for Breach

Once it is ascertained that a breach has occurred, two types of remedies are possible: (1) specific performance (i.e., a court order that the delinquent party renegotiate in good faith), or injunction (i.e., a court order that a delinquent party refrain from acting contrary to his covenant to renegotiate in good faith); and (2) money damages. Specific performance or injunction is usually a more appropriate remedy. In hardship clauses, which normally contain the phrase "agree to renegotiate," an equitable remedy serves the declared intention of the parties—to renegotiate.

a. Common Law. A preliminary injunction was the relief granted in *Southwestern Electric Power Co. v. Burlington Northern, Inc.*:⁶⁴

[T]his Court . . . order[s] that the Defendants be and they are hereby restrained and enjoined from doing any act or failing to do any act . . . that would increase the rate for the movement of coal in unit trains and shipper-owned cars from Wyoming above the rate provided for in said agreement of the parties and escalations contained there-in, subject to review of the I.C.C., including any agreement between the parties pursuant to the gross inequities clause of said agreement calling for a higher tariff, until such time as there is an adjudication of the matters raised in said Complaint.⁶⁵

However, money damages have also been ordered in precontractual negotiation contexts. In *Heyer Products Co. v. United States*,⁶⁶ the United States Court of Claims held that a disappointed low

63. Fontaine, 2 DR. PRAC. COM. INT'L, *supra* note 9, at 75.

64. 475 F. Supp. 510 (E.D. Tex. 1979).

65. *Id.* at 524.

66. 140 F. Supp. 409 (Ct. Cl. 1956) (disappointed low bidder on a contract with the Army Ordinance Corps sues United States government).

bidder could recover bid preparation expenses if he could show the bids were not invited in good faith, but as a pretense to conceal the true purpose to award the contract to another formal bidder.⁶⁷ In *Hoffman v. Red Owl Stores, Inc.*,⁶⁸ the Wisconsin Supreme Court required the defendant to compensate the plaintiff for losses he reasonably incurred in reliance upon a negotiating proposal which the defendant subsequently withdrew.⁶⁹

However, these cases do not satisfactorily reflect the situation in which an injured party might find himself in a hardship context. Remember that the injured buyer wants 1) a steady supply of goods, 2) at a cheaper price. The injured seller wants 1) a continued commitment to receive the goods, 2) at a higher price. In essence, the parties want the court to impose the most favorable price. The buyer or seller is, in effect, asking the court to devise a reasonable price assuming the negotiations were conducted in good faith and, more significantly, assuming the parties came to an agreement.

It is doubtful a court would go so far as to impose a new price. Labor law provides an appropriate analogy. The National Labor Relations Act section 158(d)⁷⁰ requires parties to negotiate in good faith. However, the U.S. Supreme Court concluded that, while the National Labor Relations Board can order a party to cease and desist from refusing to bargain, it may not order a party to include a particular term in the agreement.⁷¹ Thus the best a party can hope for is a remedy which causes the delinquent party to return to the bargaining table.

b. French Law. Remedies available in French courts are similar to common law remedies. French law recognizes both money damages and specific performance. Moreover, the problems associated with the valuation of money damages are likely to be the same.

While there appear to be no hardship clause cases involving a failure to renegotiate properly, *Electricité de France c. Société Shell Française*⁷² is instructive. In this case, a utility and an oil company engaged in negotiations pursuant to the hardship clause in

67. *Id.* at 414.

68. 26 Wis. 2d 683, 133 N.W.2d 267 (1965) (former bakery owner sues supermarket chain on promise to grant franchise).

69. *Id.* at 690, 133 N.W.2d at 275.

70. 29 U.S.C. § 158(d) (1982).

71. *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

72. Cass., J.C.P. II No. 18810 (1976). This case is discussed more fully *infra* notes 86-96 and accompanying text.

their contract. Although they renegotiated in good faith, the parties were unable to reach an accord and submitted their dispute to the court.

The *Cour d'appel de Paris*⁷³ ordered the parties to return to the bargaining table. While this case may indicate that a French court will order a delinquent party to renegotiate in good faith, *Electricité de France c. Société Shell Française* is easily distinguished from a duty to renegotiate case. In *Electricité de France*, the parties evinced a desire to return to the bargaining table; in a duty to renegotiate case, one party usually wants to block an agreement.

