USING THE UNIDROIT PRINCIPLES TO PRESERVE LONG-TERM CONTRACTS IN TIMES OF PANDEMIC: THE CASE FOR A COVID-19 MODEL CLAUSE

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I. Introduction

The outbreak of the Covid-19 pandemic is a largely unprecedented event. Comparable crises – such as the 1918 Spanish flu or World War I and II – occurred before international business as we know it came into place. Over the last thirty years, supply chains have become increasingly global, backed by legions of international contracts[1]. The impact of the pandemic on the ability to perform those contracts now risks disrupting the whole gamut of international commerce. As put forward by Sir William Blair, a former Judge of the London Commercial Court, «new thinking is going to be required if the law is to play its full part in getting international commerce back on its feet»[2].

In such uncertain context, the primary objective is keeping valuable commercial contracts alive, though on revised terms, in all those cases where the occurrence of the pandemic has fundamentally altered the economic equilibrium originally envisaged by the parties, without making contract performance impossible[3]. Hence, we might be witnessing one of those waves where the problem of hardship and adaptation of contracts to changed circumstances comes up and new solutions are embraced: «in fact hardship is discussed and legal solutions are considered mainly in periods of crises»[4].

Unsurprisingly then, the open nature of the UNIDROIT Principles of International Commercial Contracts («UPICC») has drawn renewed interest[5]. In July 2020, the UNIDROIT Secretariat published an insightful Note on the UPICC and Covid-19, stressing how the nuanced solutions offered by the UPICC can help solve the contractual problems created by the Covid-19 crisis[6].

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[1] W. SHIH, *Is It Time to Rethink Globalized Supply Chains?*, in *MIT Sloan Management Review*, 19 March 2020, available at https://sloanreview.mit.edu/article/is-it-time-to-rethink-globalized-supply-chains/.

[2] British Institute of International and Comparative Law («BIICL»), *BIICL publishes a Concept Note on the effects of the pandemic on commercial contracts and legal consideration in mitigating mass defaults*, Press Release, 27 April 2020, available at https://www.biicl.org/documents/10302_concept_note_270420.pdf.

[3] Which is likely to be the case of many long-term contracts: K.P. BERGER, *Adaptation of Long-Term Contracts by International Arbitrators in the Face of Severe Economic Disruptions: Three Salient Problems*, in *J. Int'l Arb.*, 37 (2020), p. 589, at p. 590.

[4] D. MASKOW, *Hardship and Force Majeure*, in *Am. J. Comp. L.*, 40 (1992), at p. 659.

[5] The UPICC (2016) are available at https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf.

[6] UNIDROIT Secretariat, *Note on the UNIDROIT Principles of International Commercial Contracts and the Covid-19 Health Crisis*, available at

This essay is organized as follows. Paragraph II will introduce the relevance of the UPICC in general to long-term contracts and their consistency with the theory of relational contracts, while Paragraph III will present the treatment of hardship in the UPICC. Paragraph IV will support the argument that, under normal circumstances, the flexibility enshrined in these like in other provisions of the UPICC reflects the needs of only one type of long-term contracts, *i.e.*, those that are also relational. However, it will submit that the systemic impact of the Covid-19 crisis has altered the ordinary cost-benefit analysis of not adopting a cooperative approach, so that in dealing with the consequences of the pandemic the UPICC represent an ideal set of rules for *all* long-term contracts, either relational or not. In conclusion, paragraph V contains the proposal that UNIDROIT provide specific guidance to use the UPICC in this context, by issuing a comprehensive Covid-19 Model Clause.

II. The UPICC, Long-Term Contracts and the Theory of Relational Contracts

In 2016, the fourth edition of the UPICC was published. As the Introduction to the latter edition makes clear, its purpose was not to review previous ones, but rather to deal in a more complete way with the specificities of long-term contracts[7]. Though previous editions of the UPICC already contained a number of provisions which addressed the special needs of such category of contracts[8], it was considered that some relevant issues had been left out and required specific consideration by the UPICC[9]. In this

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https://www.unidroit.org/english/news/2020/200721-principles-covid19-note/note-e.pdf.

[7] *See* the Memorandum prepared by the Secretariat on possible future work on long-term contracts (UNIDROIT 2013, C.D. (92) 4 (b), available at https://www.unidroit.org/english/governments/councildocuments/2013session/cd92-04b-e.pdf), at § 4. For an insightful account of the work that led to the 2016 edition of the UPICC, *see* Giuditta Cordero-Moss' contribution to an upcoming volume that I have had the opportunity to read thanks to the courtesy of the Editors: G. CORDERO-MOSS, *The UNIDROIT Principles: Long-Term Contracts*, in P. Galizzi, G. Rojas Elgueta, A. Veneziano (eds.), *The Multiple Uses of the UNIDROIT Principles of International Commercial Contracts: Theory and Practice*, Milan, forthcoming.

