

# UNIDROIT PRINCIPLES AND THE COVID-19 ECONOMY

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## INTRODUCTION

The world stopped because of a disease: COVID-19. This disease and the measures to contain its spread (the “pandemic”) has caused both individuals and companies to dramatically alter their normal operations. On 11 March 2020, the World Health Organization declared it a pandemic.<sup>1</sup> It was official. COVID-19 had infected nearly the entire world. Despite previous warnings of a global disease and its consequences,<sup>2</sup> the disease found the international health system unprepared. There were no established procedures on how to contain such a disease before it spread beyond national borders. Additionally, there were no vaccine processes fast enough to reduce the impact of this global disease.<sup>3</sup>

The pandemic also affected the health of the international economy and its contracts. However, the pandemic did not find the international commercial contracts regulations unprepared. Since 1994, due to the increase of globalization and international trade, several scholars concluded that global problems required global solutions. Hence, the International Institute for the Unification of Private Law or UNIDROIT created the UNIDROIT Principles of International Commercial Contracts (“PICC”) in 1994, with its current version issued in 2016.

International commercial contracts may present several conflicts of laws issues because the parties are from different jurisdictions and may have different legal systems.<sup>4</sup> In this regard, the PICC constitutes a uniform system that consolidated different national contract laws.<sup>5</sup> The PICC reflects the practice in international trade and is considered the codification of the *lex mercatoria*.<sup>6</sup>

Regarding the international economy, this pandemic infected the economy with one of the worst harms to business: uncertainty. In this regard, as a Darwinian phenomenon, the pandemic has shown the importance of being able to adapt to unforeseeable circumstances. As a cure for these types of

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<sup>1</sup> World Health Organization, *Timeline – COVID-19* <<https://www.who.int/news-room/detail/27-04-2020-who-timeline---covid-19>> accessed 4 August 2020. (‘A pandemic is the worldwide spread of a new disease’).

<sup>2</sup> Bill Gates, *The next outbreak? We’re not ready* (2015)

<[https://www.ted.com/talks/bill\\_gates\\_the\\_next\\_outbreak\\_we\\_re\\_not\\_ready/up-next?language=en](https://www.ted.com/talks/bill_gates_the_next_outbreak_we_re_not_ready/up-next?language=en)> accessed 4 August 2020.

<sup>3</sup> Stuart A. Thompson, ‘How Long A Vaccine Will Really Take?’ *The New York Times* (New York, 30 April 2020) <<https://www.nytimes.com/interactive/2020/04/30/opinion/coronavirus-covid-vaccine.html>> accessed 4 August 2020 (‘Our record for developing an entirely new vaccine is at least four years - more time than the public or the economy can tolerate social-distancing orders’).

<sup>4</sup> UNIDROIT Principles of International Commercial Contracts 2016, Preamble.

<sup>5</sup> Frederick R. Fucci, ‘Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts - Practical Considerations in International Infrastructure Investment and Finance’ (2006) American Bar Association 8.

<sup>6</sup> *ibid*; Ugo Draetta, Ralph B. Lake and Ved P. Nanda, *Breach and Adaptation of International Contracts, An Introduction to Lex Mercatoria* (Butterworth, 1992) 177; Ingeborg Schwenzer, Pascal Hachem and Christopher Kee, *Global Sales and Contract Law* (OUP 2012) 49-50.

situations, the PICC contains solutions regarding unforeseeable events.<sup>7</sup> Solutions such as: force majeure (art. 7.1.7 PICC) and hardship (arts. 6.2.2 and 6.2.3 PICC).

This Article will demonstrate that the PICC constitutes a medicinal remedy that offers guidance to parties, courts and arbitral tribunals (“adjudicators”), and legislators as to how to deal with international commercial contract issues during this pandemic.