Although French law recognizes compensatory damages, it is difficult for a court to evaluate the expectancy interest in a duty to renegotiate context. French law requires that damages reflect only those injuries which are the immediate consequences of the breach.⁷⁴ Since it is impossible to discern whether the parties would have reached an agreement if they had properly renegotiated, a French court may refrain from valuing damages based on a revised price. If the delinquent party continued to supply/accept goods at the original price and merely refused to negotiate a revision, then money damages may be negligible. In such a case, the injured party may prefer specific performance as a remedy.

C. *What Happens if Parties Cannot Agree to a Modification?*

Contrary to scholarly opinion, the most common problem relating to hardship clauses does not involve the meaning of "hardship." Rather it involves parties who agree hardship has occurred, negotiate in good faith, but fail to agree to a modification. In such a case, parties will look to alternative forums such as arbitration or adjudication. Two common scenarios will be considered: (1) the hardship clause is in a contract not containing an arbitration clause and the parties adjudicate their dispute; and (2) the hardship clause is within the scope of an arbitration clause, and the parties submit their negotiations to arbitration.

1. *Adjudication*

a. **Common Law.** Most of the common law cases involving gross inequity clauses concern long-term agreements concluded by

73. The *Cours d'appel* are regional courts of appeal. See O. KAHN-FREUND, C. LÉVY & B. RUDDEN, *supra* note 27, at 275-77.

74. See DOING BUSINESS IN FRANCE § 6.03[5] (M. Bender ed. 1987).

Burlington Northern Railroad Company and various coal shippers in the late 1960s.⁷⁵ After the October War of 1973, which led to the energy crisis of the early 1970s, transportation costs rose steadily, and Burlington Northern initiated hardship clause rate negotiations. When the fuel shippers rejected its proposals, Burlington Northern went ahead and published new rates with the Interstate Commerce Commission (I.C.C.).

In *Iowa Power and Light Co. v. Burlington Northern, Inc.*⁷⁶ and *Cleveland-Cliffs Iron Co. v. Interstate Commerce Commission*,⁷⁷ the fuel shippers petitioned the I.C.C. for review of the new tariffs, and in both instances the tariffs were suspended. Burlington Northern appealed the I.C.C. decisions in federal court. The courts held that it was not an abuse of discretion for the I.C.C. to construe the gross inequity clauses found in the contracts to suspend the tariffs and permit the parties to attempt another round of negotiations.⁷⁸

In *Southwestern Electric Power Co. v. Burlington Northern, Inc.*,⁷⁹ the facts were slightly different. After negotiations with Southwestern Electric (SWEPCO) failed, Burlington Northern published its own tariffs, and SWEPCO petitioned the I.C.C. for review. The I.C.C. reviewed the rates and neither rejected nor accepted them. SWEPCO then took its breach of contract case to federal district court.

The federal court for the Eastern District of Texas enjoined Burlington Northern from breaching the contract. The court held that although the railroad breached the gross inequity clause by publishing new tariffs, it did not breach the clause by petitioning the I.C.C. after negotiations failed: "Should negotiations break down, as they apparently have in this case, and agreement on a higher rate becomes impossible, it is implied in the contract as a matter of law that the defendant railroads could petition the I.C.C. for a determination of a reasonable rate."⁸⁰

The court did not answer the crucial question of whether parties can also petition a judicial court for determination of a reasonable rate. Traditionally, American jurisprudence eschews court-imposed

75. See, e.g., cases cited *infra* notes 76-80 and accompanying text.

76. 647 F.2d 796 (8th Cir. 1981), *cert. denied*, 455 U.S. 907 (1982).

77. 664 F.2d 568 (6th Cir. 1981).

78. See *Iowa Power and Light Co.*, 647 F.2d at 809; *Cleveland-Cliffs Iron Co.*, 664 F.2d at 576.

79. 475 F. Supp. 510 (E.D. Tex. 1979).

80. *Id.* at 521.

modification of contracts.⁸¹ Exceptions do exist, however. *Aluminum Co. of America v. Essex Group, Inc.*,⁸² is the best known case in which a court did modify the price term in a contract. The case involved a sixteen-year agreement by Alcoa to convert alumina supplied by Essex into molten aluminum.

