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INTERNATIONAL COMMERCIAL CONTRACT CLAUSES DEALING WITH CHANGED CIRCUMSTANCES

Master thesis

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INTRODUCTION

Legal contractual relations between the parties worldwide is based on the principle of *pacta sunt servanda*, which is supported by both common and civil law systems, binding a person to its promises and safeguards the interest of the promise[1]. The significance of the general maxim of *pacta sunt servanda* already has been gained since the Roman times when the principle was recognized as a rule of international law[2], and up to today considered to be a cornerstone of *lex mercatoria*[3]. However, the principle of sanctity of contracts not always might be properly enforceable. Bearing in mind that each party accepts to be bound under the circumstances prevailing at the time of a contract formation, any economic or political changes during the time of performance of contract might significantly become more onerous or even impossible to obey the contract for one or both of the contractual parties. In order to avoid unforeseeable events particularly relevant to long term contracts, contractual parties by implementing their right of party autonomy are free to include into their contract ***changed circumstances clauses.*** The doctrine of changed circumstances has developed in a light of the paramount principle of contract law (pacta sunt servanda), although application thereof and the equilibrium between statutory and contractual provisions regarding the institute of changed circumstances is not so clear.

In the case of changes in circumstances relief in international commercial practice arises under force majeure (total impossibility of contract performance) and hardship doctrines. Hardship is the institute which deals with occurrence of events which change the economic balance of the contract (contractual equilibrium) to such extent, that its performance becomes more onerous to one of the parties without rendering it absolutely impossible[4]. The concept of hardship in the light of contractual regulation is the object of this master thesis and research. Doctrine of force majeure which renders performance absolutely impossible (total impossibility of performance) is not an object of the thesis.

In connection with a particular concern of this thesis, the doctrine of changed circumstances with regard to contractual provisions on the exemption of hardship is going to be analyzed alongside different types of clauses dealing with changed circumstances. What legal effects the incorporation of these clauses might bring to contractual parties? How a particular equilibrium between contractual provisions regarding changes in circumstances and *rebus sic stantibus* derived by law can be assessed? How free are contractual parties to regulate their rights

[1] Konarski, H. Force majeure and hardship clauses in international contractual practice. International Business Law Journal (4), 2003, P. 406

[2] Zimmermann , R. The law of obligations. Roman foundations of the civilian tradition (1 ed.), Great Britain, 1996. P. 576

[3] Houtte, H. V. Changed Circumstances and Pacta Sunt Servanda. Transnational Rules in International Commercial Arbitration (ICC Publ. Nr. 480/4), Paris 1993, P. 109// http://www.trans-lex.org/117300; [accessed: 06 12 2013]

[4] Konarski, H., *supra* note 1, P. 407

and obligations by including certain clauses dealing with changed circumstances? A more penetrating question is whether hardship clauses may accomplish something more when parties could achieve by post-contractual modification?[5] To all of those and more questions author is going to answer in this thesis.

Novelty and relevance: The institute of changed circumstances regarding hardship has been particularly analyzed by international scholars. Certainly, the institute of *rebus sic stantibus* is significant concern employed by contract drafters, practitioners, professors and other experts. Since the institute of hardship has become known internationally (first time was included in 1969 in Vienna Convention on the Law of the treaties[6]), the doctrine of changed circumstances appeared as a subject matter by many international authors, such as, M. Fontaine, Ch. Brunner, H. Konarski, K. P. Berger, H. V. Houtte, W. Melis, H. Ullman and others. In a meantime, in Lithuania there are not so many comprehensive legal researches regarding hardship. It may be noted the most profound analysis, such as, doctoral dissertation (in 2012) by doc. dr. P. Zaposkis regarding „The impact on change in circumstances on the performance of contract", the joint article by Swiss prof. Daniel Girsberger and doc. dr. P. Zapolskis concerning contractual equilibrium under hardship exemption in different legal systems, as well as, the article by doc. dr. E. Baranauskas and P. Zapolskis regarding the effect of changes in circumstances on contract performance.

Nevertheless, particular concerns by authors, in principle, are based on the doctrine of hardship by statutory law provisions. We can not find any comprehensive analysis on contractual provisions of hardship alongside other clauses dealing with changes in circumstances, the differentiation between them, the need and relevance in international contractual practice thereof.

Problem. A middle or long-terms contract undertakings usually run the risks of being subject to a change of circumstances[7]. To mitigate the loss and unforeseen consequences by occurrence of certain unforeseen events distorting contractual equilibrium, contractual parties may apply either statutory, or contractual provisions regarding situation of hardship. Although, the application of hardship clauses varies and depends on the legal systems and applicable laws parties to a contract may apply. Indeed, hardship clauses appeared in the context of rigid approach maintained by courts and tribunals towards changes in circumstances outside a contract (*rebus sic stantibus*), in order to avoid unfavorable applicable law rules regarding situation of hardship. However, parties to a contract may face with situation when it is not clear which of contractual or statutory rules is better to apply: hardship clauses or hardship exemption under applicable laws.

[5] Ullman, H. Enforcement of Hardship clauses in the French and American Legal system. California Western International Law Journal, 1988-1989, Vol.19, Issue 1, P. 82

[6] Vienna Convention on the Law of Treaties of 1969// http://www.trans-lex.org/500600; [accessed: 25-06-213]

[7] Fontaine, M., De Ly, F. Drafting international contracts: An analysis of contract clauses. Leiden Boston: Martinus Nijhoff Publishers, 2009. P. 455

Accordingly, the need of contractual provisions on hardship and an interrelation between contractual and post-contractual regulation of hardship is worth particular concern.

Object. The institute of changed circumstances regarding its contractual regulation and place in contractual practice: drafting and incorporation of international commercial contract clauses dealing with changed circumstances, interpretation and court practice regarding application of the doctrine. The institute of changed circumstances is limited to the situations of *hardship* (*rebus sic stantibus).*

Hypothesis. Parties to an international commercial contract enjoy enhanced legal certainty and better protection of their rights and legitimate interests by inclusion of changed circumstances clauses while superseding statutory law provisions corresponding to hardship.

Goal. Systematically to analyze the doctrine of changed circumstances with regard to situation of hardship, and to define the role of contractual regulation due to changes in circumstances in connection with different national laws, international private law instruments and court practice.

Objectives: In order to achieve the main purpose of the research, hereinafter, following objectives:

1. To analyse the need of incorporation of hardship clauses into international contracts under different international private law instruments (soft-law codifications);
2. To examine the need and recognition of hardship clauses in civil and common law traditions;
3. To distinguish hardship clauses, on the one hand, and other clauses dealing with changed circumstances, on the other hand, simultaneously, to examine court practice and ruling by arbitrators while interpreting hardship clauses;
4. To examine the most problematic aspects while drafting contractual provisions regarding hardship and define the main risks and consequences contractual parties may encounter by incorporation of hardship clauses;
5. To define an equilibrium between contractual and statutory law provisions regarding hardship (interrelation between principle of *pacta sunt servanda* and *rebus sic stantibus*);
6. After the analysis to outline the main advantages and shortcomings by application of contractual terms regarding changes in circumstances and, thereby, to provide a recommendation for the application of the clauses dealing with changed circumstances.

Methods: Pursuant to the purpose of the thesis and the objectives set above, follows different methods used in the research:

1. *Systematic* – used by analyzing contractual and statutory law provisions, their interrelation and equilibrium;
2. *Comperative* – used by comparing different legal systems and court practice with regard to the recognition of the institute of changed circumstances, as well as, comparing different private law codifications and national laws dealing with changes in circumstances;
3. *Historical* – used by analyzing the development theory of hardship exemption and different court approaches towards application of the doctrine concerning certain periods of time;
4. *Linguistic* – used to comprehend legal acts and formulation of court rulings;
5. *Inductive* – used by construing conclusions of the thesis and determining the place of contractual hardship provisions in contractual practice;
6. *Document analysis* – used by the examination of periodical articles, codifications and other legal documents ir order to ascertain their content and essence.

Structure: Master thesis consists of: introduction, enunciation part comprised by three chapters divided into subchapters, conclusions. In the end of the thesis are provided the list of literature and summaries in English and Lithuanian languages.

1. THE NEED OF HARDSHIP CLAUSES

1.1. General definition of hardship: development of theory

The general rule of the contract law is binding character of contract. Since the Roman times it has been important to assert the principle of consensualism: „All pacts are binding, regardless of whether they are clothed or naked"[8]. The principle of *pacta sunt servanda* is the basic principle of contract law, whose binding character of a contractual agreement obviously presupposes that an agreement has actually been concluded by the parties and that the agreement reached is not affected by any ground of invalidity[9]. The principle is included into general provisions of UNIDROIT principles of International commercial contracts, the article 1.3. states: „A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles"[10]. Moreover, the principle *pacta sunt servanda* or, in other words, the principle of sanctity of contracts, is recognized by international practitioners as one of the fundamental rules of contract law, which is present in common, civil law and Islamic law systems[11], as well as, is recognized as reflecting natural justice and economic requirements because it binds its promises and protects the interest of the promise[12]. The value of transnational principle is also included into the context of *Lex mercatoria*[13], which is frequently applied by arbitrators as they have to apply the terms of the contract which parties have agreed upon. For example, for disputes with a state entity or state party, arbitrators often rely on principle of *pacta sunt servanda* and those contracts are generally submitted to international law rules, which also include principle of sanctity of contracts[14]. One of the arbitration rulings reflecting the importance of this paramount principle was the Sapphire v. National Iranian Oil Company award, where the arbitrators expressly stated: „It is a fundamental principle of law, which is constantly being proclaimed by international courts, that contractual undertakings must be respected. The rule *pacta sunt servanda* is the basis of every contractual

[8] Zimmermann, R., *supra* note 2, P. 576
[9] UNILEX on United Nations Convention of International sale of goods (CISG) and UNIDROIT principles of international commercial contracts (UNIDROIT)// http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1; [accessed: 24 06 201]
[10] Principles of International commercial contracts. Published by the International Institute for the Unification of Private Law(UNIDROIT), Rome, 2004, P. 10
[11] Zaccaria, E. Ch. The effects of changed circumstances in International Commercial Trade. International trade and Business law review, 2005, Rev. 135, P. 135
[12] Mascow, D. Hardship and Force majeure. American Journal of Comparative Law, summer 1992, Vol. 40, Issue 3, P.657
[13] Zaccaria, E., *supra* note 11, P. 135; Houtte, H. V., *supra* note 3, P. 109
[14] Houtte, H. V., *supra n*ote 3, P. 110

relationship"[15]. Arbitrators have emphasized tradition approach of the right to conclude contracts as one of the primordial civil rights and the essence of "commercium" or "jus commercii" of the Roman "jus civile" whose scope was enlarged and extended by "jus gentium", which was always considered as security for economic transactions and even extended to the field of international relations[16].

Nevertheless, in today's technological societies we start to have needs for more flexible regulation to ensure cooperation in complex and long-terms networks, thus the absolute dominance of the principle of pacta sunt servanda was slowly shifted to the relative one[17]. Notwithstanding the importance of the principle of sanctity of the contract, there are many situations when this principle might bring harmful effects to the parties and viability of the contract. One of the clear examples of harmful effects by rigorous application of the pacta sunt servanda principle is reflected in long term contracts by appearance of unexpected circumstances which make performance of the contract excessively onerous for one of the parties, fundamentally altering the equilibrium and resulting in an unfair advantage for the other party[18]. Changes in circumstances used to be very common and relevant subject matter in modern day international trade with economic fluctuations and rapid changes in political and economic environment. One of the classic examples of long term contracts and fluctuations in price could be the petroleum industry, where the duration of contracts makes them particularly susceptible to political or economic influences which are unforeseeable at the time of contract conclusion[19], investment and other types of commercial nature contracts. Indeed, the development of the sanctity of contract, reflecting stability of contract, towards flexibility due to changes in circumstances should be underlined.

Historically, unexpected situation, or bettern known, changes in circumstances which make one of the contractual parties to be in more onerous or disadvantage position than the other one, is better known as *hardship* or *rebus sic stantibus*, notion deprived from canon law. The meanining of clausula *rebus sic stantibus* is that all contracts are binding as long as and to that extent that matters stay the same as they were at the time of the contract coming into force[20], which also means, that a contract contain an implied term (clausula) that certain important circumstances must remain

[15] Houtte, H. V., *supra* note 3, P. 108; Liamco v. The Government of the Libyan Arab Republic, Yearbook Commercial Arbitration(YCA), April 12 of 1977, P. 101// http://translex.uni-koeln.de/261400; [accessed: 25 06 2013]
[16] Liamco v. The Government of the Libyan Arab Republic, *supra* note 15, P. 101
[17] Doudko, A. G. Hardship in contract: The Approach of the UNIDROIT principles and Legal Developments in Russia. Uniform Law Review, 2000, Vol. 5, Issue 3, P. 487, 493
[18] Zaccaria, E. Ch., *supra* note 11, P. 135
[19] Berger, K. P. Renegotiation and Adaptation of International Investment Contracts: The role of Contract Darfters and Arbitrators. Vanderbilt Journal of Transitional Law, October 2003, Vol. 36, Issue 4, P. 1348
[20] Baranauskas, E., Zapolskis, P. The effect of change in circumstances on the performance of contract// Jurisprudence. 2009, Nr. 4 (118). P. 198

unchanged[21]. Clausula *rebus sic stantibus* is present in many national legal systems and also known as international law principle and a part of *Lex mercatoria*[22].

Whereas a brief overview of development of hardship theory is made, subsequently, the main crititerions for situation of hardship to arise have to be outlined. Contractual parties in order to be exempted from performance (on temporary basis) of a contract due to situation of hardship have to fulfill the main criterions correspondend to: the occurrence of events appeared just after conclusion of a contract, which fundamentally alters the equilibrium or the contract, because the cost of a party's performance has increased or the value of the performance the party receives has diminished, hereinafter:

a) Events occur or become known to the disadvantaged party after the conclusion of the contract (time factor);
b) The events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract (unforseeability);
c) The events are beyond the control of the disadvantaged party (beyond control);
d) The risk of the events was not assumed by the disadvantaged party (assumption of risk)[23].

In order to reveal the main goal of the analysis and to limit the research object to the contractual provisions of changed circumstances under hardship exemption, the author is not going to describe the criterions for the hardship to arise, regarding that they are going to be analysed in the following chapters regarding contractual provisions on hardship. In fact, it should be noted that by defining the occurrence of unexpected events which leads to the disparity situation, certain effects for the contract performance may arise – renegotiation or termination of contract. The right to request for renegotiations, which does not itself entitles a disadvantage party to withhold performance, and the main purpose to restore the equilibrium of the contractual parties, are considered as substantial criterions which differs two familiar concepts of the institute of changed circumstances - *force majeure* and *hardship*. Legal effects and peculiarities of duty to renogiate are going to be analyzed in the context of contractual hardship provisions.

To summarize aforesaid, following development of hardship theory we may assume that situation of hardship (rebus sic stantibus) has developed as the the supplement to the overriding principle of contract law (pacta sunt servanda). Indeed, evaluation of *pacta sunt servanda* reflects the way in which the paramount principle is adjusting to the changing economic and moral climate,

[21] Fucci, F. R. Hardship and Changed Circumstances as Excuse for Non-Performance of Contracts: Practical Considerations in International Infrastructure Investment and Finance. American Bar Association, Section of International Law, Spring Meeting – April 2006, P. 3
[22] Houtte, H. V., *supra* note 3, P. 115
[23] Principles of International commercial contracts , *supra* note 10, P. 183

[24], however, the interrelation between the excuse of performance by using the contractual provisions on hardship (as reflecting the power of the paramanout principle of *pacta sunt servanda*), or *rebus sic stantibus* under applicable law rules, is not revealed yet. Prior to examination of international commercial contract clauses dealing with certain changes in circumstances, brief overview of hardship exemption under international applicable law instruments should be rendered.

1.2. Incorporation of contractual hardship provisions under applicable law (soft-law codifications)

In a previous subchapter the definition of hardship is revealed in the context of the general principle of *pacta sunt servanda*. However, the interaction between the principle of *pacta sunt servanda* and its exemptions has been specifically addressed by significant private „soft law" codifications of contract law principles, especially, the UNIDROIT principles of the International Commercial Contracts (further – UNIDROIT or UPICC), the Principles of European Contact Law (further – PECL)[25], 1980 United Nations Convention on Contracts for the International Sale of Goods (further – CISG) and other international and national legal instruments. With regard to the object of this thesis and a scope of analysis concerning international contracts, national applicable law rules and its provisions of hardship is not going to be a subject matter of this paragraph. The main concern of the subchapter is briefly to analyse international private law instruments, which according to prof. Ch. Brunner reflected a marked shift away from formal rule - making by international formulating agencies to more flexible private codifications efforts[26]. Thus, in order to analyze the contractual provisions of hardship and their place in contractual regulation is necessary to examine the role of hardship institute and incorporation of hardship clauses under international private law instruments which are widely used for contract drafters as soft law codifications.

As concerns, in international transactions it is often appropriate to examine force majeure and hardship defences in light of generally accepted contract principles and international (arbitral) case law to the extent that this appears to be possible under the applicable law[27]. Indeed, national laws often give the judge (and by extension the arbitrator who may be applying them) wide powers to interpret contractual provisions and to apply them to the fact pattern at hand and international arbitrator, determining whether an alleged event of hardship was truly unavoidable, he does so in

[24] Doudko, A. G., *supra* note 17, P. 492
[25]The Principles of of European Contract Law. Prepared by the Comission on European Contract Law, 1995, article 3.109//http://www.jus.uio.no/lm/eu.contract.principles.part1.1995/3.109.html; [accessed: 15 09 2013]
[26] Brunner, Ch. Force majeure and hardship under general contract principles: exemption for non-performance in international arbitration. International arbitration law library. Wolters Kluwer law and business, Netherlands, printed in Great Britain, 2009, P. 2
[27] Brunner, Ch., *supra* note 26, P. 4

the light of all circumstances[28]. However, when those circumstances pertain to an international transaction, involving foreign states, foreign languages and foreign currencies, a type of jurisprudence is generated by repeated decisions dealing with similar transnational patterns which cannnot be derived from a purely national context[29], concerning it, particular need of transnational rules regarding hardship is emphasized.