In this regard, Section I provides a brief explanation of force majeure and hardship in light of the PICC. Section II analyzes the usefulness of the PICC to parties’ contracts. I argue that parties will find the remedies provided in the force majeure and hardship provisions of the PICC useful. Especially in cases of hardship, the parties will have a framework that demonstrates how to conduct renegotiations and the possible consequences if they do not reach an agreement. Section III explains how the PICC may be used by adjudicators to decide international commercial contract disputes. I argue that adjudicators may apply the PICC’s provisions on contract interpretation to interpret the scope of force majeure and hardship clauses. Moreover, if the applicable law to the dispute does not regulate the consequences of a hardship situation, then the adjudicator may use the PICC to fill this gap. I argue further that if the PICC is used, then other adjudicators will have a useful reference when deciding similar situations caused by the pandemic. Section IV describes how the PICC may be used by different legislators as a reference to approve temporary or permanent changes to contract laws that will bring more certainty to international commercial contracts. Furthermore, I argue that the addition of a reference to the PICC in arbitration national laws will be helpful for a country’s arbitration forum.

Because the PICC is tailor-made for international merchants, it contains the solutions to help national and international economies continue to support healthy business relationships during and after this pandemic.

## **I. Force Majeure and Hardship**

### **A. Force Majeure**

Force Majeure is the occurrence of an unforeseeable event that was not taken into account at the moment of the execution of the contract, beyond the control of the obligor, and for which its consequences could not be overcome, that renders the performance of the obligation impossible.<sup>8</sup> Its consequence is that the affected party is exempted from liability in case of non-performance while it

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<sup>7</sup> Marcel Fontaine and Filip de Ly, *Drafting International Contracts* 462 (2009) (“A mere change of circumstances is not sufficient; the change of circumstances must also have been unforeseeable at the time of the making of the contract. An evolution of circumstances, which was initially foreseeable (and whose consequences on the relationship of the parties could be assessed at the outset) is covered not by hardship clauses but by other types of clauses, for example, by review or index clauses. The very fact that the parties provide for a hardship clause necessarily implies that they are aware of the possibility that the circumstances might be upset in the future. But they are not in a position to provide for the nature, scope or time of such a development”).

<sup>8</sup> The UNIDROIT Principles provide that actual impossibility is not required. The obligation has to become reasonably impossible. Note of the UNIDROIT Secretariat on the UNIDROIT Principles of International Commercial Contracts and the COVID-19 Health Crisis <<https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf>> 8, accessed 4 August 2020 (“According to Article 7.1.7 (1), for the obligor to be excused, non-performance must have been caused by an impediment that: (a) was beyond the obligor’s control (b) could not reasonably have been foreseen by the obligor at the time of conclusion of the contract, and (c) the obligor could not reasonably be expected to avoid or to overcome, nor to avoid or overcome its consequences”).

is affected by the event.<sup>9</sup> It is generally used by the affected party to protect itself and it is not an action that can be used to request performance or damages from the other party. In other words, force majeure is generally a shield and not a sword.

## **B. Hardship**

Hardship clauses are applied mostly in long-term contracts to preserve the commercial relationship of the parties.<sup>10</sup> Hardship occurs when there is an unforeseeable event, but instead of rendering the obligation impossible, the occurrence of the event makes the obligation excessively more onerous to comply with.<sup>11</sup> This may occur if the performance of the obligation becomes too expensive for the obligor to comply with or its value has been fundamentally reduced such that the obligee would not derive any benefit from it.<sup>12</sup> Thus, a party is not required to exceed the reasonable limit of sacrifice to comply with its obligation.<sup>13</sup>

In contracts with hardship clauses, an alteration of a contract may occur because of changes in monetary terms but also due to increased risk to people or property.<sup>14</sup> Article 6.2.3 of PICC indicates that the disadvantaged party is entitled to request renegotiations.<sup>15</sup> If the parties do not reach an agreement during renegotiations, then either party may require an adjudicator to adapt the contract, terminate or confirm the terms of the contract.<sup>16</sup>

Both force majeure and hardship are caused by unforeseeable circumstances which may cause overlap between the two. The difference is in the remedy. Force majeure protects the obligor from liability

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<sup>9</sup> Art. 7.1.7 UNIDROIT Principles.

<sup>10</sup> Article 6.2.2 UNIDROIT Principles, comment 5 ('Although this Article does not expressly exclude the possibility of hardship being invoked in respect of other kinds of contract, hardship will normally be of relevance to long-term contracts'); Fontaine (n 7) 459.

