“Special Clauses protecting the Seller or the Buyer in Contracts concerning energy supply in the wholesale energy market”

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Η υπογράφουσα την παρούσα, Ευαγγελία-Άννα Γεωργάτσου, βεβαιώνω ότι το έργο που εκπονήθηκε και παρουσιάζεται στην υποβαλλόμενη διπλωματική εργασία είναι αποκλειστικά ατομικό δικό μου. Όποιες πληροφορίες και υλικό που περιέχονται έχουν αντληθεί από άλλες πηγές, έχουν καταλλήλως αναφερθεί στην παρούσα διπλωματική εργασία. Επιπλέον τελώ εν γνώσει ότι σε περίπτωση διαπίστωσης ότι δεν συντρέχουν όσα βεβαιώνονται από μέρους μου, μου αφαιρείται ανά πάσα στιγμή αμέσως ο τίτλος.

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1. INTRODUCTION.

From the strict and rigid latin pacta sunt servanda principle, which underlines the sanctity of contracts, to Nelson Mandela's tragic ascertainment that "only free men can negotiate and enter into contracts", it is clear that agreements are the backbone of modern civil society and trade. Trade means faster growth, higher living standards, and new opportunities through commerce.

All commercial and industrial activity is inseparably linked with the continuous use, and hence supply, of energy. Thus, in the field of energy supply, certainty and accuracy is of outmost importance. Bearing this in mind, legal practitioners from different countries and legal systems strive to create a safe and anticipated contractual environment for both sellers and buyers of energy products.

The effort to create a common international or regional legal framework in contract law and the vast stipulation of General Terms of Reference in energy contracts render rather clearly that globalized energy trade calls for globalized legal approaches and solutions. To that end, special clauses included in such contracts are anticipated both to perform as summoned and to be comprehensible to business professionals from different legal systems and business cultures. In reality most of the special clauses found in modern contracts are rather a result of business trends than legal practice, even so these clauses must conform to certain legal standards.

The above interactive "mechanism" has led to both, a modern lex mercatoria (the so called "new new lex mercatoria"[1]) that has evolved from the medieval sense of the term[2] to established transnational systems of law with codified legal rules (eg. The Unidroit Principles), and to regional and international attempts offering alternative solutions and soft law guidance.

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[1] R. Michaels, *"The True Lex Mercatoria: Law Beyond the State",* Indiana Journal of Global Legal Studies Vol. 14 #2, 2007, p. 448.

[2] A transnational set of norms and procedural principles, established by and for commerce in (relative) autonomy from states.

This thesis attempts to present on the one hand the available legal options limiting liability in the light of the national (Greek), European and International legal framework and on the other some of the most common clauses met in Liquefied Natural Gas (LNG) Sale and Purchase Agreements (SPA's).

It is strictly out of the scope of this essay any matter considering the buyer as a consumer since the main target is to address special clauses found in contracts of the wholesale energy market.

GENERAL PART

2. LEGAL FRAMEWORK.

A. National.

i. The law of Obligations.

In the Greek legal system contracts for the sale of goods are regulated by the law of obligations, the latter being a branch of the Greek civil code. Greece has a statutory legal system. Therefore, the sources of Greek Contract Law are mainly the Greek Civil Code and several laws concerning either the protection of the buyer in his capacity as a consumer (Law 2251/1994, regarding several aspects of business to consumer contracts-the latter not being a part of the present thesis) or specific contract types for instance Law 1652/1986 on Time-Sharing, Law 1665/1986 on Financial Leasing, Presidential Decree 34/1995 on Commercial Lease etc.). Custom and "the generally accepted rules of international Law" (Art. 28 par. 1 of the Constitution) are also considered a source of Law but of secondary importance and limited influence[3].

There are certain fundamental principles that underlie the whole of the law of obligations. The most notable are: Firstly, the principle of the "autonomy of the private will" which includes the freedom of concluding contracts (Art. 361 CC) and the informal character of contracts (Art. 158 CC). Secondly, the principle of "good faith" (bona fides-Art. 288 CC) which encompasses the honesty and sincerity required in legal transactions taking also into account business usage. Finally, the principle of "favoring the feebler party", that is the financially weaker party (Art.

[3] M. Stathopoulos-A. Karampatzos, *"Contract Law in Greece",* 3rd edn, Ant. N. Sakkoulas Publishers, 2014, p. 26.

179, 388 and 409 CC) and the principle of Liability, according to which every person is responsible for the consequences of his acts[4].

ii. The Sale Contract.

Articles 513-572 CC regulate the contract of sale. According to Art. 513 sale is the contract whereby one of the contracting parties, the seller (or the vendor), undertakes the obligation to transfer and deliver the ownership of a thing or right to the other contracting party the purchaser (or the emptor), who in turn assumes the obligation to pay the agreed purchase price. Sale is classified as a reciprocal (generating rights and obligations for both parties), promissory (obligating) and onerous contract (since a quid pro quo is always agreed). Thus, the essential elements (essentialia negotii) of the contract of sale, emerging from the analysis of Art. 513, are: a. the object of the purchase, b. the price and c. the agreement between the parties.

