COMMERCIAL IMPRACTICABILITY UNDER THE INDIAN LAW OF CONTRACT: ASSESSING THE ROLE OF THE UNIDROIT PRINCIPLES

Abstract
The present era of heightened liberalization has encouraged an increasing number of jurisdictions across the globe to offer some respite to the parties of a contract when they experience a subsequent, unforeseen change in circumstance that results in commercial impracticability or hardship. However, there are sufficient judicial dicta in India, which is a common law jurisdiction to demonstrate a certain hostility in recognizing the occurrence of any such situation that is short of impossibility within the precepts of Section 56 of the Indian Contract Act, 1872. The blind adoption of the traditional common law principles have proven unsuitable in resolving the predicaments that may arise in modern-day contracts, which are often affected by inflation and other legal or political changes; and have the potential to alter the contracted price of performance to the detriment of one party. The present author suggests that the Indian courts should therefore begin referring to the International Institute for the Unification of Private Law's [UNIDROIT] approach espoused in its Principles on International Commercial Contracts [the UPICC]. Unlike the Indian law of contract, the UPICC adopts a dichotomy between the theories of hardship and *force majeure* and consequently provides different solutions to address these matters. Employing the UPICC as a gap-filler will assist the Indian courts in interpreting these issues according to well-defined and internationally accepted standards so that the parties can receive fair and adequate redress when the performance of their contract has been affected by hardship.

1 INTRODUCTION

The principle of sanctity of contracts as envisaged in the traditional legal doctrine *pacta sunt servanda* has been uniformly adhered to in civil and common law jurisdictions to mandate the strict performance of contracts.[1] Although the principle imbibes certainty and stability in contractual obligations, its rigid application may sometimes run counter-productive to the concepts of reasonableness, justice and good faith when, as a result of extenuating supervening circumstances, the performance of the contract is rendered problematic.[2] Jurisdictions across the globe thus rely on the counter principle *clausula rebus sic stantibus* to develop exemptions for extreme

[1] The Latin maxim *pacta sunt servanda* means agreements must be respected. See, Andrew Kull, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' (1991) 43 Hasting Law Journal 1, 6; Michael G Rapsomanikas, 'Frustration of Contract in International Trade Law and Comparative Law' (1979-1980) 18 Duquesne Law Review 551-605. Also see, *Sapphire v. National Iranian Oil Company* Arbitral award March 15, 1963, I.L.R., 1967, 136, 181, in which it was underscored that 'the rule *pacta sunt servanda* is the basis of every contractual relationship'; and *Libyan American Oil Company (LIAMCO) v. Libya*, Arbitral Award of 12 April 1977 YCA 1981, 89, 101. *Cf*, Art. 26 of the 1969 Vienna Convention on the Law of Treaties, which stipulates the general principle of *pacta sunt servanda*.

[2] See, Daniel Girsberger and Paulius Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) 19(1) Jurisprudencija 121, 123.

situations that subsequently destroyed the foundation of the contract.[3] The discharge of the parties from performance due to the occurrence of such circumstances has conventionally been permitted on account of *force majeure* in civil law jurisdictions, or under the theory of 'frustration of contract' in common law systems. Some legal systems, and in particular, civil law jurisdictions have, however, additionally recognized the principle of hardship or commercial impracticability as a point of departure from the rigid application of *pacta sunt survanda*. On the contrary, this practice does not seem to have found favour under the traditional principles of the English law of contract, which is also adhered to in other common law jurisdictions such as India. In this respect, the International Institute for the Unification of Private Law [UNIDROIT],[4] which is an independent, inter-governmental organization in Rome offers a feasible solution on 'hardship' via its Principles on International Commercial Contracts [the UPICC]. In particular, the UPICC, which were first formulated in 1994 and were recently modified in 2016,[5] are a restatement of international contract law that endeavour to harmonize and modernize the rules that govern commercial contracts.[6] Accordingly, they may potentially serve as a gap-filler in the respective national laws of contract when these do not contain an appropriate solution on the aspect; or alternatively as a model law for a country that is looking forward to update its laws.[7]

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[3] For a history of the principle, see, James Gordley, 'Impossibility and Changed and Unforeseen Circumstances' (2004) 52 American Journal of Comparative Law 513. Also see, art. 62 of the 1969 Vienna Convention on the Law of Treaties, which stipulates the principle of *rebus sic stantibus*; and Christina Ramberg, 'The UNIDROIT Principles as a Means of Interpreting Domestic Law' (2014) 19 Uniform Law Review/ *Rev. dr. unif.* 669, 671.

[4] For a more detailed understanding on the structure of the UNIDROIT, see, Jan Kropholler, *Internationales Einheitsrecht: Allgemeine Lehren* (Mohr Siebeck 1975) 57-59 (translated from German original); Stefan Vogenauer, 'Introduction' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2015) 7-15; and the UNIDROIT website, <www.unidroit.org/about-unidroit/overview> accessed 16 August 2017.

[5] See, UNIDROIT Governing Council, 'Summary of Conclusions' 95th Session Rome 18-20 May 2016, C.D. (95) Misc. 2, <www.unidroit.org/english/governments/councildocuments/2016session/cd-95-misc02-e.pdf> accessed 14 August 2017. Also see, UNIDROIT Governing Council, 'Adoption of Additional Rules and Comments to the UNIDROIT Principles of International Commercial Contracts concerning Long-Term Contracts' 95th Session, Rome [18-20 May 2016] <www.unidroit.org/english/documents/2016/study50/s-50-misc32-e.pdf> accessed 15 August 2017.

[6] See, the Preamble to the UPICC, which states, 'the Principles set forth general rules for international commercial contracts'. Also see, Michael J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (Transnational Publishers 2005) 9 *et seq*; and Stefan Vogenauer, 'Introduction' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2015) 5.