<sup>11</sup> Art. 6.2.2 UNIDROIT Principles (Definition of hardship) 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 (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.

<sup>12</sup> *ibid.* The hypothesis of arguments based on hardship during the pandemic are limitless, some buyers may feel buyer's remorse and may want to get out of a M&A transaction because the target company's revenue has decreased dramatically or its business has been suspended during the pandemic (e.g. movie theaters, concerts, travel packages). Other example may be the case that the costs for a supplier of medical supplies (e.g. medicines, ventilators, etc.) has increased dramatically because of the global demand for certain products that fundamentally affects the supplier of the equipment, and this may create a chain reaction that will affect the price for the seller on a purchase agreement of medical supplies. Depending on the circumstances, the seller may argue hardship.

<sup>13</sup> CISG Advisory Council Opinion No. 7 'Exemption of Liability for Damages Under Article 79 of the CISG' <<https://www.cisgac.com/cisgac-opinion-no7-p2/>> accessed 22 August 2020.

<sup>14</sup> Daniel Girsberger and Paulius Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) Mykolo Romeris University 121, 129. During this pandemic, this may occur if a football team of legends (retired football players) has signed a contract with an entertainment company to travel and play a game in an area affected by the pandemic. Even though, the players could travel and they could play the game, they may be risking their health by performing the contract. This may be a case where the limit of sacrifice may be exceeded.

<sup>15</sup> Art. 6.2.3 UNIDROIT Principles. This request does not in itself entitle the affected party to withhold performance.

<sup>16</sup> *ibid.*

and causes suspension or termination of the obligations, while hardship is centered on renegotiation and a possible adaptation.<sup>17</sup>

Hence, force majeure provides an enhanced level of protection to the obligor than hardship does. If an obligor is affected by both force majeure and hardship during the pandemic and both remedies are available, an obligor may use force majeure as a sword to indicate to an obligee that it is impossible for it to perform the contract according to the agreed terms. Consequently, requesting renegotiations based on the impossibility of performance.

In this regard, the obligor would be using the protection of a hardship situation that is a lower level of protection than force majeure which was the one that it was entitled to. If the pandemic caused a force majeure situation to the obligor, it would not have to perform its obligation and still be exempted from liability. However, if the obligor decides to request renegotiations instead of exemption from liability, this action may result in a *win-win* scenario. The contract could be performed and would not be terminated. This would allow the business relationship to continue and overcome difficult times, bringing benefits to the parties' commercial relationship in the long-term.

## II. HOW THE PICC CAN HELP PARTIES DURING THE PANDEMIC

Because both force majeure and hardship require the occurrence of an unforeseeable event, it is important to determine whether the pandemic was known to the parties when the contract was executed. If the contract was agreed upon after knowledge of the pandemic was available to the parties, then the party that bore that risk will have to comply with its obligations.<sup>18</sup>

### A. CONTRACTS EXECUTED BEFORE THE PARTIES HAD KNOWLEDGE OF THE PANDEMIC

The terms of a force majeure or hardship clause supersede the provisions of the PICC.<sup>19</sup> Thus, if the parties executed a contract before they had knowledge of the pandemic, they will first have to analyze the terms of the agreement to determine how to handle the distribution of the risks in case of the occurrence of force majeure or hardship events and the selected remedies.<sup>20</sup>

If the parties did not provide for a remedy in the force majeure clause, then the PICC may be utilized by the parties as part of a trade usages analyses and may supplement the contract. Thus, temporarily or permanently excusing the obligor from liability in case of non-performance as provided in article

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<sup>17</sup> Fontaine (n 7) 456.

<sup>18</sup> *American Distributor v. Mexican grower*, Cámara de Arbitraje de México (2006). The contract contained an arbitration clause in which the parties expressly referred to the UNIDROIT Principles of International Commercial Contracts as the law governing the substance of any potential disputes. The respondent argued hardship because rainstorms provoked by El Nino destroyed its crops. The tribunal rejected this argument indicating that the respondent as a distributor bore the risk of crop destruction by rainstorms and flooding.