The object of the purchase may be a thing or a right. A "thing" may be a corporeal object or a part of a thing or even incorporeal objects, such as natural forces or energy, as long as it can be limited and concentrated in a specific space and are subject to control (Art. 947 par. 2 CC). A "right" may include rights in rem or in personam or even an intangible property right. The price to be paid must consist in money otherwise the transaction will be deemed as an exchange contract (Art. 573 CC).

The seller has principle and collateral obligations. His primary obligations are on the one hand to transfer the ownership of the thing or right sold free of legal defects (Art. 514) and on the other to physically (if possible) deliver the sold object at time of delivery with the conceded qualities and free of material defects. The collateral obligations derive either from the agreement or from the Civil Code and the bona

[4] P. Agallopoulou, "*Basic Concepts of Greek Civil Law*", Ant. N. Sakkoulas Publishers, 2005, p. 180-184.

fide principle (see supra)[5]. Whereas, the buyer's principal obligation is to pay the agreed price.

The seller's liability for defect in title is the liability of non-performance (or partial performance since it is one of the two primary obligations-supra). The buyer-creditor in this case may: a. claim the performance of the contract, b. object in paying the agreed price on the grounds of the vendors-debtors non performance (Art. 374 CC), c. after notifying the debtor for the non performance 'render him in default' which in turn means that he owes a compensation (Art. 343 CC), d. rescind the contract (Art. 401 CC). Of course the liability of the seller for legal defects is precluded if the buyer was aware of them (Art. 515 CC).

Apart from the vendor's obligation to transfer the object free from legal defects, he must also, according to Art. 534, deliver the object free of defects of the thing, that is material defects and defects of quality, and containing the agreed qualities. Article 535 CC (as amended by Law 3043/2002 implementing Dir. EC/1999/44) stipulates that the obligation to furnish the thing sold free of material defects and with the proper conceded qualities is not considered fulfilled if "the thing does not correspond to the contractual agreement". The said article provides for certain criteria in order for the buyer to prove the lack of correspondence between the thing agreed upon and the thing finally furnished (eg. the delivered thing does not correspond to the thing described or to the sample, the thing is not good enough for the use or purpose described in the specific contract), of course this list is only indicative so it is possible for the buyer to establish the lack of correspondence between the two invoking other reasoning.

In case of material defects or absence of conceded qualities at the time the risk passes to the buyer, the seller is fully liable regardless of fault (objective liability). The buyer in that case may exercise the following rights (Art. 540 CC): a. demand the remedying of the defects or the replacement of the thing sold, b. reduce the

[5] P. K. Kornilakis, *"Law of Obligations I"*, 2nd edn, Sakkoulas Publications Athens-Thessaloniki, 2012, p. 185-190.

purchase price and finally, c. rescind the contract (unless the defect is minor). Article 543 CC provides an additional option to the aforementioned rights, the compensation for non performance of the contract. It is clear that the purchaser has the privilege to seek the remedy that suits him best according to the circumstances. Liability is excluded only in case the purchaser was aware that the thing didn't correspond to the contract or when this lack of correspondence is due to material (used for the construction of the thing) provided by the purchaser (Art. 537).

iii. Contractual and Non contractual liability.

Civil liability is broadly described as the responsibility to make reparations for the damage caused to another person. Civil Liability may roughly be separated in two categories, contractual and non contractual. On the one hand, contractual is the liability deriving from the non-performance of a preexisting agreed (in contract) obligation[6]. It is considered a secondary or derivative liability since it presupposes an existent primary obligation, namely the obligation to perform the contract. Contractual liability is mainly regulated in Art. 330 et seq., 335 et seq., 362 et seq., 382 et seq., and 534 et seq. (see supra) and 576 et seq. etc[7]. On the other, non contractual liability derives directly from the law and it is a primary liability since the obligational relation between the two Parties is generated for the first time when the conditions of the law are met. The most important case of the latter category is tortious liability (or delictual liability) that is the liability deriving from an unlawful act of the liable party, the cornerstone provision of tortious liability is Art. 914 CC[8].

The most important differences between the two types of liability are the following: A. Burden of proof, in contractual liability the fault of the person causing the prejudice is presumed; therefore he has the burden to prove it was not his fault in

[6] P. K. Kornilakis, *"Law of Obligations I"*, 2nd edn, Sakkoulas Publications Athens-Thessaloniki, 2012, p. 454-455.
[7] M. Stathopoulos-A. Karampatzos, *"Contract Law in Greece",* 3rd edn, Ant. N. Sakkoulas Publishers, 2014, p. 49.
[8] *"Whoever causes prejudice to another unlawfully and through his own fault, shall be liable for compensation."*

order to be discharged. In the case of tortious liability the burden of proof lays on the injured party (that is the plaintiff). B. Non economic damage, moral damage is compensated only with tortious liability. C. Time limitation of actions (prescription), in contractual liability applies the general twenty-year prescription rule, whereas in non-contractual the injured party has a five-year prescription that commences from the date the prejudiced was aware of the prejudice and the identity of the person liable[9].

iv. Limiting Contractual and non Contractual Liability.