One of the most important international instruments regarding hardship institute is UNIDROIT principles. The UNIDROIT principles (article 6.2.2.) embody the most developed approach to hardship regulation to date, expressly outlining that the application of hardship provisions first of all maintain the observance of pacta sunt servanda as a general rule, where only the dramatic change in circumstances may lead to imbalance the normal risks of contract[30]. According to prof. J. M. Perillo the concept of hardship stipulated in the UNIDROIT is rather complex because is not only defines the nature of the burden, but also other factors that must coexist with the burden to make it legally relevant[31]. For example, a predicate to legally relevant hardship: „the occurrence of events fundamentally altering the equilibrium of the contract either the cost of the party's performance has increased or the value of the performance a party receives has diminished"[32], according to professor is complicated, since we do not know when this equilibrium of the contract is fundamentaly changed?[33] The same condition for a hardship to arise in the UNIDROIT is interpreted by prof. B. Lehberg who defined it as limiting the scope of the application of the hardship clause[34], when is not clear whether it is enough that the value of the performance has diminished for the party who receives it or if objective standards have to be used[35]. However, prof. A. G. Doudko this objective criterion „whether an alteration is fundamental" determined as focusing on the impact of changed circumstances of contractual obligations. Moreover, professor noted that even the definition of hardship stipulated under the Principles reflects changes in circumstances through the objective terms of contractual equilibrium, it means that it focuses on the impact of changed circumstances on contractual obligations[36]. By commentary of the article 6.2.3 of the UNIDROIT we also may find that concept of hardship is described as of rather general character, hence hardship clauses incorporated into international commercial contracts often contain even more precise and elaborate provisions causing for the parties to find

[28] Brunner, Ch., *supra* note 26, P. 4
[29] Craig, W. Laurence/Park, William W./ Paulsson, Jan. International Chamber of Commerce Arbitration (3rd ed.). Dobbs Ferry, 2000, P.638; Bruneer Ch., *supra* note 26, P. 4
[30] Doudko, A. G., *supra* note 17, P. 494
[31] Perillo, J. M. Force majeure and hardship under the UNIDROIT principles of International Commercial Contracts. Tulane Journal of International and Comparative Law, 1997, Vol. 5. P. 22
[32] Perillo, J. M., *supra* note 31, P. 22
[33] Ibid.
[34] Lehrberg, B. Renegotiation clauses, the doctrine of assumptions and unfair contract terms. European Review of Private Law, 265 (1998), P. 277
[35] Lehrberg, B., *supra* note 34, P. 277
[36] Doudko, A. G., *supra* note 17, P. 495

appropriate provisions on specific transaction[37]. However, the rules of contract interpretation corresponding to the article 4.6 of the Principles, establish the rule of *contra preferendum*[38], which means that party supplying terms in a contract bears a risk of possible lack of clarity of contract formulation the party choose[39]. Nevertheless, with regard to contractual hardship provisions, author just may interprete, that contractual regulation of hardship would be also interpreted with a reference to contra pereferendum rule. To resume, first of all, Principles stress the importance of the paramount contract law principle (pacta sunt servanda) and just in exceptional circumstances refers to an application of hardship outside the will of parties. Nevertheless, even the priority of contract rule is stressed in the first place, the incorporation of hardship clauses is not particularly stipulated. Accordingly, a question, how Principles would deal in the conflict of contractual and statutory law provisions regarding hardship, stay opened.

Furthermore, in the uniform sales law, in other words, Convention regarding international sales of goods (CISG), the article 79 is interpreted as the principle provision governing the extent to which a party is exempted from liability for a failure to perform any of his obligations due to an impediment beyond his control[40]. It corresponds to domestic systems' concepts of force majeure, frustration, impossibility of performance, commercial impracticability, etc.[41]. In fact, aforementioned article of CISG governs impossibility of performance and is debatable whether a disturbance which does not fully exclude performance, but makes it considerably more difficult or onerous (e.g. change of circumstances, *hardship*, economic impossibility <…>) can be considered an impediment, thus calling for the application of CISG article 79[42]. According to prof. D. Mascow the principle of hardship cannot be said to have reached the breakthrough in the international level, in particular, it has not found its expression in CISG, though attempts were made to introduce such a provision[43]. Likewise, prof. D. Flambouras by analyzing the doctrine of clausula rebus sic stantibus in the context of CISG has emphasized that the problem is created there exist no specific provisions in the CISG that allow renegotiation or adaptation of the contract in the cases of economic impossibility, impracticability or hardship and the article 79 of CISG applies unless the

[37] Principles of International Commercial Contracts. International Institute for the Unification of Private law (UNIDROIT), *supra* note 10//http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1[accessed: 12 11 2013]
[38] Principles of International Commercial Contracts. International Institute for the Unification of Private law (UNIDROIT), *supra* note 10// http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13636&x=1; [accessed: 07 12 2013]
[39] Official Comment on the article 4.6 of Principles of International Commercial Contracts// http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637; [accessed: 07 12 2013]
[40] Flambouras, D. P. The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law – A Comparative Analysis. Pace International Law Review, 2001, Vol. 13, Issue 2, P. 263
[41] Flambouras, D. P., *supra* note 40, P. 263
[42] Flambouras, D. P., *supr*a note 40, P. 277
[43] Mascow, D., *supra* note 12, P. 658

contracting parties have otherwise provided pursuant to CISG article 6[44]. According to professor the party who want to invoke an exemption of hardship, usually exclude the application of the Convention, or subject to article 12, derogate from or vary the effect of any of its provisions[45]. Consequently, it will normally be a case and CISG article 79 will wholly or partly be excluded, since the contracting parties in international trade are normally very experienced and aware of the risks involved[46]. Therefore, because of the fact that an application of hardship under the Convention is rather problematic, contractual parties are likely to include special clauses in their contracts, use pre-drafted contracts or use general terms specific to particular trade[47], for example, hardship or force majeure clauses, addressing to contractual regulation. In particular, it concerns the inclusion of hardship clauses in order to avoid rigorous interpretion of exemption rule regarding situation of hardship. Accordingly, we can not find provisions on hardship clauses, as concerns, that even regulation of hardship institute under Convention is under discussion.

Another set of principles setting basic principles in the field of contract law is Principles of European Contract law (PECL). The same way as it was mentioned regarding UNIDROIT, PECL also in the first place provide the principle of contract freedom[48]. Parties' autonomy right is defined with regard to basic terms of contract which are agreed upon parties of a contract and gaps stay for the parties to fill[49]. Changed of circumstances concept lies in the article 6:111, which used to invoke an extensive academic discussion between application of UNIDROIT principles and PECL, because article 6:111 provides for the change of circumstances[50], which encompasses almost the same criterions stipulated under UNIDROIT. According to prof. M. V. Roussum the principle of *pacta sunt servanda* is a starting point, which might be replaced by the doctrine of changed circumstances just in case if performance became excessively onerous[51]. The requirement for performance to become excessively onerous is considered as more reflecting the doctrine of changed circumstances when it does UNIDROIT, which under requirement of „fundamental alteration" establishes a risk to be abused[52]. Grounds for an excuse of performance is almost the same as provided in UNIDROIT, however, PECL do not provide with the requirement of the event beyond the control of aggrieved

[44] Flambouras, D. P., *supr*a note 40, P. 283
[45] Convention on Contracts for the International Sale of Goods. United Nations Comssion on International Trade Law (CISG), New York, 2010, article 6// http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf; [accessed: 06 12 2013]
[46] Flambouras, D. P., *supr*a note 40, P. 283
[47] Ibid.
[48] The Priciples of European Contract Law. Prepared by the Commision on European Contract Law, 1999, article 1:102//http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm; [accessed: 07 12 2013]
[49] Roussum, M. V. The principles of European Contract law, A Review Essay. European and Comparative Law, (69) 1996, P. 75; The Priciples of European Contract Law, *supra* note 48, article 2:101
[50] Flambouras, D. P., *supr*a note 40, P. 286; The Principles of of European Contract Law. Prepared by the Comission on European Contract Law, 1999, article 6:111//http://www.trans-lex.org/400200; [accessed: 15 09 2013]
[51] Roussum, M. V., *supra* note 49, P. 78
[52] Baranauskas, E., Zapolskis, P., *supra* note 20, P. 123-124

party and speaks more of hardship rather than changes in circumstances[53]. Subsequently, the article of 3:109 of the European principles (1995) deals with the subject of clauses which limit or exclude liability, which are outlined as widely recognized throughout the various European legal systems and is frequently used by business practice, whereas such exemption or exclusion clauses are principally considered valid in all EU Member States, there are important restrictions on their validity[54]. However, we may not find specific provisions regarding hardship clauses, the incorporation thereof could be just interpreted with regard to the parties' autonomy right corresponding to the principle of *pacta sunt servanda*. Therefore, we may assume that under the European contract principles parties are generally free to limit or exclude contractual terms, nevertheless, the particular insertion of hardship clauses to contracts Europe-wide is not stipulated.

Besides the main soft law instruments which are considered as the general principles of commercial contracts, it may be also mentioned other important guides for lawmakers and drafters of commercial transactions. While drafting commercial contracts, parties may use model clauses, as ICC Hardship Clause 2003, which might be applied to any contract by the reference or expressly[55]. ICC Hardship Clause 2003 (repealed ICC Hardship 1985) is largerly taken from article 6.2.1. of the UNIDROIT Principles, starting with the contractual duties[56], and referring basically the same conditions for hardship to arise as in the Principles, with exeption of the requirement of „fundamental alteration" , which is replaced by the requirement of „exessively onerous"[57], which seems to be less problematic for situation of hardship to invoke. The clause mainly refers to negotiation of contractual terms and eventually, termination of a contract, without refference to a court or tribunal, thereby, giving for contractual parties an incentive to work out their own solution through renegotiation[58]. However, the right to incorporate model clause belongs to contractual parties, which is construed as framework of flexible rules to insert their own requirements[59].

Another list of rules which may be noted, is the UNICITRAL Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works, where hardship is described as the term which is used to describe in economic, financial, legal or technological factors which causes serious adverse economic consequences to a contracting party, thereby rendering more difficult the performance of his contractual obligation[60]. Besides, it refers for the renegotiation procedure to

[53] Roussum , M. V., *supra* note 49, P. 78-79
[54] Ibid, P. 81
[55] ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003. ICC Publication No. 650//http://www.trans-lex.org/700700; [accessed: 07 12 2013]
[56] ICC Force Majeure Clause 2003 and ICC Hardship Clause 2003, *supra* note 55.
[57] Baranauskas, E., Zapolskis, P., *supra* note 20, P. 124
[58] Brunner Ch., *supra* note 26, P. 506
[59] International Chamber of Commerce (ICC): The Worls Business Organization. Model Contracts and Clauses// http://www.iccwbo.org/products-and-services/trade-facilitation/model-contracts-and-clauses; [accessed: 07 12 2013]
[60] UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, 1988, P. 241

adapt the contract to the new situation created by the hardship[61]. Concerning the inclusion of hardship clause, it is considered to have an advantage in case if a change of circumstances results in serious adverse economic consequences to a party, however there is still opportunity to renegotiate even in the absence of a hardship clause[62]. The other list of principles, TLDB (CENTRAL's Transnational Law Digest & Bibliography), may be noted as well, which provide with a black letter text and references taken from international arbitral awards, international conventions, standard contract forms, trade practice and usages,[63] etc. Certainly, there are more important guides used for contract drafters and practitioners as framework for users while drafting the contracts of commercial nature.

To conclude aforesaid above, transnational rules dealing with provisions on hardship in the first place refer to the paramount principle of pacta sunt servanda and allow application of the doctrine of changed circumstances due to exceptional circumstances. Notwithstanding the fact, that parties‘ autonomy right under UNIDROIT and PECL is placed as priority, the incorporation of contractual hardship provisions and its interrelation with applicable law rules regarding hardship is not particularly stipulated. CISG do not provide with the rules for incorporation of hardship clauses, since the application of hardship exemption under Convention is rather questionable. Nevertheless, the gap in the Convention regarding the exemption of hardship has encouraged contractual parties, while drafting contract regarding international sales of goods, to include hardship clauses and thereby to gain relief due to changes in circumstances. Additionaly, we could interprete that regarding parties‘ autonomy right implicated in UNIDROIT and PECL contractual parties may favour the inclusion of hardship provisions to their contract than applying hardship exemption under applicable law rules, however, an interrelation between applicable law and contractual provisions of hardship is going to be further analysed.

1.3. The need and recognition of hardship clauses in different legal systems

To begin with, consider the following scanario: „*A French electric company decides to build a new electric plant. It receives a long–term commitment from an American oil supplier with whom it has a long–standarting relationship. The American oil company views the long-term contract as a means to finance an ongoing oil exploration project. However, the oil company is considered about fluctuation in the price of oil and want to incorporate some flexibility into the contract. The French electric company is willing to absorb some increase in cost so long as its oil*

[61]UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, 1988, P. 242

[62] UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, 1988, P 243

[63] Brunner, Ch., *supra* note 26, P. 21

supply is uninterrupted"[64]. The concern of this subchapter is to examine the enforceability and recognition of hardship clauses under civil law and common law systems.

1.3.1. Civil law approach

Civil law systems under the heading *clausula rebus sic stantibus* have dealt with the problem of changed circumstances for centuries because the parties used to accept the risk that circumstances existing at the time of conclusion of a contract might change in a time[65]. Indeed, in civil law countries it used to be common that only a fundamental change in circumstances could be used as grounds for avoiding or adjusting a contract by the court[66]. Prof. Ch. Brunner describing the evaluation of the principle of rebus sic stantibus in civil law systems noted that basically those countries adhere to the principle that a party must bear the risk to such extent that performance may be subsequently become more difficult, as a subject to a „limit of sacrifice"[67]. To answer the question raised above and to reveal the main purpose of this paragraph we should analyse the enforceability and recognition of hardship clauses in French and German legal systems as the main representatives of civil law tradition.

It have to be noted, that under the French law the line is drawn between, on the one hand, the impossibility of performance that is, force majeure, and, on the other hand, circumstances which destabilize the contract where economic conditions are such that fundamental and far-reaching changes occur, which is called the doctrine of imprevision[68]. The French Civil Code of 1804 did not provide for a defence on a change circumstances[69], besides the doctine of imprevision, that is the doctrine of „unforseen events", that is lack of foresight, is in French law only accepted under exceptional circumstances[70]. For example, if the circumstances which the parties agree to recognize as unforeseeable are not expressly and clearly stipulated in the given contract, the judges will not agree to adjust the terms of the contract, except in the contracts where administrative law would be applied[71]. The article 1134 of the French Civil Code, according to prof. A. H. Puelinckx, who made comparative analysis of the hardship institute in different legal systems, was described as binding the parties of the contract not just to what they commit themselves to, but also to what custom

[64] Ullman, H., *supra* note 5, P. 81
[65] Brunner, Ch., *supra* note 26, P. 401
[66] Ibid.
[67] Ibid, P. 402
[68] Puelinckx, A. H. Frustration, Hardship, Force Majeure, Imprevision, Wegfall der Geschafstgrundlage, Unmoglichkeit: A Comparative study in English, French, German and Japanese Law. Journal of International Arbitration, (47) 1986, P. 55
[69] Brunner, Ch., *supra* note 26, P. 404
[70] Puelinckx, A. H., *supra* note 68, P. 56
[71] Ibid.

stipulates and to what equity prescribes[72]. Hereinafter, an interesting opinion of the Court d'Appel of Paris, in 1978, on the matter in E.D.F. v. Shell Franfaise*:* „*Several oil companies signed a long term contract with E.D.F. for the supply of fuel oil for thermal Power stations. A price revision clause was inserted to the effect of linking the price to a rather complicated index system. However, the price of crude oil jumped so high after the Kippour war that the index formula left E.D.F. nevertheless with a substantial loss, in the case of having to perform the contract"*[73]. The court in the case declared the absence of a suitable revision formula although the parties declared their intention „to meet in order to study possible modifications"[74]. Furthermore, the interpretation of contracts in French law is governed by articles 1156-1164 of the Civil Code, where the centerpiece is the article 1156, under which the main intention of the parties should be taken into account while interpereting the contract[75]. Prof. H. Ullman by analysing the enforcement of hardship in French system noted, that the balancing a broad interpretation under article 1156 is the doctrine of *clause claire et precise,* which states that a clear and precise clause is interpreted under its plain meaning[76]. According to professor this doctrine may be in favour for a buyer to achieve a narrow interpretation of a hardship clause, as for example: "*the seller's costs rise three percent beyond the cost foreseen by an indexation clause, and the hardship clause speaks only of a hardship beyond a five percent rise in costs calculated by the indexation clause. The buyer would argue that the hardship clause is of clause claire et precise, triggered by a five percent increase in cost"*[77]. For long-term sales contracts the most significant rule is article 1602 of French Civil Code[78], which states that vague and ambiguous phrases will be construed against the seller [79]. Actually, this creates the difficulty for the seller, who is most often the party claiming hardship[80], so the seller's attorney must skillfully draft a clause broad enough to encompass all aspects of conceivable hardship but narrow enough to avoid invoking article 1602[81]. Recently, however, there are signs in the case law of the highest court

[72] Puelinckx, A. H., *supra* note 68, P. 57
[73]Puelinckx, A. H., *supra* note 68, P. 57; Paris Court of Appeals in the case of E.D.F. v. Shell Francaise// http://translex.uni-koeln.de/output.php?docid=128100&markid=944000; [accessed:21 09 2013]
[74] Puelinckx, A. H., *supra* note 68, P. 57
[75] Ullman, A .H., *supra* note 5, P. 86; The French Civil Code, published in Paris, 1804//http://www.napoleon-series.org/research/government/code/book3/c_title03.html#section5a, Book 3, Title III of Contracts or Conventional Obligations in General, Chapter III, Section V: the Intrepratation of Agreements; [accessed: 21 09 2013]
[76] Ullman, H., *supra* note 5, P. 86
[77] Ibid.
[78] The French Civil Code, published in Paris, 1804// http://www.napoleonseries.org/research/government/code/book3/c_title03.html#section5a, Book 3, Title VI of Sales of The Obligations of the Seller, Chapter IV, Section I: General regulations, article 1602
[79] Ullman, H., *supra* note 5, P. 87
[80] Ullman, H., *supra* note 5, P. 87:Hardship clauses are often referred to as "sellers clauses". Yet this in not always a case. In the event of a plunge in the market price of a necessary raw material, or a sharp decline in demand for the buyer's finished product the buyer will find a hardship clause a valuable instrument for renegotiation. In the context of international construction contracts, however, the UNICITRAL Legal Guide concludes that hardship clauses are more advantageous to contractors than the purchasers.
[81] Ibid.

indicating that French law might be on the verge of a change[82], as well as, the practice in transactions shows that very often contracting parties insert into their contracts clauses by means of which they precisely seek to avoid the intransigent position of case law[83], for example, hardship or special adaptation clauses which allow for contract modification[84]. To resume, as concerns hardship clauses, in the disputes between private individuals or companies civil courts are linked to give preference on the principle of party autonomy (principle of pacta sunt servanda), so hardship clauses may be inserted into commercial contracts between private parties and contract may be modified in case if all terms of a contract, as well as, the factual circumstances are pertinent to changed circumstances[85].