<sup>19</sup> Article 1.5 UNIDROIT Principles.

<sup>20</sup> The common law jurisdictions have a different approach to these situations than the applied in civil law systems. In a common law system if the event is not mentioned in the contract, then it will be considered excluded. While the civil law systems use the civil code as a supplement to the contract. Axel-Völkmar Jaeger and Gotz-Sebastian Hö, *FIDIC-A Guide for Practitioners* (Springer, 2010) 106. See also Fabio Bortolotti, 'ICC Force Majeure and Hardship Clauses 2020 - Introductory Note and Commentary' (ICC, 2020) <<https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf>> 2, accessed 4 August 2020.

7.1.7 of PICC. Moreover, if the parties did not provide for a force majeure clause in their contract, they may consider the addition of one, based on the PICC, in light of the pandemic.<sup>21</sup>

In recent years, there has been an international trend in the use of hardship clauses.<sup>22</sup> Moreover, different jurisdictions have applied hardship through jurisprudence or modifications of their contract law.<sup>23</sup> If the parties had a hardship clause and it indicated the remedy, then this remedy will prevail.<sup>24</sup> However, if the parties did not provide for a remedy or a hardship clause, then one party may argue, based on the PICC, good faith and fair dealing, that there is an international practice that entitles the disadvantaged party to request renegotiations in a hardship situation.<sup>25</sup> The PICC provides the legal framework for the renegotiations and the required conduct for them.<sup>26</sup> As a result, it provides more certainty for the parties during the renegotiations as the PICC requires the renegotiations to be conducted with good faith and cooperation.<sup>27</sup> Nevertheless, if the parties are not able to reach an agreement, then either or both may request an adjudicator to resolve the dispute.<sup>28</sup>

## **B. CONTRACTS EXECUTED OR RENEGOTIATED AFTER THE PARTIES HAD KNOWLEDGE OF THE PANDEMIC**

If parties entered into a contract after knowledge of the pandemic was available to them, they most likely took the pandemic into account. The parties may use the PICC as a model for the

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<sup>21</sup> Jurisdictions such as England and the United States do not recognize force majeure if the parties did not provide for one force majeure clause in the contract. Other civil law jurisdictions, supplement the contract with the provisions of the law, e.g. supplementing the contract with the requirements and effects of force majeure. Tulip De and Vibhuti Vasisth, 'Worldwide: A Guide To Force Majeure Clauses In Different Jurisdictions' (*Mondaq*, 10 July 2020) <<https://www.mondaq.com/australia/litigation-contracts-and-force-majeure/964068/a-guide-to-force-majeure-clauses-in-different-jurisdictions>> accessed 5 August 2020.

<sup>22</sup> See also Fabio Bortolotti (n 20) 1.

<sup>23</sup> Due to the economic crisis of 2008, from 2012, Spain has applied the figure of hardship through its jurisprudence without having it codified in its civil code. Augusto Garcia Sanjur, 'The Panama Canal Expansion: Adaptation of Contracts' (2019) *Arbitration Law Rev* Vol 11, 140. See also S.T.S., 30 June 2014 (Spain) <<http://www.poderjudicial.es/search/doAction?action=contentpdf&databasematch=TS&reference=7128082&links=&optimize=20140718&publicinterface=true>> accessed 4 August 2020. In the ICC Case No. 8873 (1997), the tribunal indicated that the remedy of adaptation provided in the UNIDROIT Principles was an exception and was not considered as a trade usage. *ibid* 140. However, the tribunal was applying Spanish law that has changed since then. Moreover, in 2016, France introduced the figure of hardship to its civil code. Now, adaptation is an available remedy. *ibid* at 139.

<sup>24</sup> Article 1.5 UNIDROIT Principles.