The reasonable question following the above analysis is how the seller or the buyer could discharge themselves from the often harsh liability provisions of the Civil Code. It has been already mentioned that the principle of the freedom of contract is the backbone of the Greek Civil Code, by virtue of this principle the parties may agree on the limitation or exclusion of the liability provisions. The parties, though, should always bear in mind that exoneration clauses included in contracts should not conflict with mandatory provisions[10].

Article 332 par. 1 CC, in specific, prohibits and considers null any agreement excluding or limiting beforehand liability resulting from willful misconduct or gross negligence. The principle of favoring the feebler party is evident in this provision since arbitrary clauses of this magnitude are usually imposed by the stronger party (for instance in accession contracts with general terms of business). In brief, the above provision allows agreements that limit or exclude liability in advance only in cases of slight negligence or after the occurrence of the prejudice. In par. 2 the prohibition is further extended even in cases of slight negligence, in this way agreements for the limitation or exclusion of liability in advance even for slight negligence are completely and utterly null in the following cases:

a. If the creditor is in the service of the debtor.

[9] M. Stathopoulos-A. Karampatzos, *"Contract Law in Greece"*, 3rd edn, Ant. N. Sakkoulas Publishers, 2014, p. 49-50.

[10] Id, p. 115.

b. If liability arises from the functioning of an undertaking for the running of which a concession of the authority has been required, for example gas or electricity Transmission System Operators (TSO's).
c. If the exoneration clause is contained in a term of the contract which was not an object of individual negotiation.
d. If the debtor is released from liability for an offence against goods deriving from the right of personality and in particular life, health, freedom and honor.

All the aforementioned prohibitions apply as well and with no exception to the vicarious agents whom the debtor employs in performing his contractual obligations (Art. 334 par. 2).

The concurrent liability in tort may also be limited or excluded but always in the boundaries set by Art. 332, 334 par. 2, 281 etc.[11]

The third case (case C above), provided for in par. 2 of Art. 332, is of outmost importance. It was inserted in the Civil Code after its amendment by Law 3043/2002 implementing Dir. EC/1999/44 and is applied in all contracts notwithstanding whether the purchaser is regarded a consumer or not (According to Art. 1 par. 4 of Law Nr. 2251/1994 implementing Dir. EC/1993/13 (see supra)). This pioneer but in the same time rigid provision aims to protect, again, the feebler party and in particular the party that was "obliged" to accept with no individual negotiation general terms of business. The rational of encompassing all contracts under this protective umbrella term is basically that even in large scale business contracts between companies there is always a weaker party that is perhaps unable to influence the content of the general terms of business and has to accede to the wording stipulated by the stronger counterparty (introductory report of the Law).

[11] A. S. Georgiadis ed., A. Karampatzos, "Short Commentary of the Civil Code", 2010, Law & Economy P.N. Sakkoulas, art. 537, nr. 8 et seq., especially 10 and 14.

Any clause altering the length of the statutory prescription period (statute of limitation) is also considered null and void. In specific, Art. 275 CC stipulates that every agreement precluding prescription or defining a different period for it, shorter or longer than the one established by law, or terms which generally attenuate or aggravate the conditions for prescription, is null and void. Invalid are also all agreements modifying the prescription period indirectly by stipulating in the contract a fake delivery date of the thing which is other than the day of the actual (physical) delivery. Some jurists presume that, even though Art. 275 is a mandatory legal provision (jus cogens), it is still possible to modify the prescription period in the limits set by Art. 332 and 334 (see supra)[12]. This position is in alignment with the rationale of Art. 277 CC, which provides that the Court does not consider prescription ex officio but only if pleaded by the interested party. A party may also invoke the protection of art. 281 CC in case the counterparty even though waiving beforehand art. 275 CC and systematically creating the impression that he will fulfill his obligations invokes prescription as a defense[13]. Therefore, the "legal trend" as far as it concerns the provisions regarding prescription is tending towards the gradual abolition of such limits and the prevalence of the principle of the "autonomy of the private will" (see infra B. European Art. III.-7:601 DCFR).

[12] P. Papanikolaou, "Matters concerning Prescription Law", 2015, Ant. N. Sakkoulas Publishers**,** p. 119 et seq. especially p. 144 and 149.

[13] K. Rigas, Applied Civil Law, Vol. 2012, NOMIKI BIBLIOTHIKI, p. 317.

v. Other special clauses

In order to further reinforce the creditor's position the civil code provides for two clauses the inclusion of which to the contract is at the discretion of the parties, the earnest and the Penalty Clause.

Article 402 stipulates that during the compilation of a contract it is possible to give an earnest, which is an object or usually a sum of money, with the meaning that if the party does not fulfill his performance, the object or sum will remain in the hands of the recipient and the giver will irretrievably lose it. Articles 402 and 403 provide that if the recipient of the earnest does not fulfill his counter-performance he must return it double[14].