[7] The Preamble to the *Principles*, para 7, read along with Official Comment 7 to the concerned para, 7. Also see, Bonell, *n* 16 244-246. For a list of national legislations and International Conventions that have used or can use the UPICC as a model, see Michaels, *n* 38 93 *et seq.*

The purpose of this paper is thereby to analyse the Indian position on commercial impracticability or hardship and examine if the country's courts should employ the UPICC's suggested approach to modernize its laws. The structure of this paper will be as follows: Part two will provide a comparative overview of the international best practices on hardship and emphasise on the UPICC's provisions on the subject. Part three will examine the Indian law of contract on hardship with the aid of case law to demonstrate whether the UPICC could plausibly be employed to interpret, supplement or develop the former. Part four would provide the concluding remarks and suggestions.

2 INTERNATIONAL BEST PRACTICE ON HARDSHIP: AN OVERVIEW

2.1 Definition

Although legal systems differ in their definitions for hardship, the principle typically refers to any change in circumstances after the conclusion of the contract, which is so severe that it has the ability to alter the equilibrium between the parties.[8] This could either be due to an increase in the cost of performance or diminution in the value that the affected party would otherwise receive in the absence of such circumstances. Although hardship does not result in impossibility to perform, the party must demonstrate that the occurrence of the event had the ability to affect its performance in some way[9] and was outside its sphere of allocated risk.[10]

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[8] See for instance, art 6.111, Principles of European Contract Law (Kluwer International Law: The Hague, Netherlands, 1999) [PECL 1999]; art III-1.110, Principles, Definitions and Model Rules of European Private Law, Draft Common Frame of Reference, Prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Sellier: Munich, 2008) [DCFR 2008]; ICC Clause 2003 (n); and art 79 of United Nations Convention on Contracts for the International Sale of Goods [CISG]. Also see, Ole Lando & Hugh Beale, 'Principles of European Contract Law – Full Texts of Parts I and II combined' (the Hague: Kluwer Law International, 2000) 322-328; Ingeborg Schwenzer in Peter Schlechtriem and Ingeborg Schwenzer (eds) Commentery on the UN Convention on the International Sale of Goods (CISG) (4th edn OUP, 2016) art 79 para 4; Christopher Brunner, *Force Majeure and Hardship under General Contract Principles: Exemption for Non-Performance in International Arbitration* (Kluwer Law International 2009) 167; Daniel Girsberger and Paulius Zapolskis, 'Fundamental Alteration of the Contractual Equilibrium under Hardship Exemption' (2012) 19(1) Jurisprudencija 121, 122; Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2009) 39(4) Victoria University of Wellington Law Review 709, 712-713; and Niklas Lindstroöm, 'Changed Circumstances and Hardship in the International Sale of Goods' [2006] Nordic Journal of Commercial Law 23-24. Cf Sarah Howard Jenkins, 'Exemption for Non-performance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment' (1998) 72 Tulane Law Review 2015, 2025, which opines that art 79 of the CISG does not incorporate the provision of hardship.

[9] Girsberger and Zapolskis (n), 123.

2.1.1 *Contractual practice on hardship: A Comparative Overview*

The laws of contract in most civil law systems embrace the principle of hardship. The French law has been known for historically recognizing hardship under the theory of *imprévision*.[11] Although this doctrine was originally exclusively applicable to administrative contracts, its scope has over time been extended to other forms of contractual relationships provided that the parties have expressly agreed to this effect.[12] Besides, several other civil law jurisdictions such as Austria,[13] Germany,[14] Greece,[15] Italy,[16] the Netherlands,[17] Portugal[18] and other Scandinavian countries[19] also embrace the doctrine of hardship in their respective laws to re-affirm the principle of good faith.[20] In a related vein, the Principles of European Contract Law, 1999 [PECL][21] and the Draft Common Frame of Reference, 2008 [DFCR][22] also contain similar provisions in this respect. The principle of hardship in the civil law systems do not forgive non-performance but instead call upon the parties to renegotiate the terms of their agreement to accommodate to the changed circumstances when these have fundamentally altered the equilibrium.[23] The courts in most of these jurisdictions are empowered to adapt the contract when renegotiation

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[10] See, Hans Stoll & Georg Gruber in Peter Schlechtriem & Ingeborg Schwenzer (eds) Commentary on the UN Convention on the International Sale of Goods (2nd edn OUP, 2005) art 79 para 22; Brunner (n) 220, 393, referring to *United States v. Wegematic Corp*., 360 F.2d 674, 676 (2d Cir. 1966) *per* Henry Friendly J; Denis Tallon in Cesare Bianca and Michael Bonell (eds) Commentary on the International Sales Law: the 1980 Vienna Convention (Giuffrè: Milan, 1987) art 79 para 2.6.3.

[11] See, Ewoud Hondius & Hans Cristoph Grigoleit (eds), Unexpected Circumstances in European Contract Law (CUP), 144-145.

[12] See, Schwenzer (n) 710,711.

[13] See, secs 936, 1052, and 1170a of the Austrian Bügerliches Gesetzbuch (BGB), 1811.

[14] See, sec 313 of the German BGB, 1900.

[15] art 388 of the Greek Civil Code, 1946.

[16] Art 1467 of the Italian Codice Civile, 1942.

[17] art 6:258 of the Dutch Civil Code, 1992.

[18] art 437 of the Portugal Civil Code, 1966.

[19] Art. 6.111 of the PECL 1999.

[20] cf, Hans Smit, 'Frustration of Contract: A Comparative Attempt at Consolidation' (1958) 58 Columbia Law Review 287, 289-296, which throws light on the Swiss practice in upholding the theory of hardship. Also see, Joseph M Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' (1997) 5 Tulane Journal of International and Comparative Law 5; Girsberger and Zapolskis, (n) 122; and Ingeborg Schwenzer, 'Force Majeure and Hardship in International Sales Contracts' (2009) 39(4) Victoria University of Wellington Law Review 709, 711-713, for examples of countries and international instruments that accept the modern approach to hardship.

[21] art 6.111(2) of the PECL 1999.

[22] art III-1:110(3)(d) of the DCFR 2008.

