Tijdschrift
Revue
Journal

Driemaandelijks tijdschrift verschijnt in maart, juni, september en december

Revue trimestrielle parution en mars, juin, septembre et décembre

Quarterly Journal published in March, June, September and December

voor Internationale Handel en Transportrecht
de Droit du Commerce International et des Transports
for International Trade and Transport law

2015/2

larcier

Rechtsleer
Doctrine
Articles

Renegotiating Shipping Contracts and contractual remedies in times of Economic Hardship

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ABSTRACTS

Het lijdt geen twijfel dat de economische crisis heeft geleid tot een toename van het aantal scheepvaart- en handelszaken voor de rechtbanken die de kwestie van economische tegenspoed aanhalen als excuus voor de niet-uitvoering van het contract. Als een juridisch begrip, zelfs in de westerse rechtssystemen, vormen de culturele en normatieve verschillen een grote uitdaging voor de gerechtelijke en arbitrale rechtbanken om de juiste oplossing te vinden. De twee uitersten zijn hetzij dat tegenspoed geen excuus is voor niet-uitvoering of dat het vereist dat de overeenkomst moet worden aangepast, hetzij langs gerechtelijke weg of door de partijen. Dit artikel belicht enkele van deze verschillen tussen de rechtssystemen en benadrukt dat commerciële mensen kunnen en moeten worden vertrouwd om oplossingen voor de verstorende effecten op de contractuele betrekkingen te vinden. Commerciële regelingen of oplossingen zijn echter even succesvol als het rechtssysteem waarop ze gebaseerd zijn. Dit artikel is dus bedoeld om de ontwikkelingen in de denkwereld van het Europese handelsrecht te bestuderen waarvan zou kunnen worden gezegd dat ze commerciële creativiteit en innovatie ondersteunen of hinderen. Vanuit het oogpunt van het Engels recht zal worden aangetoond dat deze ontwikkelingen geen leerstellige ontwikkelingen genoemd kunnen worden op zich, maar louter een pragmatische, in overeenstemming met de erfenis van het gemeenrecht, toepassing van de huidige leerstellige regels. De leerstellige uitdagingen zouden deze pragmatische oplossingen echter kunnen belemmeren,

[1] I am very grateful for the research assistance from Carlo Corcione, a legal researcher at the City Law School.

zoals zou worden betoogd. Scheepvaartcontracten bieden een nuttige achtergrond vanwege hun geglobaliseerde en transnationale aard. Uiteraard, scheepvaartcontracten worden vaak gezien als een zuivere versie van contracten, gezien de veronderstelde gelijke onderhandelingspositie van beide partijen.

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Cela ne fait aucun doute que la crise économique a entraîné une augmentation du nombre d'affaires de transport et de commerce portées devant les tribunaux, soulevant la question des difficultés économiques comme une excuse pour la non-exécution du contrat. Comme notion juridique, même dans les systèmes juridiques occidentaux, les différences culturelles et normatives représentent un fameux défi pour les tribunaux judiciaires et arbitraux qui s'efforcent de trouver la bonne solution. Les deux extrêmes sont soit que les difficultés n'excusent pas l'exécution ou qu'elles nécessitent une modification du contrat, que celle-ci soit judiciaire ou apportée par les parties. Le présent article met en lumière certaines de ces différences entre les systèmes juridiques et souligne le fait que les commerciaux peuvent et devraient trouver des solutions aux effets perturbateurs sur les relations contractuelles. Toutefois, le succès des solutions ou des arrangements commerciaux ne repose que sur l'efficacité du système juridique sur lequel ils sont fondés. Le présent article vise donc à étudier les développements dans la logique du droit commercial européen qui, dit-on, soutient ou entrave la créativité et l'innovation commerciale. Du point de vue du droit anglais, il sera démontré que les développements en question ne peuvent pas être considérés comme des développements doctrinaux en soi, mais seulement comme une application plus pragmatique, cohérente avec l'héritage de la Common law, des règles doctrinales actuelles. Les défis en termes de doctrine pourraient toutefois faire obstacle à ces solutions pragmatiques, comme d'aucuns pourraient l'affirmer. Les contrats d'expédition servent de toile de fond utile en raison de leur nature mondialisée et transnationale. Naturellement, les contrats d'expédition sont souvent considérés comme une version pure des contrats, étant donné les positions de négociation présumées égales des deux parties.

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There is no doubt that the economic crisis has led to an increased number of shipping and trade cases before the courts which raise the issue of economic hardship as an excuse for non-performance of the contract. As a legal concept, even in western legal systems, the cultural and normative differences pose a serious challenge for judicial and arbitral tribunals to find the right solution. The two extremes are either that hardship does not excuse performance or that it requires the contract to be modified, either judicially or by the parties. This article highlights some of these differences between the legal systems and emphasises that commercial people can and should be trusted to find solutions to the disruptive effects to contractual relations. However, commercial arrangements or solutions are only as successful as the legal system on which they are founded. This article thus aims to

study the developments in European commercial law thinking which might be said to support or hinder commercial creativity and innovation. From an English law point of view, it will be demonstrated that these developments could not be said to be doctrinal developments per se, but merely a more pragmatic, as consistent with the heritage of the common law, application of the current doctrinal rules. The doctrinal challenges however could impede these pragmatic solutions as would be argued. Shipping contracts provide a useful backdrop because of their globalised and transnational nature. Of course, shipping contracts are often seen as a pure version of contracts given the presumed equal bargaining positions of both parties.

1. Introduction

1. Economic hardship, as a legal concept, has taken on a complexion of importance in international trade law in recent times[2]. The cultural differences between diverse jurisdictions affecting and influencing the way commercial or economic hardship as constructed by law have become to some extent particularly pronounced. This article highlights some of these differences between the legal systems and emphasises that commercial people can and should be trusted to find solutions to the disruptive effects to contractual relations. These solutions may include contractual clauses providing for hardship, changed circumstances, good faith, renegotiation[3] and judicial or third party supervision of the contract performance. However, commercial arrangements are only as successful as the legal system on which they are founded. The aim of this article is thus an evaluation of developments in European commercial law thinking which might be said to support or hinder commercial creativity and innovation. From an English law point of view, it will be demonstrated that these developments could not be said to be doctrinal developments *per se*, but merely a more pragmatic, as consistent with the heritage of the common law, application of the current doctrinal rules. The doctrinal challenges however can and will impede these pragmatic solutions as would be argued. Shipping contracts make for an inter-

[2] Perhaps understandably with the many global and regional events causing economic disruption in the last ten years or so; the international trade and transport sector has traversed from one major economic disruption to another so that many have considered it poor commercial practice not to make preparation for these events or incidents which could easily affect, limit or frustrate the performance properly established commercial and contractual relations. See for example the voluminous references at www.cisg.law.pace.edu/ and www.trans-lex.org/.

[3] On renegotiation, see generally N. Horn (ed.), *Adaptation and Renegotiation of Contracts in International Trade and Finance: Studies in Transnational Economic Law 3*, Antwerp: Kluwer Law International, 1985.

esting backdrop given the globalised and transnational nature and the fact that it is a very pure form of a commercial relationship[4].

Most readers of this journal will have an awareness of the idea of economic hardship. They also are likely to have a strong sense that different legal systems provide for different legal implications arising from economic hardship. It is trite principle of western contract law that when the performance of the contract has become more onerous, in general, the performing party is not entitled to terminate the contract simply on that basis. At the other end, where a contract has become impossible to perform because of extraneous factors, the performing party may discharged from his contractual obligations. In the English common law tradition, it is equally trite that there is no halfway house – namely, serious hardship does not discharge the contract if there is no impossibility. In some systems within the civil law tradition, there is greater latitude given.

This subject perhaps has great resonance in Belgium given the case of *Scaform International BV v. Lorraine Tubes S.A.S.*[5] which created a bit of a stir in international legal circles. That said, it must be recalled that the controversies in that case centred mainly on whether and to what extent the Vienna Convention on the International Sale of Goods Contracts 1980 (CISG) accommodated the question of economic hardship and whether the UNIDROIT Principles[6] could be used to interpret the relevant provisions in the CISG on impossibility and hardship. Be that as it may, the principles surrounding the approach as to what constitutes hardship and how judicial enforcement should be applied to the general duty to renegotiate the commercial arrangement would have an impact on shipping disputes.

2. Given this background, it would be perhaps appropriate to begin with the general definition in the UNIDROIT Principles 2010 which resembles the approach taken in the civilian legal traditions. Article 6.2.2 provides:

> *"There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and*

[4] The equilibrium between the bargaining parties is usually more stable unlike that in a consumer contract. That is however not say that in shipping there is no imbalance of contracting strengths, however, the relationships are highly commercialised, over a defined period of time and rely heavily on industry norms and standard practices.

[5] Belgium 19 June 2009 Court of Cassation.

[6] In that case, the 2004 UNIDROIT Principles were considered.