[8] In the 2010 edition of the UPICC, the relevance of three provisions to long-term contracts was explicitly stressed in the respective comments: Illustration 2 in Comment 3 to Article 2.1.6 (dealing with acceptance of offer by silence); Comment 1 to Article 2.1.14 (titled *Contracts with Terms Deliberately Left Open*); and Comment 5 to Article 6.2.2 (noting that provisions on hardship are particularly relevant in the context of long-term contracts). These were not the only provisions in the UPICC that already dealt adequately with the special needs of long-term contracts: *see* UNIDROIT 2013, *supra* note 7, at § 3.

[9] Those issues were the following: (1) notion of «long-term contracts»; (2) contracts with open terms; (3) agreements to negotiate in good faith; (4) contracts with evolving terms; (5) supervening events; (6) co-operation between the parties; (7) restitution after ending contracts entered into for an indefinite period; (8) implementation by a group of linked contracts; (9) termination for cause (ultimately, the proposal for a provision on termination for compelling reason was rejected: *see* the Report of the Governing Council's 95th session, UNIDROIT 2016, C.D. (95) 15, available at

context, the theory of relational contracts was mentioned – and was undoubtedly drawn upon[10].

The theory of relational contracts – dating back to the 1960's, when the first, seminal works by Professors Stewart McAuley and Ian Roderick MacNeil were published setting forth the idea of contracts as relations[11] – emphasizes that *all* exchange occurs in relations[12], along a spectrum of contractual behavior ranging from highly *discrete* to highly *relational* (or «intertwined»[13]).

Accordingly, contracts lying towards the «discrete» end of the spectrum are characterized by short duration, little personal interactions and precise party determination of the subjects of exchange (these consisting of an easily monetized commodity and money)[14]. In these transactions, risks are

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https://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-15-e.pdf, at §§ 82-118) and (10) post-contractual obligations. *See Position Paper Prepared by Professor Michael Joachim Bonell*, UNIDROIT 2014, Study L – Doc. 126, available at https://www.unidroit.org/english/documents/2014/study50/s-50-126-e.pdf. The drafts prepared by the Rapporteurs on each topic, and examined by the Working Group on Long-Term Contracts, are published in Annexes 3-11 of the Report of the Working Group's second session (UNIDROIT 2016, Study L – Misc. 32, available at https://www.unidroit.org/english/documents/2016/study50/s-50-misc32-e.pdf). The composition of the Working Group and the list of the Observers who participated in its works are published in UNIDROIT 2016, C.D. (95) 3, available at https://www.unidroit.org/english/governments/councildocuments/2016session/cd-95-03-e.pdf.

[10] *See* UNIDROIT 2014, *supra* note 9, at §§ 6, 41 and 49, as well as comments and suggestions by Prof. Neil B. Cohen (*id.*, Annex I, p. ii) and Justice Paul Finn (*id.*, Annex I, p. v).

[11] The first expression of this idea, drawing on law, business, economics, psychology and sociology, is found in S. MACAULEY, *Non-Contractual Relations in Business: A Preliminary Study*, in *Am. Soc. Rev.*, 28 (1963), p. 55 [hereinafter, S. MACAULEY, *Non-Contractual Relations*]. Prof. MacNeil's scholarly work focused on relational contracts from the mid-1960's through the 1980's: *see*, *inter alia*, I.R. MACNEIL, *Whither Contracts?*, in *J. Legal Ed.*, 21 (1969), p. 403; I.R. MACNEIL, *The Many Futures of Contracts*, in *S. Cal. L. Rev.*, 47 (1974), p. 691; I.R. MACNEIL, *Restatement (Second) of Contracts and Presentiation*, in *Va. L. Rev.*, 60 (1974), p. 589 [hereinafter, I.R. MACNEIL, *Restatement (Second)*]; I.R. MACNEIL, *Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical, and Relational Contract Law,* in *Nw. U.L. Rev.*, 72 (1978), p. 854 [hereinafter, I.R. MACNEIL, *Adjustment of Relations*]; I.R. MACNEIL, *Values in Contract: Internal and External*, in *Nw. U.L. Rev.*, 78 (1983), p. 340 [hereinafter I.R. MACNEIL, *Values*]; I.R. MACNEIL, *Relational Contract Theory as Sociology: A Reply to Professors Lindenberg and de Vos*, in *J. Institutional & Theoretical Econ.*, 143 (1987), p. 272 [hereinafter, I.R. MACNEIL, *Contract as Sociology*]. The Author later returned to this topic in I.R. MACNEIL, *Relational Contract Theory: Challenges and Queries*, in *Nw. U.L. Rev.*, 94 (2000), p. 877 [I.R. MACNEIL, *Relational Contract Theory*].

[12] I.R. MACNEIL, *Values*, *supra* note 11, at p. 341.

[13] In one of his last articles on the topic, Prof. MacNeil noted that in the relational contract theory the term «relational» was used to mean two different things: «It is used globally to describe all relations in which exchange occurs, and since all exchange, even the most discrete, occurs in relations, all exchange is thereby "relational". But it is also used to mean the opposite of discrete, that is exchange occurring in relatively intertwined patterns». In order to avoid this ambiguity, he decided to describe the poles of the spectrum of contractual behaviors as «discrete» at one end and «intertwined» at the other: I.R. MACNEIL, *Contract as Sociology*, *supra* note 11, at p. 276. However, the new terminology was not adopted as widely: I.R. MACNEIL, *Relational Contract Theory*, *supra* note 11, at p. 895.