[23] See, art 6.111(2) of the PECL 1999; art III-1:110(3)(d) of the DCFR 2008; and ICC Model Clause 2003. Also see, Brunner (n) 480-481. But see, art 313 of the German BGB, 1900; arts 1467-1469 of the Italian Codice Civile 1942; and art 6.260 of the Dutch Civil Code, 1992, which do not impose the duty on the parties to renegotiate the contract on account of hardship. Also see, Schwenzer (n) 722.

was not viable for some reason;[24] or alternatively terminate the contract if it was unable to find any just and reasonable solution.[25] That being said, the courts in these systems do not equate unforeseen events, which render the execution of the contractual obligations more burdensome with impossibility to perform or *force majeure*[26] - that conversely extends to situations caused by *vis major* or the act of God.[27] The principle of *force majeure* thus exonerates the parties from any liability for non-performance.[28]

As opposed to the civil law countries mentioned above, the United States 'flirts with a vaguely defined doctrine'[29] of hardship, which it refers to as 'impracticability'. Accordingly, commercial impracticability constitutes a ground for discharge provided that performance, although possible, is rendered useless or radically different from the parties' contemplation at the time of the conclusion of the contract.[30] Section 2-615 of the Uniform Commercial Code, 1978 (UCC) and Section 261 of the Restatement Second (2d) of Contracts, 1981 respectively imbibe the principle of impracticability for the sale of goods and other forms of contracts under the U.S. law. As the comments to the UCC and the Restatement 2d clarify, the occurrence of circumstances such as 'extreme or unforeseen difficulty, expense…', or 'a severe shortage of raw materials or supplies due to war…' may constitute impracticability under the U.S. laws of contract *only if* they formed the basic assumption on which the

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[24] art 6.111(2) of the PECL 1999; art III-1:110(3)(d) of the DCFR 2008; and ICC Model Clause 2003. Also see, Brunner (n) 480-481. Cf art 6.5.3.11 of the Dutch Civil Code, which highlights the reluctance of Dutch courts in adapting the contract on account of hardship.

[25] Ibid.

[26] For a detailed discussion on force majeure in civil law jurisdictions, see, Marel Katsivela, 'Contracts: Force Majeure Concept or Force Majeure Clauses?' (2007) 12(1) Uniform Law Review */ Rev. dr. unif.* 101, 112. Also see generally, Schwenzer (n) for a detailed discussion on the difference between force majeure and hardship.

[27] See for instance, art 1218 of the Italian Codice Civile; art 6.75 of the Dutch Civil Code; arts 275 and 326 of the German BGB, which by default restrict the applicability of its provisions on impossibility to acts of God. Apropos, other events such as war and strike must be expressly included in the contractual terms. Cf, art 1148 of the French Civil Code; art 1470 of the Québec Civil Code; art 336 of the Greek Civil Code, art 8.108 of the PECL 1999; and art III-3:104 of the DFCR 2008 which by default extend the doctrine of *force majeure* to any impediment, including those that are internal to a contractual party's sphere of risk, such as war and strike. Also see, Augenblick & Bousseau (n) 66-71 for the impediments to invoking the force majeure clause.

[28] See, Joseph M Perillo, 'Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts' (1997) 5 Tulane Journal of International and Comparative Law 5, 6; Sarah Howard Jenkins, 'Exemption for Non-performance: UCC, CISG, UNIDROIT Principles – A Comparative Assessment' (1998) 72 Tulane Law Review 2015, 2020.

[29] Perillo (n), 112; and John D Calamari & Joseph Perillo, The Law of Contracts (3rd edn Westgroup, 1987) 13-19.

[30] Mineral Park Land v Howard 172 Cal 289, 156 P 458 [1956].

contract was made and furthermore altered the very nature of performance.[31] In other words, a mere rise or fall in prices would not in itself amount to impracticability unless it was 'well beyond the normal range' or 'wholly abnormal'.[32] The U.S. laws equate impracticability with impossibility to perform.[33]

On the other hand, under the principles of the English common law, performance and non-performance is exclusively determined on the basis of the principles of 'frustration of contract'.[34] Accordingly, performance will not be excused except when it has either been rendered impossible[35] or has frustrated the purpose in such a manner that the literal performance, although possible, has become fundamentally different from the original contemplation of the parties and thus useless.[36] As a result, the U.K. law of contract does not recognize the theory of hardship and therefore mandates the strict adherence to the principle of *pacta sunt survanda*. The judicial dicta further highlights that a change in circumstances caused by a sudden rise or fall in prices that renders the performance more onerous would not in itself lead to discharge of the contractual obligations[37] unless it has been demonstrated that there has been a 'hundredfold increase' in the prices.[38] Even in such cases, pure impracticability or hardship would not be acknowledged except when it results in frustration of the contract. Hence, the parties would not be discharged from their contractual obligations on such grounds regardless of whether they have incorporated an express

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[31] See, Comment 4 to sec 2-615 of the UCC; and Comment (d) to sec 261 of the Restatement 2d. Also zee, Treitel (n) 256 *et seq*.

[32] ibid. Also see, Treitel (n) 278, 289-290, which clarifies that 'tenfold' increase in the cost would constitute commercial impracticability with the meaning and scope of the U.S. law of contract.

[33] See, *Mineral Park Land v Howard,* 172 Cal 289, 156 P 458 [1956], which underscored that a thing is impossible only when it is impracticable. Consequently, a circumstance would be impracticable only when it can be rendered at an excessive cost. For a detailed discussion on the concept of impracticability under the US law of contract, see generally, Linda Crandall, Commercial Impracticability and Intent in UCC Section 2-615: A Reconciliation, 9 Conn. L. Rev. 266, 281 (1977); Michael A. Schmitt; Bruce A. Wollschlager, Section 2-615 Commercial Impracticability: Making the Impracticable Practicable, 81 Com. L.J. 9, 16 (1976); and Thomas Black, Sales Contracts and Impracticability in a Changing World, 13 St. Mary's L.J. 247, 290 (1981).

[34] See, Guenter Treitel, *Frustration and Force Majeure* (3rd edn, Sweet and Maxwell Publications, London 2014) 64, for a detailed discussion on frustration of contract under the English law.

[35] See, *Taylor v Caldwell*, 122 Eng Rep 309 KB 1863, which is the landmark verdict on the English doctrine of impossibility. Also see, Treitel (n) 69, 74.