The German theory of „Wegfall der Geschafstgrundlage", corresponding to the theory of change of circumstances, was developed by case law on the basis of the BGB (1900)[86]. Under the article 313 of BGB, in case if hardship created by circumstances which have either changed or erroneously assumed at the time of contracting, adaption of the contract may be claimed by the aggrrieved party, consequently, if this is not feasible, termination may be granted as a remedy of a last resort[87]. According to prof. A. Karampatzos by introducing the provision of 313 BGB, the express aim of the German legislator was solely to offer a statutory cover to a doctrine that had already attained the status of „customary law" through its recognition in the case law and academic literature, any thought of constructing at statutory level typical cases of „collapse of the foundation of the contract" was consciously dismissed[88]. Besides, professor adds that the „restatement-character" of this provision conveys the legislator's will not to bring any change in the case law[89]. However, it should be noted that the article 313 of BGB is strictly subisidiary[90]. Professor H. Rosler by analysis of aforementioned article noted that the first means of dealing with unforseen changes should be contractual provisions such as flexible price clauses and construction of the contract itself[91], which means that German law firstly prefers contractual regulation regarding changed circumstances. The legal rules governing rescission (article 119 BGB), impossibilty of performance

[82] Karampatzos, A. Supervening hardship as Subdivision of the General Frustration rule: A Comparative Analysis with Reference to Anglo-American, German, French and Greek Law. European Review of Private Law, 2007, Vol. 15, Issue 4, P.137: Decision of the Court de Cassation of 1992, where the court appears to admit that contractual good faith (bonne foi, art. 1134 p.3) may establish a contractual adjustment, which eveidently must be borne by the party who wishes the contract to be executed on its original terms.
[83] Karampatzos, A., *supra* note 82, P. 138
[84] Baranauskas, E., Zapolskis, P., *supra* note 20, P. 200-201
[85] Ibid.
[86] Brunner, Ch., *supra* note 26, P. 405
[87] Ibid.
[88] Karampatzos, A., *supra* note 82, P. 132
[89] Ibid, P. 133
[90] Rosler, H. Hardship in German Codified Private Law – In Comperative Perspective to English, French and International Contract Law. European Review of Private Law. Kluwer Law International BV, printed in Netherlands, 483 (2007), P. 490
[91] Rosler, H., *supra* note 90, P. 490

(article 275 BGB), and the liability for defects[92], amongst other legal remedies, also take precedence over article 313 of BGB[93]. Accordingly, if this does not provide a solution, a supplementary contract construction (based on articles 157 and 242 of BGB) can be performed by the judge. Generally, such a construction calls for an unintentional gap in the contract that could be closed by recurring to the parties‘ intentions which allows for the bridging of the gap by means of the contract itself, thus, if the circumstances have been a part of the contract, the concept of *Geschafstgrundlage* is not applicable[94]. Summing up observations above, the contractual hardship doctrine codified in the article 313 of BGB is concerned with circumstances outside the actual contract, thus the provision of 313 BGB can only apply when other remedies fail and when the changes in circumstances is outside the realm of the consent of the parties[95], meaning that contract according to statutory law provisions could be modified just in exeptional circumstances and if it was no contractual provisions concerning it. It is notable, that principle of *pacta sunt servanda* remains the main yardstick for contractual relations between parties[96], thus firstly referring to contractual provisions of hardship.

To sum up, we may resume that German aims to share the contractual risk between the parties, thus contractual regulation of hardship takes preference over statutory law provisions and according to applicable laws contract may be modified just in exceptional circumstances. Subsequently, the laws of France maintain the most rigid approach towards contract modification under applicable law rules, in other words, sustain the absolute contract law rule, which encouraged contractual parties to find solution to modify a contract under changed circumstances clauses compatible with circumstances occured.

1.3.2. Common law approach: the doctrines of frustration and impracticability

In order to answer the question raised in the first paragraph of this chapter and to compare the given situation of price fluctuations case having long-term contract between French and American oil companies, the main characteristics of common law system must be ascertained.

To begin, George Bernard Shaw is reputed to said: „England and America are two countries separated by a common language”[97]. In America in the field of the excuse of non-performance three doctrines are applied: physical impossibility (force majeure), frustration of

[92] German Civil Code (BGB), 1896, 18 of August, 447 BGB on Sale, 536 BGB on rent, 634 BGB the manufacturing contract, 651BGB on the travel contract// http://www.fd.ul.pt/LinkClick.aspx?fileticket=KrjHyaFOKmw%3D&tabid=505; [accessed: 11 12 2013]
[93] Rosler, H., *supra* note 90, P. 490
[94] Ibid, P. 491
[95] Ibid.
[96] Baranauskas, E., Zapolskis, P., *supra* note 20, P. 207
[97] Perillo, J. M., supra note 31, P. 6

purpose and commercial impracticability[98]. Indeed, US - American law accepts the principle of "commercial impracticability" according to which a party may be exempted if a result of unexpected supervening events, performance of the contract, though remaining possible, has become severely burdensome for one of the party[99]. Commercial impracticability is considered as the most recent term, where performance is still possible and the purpose of the contract still can be fulfilled[100]. The doctrine of "commercial impracticability" first came to existence in 1916, in the case of *Mineral Park Land Co. v Howard*, when the contract was disputed for hauling gravel and earth from plaintiff land, which was needed by defendant for the construction of the bridge[101]. As concerns, the decision of the court was based on the more flexible approach to the traditional doctrine of impossibility, stating: „A thing is impossible in legal contemplation when it is not practicable, and a thing is impracticable when it can only be done at an excessive and unreasonable cost"[102]. The impracticability test under American law also incorporates the basic distinction set out in UPICC, PECL and found in many civil law systems, between situations where performance of a contract becomes more onerous for one of the parties, and where the occurrence of events fundamentally alters the equilibrium of the contract[103], for example, *Florida Power & Light Co. v. Westinghouse Electric Corp* case, when the court stated: „<...> increased cost alone may constitute impracticability where the increase is due to an „unforseen contingency which salters the essential nature of the performance. <...> The fact that performance has become economically burdensome or unattractive is not sufficient for performance to be executed"[104]. Thus, in applying the impracticability test, American courts have adopted restrictive attitude which must be take into account in the process of determining the relevant threshold test under general contract principles, consequently, contractual parties are encouraged to foresee costs variations, and to structure their agreements accordingly[105]. To resume, American courts maintain quite strict approach towards contract modification according to changes in circumstances, thus contractual parties are rather approached to include special kind of clauses (as hardship clauses) to avoid an occurrence of unforeseen events.

Furthermore, it can be assumed that English law has never known the medieval clausula doctrine[106]. Under English law discharge is sometimes based not on impracticability alone, but with

[98] Declerg, P. J. M. Modern Analysis of the Legal effect of Force Majeure Clauses in Situations of Legal Impracticability. Journal of Law and Commerce, 1995-1996, Vol. 15, Issue 1, P. 215
[99] Brunner Ch., *supra* note 1, P. 408
[100] Declerg, P.J.M., *supra* note 98, P. 216
[101] Ibid, P. 217
[102] Ibid.
[103] Brunner, Ch., *supra* note 26, P. 408
[104] Ibid.
[105] Ibid.
[106] Rosler, H., *supra* note 90, P. 497

regard to this factor combined with impossibility or illegality[107]. However, most importantly, instead of changed circumstances or hardship rule English law tackles the problems by means of the doctrine of frustration, which sets the contract aside if factual or legal circumstances have changed to such an extent that the performance of the parties' contractual obligations has turned out to be drastically different from what they had initially indented[108]. In other words, it can be said that the doctrine is dealing with the situations where events occur after the contract has been concluded which render the agreement illegal, or impossible to perform, or even commercially sterile[109]. The doctrine of frustration reflecting the discharge by supervening events, encompasses the main criterions or subdivisions of the doctrine: a) performance become legally or physically impossible; b) the performance still legally (and physically) possible but the underlying purpose of the contact is no longer attainable, c) performance still legally (and physically) possible, but become economically excessively onerous or more burdensome when anticipated by the parties[110]. Actually, the problem of frustration of contract concerns the effects of supervening changes in circumstances, unforeseen and unforeseeable at the time of conclusion of the contract, on the obligations stemming from a contractual agreement[111], basically corresponding to the situation of hardship. It have to be noted, that the doctrine of frustration has been based on the strict common law approach maintaining "absolute contracts" rule, in other words, "literal performance of absolute promises [112], and is not used broadly. Hereinafter, the case of *Paradine v Jane* (1647), an example which particularly reflects a rule of contract law. As concerns, the action was brought before tenant who claimed that he was disposed for period of two years because of the King's enemies and he is not cliable to pay for the rent, however, the court rejected the plea being based on the "absolute contract" rule[113]. In this regard, we may see that courts used to maintain rather rigid approach towards application of the frustration doctrine. The approach has been mitigated in *Taylor v. Caldwell (1863*)[114] case when it was hired the music hall but before the day of the first concert it was burned by fair without the fault of the parties, subsequently, it has been stated by Blackburn J.: „<…> in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing person or of thing shall excuse the performance"[115]. Concerning the court rulings, the doctrine of frustration began to expand, though it always relied on the basis of implied term because of the

[107] Brunner, Ch., *supra* note 26, P. 409
[108] Rosler, H., *supra* note 90, P. 497
[109] Koffman, L., Macdonald, E. The Law of Contract (Sixth Ed.). Oxford University Press, P. 519
[110] Karampatzos, A., *supra* note 82, P. 106-107
[111] Ibid, P. 106
[112] Koffman, L., Macdonald, E., *supra* note 109, P. 519
[113] McKendrick, E. Contract law. Text, Cases and Materials. Oxford: Oxford University Press (3rd Ed.). 2003, P. 715
[114] Koffman, L., Macdonald E., *supra* note 112, P. 520; McKendrick E., *supra* note 113, P. 716
[115] Rosler, H., *supra* note 90, P.498

continued fiction of equality of bargaining power[116], thus maintaining sanctity of contract. Following already mentioned, it is believed that the notion of implied term started to be included into the contract which binding only if it is incorporated into the contract, meaning the privilege and preference of statutory law – "absolute contract" rule. Subsequently, the traditional court approach towards absolute contract rule was again reflected in the case of *Davis Contractors Ltd. V Fareham UDC*, where both Lord Reid and Lord Radcliffe stated: "there is something of a logical difficulty in seeing how the parties could even impliedly have provided for something which, *ex hypothesi*, they neither expected, nor foresaw"[117], thus again referring to the law of a contract. Nevertheless, it is notable, that traditionally English courts do not have an extensive right to change the terms of contract even after application of the doctrine of frustration[118], in this regard, English law refers to contractual regulation and adaptation of clauses according to which the strict approach towards changes in circumstances outside realm of contract could be replaced.

To conclude, the US – American impracticability test within very narrow boundaries covers hardship situations[119], where the term "frustration" is limited to the situations where it is possible to perform the contract, but performance would be senseless[120]. However, concerning contractual provisions on hardship, as we may notice from the illustrations of English court rulings on the application of the doctrine of frustration, England firmly claims to stand on the traditional rule: "A contract will only be discharged if the substance of it has become impossible or illegal, or the commercial purpose has been completely destroyed"[121], accordingly, referring to contractual regulation of hardship provisions. The same absolute contract rule is in favour under American laws. Despite the fact, that common law system prefers contractual regulation under the doctrine of changed circumstances, in order to avoid the rigorous application of the principle of *pacta sunt servanda*, there is a particular need for contractual parties to know the main pecularities regarding drafting and incorporation of different types of changed circumstances clauses.

Answering to a question by illustration given above, we may assume, that with respect to the absolute contract rule, particularly French and American-English contract drafters have to be aware of the rights and obligations they want to establish under hardship clause due to rigid courts' approach towards application of hardship under applicable law rules and modification of contract according to the „express will of parties". Although German contract drafters are in less complicated situation, still incorporation of hardship clauses requires particular attention and certain requirements to be met. With regard to it, the examination of the main pecularities by incorporation

[116] Richards, P. Law of Contract: The foundation studies in law series (7th Ed.), 2006, P. 329
[117] Richards, P., *supra* note 116, P. 330
[118] Baranauskas, E., Zapolskis, P., *supra* note 20, P. 203
[119] Brunner, Ch., *supra* note 26, P. 419
[120] Declerg, P. J. M., *supra* note 98, P. 216
[121] Perillo, J. M., *supra* note 31, P. 8

of different types of changes circumstances clauses is going to be presented in the second chapter of the thesis.

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II. CHANGED CIRCUMSTANCES CLAUSES AND THEIR ROLE IN CONTRACTUAL PRACTICE

2.1. Hardship, other clauses dealing with changed circumstances and implied terms

We have already determined that in international contract practice the term „hardship" indicates a situation where the alteration of factors, such as, politic, economic, financial, legal or technological results may lead to unfortunate consequences for one of the parties[122]. In this context, even natural conditions can be a factor which has to be taken into account regarding changes in circumstances[123]. The variability of all this factors is attributable to various causes which result starting from natural causes (natural disaster, such as, poor harvests, floods or epidemics), the social and economic conditions of current international systems of commercial activities (e.g., structural crisis, sales crisis, scarcities, price fluctuations) and their consequent effects on commercial policy (e.g., restrictions, protectionist measures)[124]. Certainly, the longer the time lapse between the conclusion and the performance of a contract, the higher the probability that the original balance of the contract will be disturbed by unforseen events[125]. The occurence of changed circumstances, according to prof. H. Konarski, may have various detrimental effects on the contract, ranging from full impossibility to perform, to the situations where performance remains possible but either becomes exessively onerous or ceases to be of any use to the contracting party[126]. Hardship can appear in various different forms: either the purpose of the contract can be fulfilled somehow or other, even despite difficulties, or the object can not be fulfilled in a given time or again the completion of the contract is absolutely impossible, thus parties to international commercial contracts seek to define the different characteristics and effects of above mentioned situations in the different clauses of the contract, and try to deal with this by standard solutions[127].

Accordingly, we shall distinct, on the one hand, contractual provisions of hardship and, on the other hand, other types of clauses dealing with changed circumstances, alongside contractual provisons of force majeure.

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[122] Strohbach, H. Force majeure and Hardship clauses in International Commercial Contracts and Arbitration. The East-German Approach. Journal of International Arbitration. By Kluwer Law International, 39 (1984), P. 39
[123] Strohbach, H., *supra* note 122, P. 39
[124] Ibid.
[125] Firoozmand, M. Z. Changed Circumstances and Immutability of Contract: Comparative analysis of Force Majeure and Related doctrines. International Business Law, 2007, Vol 8, Issue 2, P.162
[126] Konarski, *supra* note 1, P. 406
[127] Strohbach, H., *supra* note 122, P. 39

2.1.1. Composition and definition of hardship clause

To begin with, generally the construction of hardship clause varies from one contract to another because it is essential to adapt it to the particular sector and the type of performance specified[128]. However, there are some general features that characterise these clauses and the aims they embody. First of all, insertion of this clause is an explicit demonstration that the contracting parties are willing to undertake revision of the contract, if unpredicted circumstances make performance of the contract excessively onerous for either one of the parties[129]. Professor W. Peter by analysing arbitration and negotiation clauses has drown a line between hardship clauses and other types of changed circumstances clauses with regard to a hardship clause: „The contemplated event must not only occur, but it must profoundly disturb the balance of the agreement such as to place an intolerable burden on one party if performance would remain unchanged". The analysis of the hardship clause demonstrates[130] that hardship clauses always consist of two main parts: the first part of the clause defines when the clause applies, the second part deals with the effects of hardship[131]. In other words, at the first part, dealing with events, the clause refers to changes in circumstances that must necessarily have occured after the conclusion of the contract, and which must have been unforeseeable at the time the contract was concluded[132].

With regard to different kinds of changed circumstances clauses in international contractual practice they are firstly aimed at restoring the contractual equilibrium[133]. The general type of hardship clause my refer to „economic, political or technical circumstances", as follows: „*if during the performance of this Contract there should arise economic, political or technical circumstances which were unforseen by the parties and are beyond their control, and which make the performance of the Contract so onerous (though not impossible) for one of the parties that the burden would exceed all the anticipatory provisions made by the parties at the time the Contract is signed, such affected party shall be entitled to equitable relief, and may request the revision of the Contract*<...>[134]. The analysis of circumstances indicated in a first part of a clause is often indicated only in general terms, so as to widen its application to include as many cases as possible[135]. There are also some very vague expressions used, such as, „all those circumstances that might endanger the good outcome of the contract" or „for any *boda fide* clause the revenue accruing <...> for this

[128] Zaccaria, E.Ch., *supra* note 11, P. 150
[129] Ibid.
[130] Ibid.
[131] Konarski, H., *supra* note 1, P. 420
[132] Zaccaria, E. Ch., *supra* note 128, P. 150
[133] Konarski, H., *supra* note 1, P. 420
[134] Ibid.
[135] Zaccaria, E. Ch., *supra* note 11, P. 151

transaction is insufficient to meet the costs"[136]. These indicated circumstances are usually of a general economic, financial, commercial and political nature[137]. However, in practice much more specific clauses are also frequently included, which lists all the events that could arise in a given business sector, for example, the following hypothesis: „if the production of steel deriving from haematite sources should reach 20 % of the total production of steelworks X" or „in the case of new import or export law", or „if ordinary crude oil delivered to its destination should increase by more than 6 francs per ton with respect the original price"[138]. The problem might arise to identify the specified clause included in a contract: is it a hardship clause which is rather general and does not include particular risk, or it is other kind of clause typically providing for renegotiation? By defining hardship clause under the UPICC prof. D. Maskow ascertained the fact that the definition of hardship has the form of a general description and not of an enumeration. In its first part it makes clear that hardship, in the narrower sense, is basically a fundamental change of the equilibrium of the contract, although, accordingly is explained in to different ways, either the costs of the disadvantaged party increase or the value of that it has to receive decreases[139]. According to professor the Principles by defining hardship clause have taken the objective approach, that is to say, hardship exist if these objective criterions are observed, and it is not necessary that the parties themselves in a subjective manner have made their maintenance of certain conditions a basis of their relationship[140]. It should be noted, that hardship clauses also are considered as specific type of renegotiation clause, presenting all usual characteristics of renegotiation clauses with regard to procedure and sanctions[141].

The most interesting aspect of the hardship clause lies in the second part of the clause, dealing with the legal consequences deriving from ascertainment of a hardship situation[142]. Some clauses set out criterions for the revision of a contract. Apart from the latter hypothesis, revision of the contract may be the basis, also named as the „clou" of the whole structure[143]. As an example of this element in a clause could be: „to restore the equilibrium between the parties as it was at the time of the conclusion of the contract"[144]. As the prof. H. Strochbach noted that the most hardship clauses have as their aim the renegotiation of some of the contractual terms in order to adapt the contract as a whole to the changes in the situation, thus adaptation can be combined with

[136] Ibid.
[137] Peter, W. Arbitration and Renegotiation Clauses. Journal of International Arbitration. By Kluwer Law International, 29 (1989), P. 33
[138] Zaccaria, E. Ch., *supra* note 11, P. 151
[139] Mascow, D., *supra* note 12, P. 662
[140] Ibid.
[141] Peter, W., *supra* note 137, P. 34
[142] Zaccaria, E. Ch., *supra* note 11, P. 151
[142] Ibid, P. 153
[143] Ibid.
[144] Konarski H., *supra* note 1, P. 420

amendmends or modifications of the contract[145]. The pattern of formulae, as follows, used to be often used by contract drafters: „*the disadvantaged party has the right to ask the other party to participate in a joint excamination of the position, to determine whether revision of the contractual terms is necessary and if so, what revision is suitable in the circumstances*“[146]. According to professor legal effects of such a clause generally depends on the law applicable to the contract: „<..> the whole concept of the effects that a modification of the circumstances can have on the contract and its modified continuance is dependent on this law of contracts“[147]. Thereby, we are faced with the situation where contract law rules in many countries fail to provide an answer to these questions or deal with these matters rather inadequately[148]. Conversely, prof. H. Strochbach added that the contractual freedom of the parties permits them by means of agreements, to develop those kind of rules that they consider necessary themselves or to fill the gaps left in incomplete legal regulations or indeed to substitute such agreements for legal provisions that appear to them inadequate[149].