A penalty clause is a promise made by the debtor that in case he does not fulfill or not properly fulfill the agreed performance, he will give him an object or (usually) a sum of money (Art. 404-405 CC). The above clauses are usually the part or the object of a separate but accessory agreement to the principal contract, which they are intended to support. Thus, if the principal agreement is void the aforementioned clauses are void as well (Art. 408 CC). Both clauses aim to reinforce the creditor's position from possible unreliability of the debtor[15].

[14] A. Georgiadis-M. Stathopoulos, *"Civil Code"*, Vol. II General Law of Obligations, Law & Economy P.N.SAKKOULAS, 2009, p. 401-408.

[15] Id. P. 409-424.

B. European.

One of the most significant achievements of the European Union is the Single Market. Its fundamental freedoms entitle businesses to move and interact freely in the borderless Union. Traders are able to extend their activities cross-border and benefit from the economies of scale and the greater business opportunities that the single market offers. Despite this impressive success, barriers between EU Member States still remain. Many of these barriers result from differences between national legal systems. Among the barriers that hinder cross-border trade are differences between the national contract laws. For traders, these differences generate additional complexity and costs. Even though this deficit has been widely recognized European contract law, as such, still does not exist.

i. The Lando Commission and the Study Group on a European Civil Code (SGECC)

A first attempt for the unification of Contract Law in the EU (European Community at the time) was that of the Lando Commission or Commission on the European Contract Law (CECL). This first commission under the chairmanship of Ole Lando started its work in 1982 and continued until 2002. The CECL published the Principles of European Contract Law (PECL) which is a set of model rules that cover the core rules of contract that is formation, validity, interpretation, contents, performance, non-performance (breach) and remedies. The PECL became the point of departure for the Study Group on a European Civil Code (SGECC). The latter had a broader scope than the Lando Commission focusing also on patrimonial law which includes contracts, non-contractual obligations and movable property. Contentious areas such as family law have been left untouched. The SGECC published its Draft Common Frame of Reference (DCFR) in 2009[16].

Both the Lando Commission and the SGECC were comparative legal research efforts striving to create a body of principles of private (contract) law that are most suitable

[16]H. Beale, *"The Development of European Private Law and the European Commission's Action Plan on Contract Law",* 2005, published in Vol. X/ JURIDICA INTERNATIONAL, p. 5-10.

for European-wide application. While the SGECC does not have any legislative intent and only sees its work as a starting point for possible future EU law-making, the Lando Commission, at least initially, had intended a more direct political impact of its work. The PECL and the DCFR are soft law legal instruments (containing general principles, definitions and model rules) and therefore, do not represent a legally enforceable legal framework. The drafters of the DCFR considered that the most efficient way of restoring coherence of private law across the EU would be to resort to such soft-law instruments as guidance for both EU and national legislatures and judiciaries. Since the DCFR incorporated, though with modifications, the PECL, the former will be in the centre of this chapter's analysis. The DCFR is (among other things) a possible model for an actual or "political" Common Frame of Reference (CFR)[17].

ii. The Principles.

There are four fundamental principles underlying the whole of the DCFR, freedom, security, justice and efficiency. Each principle has several different aspects, not all have equal value and they often conflict with each other. For instance efficiency is more functional and less fundamental than the others. In the context of private law, however, all of these values are best regarded not independently but as means to other ends – the promotion of welfare, the empowering of people to pursue their legitimate aims. For example, on occasion, justice may have to make way for legal security or efficiency, as happens under the rules of prescription. Freedom of contract and autonomy of the will, may as well be limited on account of aspects of justice – for instance to prevent the abuse of a dominant position or discrimination. Principles can even conflict with themselves, depending on the point of which a situation is viewed: freedom from discrimination restricts another's freedom to discriminate. One aspect of justice (e. g. equality of treatment) may conflict with

[17] C. Von Bar, *"A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities",* Electronic Journal of Comparative Law, vol. 12.1 (May 2008), available in http://www.ejcl.org (accessed 15-01-2016).

another (e. g. protection of the weak). Therefore the principles can never be applied in a pure and rigid way. The principles also overlap. For instance, many of the rules designed to ensure the freedom of contract can also be explained in terms of contractual justice. These four values encompass of course all the other fundamental principles expressed in the EU legislature such as: protection of human rights, economic welfare, solidarity and social responsibility, promotion of the internal market, protection of the feebler party, rationality, legal certainty, predictability, protection of reasonable reliance and the proper allocation of responsibility. [18]

The DCFR is divided in ten Books of which only the following four will be mentioned: Book II Contracts and other Juridical Acts, Book III Obligations and Corresponding Rights, Book IV Specific Contracts and Book VI Non contractual Liability. In order to introduce the relevant articles in a clear and coherent manner, they will be presented in ascending order.

iii. Book II: Contracts and other juridical acts

Early, in Art. II. – 1:102, the DCFR attempts to clarify, in the light of the principle of freedom and in particular party autonomy, that Parties are free on the one hand to determine the contents of a contract subject, though, to any applicable mandatory rules (par. 1) and on the other to exclude the application of any rules relating to contracts or derogate from or vary their effects, except as otherwise provided (par. 2). In the third paragraph the DCFR allows the waiving of any right which has already arisen and of which that party is aware. Article II. – 1:103 in par. 3, concerning the binding effect, further stipulates: *"(3) This Article does not prevent modification or termination of any resulting right or obligation by agreement between the debtor and creditor or as provided by law."* Therefore, it is already