[36] See, Krell v Henry, [1903] 2 KB 740, which is the seminal case on 'frustration of purpose' under the English law of contract. Also see, Treitel (n) 65-66.

[37] **British Movietonews** Ltd. **v. London and District Cinemas** [1952] A.C. 166, 185 per Lord Simon; and **WATES Ltd v GREATER LONDON COUNCIL**, [1984] 25 BLR 1; and Treitel (n), 299-300.

[38] Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] 2 All ER 497, 501 per Lord Denning. Also see, Treitel (n) 282, which opines that the phrase 'hundredfold increase' refers to a fantastic and unlikely contingency.

stipulation to this effect via a *force majeure* clause in their agreement.[39] That being said, the English courts have exclusively been recognizing the existence of commercial impracticability or hardship if the parties had been unable to carry out the contractual obligations for a considerable amount of time *and* subsequently experienced an increase in the cost of performance.[40]

2.2. The UNIDROIT's Solution to Hardship

The UNIDROIT via the UPICC offers a practical and sustainable solution on commercial impracticability or hardship to assist the lawmakers and the judiciary of individual countries in interpreting, supplementing or developing their legislations according to internationally accepted standards.[41] The UPICC's significance lies in the fact that although they are in the form of soft law,[42] they are apolitical and are not drafted by government officials, but rather by experts in the field in private capacity.[43] With particular reference to the subject of hardship, the UPICC offers neutral clarifications insofar as they draw inspiration from major jurisdictions to reflect the values of both the civil and the common law systems.[44] They therefore, adopt rules

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[39] See, Thames Valley Power Ltd v Total Gas and Power Ltd, [2005] EWHC 2208; and Tandrin Aviation Holdings Ltd v Aero Toy Store LLC, [2010] EWHC 40. Cf, the earlier verdict of Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] 2 All ER 497, 501 per Lord Denning, which stated that an escalation in the cost of performance by a hundredfold would discharge the seller from performance by frustration of contract by bringing the *force majeure* clause into operation.

[40] Acetylene Co of Great Britain v Canada Carbide Co, [1921] 6 LlL Rep 410 KB. Also see, Treitel (n), 284-285.

[41] See, para 6 of Preamble to the UPICC, read along with Official Comment 6 to the concerned para; and Ralf Michaels, 'The UNIDROIT Principles as Global Background Law' (2004) 19 Uniform Law Review / *Rev. dr. unif.* 643, 655-656. Also see generally, Larry A. Dimattei and Lucien J. Dhooge, *International Business Law: A Transnational Approach* (2nd edn, Cengage Learning 2004) 236; Eckart Brödermann, 'The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal' (2006) Uniform Law Review / *Rev. dr. unif.* 749; and Michael J Bonell, 'An International Restatement of Contract Law' (28 October 2011) Georgetown University Law Centre for Transnational Business and the Law: Symposium on the 2010 UNIDROIT Principles of International Commercial Contracts: Towards a "Global" Contract Law 22-24, <http://www.law.georgetown.edu/cle/materials/unidroit/2011.pdf> accessed on 2 November 2016

[42] Non-binding legal principles are commonly referred to as 'soft law'. Bonell defines 'soft law' as 'general instruments of normative nature with no legally binding force and which are applied only through voluntary acceptance'. See, Micheal Joachim Bonell, 'Soft Law and Party Autonomy: The case of the UNIDROIT Principles' [2005] 51 Loyola Law Review 229, 229. Also see, Sieg Eiselen, 'Globalization and Harmonisation of International Trade Law' in Faure and Van der Walt (eds) *Globalization and Private Law: The Way Forward* (1st Edward Elgar 2008) 97, 123-125.

[43] See, Alan Farnsworth, 'The American Provenance of the UNIDROIT Principles' (1998) 72 Tulane Law Review 397, 397; and Bonell, *n* 16 33.

[44] For a more detailed understanding on the UPICC, see, Vogenauer, (n 1) 7-30; Bonell, (n 31) 305 *et seq*; and Michael J Bonell, 'Towards a Legislative Codification of the UNIDROIT Principles' [2007] Uniform Law Review / *Rev. dr. unif.*, 233.

that are a majority in most legal systems and are consequently not tilted in favour of any State's interests.[45]

The UPICC embraces a rigid dichotomy between the principles of hardship and *force majeure*. As regards hardship, the UPICC incorporates the common law's preference for the strict adherence to the principle of *pacta sunt survanda* as a basis, but further accommodates to special and extenuating circumstances that merely render performance more onerous but not impossible. In this context, Article 6.2.1 stipulates that each party is bound to perform its obligations irrespective of whether 'the performance has become more onerous for one of the parties'.[46] Article 6.2.2 subsequently qualifies this principle of sanctity of contracts by clarifying that the parties would however not be obligated to adhere to the terms of the contract if they experience hardship, which is manifested through the occurrence of an event which 'fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because of the value of the performance a party has received has diminished'. The occurrence of any of these events must occur or become known to the disadvantaged party after the conclusion of the contract. Furthermore, such change in circumstances should be beyond the control of the disadvantaged party[47] and of such a nature that it not have reasonably taken the same into account at the time of formation of the contract.[48] In a related vein, the disadvantaged party must also prove that it did not assume the risk of such event due

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[45] See, Alan Farnsworth, 'The American Provenance of the UNIDROIT Principles' (1998) 72 Tulane Law Review 397, 397; and Bonell, *n* 16 33.