[14] I.R. MACNEIL, *Adjustment of Relations*, *supra* note 11, at p. 856.

rigidly allocated *ex ante* rather than shared, nor is altruism expected[15]. Minimum future cooperation is required of the parties, who are bound precisely to the carefully planned arrangement laid down in their contract[16].

To the opposite, exchange lying towards the «relational» end of the spectrum occurs over an extended period of time and involves close personal relations which may have an independent value besides the exchange. The participants never intend or expect to have the whole future of the relation fixed at any single time, but view their relation as an ongoing integration of behavior which will evolve with events in a largely unforeseeable future[17]. Contracts of this sort involve «asset-specific» or «idiosyncratic» investments which cannot be easily reallocated in the market, enhancing incentives to preserve the relationship[18]. Risk is to be shared rather than allocated on one of the parties, and future cooperative behavior is expected – and, perhaps, facilitated by agreed governance mechanisms, allowing for contract adaptation either with a view to substantiate contractual terms or to preserve the relationship in case of unforeseen or changed circumstances[19].

Even prior to the adoption of the fourth edition, the UPICC were considered a set of rules consistent with the theory of relational contracts, being the expression of an expansive model of good faith[20]. Since the UPICC

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[15] G. ROJAS ELGUETA, *From «Antagonistic» to «Empathic»: The Long-Term Contracts' Continuum and the Role of the UNIDROIT Principles*, in P. Galizzi, G. Rojas Elgueta, A. Veneziano (eds.), *supra* note 7, at p. 104.

[16] I.R. MACNEIL, *Contract as Sociology*, *supra* note 11, at p. 275.

[17] I.R. MACNEIL, *Restatement (Second)*, *supra* note 11, at p. 595.

[18] On the notion of «asset specific» or «idiosyncratic» investments, *see* G. ROJAS ELGUETA, *supra* note 15, at p. 105, note 23.

[19] R.E. SPEIDEL, *The Characteristics and Challenges of Relational Contracts*, in *Nw. U.L. Rev.*, 94 (2000), p. 823, at p. 831 *et seq.* refers to the case *Oglebay Norton Co. v. Armco, Inc.*, 556 N.E.2d 515 (Ohio 1990) as an illustration of a highly relational contract where all these features were present. In 1957, Oglebay agreed to transport iron ore from mines near Lake Superior to Armco's plants in the lower Great Lakes region. The contract was modified four times; with the last amendment of 1980, its duration was extended until 2010. The business relationship developed beyond the scope of the contract, with one seat on Oglebay's Board of Directors being reserved to Armco, the latter owning Oglebay stock, and the two being bound by a partnership in another venture. Contractual terms were flexible both as to the quantity to be shipped and the price. At the time of the fourth amendment, Oglebay agreed to undertake a $95 million investment to upgrade its carrier vessels to accommodate Armco's increasing shipping requirements. The contract, however, presented some gaps in planning, which ultimately caused the dispute to arise: *see id.*, at p. 834.

[20] R.E. SPEIDEL, *supra* note 19, at p. 841. On the principle of good faith in the UPICC, *see* M.J. BONELL, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, 3rd edn., Ardsley, 2009, at p. 127 *et seq.*; A. DI MAJO, *L'osservanza della buona fede nei Principi Unidroit sui contratti commerciali internazionali*, in M.J. Bonell, F Bonelli (eds.), *Contratti commerciali internazionali e Principi Unidroit*, Milan, 1997, at p. 143 *et seq.*; E.A. FARNSWORTH, *Duties of Good Faith and Fair Dealing under the UNIDROIT Principles, Relevant International Conventions, and National Laws*, in *Tul. L. Rev.*, 72 (1998), p. 1985; A.S. HARTKAMP, *The Concept of Good Faith in the UNIDROIT Principles for International Commercial Contracts*, in *Tul. J. Int'l & Comp. L.*, 3 (1995), p. 65.

first edition[21], good faith has indeed been attributed a pivotal role both in filling gaps in the contract[22] and in preserving the contract in case of a change of circumstances[23]. This approach provides the parties to a relational contract – *i.e.*, a contract that is not simply a «snapshot» of the exchange that it is meant to bring about, but is rather intended to create a relation that is expected to evolve in the future in a largely unforeseeable manner – with the flexibility necessary to adapt their contract to such developing reality.

III. Hardship as a Case for Contract Adaptation in the UPICC

One of the grounds for adaptation of the contract that are found in the UPICC, which is likely to be highly relevant in the new context described in paragraph I, is hardship[24].