The contract contained an escalation clause⁸³ based on the wholesale price index (WPI). The WPI did not keep up with the sharp rise in energy costs in the middle 1970s, and Alcoa stood to lose over \$60 million during the balance of the contract term.

The federal court for the Western District of Pennsylvania modified the price term, finding a mutual mistake of fact. The court explained: "At stake in this suit is the future of a commercially important device—the long-term contract. . . . If the law refused an appropriate remedy when a prudently drafted long-term contract goes badly awry, . . . [p]rudent business people would avoid using this sensible business tool."⁸⁴

The major argument for court-imposed modification is that it provides a fairer result and strengthens the long-term contract as a legal instrument. The major arguments against court-imposed modification are that it places too great a burden on the courts and that it is contrary to the doctrine of *pacta sunt servanda*.⁸⁵ The *pacta sunt servanda* argument, however, is somewhat weakened in the context of hardship clauses, since part of the agreement of the parties is to revise the contract in the event of a gross inequity.

b. French Law. The foremost opinion involving a hardship clause in French law is *Electricité de France c. Société Shell Française*.⁸⁶ The case involved a ten-year fuel oil supply contract between E.D.F. and Shell Française. The contract contained both an indexation clause and a hardship clause with the following elements:

If the price of fuel sustains vis-a-vis its initial value a rise or fall of more than 6 francs-a-ton; the parties should come together to examine the modifications to be brought to the contract; should they fail to agree, E.D.F. shall have the right to rescind the con-

81. See generally, Spiedel, *Court Imposed Price Adjustments under Long-Term Supply Contracts*, 76 NW. U.L. REV. 369 (1981).

82. 499 F. Supp. 53 (W.D. Pa. 1980).

83. An escalation clause fixes price according to a formula tied to the market price. E. FARNSWORTH, *supra* note 1, at 200.

84. 449 F. Supp. at 89.

85. *Pacta sunt servanda* is the fundamental principle that agreements of the parties to a contract must be observed. BLACK'S LAW DICTIONARY 999 (5th ed. 1979).

86. Cass., J.C.P. II No. 18810 (1976).

tract in the case of an increase in price and Shell shall have the same right in the case of a decrease in price.⁸⁷

The indexation clause contained a floor price and a ceiling price. Due to the sharp rise in the price of crude oil following the October War, the floor price exceeded the ceiling price and the indexation clause created the “absurd result”⁸⁸ that the sale price was below cost.

The parties attempted to renegotiate under the hardship clause but failed to reach an agreement. They brought their dispute to court. The *Tribunal de commerce de Paris*, the trial court, declared that it was bound to act “within the will of the parties”⁸⁹ and it could not invent an indexation clause. It refused to modify the contract.

The *Cour d'appel de Paris* offered a more inventive solution. It appointed an observer to aid the parties in attempting another round of negotiations. If the parties failed to reach an agreement after six months, they were permitted to return to court to seek a modification of the indexation clause. The court would then determine whether revision was possible. For, if the required changes would modify the basis on which the contract was formed, the court would not intervene.⁹⁰

This case is important because the court was able to offer a unique yet sensible solution while remaining within the *jurisprudence classique* (traditional legal system).⁹¹ French case law traditionally views court-imposed modification as an infringement of the will of the contracting parties (*l'autonomie de la volonté des parties*). French courts are more sensitive than American courts on this subject because the *Cour de cassation* steadfastly refuses to introduce the doctrine of *imprévision*, which exists in administrative law, into the private law of contracts.⁹²

87. *Id.* note J. Robert.

Si le prix du fuel subissait par rapport à sa valeur initiale une hausse ou une baisse de plus de 6 francs à la tonne; les parties se rapprocheraient pour examiner les modifications à apporter au contrat; faute d'accord E.D.F. aurait la faculté de résilier le contrat en cas de hausse et Shell en cas de baisse.

88. *Id.*

89. *Id.* The court declared it would act “dans la limite des volontés des parties.”