> *(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;*
> *(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;*
> *(c) the events are beyond the control of the disadvantaged party; and*
> *(d) the risk of the events was not assumed by the disadvantaged party."*

There are a several prerequisites in this definition – the events must have occurred after the conclusion of the contract and, more importantly, the contract did not and could not envisage these risks and thus, did not make provision for them. Article 6.2.3 goes on to provide for the appropriate remedy – largely the conferment of a right to renegotiate the contract. It states:

> *"(1) In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.*
> *(2) The request for renegotiation does not itself entitle the disadvantaged party to withhold performance.*
> *(3) Upon failure to reach agreement within a reasonable time either party may resort to the court.*
> *(4) If the court finds hardship it may, if reasonable,*
> *(a) terminate the contract at a date and on terms to be fixed; or*
> *(b) adapt the contract with a view to restoring its equilibrium."*

In the shipping world, the economic crisis of 2008-2009 brought home the realities of economic hardship. The collapse of freight rates meant that charterers who have entered into long-term charterparties found themselves trapped in substantially unprofitable contracts. It should be pointed out that in a good number of such cases, the law is not relied on. Indeed, in a good number of cases it would be in the shipowner's interest to allow the charterer to renegotiate rates. However, the renegotiation of rates is not without legal perils and risks. We shall explore more of this later on. It suffices at this stage to say that the principle in civil law, generally, needs to be applied with proper and due regard to commercial practicalities and risks.

2. A Snapshot of the Different Legal Traditions in Europe[7]

It is not intended for this section to provide a detailed analysis of how the different jurisdictions in western Europe deals with changed circumstances in contractual relations. However, a snapshot or bird eye's view of the legal tapestry is essential in our examination of the matter of renegotiation of shipping and trade contracts.

3. From an English common law perspective, the rule of 'absolute obligation' applied until the 19th century when the royal courts adopted and began to develop a new doctrine – the doctrine of frustration of contracts. The germ of the idea of frustration is seen sometimes as a judicially endorsed measure of gap filling[8]. The presumption is that the parties must have intended for their contractual relationship to be subject to an implied term which excuses performance on the basis of supervening impossibility or illegality[9]. The converse therefore is true – unless a contract could *properly* be said to have been frustrated, the parties are not freed from their contracts.

Many English commercial lawyers will be familiar with Lord Diplock's words in *Pioneer Shipping Ltd v. BTP Tioxide Ltd*[10] that frustration is "*…never a pure question of fact but does in the ultimate analysis involve a conclusion of law as to whether the frustrating event or series of events has made the performance of the contract a thing radically different from that which was undertaken by the contract*." This construction or interpretation of the idea of frustration follows Lord Radcliff's in *Davis Contractors v. Fareham Urban DC*[11] in which the House of Lords rejected the constructors' claim that a construction contract was frustrated because the unforeseen labour shortages, which resulted in delay and increase in costs, were within the ordinary range of commercial probability. The requirement as far as English law is concerned is that for frustration to exist,

7 It is always challenging to define Europe or European in comparative law works; in the context of this article, we take the methodological position that for the purposes of a basic comparison of different legal cultures, it would be sufficient to take a snapshot of mainly a few major western European systems. For a functional and comparative study of the French, German, English and US approaches to hardship or changed circumstances see C. Pedamon and J. Chuah, *Hardship in Transnational Commercial Contracts – A Critique of the Legal, Judicial and Contractual Remedies*, Paris Legal Publishing, Zutphen, The Netherlands 2013. For a descriptive account of the different legal systems, see E. Hondius and H.C. Grigoleit, H.C (ed.) *Unexpected Circumstances in European Contract Law*, 2nd. ed., Cambridge University Press, Cambridge, 2011.

8 *Ibid*., at chapter 3.

9 Peel, *Treitel on The Law of Contract*, 13th Edition, Sweet and Maxwell, London, 2011, 821.

10 In *Pioneer Shipping Ltd v. BTP Tioxide Ltd*, 1982, *A.C.*, 724. Also, Treitel, "Frustration and Force Majeure", *ibid*. at p. 314. The frustration of purpose doctrine amounts to the discharge of the contract: see E. Ewan McKendrick, *Discharge by Frustration in AG Guest* (ed.) "Chitty on Contracts, Vol. I: General Principles", 30th ed., Sweet & Maxwell, London, 2008, paras 23-001-23-006.

11 1956, *A.C.*, 696.

there should be, subsequent to the conclusion of a contract, a fundamentally different situation has emerged unexpectedly[12]. It indeed thus follows that abnormal rise or fall in prices or shortage of supplies needed for production would not usually frustrate a contract. They must cause a "fundamental change in the performance itself." English law does not refer to the equilibrium of the contract and limits itself to economic considerations, which is different from the provisions in the UNIDROIT Principles and the EU Principles of European Contract Law (PECL)[13].

As Lord Simon said in the *British Movietonews* case[14]:

> *"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden depreciation of currency, and unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in the light of the circumstances, existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point – not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction its does not apply in that situation."*

4. The English court is resolved thus in law not to compel any adaptation of the contract to accommodate the changed circumstances or to relieve the parties from performance on the grounds of hardship or changed circumstances. However, the laissez-faire attitude toward contracts in English law also means that where the parties have made their own arrangements in the contract to deal with any fallout from changed circumstances or indeed to define what constitutes excusatory changed circumstances, the courts are quite prepared to recognise and give full effect to their presumed intention. The emphasis on presumed intention both in the characterisation of the doctrine of frustration and the construction of the contract in how it addresses changed circumstances is impor-

[12] TREITEL, "Frustration and Force Majeure", *ibid*., at p. 314. "The frustration of purpose doctrine amounts to the discharge of the contract", see E. EWAN MCKENDRICK, *Discharge by Frustration in AG Guest* (ed.) "Chitty on Contracts, Vol. I: General Principles", 30th ed., Sweet & Maxwell, London, 2008, paras 23-001-23-006.

[13] R. BACKHAUS, "The Limits of the duty to perform in the Principles of European Contract Law", *EJCL*, March 2004, Vol. 8.1, at 8. Also C. PEDAMON & J. CHUAH, *supra*, n. 7, at Chapter 4.

[14] *British Movietonews Ltd v. London and District Cinemas Ltd*, 1952, *A.C.*, 166 at 185.

tant[15]. Indeed, that reference to the presumed intention may be said to be the basis of any judicial intervention.

5. First, not all supervening radical events are relevant – the extent an event is relevant depends on what the subject matter of the contract is found to be. In a shipping and international trade case, *Tsakiroglou & Co Ltd v. Noblee Thorl GmbH*[16], the contract in question was a CIF Hamburg contract for a cargo of Sudanese nuts. The conventional route would have been from Port Sudan to Hamburg. However, the Suez Canal was closed as a result of the Suez crisis. The ship could of course sail the much longer route, namely down the coast of East Africa through the Cape of Good Hope and up the coast of West Africa. Before considering whether the closure of the canal was a frustrating supervening event in law, the court observed that the contract in question was a sale contract not a carriage contract. Properly construed, the subject matter of the contract was the delivery of goods and documents CIF Hamburg; it did not matter to the contract of sale which route was taken. On that basis, the supervening event was not relevant to the contract in question[17]. It thus follows that had the contract in question was the carriage (say, a voyage charterparty) which had clearly anticipated the use of the Suez Canal, that contract could be said to have been frustrated. This case shows quite explicitly how important it is to ascertain the subject matter of the contract before embarking on the inquiry as to whether there is a frustrating event. Similarly in the so-called frustration of purpose cases[18], English law also undertakes first an inquiry as to what that purpose is from a construction of the contract and its factual matrix. However, subjective intent as always in English law is not deemed legally relevant. What matters is the presumed intention of the parties to be ascertained from the four corners of the contract and the known and ascertainable factual matrix[19] (the assumption being that an individual's subjective state of mind is not easily ascertainable).

6. Secondly, as to the issue of contractual solutions to changed circumstances, the courts have always been prepared to give effect to the presumed intention of the parties[20]. There are naturally particular challenges to the court – there is no

15 C. Pedamon & J. Chuah, *supra*, n. 7 at Chapter 3.
16 1962, *A.C.*, 93.
17 The court however went on to hold that even if the route was relevant to the contract, the contract could not be said to have been frustrated because the closure did not make it impossible for the ship to get from Port Sudan to Hamburg, merely [a lot] more economically burdensome.
18 Often best illustrated by the British coronation cases arising out of the events surrounding the coronation of King Edward VII and Queen Alexandra in 1902 such as *Krell v. Henry*, 1903, 2, KB, 740.
19 *Prenn v. Simmonds* ,1971, 1, *WLR*, 1381.
20 *The Marine Star*, 1996, 2, *Lloyd's Rep*, 383.

complete cure for poor drafting and a professionally minded court would always render itself constrained by the words used and although would go beyond the literal reading of the contract, the judge would not re-write the contract[21]. Moreover, the court is required to consider the factual matrix when interpreting the contract[22] – in shipping and trade, that can easily pose factual and evidentiary challenges.