[46] Also see, Official Comment 1 to the concerned art 6.2.1; Ewan McKendrick, "Hardship" in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2015) 812-813; and Hans Van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1995) International Trade and Business Law, <http://www.business.vu.edu.au/cisg/PDF/vanhoutte.pdf> accessed on 11 November 2016 13. But see, the ICC International Court of Arbitration (Zürich), Arbitral Award No. 8486 (1996), <http://www.unilex.info> accessed on 19 November 2016; the ICC International Court of Arbitration, Arbitral Award No. 9479 (1999), <http://www.unilex.info> accessed 19 November 2016; *Delta Comercializadora de Energia Ltda. v. AES Infoenergy Ltd*., the Court of Câmara FGV de Conciliação e Arbitragem (São Paulo, Brazil), Arbitral Award No. 1 of 2008 (2009), <http://www.unilex.info> accessed on 19 November 2016; *Insurance Company Provita v. Joint-Stock Commercial Bank Forum*, Kyiv Regional Commercial Court, Ukraine (2009), <http://www.unilex.info> accessed on 19 November 2016; *G. Brencius v. "Ukio investicine grupe"*, Supreme Court of Lituania, (2003) <http://www.unilex.info> accessed on 19 November 2016; the *Tribunal de Contas da Unilão*, Brazil, (2011), <http://www.unilex.info> accessed on 19 November 2016, which also underscore the general duty to perform unless there is a fundamental alteration in the original contractual equilibrium as provided in art. 6.2.1 of the UPICC.

[47] Ibid art 6.2.2(b) read along with Official Comment 3(b) to the concerned art; and McKendrick, *n* 43 817.

[48] ibid art 6.2.2(c) read along with Official Comment 3(c) 216; and McKendrick, *n* 43 818.

to its unforeseeable nature.[49] Accordingly, if their contract were highly speculative, the party would have been deemed to have accepted the risk involved, irrespective of whether or not it was fully aware of the same at the time of the conclusion of the contract.[50] Thus, for instance, there would be no hardship irrespective of the sudden eruption of war in a country, which has caused the contractual price of the oil to increase dramatically - if the parties have concluded their contract amidst political tension in that nation, since the same was not unforeseeable.[51] Likewise, there would also be no hardship caused by the change in circumstances of the nature described above, if the disadvantaged party had purchased an insurance policy that covered the risk of war upon the payment of an additional premium.[52]

Although the parameters for determining the circumstances that constitute a 'fundamental alteration' are nebulous,[53] the Official Comments illustrate that this could either be due to a dramatic rise in a) the price in the raw materials that are incumbent for the production of the contracted goods; b) the rendering of the concerned services; or c) a consequence of the introduction of new safety regulations.[54] Such effects are thus most likely to be experienced by the party that is obligated to perform the non-monetary obligations.[55] In a related vein, dramatic inflation or frustration of purpose that has been caused by sudden changes in the market conditions would also constitute hardship under the UPICC insofar as these diminish the value of performance that one party was entitled to receive under the contract.[56]

Upon the determination of hardship, the UPICC further entitles the disadvantaged party with the right to request for the renegotiation of the terms of the contract via Article 6.2.3. However, an intervention by a court is permissible if such renegotiations are unsuccessful.[57] In such situations, the court may adapt the contract

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[49] ibid art 6.2.2(d) read along with Official Comment 3(d) 216; and McKendrick *n* 43 818.
[50] Official Comment 3(d) to the art. 6.2.2. Also see, Brunner *n* 3 220, 393, 3147-3148.
[51] See, illustration 2 to art 6.2.2 of the UPICC.
[52] Ibid, illustration 4.
[53] But see, Brunner (n) 428 *et seq*; Girsberger and Zapolskis, (n) 126 *et seq;* Schwenzer, (n) 716, which provide suggestions as regards the circumstances that would 'fundamentally alter the equilibrium of the contract'.
[54] Official Comment 2 (a) to art. 6.2.2 of the UPICC.
[55] Ibid.
[56] ibid, Official Comment 2(b). Also see, *Cherkassy Branch of OJSC Kredobank v. Individual entrepreneur 2*, Cherkasy Regional Commercial Court, Ukraine (2009), <http://www.unilex.info> accessed 19 November 2016; and *Wirtgen Ukraine v. TOV VAB Leasing*, the Kyiv Commercial Court of Appeal, Ukraine (2010), available at http://www.unilex.info
[57] See, art 6.2.3(4)(a)-(b) of the UPICC.

'with a view to restoring its equilibrium' and for making a 'fair distribution of the losses between the parties'.[58] Such adaptation may either mandate a modification of the agreed prices; changes in the quantity to be delivered; means, method or duration of performance; or by a compensatory adjustment.[59] The court may alternatively order the termination of the contract if such adaptation is unfeasible.[60]

Towards this end, the UPICC does not, under normal circumstances[61] advocate the discharge of the parties from performance merely on the occurrence of hardship. In this respect, it reaffirms the civil law's practice on the subject insofar as it endeavours to keep the contract alive in as far as practicable.[62] The UPICC thus also adopts a more liberal and contemporary approach in comparison to the English common law of contract, which considers frustration of purpose as a ground for discharge and further does not acknowledge any dramatic changes caused by inflation.[63] To be excused from performance due to the happening of a supervening event, the disadvantaged party must instead prove the existence of a *force majeure* event via Article 7.1.7 of the UPICC.[64] Unlike hardship, the provision on *force majeure* is included in the UPICC's chapter on non-performance. Such an event is not limited to impossibility, but may be caused by *any* impediment that was beyond the party's control[65] and which, it 'could not reasonably be expected to have taken into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences'.[66] For instance an event would constitute *force majeure* under the UPICC when performance of a transnational commercial contract pertaining to the purchase of a nuclear power station and uranium at a fixed price expressed in USD, is subsequently prevented due to one of the Government's sudden foreign exchange controls that forbids payment in any currency other than its own.[67] Consequently,

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[58] Official Comment 7 to art. 6.2.3(4) of the UPICC; and McKendrick, n 43 821.

[59] Brunner, *n* 3 referring to Lando/Beale, Comment D on Art. 6.111 of the Principles of the European Contract Law (PECL) 327.

[60] See, Illustration 5 to Official Comment to art. 6.2.3(4) of the UPICC.

[61] But see, art 6.2.3(4) of the UPICC, which permits termination as the last resort.

[62] See, Official Comment 6 to art 6.2.2 of the UPICC.

[63] See, Krell v Henry, [1903] 2 KB 740; and Treitel (n) 65-66.

[64] See in this respect, Dietrich Maskow, 'Hardship and Force Majeure' (1992) 40 American Journal of Comparative Law 657, 664, which states that the theory of force majeure may be referred to as the 'exemption principle' insofar as it excuses the breach of contract on the satisfaction of certain pre-requisites.