90. *Id.*

91. *Id.*

92. See A. WEILL, *supra* note 21, at 401; J. GHESTON, LES OBLIGATIONS (II) 106 (1980); M. LE GALCHER-BARON, LES OBLIGATIONS 79 (1980). American lawyers should appreciate the distinction between *droit privé* (private law) and *droit public* (public or administrative law). *Droit privé* governs private entities while *droit public* governs all matters involving the French administration.

The doctrine of *imprévision*, recognized since 1916,⁹³ permits administrative law courts to repair contracts that become inequitable due to “unforeseen contingencies.”⁹⁴ Administrative law courts are empowered to direct the payment of an indemnity (*indemnité d'imprévision*) to the party injured by the unforeseen contingency to restore balance to the contract. The rationale for this doctrine is that public interest mandates that these contracts be performed and that the private entities should not be discouraged from contracting with the government.

Jean-Louis Delvolvé argues that *Electricité de France c. Société Shell Française* signals adoption of the doctrine of *imprévision* in private contract law.⁹⁵ This is not the case. While the judgment rendered by the *Cour d'appel de Paris* was inventive, the court's reasoning was well within the *jurisprudence classique*. The court based its power to modify the contract on the widely accepted practice of judicial courts to fix defective indexation clauses. Moreover, it distinguished the facts of the case based on the quasi-public nature of E.D.F.⁹⁶ Thus *Electricité de France c. Société Shell Française* provides an uncertain indication of the way in which a court will handle a contract between different private parties.

Not only are *droit public* rules, such as *imprévision*, different from rules of *droit privé*, but there are also distinct court systems. In the private law system, there are several courts of first impression, such as the *tribunal d'instance* and the *tribunal de commerce*, but in the administrative system there is only one, the *tribunal administratif*. In the private law system the highest court is the *Cour de cassation*, while in the administrative system the highest court is the *Conseil d'Etat*.

93. The doctrine of *imprévision* was established by the *Conseil d'Etat* in *Gaz de Bordeaux*, Périodique et critique [D.P.] 3, 25 (1916). The court modified a fuel concession contract because of a sharp rise in the cost of gas during World War I. The price increase exceeded the escalation formula provided in the contract.

94. Jean-Louis Delvolvé defines “unforeseen contingency” as:

[A] situation in which the balance of a contract is upset as a result of an event of a general character, which is either political or most often economic, which is, in any case, independent of the intention of the parties, and which was unforeseeable on the signing of the contract, and which, without making performance by the administration's opposite contracting party impossible, makes the carrying out of his obligation intolerably onerous.

J.L. Delvolvé, *The French Law of “Imprévision” in International Contracts*, 2 INT'L CONT. 3, 5 (1981).

95. *Id.* at 8.

96. “Il leur appartient donc . . . de substituer . . . une formule qui assure à E.D.F. pour chaque catégorie de fuel, un prix d'achat réduit en rapport avec l'importance exceptionnelle des fournitures en quantité comme en durée et la mission de service public de cet organisme.” (“It is up to them therefore . . . to substitute . . . a formula that assures E.D.F. for each category of fuel, a reduced purchase price in relation to the exceptional character of the supplies, both in terms of quantity and duration, and the public service mission of this organization.”) E.D.F. c. Sté. Shell Française, Cass., J.D.P. II No. 18810 (1976) (emphasis added).

2. Arbitration

In some ways, an arbitration clause can simplify matters. When parties agree to submit unresolved hardship negotiations to arbitration, the arbitration panel will not feel the same compunction as a judicial court in imposing a price adjustment. However, the interpretation of arbitration clauses presents problems of its own.

a. Common Law. The best known common law case involving a gross inequity clause is *Georgia Power v. Cimarron Coal Corp.*⁹⁷ Georgia Power entered into a ten year agreement with Cimarron Coal Corporation to purchase coal at \$4.03 per ton. The contract contained both a gross inequity clause⁹⁸ and an arbitration clause.⁹⁹ During 1973 and 1974 the market price of coal rapidly escalated. Relying on the gross inequity clause, Cimarron Coal sought an upward adjustment of the base price. After several rejections, Georgia Power finally agreed to negotiate an increase in the price to \$10.41 per ton.

