

CONTRACTS AND THEIR ADAPTATION TO EXTERNAL CHANGES: FROM HARDSHIP CLAUSES TO JUSTIFYING IMPEDIMENTS

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Abstract: In the context of increasing global uncertainties, such as economic crises, pandemics, and regulatory changes, contract adaptation mechanisms have become essential tools for maintaining stability in commercial relationships. This study examines the role and effectiveness of specific contractual clauses, namely hardship clauses and justifying impediments (such as force majeure), in enabling parties to adjust their obligations and mitigate risks arising from unforeseen external changes. The research aims to provide a comprehensive analysis of the theoretical foundations, legal frameworks, and practical applications of these clauses, focusing on how they can be utilized to preserve the equilibrium of contractual relationships under conditions of significant change.

The study begins by defining and differentiating between hardship clauses and justifying impediments, exploring their historical evolution and legal underpinnings in various jurisdictions. Through a comparative analysis, the paper illustrates how these clauses have been invoked and interpreted in recent years, particularly in response to crises such as the COVID-19 pandemic and geopolitical conflicts. Furthermore, the research highlights the impact of such clauses on contractual stability and the challenges faced by parties in negotiating and applying them effectively.

The findings suggest that while both hardship and justifying impediments clauses are valuable tools for contract adaptation, their effectiveness largely depends on the clarity of their terms, the foreseeability of the events, and the specific legal environment in which they are applied. The paper concludes with strategic recommendations for drafting and negotiating these clauses to better manage contractual risks, enhance adaptability, and maintain commercial relationships in volatile environments.

Keywords: contract adaptation, hardship clauses, justifying impediments, force majeure, external changes, risk management

JEL Classification: K15, K20.

1. Introduction: the relevance of contract adaptation in the knowledge economy

Contracts are essential tools in the business world, but in the face of constant economic changes, they must be more than just static agreements. In the knowledge economy, characterized by rapid innovation, digitalization, and global interdependencies, the ability of contracts to adapt to unpredictable external conditions has become crucial. The emergence of unexpected events, such as economic crises, technological innovations, or legislative changes, can cause significant imbalances in commercial and contractual relationships (Stănescu C. and Bârsan C., 2000).

To maintain stability and trust between parties, it is essential for contractual relationships to include flexible mechanisms capable of addressing these challenges. Hardship clauses and excusable impediments are two such mechanisms that allow for the adjustment or, in some cases, even the suspension of contractual obligations depending on external circumstances. Thus, they become not

only legal tools but also means of contractual innovation, ensuring a balance between the rights and obligations of the parties (Cazacu O., 2020).

The aim of this article is to explore how hardship clauses and excusable impediments contribute to the adaptation of contracts to external changes, analyzing their efficiency and applicability in various jurisdictions and within the current economic context. The objectives are to assess the impact of these contractual instruments on commercial relationships and to propose solutions for improving the flexibility and fairness of contracts.

In our analysis, we will first examine hardship clauses and excusable impediments, investigating how these tools contribute to managing unforeseen changes. We will then explore recent innovations in the contractual field and their impact on commercial practice. Finally, we will focus on the challenges encountered and the proposed solutions for ensuring the effective adaptation of contracts to external changes.

2. Data and methodology

To analyze how hardship clauses and justifying impediments are applied in practice and influenced by external changes, this article employs a research methodology based on a combination of theoretical and practical approaches. A detailed legal analysis was conducted on relevant national and international legislation, including the Civil Code of the Republic of Moldova, European Union directives, and other regulations applicable in various jurisdictions.

Additionally, judicial decisions and contractual practices from different countries were studied to highlight how these legal tools have been implemented and interpreted in concrete contexts.

The research also includes a review of the specialized literature to identify current trends and challenges in the use of hardship clauses and excusable impediments. Both primary and secondary sources, such as scientific articles, case studies, and legal reports, were used to provide a comprehensive perspective on the subject. This method allows for a critical evaluation of legislative gaps and practical challenges while also offering solutions and recommendations for improving the legal framework and contractual practices.