Concerning duty to renegotiate, is worth to be mentioned that contractual parties are obliged to negotiate but not necessarily to reach an agreement[150]. Parties to a contract may, however, fail to reach, the agreement and in a case where no agreement between the parties can be reached, hardship clauses provide for sanctions. Sanctions are usually the termination of the contract or adaptation of the contract by a third person[151].

As concerns, there are various types of clauses enabling the amendment of the contractual conditions in certain enumerated circumstances, for example, in the event of deviation of the prices (e.g., a price indexation clause if certain events occur, which is typical in long-term delivery contracts), costs, salaries, exhange rates, in the event where one of the parties finds himself able to contract on more favorable conditions with the third party (most favoured client clause) or receives a more favorable offer from a competitor, etc.[152]. Hardship clauses are considered to be found mostly in long-term contracts, typically those dealing with energy[153]. Prof. Ch. Brunner noted: „the risk of costs increases may be addressed by other typical clauses, especially escalator or index clauses, clauses fixing the price on a cost plus basis, most favoured client clauses or market-out clauses, conditioning a party‘s duty to go through with transaction on no material adverse change in

[145] Strohbach, H., *supra* note 122, P. 40
[146] Zaccaria, E. Ch., *supra* note 11, P. 153
[147] Strohbach, H., *supra* note 122, P. 41
[148] Ibid.
[149] Ibid.
[150] Zaccaria, E. Ch., *supra* note 11, P. 154
[151] Konarski, H., *supra* note 1, P. 420
[152] Ibid, P .421
[153] Brunner, Ch., *supra* note 26, P. 513

market conditions"[154]. Under such clauses the alteration of the original circumstances is a result of the occurrence of well specified-event, whose effects on the contract may be often prearranged: immediate indexation, modification of exchange rate, alignment on more favorable conditions offered to third parties[155].

Concluding mentioned above, it should be remembered that certain kind of clauses constitute borderline cases of hardship clauses and it may be disputable, if other types of clauses are regarded as a hardship clause relating to the occurrence of burdensome circumstances or just a simple automatic adaptation clause[156]. The distinction and separation of hardship and other types of changed circumastnces clauses is going to be outlined in the following subchapters.

2.1.2. Renegotiation and adaptation clauses

In contrast to stabilisation clauses, which are aimed at maintaining the rigidity of the contract throughout its course, there is a group of clauses aimed at ensuring that the contractual structure is flexible enough to withstand the changes taking place in the environment in which it operates[157], which we may name as renegotiation or adaptation clauses. Generally, the renegotiation or adjustment of the contract to changed circumstances can be initiated either where the contract contains a renegotiation or adjustment clause, or where the applicable law or other contractual terms provide an appopriate starting point for the renegotiation of the contract[158]. This paragraph focuses on the renegotiation of contracts which contain special provisions dealing with renegotiation or adjustment (adaptation clauses) to be included in international contracts.

To start with, concerning the terminology used for renegotiation clauses, it can be said that is rather confusing[159]. For instance, we may find different formulations of clauses, named as review, revision, renegotiation, adaptation, adjustment, restructuring, resheduling, variation, and so on[160]. According to prof. W. Peter a strict and consistent classification might distinguish between terms that describe the procedure and terms that describe a result, however, such classification would be unusual and may create a risk of misunderstanding or additional difficulties[161]. Indeed, professor gives preference to a classification which is based on the extent of change, that these clauses may produce in the contract and notes that basically, we see three categories:

[154] Konarski, H., *supra* note 1, P. 512
[155] Konarski, H., *supra* note 1, P. 421
[156] Ibid.
[157] Sornarajah, M. Supremacy of the Renegotiation Clause in International Contracts. Journal of Internation Arbitration. By Kluwer Law International, 97 (1988), P. 107
[158] Qurashi, Z. A. Al. Renegotiation of International Petroleum Agreements. Journal of International Arbitration, 2005, 22 (4), P. 261-262
[159] Peter, W., *supra* note 137, P. 30
[160] Ibid.
[161] Ibid.

1. On the one hand, there is a group of provisions that allow contracting changes by following an automatic or predetermined pattern or which are merely designed for the filling of gaps in contracts (named as a group of *adaptation clauses),*
2. On the other hand, there is a group of clauses which produce a radical change, as they normaly terminate or suspend the further carrying out of the contract (group of *force majeure clauses),*
3. In between aforementioned, there are clauses which require a common effort of the parties to agree, for various reasons, to a substantial material change of the contract to an extent usually determined at the time of the conclusion (named as *renegotiation clauses*)[162].

The question arises how to differ them? Renegotiation clauses are considered as specific contractual provisions which differ from adaptation clauses because they authorise changes in a contract without following an automatic or predetermined pattern and serve a purpose that goes beyond the filling of simple gaps,[163] in contrast with, adaptation clause. It should be noted that the possibility to renegotiate can vary between different types of contracts: for example, contracts such as joint venture agreements are often open-ended or flexible, other contracts, such as severence agreements, are fixed once and for all and would counteract their own purpose if they were open for renegotiation[164]. Actually most of contracts are somewhere between these extremes, although the need for renegotiation is considered to be of greater importance in long-term than in short-term contracts[165]. It is sometimes asserted that renegotiation clauses reduce, rather than increase contract stability, for example, contractual parties used to face with a question: „Why should we include a renegotiation clause in our contract? Is it not more stable not to have one?"[166] Before answering the question, is important to emphasize that a professor B. Lehrberg has noted referring to the use of renegotiation clause: „ *If a party at the formation of a contract can foresee that he might have the problem in a future, he has the possibility of proposing a renegotiation clause that gives him the right to renegotiate the contract if his apprehensions are realised. It is up to the other party if he wants to accept a contract that contains a renegotiation clause. To do this he might request some advantages in other respects, e.g. higher (or lower) price, or another renegotiation clause that works in his favour, the party who wishes the renegotiation clause may be willing to agree to this if the clause is of great importance to him*"[167]. Moreover, professor outlined that if a contract does not include a clause for renegotiation, the legal right to renegotiation depends only upon the law which

[162] Peter, W., *supra* note 137, P. 30
[163] Ibid.
[164] Lehrberg, B., s*upra* note 34, P. 266
[165] Ibid.
[166] Peter, W., *supra* note 137, P. 31
[167] Lehrberg, B., *supra* note 34, P. 267

governs that contract[168]. Accordingly, professor W. Peter noted that the existing doctrines on contract change, such as *frustration, commercial impractibility imprevission, Wegfall der Geschafstgrundlage, etc.,* offer hardly any legal ground for renegotiating contracts which do not include a renegotiation clause[169]. Subsequently, prof. J. Y. Gotanda, who made reasearch about renegotiation and adaptation clauses in investment contracts, noted that „perhaps would be better if renegotiation clauses should not be included when one of the parties controls the event that triggers renegotiation and it would be more acceptable for investors to include them if the scope of clause would be limtited just to unforseeable matters"[170]. The benefits of renegotiation clause were ascertained by professor Z. A. Al. Qurashi by investigating the renegotiation of international petroleum agreement stating that „it is idle to freeze the position of the parties for long periods to conditions that become so out of date. Either parties will include renegotiation provisions in their contracts or they will act as if they were there"[171].

Since we know why and when a renegotiation clause is the most useful to be included by the parties to a contract, the main elements of drafting renegotiation clause need to be clarified. Firstly, it should be noted when and under which conditions a renegotiation clause might be applied, in other words, *triggering events for renegotiation[172]:*

1. Some clauses simply identicate a *possibilty to renegotiate,* for example:

1) a sample clause in 1976 Ok-TEDDI copper mining Project in Papua New Guinea formulated as follows: „ The parties may from time to time by agreement in writing add to, substitute for, cancel or vary all or any of the provisions of this Agreement"[173].
2) The other example: „a change in financial and economic circumstances relating to the petroleum industry, operating conditions in Ghana and marketing conditions generally as to materially affect the fundamental economic and financial basis of this Agreement"[174].

Some agreements, instead, account for a *periodic review mechanism*, in which renegotiation is to occur at predetermined points in time[175], for example: „*not less often than 4 years after the commencement of commercial production the parties shall consult together in Liberia for the purpose of considering such changes in or clarifications of this Agreement as either*

[168] Peter, W., *supra* note 137, P. 31
[169] Ibid.
[170] Gotanda, J. Y. Renegotiation and Adaptation Clauses in International Investment Contracts, August 2003, P. 1469
[171] Qurashi, Z. A. Al., *supra* note 158, P. 265
[172] Peter, W., *supra* note 137, P. 32
[173] Ibid, P. 32-33
[174] Qurashi, Z. A. Al., *supra* note 158, P. 289
[175] Russi, L. Chronicles of a Failure: From Renegotiation Clause to the Arbitration of Transnational Contracts. Journal of International Law, Vol. 24 (77), 2008-2009, P. 83

party deems to be appropriate"[176]. Actually, the distinctive feature of such clauses is that the triggering event is not bound to a change in the underlying economic circumstances, thus, the „extent to which the contract will be changed, is independent from the triggering event"[177].

To outline aforesaid, an undetermined trigger such as „profound change in the circumstances" is considered as open to extensive interpretation[178]. Under these conditions both of the examples are very general and create a confusion. As we already know, the aim of the renegotiation clause is to provide an oppurtunity to the parties to restore the contractual equilibrium if previously identified triggering events occur[179]. Therefore, there are triggers that create and even more open-ended clause when the agreement is not continuing to operate fairly to each of the parties[180]. It have to be noted, that under these conditions the renegotiation clause take the legal form of a hardship (or even force majeure) clause because the trigger corresponds to the circumstances usually contemplated by hardship clauses which are similar or identical to the concepts of frustration, commercial impracticability and imprevission[181]. Nevertheless, *hardship clauses* are to be distinguished from *renegotiation clauses*, because the insertion of renegotiation clause certainly do not require the occurence of hardship[182]. Indeed, specific risk or event inticated in a clause are the main elements differing a hardship clause and renegotiation clause. Likewise, the renegotiation clause is considered to be triggered upon the occurence of a particular risk (for instance, particular increase in taxes to be specified even in numbers) and the renegotiation clause may usually not be applied by analogy to other general risks (as hardship clause) unless the general threshold test of hardship exemption is met[183].

2. Another example of renegotiation clauses formulated in an extensive sense, since they incorporate a *determined triggering event to renegotiate*[184]*:*

1) „*The contract will be opened to renegotiation on the later of the two dates: seven years after the year the contractor has been able to recover its costs out of the 40 % costs recovery portion of revenues or ten years after the first commercial production*"[185].

In fact, for a fear of excessive uncertainty may be formulated clauses which are quite specific in determination of triggering events, such as, „contracts binding a private business organization and a state with respect to the exploitation of the state's natural recourses, which referres to the company's profits reaching a certain level or to the recovery of investment costs by

[176] Peter, W., *supra* note 137, P. 34
[177] Russi, L.., *supra* note 175, P. 83
[178] Peter, W., *supra* note 137, P. 33
[179] Sornarajah , M., *supra* note 157, P. 108
[180] Peter, W., *supra* note 137, P. 33
[181] Ibid.
[182] Brunner, Ch., *supra* note 26, P. 513
[183] Ibid.
[184] Peter, W., *supra* note 137, P. 34
[185] Ibid.

the private party"[186]. Nonetheless, such prerequisites do not have set of formula that can be adopted in renegotiation clauses[187]. However, is almost obvious that the criterions that had to be met before an event can trigger renegotiation is of great importance and have to be carefully worded[188].

Furthermore, a renegotiation clause usually also defines standards for the *extent of contract change*, the importance of which stems from the fact that it will determine the result to be achieved by renegotiation process[189]. It may be differed clauses which *include guideliness for the extent* of renegotiation, some might only cover *particular subject matter*, such as fiscal system, some of the clauses expressly limit the extent of contract change to *objective standards*, such as maintenance of the original contractual equilibrium, or they refer to *subjective standards* such as fairness and equity[190]. Professor L. Russi by analysing the other structural elements of renegotiation clauses has stated that parties may wish to limit their discretion within negotiation process, indicating:

1. Criteria or parameters which they are to refer to in reviewing their respective obligations, or
2. The purposes which renegotiation process is to fulfil which may be formulated in either an objective and practical manner, such as the preservation of financial equilibrium, or subjective standards, such as „fairness"[191].

Whereas we know when the renegotiation clauses are usually applied, which structural elements they cover, the contractual practice of renegotiation should be briefly overlooked.

With regard to the legal systems each of them differs as to the extent to which contract should be modified in a response to change of circumstances[192]. For example, the English common law system is rigid with respect to contract adaptation and it emphasizes on detailed contracting drafting, on the oher hand, as we already know, the civil law tradition is more opened to renegotiability of long term contracts[193]. Although, according to prof. Abdullach al Faruque, who has analysed the practice of renegotiation clauses in petroleum contracts, the expression of „renegotiation" is hardly used, nevertheless, the contractual stipulation of periodic review or readjustment clauses, modification, consultation process are found to be quite common and they are more likely to be invoked by host states, also more available by the investors, especially, who want to change the agreement in times of recession and depressed prices[194]. In addition, such clauses have certain benefits, as may cause the state to refrain from taking unilateral actions, hence, parties

[186] Russi, L., *supra* note 175, P. 83
[187] Qurashi, Z. A. Al, *supra* note 158, P. 289
[188] Ibid, P. 290
[189] Ibid.
[190] Peter W., *supra* note 137, P. 35-36
[191] Russi L., *supra* note 175, P. 84
[192] Faruque, Adullach al. Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability, The Journal of World Investment and Trade, 113 (2008), P. 124
[193] Faruque, Abdullach al., *supra* note 192, P. 83
[194] Qurashi, A. Al., *supra* note 158, P. 299

to international petroleum agreements are well advised to include such clauses in their agreements[195]. Prof. K. P. Berger by analysing the renegotiation, adaptation of intenational investment contracts remarked that renegotiation and adaptation clause are particularly used in international investment contracts between a party and a goverment entity, accordingly, instead of mandating that a state not change its laws in a way that would disrupt the financial returns negotiated under the parties‘ agreements (as traditional stabilization clauses), the clause would allow the state unilaterally to take steps that would affect its contractual regime[196].

To summarize aforesaid, contractual parties before deciding to include renegotiation or adaptation clause into their contract have to be aware of many things: starting from drafting of a clause and their main structural elements, ending with the main effects and consequences the clauses might bring to them. In this paragraph we briefly overviewed the main pecularities of renegotiation clause: how to recognize the clause, what main elements the clause might cover, how to differ it from other types of changed circumstances clauses, especially, hardship clause, and finally, practical usage of clauses. The particular benefits, drawbacks and legal effects to the contactual parties by stipulation of certain changed cirumstances clauses will be analysed in the following paragraphs.

2.1.3. Inflation, escalator, index clauses

It was already ascertained that courts are generally reluctant to adjust a contract due to changed economic conditions, or at least they are very cautious to do so, particularly in international commercial contracts[197]. It actually means that the parties are advised to construe a clause spelling out how changed economic conditions will affect their contractual relations[198].

To begin, certain risks, for example, of cost increases, may be adressed by escalator or index clauses, clauses which fix the price on a cost plus basis, also most favoured client clauses, as well as, market – out clauses, conditioning a party‘s duty to go through with the transaction on no material adverse change in market conditions[199]. Indeed, these kind of clauses work in different way because they usually exclude the arisal of a hardship situation in the first place[200]. Since we know that the exemption of hardship requires the equilibrium of the contract to be fundamentally altered,

[195] Ibid.
[196] Gotanda, J. Y. Renegotiation and Adaptation Clauses in Investment Contracts. Revised, From the selected works of John Y Gotanda. Villanova University School of Law, august 2003, Vol 36:1461, P.1462// http://works.bepress.com/gotanda/8; [accessed: 26 10 2013]
[197] Gorton, L. Escalation and Currency clauses in Shipping Contracts. Journal of World Trade, 319 (1978), by Kluwer Law International, P. 321
[198] Gorton, L., *supra* note 197, P. 321
[199] Brunner, Ch., *supra* note 26, P. 513
[200] Brunner, Ch., *supra* note 26, P. 513

and the relevant threshold test for occurence of hardship have to be satisfied, consequently, it should be clear that a party can not rely on inflation as a ground of exemption under hardship merely because inflation has reduced the benefit in real terms that the party had expected to gain under the contract[201]. Therefore, is necessary to distinguish cases of merely „creeping" inflation from cases involving extreme inflation, according to which is considered that generally hardship could exist only in cases of extreme inflation, and even then it must be determined whether the parties have not provided for a particular risk allocation, as for instance, an escalator or index – clause[202], which are not regarded to meet threshold for hardship to arise.

To continue, prof. L. Gorton by analyzing escalation and currency clauses in shipping contracts noted that the object of a currency clause, a bunker clause and a general escalation clause is to regulate problems which have a common core but different effects which may invoke some legal problems to the effect of contractual dispositions in connection with inflation and exhange rate fluctuations[203]. According to professor the risk of creeping inflation is actually a typical risk which should be taken into account and assumed by sellers or other suppliers of goods or services[204]. Nevertheless, contractual parties may protect themselves against the risk of depreciation of the currency by insisting that the contract contain an escalator, or value – stabilization, as well as, index clause, which usually provide for an automatic indexing or prices by reference to a cost-of-living index[205]. In order to avoid at least certain effects of cost increases professor advises the measures, such as, to let the basic price to be increased by a certain percentage per a certain time unit without to a real cost development or to link the basic price to the raw material price, or to a certain index in order that the basic price then follows the moves of such raw material price or index[206].

In a meantime, while drafting index clauses certain factors have to be determined, namely, the object of the index, the time when the index shall be applied and the index or the indices which are applicable[207]. By determination of index clause it may be ascertained that a party accepts an index clause based on criterion which was reasonably foreseeable at the time of incorporation thereof, thus a disadvantged party appropriately reflects the risk of cost increase in the relevant field, which means that the party nevertheless assumes the risk[208]. For example, in an award of 1977, an arbitral tribunal sitting in Hamburg stated: „*As a matter of principle, every money debt is a debt in value in the broadest sense, with the result that only the nominal value of the currency is due and payment of the depreciated money releases the debt. The only exception to this principle is*

[201] Ibid, P. 452
[202] Ibid.
[203] Gorton L., *supra* note 197, P. 322
[204] Brunner, Ch., *supra* note 26, P. 452
[205] Ibid.
[206] Gorton, L., *supra* note 197, P. 328
[207] Ibid, P. 330
[208] Brunner, Ch., *supra* note 26, P. 452-453

where post-inflation revaluation of currency takes place by means of a monetary reform. There is no reason to deal with this exception in the present case, since so far the British pound has not been subject to a monetary reform<...>"[209].

Prof. L. Gorton distinguished index clauses as some kind of „standartization" clauses, where the adjustment is based on a percentage figure or an index instead of on real costs and also determined that there should not be a problem to show the actual cost increase, but there may be some difficulty in finding an appropriate index[210]. Moreover, before inserting a clause it should be considered that there might be a time-lag between the period of the actual costs and the time when the index is published, therefore it is important that the index chosen is reliable[211].