Several months later, as the market price of coal continued to rise, Cimarron Coal notified Georgia Power that it would cut off supplies unless the utility agreed to an increase in price or submitted the price dispute to arbitration. Georgia Power sought a temporary restraining order in federal district court to prevent Cimarron from cutting off coal supplies. Georgia Power also requested a declaratory judgment that an increase in price was not arbitrable since, under the gross inequity clause, the parties agreed to negotiate the price themselves.

The lower court held the dispute was arbitrable, and on appeal the Sixth Circuit affirmed:

When the parties to a contract foresee the possibilities of a

97. 526 F.2d 101 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976).

98. The gross inequity clause stated:

Any gross proven inequity that may result in unusual economic conditions not contemplated by the parties at the time of the execution of this Agreement may be corrected by mutual consent. Each party shall in the case of a claim of gross inequity furnish the other with whatever documentary evidence may be necessary to assist in affecting a settlement.

Nothing contained in this section shall be construed as relieving either the Purchaser or Seller from any of its respective obligations hereunder solely because of a claim of inequity or the failure of the parties to reach an agreement with respect thereto.

Id. at 103.

99. The arbitration clause stated: "Any unresolved controversy between the parties, arising under this agreement shall, at the request of either party, be submitted to arbitration under the rules of the American Arbitration Association. The cost and expense of any arbitration shall be shared equally by the parties, unless otherwise ordered by the arbitrator." *Id.* at 104.

change in circumstances which might require modification of the contractual terms and provide for modification by mutual consent, and thereafter are unable to agree upon such modification, the resulting dispute is subject to a broad arbitration provision such as that contained in the Agreement now before the court. The fact that contracting parties agree in general to arbitration of disputes indicates a determination that their interests will be better served by arbitration than by resort to courts if problems arise.¹⁰⁰

The court in *Georgia Power* can be criticized for failing to adequately consider *Georgia Power's* argument that submission of the dispute to arbitration would defeat the parties' intention to negotiate a revision among themselves. The court's analysis should have distinguished between two situations. In the first, the parties negotiate in good faith but fail to reach an agreement. When this happens, it is reasonable that the parties would, upon reaching an impasse, submit their negotiations to arbitration. In the second situation, one party fails to fulfill its duty to negotiate in good faith. When this occurs, the delinquent party could exploit the arbitration clause to circumvent negotiations. A clever arbitration panel would require the delinquent party to return to the bargaining table before imposing an arbitral decree. Likewise, the Sixth Circuit should have distinguished between the two situations and ordered the parties to renegotiate.

b. French Law. French hardship clauses are sometimes located within contracts containing arbitration clauses. Recent legislation in France has focused on international arbitration, which is broadly defined as the arbitration of issues involving international commerce.¹⁰¹ Arbitral decisions are enforced pursuant to an *ordonnance d'exéquatur* issued by a *tribunal de grande instance*.¹⁰²

Hardship clauses are often subject to third party intervention, by an expert, which is not the same as arbitration.¹⁰³ French scholars are sensitive to the distinction between *intervention d'un tiers* (third party intervention by conciliation or irrevocable expertise) and arbitration.¹⁰⁴ While a judge enforcing an arbitral decree will only examine the form of the award, a judge examining an expert's opin-

100. *Id.* at 106.

101. CODE DE PROCÉDURE CIVILE art. 1492.

102. *Id.* at art. 1500.

103. Fontaine, 2 DR. PRAC. COM. INT'L, *supra* note 9, at 76.

104. *See id.* at 39; B. OPPETIT, *supra* note 2, at 808; E.D.F. c. Sté. Shell Française, Cass., J.C.P. II No. 18810 (1976) note J. Robert.

ion will look at the substance as well.¹⁰⁵

Michel Fontaine explains the significance of this distinction:

The distinction is far from being academic. Arbitration in the classical sense conforms to a precise procedure; compliance with the arbitration award can be enforced through a confirmation by a court. These rules do not apply to irrevocable expertise. It is not certain which procedure is applicable if the parties have specified nothing (are there any 'rights of the defendant' to be respected, must the decision mention its ground, etc . . . ?); the expert's conclusions are integrated into the contract and any dispute arising in this connection can be brought before the courts.¹⁰⁶

In a hardship context, this distinction may have little practical value if the arbitration panel or expert merely revises a price term. But if an expert tinkers with the actual wording of contract clauses, this distinction takes on great material importance. When the contract is altered, a court might be willing to attack the expert's judgment.