Roman law based systems have long been influenced by the notion that *contractus qui habent tractum successivum et dependiam de future* ***rebus sic stantibus*** *intelliguntur*[23]. It is not unexpectedly therefore for a conclusion to be drawn that the roots of the doctrine of hardship or changed circumstances as an excusatory factor had long existed in the civilian legal tradition. However, it should also not be forgotten that in the period of the European enlightenment and scientific positivism in the 18th century, the notion of *pacta sunt servanda* gradually took hold[24] and although there are variations between the different European systems, the principle of the sanctity of contract prevailed and contractual performance is not easily forgiven on some vague notion of 'fairness'. In the wake of World War I, the Roman law notion doctrine was however resurrected under different names to cope with the drastic economic changes experienced, especially in Germany, but continental courts in the French legal tradition were nevertheless reluctant to embrace the theory of *imprévision* (theory of unforeseeability or hardship). That rejection of the theory of *imprévision* is, for example, properly codified in Article 1134 of the French Civil Code[25]. However the rejection of *imprévision* does not mean that the courts would not permit some relief to the parties. For instance, it has been considered that the requirement that the performance is to be made in good faith might allow for some excusatory defence or at the very least, the opportunity to adapt or renegotiate the contract[26]. This is borne out by the fact that France and related systems, such as the Belgian Civil Code[27], the recognition of a duty of good faith in the performance of contracts implies a degree of collaboration and cooperation. It should

21 *Antaios Cia Naviera SA v. Salen Rederierna AB* (*The Antaios*), 1985, *A.C.*, 191.
22 *Reardon Smith v. Hanen-Tangen*, 1976, *WLR*, 989; *The Karen Oltman*, 1976, 2, *Lloyds Rep*, 708.
23 Translated loosely as contracts providing for successive acts of performance over a future period of time must be understood as subject to the condition that circumstances will remain the same.
24 See A.T. Saliba, "Rebus sic stantibus: A comparative survey, E law", *Murdoch University Electronic Journal of Law*, Vol. 8, Number 3 (September 2001).
25 Art. 1134 of the French Civil Code – "Contracts legally entered into have the legal effect of law for those who made them. They can only be terminated by the mutual will, or for the causes authorised by law. They must be performed in good faith."
26 See for example Belgian Cour de Cassation's reading of the French theory in the *Scafom*-case (para 9 of the decision).
27 See Belgian Civil Code art. 1134(3) C.civ.

not be outside a syllogistic reasoning that the cooperative spirit entailed the renegotiation of the original agreement.

It is outside the scope of this article to examine whether systems of law based on the French civil code are moving towards an acceptance of *imprévision*; that is a subject best left to the experts in the civilian tradition. The emphasis in this article to demonstrate, quite simply, that whether or not there is a wholehearted acceptance of *imprévision*, the various legal systems have adopted renegotiation of contracts as a valid relief. That said, some commentators have argued that there has been a move in the French system to accept *imprévision* and as a result, the imposition of a duty to renegotiate has followed[28].

7. In the French legal tradition and related jurisdictions, the test as to whether renegotiation is called for as a result of changed circumstances is always whether the intervening or supervening event has changed the economic balance or equilibrium of the contract[29]. As could be seen in the discussion above, this approach based around the equilibrium of the contract is not adopted in the English common law. Also, it should be remembered that the French court might be prepared to order renegotiation or adaption if it is positively convinced that that is consistent with the general precept of good faith; it would exercise that power whether or not there exists a clause in the contract dealing with changed circumstances or renegotiation[30]. It might also be noted that various projects have recommended for a judicially guided process of renegotiation as consistent with the precept of good faith[31].

8. In Germany, there was also a recognition of pacta sunt servanda in the early years of the modern legal system but from 1918, the German courts began invoking § 275 BGB[32] and extending the idea of general impossibility to include 'economic impossibility' (*wirtschaftliche Unmöglichkeit*). The emphasis was on

[28] M. Boutonnet, "L'obligation de renégocier le contrat au nom de la lutte contre les gaz à effet de serre", *D.*, notes, No. 16 (2008).

[29] See generally D. Phillipe, "French and Belgian Reports" in E. Hondius and H.C. Grigoleit (eds.), *supra*, n. 7, at 144-163; in the case of Belgium, see Cass. 30 October 1924, *Pas.* 1924, I, 565; H. De Page, *Traité élémentaire de droit civil belge*, II, Brussel, Bruylant, 1964, 560.

[30] See *Novacarb v. Socoma Nancy* (2eme ch.com), 26 September 2007, *D.* 2008.1120, Note M. Boutonnet, *RDC* 2008.738, obs. D. Mazeaud; also, for example TGI Paris 16 November 1988, *Gaz.Pal.* 1989; *RTD Civ* 1990.275, obs. J. Mestre.

[31] Avant-projet de réforme du droit des obligations et du droit de la prescription, Arts. 1135-1 to 1135-3, available at: www.ladocumentationfrancaise.fr/docfra/rapport_telechargement/var/storage/rapports-publics/054000622/0000.pdf, 19 September 2012. See also F. Terré, "Pour une réforme du droit des contrats", *D.* 2008, 23, Art. 92.

[32] That article provides: "The obligor may be excused for the non-performance of his obligation when this performance becomes impossible further to a circumstance arising since the conclusion of the contract and for which he is not responsible."

whether performance of the contract posed 'an extraordinary difficulty'[33] (unreasonable burden) for the obligor due to supervening events (especially as regards incidents when pre-war or post-war contracts which had become economically burdensome to perform as a result of shortages in supply and/or hyperinflation. However, as times became economically more stable, it quickly recognised that this concept was too vague and uncertain and the remedy provided, namely the right to terminate the contract, was simply too blunt[34]. An important threshold in the timeline is the Act of 26 November 2001, which came into force on 1 January 2002, reforming German contract law comprehensively. The theory of '*Wegfall der Geschäftsgrundlage*'[35] was codified in § 313 BGB with the heading '*Störung der Geschäftsgrundlage*' (change of circumstances)[36]. It states:

> *"(1) If circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change, adaptation of the contract may be claimed in so far as, having regard to all the circumstances of the specific case, in particular the contractual or statutory allocation of risk, it cannot reasonably be expected that a party should continue to be bound by the contract in its unaltered form.*
> *(2) If material assumptions that have become the basis of the contract subsequently turn out to be incorrect, they are treated in the same way as a change in circumstances.*
> *(3) If adaptation of the contract is not possible or cannot reasonably be imposed on one party, the disadvantaged party may terminate the contract. In the case of a contract for the performance of a recurring obligation, the right to terminate is replaced by the right to terminate on notice."*

The judicial remedy is not merely a right or duty to renegotiate the contract but direct judicial adaption of the contract[37], something which the courts in the

[33] Das Festhalten am gegebenen Wort. Larenz, Lehrbuch des Schuldrechts I – Allgemeiner Teil, Beck 14th ed., § 21c.

[34] RG 8 February 1918, RGZ 93-341; RG 8 December 1920, RGZ 101-74; A. Rieg, "Le rôle de la volonté dans l'acte juridique en droit civil français et allemande", pref. R. Perrot, *LGDJ* 1961, No. 531 & others.

[35] Which is similar to the idea of frustration of purpose. See RG 3 February 1922, RGZ. 103-329; RG 3 March 1924, *RGZ*, 108-125; RG 4 February 1935, *RGZ*, 146-376.

[36] § 313 BGB refers to 'the contractual basis' (Grundlage des Vertrags). This article has been translated in English by Geoffrey Thomas and Gerhard Dannemann and is available at www.iuscomp.org/gla/statutes/BGB.htm.

[37] The Dutch Civil Code also provides for a similar judicial right to adaptation. (New Civil Code, art. 6.5.3.11.).

French and English traditions would conventionally resist. However, it should not be ignored that this right to interfere in German law is largely constrained by the requirement that the changed circumstances cause a serious disruption to the equilibrium and that it would be 'grossly unfair' or contrary to good faith and equity to not intervene[38]. That has resulted in a German court holding that an increase of 300% in the price of the goods could not be relied on to free the manufacturer from liability because they were fully aware of the huge price fluctuations in that market and as seasoned traders in the sector they should have foreseen that probability during their initial negotiations[39].

It would appear that § 313(1) offers the aggrieved party a right to ask for the contract to be adapted to meet the changed circumstances[40] in the light of the words "adaptation may be claimed in so far as … it cannot be reasonably expected that a party should continue to be bound by the contract in its unaltered form". It is however quite another matter to suggest that § 313 gives rise to a right of renegotiation. The view at large was that § 313 merely offers the aggrieved party a right to ask the court to adapt the contract[41], it does not convey any words providing for the right to call for the contract to be renegotiated. The contrary position was however controversially adopted by the *Bundesgerichtshof*[42]. It ruled in a decision dated 30 September 2011 that "the right (of the aggrieved party) to the adaptation of the contract obliges the other party to cooperate to this adaptation." That in turn naturally leads to renegotiations. The court went on to state that a breach of this duty would fall within the scope of § 280(1)[43] and would therefore entitle the disadvantaged party to succeed in a claim for damages. Be that as it may, it is consensus that the duty to cooperate does not imply that the parties must reach an agreement. Failure to reach an agreement would not therefore be a breach as long as the party in question had entered into the renegotiations in good faith.

38 See C. PEDAMON and J. CHUAH, *supra* n. 7, at 28; also H. ROSLER, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law", *ERPL*, vol. 15, No. 4 (2007), 483.

39 The Oberlandesgericht Hamburg (28 February 1997, No. 167, CISG-online 261 cited by I. SCHWENZER, "Force majeure and Hardship in International Sale Contracts" 2008, 39, *VUWLR*, 709, 715).

40 Anspruch auf Anpassung des Vertrags.

41 TEICHMAN, BB 01.1491; B. DAUNER-LIEB, DOTSCH, *NJW*, 02.925; *Jauernig/Stadler*, § 313, *BGB*, 13 ed., No. 27 – Stadler states that the prevailing view rejects a duty to renegotiate under § 313 BGB.

42 For a criticism of the case, see TEICHMANN, BB 01.1491.

43 § 280 BGB – Damages for breach of duty – "(1) If the obligor breaches a duty arising from the obligation, the obligee may demand damages for the damage caused thereby. This does not apply if the obligor is not responsible for the breach of duty. (…)." Translation of the BGB available at www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0828.