[65] Official Comment 1 to art 7.1.7 of the UPICC.

[66] Ibid, art 7.1.7(1).

[67] ibid, illustration 1(1) to art 7.1.7.

although Article 7.1.7 is comparable to Article 6.1.2 insofar as it similarly stipulates that such supervening event should be unforeseeable and beyond the party's sphere of allocated risk,[68] it endows the parties with the right to terminate the contract and to withhold performance due to such impediments.[69] Apropos, if such impediment is temporary, non-performance on account of *force majeure* would merely be excused as long as the effect of such event lasts.[70]

3 THE THEORY OF HARDSHIP UNDER THE INDIAN LAW OF CONTRACT

The Indian law of contract does not contain any specific provision on hardship. Instead, support for hardship is confined to judicial dicta, which indicates that the paradigms of the subject are to be dealt with within the parameters of the principles of discharge by frustration of contract as envisaged in paragraph two of Section 56 of the Indian Contract Act, 1872. In particular, the provision is predicated on the English law of contract and provides

> 'a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.'

A contract is thus said to be frustrated under Section 56 of the Indian Contract Act, 1872, when discharge has occurred either due to impossibility or when performance becomes radically different from the original contemplation of the parties.[71] Unlike the principles of civil law, impossibility or *force majeure* under the Indian law of contract is not merely limited to acts of God or *vis major*, but instead also extends to all other unforeseeable supervening events, which cannot be prevented by any amount of human care and diligence such as strike or breakdown of machinery.[72] In a related

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[68] Pascal Pichonnaz, 'Non-performance in General' in Stefan Vogenauer (ed), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)* (Oxford University Press 2015) 871 *et seq*.

[69] art 7.1.7(4) of the UPICC.

[70] Ibid, art 7.1.7(2). cf Hans Van Houtte, 'The UNIDROIT Principles of International Commercial Contracts' (1995) International Trade and Business Law, <http://www.business.vu.edu.au/cisg/PDF/vanhoutte.pdf> accessed on 11 November 2016 18, which opines that whether impossibility to perform is definite or merely temporary, may not always be clear.

[71] *Satyabrata Ghose v. Mugneeram Bangur & Co*., [1954] SCR 310. Also see, Nilima Bhadbhade, *Pollock and Mulla on the Indian Contract and Specific Relief Acts* (Lexis Nexis Publications 2014) 871-872. Cf Treitel (n) 64-66.

[72] See, the verdict of the Supreme Court in *Dhanrajamal Gobindram v. Shamji Kalidas & Co*, AIR 1961 SC 1285, para 17-19, referring to the decision of the English

vein, while commenting on the Government's temporary requisitioning of land for military purposes in the seminal case of *Satyabrata Ghose v Mugneeram Bangur & Co,* the Apex Court *per* Mukherjea J. further clarified that application of Section 56 of the Indian Contract Act, 1872 is not confined to physical or literal impossibility.[73] Section 56 may thus regulate instances of commercial impracticability only when the performance has become

> 'useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change in circumstances totally upsets the very foundation upon which the parties rested their bargain'.[74]

The Indian law of contract is therefore akin to the English common law on the subject insofar as it disregards the occurrence of frustration of the contract on account of pure commercial impracticability or hardship unless the changed circumstances have affected very bargain that the parties made so as to render the performance impossible in the time and manner contemplated.[75] For this reason, Section 56 of the Indian Contract Act, 1872 does not permit the parties to be relieved merely on account of alteration in economic circumstances, which merely render the performance more onerous, for instance, due to a price rise or fall. This was the position in *Alopi Parshad & Sons Ltd. v. Union of India.*[76] *In casu*, the Supreme Court disregarded the appellant's plea invoke the doctrine of frustration of contract when, due to the changed circumstances caused by the Second World War, the contract became more burdensome to perform due to an abnormal increase in the

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courts in *Lebeaupin v. Richard Crispin & Co,* [1920] 2 KB 714. Also see, Bhadbhade, n 106 871, 915; and Avtar Singh, *Law of Contract: A Study of the Contract Act 1872 and Specific Relief* (Eastern Book Company 2013) 402-403.

[73] AIR 1954 SC 44.

[74] Ibid para 9.

[75] Ibid. Also see, Sachindra Nath v Gopal Chandra, AIR 1949 Cal 240; Pameshwari Das Mehra v Ram Chand Om Prakash, AIR 1952 Punj 34. Cf, FA Tramplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd, (1916) 2 AC 397;Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd, 1945 AC 221 (HL); Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd, 1942 AC 154 (HL); **British Movietonews** Ltd. **v**. **London and District Cinemas** [1952] A.C. 166; Davis Contractors v Fareham Urban District Council, (1956) AC 696; Krell v Henry, [1903] 2 KB 740; and Treitel (n) 65-66 on frustration of purpose.

[76] AIR 1960 SC 588

prices of *ghee*, which was originally supposed to be supplied at a fixed price.[77] The court *per* Shah J. reaffirmed that the change in circumstances in question did not 'in itself affect the bargain' that the parties had made.[78] It further observed that the doctrine of frustration as enshrined in Section 56 of the Indian Contract Act, 1872 would only come into play when the performance has eventually become impossible or unlawful and not merely altered.[79] The court further accentuated that it was not endowed with any 'general liberty' to 'absolve a party from liability to perform his part of the contract merely because, on account of an contemplated turn of events, the performance of the contract may become onerous'.[80]

Shah J's opinion has continued to represent the judicial opinion in India by virtue of the mandate enshrined in Article 141 of the Constitution of India, 1950, which mandates that 'the law declared by the Supreme Court shall be binding on all courts within the territory of India'. The Apex Court has continued to express similar hostility in a line of other cases, such as, for instance, *Continental Construction Co Ltd v State of MP*,[81] *Travancore Devaswom Board v Thanath International*;[82] and more recently in *Bharti Cellular Limited v Union of India,*[83] while rejecting the disadvantaged parties' pleas to discharge the contract due to an increase in the cost of performance. Consequently, while rejecting a party's appeal in another verdict for the adaptation of the contract due to sudden increase in the cost of materials that had rendered the performance more burdensome, Banumathi J. of the Madras High Court stressed that it was a settled law that the Indian Contract Act, 1872 does not enable ignorance of the express provisions of the contract by claiming renegotiation on some 'vague plea of equity'.[84] For this reason, although the change in circumstance was 'completely outside the contemplation of parties' at the time of the conclusion of