<sup>25</sup> ICC case No. 9994 (2001) <<http://www.unilex.info/case.cfm?pid=2&do=case&id=1062&step=FullText>> accessed 4 August 2020 ('French law requires from each party to perform the agreement in good faith. Good faith imposes upon the parties the duty to seek out an adaptation of their agreement to the new circumstances which may have occurred after its execution, in order to ensure that its performance does not cause, especially when the contract at stake is a long term agreement, the ruin of one of the parties. This principle is also prevailing in international commercial law (see Unidroit Principles, art. 6.2.2 and 6.2.3)'. Internal citations omitted.). Garcia (n 23) 138-139.

<sup>26</sup> UNIDROIT Secretariat (n 8) at 21; Christoph Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Nonperformance in International Arbitration* (Kluwer, 2008) 482-486.

<sup>27</sup> Article 1.7 UNIDROIT Principles provides for good faith and fair dealing ('(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty'). Article 5.1.3 UNIDROIT Principles provides for the co-operation between the parties ('Each party shall cooperate with the other party when such co-operation may reasonably be expected for the performance of that party's obligations').

<sup>28</sup> Brunner (n 26) 483. ('The purpose of the duty to renegotiate is to encourage the parties to work out their own solutions. If this cannot be achieved, either party has the right to resort to the court or arbitral tribunal').

distribution of risks and consequences for force majeure and hardship situations that even if the parties foresaw them, the parties could not avoid or overcome their consequences.

In force majeure clauses, the parties may agree to tailor the requirements, scope, and consequences for force majeure situations and regulate the manner and time for the notifications of the obligor to the obligee when the impeding event starts or ceases to exist. In practice, this may be included to prevent the obligee from entering into a replacement transaction because the obligor did not communicate the status of the force majeure event.<sup>29</sup> The UNIDROIT Secretariat suggested that the parties should limit the time that the force majeure event impedes performance before totally exempting the obligor from liability.<sup>30</sup> For example, if the event extends more than a certain amount of days, e.g. 120 days, then the obligor would be exempted from liability.<sup>31</sup> The parties may also provide for the situation in which the supplier of one of the parties is facing a force majeure event that affects the performance of the contract.

Likewise, the parties may consider the addition of a tailor-made hardship clause based on the PICC. Hardship is regulated in different ways in national legislations.<sup>32</sup> The agreement and interpretation of hardship clauses may be problematic when the parties are from different backgrounds.<sup>33</sup> For this reason, the PICC has provided for a uniform definition, requirements and consequences of hardship that reflects the current practice in international commercial contracts.<sup>34</sup> In this regard, the parties may use the ICC Hardship Clause 2020.<sup>35</sup> This clause provides a useful template as it offers three possible remedies after renegotiations are conducted.<sup>36</sup> These remedies include: (1) one party may unilaterally terminate the contract, (2) a party may request its termination to an adjudicator or (3) a party may request adaptation.<sup>37</sup> As this clause was inspired by the PICC,<sup>38</sup> the parties would apply the PICC, as tailored to their needs.

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<sup>29</sup> UNIDROIT Secretariat (n 8) 15.

<sup>30</sup> *ibid.*

<sup>31</sup> *ibid.*

<sup>32</sup> In Italy, the concept of hardship is called *eccessiva onerosità sopravvenuta* which only entitles the disadvantaged party to request for termination if the requested party did not provide for an alternative due to the unforeseeable event. The previous ICC Hardship Clause 2003 was based on the Italian Rule. See Brunner (n 26) 497-498 discussed in Garcia (n 23) 136. In U.S. law, hardship is provided in the theory of impracticability ('According to the §261 of the Restatement (Second) of Contracts the main remedy is discharge of the obligation for the disadvantaged party, which is related to the termination of the contract'). Garcia (n 23) 132.

<sup>33</sup> Fontaine (n 7) 459.

<sup>34</sup> Article 6.2.1 UNIDROIT Principles, comments 1 and 2; ICC case No. 9994 (2001); Fabio Bortolotti (n 20); Amin Dawwas, 'Alteration of the Contractual Equilibrium under the UNIDROIT Principles' (2010) *Intl Law Rev Pace U School of Law*; ICC Case no. 8486 (1996).

<sup>35</sup> ICC Force Majeure and Hardship Clauses 2020 (ICC, March 2020)

<<https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf>> accessed 4 August 2020. Also, the parties may consider the mention of specific and general circumstances in their hardship and force majeure clauses to avoid having a limited scope regarding possible new issues indirectly caused by the pandemic. Fontaine (n 7) 469-470.

