COVID-19 AND FRUSTRATION OF INTERNATIONAL CONTRACTS

IHLADI RECOMMENDATIONS

Noting that the pandemic caused by COVID-19 has given rise to various circumstances, both *de jure* and *de facto*, which have led to frustration, impossibility or difficult performance of long term international contracts, such as legal limitations on the movement and transport of goods, persons and services; seizures or embargoes; impossibility of access to raw materials and components; prohibition of economic activities (construction, transport, hotel and catering, product manufacturing, etc.); illness or quarantine of workers, professionals and civil servants.

Taking into account that such circumstances, unforeseeable at the time of contracting, beyond the will of the parties, external and insurmountable, may justify various legal figures, such as force majeure, fortuitous case or material impossibility; economic impossibility or impracticability; frustration of the purpose or agreed bases of the contract; *théorie de l'imprévision* or hardship. And that each of these institutions has a different impact on the breach of contract, its termination, renegotiation or adaptation and the possible compensation for damages arising from the breach.

Considering that, although most legal systems under the sphere of the *Instituto Hispano-Luso-Americano de Derecho Internacional* recognise cases of force majeure or material impossibility as grounds for exemption from contractual liability, the conditions required in this respect vary, as do the effects of termination of the contract on services already provided.

Considering that, there is also a marked diversity in the recognition of other institutions such as the economic impossibility, frustration of purpose of the contract and hardship. Due to the French heritage, in Haiti and the Dominican Republic only the exoneration of liability due to force majeure or material impossibility is recognized. On the other hand, few systems have a specific regulation of the frustration of the purpose or the agreed bases of the contract (Article 1090 of the Civil and Commercial Code of Argentina). In many countries, both doctrine and case law do not offer a clear solution to cases of hardship and to the scope of the *thérie de l'imprévision* (Chile, Costa Rica, Ecuador, El Salvador, Nicaragua, Uruguay, Venezuela). In those systems in which such institutions have been accepted in written law or by the courts, the solutions remain variable: some legal systems only envisage the termination of the contract (Article 80 of the Cuban Civil Code; Article 1267 of the Philippine Civil Code) or its revision (Article 1330 of the Guatemalan Civil Code); in some the affected party can

request indiscriminately the termination or adaptation of the contract (Article 1091 of the Argentine Civil and Commercial Code; Article 1796 Bis of the Civil Code for the Federal District of Mexico; Spanish and Puerto Rican case law); in others, the aggrieved party may request the termination or adaptation of the contract, but in the event that the former is requested the other party may also offer an adaptation of the contract (Articles 581 and 582 of the Bolivian Civil Code; Articles 478-479 of the Brazilian Civil Code; Article 437 of the Portuguese Civil Code). According to another variant, the aggrieved party may only request termination, and it is up to the other party to offer an adaptation of the contract (Articles 755 and 757 of the Honduran Commercial Code; Article 1161-A of the Panamanian Civil Code; Article 672 of the Paraguayan Civil Code). In other systems, the aggrieved party requests a review of the contract, and the judge may grant the adaptation or termination (Article 868 of the Colombian Commercial Code; Article 1440 of the Peruvian Civil Code)

Recalling that such uncertainty also arises in the interpretation of some relevant international conventions, such as the 1980 Vienna Convention on the International Sale of Goods. Thus, national scholars and case law do not allow for a clear agreement on the scope of Article 79 CISG, in particular whether, in addition to force majeure, it also covers cases of hardship.

Noting that, other bodies of soft law, such as the UNIDROIT Principles of International Commercial Contracts or the OHADAC Principles of International Commercial Contracts, do provide satisfactory and comprehensive solutions of these institutions, although their application is more restricted at the jurisdictional level than at the arbitral level.

Warning that the paralysis or congestion of judicial procedures has also been a negative effect of the pandemic, so that a judicial solution gives rise to serious problems in case of frustration of international contracts caused by COVID-19, which advises more dynamic and effective dispute resolution formulas,

IHLADI has adopted the following RECOMMENDATIONS:

1. General

1. In order to strengthen the progressive harmonization of the law of international contracts, it is recommended that States, judges and arbitrators take into account the guidelines, solutions and interpretations contained in the Guide on the Law Applicable to International Commercial Contracts in the Americas of the Inter-American Juridical Committee of the OAS, which aims "to advance important aspects of the law applicable to international commercial contracts in the Americas, to promote regional harmonization on the subject and thereby to encourage regional economic integration, growth and development" (para 8), in particular the 18 recommendations of the Guide concerning States' own laws on the law applicable to international commercial contracts.

2. It is recommended that the autonomy of the parties in the choice of law applicable to the contract be encouraged, in particular by allowing recourse to non-national bodies of law or soft law, such as the UNIDROIT Principles of International Commercial Contracts, the OHADAC Principles of International Commercial Contracts or the Latin American Principles of Contract Law.

2. To International Organizations

3. Joint action by the international organizations involved in the development and harmonization of international contract law is recommended in order to optimize compatibility between conventional and soft law texts, along the lines of the work carried out in the United Nations Commission on International Trade Law for the draft of a Legal Guide to Uniform Legal Instruments in the Area of International Commercial Contracts -with a focus on sales-, as contained in document A/CN.9/1029.

3. To companies and traders

4. In long term international contracts, traders and companies must weigh the need to include in the contract express clauses of force majeure, frustration of the contract, and hardship. Such clauses should be supplemented by specific mediation, conciliation or arbitration clauses for cases of change of circumstances. It is recommended, in this respect, to consider the standard clauses proposed in the Comments to Article 6.3.1. of the OHADAC Principles of International Commercial Contracts (http://www.ohadac.com/textes/2/104/seccion-3-hardship.html)

5. As an alternative or subsidiary option to the formulation of specific clauses, traders and companies should weigh the need to partially incorporate by reference, in the event of supervening circumstances, the rules contained in Articles 6.3.1, 6.3.2 and 7.1. 8 and of the OHADAC Principles of International Commercial Contracts (2015); in Articles 84, 85, 89 and 90 of the Latin American Principles of Contract Law; or in Articles 6.2.1 to 6.2.3 and 7.1.7 of the UNIDROIT Principles of International Commercial Contracts (2016). Such clauses should be supplemented by specific mediation, conciliation or arbitration clauses for cases of change of circumstances.

4. To the States

6. It is recommended that the States represented in the IHLADI, lacking specific regulations, partially revise the general rules on contracts included in their normative bodies in civil and commercial matters, establishing specific regulation of the effects of the supervening circumstances that produce impossibility, hardship or frustration of the contract's purpose.

7ª. It is recommended that the States represented in IHLADI adopt the necessary measures to facilitate the recognition and execution of arbitration awards issued in abbreviated procedures and mediation agreements signed both in the territory of the State and in other States, through internal provisions and the promotion of instruments for international cooperation.

5º. To the arbitral institutions

8ª. It is recommended that specific arbitration rules be established for abbreviated arbitration procedures in response to the need for a flexible, efficient and accurate solution for the termination or adaptation of contracts and other legal relationships affected by COVID-19 and by similar events.

9ª. It is also recommended that institutional mediation mechanisms be promoted for the settlement of disputes in the event of supervening circumstances, and in particular that the training and specialization of arbitrators and other legal and technical experts in the field of mediation and conciliation be encouraged.