[18] SGECC, "Acquis Group", adited by C. Von Bar et al, "Principles, Definitions and Model Rules of European Private Law", Sellier European Law Publishers, 2009, p. 60-61.

rendered clear that party autonomy should be respected unless there is a good reason to intervene.[19]

Further, in Articles II. – 7:301 and II. – 7:302, the DCFR considers absolutely void a contract, in whole, if it infringes a principle recognized as fundamental in the laws of the Member States and also where a contract is not void, as explained earlier, but infringes a mandatory rule of law, the effects of that infringement on the validity of the contract are the effects prescribed by that mandatory rule. Thus contracts which are illegal or contrary to public policy are invalid (for example contracts which infringe competition rules). The DCFR does not specifically stipulate when a contract is contrary to public policy in this sense, because that is a matter for law outside the scope of the DCFR, which is the law of the Member State where the relevant performance takes place.

DCFR also deals with the lack of information as to the terms of the contract. Standard terms are very useful nowadays but there is the risk that the parties may not be aware of their contents or may not fully understand them. Directive EC/1993/13 addresses this problem and gives protection to consumers when the term in question is in a consumer contract[20] and was not individually negotiated. However, as the laws of many Member States recognize, the problem may also occur in contracts between businesses. This occurs particularly when one party is a small business that lacks expertise or where the relevant term is contained in a standard form contract document prepared by the party seeking to rely on the term and the other party may not be aware of the existence or extent of the term. The DCFR contains controls which deal with similar problems in contracts between businesses, though the controls are of a more restricted kind than for consumer contracts.

[19] SGECC, "Acquis Group", adited by C. Von Bar et al, "Principles, Definitions and Model Rules of European Private Law", Sellier European Law Publishers, 2009, p. 75-80.

[20] Ibid, p. 80-85.

The question of inclusion of terms is regulated in article II.–9:103 ('Terms Not Individually Negotiated'), thus:

"(1) Terms supplied by one party and not individually negotiated may be invoked against the other party only if the other party was aware of them, or if the party supplying the terms took reasonable steps to draw the other party's attention to them, before or when the contract was concluded."

Section 4 of Chapter 9 contains mandatory provisions regarding unfair terms. Therefore, the parties are not able to exclude the application of these provisions or derogate from whatsoever (Art. II. – 9:401). This section attempts to set general standards while differentiating several aspects concerning Business-to-Consumer (B-to-C) and Business-to-Business (B-to-B) transactions. The most important provisions, concerning especially the latter, are the following.[21]

Article II.–9:402 ('Duty of Transparency in Terms Not Individually Negotiated')[22], stating: *"(1) Terms that have not been individually negotiated must be drafted and communicated in plain, intelligible language."*

Article II.–9:405 ('Meaning of "Unfair" in Contracts between Businesses')[23], specifying:

"A term in a contract between businesses is unfair for the purposes of this section only if it is a term forming part of standard terms supplied by one party and of such a nature that its use grossly deviates from good commercial practice, contrary to good faith and fair dealing."

The above provisions on unfair terms are based on the notion of preserving the freedom of contract. The laws of some Member States apply these provisions to contracts of all types (not just to contracts between businesses and consumers) as it is the case in the Greek Civil Code (supra). The DCFR takes a rather balanced view, suggesting a cautious extension beyond the existing framework of the Directive.

[21] Ibid, p. 656.
[22] Ibid, p. 658.
[23] Ibid, p. 670.

In some cases there is no need to undergo the unfairness test of the aforementioned articles. Certain contract terms are thus excluded if they are based on: (a) provisions of the applicable (national) law, which may be less strict; (b) international conventions to which the Member States are parties, or to which the European Union is a party, for instance the CISG; or (c) the rules of the DCFR (II. – 9:406)[24]. Paragraph 2 stipulates that a term which is unfair under this Section is not binding on the party who did not supply it and if the contract can reasonably be maintained without the unfair term, the other terms remain binding on the parties.

iv. Book III: Obligations and corresponding rights.

The general definition of an obligation is that it is a duty to perform, in the framework of a legal relationship, between the debtor and the creditor (Art. III.-1:102). The Parties must act in accordance with good faith and fair dealing and, of course, they may not exonerate themselves by contract or otherwise from this duty (Art. III. – 1:103)[25].

a. Limiting liability.

Article III. – 3:105: (Term excluding or restricting remedies)[26] is the compass provision that sets the general guidelines for liability limiting clauses. Paragraph 1 provides that a contract term excluding or even restricting liability to pay damages for personal injury, including fatal injury of course, caused intentionally or by gross negligence is completely and utterly void. This means that any other case is not excluded and therefore is valid and can be legally included in a contract even if it is caused intentionally or by gross negligence. Of course this provision is restricted by other articles with mandatory effect, for example the provisions concerning unfair terms.