Pursuant to Section 6.2 of the UPICC, whenever a fundamental alteration of the equilibrium of the contract occurs[25], either because the cost of a party's performance has increased[26] or because the value of the performance a party receives has diminished[27], and provided that four

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[21] *See* Comment 1 to Article 1.7 UPICC («*Good faith and fair dealing» as a fundamental idea underlying the Principles*), which has remained unchanged since the UPICC first edition in 1994 (save the list of provisions that represent a direct or indirect application of the principle of good faith and fair dealing, which has grown quite significantly through the editions).

[22] *See* Articles 2.1.14 (*Contract with terms deliberately left open*), 4.8 (*Supplying an omitted term*) and 5.1.2 (*Implied obligations*) UPICC.

[23] *See* Article 6.2.3 UPICC (*Effects of hardship*).

[24] On the regulation of hardship in the UPICC, *see* M.J. BONELL, *supra* note 20, at p. 117 *et seq.*; E.J. BRÖDERMANN, *UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary*, Baden-Baden, 2018, at p. 176 *et seq.*; A. VENEZIANO, *UNIDROIT Principles and CISG: Change of Circumstances and Duty to Renegotiate according to the Belgian Supreme Court*, in *Unif. L. Rev.*, 15 (2010), p. 137; J.M. PERILLO, *Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts*, in *Tul. J. Int'l & Comp. L.*, 5 (1997), p. 5; D. MASKOW, *supra* note 4.

[25] As noted by E. MCKENDRICK, *Ch.6 Performance, s.2: Hardship*, in S. Vogenauer (ed.), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, 2nd edn., Oxford, 2015, at p. 815, whether hardship arises pursuant to Article 6.2.2 UPICC ultimately depends on the ability of the disadvantaged party to prove that the alteration of the equilibrium of the contract is «fundamental». While in the 1994 edition of the UPICC Comment 2 to Article 6.2.2 stated that «an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental alteration"», this sentence was deleted in the 2004 edition and replaced by the general statement that «[w]hether an alteration is "fundamental" in a given case will of course depend upon the circumstances». In the absence of more specific guidance, the provisions on hardship should be given narrow operation in light of the general principle set forth by Article 6.2.1 UPICC that a change in circumstances does not affect the obligation to perform.

[26] For example, due to a dramatic rise in the price of the raw materials necessary for the production of the goods or the rendering of the services, or to the introduction of new safety regulations requiring far more expensive procedures: *see* Comment 2(a) to Article 6.2.2 UPICC (*Fundamental alteration of equilibrium of the contract. Increase in cost of performance*).

[27] Either due to drastic changes in market conditions or to the frustration of the purpose for which the performance was required: *see* Comment 2(b) to Article 6.2.2 UPICC

«additional requirements» pertaining to the sphere of the disadvantaged party are satisfied[28], the latter party has the right to request the renegotiation of the contract in order to adapt its terms to the changed circumstances[29].

The conduct of the parties during the renegotiations is subject to the general principle of good faith and fair dealing[30] and to the duty of cooperation[31]. While the UPICC do not impose an obligation to reach an agreement, if the parties fail to do so within a reasonable time either party may resort to the court, which then has four options: (a) it may terminate the contract at a date and on terms to be fixed, (b) it may adapt the contract with a view to restoring its equilibrium, or, if neither of the foregoing options is «reasonable», it may either (c) direct the parties to resume negotiations or (d) confirm the terms of the contract as they stand[32].

In view of the differences among domestic laws with respect to both the relevance of hardship as such[33] and the remedies thereto (especially as to compelled renegotiation and judicial modification of the terms of the

(*Fundamental alteration of equilibrium of the contract. Decrease in value of the performance received by one party*).

[28] *I.e.*, that «(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»: *see* Article 6.2.2 UPICC (*Definition of hardship*) and its Comment 3 (*Additional requirements for hardship to arise*).

[29] Article 6.2.3 UPICC (*Effects of hardship*).

[30] Article 1.7 UPICC (*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 limit this duty».

[31] Article 5.1.3 UPICC (*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».

[32] Comment 7 to Article 6.2.3 UPICC (*Court measures in case of hardship*).

[33] While civil law traditions have been acquainted for a long time with the idea that a party whose performance results excessively burdensome as a consequence of an unforeseen change of circumstances should not be held to the original terms of the contract (*see, e.g.*, Articles 1467 of the Italian Civil Code of 1942, 388 of the Greek Civil Code of 1946 and 1198 of the Argentinian Civil Code of 1968), common law systems still largely stand on the traditional rule that «[a] contract will only be [discharged] if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed» (H. BEALE, *Adaptation to Changed Circumstance, Specific Performance and Remedies. Report on English Law*, in A. Harmathy (ed.), *Binding Force of Contract*, Budapest, 1991, at p. 20). For an account of the development of such rule, *see* G.H. TREITEL, *Frustration and Force Majeure,* 3rd edn., London, 2014, p. 19 *et seq.*.

contract[34]), the Section dealing with hardship has been rightly defined «one of the more innovative aspects of the PICC»[35].