CONCLUSION

Hardship clauses are increasingly familiar to French and American lawyers. Although they appear in a variety of contexts,¹⁰⁷ they are most often used in long-term contracts to provide flexibility in the event of unforeseen or unusual conditions.¹⁰⁸ Without a hardship clause, contract revision is difficult to organize, and termination or breach is more likely to occur.

Lawyers in various countries recognize the usefulness of hardship clauses.¹⁰⁹ Private international law institutions are especially active in this area. Within the last year, articles on hardship clauses were published by UNIDROIT¹¹⁰ and UNCITRAL.¹¹¹ These articles note the flexibility of hardship clauses and offer examples of how they may be drafted to suit different circumstances.

Parties that choose to include a hardship clause in their contract must understand the basic function of the clause and how it will be

105. Fontaine, 2 DR. PRAC. COM. INT'L, *supra* note 9, at 39.

106. Fontaine, 2 DR. PRAC. COM. INT'L, *supra* note 9, at 79.

107. *See supra* text accompanying note 3.

108. *See supra* text accompanying note 4.

109. *See, e.g.,* van Dunne, *Contractual Revision of Contracts in Dutch Law*, in NETHERLANDS REPORT TO THE TWELFTH INTERNATIONAL CONGRESS OF CORPORATION LAW 75, 89 (1975); C. SCHMITTHOFF, *EXPORT TRADE* 648 (8th ed. 1986).

110. INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW [UNIDROIT], *Principles for International Commercial Contracts*, Study L, Doc. 37 (1987).

111. UNCITRAL, *supra* note 5.

enforced. A typical hardship clause contains: 1) a definition of hardship—normally, some change in economic circumstances; and 2) an agreeable method to modify the contract—normally, some form of negotiation.¹¹²

If the parties cannot agree whether an event triggers a hardship clause, how does a court interpret hardship? Courts often look to legal analogies, like force majeure or impossibility, but judges should remember that hardship is not a legal concept with a fixed meaning. A hardship clause is designed to incorporate flexibility into a contract, so that parties will renegotiate rather than terminate the agreement.¹¹³

Parties must be aware of their duty to renegotiate and the consequences that will arise if they breach this duty. In common law, the duty to renegotiate entails a good faith standard, while in French law the standard appears to be higher.¹¹⁴ Although a court may order money damages for breach of this duty, the more appropriate remedy is specific performance or injunctive relief.¹¹⁵

Finally, parties should realize that even if they agree that a hardship has occurred and negotiate in good faith, they may not agree to a modification. Failure to agree to a modification poses a difficult problem, because courts are reluctant to impose their own modification.

In the leading American case involving a hardship clause, *Georgia Power Co. v. Cimarron Coal Co.*,¹¹⁶ the court enforced a contract's arbitration clause when the parties were unable to successfully renegotiate a new price for coal pursuant to a hardship clause.¹¹⁷ Even when an arbitration clause is present, courts should pay careful attention to the provisions for renegotiation contained in the hardship clause. Renegotiation is as efficient as arbitration, and a negotiated settlement may be more acceptable to contracting parties than an arbitral decree.

In the leading French case, *Electricité de France c. Société Shell Française*,¹¹⁸ the court appointed an observer to aid the parties' negotiations. If the parties were unable to reach an agreement, they were permitted to return to court to seek a modification of the con-

112. See *supra* text accompanying notes 9-16.

113. See *supra* text accompanying note 19.

114. See *supra* text accompanying notes 51-63.

115. See *supra* text accompanying notes 64-74.

116. 526 F.2d 101 (6th Cir. 1975), *cert. denied*, 425 U.S. 952 (1976).

117. See *supra* text accompanying notes 97-100.

118. Cass., J.D.P. II No. 18810 (1976).

tract.¹¹⁹ The *Cour d'appel de Paris* demonstrated an appreciation of the underlying purposes of the hardship clause. For this reason, *Electricité de France c. Société Shell Française* presents a forward-looking approach capable of guiding courts and parties through the infancy of hardship jurisprudence.

119. See *supra* text accompanying note 90.