In addition to the legal and literary analysis, the article utilizes comparative case studies to illustrate how hardship clauses and justifying impediments have been applied in practice across different jurisdictions. These case studies offer a deeper understanding of how contractual innovations and adaptations have been integrated in response to external changes, highlighting both best practices and difficulties encountered during implementation. The chosen methodology allows for not only a descriptive approach but also an analytical one, capable of providing a solid foundation for the recommendations and conclusions presented in this article.

3. Literature review

This article explores how hardship clauses and justifying impediments are applied and adapted in commercial contracts, drawing on relevant legal and economic studies.

Amarîța (2006) offers an analysis of force majeure clauses in comparative law, highlighting the differences and similarities across various legal systems. This comparative approach is essential for understanding how these clauses are applied in different legal and cultural contexts. Additionally, Jaffa (2023) discusses the implications of force majeure clauses in the context of war, emphasizing the complexity of legal challenges that arise during crises.

The studies by Plotnic and Popescu (2022) focus on the impact of force majeure on intellectual property contracts, providing an innovative perspective on how these clauses can protect the rights of the involved parties. Furthermore, Plotnic and Praporščic (2023) extend their analysis to the effects of the pandemic on the business environment, underlining the importance of hardship clauses and excusable impediments in maintaining contractual balance amid significant global changes.

In the context of national legislation, the Civil Code of the Republic of Moldova (2002) plays a crucial role in defining the conditions under which a contractual obligation may be excused by an external, unforeseeable, and unavoidable impediment, as specified in Article 904. This clarifies how national legislation protects contractual rights in the face of unforeseen events, providing a solid legal framework for the interpretation and application of hardship clauses (Civil Code of the Republic of Moldova, 2002).

Through his research, Praporščic (2023) explores the impact of excusable impediments on contractual relations, highlighting the differences between national legislation and international approaches in addressing this concept. These studies are complemented by Cazacu (2020), who offers an updated interpretation of Article 904 of the Civil Code, emphasizing the need for clarifying existing regulations to address contemporary challenges.

In conclusion, the specialized literature underscores the importance of clear and uniform regulations to ensure the fair application of hardship clauses and excusable impediments across various jurisdictions, thus protecting contracting parties against unforeseen external changes.

4. Hardship clauses: adaptation and challenges in contractual practice

Hardship is not currently regulated in Moldovan law but can be defined as the loss suffered by one of the contracting parties due to the deterioration of the value equivalence between its performances and the counter-performances of the other party during the execution of the contract, caused by objective events. There is also no regulation of hardship in EU law at this time, only a proposal in the draft European Private Code, according to which hardship would be regulated in Article 6:111.

Hardship clauses are essential legal instruments that allow contracting parties to modify or suspend contractual obligations in the event of unforeseen events that significantly affect the execution of the contract. These clauses are based on the legal concept that contractual balance must be maintained even in the face of unexpected changes, such as economic crises, drastic legislative changes, pandemics, or natural disasters. They provide a flexible adjustment mechanism adaptable to a wide range of unforeseen situations while ensuring the protection of the interests of both contracting parties (Chibac, G., Băieșu, A., Rotari, A. and Efrim, O., 2010).

Essentially, a hardship clause allows for the renegotiation of contract terms when a major and unpredictable change makes the initial execution of the contract extremely burdensome or impossible for one party. For example, a contract may stipulate price adjustments, extensions of delivery deadlines, or even contract termination under certain circumstances. However, the application of these clauses is conditional upon meeting strict criteria: the event must be unforeseen, unavoidable, and must create a significant disproportion in the execution of the parties' obligations. (Cuznețov, A., 2016)

The application of hardship clauses varies significantly among different jurisdictions, each having its own rules and interpretations. In most civil law systems, such as those in France, Italy, or Romania, the principle of hardship is recognized as a justification for renegotiating or adapting the contract. In France, for example, Article 1195 of the Civil Code allows a party to request the renegotiation of a

contract if economic changes make its execution impossible without substantial losses. However, if the parties cannot reach an agreement, courts may intervene to modify or terminate the contract.