[24] Ibid p.674.
[25] Ibid, p. 704-707.
[26] Ibid, p. 818-20.

Paragraph 2 of the aforementioned Article adds a rather broad but still important limit; it stipulates that even if the term excluding liability (especially unfair terms) is valid, it cannot be invoked if it is contrary to good faith and fair dealing. This option has probably been included in order to alleviate the consequences of the minimum restrains set by this Article. Usually, the most common limitation, found in most legal systems (including in Art. 332 CC- supra), involves the notion of fault, the course of action must somehow be at variance with the care to be expected from the defendant if liability is to follow. In the case of the DCFR the limitation is set in both fault and event, providing this way unlimited option in limiting contractual liability! Therefore it was somehow essential to include a safety net provision covering cases of arbitrary conduct in the sense of Art. I. – 1:103 on Good faith and fair dealing.

b. Damages and Interest

Under the section "Damages and Interest", it is provided that the creditor is entitled to damages for loss caused by the debtor's nonperformance of an obligation (III. – 3:701: Right to damages)[27], damages are recoverable for future loss -both economic and non-economic loss-, as a detriment to the creditor caused by the inexcusable non performance of the debtor. The DCFR approach is that of restitutionary damages to such an extent that will put the creditor as nearly as possible into the position in which the creditor would have been if the obligation had been duly performed (III. – 3:702)[28]. Of course the debtor is liable only for loss which the debtor foresaw or could reasonably be expected to have foreseen (III. – 3:703)[29]. It cannot be presumed by the stipulation that it is not possible to limit or exclude the creditors right to damages.

c. Prescription

Another matter regulated by the DCFR which the party's can form and intervene is that of the prescription period. Even though the general rule provides for a

[27] Ibid, p. 934-6.
[28] Ibid, p. 942-4.
[29] Ibid, p. 947-8.

minimum 3 year prescription period (III. – 7:201: General period)[30] it is possible to modify it by agreement. Thus, according to Art. III. – 7:601 (Agreements concerning prescription)[31] the parties may agree to either shorten or lengthen the respective prescription periods but this period may not be less than one year or more than thirty. This provision depicts the prevailing view in EU contract law that dictates the abolition of strict and rigid prescription limits in contract law.

v. The Sale Contract.

The contract of sale is regulated in Book IV of the DCFR about Specific contracts. Article IV. A. – 1:101 informs us that the DCFR applies to contracts for the sale of goods and with appropriate adaptations to contracts for the sale of electricity. The definition of the contract of sale is given in IV. A. – 1:202 according to which: *"A contract for the "sale" of goods is a contract under which one party, the seller, undertakes to another party, the buyer, to transfer the ownership of the goods to the buyer, or to a third person, either immediately on conclusion of the contract or at some future time, and the buyer undertakes to pay the price".* This definition is more or less similar to most of the respective articles found in European contract laws. Therefore, the Sellers fundamental obligations: (a) to transfer the ownership of the goods; (b) to deliver the goods; (c) to transfer such documents relating to the goods; and (d) to ensure that the goods conform to the contract."(Art. IV. A. – 2:101)[32].

The DCFR provides even for cases where carriage of the goods is required in Art. IV. A. – 1:203[33]. In specific: *"(1) If the contract requires the seller to arrange for carriage of the goods, the seller must make such contracts as are necessary for carriage to the place fixed by means of transportation appropriate in the circumstances and*

[30] Ibid, p. 1169-70.
[31] Ibid, p. 1229-30.
[32] Ibid, p. 1276-8.
[33] Ibid, p. 1262-3.

according to the usual terms for such transportation. (2) If the seller, in accordance with the contract, hands over the goods to a carrier and if the goods are not clearly identified to the contract by markings on the goods, by shipping documents or otherwise, the seller must give the buyer notice of the consignment specifying the goods. (3) If the contract does not require the seller to effect insurance in respect of the carriage of the goods, the seller must, at the buyer's request, provide the buyer with all available information necessary to enable the buyer to effect such insurance." The vast majority of sales require the transportation of the goods; this provision aids the parties since it regulates the most common aspects in a carriage of goods such as: appropriate documentation, description of the products and insurance. These provisions can be easily combined with ICC's Incoterms 2010 (a set of essential international commercial and trade terms, when incorporated into a sale contract, the Incoterm code provides a detailed interpretation of rights and obligations between parties).

The typical liability exoneration ratio in practically all contract laws is knowledge of the defect of the product. In particular, "the seller is not liable if, "*at the time of the conclusion of the contract, the buyer knew or could reasonably be assumed to have known of the lack of conformity."* (IV. A. – 2:307)[34]. Therefore the DCFR completely exonerates the seller if the buyer knew or could have reasonably known the defect of the goods sold.

The buyer has three main obligations. He must: "(a) pay the price; (b) take delivery of the goods; and (c) take over documents representing or relating to the goods as may be required by the contract." (IV. A. – 3:101)[35]. Of course the buyer's primary obligation is without doubt paying the agreed price.