It have to be noted, that generally if creditors have protected themselves against the risk of inflation by an escalator clause or the like, that clause will cover the relevant risk in an exhaustive manner[212]. However, if later on it turns out that the escalator clause does not sufficiently reflect the actual cost increase in the relevant field, the principle of good faith and fair dealing generally exclude any further adaptation and do not satisfy criterions, for example, hardship exemption to be envoked, as the parties have specifically allocated the risk of inflation in their contract[213]. Hereinafter, the relation and separation of escalator and index clauses, in the one side, and hardship exemption, in the other side, need to be determined.

Accodingly, a situation in a Swiss case in 1969, when parties had entered to a building lease agreement for duration of eighty-one years and the fee was coupled with an index clause based on a consumer price index which provided for an earlier adaptation of the fee[214]. A concern was whether the the basic price or fee to be adapted over time by an index-linking clause, at the time of contracting, set at a level considerably above or below the market price which lead to an equivalency distortion[215]: *„A comparison with a comparable building lease agreement revealed a price difference of 120%. However, it was established that the basic building lease agreed upon by the lessee at the time of contract conclusion was at the time 64 % above the market price. If this Premium was taken into account, the price difference was merely 34 %. This alteration clearly did not amount to a fundamental change of equilibrium of the contract"*[216]. The other case, where the effects of the relevant index was considered in light of the hardship exemption has been the German courts position in heretidary building lease cases: *„The contract included a clause conferring the lessor the right to claim a certain amount of rye instead of the fixed building lease fee (not linked to*

[209] Brunner, Ch., *supra* note 26, P. 453
[210] Gorton, L., *supra* note 197, P. 341
[211] Ibid, P. 330
[212] Brunner, Ch., *supra* note 26, P. 455
[213] Ibid.
[214] Ibid, P. 457-458
[215] Ibid, P. 458
[216] Brunner, Ch., *supra* note 26, P. 458

an index). The Bundesgerichtshof held that according to the parties' intentions, the „rye-clause" had the effect of the value-stabilization clause, and that at the time of contracting, the rye-clause was an appropriate means to this end. However, because of supervening goverment control measures in the crop sector, the clause lost its intented purpose, for while the index of cost of living increased by 96 % from 1958 to 1978, the price for rye increased by only 5 %. Accordingly, the contract was adapted by increasing the rent in proportion to the increase in the general index of cost of living"[217]. Nevertheless, following a case practice according to prof. Brunner because of the risk allocation at the time of contracting, the standard thershold for the hardship exemption may have to be lowered[218]. Moreover, professor outlined that in the absence of an index – clause or any other contractual risk allocation, the risk of inflation is generally to be borne by the land owner (lesssor, supplier), but only up to an increase of 150 % of the cost of living according to a cost of living index and if this threshold is exeeded, the land owner may be allowed to claim an increased rent in proportion to the increase of cost of living, for example: an increase of the cost of living by 150 % during a thirty-year period has been held sufficient to tigger the lessor's right for adaptation, an increase by 133 % during a twenty-five-year period has not been considered to be sufficient[219].

Generally, such kind of clauses as index clauses, adaptation clauses, exhange or like that, differ from hardship clauses inasmuch as they provide for the modification of the original circumstances based on the occurence of well-specified event, consequently, the effects of a contract can be pre-arranged, in contrary to hardship clause, which do not enable prior re-arrangments because renegotiations firstly will be required[220]. However, the differentiation is not absoliute one since there are such kind of clauses which instead of automatic adaptation provide for re-negotiation as well, thus according to prof. M. Fontaine it is worth providing simultaneously for the different types of clauses (e.x. hardship, force majeure, other clauses), since they can be used either separetely or together according to the circumstances[221].

Resuming aforementioned, such kind of clauses as ecalator, currency, index-clause or the like, usually are described in an exhaustive manner. Contractual parties before including such kind of clauses have to be particularly aware of specific circmstances they want to include, specific economic conditions at the time of contracting and after certain period of time, as well as, other relevant risks, in order to receive the benefits they expect by the inclusion of those specific clauses. Moreover, contractual parties have to bear in mind, that these kind of clauses may be considered in the light of hardship exemption when unexpected event completely alter the effect of, for example,

[217] Ibid, P. 456
[218] Ibid, P. 455
[219] Ibid, P. 459
[220] Fontaine, M., De Ly F., *supra* note 7, P. 457
[221] Ibid, P. 458

an index clause[222] and even parties have specified and allocated the risk by the clauses like that, the outcome of the contractual parties risk might be outlined by a fundamental change of contractual equilibrium.

2.1.4. Implied terms and delimination between implied terms and hardship exemption

It may be presumed that parties to a contract have expressed in it every material term and accordingly that there is no necessity to imply additional terms[223], however, we may notice that it is not always a truth. The implication of terms must be necessary in order to carry out that is necessary to give efficiency to the contract which the parties intented, nevertheless, there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process[224]. In those kind of cases the courts are spelling out that both parties know and would, if asked, unhesitatingly agree to be part of the bargain, in other cases, where is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work, for example, a case of Lord Wilberforce in Liverpool City Council v. Irwin where Liverpool City Council were the landlords of 70 dwelling units and rented one of these units to a teenant, but a teenant withold the payment of the rent due to unpleasant conditions of the building and their maisonette[225]*: „<...> as far as the common parts of the building were concerned, there was an* ***implied obligation*** *on the landlords that the tenants may use the staircase, the lifts and the rubbish chutes. The Standard of this obligation was to take reasonable care to keep the means of access in reasonable repair and usability, with the recognition that the tenants themselves had their responsibilities to what a reasonable set of tenants would do for themselves"*[226]. Court ruled that in the present case it was not shown that the landlords were in breach of this implied obligation[227].

However, it have to be noted that term will not be implied merely because it would be reasonable to imply it, in contrary, the court refuses to make a contract for the parties and leaves the contract-making to them[228]. Moreover, to iliustrate how an implied term may be included into a commercial contract author also choose a case of *Martin-Baker Aircraft Company v Canadian Flight Equipment (1955)*[229], where it was ascertained: „if a long term contract doesn't include a

[222] Fontaine, M., De Ly F., *supra* note 7, P. 458
[223] Dobson, P., Schmitthoff, Clive M. Charlesworth's Business Law (15th edition). London: Sweet&Maxwell LTD, 1999, P. 38
[224] Dobson, P., Schmitthoff, Clive M., *supra* note 223, P. 38
[225] Ibid.
[226] Dobson, P., Schmitthoff, Clive M., *supra* note 223, P. 39
[227] Ibid.
[228] Ibid.
[229] Anderson, M. Solicitor Anderson & Company. Recent case law on contract drafting and intelectual property issues// http://www.andlaw.eu/downloads/Recent_case_law_on_contract_drafting_issues_-_Anderson_&_Company.pdf; [accessed: 03 11 2013]; Dobson P., Schmitthoff, Clive M., *supra* note 223, P. 39

clause giving either party a right to terminate, a term to this effect may be implied"[230]. In the mentioned case the commercial contract was signed for the supply of goods at a fixed price but did not specify for a period of termination, thus, the contract may be terminable by reasonable notice and this term has to be implied to the contract[231]. By determinating the period of reasonable notice time the Court also considered the main factors to reach the conclusion: the degree of formality of the contractual relationship, whether there was any non-compete clauses in the agreement, the duration of the agreement[232].

Apart from these terms which are implied merely because they are obvious and necessary to make the contract work, there are also terms implied by virtue of *various statutes*[233], for example, Sale of Goods Act 1979, Unfair Contract Terms Act 1977, Supply of Goods and Services Act 1982 etc., providing implied terms which in some instances, e.g., consumer protection, cannot be excluded by agreement of the parties[234]. The mentioned acts applies mostly to business contracts and contracts for the sales or supply of goods[235], which prohibit the exclusion or restriction or terms implied by law in certain circumstances (contracts for the sale or supply of goods etc.)[236]. According to prof. R. G. Lawson the United Kingtom's Unfair contract Terms Act 1977 was never the most accurately entitled enactment[237], however, the Act is concerned not with unfair contract terms in general sense but more with specific category of term, namely the exclusion and limination clause, and such clauses are valid only if reasonable: in some cases even they deemed automatically void[238]. The terms implied by concerned Acts above are not particularly interrelated to this thesis research, thus comprehensive analysis about this subject matter is not going to be done.

Nevertheless, the main distinction and delimination between implied terms and hardship exemption have to be outlined. According to prof. Ch. Brunner concept of implied terms is equivalent to the concept of supplying an ommited term[239] and therefore is not equivalent to hardship, therein: „while the legal basis of the hardship/change of circumstances doctrine can thus be seen in the principle of good faith and the courts' power to fill gaps in the contract by supplying

[230] Anderson, M. Solicitor Anderson&Company. Recent case law on contract drafting and intelectual property issues// http://www.andlaw.eu/downloads/Recent_case_law_on_contract_drafting_issues_-_Anderson_&_Company.pdf; [accesed: 03 11 2013]
[231] Dobson P., Schmitthoff ,Clive M., *supra* note 223, P. 39
[232] Anderson, M. Solicitor Anderson&Company. Recent case law on contract drafting and intelectual property issues// http://www.andlaw.eu/downloads/Recent_case_law_on_contract_drafting_issues_-_Anderson_&_Company.pdf; [accessed: 03 11 2013]
[233] Dobson, P., Schmitthoff Clive M., *supra* note 223, P. 39
[234] Ibid, P.39
[235] Pollard, D. The Unfair Contract Terms Act: Points when drafting contracts. Business Law Review, 111 (May 1987), Vol. 8, No.5. P.131
[236] Dobson, P., Schmitthoff, Clive M., *supra* note 223, P. 39
[237] Lawson, R. G. Unfair Contract Terms - The EC Commission's Proposals. Business Law Review, 195 (August/September 1992), Vol. 13, No. 8/9. P. 195
[238] Lawson, R. G., *supra* note 237, P. 195
[239] Principles of International Commercial Contracts, *supra* note 10, Principles of International Commercial Contracts, artc. 4.8//http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637; [accessed: 02 11 2013]

an omitted term, it should be emphasized that hardship is a legal doctrine of its own requirements“[240]. The concept of implied term is also indicated under article 4.8. of the UPICC where implied term is described as an appropriate term in the circumstances when the parties to the contract have not agreed with respect to the term which is important for determination of their rights and duties[241]. By the official commentary on the article of 4.8. of UPICC omitted terms or gapps are described as a question occuring which the parties, after conclusion of the contract, have not regulated in their contract either because they prefered not to deal with or simply because they did not foresee[242]. The concept of implied obligations refered under the PECL artc. 6.102[243] as well.

Though, the main question arises how to recognize implied term to be included in a contract? The finding of an implied term according to prof. Ch. Brunner requires that the contract includes a sufficiently specific and comprehensive indication as to how the parties would have dealt with a particular event[244]. From the practical point of view the theory of implied term was indicated in the case of *Davis Contractors Ltd v. Fareham Urban District Council (1956) by the House of Lords,* where the House of Lords concluded that contractors could have made some express stipulation in the contract in order a contract could be frustrated[245]. However, it was significant case providing that in the absence of specific indications as to the parties‘ legal intentions,[246] the role of parties intentions (subjective criteria) was replaced by objective criteria[247] (individual requirements of hardship exemption). It should be noted that mere consciousness of both parties that the deal might possibly not be implemented as envisaged does not turn the parties‘ mutual performance obligations into conditional ones[248].

The main differences and delimination between hardship exemption and implied terms according to prof. Brunner:

1. Hardship situations should be dealt with on the basis of objective criteria rather than subjective (objectivity of hardship);
2. Implied term have to be specific and comprehensive as to how the parties would have dealt with a particular event (specification of event under impied term);

[240] Brunner, Ch., *supra* note 26, P. 395
[241] Principles of International Commercial Contracts, *supra* note 10, artc. 4.8// http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13636&x=1; [accessed: 03 11 2013]
[242]Principles of International Commercial Contracts, *supra* note 10, Official coment on the article 4.8 of UPICC// http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637; [accessed: 02 11 2013]
[243] The Principles of of European Contract Law., *supra* note 25, http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/6.102.html, connected at: 03 11 2013, 20;13
[244] Brunner, Ch., *supra* note 26, P. 421
[245] Koffman, L., Macdonald, E., *supra* note 109, P. 524
[246] Brunner, Ch., *supra* note 26, P. 395
[247] Zapolskis, P. Aplinkybių pasikeitimo įtaka sutarties vykdymui (The impact of Change in Circumstances on the Performance of Contract): daktaro dis. soc. Mokslai: teisė (01S)/Vilnius - MRU, 2012, P. 35
[248] Brunner, Ch., *supra* note 26, P. 422

3. Adaptation, termination or reformation clauses regarding future events can normally not be implied;
4. There is no hardship if and to the extent that the obligor has assumed the risk of the change of circumstances (assumption of risk principle);
5. Under implied terms as a result of contract interpretation it may have to be concluded that the obligor‘s obligation is limited in scope and thus remains unaffected by the change of circumstances, conversely, party‘s obligation is terminated by a *particular event*[249].

To conclude, we may resume that implied terms are not equivalent to hardship clause which have specific requirements to be treated as the hardship exemption. First of all, inclusion of implied term to a contract does not require the occurence of hardship and the main contractual parties‘ obligation is to indicate the relevant implied term which would deal with a particular event. Author of the thesis noticed that function and construction of implied term is rather similar to renegotiation or adaptation clauses under which specific trigger event is underlined and is no need for situation of hardship to occur. More comprehensive analysis of hardship clause and its specific requirements encompassed in the paragraph 2.2. Interpretation and legal effects of hardship clauses.

2.1.5. Force majeure clauses

In previous subchapters we have made short overview about different types of changed circumstances clauses and implied terms which are used in international commercial contracts. It was emphasized a particular interrelation between, on the one side, different types of changed circumstances clauses, implied terms and, on the other side, hardship clauses. Since we know that hardship and force majeure clauses are regarded as types of renegotiation clauses permitting contractual adaptation and suspension of the agreement in the event of certain changes[250], a review of the main aspects of force majeure clauses in international contracts and the interrelation with hardship clauses are also of particular relevance.

Firstly, should be outlined the main purpose and object of force majeure clause, which is to exempt the affected party from the performance of its obligations[251]. According to prof. U. Draetta municipal systems, in dealing with force majeure isues, were traditionally confronted with contracts, such as sales contracts, where the performace of both parties occured immediately or relatively a short period, for this reason, the negotiators and drafters of international contracts have

[249] Ibid, P. 422-423
[250] Sornarajah , M., *supra* note 157, P. 108-109
[251] Strohbach, H., *supra* note 122, P. 46

developed private solutions, better articulated than those offered by municipal laws[252], such as force majeure clauses. As concerns a purpose of incorporation, by an agreement on certain criterions and conditions of exoneration from responsibility, such a clause ensures that, after the signature of the contract, there will not be a total breakdown of the contract[253]. Prof. M. Sornarajah noted that even a distinction between hardship clauses and force majeure clauses is sometimes drawn, both of them have the same object: „to reduce the damage that may result to one of the parties because the contract is performed in changed circumstances"[254], despite the differences in legal consequences thereof.

The other subject matter is describtion and composition of force majeure clause. Contractual party seeking to terminate the obligation under a contract because of situation of force majeure has to include a clause which set out circumstances referred as situations of force majeure[255], otherwise, contractual parties might be exempted from performance relying on statutory law provisions. It have to be noted, that in international or transnational business law parties can freely agree to force majeure provisions,[256] but they should not be regarded as irrespective of conditions which have to be met under the applicable law[257]. Generally, force majeure clauses that excuse a breaching party to terminate its obligations from liability for non-performance are common in most national legal systems and are almost invariably included in international business contracts[258]. Prof. H. Konarski by analysing practical aspects of force majeure and hardship clauses in international commercial practice distinguished the main elements of force majeure clause which may consist of: „<...> a general definition of force majeure – an event 1) that renders the performace impossible, and 2) is beyond a partys' control, 3) reasonably inevitable, and 4) unforeceeable – and provide for either and exhaustive or open-ended illustrative list of factual circumstances of force majeure"[259]. Professor added that most advanced force majeure clause should include a definition of force majeure and its consequences. International Chamber of Commerce (further - ICC) Force Majeure Clause 2003 gives a list of events that may amount to an impediment, such as war, natural disasters, explosions, strikes, acts

[252] Draetta, U. Force majeure clauses in International Trade Practice. International Business Law Journal, 1996, 547 (1996), Vol. 5. P. 547
[253] Strohbach, H., *supra* note 122, P. 46
[254] Sornarajah, M., *supra* note 157, P. 109
[255] Strohbach , H., *supra* note 122, P. 46
[256] Konarski, H., *supra* note 1 , P. 408
[257] Melis, W. Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration. Journal of International Arbitration, By Kluwer Law International, 213 (1984), P. 215
[258] Katsivela, M. Contracts: Force Majeure concept or Force Majeure Clauses? Uniform Law Review, 101 (2007), P. 110
[259] Konarski, H., *supra* note 1, P. 409

of authority[260], which are rather different from the listed economic, political or technical circumstances under hardship clause. The ICC Force Majeure Clause might be recoursed by contractual parties drafting force majeure clause in international contract and it should be distinguished from ICC Hardship Clause in that two clauses take effect in different circumstances and have different consequences[261]. In this effect, according to prof. M. Katsivela force majeure clauses do not refer to circumstances that result in mere hardship and have the effect of excusing non performance in the absence of any obligation to negotiate "alternative contractual terms"[262]. ICC Model Clauses foresee and separate hardship and force majeure clauses in the following way:

1) A Force majeure clause, which lays down the conditions for release from liability when performance of a contractual obligation has become impossible (impossibility or performance) and
2) A Hardship clause, which is intented to cover cases where unforeseen event so fundamentaly alter the equilibrium of a contract that an excessive burden is placed on one of the parties[263] (fundamental alteration of contractual equilibrium).

Hereinafter, as we may see both clauses are similar but not identical: while contractual parties including hardship clause attempt to negotiate and adapt a contract, the contractual parties invoking force majeure situation tend to terminate the contract if no agreement can be reached[264].

After a brief overview about the main elements of force majeure clause and its interrelation with hardship clause, some practical aspects of force majeure clauses have to be indicated. Hence, one of the ICC arbitration cases which reveals how force majeure clauses are interpreted in the Court of Arbitration: *„An Indian defendant refused to deliver a certain quantity of a commodity on the grounds that the Goverment of India had requested him to meet domestic requirements in priority to export. He informed the claimant thereof and asked to be relieved of his contractual obligation by virtue of a force majeure clause which they had stipulated"*[265]. The arbitrator in the case concluded: „In the premises such decision did not have force of law, or consequently, the effect of constituting force majeure within the meaning of clause... of the letter dated"[266]. The other case which reflects restictive courts' approach was in 1989 of the French Supreme Court, where the Court rejected appelant's claim in deciding that an interruption in the electricity supply was covered by force majeure clause, which was voguly worded: *„Parties*

[260] Schwenzer, I. Force majeure and Hardship in International Sales Contracts. Victoria University of Wellington Law Review, 709 (2008-2009), No. 39. P. 714; ICC Force Majeure Clause 2003. ICC Publication No. 650// http://www.trans-lex.org/700700; [accessed: 09 11 2013]
[261] Katsivela, M., *supra* note 258, P. 116; ICC Force Majeure Clause 2003, supra note 260.
[262] Katsivela, M., *supra* note 258, P. 116
[263] Melis, W., *supra* note 257, P. 216-217
[264] Ibid, P. 217
[265] Melis, W., *supra* note 257, P. 220
[266] Ibid.

accept that electricity supply remains, despite the precautions taken, subject to risks which may vary basen on the location, consequently there may be interruptions, which within certain limits as to duration or number that may vary in every case should be assimilated to force majeure events"[267]. This kind of strict approach maintained by arbitrators was common in many cases, creating higher standards for contractual parties expresssly to stipulate all the circumstances to be accepted as force majeure. In this way, if the party invoking force majeure clause is at fault in either inducing or avoiding the force majeure event, it will not benefit from the clause[268], as a party invoking a hardship under clause which do not met hardship threshold.