In common law jurisdictions, such as the UK, hardship clauses are less common, as courts are reluctant to intervene in contracts. In these jurisdictions, the concept of "frustration" applies only in extreme cases, where the event renders contract execution impossible, not merely more difficult or costly. However, courts tend to apply this concept restrictively, limiting its practical application. A notable example is the English case *Davis Contractors Ltd v. Fareham Urban District Council* (1956), where the court decided that rising construction costs due to changing economic conditions do not constitute sufficient grounds to invoke "frustration." This illustrates the challenges faced by parties attempting to apply hardship clauses in common law jurisdictions, where judicial intervention in contracts is strictly limited (Stone, R. and Devenney, J., 2017).

In the energy sector, hardship clauses are widely used to address market volatility and price fluctuations. For instance, in natural gas supply contracts, hardship clauses are often invoked in the context of significant price increases in the global market, as seen during recent energy crises. However, the interpretation of these clauses may vary depending on the specific contract and applicable jurisdiction, potentially leading to complex litigation.

These examples illustrate both the importance of hardship clauses and the challenges encountered in their application. Although they provide some protection against unforeseen changes, the effective use of these clauses requires a deep understanding of the specific legal and economic context of each jurisdiction. Moreover, the clauses must be drafted clearly and prudently to minimize ambiguities and protect the interests of the contracting parties.

5. Justifying impediments: legislation and implementation in the global context

5.1. Defining justifying impediments: characteristics and differences from similar concepts

Justifying impediments refer to those external and unforeseen circumstances that prevent parties from fulfilling their contractual obligations without fault. They differ from similar concepts, such as force majeure, by being broader and more flexible in nature. While force majeure is typically limited to extraordinary and inevitable events, such as natural disasters, wars, or pandemics, justifying impediments can also include a wider array of situations, such as severe economic changes, unforeseen legislative interventions, or other events that disrupt contractual balance. (Pop, L., 1996)

In civil law, a justifying impediment implies that a contracting party cannot be held liable for the non-performance of an obligation if this is due to an event beyond its control that could not have been anticipated or avoided. Unlike force majeure, which involves a high degree of objective impossibility, justifying impediments may also encompass circumstances in which execution becomes excessively burdensome, without necessarily being impossible. This flexibility provides a broader range of legal protection, allowing for the adaptation of contracts to various types of external risks. (Civil Code of the Republic of Moldova, 2002).

5.2. Applicable legislation and examples: analysis of national and international legislation

In the Republic of Moldova, justifying impediments are primarily regulated by Article 904 of the Civil Code of the Republic of Moldova (Law no. 1107-XV of 2002 regarding the Civil Code of the Republic of Moldova). This provision stipulates that non-performance of an obligation is justified if it results from an impediment that could not have been controlled by the debtor, and if the debtor

cannot reasonably be required to avoid or overcome the impediment or its consequences. The concept thus allows for a more balanced approach in contractual relationships, providing an appropriate legal solution for cases where external events disrupt the normal execution of the contract. (Plotnic, O. and Popescu, L., 2022)

In EU legislation, similar principles can be found in Directive 2011/83/EU on consumer rights and other regulations regarding consumer protection and the execution of contractual obligations. These rules emphasize transparency, fairness, and consumer protection in the face of unforeseen external circumstances. (Ciobanu, N., 2014). For example, the Directive on Unfair Terms in Consumer Contracts (93/13/EEC) states that any clause that creates a significant imbalance to the detriment of the consumer is considered null and void. This may include situations where the consumer is affected by a justifying impediment, without having the possibility to renegotiate or modify its obligations. (Plotnic, O. and Praporșic, V., 2023)

An example of effective application of justifying impediments can be found in European jurisprudence during the global financial crisis of 2008, when courts in several member states allowed for the adaptation of commercial contracts based on justifying impediments. For instance, in Spain, courts accepted arguments regarding fundamental changes in economic circumstances as a reason for adjusting prices in long-term rental contracts. In France, courts recognized hardship clauses, similar to justifying impediments, allowing parties to renegotiate contracts when their execution became extremely difficult due to drastic economic changes. (Beale, H., Fauvarque-Cosson, B., Rutgers, J. and Tallon, D., 2010)

In a global context, the concept of justifying impediments is also reflected in the United Nations Convention on Contracts for the International Sale of Goods (CISG). Article 79 of the CISG states that a party is not liable for the non-performance of its obligations if this is due to an impediment beyond its control and if it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome its consequences. (Fisher, R., Ury, W. and Patton, B., 2011). These examples and legislative frameworks underscore the importance of the concept of justifying impediments in contemporary contract law, highlighting the need for flexible mechanisms that allow for contract adaptation in the face of unforeseen and unavoidable external changes. The concept thus provides an essential balance between the protection of rights and the adaptability of obligations across various legal systems (Amarîța, A., 2006).