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[77] ibid.
[78] ibid, para 4. Cf **British Movietonews** Ltd. **v**. **London and District Cinemas** [1952] A.C. 166, 185.
[79] Ibid.
[80] ibid.
[81] AIR 1988 SC 1166
[82] (2004) 13 SCC 44
[83] (2010) 10 SCC 174
[84] Sree Kamatchi Amman Constructions v The Divisional Railway Manager-Works, Palghat Division, OSA Nos 109 & 247 of 2005, para 38.

the parties, it would not justify the court in departing from the express terms of the contract.[85]

In some other subsequent cases, the parties expressly incorporated the occurrence of certain supervening circumstances that could result in hardship as a term in the *force majeure* clause of their agreement. In such instances, one may assume that the Indian jurisdiction, being influenced by the English common law of contract, would not construe the mere inclusion of a *force majeure* clause as a shield for parties from performance exclusively on the ground of such price hikes unless such alteration is complemented with another event, which frustrates the purpose.[86] However, the judicial dicta in India has failed to provide any clear illustration on the exact legal position in this respect. For instance, in a dispute before the Delhi High Court in *Coastal Andhra Power Limited v Andhra Pradesh Central Power Distribution Co. Ltd & Others,*[87] the parties expressly stipukated that they would be discharged if the performance of their obligations was 'prevented, hindered or delayed' due to a *force majeure* event that resulted in *inter alia*, changes in the cost of materials required.[88] The contract *in casu* pertained to the long-term supply of coal from Indonesia at a fixed price of USD 24 Per Metric Ton (PMT).[89] As a result of the promulgation of a new Indonesian Regulation in 2010, the prices of coal escalted by 150 percent, *viz.* from the contracted rate of USD 24 PMT to USD 60 PMT.[90] The supplier, namely Coastal Andhra Power Ltd (CAPL) subsequently issued a notice in 2011 to the respondent claiming to be released under the *force majeure* clause due to impossibility. CAPL asserted that the performance of the project had 'become unviable' due to the 'expotential increase in coal prices' as a consequence of sudden and unforeseeable change in law.[91] Rejecting these contentions, Murliadhar J. opined that although the increase in the fuel cost was a consequence the change in law, it would not constitute a *force majeure* event since it did not prevent the parties from

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[85] Ibid. Also see, Sec 62 of the Indian Contract Act, 1872, which prohibits the parties to make any variance to the existing terms of their agreement, except by the conclusion of a new contract.
[86] cf the verdict of the English court in **British Movietonews** Ltd **v London and District Cinemas** [1952] AC 166, which expressed a similar opinion.
[87] Decision of the Delhi High Court, OMP No. 267 of 2012 (decided on 2 July 2012).
[88] Ibid para 24.
[89] Ibid para 5.
[90] Ibid para 7.
[91] Ibid para 7-8.

performance. Instead, the parties should 'generally factor in the possibility of [a] sudden fluctuation in international prices' by providing for 'risk purchase and like clauses' in a commercial contract.[92] Accordingly, the disadvantaged party could merely claim compensation for the loss suffered in such circumstances.[93] Murliadhar J. nonetheless remained silent as regards the parameters for claiming such compensation; and whether it would confer a right on the aggrieved party to request for a renegotiation of the contractual price, or instead merely empower the court to adapt the contract. In any situation, it appears that all such claims to compensate would run *de hors* to the present provisions of the Indian Contract Act, 1872, enshrined in Section 62 - which prohibits any variation to the existing terms of the agreement unless it is by means of a new contract.[94]

In another more recent verdict, *viz*., *Uttar Haryana Bijli Vitran Nigam Ltd. v. Central Electricity Regulatory Commission,* the Appellate Tribunal for Electricity, New Delhi [the Tribunal], however, invoked Section 56 of the Indian Contract Act, 1872 to discharge the aggrieved party from its obligations due to a sudden increase in the price of performance.[95] The Tribunal *in casu* was presented with the opportunity to hear 15 appeals that were divided into four groups and primarily concerned the impact of the Indonesian Regulation of the nature similar to that discussed in *Coastal Andhra Power Limited*.[96] The parties had expressly stipulated via their *force majeure* clause that they would be discharged from performance of the contract was 'hindered' and subsequently became commercially impracticable as a consequence of any other event that is beyond their reasonable control.[97] While examining whether the suppliers could righfully invoke the *force majeure* clause due to the escalation in the prices together with a shortage/non-availability in the supply of coal from Indonesia, the Tribunal relied on the findings of the Apex Court in *Alopi Parshad*[98] and *Dhanrajamal Gobindram*[99] and emphasized that it was a 'well settled

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[92] Ibid 24. Cf the verdict of the English court in Thames Valley Power Ltd v Total Gas and Power Ltd, [2005] EWHC 2208, which expressed a similar opinion.
[93] Ibid.
[94] Cf Sree Kamatchi Amman Constructions v The Divisional Railway Manager-Works, Palghat Division, OSA Nos 109 & 247 of 2005, *per* Banumathi J., para 38
[95] Decision of the Appellate Tribunal for Electricity, decided on 7 April 2016.
[96] ibid para 24.
[97] Ibid para 280 referring to Art 12 of the Power Purchase Agreement (PPA).
[98] AIR 1960 SC 588.
[99] AIR 1961 SC 1285.

principle in law' that a mere increase in prices does not lead to impossibility of performance under the contract.[100] However, it underscored that due regard must be given to the wordings of the terms of the clause in the present case. Apropos, since the agreement had subsequently become more onerous to perform due to a *force majeure* event, *viz*., the sudden change in law, it would constitute 'frustration' within the ambit of Section 56 of the Indian Contract Act, 1872 since 'the basic premise' of the contract was wiped out[101] and 'the parties found themselves…in a fundamentally different situation' from what they initially agreed upon.[102]

3.1 Assessing the Plausible uses of the UPICC as a gap-filler in the Indian law of contract on hardship

The Indian law of contract provides no respite to the parties when performance has merely become more burdensome unless it is additionally also rendered impossible within the parameters of Section 56 of the concerned Act. In this respect, the parties must subjectively delineate certain conditions as the basis of their contract and subsequently prove its *destruction* before moving the court for discharge from performance.[103] The employment of the UPICC's provisions on the subject could plausibly play a crucial role in the development of the Indian law of contract insofar as the latter is predicated on well-defined standards to assess the existence of conditions that may lead to discharge.