[34] Ibid, p. 1331-3.

[35] Ibid, p. 1344-5.

The DCFR introduces in Art. IV. A. – 4:301[36] another duty of the buyer, the examination of the Goods and notification for non conformity. This duty may be considered as a fourth obligation since failure to perform it may result to less available remedies for the buyer. Of course it is applied only to non consumer contracts. The general rule concerning examination is that: *"The buyer should examine the goods, or cause them to be examined, within as short a period as is reasonable in the circumstances."*

There is much contemplation regarding this extra obligation for instance in cases of a contract for the delivery of the goods by installments where the buyer must examine each individual consignment. When the buyer does not comply with his duty to examine each individual consignment and therefore does not inform the seller of the defects, he loses his right to rely on a lack of conformity remedy. On the other hand, the buyer retains his rights in respect to posterior non-conforming deliveries. Also, in contracts which involve carriage of goods Art. IV. A. – 5:202[37] provides for the passing of the risk the following: "(*2) If the seller is not bound to hand over the goods at a particular place, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer in accordance with the contract. (3) If the seller is bound to hand over the goods to a carrier at a particular place, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. (4) The fact that the seller is authorised to retain documents controlling the disposition of the goods does not affect the passing of the risk."*In general, it is a rather ambivalent provision since it requires the buyer being extremely alert and cautious in order to scan any lack of conformity and notify on time the seller.

Article IV. A. – 4:304 (Seller's knowledge of lack of conformity)[38] attempts to alleviate the buyer's demanding duty for examination and provides that the seller

[36] Ibid, p. 1374-5.
[37] Ibid, p. 1411-12.
[38] Ibid, p. 1391-2.

may not benefit from the provisions of Art. IV. A. – 4:301*"… if the lack of conformity relates to facts of which the seller knew or could reasonably be expected to have known and which the seller did not disclose to the buyer."*.

vi. Book VI: Non Contractual Liability

Non contractual liability can be regarded as supplementing contract law. Under contract law parties typically acquire assets. The protection of assets once acquired and the protection from infringement of the rights of personality is not something which contract law is able to provide. That is the task of the law on non-contractual liability for damage (Book VI).[39]

The notion of contract would be meaningless if it did not encompass the notion of compensation for loss involuntarily sustained. Contracts are aimed at a voluntary change in relationships. That presupposes, however, a regime for the protection against involuntary changes. The law on non contractual liability for damage caused to another is thus directed at reinstating the person suffering such damage in the position that person would have been in had the damage not occurred. It does not seek to punish anybody; neither does it aspire to enrich the injured party. Rather it is aimed at protection. A person's rights to physical wellbeing (health, physical integrity, freedom) are of fundamental importance, as are other personality rights, in particular that of dignity and with it protection against discrimination and exposure[40]. Injuries to the person give rise to non-economic loss besides economic loss; the former also deserves compensation.[41]

[39] Ibid, p. 2978-83.
[40] P. Larouche & F. Chirico, *"Economic Analysis of the DCFR"*, Sellier European Law Publishers, 2010, p. 295-298.
[41] P. Larouche, "*Legally Relevant Damage and a priori Limits to Non-Contractual Liability In The DCFR",* December 2008, found in

Therefore, the basic rule provided for in Art. VI. – 1:101 is the following: *"(1) A person who suffers legally relevant damage has a right to reparation from a person who caused the damage intentionally or negligently or is otherwise accountable for the causation of the damage. (2) Where a person has not caused legally relevant damage intentionally or negligently that person is accountable for the causation of legally relevant damage only if Chapter 3 so provides.*" The main elements of this provision are: a. legally relevant damage (that results from a violation of a right conferred by the law or from a violation of an interest worthy of legal protection), b. causation (between the damage and the conduct) and c. accountability (intention or negligence). Paragraph 2 provides for accountability for the causation of the damage without intention or negligence in certain instances such as damage caused by employees and representatives, defective products and dangerous emissions (VI. – 3:201-8). Of course, the DCFR provides for defences in cases where the person suffering the damage validly consents to it or knowing the risk of damage voluntarily takes that risk (VI. – 5:101) or in cases of contributory fault (VI. – 5:102). The drafters have deliberately avoided the notions of fault and strict liability, since they thought that both would have been misleading *"because negligence does not require fault in a moral sense and also because a liability, once arisen, is always in nature"* as Christian Von Bar outlines[42].

A more thorough study of the concept of "legally relevant damage", leads to the conclusion that the DCFR introduces a priori limits to liability. In Art. VI.-2:101, "legally relevant damage"[43] is defined as loss or injury either (i) to a right conferred by law outside of the DCFR or an interest worthy of protection, but then only if certain conditions are fulfilled or (ii) falling within one of the cases explicitly

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https://www.researchgate.net/publication/24110133_Legally_relevant_damage_and_a_priori_limits_to_non-contractual_liability_in_the_DCFR (accessed January 10 2016), p. 1-2.

[42] C. Von Bar, *"Non Contractual Liability Arising out of Damage Caused to another under the DCFR"*, ERA, published online on 14 August 2008, p. 35.