<sup>36</sup> ICC Force Majeure and Hardship Clauses 2020 (n 35). The parties should also consider the addition of the regulation of timing and manner for notification in case of hardship. Fontaine (n 7) 477 ('A well-drafted clause should set a time limit, as well as the form (e.g., in writing) and contents (a description of the circumstances and their effects, possibly already a proposal for readjusting the contract) of the required notice').

<sup>37</sup> ICC Force Majeure and Hardship Clauses 2020 (n 35).

<sup>38</sup> UNIDROIT Secretariat (n 8) 4.

During this pandemic, it will be in the best interest of both parties to agree on how to handle the effect of the unexpected and unavoidable events caused by this crisis. A considerable number of companies are suffering financial struggle.<sup>39</sup> As a result, only companies with a good mechanism to remedy hardship situations and maintain strong business relationships will survive.<sup>40</sup>

### III. TURNING TO ADJUDICATORS TO RENDER DECISIONS

Usually, parties will turn to an adjudicator when they cannot reach an agreement. During this pandemic, the PICC may also prove useful to adjudicators to resolve controversies in a commercially guided manner<sup>41</sup> as the PICC provides beneficial guidance on how to resolve controversies by applying its contract interpretation tools to interpret force majeure or hardship clauses. Moreover, it will help adjudicators to determine the right path to take in a hardship situation when the parties did not provide for a remedy. Furthermore, when the parties have agreed to a specific applicable law that does not cover hardship, the adjudicator may use the PICC to fill the gap.

#### A. CONTRACT INTERPRETATION

The most controversial situation an adjudicator may face during contract interpretation is a situation wherein the parties agreed to a force majeure or hardship clause and listed a series of events, but did not include words such as ‘epidemic’ or ‘pandemic’. In international commercial contracts, the parties may be from different countries with different rules of contract interpretation.<sup>42</sup> Instead of applying different and possibly contradictory legal theories of contract interpretation that may confuse or upset the international parties, the adjudicator may use the PICC’s uniform contract interpretation provisions as a middle-point to determine the circumstances of the case and decide whether the pandemic should be considered a force majeure or a hardship event that is included in the contract.<sup>43</sup>

#### B. WHEN RENEGOTIATIONS FAIL OR ARE CONDUCTED INCORRECTLY

In a hardship event, if the parties started renegotiations but were not able to reach an agreement, then the adjudicator may apply the remedy selected by the parties in the contract. If the parties did not provide for a remedy in case of failed renegotiations, then the adjudicator may apply the PICC as trade usages to supplement the contract and provide for the appropriate remedy.<sup>44</sup>

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<sup>39</sup> Lindsay Cook and Clear Barrett, ‘How Covid-19 is escalating problem debt’ *Financial Times* (London, 1 May 2020).

<sup>40</sup> ‘COVID-19 – Maintaining customer loyalty and trust during times of uncertainty’ (*Deloitte*, 2020) <<https://www2.deloitte.com/content/dam/Deloitte/ie/Documents/covid19/gx-coronavirus-customer-loyalty.pdf>> accessed 4 August 2020.

<sup>41</sup> Elena Christine Zaccaria, ‘The Effects of Changed Circumstances in International Commercial Trade’ *International Trade and Business L J* 136 (‘The Unidroit Principles, on the other hand, although not of a binding nature, do deal with hardship under Articles 6.2.2 and 6.2.3. These principles establish not only rules shared by most existing legal systems, but also rules more suited to the requirements of international commercial trade’).

<sup>42</sup> See Völkmar Jaeger (n 20).

<sup>43</sup> Chapter 4 – Interpretation UNIDROIT Principles. Regarding force majeure or hardship clauses, an important provision may be article 4.8 which provides for supplying an omitted term. This provision indicates that: ‘(1) Where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied. (2) In determining what is an appropriate term regard shall be had, among other factors, to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness’.

<sup>44</sup> *ibid*; ICC case No. 9994 (2001).