To resume above-mentioned, force majeure clauses encompass very similar criterions of hardship situation: unforseeability, unavoidability, impossibility to control, inability to assume a risk. However, the legal consequences the two clauses cause are rather different. As prof. H. Konarski highlighted: „Theoretically, hardship is different from force majeure, because the performance of a contractual obligation, contrary to force majeure, need to be absolutely impossible"[269], at least temporarily[270]. To add, prof. H. Strohbah remarked that force majeure clauses relate to circumstances that cause such a degree of hardship that the performance of the contract is temporarily or definetely out of the question[271]. It should be noted, that by drafting force majeure clauses, not an exemption for hardship clause drafters, the contractual parties have to be particularly aware of the risk they might encounter by inclusion of vague clause and to bear in mind that interpretation of the the contractual terms is rather of strick standard.

2.2. Interpretation and legal effects of hardship clauses

In previous subchapters we have analyzed and differed separate types of changed circumstances clauses. In principle, all of them are incorporated in the contracts of commercial nature in cases of changes in circumstances, nevertheless, all of them are rather different regarding formulation and interpretation thereof. Moreover, legal effects by incorporation of each of clauses may also differ. In order to know when and how to apply contractual hardship provisions in international contracts, the interpretation and legal effects of hardship clauses are of relevant importance.

Since we know that general principle prevalent in civil law countries is the priciple of *pacta sunt servanda*, determining the contract as the law between the parties and freedom of

[267] Katsivela, M., *supra* note 258, P. 113
[268] Ibid, P. 112
[269] Konarski, H., *supra* note 1, P. 405
[270] Mascow, D., *supra* note 12, P. 664
[271] Strohbach, H., *supra* note 122, P. 40

contractual parties to agree which provisions they choose, provided that they do not violate mandatory provisions of law[272], contractual parties seeking to include a hardship clause to their contract, must carefully consider the terms they want to include to be regarded as a situation of hardship. First of all, in order to be considered as a hardship clause, a hardship clause need to contain the *event/changes of circumstances* which would suffice to invoke the exemption of hardship. According to prof. E. H. Zaccaria the analysis of the defined circumstances is often indicated in general terms, such as „serious occurence of a political, economic or financial nature" or „if the economic or finacial situation were to change",[273] but may be also rather specified event underlining changes in circumstances (by reffering changes in specific number of percentage or price increase), which may cause some difficulties to differ hardship clause from the other type of changed circumstances clause do not invoking hardship, particularly, while specifying a triggering event in a case. For example, in case of investment contracts contractual parties may better be advised to include escalator or similar adjustment clause[274], which do not require occurence of hardship and specifically addresses particular well specified event to invoke renegotiation or atjustment of the contract. Author of this thesis noticed that definition of the event/change in circumstances is not so problematic as the evaluation of *fundamental changes in circumstances*/*distortion of contractual equilibrium*. In order to invoke a situation of hardship a regular tool used is the relevant threshold of alteration of contract equilibrium by numeric expression of contractual equilibrium of the contract[275], where the disruption of balance amounting to more than 50% of the cost or value of the performance in international contractual practice may be regarded as fundamental alteration[276]. However, some clauses require that the alteration of the equilibrium of contract be significant not by enumeration of it but by including terms like: „substantial economic hardship", „obvious hardship to either party", „incurring unreasonable high additional costs that were not reasonably forseeable when the agreement was made"[277] and etc. This kind of general terms could also confuse whether a hardship thershold is met or more relaxed standard is used. It should also be noted, that determination of the relevant hardship threshold can only be made by *evaluation of the risk* assumed by the relevant party under the circumstances, so if hardship clause only refers to the situation which renders performance more burdensome or harmful (and not execissevely) might be that a more relaxed standard of hardship is used[278].

[272] Fucci, F. R., *supra* note 21, P. 11
[273] Zaccaria, E. Ch., *supra* note 11, P. 151
[274] Brunner, Ch., *supra* note 26, P. 514
[275] Girsberger, D., Zapolskis, P. Fundamental Alteration of The Contractual Equilibrium Under Hardship Exemption//Jurisprudence. 2012, Vol. 19 (1). P. 136
[276] Doudko, A. G., *supra* note 17, P. 495
[277] Brunner, Ch., *supra* note 26, P. 516
[278] Ibid, P. 515

The other element which encomposses a clause and has to be interpreted as invoking an exemption of hardship is the *renegotiation procedure* for *adaptation of the contract* to the changed circumstances and the *legal effects* if renegotiation procedure fails to result. Parameters which are used to define the adaptation of the contract are usually construed by objective criterions, for example, *„adjusting the price to a certain level", „reinstating the parties in an equilibrium comparable to that existing at the moment of the conclusion of the contract",* or the subjective criterions, such as *„equity, good faith, loyalty, aim to favour adequate remedies or to facilitate adaptation of the contract"*[279]. As it was already underlined in the previous subchapter of Renegotiation clauses, that the renegotiation clause is distinguished from the hardship clause by defining renegotiation procedure, which do not require a hardship to occur and the latter one is a condition for a hardship to invoke, however, it have to be noted that the legal consequences of renegotiation and hardship clauses are often identical[280]. Since we know that not always renegotiation procedure may be succeeded by contractual parties, thus parties are usually advised to include the *legal consequences,* such as *termination of the contract* or *adaptation by third parties,* in case of failed negotiations. The relevant importance of this hardship clause element was underlined by arbitrators in a case of contract for supply of cruide oil, in which the parties had stipulated just the obligation to renegotiate if the rates of exchange were to change[281]. It was stressed that the only obligation is of negotiating in good faith and failure to reach an agreement could not be resulted in termination unless it was explictitly stated under agreement[282]. The hardship clauses without sanctions of a hardship clause, according to prof. Shimtthoff, is hardly worth the paper on which it is written[283].

In 1985 ICC drafted model law rule under which contractual parties could delegate the third parties, called as an arbitrator, an expert, a referee or an intervener, to adapt a contract, which in the strict term of adaptation is not arbitration and is the third party who makes desicion merely to rearange the contractual relationship on behalf of the parties[284]. In this case contractual parties in respect of failed negotiations could use all the possible remedies to a hardship situation referring to specific model law rules on Hardship Clauses of ICC 1985, which enabled the parties to call upon a third person, which is not an arbitrator, to adapt a contract[285]. Since the ICC Hardship Clause in 2003 was drafted, the legal consequence of the so called arbitration was abolished, providing just

[279] Zaccaria, E. Ch., *supra* note 11, P.153
[280] Brunner, Ch., *supra* note 26, P. 514
[281] Zaccaria, E. Ch., *supra* note 11, P. 154
[282] Zaccaria, E. Ch., *supra* note 11, P. 154; ICC Award No. 2478 in 1974, YCA 1978, at 222 et seq// http://translex.unikoeln.de/output.php?docid=202478&markid=936000; [accessed:18 11 2013]
[283] Zaccaria, E. Ch., *supra* note 11, P. 154
[284] Zaccaria, E. Ch., *supra* note 11, P. 156
[285] Ibid.

two alternative consequences, renegotiation and termination of a contract[286]. The question arises, according prof. Ch. Brunner, whether a hardship clause which only provide for the adaptation or termination of the contract as a consequence of failed negotiations also obliges the other party not to renegotiate or break off renegotiations in bad faith in the the absence of the renegotiation procedure?[287] The answer could be given only under general contract principles[288], bearing in mind that the main purpose of the institute of hardship is renegotiation of contractual terms. Prof. H. Ullman comparing hardship clauses in French and American legal systems stressed that hardship clause is designated to incorporate flexibility into a contract, so the parties rather will renegotiate than terminate the agreement thus courts interpreting hardship clauses have to remember the fixed meaning of hardship clause[289].

To sum up, generally contractual hardship provisions are interpreted in the light of hardship exemption under general contract principles and by drafting a clause contractual parties have carefully to analyze whether they include the terms which require the hardship thershold test to be met under applicable law rules or they want to include something more liberal when more relaxed standard might be used[290]. However, author of the thesis resumes that in a case of using less stringent standard and including terms which are very general and might be interpreted as other type of changed circumstances clause or implied term hereby, where is no situation of hardship, the contractual parties might be in more difficult situation to invoke a hardship on the basis of its contractual regulation. The analysis of hardship clauses and interpretation thereof reveals that construction of hardship clauses is of particular importance in order to bring legal effects to contractual parties, thus drafting of contractual hardship terms is worth more detail analysis which is following in the next chapter.

[286] Brunner Ch., *supra* note 26, P. 506; ICC Hardship Clause 2003. ICC Publication No. 650// http://www.trans-lex.org/700700; [accessed: 16 11 2013]
[287] Brunner, Ch., *supra* note 26, P. 516
[288] Ibid.
[289] Ullman, H., *supra* note 5, P. 105
[290] Brunner, Ch., *supra* note 26, P. 515

III. PROBLEMATIC ASPECTS OF CONTRACT DRAFTING AND CONSTRUCTION OF HARDSHIP CLAUSES

3.1. Structure of hardship clause

International contract drafting can be described as a continuous process which to a certain degree is an autonomous, leading to a certain standartization of contract clauses and is developed by to respond to practical needs and problems[291]. Nevertheless, even we know that in most jurisdictions the statutory provisions are not of public order and parties to an commercial contract are at some liberty to fashion a clause that suits them[292], contractual parties to a contract have to be very careful to determine the clause according to applicable laws defining the exemption of hardship and to follow Courts‘ interpretation of hardship clauses.

We already know that hardship clause always consists of two main parts: the part which defines when a clause applies (hypothesis) and the part describing legal effects a hardship clause may bring to contractual parties thereby[293]. To define those two parts of hardship clause the particular standards to invoke application of hardship have to be followed. First of all, as prof. F. R. Fucci noted, it is important from a due diligence standpoint to determine what the hardship law say in particular jurisdiction and also to examine how courts have interpreted them[294]. The standards of determining hardship might be of two kinds: if the standards appear reasonable, the option could be to have contract be silent on hardship and let applicable legal provisions prevail, however, if the standards are too liberal, nothing prevents the parties from defining stricter ones both as to the triggers (events) for hardship and the standards for adjusting the contract, unless the governing law do not allow to derogate from the hardship provision[295]. Indeed, to construct a clause which could be reasonable and fulfilling the standards to invoke the exemption of hardship based on contractual provisions, is not so easy.

First of all, in order to describe the first part of a clause which is event (trigger which leads to changes in circumstances) contractual parties have to be particularly in line with the concept of hardship and one of the criterions for hardship to arise which is *unforseeability of changes in circumstances*. Since we know that one of the conditions for hardship to be invoked is *unforseeability* of the trigger and that the risk of events could not be assumed[296], concerning the

[291] Fontaine, M., De Ly, F., *supra* note 7, P. 462
[292] Fucci, F. R., *supra* note 21, P. 40
[293] Konarski, H., *supra* note 1, P. 420)
[294] Fucci, F. R., *supra* note 21, P. 40
[295] Ibid, P. 41
[296] Principles of International commercial contracts, *supra* note 10// http://www.unilex.info/dynasite.cfm?ds; [accessed: 23 11 2013]

insertion of hardship clause, the question arises how parties may describe particular event before this event occur? As prof. M. Fontaine assumed, that the fact that hardship clause has been inserted into the contract already implies that the parties are aware of the risk of future events overthrowing the equitable balance of interests[297]. Hence, how contractual parties drafting a clause may predict the event which could overthrow the contractual balance before the trigger occurs if they already inserting that clause foresee event which cant be forseeable at the time of conclusion of a contract? According to prof. F. R. Fucci the question „what is foreseeable and what is not" is almost a philosophical question. It might be differed two mindsets on contract risk assessment: in common law tradition, there actually a contract allocates risk, the observation used to be made that everything is in sense forseeable, also it is seen as something of a chalange to make sure that every eventuality is provided against in a contract[298], conversely, in civil law tradition, there is no need to spell out eventualities and the specific event giving rise to excused performance does not have to be unforseeable, rather its occurence[299]. Because of the fact, that the criterion of unpredictability might restict the application of a clause, in some cases contractual parties require to be „against the will of the parties" or „beyond the sphere of control" of the disadvantaged party[300], simply describing events in general and vague terms. In cases as such, where a clause is composed by including the circumstances described in words as follows: „dramatic changes in market prices for products", „unfavourable general economic circumstances in a country", „currency fluctuations, even severe"[301], etc., usually hardship has been claimed as not satisfying the criterion of unforseeability.

The other concern while drafting the hypothesis of a clause should be on the level of changes in circumstances – just *substantial* changes in circumstances can be considered in a case. However, the use of vague terms do not solve a problem, conversely, hardship exemption might be not invoked because of unclearity of words used to describe this kind of level thereof. For example, the dispute in *Superior Overseas Development Coorporation* concerned certain long-term sales agreements for the supply of natural gas where a hardship clause included in the contract has provided: „*If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and <..> either party feels that such change is causing it to suffer substantial economic hardship then the parties shall <..> meet together and consider what adjustment <..> in the prices then in force under this Agreement or in the price revision mechanism...are justified in the circumstances in fairness to the parties to offset or alleviate the said hardship caused by such change"*[302]. The Court stated that the

[297] Zaccaria, E. Ch., *supra* note 11, P. 150
[298] Fucci, F. R., *supra* note 21, P. 17
[299] Ibid.
[300] Zaccaria, E. Ch., *supra* note 11, P. 151
[301] Fucci, F. R., *supra* note 26, P. 18
[302] Kemp, K. Applying the hardship clause. Journal of Energy and Natural Resources Law, 119 (1983), P. 120

use of phrases such as „substantial economic hardship“ and „substantial change in circumstances“ without any attempt to define „substantial“, also incorporation of the criterion of „fairness“ or reference to an „effective date“ without any attempt to clarify its significance, virtually invited a dispute[303]. The court also stated in a mandatory tone that all of the hardship was „required to be“ or „should be“ alleviated, thus replacing the subjective discretion of the clause with the objective criterion of restoring the initial equilibrium of the parties‘ obligations[304]. The other example is of the ICC Award, when the case arose because a Norvegian company which failed to perform a petroleum purchase agreement because the price of petroleum had go down by more than half between the time of contract and sheduled delivery and the Tribunal did not permit an adjustment in the contract price because the changes was not constituted *a „bouleversement“ of economic changes*, but as a simple fluctuation in market prices[305].

Another drafting approach should be focused on the second part of a clause describing legal consequences deriving from ascertainment of hardship. Hardship clauses, as prof. A. P. Monteiro described, are aimed at two levels: one which determines when the obligation to renegotiate the contract has occured, and a second, which provides details of the procedure for renegotiating the contract and explains the consequences of non-execution, in other words, the failure of the contract[306]. First of all, hardship situation exist when the event in question results in the upsetting of the balance of the contract, which might be described in objective and subjective manners to describe the damage/consequences by the distortion of the economic disturbance of a contract[307]. Since we know that the main purpose of hardship clauses is to provide contractual parties to restore contractual equilibrium by negotiating contractual terms to reach adjustment of a contract, we have to describe how a duty *to renegotiate is drafted*. Hereinafter, different objective and subjective criterions formulated to describe renegotiation/ adaptation procedure: objective, such as, „adjusting a price to a certain level“, or „reinstating the parties in an equilibrium comparable to that existing at the moment of the conclusion of the contract“, and subjective, usually relying on general principles, such as, „good faith“, „loyalty“, „corectness“ etc., or combination of both of them[308]. Including subjective criterions, for example, „good faith“ which is one of the main obligations required in negotiations but rather unclear and vague, is risky for a disadvantaged party to stay without result, because the parties can be obliged to negotiate in good faith, but not to reach a result[309]. The other concern examining the scope of duty to renegotiate should be focused on

[303] Kemp, K.., *supra* note 302, P. 121
[304] Ibid, P. 122
[305] Fucci, F. R., *supra* note 21, P. 18
[306] Monteiro, A. P., Gomes, J. Rebus Sic Stantibus – Hardship Clauses in Portugese law. European Rewiev of Private Law, 319 (1998), P. 322
[307] Fontaine, M., De Ly, F., *supra* note 7, P. 473
[308] Zaccaria, E. Ch., *supra* note 11, P. 153
[309] Fucci, F. R., *supra* note 21, P. 41

reasonableness of proposal, rejection, conterproposal, appropriateness of the parties behaviour during the negotiation process, which in all the cases seems to be a delicate one as well[310].

As it was mentioned above, even parties include a duty to renegotiate, they are not obliged to reach an agreement. Thus, in case of a failure to reach an agreement, contractual parties are advised to stipulate what kind of effects that failure may have on a contract[311]. Contractual parties sometimes provide for termination of a contract or suspension for a given period of time, however, mostly the desicion is delegated to judge or arbitrator to specific field to take a decision in a dispute[312]. The parameters of the determination of a third party adjudication also need to be clear, as well as, how this special form of adjudication to deal with changed circumstances and contractual adjustments works in conjunction with the overall dispute resolution mechanism in the contract[313]. The use of permanent dispute boards (e.x. ICC dispute resolution board) as a third party adjudication mechanism has gained significance, especially in construction contracts[314]. The advantages of the board can be gained in a case when a hardship triggers are met under applicable law and then a dispute board may quickly to proceed to apply the appropriate contractual adjustment formula[315]. The main purpose of a third party is to decide whether and to what extent the event alleged by one of the parties met the conditions set forth in a hardship clause[316]. However, the intervention of third parties also has some specifics to bear in mind, for example, often introduces an element of unpredictabilty, moreover, dispute board clauses and applicable rules chosen must be scrutinized to determine if the dispute board must follow the applicable law of the contract or have a prerogative to make equitable determinations[317].

The second part of a clause also may consists of *terminations provisions*, as in investment contracts are used so called terminations payments, which are considered to be a reason for a parties better to restore contractual equilibrium instead of having a „penalty". As prof. F. R. Fucci asserted: „If the parties know what the consequences of hardship will be, this can greatly influence the way in which they approach the negotiation of adjustments to the contract"[318].