9. In Italian law, the article in the Civil Code relating changed circumstances or economic hardship is found in Article 1467.1[44]. There is an important conditionality in the application of this article. This article concerns only executory contracts[45] which, before performance is properly executed, the circumstances change and that change causes excessive undue hardship for the obligor. The changed circumstances should not have been within the predictable or foreseeable risk of the contract or commercial venture. Italian jurisprudence suggests that predictabiltiy is what the average man can foresee at the moment of the agreement. These risks can be natural or human. They can be technical, economic, political, normative[46]. These risks are different for each contract and each case, and is therefore to an appreciable extent a question of fact for the judge. It is likely the court would be guided by two factors. First, the level of specificity of the risk of the occurrence, and, secondly, the level of probability that that fact would occur. In that context, it would follow that the duration or length of the contract is a significant factor. The longer the relationship, the higher probability the intervening or supervening event would occur and thus the commercial parties are expected to have made allowance or proper accommodation for that risk.

The remedy lies in the right for the disadvantaged party to petition the court for termination of the contract. The party *against whom the termination petition is made* can avoid it by offering an equitable modification or renegotiation (*reductio ad equitatem*) of the contract[47]. This adaptation or modification cannot be asked for by the party who is suffering from the hardship and it cannot be initiated by the judge without the consent of the other party. It is especially noteworthy that the *reductio ad equitatem* is not intended to re-establish the equilibrium of the contractual relationship (unlike the UNIDROIT Principles) but simply to remove the proportion of the risk which exceeds what was in the original contemplation of the parties[48]. It is not always clear what is the scope

[44] Art. 1467: Contracts to be performed permanently or periodically or to deferred execution, if the performance of one of the parties has become prohibitively expensive for the occurrence of extraordinary events and unpredictable, the party who is such a benefit can apply for termination of the contract, with the effects established by Article 1458 (fl. 168).The resolution cannot be sought if the undue hardship is considered as a normal risk of the contract. The party against whom the resolution is sought can avoid it by offering to modify the conditions of the contract equitably (962, 1623, 1664, 1923).

[45] As against cases where there was a mistake made as to the existence of the subject matter of the contract, such as the goods in question etc.

[46] Cass. 15 December 1984, No. 6574.

[47] Art. 1467.3; see also GIANNATTASIO in *Rassegna di Giurisprudenza sul Codice civile*, art. 1467, No. 19 (ed. NICOLÒ-RICHTER, IV/III 1972).

[48] For example the Court of Cassation said in an 1992 case: "[A]n offer of adaptation can be considered equitable if it brings the contract to a situation that had it existed at the time of the conclusion of the contract, the disadvantaged party would not have had the right to ask for termination." (Cass 11 January 1992, No. 247, *Giurisprudenza italiana*, 1993, I, 1, 2018).

of the judge's powers when an equitable renegotiation proposal had been made. In general terms, it would appear to be inappropriate for the judge to change the offer[49]. However, there is some evidence that where the offer is inadequate, the judge may, in exercise of his or her power of adaptation, suggest the scope of what is equitable and fair in the circumstances[50]. It is submitted that it is not entirely clear how an appropriate balance could be struck by the court in exercise of this discretionary power, given the statutory requirement that the proposal should be a prerogative of the person against whom dissolution or termination of the contract had been sought.

It has been argued that Italian jurisprudence should permit a right to be conferred on the disadvantaged party to seek a renegotiation of the contract, instead of dissolution[51]. However, in practical terms, it might be suggested that when the other party is threatened with a petition for dissolution they would be quite prepared[52] (as in cases of shipping contracts and charterparties[53]) to salvage the relationship given the severely depressed or inflated market conditions. That would then serve as the catalyst for a judicially guided renegotiation exercise. There are clearly practical challenges too especially when a court is involved. Delay and additional costs which may ultimately lead still to dissolution of the relationship cannot be understated.

3. The Challenges of a Transnational Problem for Shipping and Commerce

Thus far we have seen the different approaches to the concept of changed circumstances, economic hardship and the remedies in national law (judicial adaptation, renegotiation and hybrid models). In international shipping the challenges of a diverse legal background are especially pronounced. Perhaps a case might be used to illustrate the point.

[49] Cass. 29 June 1981, No. 4249, *Foro italiano*, 1981, I, 2133.

[50] Cass. 18 July 1989, No. 3347, *Foro italiano*, 1990, I, 565. See also E. Zaccarria, "The Effects of Changed Circumstances in International Commercial Trade", 2004, *International Trade and Business Law Review*, 6.

[51] R. Sacco and G. De Nova, *Il Contratto* (2nd edn, Turin, Utet, 1993) 685-86; P. Gallo, "Eccessiva onerosità sopravvenuta e problemi di gestione del contratto in diritto comparato", 1991, VII, sez civ, *Digesto*, IV 244; *Criscuolo*, 71-79.

[52] There are of course exceptions to this commercial expedience, such as where the party with the advantage is under the impression that the disadvantaged party is likely to be able to meet the originally agreed obligation (e.g. financially stronger than they make out).

[53] See above.

10. In *Ravennavi S.P.A. v. Handitankers*[54] the M/T Ionian Wave, an oil tanker, was under charter to an Italian company for a period of 24 months in 2008. Hire was set at USD22,000 a day[55]. As most readers would know, in the second half of 2009 market conditions collapsed. In consequence, the market rate fell to around USD11,000 a day. The contract did not provide for the adjustment of hire under such circumstances. However, as to be expected the charterer instigated discussions with the owner to renegotiate more favourable terms. The charterer argued that the collapse in market conditions meant that the hire was unsustainable and those unforeseeable and extraordinary circumstances could spell its financial insolvency.

In November 2009 the charterer commenced legal proceedings in Ravenna against the owner claiming that the latter was in breach of the general good-faith rule under Article 1375 of the Italian Civil Code and Articles 6.2.2 and 6.2.3 of the UNIDROIT Principles[56] by refusing to renegotiate. In filing the writ of summons, the charterer also filed a claim for damages against the owner in the event of the owner withdrawing the vessel. The owner argued that the Italian court lacked jurisdiction, citing the English arbitration clause contained in the charterparty. It also argued in the alternative that it was not under any duty to renegotiate the terms of the charter. At the same time, the owner commenced arbitration proceedings in London against the charterer seeking the payment of unpaid hire until the date of withdrawal of the ship, *quantum meruit* plus expenses incurred from the date of withdrawal until the final discharge of the cargo and damages for repudiatory breach[57]. The charterer refused to appear in the arbitration proceedings and the London arbitrators issued an award allowing the owner's claims.

Before the Court of Ravenna, the charterer responding to the jurisdictional defence raised by the owner on the grounds of the London arbitration clause, argued that its demands for suspension of payment of hire and for damages were based on general principles of the law of good faith and undue hardship, and that such principles derive directly from the law, *not from the charter*, being principles of public policy. They also assert that these principles which have been incorporated into the UNIDROIT Principles and Article 2 of the Italian Consti-

54 Court of Appeal, Ravenna, Italy (Judgment of 19 May 2011); www.internationallawoffice.com/Newsletters/Detail.aspx?g=ad5bfabf-eb86-4ccf-a79d-3ed7497868e7.
55 Plus or minus 15 days at the charterer's option.
56 Principles for International Commercial Contracts.
57 Which was equal to the difference between the hire payable for the unexpired part of the charter at the rate of USD 22,000 a day and the assessed market rate for the vessel during the same period at the rate of USD 11,000 a day.

tution, obliged the parties to act in good faith and to renegotiate the terms of a contract whenever a situation of undue hardship occurs.

11. It is immediately obvious that a claim for relief in the light of changed circumstances in transnational commercial contracts (especially shipping contracts) which not only contained foreign arbitration and jurisdiction clauses, but also depended on where the security of the assets (vessel, cargo or bank accounts) is located, raises challenging issues of jurisdiction and practical relief. In the present case, the Italian court ruled that it did not have jurisdiction because of the arbitration clause. It was also accepted that it was trite principle in English law that undue hardship would not lead to a right of renegotiation or adaptation. That said, it should be observed that under Italian law, the right to renegotiate under these circumstances may not be as clear as the charterer had hoped. Although the matter was never decided given the point of lack of jurisdiction, it is tantalising that in Italian jurisprudence that the right to renegotiate is narrowly construed and must operate within the scope of the Civil Code[58]. The omission of the parties to insert a hardship clause makes it all the more problematic.

The observations to be drawn from an example like this (which is not uncommon in international shipping) are that conflict of laws points will always make the issue of what law applies vexing. However, there is a more problematic issue around conflict of laws. It is whether the principles on hardship, good faith, renegotiation and adaptation are mandatory rules[59] (whether of the *lex fori* or the forum with the closest connection to the contract) which would impact on the application of the applicable law of the contract. In *Ravennavi S.P.A. v. Handitankers*[60] the charterer was asserting that in law, not contract, the requirement to renegotiate was of a fundamental nature.

Another is the clear aversion the charterer felt for subjecting its legal relationship to the scrutiny of English law – it seems fairly incontrovertible that the English common law's laissez-faire approach to economic hardship in contract

[58] See above.

[59] Art. 3 of the Regulation 593/2008 on the law applicable to contracts (Rome I Regulation) provides: (3) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement. (4) Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

[60] *Supra*, n. 54.

law is infamous. This article seeks to trace certain more recent developments in English law which might be interpreted by some as evincing a more preparedness to admit an element of adaptation or modification as a remedy. It will be argued that in many a case, these are merely a pragmatic attempt to find relief in a doctrinal tradition founded on ideas of laissez-faire. Doctrinal challenges continue to pose a serious challenge.