6. Innovation and adaptability in contracts: contemporary trends and practices

Technological and economic innovations have profoundly transformed the field of contracts, influencing both the drafting and application of unforeseeability clauses and justifying impediments. As the global economy becomes increasingly complex and interconnected, modern contracts require greater flexibility and adaptability to external changes. Emerging technologies, such as blockchain and artificial intelligence (AI), have significantly altered how contracts are negotiated, executed, and monitored, bringing new opportunities as well as challenges. (Praporșic, V., 2023).

Blockchain and smart contracts represent a revolution in the legal and business fields, enabling increased automation of contractual execution and unprecedented transparency. Smart contracts that run on blockchain platforms allow for the automatic inclusion of clauses related to unforeseeability and justifying impediments. For instance, a smart contract can contain code that automatically triggers the renegotiation of contractual terms or temporarily suspends obligations in the event of a force majeure or an unforeseen

circumstance, such as a pandemic or a sudden economic crisis. This reduces the risk of conflict between parties and minimizes the need for judicial intervention (McKendrick, E., 2022).

Artificial intelligence (AI) also contributes to contract drafting by using machine learning algorithms to analyze risks and generate customized clauses based on the specific context of each contract. This includes identifying and assessing external risks, such as market fluctuations, regulatory changes, or climate risks that may impact contractual performance. For example, AI can recommend the inclusion of adaptability clauses that automatically adjust price conditions or delivery terms based on external developments (Klein, N., 2020).

Technological innovations have also led to the development of digital dispute resolution platforms that utilize online mediation and arbitration to swiftly and effectively resolve conflicts arising from non-fulfillment of contractual obligations due to unforeseen events. These platforms help reduce costs and the time required for dispute resolution, facilitating a quicker and more flexible adaptation to external changes (Peel, E., 2015).

A notable example of integrating technological innovation into contractual practice is the use of smart contracts in the logistics and maritime transport sector. In this field, fluctuations in oil prices and supply chain disruptions due to the COVID-19 pandemic created an acute need for contractual flexibility. Blockchain-based smart contracts have been used to include unforeseeability clauses that automatically trigger price adjustments and changes to delivery terms when significant fluctuations in fuel costs or delays caused by government restrictions occur. These practices have demonstrated significant success in reducing disputes and maintaining long-term commercial relationships (Jaffa, L., 2023).

In the financial sector, the use of artificial intelligence for credit and risk analysis has led to the creation of dynamic loan contracts that automatically adjust interest rates and repayment terms based on global financial market conditions. This innovative approach has been adopted by major financial institutions in Europe and the United States to mitigate default risks and increase transparency and predictability for both parties involved in the contract.

Thus, technological innovations have a significant influence on the drafting and application of unforeseeability clauses and justifying impediments (Pop, L., 2020). They allow for greater flexibility and adaptability in the face of external changes, contributing to the development of fairer and more efficient contractual practices. Additionally, case studies of new contractual practices demonstrate how technology can be effectively used to address external risks and promote stability and trust in commercial relationships.

7. Challenges in implementing unforeseeability clauses and justifying impediments: analysis and recommendations

The implementation of unforeseeability clauses and justifying impediments in contemporary contracts faces several significant challenges, especially in the context of unexpected events such as economic crises, pandemics, or natural disasters. The difficulties encountered by contracting parties and courts in interpreting and applying these clauses are primarily due to factors such as the ambiguity of contractual formulations, the lack of uniform legal standards, and the diversity of legal practices across jurisdictions (Plotnic, O. and Praporscic, V., 2023).