Other drafting approach should be based on differentiation of hardship and force majeure clause while drafting a contract. A problem arises when both of hardship and force majeure clauses are included into a contract when an interessting system is to merge the two hypothesis in the same

[310] Monteiro, A. P., Gomes, J., *supra* note 306, P. 323
[311] Zaccaria, E. Ch., *supra* note 11, P. 155
[312] Ibid.
[313] Fucci, F. R., *supra* note 21, P. 42
[314] Ibid.
[315] Ibid.
[316] Konarski, H., *supra* note 1, P. 424
[317] Fucci, F. R., *supra* note 21, P. 43
[318] Ibid.

provision, while distinguishing them[319], as for example: „*The Manufacturer shall not be held responsible to the buyer for any failure to perform, including late delivery and failure to deliver, which failure to perform is caused by occurences beyond the Manufacturer's reasonable control, including, but not limited to, late delivery or non-delivery of manufacturing materials by suppliers, strikes or other industrial action, suspension of or difficulties in transportation*"[320]. Indeed, even two legal concepts deals with the problem of changed circumstances, there seems to be functional differences between them[321]. Concerning a drafting of force majeure and hardship clause prof. M. Fontaine asserted that freedom of a contract seems to permit such slippage from one concept to the other thus it is very important for drafters of contract to be aware of this problem[322]. Drafters of contracts have to be particularly aware to adapt proper regime of hypothesis with regard to effects attached to stipulated circumstances: whereas hypothesis of hardship is placed for the outset for re-negotiation of a contract, hypothesis of force majeure initially invoke a question of suspending of a contract and re-negotiation should only be considered in the event of prolong impossibility[323].

To conclude aforesaid, there is no one formula how a hardship clause should be drafted to bring effects to the contract parties based on contractual provisions of hardship. On the one side, the stipulation of specific circumstances/triggers might bring for the parties the risk of unforseeability criterion to be failed, on the other side, too much general and vague terms describing events might be treated as unclear provisions do not fulfilling the standard for hardship to arise, or might confuse between the concepts of hardship and force majeure under similar hypothesis implied. Very similar situation we may face when a second part of a clause is drafted: if contractual parties choose to address a renegotiation process in an objective manner, might be a case when even hardship thershold could not be required, just simple renegotiation procedure under renegotiation clause could be invoked. Conversely, using subjective criterions contractual parties might be at the risk to reach any ammicable solution at the end. Moreover, author believes that even particularly well drafted, in other words precise hardship clause, could face not only with the requirements for hardship threshold to be met but also may face a conflict of contractual and statutory provisions on hardship which are going to be analysed in the following subchapter.

[319] Fontaine, M., De Ly, F., *supra* note 7, P. 444
[320] Ibid.
[321] Pirozzi, R. Developments in the Change of Economic Circumstances Debate? 2012, VJ 95-112, P. 102
[322] Fontaine, M., De Ly, F., *supra* note 7, P. 444
[323] Ibid.

3.2. Risks and consequences to contractual parties by incorporation of hardship clauses to the contract

In a previous paragraph we have analysed the structural elements of a hardship clause and also have revealed some pecularities while drafting and determining those parts of clause. Since we know that drafting of hardship clause is one of the most important and, simultaneouly, one of the most problematic concerns to gain potential consequences by insertion of the clause to a contract, there is a need to examine risks and consequences contractual parties may encounter by incorporation of the contractual provisions on hardship.

Hardship because of its nature can appear in different forms, such as the purpose of a contract can be fulfilled somehow or an object cannot be fulfilled somehow or other, and the same situation can have different effects depending on the characteristics of a particular contract concern[324]. Moreover, parties to international commercial contract seek to define different characteristics and effects of certain situations in different clauses of a contract[325], thus assuming risks and consequences by them. The concern should be focused on risks and, subsequently, consequences parties to a contract may encounter when a hardship clause do not meet the standards for hardship to be invoked. The principle of contract freedom pressuposes that contractual parties whatever contingencies they may attach to a contract, they have to be take upon by themselves by the parties to it[326]. Following the approach of arbitrators we may assume that even parties failed to include a hardship clause to a contract, or they did it, it is too limited to be able to deal with consequences of a particular event[327]. However, it have to be noted, that failure to include a hardship clause indicates the parties‘ intention to accepts the risks implicits in changing circumstances[328], thus parties inserting a clause should accept the risks and consequences they foreseen to the extent of a clause (*criterion of specified event in a hardship clause*)[329]. Following this manner, the ICC arbitrators (award No. 1512) stated: „<..> *as a general rule one should be particularly reluctant to grant relief in situations of hardship, especially when the intent of the parties has been clearly expressed. Moreover, caution is especially called for an international transactions where it is generally much less likely that the parties have been unaware of the risk of a remote contingency or unable to formulate it precisely*“[330]. Very similar position of arbitrators

[324] Strohbach H., *supra* note 122, P. 40
[325] Ibid.
[326] Fry, E., Donaldson, R. W. A Treatise on the Specific Performance of Contracts (5 ed.), 209 (1911), P.209
[327] Zaccaria, E. Ch., *supra* note 11, P. 159
[328] Zaccaria, E. Ch., *supra* note 11, P. 159; Berger, K. P. The relationship betweeen the UNIDROIT Principles of International commercial contracts and the new *lex marcatoria*, 2000, 1 Uniform law review, P. 162-164
[329] Zapolskis, P., *supra* note 247, P. 159
[330] Zaccaria E. Ch., *supra* note 11, P. 159-160; ICC Award No. 1512, YCA 1976, at 128 et seq// http://www.trans-lex.org/201512; [accessed: 25 11 2013]

was stated in the ICC award No. 2478[331] and other cases where seems to be that arbitrators in a situation of changed circumstances tends only to consider what was expressly stated in the contract, assuming that the parties have implicitly accepted the risk of any supervening event not expressly mentioned[332]. In this regard, hardship clause determines the contractual adaptation just to the particular level of changed circumstances stipulated under a clause[333], hereinafter, a court ruling of Appeal Court of Paris (Cour d'Appel of Paris), when court delivered an opinion that even contractual parties have stipulated the index formula in their long-term contract for supply of oil, a price revision clause was insuficient because it contained a minimum and maximum variations[334], which was considered to be not satisfying a suitable price revision formula.

Indeed, as prof. U. Draetta noticed that in a practice there are contracts, so called risk-taking contracts, where the risk is itself the object of a contract (e.g., financial sector) and there also contracts, where the risk is not one of their inherent elements, thus contractual parties proceed themselves to an evalution as complete as possible of all the specific risks of that contract (the risk evalution)[335]. However, contractual parties, because of the the nature of hardship and force majeure clauses, in case of financing contracts or like that, are deemed to be not allowed to allocate the risks of a contract by incorporation thereof. In order to establish which party have to bear a risk, instead of using tradional pre-established models of risk allocation, such as, hardship or force majeure clauses, parties are aimed to negotiate suitable risk allocation[336] by other models of risk allocation. It was underlined in the thesis before that hardship can be invoked just in case if a disadvantage party could not asuume the risk of event at the time of a contract. However, the contract may expressly allocate the risk of supervening hardship, in case if allocation is express and is inherent in the nature of a contract[337], although it have to be noted, that the mere fact that contract contains a fixed price do not mean that it allocates the risk[338]. With regard to a contracts which are of aleatory nature, such as, contract of insurance, the obligor can not complain that the risk has occured even though the occurence far exeeded that had been foreseen, because in the contracts like that the assumption of a risk follows from the nature of a contract[339]. Thus, concerning the contracts of speculative nature contractual parties have to be aware that even very specified clause with

[331] *Supra* note 281.
[332] Zaccaria, E. Ch., *supra* note 11, P. 160
[333] Zapolskis, P., *supra* note 247, P. 160
[334] Zapolskis, P., *supra* note 247, P. 160; Puelinckx, A. H., *supra* note 68, P. 57
[335] Draetta, U. Hardship and Force majeure Clauses in International Contracts. International Business Law Journal, 347 (2002), P. 357
[336] Draetta U., *supra* note 335, P. 358
[337] Perillo, J. M., *supra* note 31, P. 24
[338] Ibid.
[338] Perillo, J. M., *supra n*ote 31, P. 24; Commentary on the Principles of International commercial contracts (UNIDROIT), Rome 2010, Unilex on CISG and UNIDROIT Principles/International case law and bibliography. http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13637&x=1; [accessed: 01 12 2013]
[339] Draetta, U., *supra* note 335, P. 358

particular risk allocation, which has been recognized as not assumed at the time of a contract, might be treated as not satifying hardship threshold.

Nevertheless, contractual parties may have situation when is not enough only to draft precise enough clause which could be interpreted as accomplishing the standard for hardship to appear. There might be a situation when parties to a contract expressly stipulated all the circumstances interpreted as equivalent to a situation of hardship and even all consequences they could expect in case of specified events may occur, contractual parties may face with other problems, for example, in *negotiation process*. What kind of consequences a disadvantaged party may encounter in case of failed re-negotiations? Actually, firstly, is worth to remember the main purpose of inclusion of hardship clauses to international contracts. Indeed, one of the main features is that inclusion of hardship clauses allows parties to adjust their long-term contracts to changed circumstances[340], and also to avoid unintented consequences by application of the law of the contract[341]. According to prof. M. Fontaine in a time when one of the parties tends to invoke a clause, there is the risk that the other contracting party who is benefiting from advantages corresponding to damage suffered by its partner, may seek to escape from re-negotiation of a contract[342]. Meanwile, in case if contractual parties can not reach agreement and if did not stipulate any adjudication, modification or other special procedure in case of failed renegotiations, one of the parties may take contractual responsibilty of the oher party in question[343], or simply to rely only on applicable law provisions, as they could do without stipulation of a clause. Therefore, contractual parties are advised and recommended to provide in a hardship clause a procedure that will apply in case the parties can not reach an amicable agreement concerning the revision of the contract[344].

Different situation could be in case of failed renegotiations and when contractual parties delegate third parties for adaptation of their contract. There are many cases when contractual parties to complex and long-terms contracts are aware that they are not able to know all the details to carry it out when a contract is concluded, thus they determine a clause providing the intervention or assistance of third party, technical person, or other natural person[345]. Contractual parties by delegation of third party, usually arbitrator, so called natural judges chosen by parties to revise or fill gaps of a contract[346], have to be prepared to accept more or less imposed decision of an arbitrator[347]. A clause encompassing intervention of third parties could be described as, for

[340] Sornarajah , M., *supra* note 157, P. 109
[341] Fucci, F. R., *supra* note 21, P. 11
[342] Fontaine, M., De Ly, F., *supra* note 7, P. 474
[343] Ibid.
[344] Ibid, P. 481
[345] Horn, N. Third party intervention. International Business Law, 139 (1985) , Vol.13, Issue 3, P.140
[346] Berger, K. P. Powers of Arbitrators to fill gaps and Revise contracts to make sense. Journal of International Commercial Arbitration, 1 (2001), Vol. 17. P. 2
[347] Zaccaria, E. Ch., *supra* note 11, P. 155

example: „If the parties have not agreed a mutually acceptable solution within sixty days after the notice requesting a meeting...“[348] a decision about a contract might be submitted to one or several third parties[349]. It is notable, that the criterion for intervention of a third party also used to be defined in objective or subjective manner and the binding decision of third parties consequently will depend on the nature of the role of such arbitrators described in a clause[350].

Furthermore, concerning potential risks of inclusion of hardship clause and its superseding power over statutory regulations, contractual parties may face with the situation when even precisely drafted clause can not be in line with particularly fast changes in circumstances not compatible with stipulated in a clause[351]. If contractual parties include an adaptation clause referring to the revision of price, for example, to be carried out periodically, e.g., every five or ten years after conclusion of a contract[352], or fix a lesse fee for certain period of time, accordingly, in case of substantial changes or economic fluctuations (e.g., extreme inflation cases) contractual parties may invoke statutory law provisions regarding hardship, if this alteration of circumstances amounted to fundamental change in equilibrium of contract[353]. Therefore, contractual parties may face a collision between statutory and contractual provisions regarding hardship, which are going to be analysed in the last subchapter.

3.3. An equilibrium between statutory and contractual provisions of hardship

In the first chapter of the thesis was already outlined that the doctrine of *rebus sic stantibus* (changed circumstances) has developed as a supplement to the overriding principle of contract law (*pacta sunt servanda*). Incorporation of hardship clauses to international commercial contracts reflects the principle of parties‘ autonomy right which permits for parties to include different types of changed circumstances clauses by consent of them. Nevertheless, since it was ascertained that the paramount principle of contract law is not an absolute one[354], there is a need to analyse an equilibrium between contractual and statutory law provisions regarding application of hardship concerned at national and international levels.

First of all, it should be noted, that hardship clauses are generally included to long-terms contracts in order to avoid unintented consequences by application of the law of the contract, particularly concerning investment contracts, where significant amount of capital is employed[355].

[348] Fontaine, M., De Ly, F., *supra* note 7, P. 483
[349] Ibid.
[350] Fontaine, M., De Ly, F., *supra* note 7, P. 485
[351] Zapolskis, P., *supra* note 247, P. 160
[352] Ibid.
[353] Brunner, Ch., *supra* note 26, P. 458
[354] Doudko A. G., *supra* note 17, P. 487, 493
[355] Fucci, F. R, *supra* note 21, P. 11

However, a question arises whether contractual parties may foresee all kind of events which might distort the performance of contract, accordingly, to stipulate them in their contract as a hypothesis of hardship clause? Subsequently, can contractual parties specify the particular level or rate of probable losses or changes in circumstances? Moreover, how courts should apply contractual regulation accomplished by parties in a case of occurence of supervening circumstances not compatible with stipulated under a clause? It was stated before, that contractual parties in order to gain benefits from the inclusion of hardship clauses are advised to draft a particularly precise clause, application thereof depends if the standards for hardship will be fulfilled. Accordingly, the standard for hardship to arise is assessed in the light of applicable law provisions concerning hardship. As a relevant example, providing courts‘ attitude towards the application of contractual provisions of hardship which were considered as not compatible with applicable law rules in order to meet a relevant hardship threshold, is the case of *Cleveland-Cliffs Iron Co. v. Interstate Commerce Commission,* when a court stated that a clause referring to general formula of cost changes to be described in vague terms, as „gross inequity“ do not trigger the hardship clause[356]. Consequently, is considered as not satisfying a criterion of fundamental changes in circumstances according to applicable law provisions.

The other concern is based on application of hardship clauses by compliance to unforseeability criterion which is provided under applicable law provisions. The criterion of unforseeability, as it was already mentioned, is considered to be rather philosophical or hypothetical question[357]. Indeed, generally if an event is forseeable, the parties should deal with that in a contract[358], otherwise, parties could rely on applicable law provisions and to take responsibilities for unforseen events. In the previous paragraphs regarding hardship and other clauses, as adaptation, price index and etc., it was assumed that incorporation of these kind of clauses to a contract is regarded as an express indication of acceptance of the risk of changed circumstances[359]. Therefore, contract could be modified just in case of specified risks allocated by a clause and not outside a contract. This positions was hold by *High Arbitration Court of Russia* which declared that courts can not apply applicable law provisions to modify a contract in connection with a substantial changes in circumstances if the parties have included a mechanism to adapt[360].

Further concerning contract law rule, it my be noted, that generally there is such a variety in hardship clauses with regard to their scope, application and remedy, that it is considered to be difficult to base any customary principle on them[361]. Indeed, arbitrators used to refuse to read

[356] Ullman, H., *supra* note 5, P. 91
[357] Fucci, F. R, *supra* note 21 P. 17; Zaccaria, E. Ch., *supra* note 11, P. 150; Doudko, A. G., *supra* note 17, P. 499
[358] Perillo, J. M., *supra* note 31, P. 23
[359] Doudko, A. G., *supra* note 17, P. 500
[360] Ibid.
[361] Houtte, H. V., *supra* note 3, P. 109//http://www.trans-lex.org/117300; [accessed: 05 12 2013]

hardship clauses into long-terms contracts, referring that „a clause which mentiones specific changes must be interpreted as meaning that no other changes should be taken into account"[362]. Similar position by arbitrators was already mentioned in the ICC case No. 2478 (in 1974)[363] regarding the price indexation clause which allocated the risk of parties, thus changes of fixed prices by a clause was not allowed due to the allocation of risk by contractual regulation. Other example is ICC case No. 5953 (1989) where arbitrators allowed the renegotiation of the purchase price of every sixth months which was foreseen by a clause and did not allow interim adaptations because of changes in circumstances[364].

Nevertheless, the equilibrium between contractual and statutory law provisions can not be allocated just in favour of contract. One of the cases in a court practice reflecting balance between contractual and statutory law provisions is a case of *Aluminum Co. of America (ALCOA) v. Essex Group* where a contract between two companies was made by including complex price index formula to be calculated for each pound of molten aluminum which should be made from alumina[365]. Accordingly, by this formula non-labour costs were to be escalated in accordance with the Wholesale price index for industrial commodities (so called WPI-IC), however by increase of oil prices and by unticipated pollution-control costs ALCOA's costs for electricity increased and much more fast than was made by WPI-IC[366]. Subsequently, ALCOA claimed for excuse of indicated formula on the ground that WPI-IC could not reasonably reflect its changes in non-labour costs and court granted relief and reformed the contract by new price escalation clause[367]. In principle, this ruling used to be considered as quite questionable because it could be arguable whether ALCOA by inclusion of price index formula for aluminum, did not assumed the risk of substantial increases in the costs of energy prices, which used to be necessarily used for the smelting of alumina[368]. This case reflected the different attitude of courts to be linked even to adjust contract to changes of circumstances outside the contract, thus the absolute dominance of contract law provisions was balanced by application of governing law provisions. Moreover, similar position regarding applicable law provisions was granted in several Brazilian court rulings, when was ascertained that „*whether or not the contracts contains a hardship clause and, separate from the issue of force majeure, hardship will be an excuse under Brazilian law if the conditions are met*"[369].

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[362] Houtte, H. V., *supra n*ote 3, P. 110; ICC Award No. 2291, Clunet 1976// http://trans-lex.org/202291; [accessed: 05 12 2013]
[363] *Supra* note 281.
[364] Houtte, H. V., *supra* note 3, P. 110
[365] Aluminum Co. of America v. Essex group, Inc., 1980//http://www.leagle.com/decision/1980552499FSupp53_1540; [accessed: 04 12 2013]; Doudko, A. G., *supra* note 17, P. 489; Brunner, Ch., *supra* note 26, P. 456
[366] Brunner, Ch., *supra* note 26, P. 456
[367] Ibid.
[368] Ibid.
[369] Fucci, F. R., *supra* note 21, P. 17

Since the question of risk allocation and unforseeabilty criterions used to be already discussed in a case of ALCOA when useless price escalation (index) clause was not able to deal with concern of a case[370], we continue analysis with respect to statutory law provisions on the doctrine of changed circumstances. Generally, if a performance of contract becomes ruinously expensive and contrary to good faith, the court even in exceptional cases may apply applicable law provisions and to disregard contractual will of parties[371]. For example, a case in *ICC under Swiss law* when it was ruled to modify even a speculative nature contract where parties contemplated their risks, by the application of *good faith* principle[372]. The equilibrium between the principle of party autonomy, on the one hand, and the overriding principle of good faith, on the other hand, can be solved in different ways[373] due to the legal systems of particular country and legal acts applicable to a dispute. Moreover, another significant case investigated by *Iran-US Claims Tribunal* when Tribunal stated: „Provision not only lies down the law to be applied by the Tribunal, but it also mandates the Tribunal to take into account relevant usages of the trade, contract provisions and changed circumstances when deciding „all cases", thereby mentioning „changed circumstances" on the same level as „contract provisions"[374]. The other case of ICC also expressly stated that the doctrine of *rebus sic stantibus* may be applicable regardless the clause to this effect, however as an exemption to the sanctity rule[375].