A third observation is that national laws are not a reliable prophylactic against economic hardship or changed circumstances. Contractual devices are perhaps the more effective control. In our Italian case example, it was clear that the charterer's position would have been greatly enhanced had there been a hardship clause. A casual reader might legitimately ask why in a legally formalised sector like international shipping these clauses are not the norm. Indeed.

4. New and Emerging Issues for the Right or Duty to Renegotiate

12. As stated earlier, the effectiveness and utility of a contractual remedy of renegotiation depends very much on how accommodating the relevant applicable law is to the contractual provision. That accommodation cannot be overstated or presumed, even in legal systems where the right to renegotiate terms is prescribed as legal remedy. Taking the German law, for example, although the parties are required to renegotiate the agreement in the event of changed circumstances constituting hardship, there is legal requirement that the contract must be saved. Where the parties renegotiated in good faith but a satisfactory outcome could not be arrived, the parties are free to walk away. There is a dearth of literature in German jurisprudence how the courts of law should be involved, especially, whether and to what extent, they should guide and influence the renegotiation. In civilian systems where there *might* conceivably exist such a right either in general jurisprudence (such as concepts of good faith and fair dealing) or in the civil codes, similar issues of judicial influence and guidance can surface. In many a case, such as in Italy, the preference for the court is to be reticent unless there is present a properly incorporated hardship clause[61]. The reliance on good faith as the premise for the duty to renegotiate raises the principle of *nemo locupletari potest cum aliena iactura* where makes it clear that no party can be enriched at the expense of the other party[62]. That principle makes it all the more difficult for an Italian tribunal to ascertain the appropriate balance in

[61] There is some authority to suggest that the Italian court can intervene and adapt the contract if the renegotiation fails (Cass., Sez. un. 13 settembre 2005, No. 18128).

[62] See art. 2041 Civil Code.

the renegotiation exercise – commercial balance[63] is notoriously difficult to determine, especially, for non-commercial party such as a judge. Even reliance on third party expert or surveyors is not especially helpful, given that in most western systems of law there is no requirement for the consideration or price of the promise to be adequate. In shipping where the bargaining strengths of the parties are similar and there is a high degree of speculation in the transactions, the question as to the right balance to be achieved following an intervention of untoward economic events is virtually impossible to measure. That lack of certainty, despite the provisions in the law which attempt to create a new and fair equilibrium, has led commercial parties to rely on hardship clauses instead[64].

In English common law doctrine, there is no right to renegotiate without a properly enforceable hardship clause. However there have been certain interesting developments which both tantalise and frustrates the lawyer as to the direction of travel in English law.

5. Hybrids of Good Faith?

5.1. Duty to Mitigate and Agreed Damages Clauses

Liquidated damages or agreed damages clauses are commonplace in shipping – the demurrage clause, for example, is a classical liquidated damages clause. Why would a liquidated damages clause be relevant in the case of economic hardship or changed circumstances? It is entirely conceivable that given the strictures English law places around economic hardship, the failure of one party to perform the contract because of economic hardship will invariably be treated as a repudiatory breach. The other party is not required by law to accept the repudiatory breach[65]; it is entitled simply to claim the amount of compensation set by the liquidated damages clause.

13. Against this backdrop is the oft-cited duty to mitigate rule. The English rules governing mitigation of damages for breach of contract are well established. However, despite the common use of the phrase 'duty to mitigate', in the

63 In many situations reference needs to be had to industry practice or the business community (Cass. 8 febbraio 1982, No. 722, in *Foro it.* 1982, I, c. 2285.).

64 In *Ravennavi S.P.A. v. Handitankers* (*supra* n. 54) the absence of a hardship clause made the claim substantially more challenging.

65 It is settled law in England and Wales that a repudiatory breach of contract does not automatically bring the primary obligations of the parties to perform the contract to an end. Rather, it gives the innocent party a choice whether to accept the repudiation as terminating the contract or whether to keep the contract in force: see e.g. *Geys v. Société Générale*, 2013, 1, A.C., 523; also *MSC Mediterranean Shipping Co SA v. Cottonex Anstal*, 2015, EWHC, 283 (Comm) at para 89.

absence of a contrary agreement a claimant is free to act as it wishes following a breach of contract by the defendant and does not owe any obligation to the defendant to mitigate its loss[66]. However, the general principle is that the damages recoverable for a breach of contract are to be calculated *as if* the claimant had acted reasonably to mitigate its loss[67]. This is actually the properly so-called 'mitigation principle'. The burden of proof is on the defendant to show that there were steps available to the claimant to take which would have avoided all or an identifiable part of its loss, and that it is reasonable to expect that someone in the claimant's position would have taken those steps[68]. The standard of reasonableness to be applied is not an exacting one having regard to the fact that the claimant's predicament has been caused by the defendant's wrongdoing[69].

14. In the recent case of *MSC Mediterranean Shipping Co SA v. Cottonex Anstal*[70] an unusual turn of events arose. The consignee of raw cotton refused to take delivery of the goods when the ship arrived at Chittagong. The price of raw cotton had collapsed in 2011 making it uneconomic for the consignee to pay for the goods. The containers were then placed within Bangladeshi Customs' control and a release was not possible without certain fees being made. The shipper and the carrier had entered into a contract of carriage evidenced by several bills of lading. Incorporated in the contract is a 'container demurrage' clause. Maritime transport lawyers will appreciate that these clauses are a fairly recent phenomenon. They basically provide that if the containers used by the shipper are not returned to the carrier within a number of 'free days', the shipper will have pay a sum of money for every day the containers are returned late. Under the circumstances, the shipper in the *Cottonex* case were unable to retrieve the containers without undue inconvenience and expense. Similarly, the carrier was unwilling to retrieve them given that the ship had by then already left port and like the shipper would have had to pay Bangladeshi customs to collect the containers. By the time the case went to court, the container demurrage accrued totalled over USD1m which was at least ten times the cost of the containers. The carrier insisted that the container demurrage must be paid per contract. If the letter of the law is to be adhered to, although MSC did not suffer

66 See e.g. *Darbishire v. Warran*, 1963, 1, *WLR*, 1067, 1075; *Sotiros Shipping Inc v. Samiet Solholt* (The '*Solholt*'), 1983, 1, *Lloyd's Rep*, 605, 608.

67 *Golden Strait Corp v. Nippon Yusen Kubishika Kaisha* (The '*Golden Victory*), 2007, 2, *A.C.*, 353, 370, para 10.

68 *Roper v. Johnson*, 1873, LR 8 CP 167; *Standard Chartered Bank v. Pakistan National Shipping Corp*, 2001, 1, All ER (Comm) 822 at para 38.

69 *Banco de Portugal v. Waterlow & Sons Ltd*, 1932, *A.C.*, 452, 506. See also *MSC Mediterranean Shipping Co SA v. Cottonex Anstal*, 2015, EWHC, 283 (Comm).

70 *Ibid.*

any real financial loss, they were entitled to claim the demurrage as provided in the contract as long as the demurrage did not constitute a penalty[71].

The Commercial Court held that MSC should not have refused to accept the repudiatory breach – it had no legitimate reason[72] to refuse. As a result, it was not entitled to rely on the container demurrage clause. The court went further to say that in the light of a decision by the Supreme Court of Canada, *Bhasin v. Hrynew*[73] the common law should no longer be resistant to a general precept of good faith which could be applied with limited judicial discretion to prevent one party from acting entirely in its own self-interest. The court did not have to rely on this proposition to decide against MSC; there is sufficient scope to reason that a demurrage clause with unlimited duration could amount to a penalty and therefore was unenforceable.

15. It is sometimes an appropriate commercial option for one party to terminate the contract instead of seeking renegotiation. In another recent case, *Isabella Shipowner SA v. Shagang Shipping Co Ltd (The Aquafaith)*[74], the time charterer redelivered the ship early because of serious economic hardship caused by the highly volatile charter market between 2009 and 2011. As we have seen above, a shipowner in these circumstances is confronted with two options: to maintain the charter and insist on the charterer's performance, or to terminate immediately. In *MSC v. Cottonex*, J. Leggatt was concerned that there was no legitimate reason for maintaining the status quo. In *The Aquafaith*, on the other hand, J. Cooke held that in certain circumstances it would be acceptable for the shipowner to maintain the charter and to continue to invoice the charterer for the

71 A sum in terrorem or penalty is unenforceable in English law (see *Makdessi v. Cavendish Square Holdings BV*, 2013, *EWCA Civ*, 1539, 2014, 2, All ER (Comm), 125) where it was held that a sum is not a penalty just because it is payable in a variety of circumstances in some of which it will or may exceed the loss caused by the breach. However, if the sum is extravagant and out of all proportion to the loss likely to be incurred (or the greatest loss which could be incurred) in all or many or a significant category of cases, this may indicate that it is a penalty. A liquidated damages will not be regarded as a penalty if there is a commercial justification for it.) In France, the courts may lessen the agreed liquidated damages when they appear to be manifestly excessive. The French courts will consider the excessive nature of the stipulated damages compared to the absence of loss or damages actually suffered as well as the overall value of the contract. They may appoint an independent expert to help with the assessment of the actual damages suffered to determine if the liquidated damages are manifestly excessive. The courts' power to decrease (and increase) the stipulated damages may not be modified or excluded by contract. (see http://globalarbitrationreview.com/know-how/topics/73/jurisdictions/28/france/). In Germany, § 343 BGB allows the court or arbitral tribunal to adjust any liquidated damages or penalty clause taking into account the nature of the respective obligation, the interest of the relevant party and the proportionality of the financial impact. Such an option is applied with restraint as regards commercial entities.