The PICC provides that in cases of failed renegotiations, the adjudicator may terminate the contract, order the parties to resume renegotiations, adapt the contract with a view to restore its equilibrium<sup>45</sup> or confirm the contract as it exists.<sup>46</sup> Adaptation has been considered an exceptional remedy because the principle of *pacta sunt servanda* has been established as the predominant rule in contract law.<sup>47</sup> Thus, a contract will only be adapted if it is reasonable in light of the circumstances.<sup>48</sup> The adjudicator may take into account whether it is a long-term contract where the parties want to maintain the business relationship. In this regard, the adjudicator may ‘revise the price so as to distribute equally among the parties the increased costs or loss suffered’.<sup>49</sup>

If the adjudicator considers the option of adaptation, both parties will be asked to present proposed terms.<sup>50</sup> According to the PICC, during renegotiations, one party may not take unfair advantage of the situation of the other caused by the pandemic, e.g. economic dependence, distress or urgency derived from the pandemic.<sup>51</sup> Also, the adjudicator may take into account the conduct during renegotiations to determine the allocation of the costs of the proceedings.<sup>52</sup>

### C. GAP FILLING THE APPLICABLE LAW

It may be the case that the applicable law to the contract only provides for force majeure and not hardship situations.<sup>53</sup> As the law has to adapt to the present situation, the adjudicator may fill the gap by applying the PICC’s provision on hardship.<sup>54</sup> This may give the parties an up to date commercial solution to a problem that was not contemplated when the applicable law was approved.<sup>55</sup>

Because the pandemic is a global problem, several jurisdictions and companies are facing similar issues. If adjudicators use the PICC to resolve international trade disputes caused by the pandemic, this would

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<sup>45</sup> Article 6.2.3 UNIDROIT Principles.

<sup>46</sup> *ibid.*

<sup>47</sup> Article 1.3 UNIDROIT Principles, comment 2. Exceptions (‘A corollary of the principle of *pacta sunt servanda* is that a contract may be modified or terminated whenever the parties so agree. Modification or termination without agreement are on the contrary the exception and can therefore be admitted only when in conformity with the terms of the contract or when expressly provided for in the Principles [...] 6.2.3. [...]’). Fontaine (n 7) 488.

<sup>48</sup> Article 6.2.3 UNIDROIT Principles, comment 7. Court measures in case of hardship (‘[...] Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium (paragraph (4)(b)). In so doing the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve a price adaptation. [...] Paragraph (4) of this Article expressly states that the court may terminate or adapt the contract only when this is reasonable’).

<sup>49</sup> UNIDROIT Secretariat (n 8) 22.

<sup>50</sup> ICC Force Majeure and Hardship Clauses 2020 (n 35) 6. (‘In case the parties opt for adaptation, it may be suggested that the judge or arbitrator invites the parties to submit proposals of the required adjustments, which might be taken as starting point for adapting the contract’).

<sup>51</sup> UNIDROIT Secretariat (n 8) 21.

<sup>52</sup> Brunner (n 26) 485.

<sup>53</sup> For example, article 79 of the United Nations Convention on Contracts for the International Sale of Goods.

<sup>54</sup> *Scafom International BV v. Lorraine Tubes S.A.S.*, Belgium 19 June 2009 Court of Cassation [Supreme Court]. In this case, there was an agreement for supplying steel tubes. The price of the tubes increased by 70%. The Supreme Court indicated that the CISG had a gap regarding the remedy for hardship that needed to be filled with article 6.2.3 UNIDROIT Principles. The Supreme Court sent the parties to renegotiations. Garcia (n 23) 140.

<sup>55</sup> UNIDROIT Principles of International Commercial Contracts 2016, Preamble, comments 5 and 6. The Principles as a means of interpreting and supplementing international uniform law instruments; and the Principles as a means of interpreting and supplementing domestic law. In France, Belgium and Spain, the application of hardship was done first by the jurisprudence of the courts based on the UNIDROIT Principles and notions of good faith and fair dealing. See Garcia (n 23) 137-143.



provide for a useful guide to adjudicators from other jurisdictions to resolve similar disputes. Thus, PICC will provide more uniformity and certainty for international merchants.