It is thus unsurprisingly that the treatment of hardship in the UPICC has been made the object of contrasting reactions. On the one hand, it has admittedly been a source of inspiration for both national legislators and drafters of international instruments[36]. On the other, some scholars have

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[34] The trend in the last three decades in civil law systems has been toward admitting that the remedy to hardship may be the adaptation of the contract by an adjudicator: *see*, prior to the publication of the UPICC in 1994, the reforms of the Civil Codes of Peru in 1984 (Article 1440) and the Netherlands in 1992 (Article 6:258). In 2002, the German Civil Code was amended to reflect the theory, established in the case law since the 1920's, that the party who is unduly burdened because of a change of the circumstances lying at the foundation of the contract (*Störung der Geschäftsgrundlage*) may request the court to either discharge or adapt the contract (§ 313 German Civil Code). In 2016, the reform of the French Civil Code extended from the context of government contracts to the private sector the scope of the *théorie de l'imprevision*, which provides that in case of an unforeseen change of circumstances the disadvantaged party may request the other party to renegotiate the terms of the contract and, if the negotiation is denied or fails, may request the court to adapt or terminate the contract (Article 1195 French Civil Code). This trend has been followed even by the latest attempts to harmonize European private law: *see* Article 6:111 Principles of European Contract Law («PECL») and Article III.-1:110 of the Draft Common Frame of Reference («DCFR»). For a comparison of the latter instruments with the UPICC, *see* R.M. URIBE, *Change of Circumstances in International Instruments of Contract Law. The Approach of the CISG, PICC, PECL and DCFR*, in *Vind. J. Int'l Comm. L.*, 15 (2011), p. 233).
On the other hand, compelled renegotiation and judicial adaptation of the contract have little to no place even in those common law systems that have to some extent departed from the traditional rule that hardship, falling anything short of impossibility, is no excuse for non-performance of the contract. For instance, in the United States the doctrine of commercial impracticability extends the possibility that a party is excused from performance to cases where performance is not materially impossible, but has become so excessively and unreasonably burdensome that it makes no commercial sense anymore: *see* § 261 Restatement (Second) of Contract and, with regard to sales contracts, § 2-615 Uniform Commercial Code. However, the traditional approach of American courts is an all-or-nothing one: either the promisor is discharged and the contract terminated, or the promisee is entitled to performance under the original terms of the contract. Supporting the idea that in case of unanticipated, calamitous circumstances the parties should be required of sharing unallocated losses through a duty to adjust, and the courts should have the possibility to adjust the contract for the parties, *see* R.A. HILLMAN, *Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law*, in *Duke L. J.*, 1987, p. 1, at p. 15 *et seq.*; opposing this possibility, *see* J.P. DAWSON, *Judicial Revision of Frustrated Contracts: The United States*, in *B.U.L. Rev.*, 64 (1984), p. 31, and C.P. GILLETTE, *Commercial Rationality and the Duty to Adjust Long-Term Contracts*, in *Minn. L. Rev.*, 69 (1985), p. 521.

[35] E. MCKENDRICK, *supra* note 25, at p. 808.

[36] In addition to the domestic reforms and the European instruments referred to *supra* at note 34, *see ICC Hardship Clause 2020*, available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf, whose main innovation has been the introduction, as a possible option, of the right of the party invoking hardship to request adaptation (*ICC Force Majeure and Harship Clauses 2020. Introductory Note and Commentary*, available at https://iccwbo.org/content/uploads/sites/3/2020/07/icc-forcemajeure-introductory-note.pdf). *See also* the User's Guide to Article 26 of the *ICT Contractual Joint Venture Model Agreements*, 2004, available at http://www.mid-as.it/wp-content/uploads/ITC-Contractual-Joint-Venture-Model-Agreements.pdf, at p. 56, setting out that «[t]he provision of Article 26 has been inspired by the corresponding clauses in the UNIDROIT Principles of International Commercial Contracts».

argued that it brings into international contracts an element of uncertainty which is at odds with the interest in predictability that is prominent in some long-term commercial contracts[37]. In fact, it is arguably one of the provisions that make users (*i.e.*, businesses and legal practitioners) cautious about adopting the UPICC as the governing law in their contracts[38], favoring those domestic laws (like those of England and Wales or of the State of New York) that are perceived to attain greater commercial pragmatism and certainty[39].

It would however be simplistic to assume that the reasons for such mixed reactions lie in the personal views – or the legal background – of those who expressed them. Rather, as it has been argued, they reflect the fact that, far from being homogenous, the category of long-term contracts encompasses very different types of contracts, and the flexibility inherent in these like in other provisions of the UPICC does not meet the commercial needs of all of them[40]. The next paragraph will refer to the theory of relational contracts to support this proposition, while arguing that the exceptional circumstances brought about by the Covid-19 crisis have leveled out the differences among the needs of different types of long-term contracts.

IV. The Application of the UPICC Section on Hardship to Long-Term Contracts and the New Questions Posed by Covid-19

As seen above, the theory of relational contracts ideally places all contracts on a spectrum going from highly discrete to highly relational, depending on the contractual behavior of the parties. Accordingly, parties may or may not prefer a flexible approach to their contractual obligations; may or may not have an interest in preserving their relationship; and may or may not expect mutual cooperation and risk sharing.