72 It should be noted that there is no consensus in English law that such a principle of legitimate interest actually exists; it is hoped that if the decision is appealed, that point could be clarified by the appellate court/s.

73 2014, SCC 71.

74 2012, *EWHC*, 1077 (Comm).

hire due up to the earliest redelivery date under the charter. It should of course be noted that by keeping the contract alive, the ship must be continually ready to take orders from the charterer as required by the charter. That means if the charter could not be kept alive without the charterer's help, the owner should essentially accept the termination and claim compensation. If it does not, it runs the risk of committing a breach of the charterparty if it is unable to meet any new instruction from the charterer (who for whatever reason changes its mind and resumes using the vessel).

In that case, the court considered that the contract in question was a time charter where a greater degree of cooperation is not required from the defaulting party to maintain the contract. In a time charter (such as the one in question, an NYPE form), the owner is not dependent on the charterer and it does not require the charterer's assistance in continuing to instruct the vessel to maintain its position and perform any service required, despite a lack of orders or payment from the charterer.

16. From a commercial perspective, whilst in the short term it might be attractive for the owners to keep the charter alive, in the long run, if the court finds that there is no legitimate reason for maintaining the charter, any claim in compensation could be reduced considerably because of the mitigation principle[75]. It also runs the risk of the charterer becoming insolvent (given the economic hardship conditions, that is not inconceivable) and thereby unable to pay any form of compensation.

Another matter which has been the subject of controversy in recent times is when is non or late payment a repudiatory breach. In challenging economic times, charterers and other sub-contractors may try to renegotiate their freight or hire rates. Often this is preceded by several failures to pay or late payments. In English law, it must be recalled that unless specifically stipulated in the contract, non-payment is not a condition of the contract[76]. In general law, it is a mere breach of warranty which means a failure to pay would not be treated as a repudiatory breach. It would only be a repudiatory breach if the pattern of late payments or non-payment evinces an intention by the defaulting party not to

[75] See above.

[76] *The Brimnes*, 1972, 2, *Lloyd's Rep*, 465; though see controversial obiter dicta of J. Flaux in *The Astra*, 2013, *EWHC*, 865. Note that *The Astra* was not followed recently in *Spar Shipping AS v. Grand China Logistics Holding (Group) Co. Ltd*, 2015, *EWHC*, 718 (Comm) which held that payment of charter hire is not a condition of the contract.

carry on with the contract[77]. As is immediately obvious, that is a most challenging question of fact for any tribunal!

Early redelivery as a result of hardship is not something owners should take lightly. There has been a steady chain of cases before the English courts on precisely this problem. In the final analysis, owners must make a commercially sensible decision – it is not always clear what that should be in the English law context. However, *The Aquafaith* offers some instruction as to what factors would influence the court's approach.

5.2. An Implied Term of Good Faith?

17. Reading the *MSC v. Cottonex* judgment alongside another recent case, *Yam Seng v. International Trade Corporation Limited*[78] one finds evidence that some English judges are gradually more prepared to consider good faith as a factor in the performance of contracts, if not as a general principle[79]. In *Yam Seng* the parties had entered into a distributorship agreement for sporting goods. It was alleged that one party had deliberately caused various disruptions to the performance of the contract. The question was whether there was an implied term of good faith which had been breached. The court held that it was wrong to assume that English law did not imply a term of good faith in contracts; it was pointed out that in certain contracts, such as contracts of employment or contracts involving fiduciaries, necessitated the implication of good faith as a term or promise in the contract. Applying what is a general test of implication of terms, the court held that for proper business efficacy of the commercial relationship, good faith in the performance of the contract should necessarily be implied into the contract in question. The judge, J. Leggatt, said[80]:

> *"The modern case law on the construction of contracts has emphasised that contracts, like all human communications, are made against*

77 *Januzaj v. Valilas*, 2014, EWCA Civ, 436.

78 2013, *EWHC*, 111 (QB); decided by J. LEGGATT, the same judge in the *MSC v. Cottonex*-case.

79 It is well known that there is no legal principle of good faith of general application in English law (see *Chitty on Contract Law* (31st Ed.), Vol. 1, para 1-039). In this regard the following observations of L.J. BINGHAM (as he then was) in *Interfoto Picture Library Ltd v. Stiletto Visual Programmes Ltd*, 1989, 1, *QB*, 433 at 439 are often quoted: "In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, a principle which any legal system must recognise; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's cards face upwards on the table.' It is in essence a principle of fair open dealing… English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness."

80 At paras 133-135.

a background of unstated shared understandings which inform their meaning. The breadth of the relevant background and the fact that it has no conceptual limits have also been stressed, particularly in the famous speech of Lord Hoffmann in Investors Compensation Scheme Ltd v. West Bromwich Building Society [1998] 1 WLR 896 at pp. 912-3, as further explained in BCCI v. Ali [2002] 1 AC 251 at p. 269.

Importantly for present purposes, the relevant background against which contracts are made includes not only matters of fact known to the parties but also shared values and norms of behaviour. Some of these are norms that command general social acceptance; others may be specific to a particular trade or commercial activity; others may be more specific still, arising from features of the particular contractual relationship. Many such norms are naturally taken for granted by the parties when making any contract without being spelt out in the document recording their agreement.

A paradigm example of a general norm which underlies almost all contractual relationships is an expectation of honesty. That expectation is essential to commerce, which depends critically on trust. Yet it is seldom, if ever, made the subject of an express contractual obligation. Indeed if a party in negotiating the terms of a contract were to seek to include a provision which expressly required the other party to act honestly, the very fact of doing so might well damage the parties' relationship by the lack of trust which this would signify."

It is clear that although J. Leggatt did not pronounce that there was a general *legal* duty of good faith, The judge was unequivocal that it was proper to imply a *term* that the contracting parties should behave with honesty and decency towards each other. In the common law, unlike the civil law, the distinction between what is legal and what is contractual is significant. The former means that it is much harder to avoid, qualify or delimit by contract than the latter. Also, a breach of a legal rule is likely to be fundamental and would thus constitute a repudiatory breach. A repudiatory breach, as against a breach of a mere warranty, would entitle the other party to bring an end to the contract.

18. There are two particular issues arising from these developments. First, it has to be said that whether there exists an implied term of good faith is very fact dependent and cannot be presumed to exist in every commercial transaction. Secondly, even in the circumstances where there is to be found a term of good

faith, the parameters of that term in the given case are not such that there is a further implied duty to renegotiate the deal when faced with changed circumstances or hardship.

It is quite clear that although J. Leggatt reasoned that it was to swim against the tide to resist the introduction of some *general*[81] good faith element into English contract law, the judge went a long way but did not go so far as to say that it was general principle of law. Instead, the finding that there was an implied term of good faith depended heavily on the fact that the distributorship agreement was founded on an expectation of honesty and fair dealing between the parties. The fact that the distributorship was virtually exclusive in the context of the goods in question suggested a strong dependency by one party on the other to make the commercial purpose succeed. Indeed, it is becoming fairly clear that the nature of (inter-)dependency in the contractual relationship has a strong influence on any findings of legitimate expectation and, consequently, a duty of good faith[82].

19. The other observation to be made is that *Yam Seng* was simply about the duty to act by one contracting party toward the other in decency and honesty. It was not about whether one had to extend themselves beyond the pre-existing relationship to renegotiate a *new* contract when that relationship is jeopardised by changed circumstances or economic hardship. As to whether there is such an implied term depends on the so-called business efficacy test. That test was described by Lord Wright as a term "of which it can be predicated that 'it goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended."[83]. The test is strictly applied – namely that the courts would not re-write the contracts simply because it is reasonable to do so[84]. Indeed, as Lord Simond said, the process of implying a term is one "against the abuse of which the courts must keep constant guard"[85]. Moreover, there is case law to suggest that where the relationship had been reduced to a detailed written agreement as in many shipping and trade

[81] English law has always recognised a piecemeal approach to 'good faith'. See L.J. Bingham's dicta in *supra* n. 79.

[82] See for example *The Aquafaith* (*supra* n. 74).

[83] *Luxor (Eastbourne) Ltd v. Cooper*, 1941, *A.C.*, 108 at 137. In some case law, it had also been said that *all* implied terms (not only those implied by fact but also those implied by law and those implied by custom, which falls outside the scope of our discussion) are subject to some requirement of 'necessity' (see for example *Anderson v. Corp. of Lloyd's* (No. 2), 1992, 1, *Lloyds Rep*, 620 at 627; *Hughes v. Greenwich L.B.C.*, 1994, *A.C.*, 170 at 179; *Baker v. Black Sea & Baltic Insurance Co. Ltd.*, 1998, 1, *WLR*, 974 at 980.

[84] *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd*, 1918, 1, KB, 592 at 605; *The Mammoth Pine*, 1986, 3, All ER, 767 at 770; *McAuley v. Bristol C.C.*, 1992, QB, 134 at 146.

[85] *Scruttons Ltd v. Midland Silicones Ltd*, 1962, *A.C.*, 446 at 467.

cases the presumed intention of the parties is not to allow for the introduction of new terms or promises[86].

20. It has to be borne in mind that the traditional approach has been to use the implied term device to fill gaps in the contract. It is highly debatable as to whether the need to save the contract in the event of hardship is a 'gap' which the parties are presumed to have intended for the courts to fill. That is quite dissimilar to the scenario in *Yam Seng* – there the duty of good faith to be implied related to the fact that one party had deliberately misled the other about the legal, commercial and logistical issues and had repeatedly missed deadlines for supplying the goods (where time had not been made of the essence). The *Yam Seng* scenario was thus about performance of the contract; renegotiation, it might be said, is not.