One of the main difficulties in applying unforeseeability clauses relates to the ambiguity and generality of the formulations. Contracts often contain unforeseeability clauses drafted in vague terms, leaving room for multiple interpretations and leading to legal uncertainty. For example, terms

such as "unforeseen events" or "significant changes in circumstances" may have different connotations depending on the jurisprudence of each country, which can lead to contradictory decisions. Additionally, courts are often reluctant to intervene in terms freely negotiated by the parties, limiting the ability to adapt the contract to external changes (Klein, N., 2020).

Another major challenge is the legal diversity among jurisdictions. While European legislation tends to be more uniform, regulations and their application vary significantly between countries. For example, in some jurisdictions, such as France or Italy, the principle of unforeseeability is legally recognized and regulated, while in others, such as England, traditional common law doctrines do not allow judicial intervention to modify contract terms due to economic changes. This diversity creates confusion and difficulties for parties operating internationally (Ewan, M., 2021).

Moreover, technical and technological challenges affect the implementation of these clauses. For instance, in the context of using smart contracts and blockchain technologies, there are difficulties in programming unforeseeability clauses that take into account all possible variables and allow the necessary flexibility to adequately respond to external changes.

7.1. Practical solutions and recommendations

To improve the efficiency and clarity of the application of unforeseeability clauses and justifying impediments, it is essential to adopt a more standardized and clear approach to contract drafting. Precise and detailed formulations can reduce the risks of misinterpretation and ensure better legal predictability. Utilizing model guidelines or standardized clauses developed by international organizations, such as the International Chamber of Commerce (ICC), can provide a common reference point for contracting parties. (Smith, J. and Brown, L., 2021)

Legal harmonization at the international and European level could also help reduce disparities among different jurisdictions. European institutions could develop additional directives or guidelines for the uniform interpretation and application of unforeseeability clauses and justifying impediments, which could be integrated into national legislations. This would facilitate consistent application and support the development of a uniform practice in the contractual field (Praporščic, V., 2023)

On a technological level, improving the design of smart contracts should include flexible programming solutions that allow for automatic adaptations, as well as mechanisms for human oversight to resolve exceptional cases that cannot be managed through code. Additionally, online arbitration and mediation platforms could be developed to provide rapid and efficient solutions in disputes regarding the application of unforeseeability clauses (Gheorghiu, A., 2020).

In conclusion, a combination of legal clarity, international legislative harmonization, and technological innovation can help overcome current challenges and improve the application of unforeseeability clauses and justifying impediments in modern contracts.

Conclusions and recommendations

This article has explored the complexity of adapting contracts to external changes through the use of unforeseeability clauses and justifying impediments, highlighting the importance of these legal tools in maintaining contractual balance in the face of unforeseen events. The crucial role of legal clarity, legislative harmonization, and technological innovation in improving the application and efficiency of these clauses has been emphasized. The case studies and examples analyzed have shown how various jurisdictions and business practices have addressed the challenges posed by unforeseeability and justifying impediments, offering valuable lessons for practitioners and lawmakers.

Recommendations for practitioners and companies include adopting more detailed and well-defined contractual clauses that prevent ambiguity and provide greater legal certainty. It is essential to use standardized clause models and to ensure sufficient flexibility to adapt contracts to unforeseen circumstances. Additionally, companies should regularly assess external risks and include appropriate risk allocation mechanisms in their contracts, relying on specialized legal advice and successful international practices.

For lawmakers, it is recommended to harmonize national legislation with international and European norms to provide a uniform and predictable framework for the application of unforeseeability clauses and justifying impediments. Clear, well-defined legislation that explicitly regulates these clauses will support the development of a fair and stable legal environment, thereby contributing to trust in commercial relationships. In the long term, further research is necessary regarding the adaptation of contracts to external changes, exploring new trends and challenges posed by globalization and digitalization. Researchers should investigate the impact of emerging technologies, such as artificial intelligence and blockchain, on the drafting and implementation of contracts, as well as their potential to enhance efficiency and transparency in the application of unforeseeability clauses and justifying impediments. This could contribute to the development of more dynamic and resilient contractual instruments capable of facing the challenges of an ever-changing economy.

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