Revisiting the drafting of hardship clauses in the context of geopolitical unexpected events

Panel members:
Tina Denso, Verry Iskandar, Sherif El Saadani,
Christiana Fountoulakis (Chair)

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Drafting of hardship clauses in the light of changing geopolitical circumstances

- Topics:
  - What is the current state of the art of drafting hardship clauses?
  - Is there a need to revisit the current drafting style?
    - What is outdated? What is missing? What is superfluous?
  - If there is a need to revisit, what should newly drafted hardship clauses contain (or not contain)?
    - General clauses vs. detailed clauses
    - Relevance of applicable law (unified law vs. domestic law, common law vs. civil law, etc.)
    - Relevance of jurisdictional issues (state court vs. arbitration proceedings)

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Unidroit Principles, Articles 6.2.1-6.2.3

Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless **bound to perform its obligations** subject to the following provisions on hardship.

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

(a) the events occur or become known to the disadvantaged party **after the conclusion of the contract**;

(b) the events **could not reasonably have been taken into account** by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are **beyond the control** of the disadvantaged party; and

(d) the **risk** of the events **was not assumed** by the disadvantaged party.

(1) In case of hardship the disadvantaged party is entitled to **request renegotiations**. The request shall be made **without undue delay** and shall indicate the grounds on which it is based.

(2) The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.

(3) **Upon failure to reach agreement** within a reasonable time either party may **resort to the court**.

(4) If the court finds hardship it may, if reasonable,

(a) **terminate the contract** at a date and on terms to be fixed; or

(b) **adapt the contract** with a view to restoring its equilibrium.

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ICC model clause 2003 on hardship

1. A party to a contract is **bound to perform its contractual duties** even if events have rendered performance more onerous than could reasonably have been anticipated at the time of the conclusion of the contract.
2. Notwithstanding paragraph 1 of this Clause, where a party to a contract proves that:
   a) the continued performance of its contractual duties has become **excessively onerous** due to an **event beyond its reasonable control** which it **could not reasonably have been expected** to have taken into account at the time of the conclusion of the contract; and that
   b) it could **not reasonably have avoided or overcome** the event or its consequences, the parties are bound, **within a reasonable time** of the invocation of this Clause, to **negotiate alternative contractual terms** which reasonably allow to overcome the consequences of the event.

3A: Party to terminate **3B: Judge adapt or terminate** **3C: Judge to terminate**

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