Knowledge of the parties as to the potential 'gap' is often relevant. The implied term device also depends on what is commonly known as the 'officious bystander' test. That test was espoused by LJ MacKinnon in these terms: "Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying; so that, if while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common 'Oh, of course!'"[87]. That suggests that unless it is a matter which is within the parties' scope of contemplation or knowledge, for a court to introduce a new duty would essentially be to re-write the contract. A commercial sale case might prove relevant here. In *K.C. Sethia Ltd v. Partabmull Rameshwar*[88] the sellers of Indian jute to Italian buyers were unable to perform their contractual duty because they failed to obtain a quota for shipment to Italy. They argued that a term should be implied in their contract that performance was subject to quota. The argument was rejected, inter alia, on the basis that the buyers did not know that the sellers did not originally have a quota for Italian shipment. The scope of the buyers' knowledge was an important factor – the officious bystander test could not be satisfied because if the officious bystander were to suggest to the parties at the time the contract was negotiated to provide for quota restrictions, the buyers would certainly say "what's that?" instead of an "Oh of course!" because the quota matter would have been unknown to them at that time.

86 *Shell UK Ltd v. Lostock Garages Ltd*, 1976, 1, *WLR*, 1187; *The Maira* (No. 3), 1988, 2, *Lloyds Rep*, 126 (reversed on other grounds).
87 *Shirlaw v. Southern Foundries* (1926) Ltd, 1939, 2, KB, 206 at 227 (affirmed, 1940, *A.C.*, 701).
88 195, 1, All ER, 51.

21. Another implied term device which might be relevant to the discussion around hardship and renegotiation, is the implied duty of cooperation. This controversial aspect of English law has also in recent times seen renewed judicial activity.

The idea of a duty to cooperate in commercial contracts was more or less established by the House of Lords in the Victorian age in *Mackay v. Dick*[89]. That case concerned the sale of a digging machine, a term of the contract being that delivery would be accepted if the machine is able to meet the guaranteed performance. However, the buyer refused to test the machine thereby preventing the completion of the contract. The House of Lords referred to a passage in Bell's Principles[90] (§ 50): "If the debtor bound under a certain condition have impeded or prevented the event, it is held as accomplished. If the creditor had done all that he can to fulfil a condition which is incumbent on himself, it is held sufficient implement." The House of Lords held that there was thus a doctrine, *borrowed from the civil law*, that the buyer was under a duty to pay damages to the seller for its refusal to allow the contract to be performed. There are two preliminary observations – one is that the case involves the law of Scotland which has civilian roots and the other is that the word 'cooperation' was not used by the judgment.

22. That said, it is undeniable that more recent English cases have taken the line that *Mackay v. Dick* is good authority for the finding of an implied term of cooperation[91]. In *Swallowfalls Ltd v. Monaco Yachting & Technologies S.A.M. & Anor*[92] a shipbuilding contract had been entered into whereby the purchase price of €35,231,600 was to be paid over 11 instalments following certain specified milestones in the shipbuilding process. The builder ran into financial difficulties and it was agreed between the builder and the buyer that the buyer would provide interim finance for the builder. The amounts would then be gradually set-off against the payment of the instalments. Disputes followed and the buyer sought to recover the balance of the loan. The court held that the buyer must cooperate with the builder by signing any certificates confirming the specific milestones in the shipbuilding process so that payment would be properly triggered. This part of the judgment is perhaps not especially controversial if we

89 1881, 6 *App. Cas*, 251.
90 *Bell, Principles of the Law of Scotland*, 10th ed., 1899.
91 See for example *Mona Oil Equipment Ltd v. Rhodesia Railways Ltd* (1949), 83, *Ll.L.Rep.*, 178 and *London Borough of Merton v. Stanley Hugh Leach Ltd* (1985), 32, *BLR*, 51; also, even more recently, *Swallowfalls Ltd v. Monaco Yachting & Technologies S.A.M. & Anor*, 2014, *EWCA Civ*, 186.
92 *Ibid.*

accept that there is a duty of cooperation. What was highly problematic is this passage in LJ Longmore's judgment:

> *"The … proposed implied term is an ordinary implication in any contract for the performance of which co-operation is required. A shipbuilding contract is such a contract since, as Mr Hofmeyr points out, the builder only earns a stage payment when the buyer's representative signs a certificate that the relevant stage or milestone has been achieved. If the relevant milestone has in fact been reached, the buyer must so certify as part of his implied obligation to co-operate in the performance of the contract.* ***Similarly if the buyer proposes a variation and the builder notifies the buyer of the impact in price, performance and delivery, the buyer must co-operate to agree, propose an alternative solution or abandon the proposed variation****. If this is not spelled out in the contract expressly, a duty to co-operate in the project will be implied."*[93] *(emphasis added)*

It seems to suggest that where a buyer proposes a variation to the specification of the shipbuilding contract and the other side, the builder, responds with concerns and problems, the buyer must cooperate to agree, propose other options or abandon the suggested changes. Could this be interpreted as opening up a passage for reading into the implied term of cooperation, a duty to vary (renegotiate) the contract? It has to be said that the jury is definitely still out given the following reasons:

(a) this decision is unlikely to be setting a rule that such an implied term is to be found in shipbuilding contracts, much less, general commercial contracts;
(b) the nature of the shipbuilding contract is such that the buyer is entitled to make suggestions for variation to the project but the expectation is that these variations should be workable modifications. Hence, the modifications should operate within the boundaries of the original project. In cases of economic hardship, the variation (renegotiation) of the original contract may be quite far reaching as the parties attempt (in good faith) to overcome the hardship and rebuild a new equilibrium;
(c) the nature of the shipbuilding contract is also such that it is a long term relationship with built intervals or milestones for variation. That is not always the case with general commercial cases encountering changed circumstances.

[93] *Ibid*., at para 32.

In the final analysis, although we have seen some inroads to a general principle of good faith being attempted judicially, English jurisprudence is nevertheless still largely resistant to good faith type solutions to cases of changed circumstances or economic hardship.

6. Contractual Devices and Legal Doctrine

23. It is clear that in English law, despite these various excursions into the territory of good faith, the preferred option is for the parties to provide for their own protection and preservation. This can take the form of clauses providing for hardship, renegotiation, cancellation, time extension or simply, good faith. It should be said that is very much the case with civilian systems. Take the Italian system for example, in the case cited above, *Ravennavi S.P.A. v. Handitankers*[94], it was quite clear that regardless of the London arbitration clause, the failure of the parties to insert a hardship clause was not viewed positively by the Ravenna court. As regards the French context, it has been said that general hardship clauses[95] will not only describe what constitutes hardship but will often spell out what remedial procedure needs to be followed to ensure a satisfactory outcome[96]. The role of the French judiciary is then to ensure that the new bargain is properly enforced. In a case decided by the Cour d'appel de Paris[97] it was ruled that a clause which merely called for the parties to consult with each other in certain circumstances without setting expressly the procedure to adopt was enforceable. The court held that it was prepared to compel negotiations between the parties under the supervision of an independent third party so as to give effect to the clause. The role of independent third parties in ensuring the [re-]negotiations could work is crucial and accepted as trite in the French legal system.

The monitoring of such protective contractual devices in civilian systems is not often considered to be an extra-judicial function. Indeed, the courts would be more than prepared to intervene to re-establish the equilibrium caused by changed circumstances where the contract expressly contained some form of words to that effect. The courts would also be able to fill in gaps (as in the Paris case

94 *Supra*, n. 54.

95 As against indexation clauses. See also the strict monetary nominalism rule for all money debts (Art. 1895 French civil code).

96 See E. Baranauskas, P. Zapolskis, "The Effect of Change in Circumstances on the Performance of Contract", *Jurisprudence*, 4 (118) 2009, 200 and A. Karampatzos, "Supervening Hardship as Subdivision of the General Frustration Rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law", *ERPL*, 2/2005, 144.

97 Cour d'appel de Paris 28 September 1976, *JCP* 1979.II.18810.

above) where it is needed to give effect to the protective contractual device as agreed between the parties.

24. In English law, whilst there is a general reticence towards interfering with the parties' express and literal frame of agreement, where affordable, the courts are more ready to give force to the parties' presumed intention as regards the consequences of changed circumstances or economic hardship. Many civil lawyers would of course be familiar with the infamous *Walford v. Miles*[98] decided by the House of Lords in which it was held that an agreement to agree was too vague to be enforced[99]. It is certainly open to the interpretation that that meant that an agreement to negotiate (or indeed, renegotiate) in good faith would be unenforceable. However since the Court of Appeal decided in *Petromec Inc Petro-Deep Societa Armamento Navi Appoggio SPA v. Petrobras Brasileiro SA*[100] *Walford v. Miles* must be confined to its set of facts. In *Petromec*, there were a number of complex contracts which concern the purchase, charter and insurance of an oil production platform. The transactions anticipated the need to upgrade the platform at some future stage. Following the discovery of a new oil field (Rocandor), changes had to be made to the contract. The parties then agreed in a written agreement to negotiate in good faith for those changes to be made to the contract. The question was whether the agreement to negotiate was enforceable.