Hereinafter, it may be assumed that each of countries may solve a problem by maintaining different approaches. It was already mentioned that parties to a contract are free to address issues of hardship in their contract, thus to benefit from the institute of contractual liability. In particular, favour of contractual provisions is maintained by French courts which tends to apply the doctrine of imprevision just in cases when circumstances render performance to be impossible (force majeure). Applicable law of France traditionally strictly adheres to the principle of *pacta sunt servanda*[376]. One of the examples is a case of *Electricit de France (E.D.F) c. Socit Shell Franqaise (Shell Française)* when a fuel oil supply contract contained a hardship and price indexation clause, which due to a sharp rise of the crude oil prices consequently exeeded the ceiling price indicated by a clause[377]. The contractual parties brought a dispute to the Tribunal Court of Paris (*Tribunal de commerce de Paris)* which declared that contractual parties should be bound by contract as it is an

[370] Doudko, A. G., *supra n*ote 17, P. 500
[371] Doudko, A. G., *supra* note 17, P. 500
[372] ICC award No. 3267 (1984), Yb. Comm. Arb., 1987, 87 at 10// http://www.trans-lex.org/117400; [accessed: 05 12 2013]
[373] Brunner, Ch., *supra* note 26, P. 391-392
[374] Houtte, H. V., *supra* note 3, P. 110
[375] Nassar, N. Sanctity of Contracts Revised. Dordrecht, Boston, London, 1995, P. 201// http://www.trans-lex.org/105700; [accessed: 05 12 2013]
[376] Brunner, Ch., *supra* note 26, P. 392
[377] E.D.F. v. Shell Française, 1978// http://translex.unikoeln.de/output.php?docid=128100&markid=944000; [accessed: 04 12 2013]; Ullman, H., *supra* note 5, P. 99-100

act within the will of the parties[378]. The position of French courts maintaining the power of contract law even slightly changed after World Wars, it is still considered to be adjusted in France up to this day[379]. Similar position is maintained by Belgium courts which also apply changed circumstances doctrine (imprevision) in case if it leads to unbalanced obligations[380]. Accordingly, comparable position used to be maintained by German and Anglo-American systems regarding a contract as a law between a parties, however courts still have power within narrow boundaries to release parties from their contractual obligations[381], by reference to applicable law privisions, thus providing much more flexibe approach towards changed circumstances outside the boundaries of a contract. Indeed, German and, especially, US the doctrine of hardship base on inquiry, whether the non-occurence of the circumstances was a basic assumption on which the contract was made and assumption of parties‘ risks allocation contemplated in a contract is made according to the principle of good faith[382]. Concerning the application of general law principles, such as good faith, a ruling of German court: „The contract is a law adopted by the parties, and it is a contract which the judge must use as a starting point for deliberations, if it has a gap, he must fill in accordance with the standards developed by reputable commercial men for contracts of that type“[383]. Although, English courts' decisions regarding application and maintenance of equilibrium between the rules of contract law and statutory rules is worth more comprehensive analysis.

The common law traditions, in particular, maintain the maxim of *contra preferentum* regarding contract interpretation[384]. Absolute contract rule use to be maintained in already mentioned *Paradine v Jane (1647)*[385] case, in the case of *Lauritzen A.S. v Wijsmuller B. V (the Super Servant Two) (1990)*[386] and others, hereby contractual parties used to be particularly aware in contract formulation and to consider what clauses they want to incorporate without leaving the gaps for court intervention. However, afterwards the sanctity of contract law slightly changed. One of the most significant examples when court ruled in favour of applicable law provisions used to be decision in *Taylor v. Caldwell (1863)*[387], which established not only the doctrine of frustration but also made inroads into the notion of absolute obligations[388]. Yet, the decision of court still was considered to be questionable, accordingly prof. K. Zweigert and H. Kotz stated : „the judge must

[378] Ullman, H., *supra* note 5, P. 100
[379] Zweigert, K., Kotz, H. Introduction to Comparative Law. Oxford: Clarendon Press, 1998, 3rd revised edition. P. 527
[380] Fontaine, M., De Ly, F., *supra* note 7 P. 454
[381] Zweigert, K., Kotz, H., *supra* note 379, P. 533
[382] Brunner, Ch., *supra n*ote 26, P. 393
[383] Zweigert, K., Kotz, H., *supra* note 379, P. 536
[384] Ullman, H., *supra* note 5, P. 89: maxim by E. Allan Farnsworth : „If a language supplied by one party is reasonably susceptible to two interpretations, one of which favours each party, the one that is less favourable to the party who supplied the language is preffered“.
[385] Koffman, L., Macdonald, E., *supra* note 109, P.520
[386] O' Sullivan, J., Hilliard, J. The Law of Contract. Oxford: University Press, 1988, 3rd edition. P. 353
[387] Koffman, L., Macdonald, E., *supra* note 109, P. 520
[388] Ibid.

ask what agreement reasonable parties would have reached if at the time of contract may had foreseen the subsequent events and made some provisions for them?"[389], since a contract did not contain any express provisions with this eventuality[390]. In the following case the court answered a question providing that courts have power to adapt contract with regard to the mutual interests of parties and basis of equity[391]. Hence, even parties' autonomy right is pertinent under English law and used to be prevailing in England[392], the contract law is still not absolute and attitude of courts slightly changed by the doctrine of frustration. However, traditionally courts do not have right to change the terms of contract[393], thus a question whether a contract encompassing a hardship clause could be modified outside the boundaries of contractual provisions still remains opened.

Furthermore, sometimes contractual parties may face a situation when in order to gain particular benefits from application of contractual provisions they include a hardship clause compatible with the requirements for exemption of hardship to be applied, but unfortunately failed in re-negotiation procedure or even when re-negotiation is already underway, they could not reach an agreement[394]. Whereas a duty to reach an ammicable solution it is not obligatory, it seems to be that only one way to solve a dispute in a case would be to incur its contractual responsibilty under applicable law rules[395].

To conclude, regarding a brief analysis balancing „contract provisions" and contract law privisions, it may be assumed that a task to define the particular equilibrium between contractual and statutory law provisions on hardship is rather difficult. Author of the thesis considers that neither contractual, nor statutory law provisions can benefit contractual parties if they are applied individually without respect to both of them. As concerns, a notable phrase used to be expressly stated by prof. H. V. Houtte that „it would be too cumbersome if parties were obliged to negotiate and draft hardship clauses covering all possible events which may effect performance"[396]. Thereby, parties to a contract could rely just on „act of their will", assuming all the risks they have not foreseen or expected. Accordingly, it may be assumed that in order for a contract law rule to be applied in respect of contractual parties' interests, there is a need to recognize the importance of applicable law rules, generally, employed to protect and safeguard the contractual regulation.

[389] Zweigert K., Kotz H., *supra* note 379, P. 529
[390] Richards, P., *supra* note 116, P. 329
[391] Zweigert, K., Kotz H., *supra* note 379, P. 529-530
[392] Baranauskas, E., Zapolskis, P., *supra* note 20, P. 201
[393] Ibid, P. 203
[394] Fontaine, M., De Ly, F., *supra* note 7, P. 480
[395] Ibid.
[396] Houtte, H. V., *supra* note 3, P. 110

CONCLUSIONS

The analysis of this thesis has integrally related arguments and conceptual implications regarding international commercial contract clauses dealing with changed circumstances. Pursuant to legal reseach the hypothesis raised above is partially confirmed. In the legal systems where applicable laws provide with the principle of *rebus sic stantibus* and statutory law provisions may be employed to ensure better protection of contractual regulation, contractual provisions regarding changes in circumstances do not ensure enhanced legal certainty and legitimate interests of contractual parties. However, legal systems where the „absolute contract rule" prevails and the principle of *rebus sic stantibus* is not established or controversially applied, contractual regulation might be seen as a solution and protection of contractual parties' interests in case of changes in circumstances. The conclusions that can be drawn are summarized below:

1. International private law codifications (soft-law instruments), such as, UNIDROIT, PECL, CISG, to a certain extent establish relatively similar rules regarding the institute of changed circumstances. UNIDROIT and PECL maintain the absolute contract rule, therefore, the rules for modification and adaptation of contractual terms by applicable law privisions are provided due to exceptional circumstances. Hereby, both instruments determine the parties' autonomy right for incorporation of hardship clauses and reflect a need of contractual regulation in case of changes in circumstances. With regard to the incorporation of hardship clauses under CISG, hardship exemption is deemed to be not a subject matter of the Convention, thus hardship clauses are considered as a solution for contract parties to gain a relief in case of situation of hardship.
2. A comparative analysis of the different legal systems shows that French and American-UK legal systems maintain the rule of „absolute contract law", therefore, hardship clauses appeared in the context of a rigid Courts' approach towards application of the institute outside the boundaries of the contract. Essentially, German law sustains less stringent approach regarding the doctrine of changed circumstances under applicable law rules, however, the modification or adaptation of contractual terms is allowed within the boundaries of changes in circumstances underlined in a contract. Hence, the maintenance of contract law rule in civil and common law systems reflects the need of changed circumstances clauses and its relevance in contractual practice.
3. For the purpose of contract modification or adaptation with reference to special clauses dealing with changed circumstances, such as, renegotiation, adaptation, price-index clauses, etc., account is taken merely to the occurence of well-specified event compatible with circumstances underlined in a specific clause. There is no need of

requirements for hardship exemption to apply. In contrast to the modification of contractual terms under hardship clause, which demands the relevant standards for hardship exemption to be met. Nevertheless, the differentiation line between hardship and other clauses dealing with changed circumstances is considered to be slight and quite uncertain.

4. Due to the practice of different national courts and international awards by arbitrators it is ascertained that an interpretation of hardship clauses particularly depends on the construction of hardship clause and, simultaneously, on the contract laws and case law concerning certain transactions. The following conclusions is ascertained:
    - on the one hand, vague and open-ended contractual terms may leave an aggrieved party with certain losses even without the right to recourse statutory law provisions,
    - on the other hand, excessively drafted clause may face a collision with other types of changed cirumstances clauses differing with their scope and legal effects parties to a contract might expect.
5. The interrelation between the principle of *pacta sunt servanda* and *rebus sic stantibus* depends on the legal system and applicable laws contractual parties may use and it is a burden for contractual parties of each case. Indeed, in case of collision between the statutory and contractual provisions concerning hardship different legal systems either maintain the approach towards priority of contractual regulation (e.g., American-UK, French, Belgium), or refer to the priority of statutory law rules (e.g., Brazil), or simply use combination of them. The observation is that neither contractual, nor statutory law provisions regarding an exemption of hardship may benefit contractual parties if they are employed individually.
6. Following the conclusions above, we may recommend to contract drafters and legal entities involved in commercial activities to take into account each legal system and court practice with respect to the interpretation of different types of transactions. Besides, contractual parties are advised to bear in mind that by general obedience of contract law rule, statutory law privisions regarding hardship should not be disregarded due to particular interrelation between them.

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SUMMARY

The doctrine of changed circumstances concerning the situation of hardship has developed in the light of the paramount contract principle (*pacta sunt servanda*) and is considered as the supplement to the overriding principle of contract law. Hardship clauses have appeared in the context of rigid courts' approach towards application of *rebus sic stantibus* when the absolute dominance of contract law rules takes privilege. Thereby, contractual parties found a solution to be relieved from unforeseen changes in circumstances referring to contractual regulation. However, the need of hardship clauses and an interrelation between contractual and statutory law rules concerning hardship exemption require particular analysis.

The first part of the thesis starts with the general definition of hardship doctrine and the development theory thereof. The analysis of first chapter is based on the need of hardship clauses in a connection with international private law instruments (UNIDROIT, PECL, CISG, etc.), other model rules and incorporation of hardship clauses accordingly. Moreover, the need of hardship clauses is revealed by different approaches on the recognition and incorporation of the clauses maintained in civil (France, Germany) and common law (American, England) systems. An examination revealed that although the incorporation of hardship clauses and the maintenance of the principle of *pacta sunt servanda* are prevalent in mentioned legal systems and under most of applicable laws rules, the particular need of hardship clauses has developed in the context of the gap in CISG regarding hardship exemption and, particularly, as a solution for contract parties in French and American –UK legal systems.

The second part of the thesis deals with different types of clauses dealing with changed circumstances, their differences, similarities, role in contractual practice and interrelation with hardship clauses. Particular concern is on hardship clauses, an interrelation with different clauses dealing with changed circumstances and brief interpretation thereof. Analysis has shown that special clauses dealing with changed circumstances, such as, renegotiation, adaptation, price-index, force majeure clause, etc. are similar to the extent that they are applied in case of changes in circumstances, however, they have certain differences and peculiarities in a connection with hardship clauses and the differentiation line between them can be very slight and problematic.

The third part of the thesis examines the most problematic aspects of contract drafting and construction of hardship clause, consequently, risks and consequences contractual parties may face by incorporation of excessively precise or vague contractual terms. An interrelation between contractual and statutory provisions of hardship also is examined in the light of the structure of hardship clause and different practice by national courts and arbitration regarding different commercial contracts.

The hypothesis of this thesis is partially confirmed. According to the analysis of different national legal systems, applicable laws and court practice regarding application of clauses dealing with changes in circumstances author ascertained, that in the legal systems where applicable laws provide with the principle of *rebus sic stantibus* and statutory law provisions may be employed to ensure better protection of contractual regulation, contractual provisions regarding changes in circumstances do not ensure enhanced legal certainty and legitimate interests of contractual parties. However, legal systems where the „absolute contract rule“ prevails and the principle of *rebus sic stantibus* is not established or controversially applied, contractual regulation might be seen as a solution and protection of contractual parties‘ interests in case of changes in circumstances.

SANTRAUKA

Pasikeitusių aplinkybių teisinis institutas (darbe analizuojamas kaip sutarties vykdymą apsunkinančios aplinkybės – *rebus sic stantibus*) paplito sutarties privalomumo (*pacta sunt servanda*) aksiomos kontekste ir yra laikomas papildomu instrumentu, siekiant apsaugoti sutarties šalis nuo nenumatytų, sutarties vykdymą apsunkinančių aplinkybių. Pasikeitusių aplinkybių instituto sutartinių sąlygų atsiradimą sąlygojo pernelyg griežtas kai kurių teismų požiūris, taikant įstatymines pasikeitusių aplinkybių nuostatas bei laikant *pacta sunt servanda* principą pagrindiniu sutarties šalių santykius reguliuojančiu principu. Atsižvelgiant į tai, sutarties šalys surado sprendimą, t.y. kaip išvengti nuostolių atsiradus nenumatytoms sutartyje aplinkybėms, įtraukiant į sutartis pasikeitusių aplinkybių sutartines sąlygas. Vis dėlto, koks yra šių sutartinių sąlygų poreikis ir kaip nustatyti pusiausvyrą tarp sutartinių ir įstatyminių pasikeitusių aplinkybių nuostatų, nėra žinoma, todėl šiems klausimams atsakyti, reikalingas išsamus tyrimas.

Pirmojoje darbo dalyje yra bendrai pristatomi pasikeitusių aplinkybių teisinio instituto apibrėžimas, jo raida ir vystymasis. Dėmesys šioje dalyje yra sutelkiamas išnagrinėti pasikeitusių aplinkybių sutartinių sąlygų poreikį, pateikti, kaip skirtingi tarptautinės privatinės teisės instrumentai apibrėžia pasikeitusių aplinkybių institutą bei sutartines pasikeitusių aplinkybių sąlygas, bei kaip pasikeitusių aplinkybių įstatyminės ir sutartinės sąlygos yra pripažįstamos ir naudojamos civilinės (Prancūzija, Vokietija) ir bendrosios (Amerika, Anglija) teisės sistemų valstybėse. Autorius daro išvadą, kad nors ir sutarties privalomumo principas yra laikomas pagrindiniu sutarties šalių santykius reguliuojančiu principu minėtose valstybėse bei yra įtvirtintas daugumoje privatinės taikytinos teisės nuostatų, pagrindinį pasikeitusių aplinkybių sutartinių sąlygų poreikį atskleidžia CISG (Vienos konvencija dėl tarptautinio prekių pirkimo-pardavimo sutarčių) esanti spraga (nėra numatytas pasikeitusių aplinkybių institutas – hardship) bei Prancūzijoje, Amerikoje-Anglijoje vyraujantis sutarties privalomumo principo absoliutinimas.

Antroje dalyje nagrinėjamos skirtingos pasikeitusių aplinkybių sąlygos, panašumai, skirtumai, vaidmuo sutarčių sudarymo praktikoje bei sąveika su sutarties vykdymą apsunkinančių aplinkybių sutartinėmis sąlygomis (hardship clauses). Ypatingas dėmesys suteikiamas sutarties vykdymą apsunkinančių aplinkybių sutartinėms sąlygoms bei jų aiškinimui. Atsižvelgiat į šios dalies analizę, daroma išvada, kad nors ir visos skirtingos pasikeitusių aplinkybių sutartinės sąlygos, tokios kaip, persiderėjimo, adaptacijos, kainų indekso, force majure, etc., yra taikomos pasikeitus tam tikroms aplinkybėms, jos turi tam tikrų skirtumų ir ypatumų, ypatingai sąveikaujant su sutarties vykdymą apsunkinančių aplinkybių sutartinėmis sąlygomis, kurie nevisada aiškiai apibrėžiami.

Trečioje darbo dalyje atskeidžiami pagrindiniai probleminiai aspektai, kurie atsiranda sudarant sutartis bei formuluojant pasikeitusių aplinkybių sutartines sąlygas. Taip pat nagrinėjama,

kokią riziką bei numanomas pasekmes prisiima sutarties šalys, įtraukdamos pasikeitusių aplinkybių sutartines sąlygas į jų sudaromas sutartis. Įstatyminių bei sutartinių pasikeitusių aplinkybių nuostatų sąveika taip pat nagrinėjama, atsižvelgiant į sutartinių sąlygų formulavimo vaidmenį bei skirtingą teismų ir arbitražų suformuotą praktiką.

Autoriaus iškelta hipotezė iš dalies pasitvirtino. Atsižvelgiant į tai, kad pasikeitusių aplinkybių sutartinių sąlygų taikymo aspektai buvo išnagrinėti skirtingų šalių teisinėse sistemose pagal skirtingą valstybių taikytiną teisę bei vadovajauntis teismų praktikos analize, autorius daro išvadą, kad teisinėse sistemose, kuriose yra įtvirtintos pasikeitusių aplinkybių doktrinos (rebus sic stantibus) įstatyminės nuostatos ir jos yra taikomos siekiant apsaugoti sutartinį reguliavimą, sutartinės pasikeitusių aplinkybių nuostatos neužtikrina didesnio teisinio tikrumo ar šalių teisėtų lūkesčių apsaugos. Tačiau teisinėse sistemose, kuriose sutarties privalomumo principas laikomas pagrindiniu sutarčių šalių santykius reguliuojančiu principu, o pasikeitusių aplinkybių institutas nėra įtvirtintas arba taikomas gana kontraversiškai, sutartinis reguliavimas gali būti vienas iš būdų apsaugoti sutarčių šalių interesus ir jų apsaugą.