By providing for the duty to renegotiate in good faith and the possibility of adaptation of the contract, the Articles on hardship are among those provisions of the UPICC that are most consistent with the needs of relational contracts[41], reflecting the specific interest of parties thereto in keeping their relationship alive[42].

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[37] G. CORDERO-MOSS, *supra* note 7, at p. 80.
[38] For a collection of surveys reporting the scarce reception of the UPICC among users, *see* S. VOGENAUER, *Introduction*, in S. Vogenauer (ed.), *supra* note 25, at pp. 23-24, noting that «[b]usiness people and practitioners have also been slow to embrace the PICC».
[39] Though with reference to French private law, *see* the considerations made in S. ROWAN, *The New French Law of Contract*, in *Int'l & Comp. L. Quart.*, 66 (2017), p. 805, at p. 809.
[40] This argument has been recently submitted by G. ROJAS ELGUETA, *supra* note 15, at p. 122.
[41] *See supra*, paragraph II.
[42] D. ROBERTSON, *Symposium Paper: Long-Term Relational Contracts and the UNIDROIT Principles of International Commercial Contract*, in *Aust'l Int'l L.J.*, 17 (2010), p. 185, at p. 189.

However, as the very definition of long-term contracts in the UPICC makes evident, not all long-term contracts are necessarily relational[43]. Comment 3 to Article 1.11 UPICC stresses that, the distinctive feature of long-term contracts being duration, the «complexity of the transaction» and the existence of «an ongoing relationship between the parties» (signaling the relational nature of a contract) are «normally present to varying degrees, but are not required» for the purpose of the UPICC[44]. In fact, even where the exchange extends over a period of time, a contract may nonetheless lie somewhere farther from the relational end of the spectrum of possible contractual behaviors. A long-term contract may well *not* be a relational one if its core consists of «the exchange between money and a counter-performance», and the interest of the parties lies in «the surplus deriving from the exchange, which takes precedence over their commercial relationship»[45].

In these nonrelational (or «antagonistic»[46]) long-term contracts the risk of the occurrence of an event altering the equilibrium of the contract should be entirely allocated on one party – *i.e.*, the promisor, unless an express clause discharges her in case of hardship, thus shifting the risk onto the promisee[47] – and the other party has no duty to cooperate. Such risk allocation being ultimately reflected in the contract price[48], these contracts represent «egoistic gambles about the future», so that «it would disrupt the very function of the transaction to require adjustment by the party whose prognostication proves correct in order to rescue the party who guessed wrong»[49]. While the participants may still find it convenient to accede to their counterparty's request for renegotiations, they only accept to do so on a strictly voluntary basis. If renegotiations fail, the affected party will simply face the consequences of a bad bargain.

Based on the foregoing, it can be argued that the flexible approach of the UPICC is at odds with the need for certainty that, under normal circumstances, is inherent to the latter type of long-term contracts, being only desirable for those long-term contracts that are also relational. If, in

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[43] Article 1.11 UPICC provides that: «"[L]ong-term contract" refers to a contract which is to be performed over a period of time and which normally involves, *to a varying degree*, complexity of the transaction and an ongoing relationship between the parties» (emphasis added).

[44] Comment 3 to Article 1.11 UPICC (*Long-term contracts*).

[45] G. ROJAS ELGUETA, *supra* note 15, at p. 104.

[46] This definition has been put forward for the first time by Prof. Rojas Elgueta in G. ROJAS ELGUETA, *supra* note 15, at p. 103.

[47] According to R.A. POSNER, A.M. ROSENFIELD, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, in *J. Legal Stud.*, 6 (1977), p. 83, at p. 110, the promisor is generally the «superior risk bearer» (*i.e.*, in Economic Analysis of Law, the party who either is in a better position to prevent the risk from materializing, or can insure against the materialization of the risk at a lower cost: *id.*, at p. 90 *et seq.*): *see* G. ROJAS ELGUETA, *supra* note 15, at p. 114, note 54.

[48] G. ROJAS ELGUETA, *supra* note 15, at p. 104.

[49] C.P. GILLETTE, *Commercial Relationships and the Selection of Default Rules for Remote Risks*, in *J. Legal Stud.*, 19 (1990), p. 535, at p. 539.

the words of Professor MacAuley, businessmen do not want to turn «a cooperative venture into an antagonistic horse race»[50], the opposite is also true.

However, the Covid-19 crisis may have come to alter this ordinary state of things. The systemic impact it has had on international contracts, at least in certain sectors, has led to a potentially dramatic rise in the costs of sticking to the contractual risk allocation originally made by the parties. This, in turn, may have created a strong incentive for unaffected parties to adopt a cooperative approach toward their contractual counterparties (*i.e.*, the disadvantaged parties) even in nonrelational contracts.