#### IV. PICC AS A GUIDE TO LEGISLATORS

Even though several countries have adapted their legal systems to add a provision regarding hardship and possible adaptation of contracts, other national laws have not instituted this helpful tool to deal with hardship issues.<sup>56</sup> Hence, the PICC may also help legislators to update their contract legislation.<sup>57</sup>

For this reason, it is advisable that legislators consider the approval of temporary or permanent changes to their contract legislation, based on the PICC, to deal with hardship situations. This will not only provide more certainty for international merchants but will bring more uniformity to contract regulation. Moreover, national arbitral laws inspired in the UNCITRAL Model Law<sup>58</sup> may take into account that UNCITRAL recommended the use of the PICC.<sup>59</sup> This is a development that the legislators may use to attract more arbitrations to their forums, as they will give international arbitrators a useful tool in the resolution of international commercial contract disputes.

#### CONCLUSION

Even though the pandemic found the international health system unprepared, this crisis found the international commercial contracts regulations duly prepared, in part, because of the PICC. The PICC will provide guidance for parties who executed contracts before the pandemic and now face a completely different reality. The PICC may also be used as a model for contracts that were executed during and after the pandemic.

Moreover, the PICC will be useful for adjudicators to decide international disputes by applying state-of-the-art principles regarding interpretation of clauses and remedies in a force majeure or a hardship situation. As indicated by one lead practitioner, the pandemic not only brought a global problem, it also caused a historic opportunity for the use of comparative law and international jurisprudence with

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<sup>56</sup> Brunner (n 26). E.g. Panama Civil Code; Italian Civil Code; U.S. Law; English Law.

<sup>57</sup> UNIDROIT Principles of International Commercial Contracts 2016, Preamble, comment 7. The Principles as a model for national and international legislators ('[...] Not too different is the situation of those countries with a well-defined legal system, but which after the dramatic changes in their socio-political structure have an urgent need to rewrite their laws, in particular those relating to economic and business activities. At an international level the Principles could become an important term of reference for the drafting of conventions and model laws. So far, the terminology used to express the same concept differs considerably from one instrument to another, with the obvious risk of misunderstandings and misinterpretations. Such inconsistencies could be avoided if the terminology of the Principles were to be adopted as an international uniform glossary'). See also Michael Bridge, 'The CISG and the UNIDROIT Principles of International Commercial Contracts' (2014) *Unif. L. Rev.* 623, 625.

<sup>58</sup> UNCITRAL Model Law on International Commercial Arbitration 1985 With amendments as adopted in 2006.

<sup>59</sup> UNCITRAL, 'Report of the United Nations Commission on International Trade Law Forty-fifth session' (25 June-6 July 2012) <<https://www.unidroit.org/english/news/principles2010-un-en.pdf>> accessed 5 August 2020. Article 56 of Law 131 of 2013 of National and International Arbitration in Panama provides that: 'In all of the cases, the arbitral tribunal will decide in accordance with the terms of the contract and the arbitrators will take into account the trade usages applicable to the case. In international arbitrations, the arbitrators will take also into account the UNIDROIT Principles of International Commercial Contracts' (unofficial translation).

respect to international trade disputes.<sup>60</sup> Thus, if adjudicators apply the PICC to resolve international trade disputes, then more adjudicators will have a reference on how to deal with similar situations caused by this pandemic. Additionally, the PICC may be used by legislators as a template for legislators to update their regulation on international commercial contracts and used to attract more arbitrations to their economies and give parties commercial solutions for their disputes.

In conclusion, the PICC constitutes a remedy that parties, adjudicators and legislators may apply to maintain the health, uniformity, predictability and certainty of business relationships during these uncertain times.

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<sup>60</sup> Julie Bédard, 'Comparative Perspectives on Investment Arbitration from Latin America and Europe' (*SIAC webinar*, 23 July 2020) 11:25 in Spanish (unofficial translation) <<https://www.youtube.com/watch?v=EtXdh6VZl-c&t=318s>> accessed 7 August 2020.