The court found that unlike *Walford v. Miles* where there was no agreement in the first place, here there was a pre-existing detailed contract. Thus, even if the negotiation agreement is unenforceable, the contract remains as whole enforceable. The agreement to negotiate was not a bare promise. As LJ Longmore said:

> *"It is not irrelevant that it is an express obligation which is part of a complex agreement drafted by City of London solicitors and issued under the imprint of Linklater & Paines (as Linklaters were then known). It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has 'no legal content' to use Lord Ackner's phrase would be for*

98 1992, 2, *A.C.*, 128.

99 In that case, it was held that a duty to negotiate in good faith is inherently inconsistent with the position of a negotiating party. In addition the court considered that such an agreement was unworkable in practice; "how is to the court to police such an agreement?" Similarly clauses providing for an obligation on a party to use or exercise "all reasonable endeavours" could very well fall within the same proscription. (See *R&D Construction Group Limited v. Hallam Land Management Limited*, 2009, CSOH, 128).

100 2006, 1, *Lloyd's Rep*, 121.

> *the law deliberately to defeat the reasonable expectations of honest men …"*[101]

25. It should be pointed out though that despite the preparedness of the court in this case to support the enforcement of an agreement to negotiate in good faith, there are fundamental problems where one party alleges that there has been a breach committed when the other party walks away having commenced discussions. It is easy enough to say that there is a breach if that party simply refuses to negotiate; however, it is much more problematic to find if a party was had committed a breach of good faith having started negotiations but then walked away. Bringing an end to negotiations in bad faith is elusive concept[102].

Be that as it may, the path having been partially cleared for the recognition of agreements to negotiate in good faith, we see in *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd*[103] the court even allowing the enforcement of an agreement to open 'friendly discussions' in a commercial relationship. The clause was adopted very much as an alternative dispute resolution clause and the court saw no objections to its certainty. Mr Justice Teare considered that:

> *"where commercial parties have entered into obligations they reasonably expect the courts to uphold those obligations. The decision in Walford v. Miles arguably frustrates that expectation"*[104]

Mr Justice Teare was of the opinion that 'friendly' imported an element of good faith.

26. The English courts have also traditionally been averse to enforcing agreements referring to dispute resolution devices which lack specificity as to the process to be followed. In *Sulamérica CIA Nacional de Seguros SA v. Enesa Engenharia SA*[105] for example the court refused to enforce a mediation clause[106]. The Court of Appeal held that the clause could not be enforced,

[101] At para 121 of the judgment.
[102] It has been said however that the fact that it is difficult to police the agreement does not mean that the agreement is unenforceable (see *United Group Rail Services v. Rail Corporation New South Wales* (2009) 127 *Con LR*, 202).
[103] 2014, *EWHC*, 2104.
[104] At para 40.
[105] 2012, *EWCA Civ*, 6.
[106] The relevant clause read: "If any dispute or difference of whatsoever nature arises out of or in connection with this Policy including any question regarding its existence, validity or termination, hereafter termed as Dispute, the parties undertake that, prior to a reference to arbitration, they will seek to have the Dispute resolved amicably by mediation."

despite expressly recognising that the parties had plainly intended for it have legal effect. The court was especially concerned that no mediation provider was identified in the agreement, and there was no procedure for the selection of the mediator. As the mediator would be central to the performance of the mediation duty, the omission of a proper procedure for his or her appointment was fatal to the clause. It would seem to follow that where there was the proper prescription of the mediation procedure, the agreement would be sufficiently clear to be enforced.

In *Emirates Trading Agency LLC v. Prime Mineral Exports Private Ltd*[107] J. Teare considered that 'friendly discussions' did not require the intervention of a third party (such as a mediator), therefore it was immaterial whether or not third party monitoring of the 'discussions' was required.

27. It should perhaps be noted that given the way the English justice system works, practical issues need to be considered. For instance, if the agreement to (re-)negotiate in good faith is to be interpreted in the way J. Teare had approached the 'friendly discussion' clause, that would necessitate a review of evidence by the courts of what the parties said or did in the (re-)negotiations. Many shipping and commercial negotiations take place on a 'without prejudice' basis. The vital question is whether these exchanges can be used in evidence or made known to a judge following a subsequent dispute[108]. The UK Supreme Court has recently confirmed in *Oceanbulk Shipping & Trading SA v. TMT Asia Ltd*[109], not without controversy, that as an exception to the general rule evidence of without prejudice exchanges can be adduced to interpret and explain any settlement agreement which arises. It might be thought that the loss of protection of those exchanges or communications could potentially lead to less than frank and open negotiations. It is largely accepted in Anglo-American business thinking that frank and open discussions during and concessions made in a 'without prejudice' context provide the best chances of reaching a commercial settlement. This is perhaps equally apposite in hardship renegotiation cases. It would be interesting to evaluate how civilian jurisdictions which have increasingly come to encounter 'without prejudice' communications.

[107] *Supra*, No. 103.
[108] In *Rush & Tompkins Ltd v. Greater London Council*, 1989, *A.C.*, 1280 it was held that in general the rule makes inadmissible in any subsequent litigation connected with the same subject matter proof of any admissions made with a genuine intention to reach a settlement and that admissions made to reach a settlement with a different party within the same litigation are also inadmissible, whether or not settlement is reached with that party.
[109] 2010, *UKSC*, 44.

28. In some cases, there is an explicit reference in the contract to 'good faith' – so even if there is no implied term of good faith or a general legal principle of good faith, the parties are obliged by an express term to act in good faith. What does 'good faith' mean in cases where the contract contains an English applicable law clause? The question is particularly concerning because, as has been stressed, English law does not recognise a general concept of good faith in contractual relations. A recent case goes some way at helping to provide a [new] construction, if not conception, of 'good faith'. In *CPC Group Limited v. Qatari Diar Real Estate Investment Company*[110], as is becoming more common in transnational commercial contracts, there is an express clause providing for the parties to act in good faith towards each other. CPC and Qatar Diar had entered into a joint venture to develop some land in London. However, following the informal intervention of the Prince of Wales[111], Qatar Diar decided not to proceed with the planning application. The question was whether Qatar Diar had failed in their duty of good faith to CPC. In that case, J. Vos noted the lack of English authority as to the meaning of the obligation to act "in the utmost good faith and referred to J. French's analysis in *Bropho v. Human Rights & Equal Opportunity Commission*[112] which drew from many legal articles and textbooks, including the U.S. Second Restatement of Contracts, which states, "good faith performance or enforcement of a contract emphasises faithfulness as to an agreed common purpose and consistency with the justified expectations of the other party". In the circumstances, J. Vos considered that the duty of good faith necessitated:

(a) Adherence to the spirit of the contract;
(b) Observe reasonable commercial standards of fair dealing; what is reasonable depends on the factual background and nature of each contractual relationship;
(c) Adherence to the agreed common purpose;
(d) Act in a manner consistent with the legitimate expectations of the parties.

Whether this takes us, in practical terms, very far in seeking to enforce and give effect to a hardship and/or renegotiation clause is perhaps questionable. However, this is yet another piece of the jigsaw in the gradual accretion of principles/norms to make up new legal doctrine, which is entirely characteristic of the common law.

[110] 2010, *EWHC*, 1535 (Ch).
[111] A widely reported incident in the UK (see an extract of Prince Charles' impassioned letter at www.telegraph.co.uk/culture/culturenews/7850091/Prince-of-Waless-emotional-Chelsea-Barracks-letter-revealed.html).
[112] 2004, *FCAFC*, 16.

29. The challenges in drafting an appropriately protective clause in the contract in respect of changed circumstances or hardship are well recognised[113]. Poor drafting make the task of the tribunal or court much more difficult and in some cases, the parties would be better off had there been no express provision in the contract! That is especially the case in some civil law countries (such as Germany) where the law readily steps in to provide for hardship, its definition and consequences.

7. Conclusion

30. The subject under study is vast. This article seeks to examine, in some modest way, the different normative approaches to hardship in a selection of western European legal systems. It is suggested that the different legal systems cultural perspective on hardship has a direct impact on the legal and contractual solutions available to the contracting parties. In certain (but not all) civil law systems, it is quite clear that there are more legal or statutory solutions with varying degree of clarity. In the English common law system, there are few legal solutions although it has pointed out that instead of "swimming against the tide"[114] certain concessions, albeit in a limited way, have been and are increasingly being made to the accommodation of a principle of good faith. These concessions however have not been explicitly extended to hardship but could prove, as consistent with the common law character, to be the aperture the law needs to extend judicial intervention to hardship cases. Contractual solutions of course remain the best, whether in civil or common law systems. However how these contractual devices are dealt and enforced by law continues to be a challenge. In this article has traced some recent developments, especially in the common law, and shown that those developments continually reflect the tension between doctrine and pragmatic commercial fairness. The beauty of the common law lies in its gradual logical and intellectual incrementalism – although it does not please the impatient amongst us, its conservatism is not always without merit in transnational shipping and commerce where certainty is highly prized.

[113] Indeed, the International Chamber of Commerce (ICC) has created a standard form clause for all commercial parties to use. The ICC Hardship Clause reads: "Where a party to a contract proves that: (a) the continued performance of its contractual duties has become excessively onerous due to an event beyond its reasonable control which it could not reasonably have been expected to have taken into account at the time of the conclusion of the contract; and that (b) it could not reasonably have avoided or overcome the event or its consequences, the parties are bound, within a reasonable time of the invocation of this Clause, to negotiate alternative contractual terms which reasonably allow for the consequences of the event."

[114] See *Yam Seng* at para 124, *supra*, n. 78(per J. LEGGATT).