Assume the following scenario: a multinational company operating globally in the energy sector receives hundreds of *force majeures* notices related to as many contracts[51]. The contracts are governed by English law and include a *force majeure* clause, but not a hardship one. As the events unravel, it appears that the situation is one of hardship rather than of *force majeure*[52]. Normally, *i.e.*, if an event had occurred that impacted the performance of a contract, the unaffected party would choose not to renegotiate and have the contract enforced pursuant to its original terms, leaving all the economic losses caused by the event on the disadvantaged party. However, under the present circumstances, this would mean referring hundreds of contracts to a court or an arbitral tribunal in order to establish whether nonperformance is excused under the *force majeure* clause or under any doctrine of the applicable law. The costs of litigating all those contracts would probably exceed the benefits of enforcing the favorable risk allocation made in the contract, so that under a cost-benefit analysis it may have become the most rational choice for the unaffected party to renegotiate existing contracts.

It can be argued, then, that in dealing with the consequences of the pandemic the flexibility that is normally desirable only for relational contracts has become a must for *all* long-term contracts[53].

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[50] S. MACAULEY, *Non-Contractual Relations*, *supra* note 11, at p. 64.

[51] The party who fails to perform due to an alleged *force majeure* event generally has the duty to give notice of the impediment to the other party without undue delay: *see* Article 7.1.7 UPICC (*Force majeure*), as well as the *ICC Force Majeure Clause (Long Form)*, available at https://iccwbo.org/content/uploads/sites/3/2020/03/icc-forcemajeure-hardship-clauses-march2020.pdf, at § 4.

[52] For an explanation of the common failure, in both theory and practice, to properly distinguish the doctrines of hardship and *force majeure*, *see* K.P. BERGER, D. BEHN, *Force Majeure and Hardship in the Age of Corona: A Historical and Comparative Study*, in *McGill J. Disp. Resol.*, 6 (2020), p. 79, at p. 88.

[53] It is worth noting that this shift has been acknowledged even by the construction industry, which typically operates through nonrelational long-term contracts (involving, *e.g.*, the delivery of a project against a fixed lump-sum price): Construction Leadership Council («CLC»), *CLC Covid-19 Contractual Best Practice Guidance*, 7 May 2020 (updated 28 May 2020), available at https://www.constructionleadershipcouncil.co.uk/wp-content/uploads/2020/06/Construction-Leadership-Council-Covid-19-Contractual-Best-Practice-Guidance-7-May-2020.pdf, at § 2.4 («[N]otwithstanding the contractual provisions, Employers and Suppliers should seek to take a collaborative approach [...] and

The foregoing requires rethinking the traditional mindset guiding the parties' choice of law in international commercial contracts. Parties faced with the above scenario should be aware that, even if they voluntarily accept to renegotiate contractual terms, failing these renegotiations their dispute will be submitted to the governing law of the contract and, unless this provides for adequate remedies to changes of circumstances, valuable contracts will be put at risk[54]. The choice of law should then be reconsidered in light of the need for default mechanisms allowing to achieve contract adaptation even where renegotiations fail. In particular, the UPICC could constitute a timely set of rules to provide parties to both relational *and* nonrelational long-term contracts with those mechanisms.

V. Conclusion: A Comprehensive Covid-19 Model Clause

Once it is accepted that the UPICC represent an ideal set of rules to deal with the consequences of the pandemic on all long-term contracts, the following question is: How can the UPICC be applied to existing contracts?

Let us assume that the parties accept to renegotiate the terms of their contract, in view of the impact that Covid-19 or its containment measures have had (and may have in the future) on it. The first issue that they should tackle is the regulation of the renegotiation process and of the situation where renegotiations fail. The parties are advised to choose the UPICC as a tool to regulate both.

The parties' choice is one of the possibilities envisaged by the Preamble of the UPICC for their use[55], and has been facilitated by the Model Clauses

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discuss whether [...] any additional costs [can be] shared in any event, in light of the unforeseeable and unprecedented nature of Covid-19»). In the same vein, *see* the note released by the UK Government: Cabinet Office, *Guidance on Responsible Contractual Behaviour in the Performance and Enforcement of Contracts Impacted by the Covid-19 Emergency*, 7 May 2020, available at https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/883737/_Covid-19_and_Responsible_Contractual_Behaviour__web_final___7_May_.pdf, at § 14.

[54] This is particularly true if the law of a common law system is chosen to govern the contract, as is traditionally the case for international commercial contracts: *see supra* notes 33 and 34.