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100 ibid para 192.

101 Cf the provisions of the U.S. law of contract on impracticability as enshrined in Secs 2-615 and 261 of the UCC and Restatement 2d, respectively, read along with Official Comment 4 and d to the concerned provisions, which similarly an application for discharge on account of commercial impracticability will only be successful if the change in circumstances formed the 'basic assumption' on which the contract was concluded.

102 Ibid para 289. Cf **British Movietonews** Ltd. **v**. **London and District Cinemas** [1952] A.C. 166, 185.

103 Also see in this regard, Sec 2-615 of the UCC; para 313 of the German BGB; and the English common law of contract enshrined in - FA Tramplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd, (1916) 2 AC 397, Cricklewood Property and Investment Trust Ltd v Leighton's Investment Trust Ltd, 1945 AC 221 (HL), Joseph Constantine Steamship Line Ltd v Imperial Smelting Corpn Ltd, 1942 AC 154 (HL), **British Movietonews** Ltd. **v**. **London and District Cinemas** [1952] A.C. 166, Davis Contractors v Fareham Urban District Council, (1956) AC 696, Krell v Henry, [1903] 2 KB 740, and Treitel (n) 65-66, which similarly employ subjective criteria to determine the existence of hardship.

Unlike Section 56 of the Indian Contract Act, 1872, which fails to recognise extenuating circumstances such as dramatic inflation or sudden legislative changes, the UPICC adopts an objective approach by conversely stipulating that a *prima facie* case of hardship would be made out as soon as the parties experience a *fundamental* disequilibrium that is manifested through an increase or decrease in the value of performance.[104] Article 6.2.2 of the UPICC is consequently applicable regardless of whether the parties have delineated the basic premise of their contract to be something else. Moreover, the UPICC does not entitle the disadvantaged party to be discharged except by means of a 'comparatively comprehensive method',[105] *viz.* when the re-negotiation or adaptation of the contract has been proven unfeasible under Article 6.2.3(4); or on the determination of *force majeure* under Article 7.1.7 of the UPICC.

Consequently, employing the UPICC's approach *vis-à-vis* this dichotomy between the provisions on hardship and *force majeure* would have been particularly beneficial for the Indian judiciary while pronouncing verdicts such as *Alopi Parsad*,[106] *Coastal Andhra Power Ltd*[107] and *Uttar Haryana Bijli Nigam*, in which the parties had undoubtedly experienced hardship. Although the Tribunal adopted a relatively empathetic approach in *Uttar Haryana Bijli Vitran Nigam Ltd*[108] by at least recognizing the extenuating circumstances of the nature described above, it needlessly discharged the disadvantaged party when performance was still possible. These inconsistencies have only arisen due to the narrow precepts within which the Indian courts have interpreted Section 56 of the Indian Contract Act, 1872. As seen above, the judiciary has been combining the determination of hardship with *force majeure* by refusing to acknowledge the former except when it is complemented with the latter. Employing the UPICC's *favor contractus* approach[109] would thereby provide fair and adequate redress in such situations by assisting the Indian courts to interpret precisely how radically changed circumstances can render the contract extremely onerous, but not as such impossible.

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[104] See, Girsberger and Zapolskis (n) 124-125; and Maskow (n) 662
[105] Ramberg (n) 671.
[106] AIR 1960 SC 588.
[107] Decision of the Delhi High Court, OMP No. 267 of 2012 (decided on 2 July 2012).
[108] Decision of the Appellate Tribunal for Electricity, decided on 7 April 2016
[109] Bonell (an intl restatement) 102.

4 CONCLUDING REMARKS

Predicated on the English common law, India has demonstrated itself to be the 'staunchest bastion' of *pacta sunt survanda*.[110] This blind adoption of the principles of the English law on 'frustration of contract' have contributed to the ambiguities prevalent in the Indian legal system, which fails to provide any reliable standard as regards cost increases *vis-à-vis* performance of the contract. Although is hard to formulate an exact opinion on the Indian position on the subject, it appears that the country's courts would in all probability be hostile in acknowledging any change in circumstances post the conclusion of the contract unless these have *altogether* destroyed the basic premise on which the parties' agreement was founded.[111] This traditional approach espoused in the common law has not been suitable in resolving the predicaments that may arise in modern-day transnational contracts, which are often affected by inflation and other circumstances that have the potential to alter the contracted price of performance to one parties' detriment. Apropos, the Indian courts should strongly consider using the UPICC's provisions on hardship as a gap-filler for interpreting and developing its law of contract according to internationally acceptable standards.[112] In this respect, the most commendable feature of the UPICC's solution to hardship or commercial impracticability remains its ability to balance and weigh the common law's preference for the rigid adherence to *pacta sunt survanda*[113] with the flexibility offered by the civil law.[114] At the same time, the UPICC would enhance the certainty and predictability in the law in India by enumerating the precise circumstances that constitute hardship or conversely *force majeure* in an objective fashion.

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[110] Joseph M Perillo, 'Contracts' (7th edn, Hornbook Series, West Law, 2014), 487; and Perillo (n) 113.

[111] see, Alopi Parshad, AIR 1960 SC 588 and a line of other cases mentioned above, which will remain the law of the land by virtue of the constitutional mandate of India.

[112] See, para 6 of the Preamble to the UPICC.

[113] See, Art 6.2.1 of the UPICC.

[114] Ibid art 6.2.2 and 6.2.3.