[55] Preamble, § 2, UPICC. On the different uses of the UPICC, *see*: M.J. BONELL, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, in *Unif. L. Rev.*, 23 (2018), p. 15 [hereinafter, M.J. BONELL, *The Law Governing International Commercial Contracts*]; M. BENEDETTELLI, *Applying the UNIDROIT Principles in International Arbitration: An Exercise in Conflicts*, in *J. Int'l Arb.*, 33 (2016), p. 653; R. MICHAELS, *Preamble I*, in S. Vogenauer (ed.), *supra* note 25; M. SCHERER, *Preamble II*, *id.*; R. MICHAELS, *The UNIDROIT Principles as Global Background Law*, in *Unif. L. Rev.*, 19 (2014), p. 643; M.J. BONELL, *The UNIDROIT Principles and Transnational Law*, in *Unif. L. Rev.*, 5 (2000), p. 199. *See also* the empirical study on the use of the UPICC conducted by E. FINAZZI AGRÒ, *The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures*, in *Unif. L. Rev.*, 16 (2011), p. 719. An updated collection of cases where the UPICC are mentioned or applied, either by courts or arbitral tribunals, may be found in the UNILEX database: http://www.unilex.info/instrument/principles.

published by UNIDROIT in 2013[56]. The UNIDROIT Model Clauses aim at providing guidance to contract drafters as to how the parties may agree in their contract to use the UPICC. The parties' task, however, may not be an easy one, if they are to adapt the Model Clauses to limit the choice of the UPICC to the context of renegotiations prompted by Covid-19.

If that is the case, the parties should consider using the UPICC provisions on hardship as a model for an event-specific hardship clause that also incorporates the choice of the UPICC as the law applying to the substance of the dispute[57] in case renegotiations should fail. It could thus be useful if UNIDROIT took the proposals made in the Secretariat's Note one step further by providing specific guidance as to the clause that the parties should add to their contract to these effects[58].

One example of such a clause could be the following:

> «(1) Where the occurrence of the Covid-19 pandemic, or the containment measures that a party has (had) in good faith to abide by, have fundamentally altered the equilibrium of the contract either because the cost of [name of the promisor]'s performance has increased or because the value of the performance [name of the promisee] receives has diminished, hardship arises.
>
> (2) Subject to the conditions of paragraph (1), 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.
>
> (3) The request for renegotiations does not in itself entitle the disadvantaged party to withhold performance.
>
> (4) Both in making the request for renegotiations and during the renegotiation process, each party must act in accordance with good faith and fair dealing in international trade and shall co-operate with the other party.
>
> (5) Upon failure to reach agreement within a reasonable time, either party is entitled to refer the dispute under the [ICC Mediation Rules or other]. If the dispute has not been settled within [x] days following the filing of the Request of Mediation or within such other period as the parties may agree in writing, the dispute shall be finally settled under the Rules of Arbitration of the [International Chamber of Commerce

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[56] *UNIDROIT Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*, 2013, available at https://www.unidroit.org/english/principles/modelclauses2013/modelclauses-2013.pdf. On the UNIDROIT Model Clauses, *see* K.P. BERGER, *The Role of the UNIDROIT Principles of International Commercial Contracts in International Contract Practice: The UNIDROIT Model Clauses*, in *Unif. L. Rev.*, 19 (2014), p. 519 and M.J. BONELL, *Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts*, in *Unif. L. Rev.*, 18 (2013), p. 473.

[57] *See* UNIDROIT Model Clause 1.1(b).

[58] UNIDROIT Secretariat, *supra* note 6, at §§ 45-46.

or other] by one or more arbitrators appointed in accordance with the said Rules.

(6) The dispute shall be decided in accordance with the UNIDROIT Principles of International Commercial Contracts (2016)».

This goes with a caveat: even where such proposal was accepted, the purpose of a Covid-19 Model Clause, like that of other UNIDROIT Model Clauses, would be «merely to allow [the parties] to indicate more precisely the way they wish the PICC to be used» and «even if [they] decide not to use [it], judges and arbitrators may still apply the UNIDROIT Principles according to the circumstances of the case as they have been doing so far»[59]. Therefore, the unaffected party should be wary of refusing to renegotiate in the first instance, since courts and arbitral tribunals may well use the UPICC provisions on hardship as a tool to further advancements in the applicable domestic laws, in order to reach the flexible solutions required by these exceptional times[60].

[59] *UNIDROIT Model Clauses*, *supra* note 56, at p. 3.

[60] As they have done in a number of cases: *see* T.A.R. Lombardia (Italy), 23 July 2019; Cour d'Appel, Province de Québec, District of Montreal (Canada), 8 August 2016; T.A.R. Molise (Italy), 17 May 2015; Tribunal Supremo (Spain), 30 June 2014; Supreme Court of Lithuania, 31 May 2011; Cámara de Apelaciones en lo Civil y Comercial de La Matanza, sala II (Argentina), 28 February 2006 (all from the UNILEX database, *supra* note 55). The use of the UPICC «to interpret or supplement domestic law» is explicitly envisaged by the Preamble of the UPICC, at § 6. Even though this use was not provided for in the UPICC first edition and was only added in 2004, it constitutes the most common role played by the UPICC: *see* M.J. BONELL, *The Law Governing International Commercial Contracts*, *supra* note 55, at p. 36 *et seq.* and A. VENEZIANO, E. FINAZZI AGRÒ, *The Use of the UNIDROIT Principles in Order to Interpret or Supplement National Law: An Italian Perspective*, in P. Galizzi, G. Rojas Elgueta, A. Veneziano (eds.), *supra* note 7.