[43] SGECC, "Acquis Group", adited by C. Von Bar et al, "Principles, Definitions and Model Rules of European Private Law", Sellier European Law Publishers, 2009, p. 3030-5.

recognized in Art.VI.-2:201[44]. The latter provision comprises of several different protected rights and interests as well as specific courses of conduct. Therefore, the concept of 'legally relevant damage' under the DCFR is so complex that it cannot produce any strong incentive for the deterrence of harmful conduct (which is the most important objective of liability law). In brief, there is no reason to consider non-contractual liability cases differently from other cases involving other types of liability, they should be therefore subject to the general conditions of liability.[45]

The question of course is whether it is possible to directly limit liability in cases of non contractual liability beforehand. The answer is yes but not unconditionally. Article VI. -5:401 "Contractual exclusion and restriction of liability"[46] provides as a general rule (adopting the usual fault degree regime found in the Greek Civil Code as well-see supra Chapter 1A) that it is not possible to exclude or restrict liability in cases of causing intentionally legally relevant damage. As far as it concerns, legally relevant damage due to gross negligent behavior ("*profound failure to take such care"*), the DCFR prohibits –of course- the exclusion of liability in cases of a. personal injury (including fatal) and b. where the exclusion or restriction is otherwise illegal or contrary to good faith and fair dealing practices. Accountability for damage caused by defective products can't be excluded either. This Article stems from the principle of freedom of contract which allows the parties to set precautionary stipulations in relation to non-contractual liability possibly arising between them in the future. Therefore, paragraph 4 reflects boldly the principle

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[44] Ibid, p. 3080-2.

[45] P. Larouche, "*Legally Relevant Damage and a priori Limits to Non-Contractual Liability in the DCFR",* December 2008, found in https://www.researchgate.net/publication/24110133_Legally_relevant_damage_and_a_priori_limits_to_non-contractual_liability_in_the_DCFR (accessed January 10 2016), p. 25.

[46] *"(1) Liability for causing legally relevant damage intentionally cannot be excluded or restricted.*
(2) Liability for causing legally relevant damage as a result of a profound failure to take such care as is manifestly required in the circumstances cannot be excluded or restricted:
(a) in respect of personal injury (including fatal injury); or
(b) if the exclusion or restriction is otherwise illegal or contrary to good faith and fair dealing.
(3) Liability for damage for the causation of which a person is accountable under VI.–3:204 (Accountability for damage caused by defective products) cannot be restricted or excluded.
(4) Other liability under this Book can be excluded or restricted unless statute provides otherwise."

that a pre-emptive exclusion or restriction of liability is possible in all remaining cases.

What is essentially involved here is the exclusion of liability in cases of ordinary negligence and the exclusion or restriction of liability without intention or negligence. In turn, II.–9:411 (Terms which are presumed to be unfair in contracts between a business and a consumer) is to be observed here. Liability for damage to body and health caused by slight negligence cannot be contractually excluded in standard terms. Of course, the same does not apply to liability without intention or negligence. This is because II.–9:411 requires an "act or omission" on the part of the business and this is lacking in the cases covered by Chapter 3, Section 2 (Accountability without intention or negligence). Where a person is liable without having "done something wrong", that person is liable for neither a positive act nor an omission, but is liable regardless of conduct. Finally, under paragraph (4), an exclusion or restriction of liability is invalid where such a contractual stipulation contradicts the applicable national law. Thus, these model rules leave room for regional statutory rules for individual fields of activity.

In conclusion, it is important to highlight the fact that the DCFR has not adopted a very liberal regime in the case of pre emptive limitation of liability and that it is highly influenced by the legal framework for the protection of the consumer.[47]

vii. Conclusion

The ultimate target (and perhaps wishful thinking) of the drafters of the DCFR is an aspect or result of efficiency and security which is stability. People feel more secure with solutions which are familiar, tried, tested and traditional. This aspect of security and efficiency seems to be particularly valued in the legal sphere. The valuable storage of knowledge and experience acquired by the DCFR is not wasted even if it is not directly applicable. The Drafters expected and aspired that there is

[47] Von Bar et al., *"Principles, Definitions, And Model Rules of Private Law, Draft Common Frame of Reference",* 2009, available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf , P. 3547-3550.

much in the DCFR which will indeed be perfectly familiar to private lawyers from every part of Europe and that no lawyer from any part of Europe will see it as an alien product but that all will see it as growing out of a shared tradition and a shared legal culture.[48] However, a significant caveat must be entered here: Although the DCFR might at first glance honor the principle of freedom of contracts, in many specific instances it imposes severe restrictions to said principle, following the pattern of the European Consumer protection policy. This means that in some cases mandatory law becomes the rule and non mandatory law the exception.

C. International.

I. The CISG.

The United Nations Convention on Contracts for the International Sale of Goods (CISG) has been recognized as the most successful attempt to unify a broad area of commercial law at the international level. This self-executing treaty aimed to reduce obstacles to international trade, particularly those associated with choice of law issues, by creating even-handed and modern substantive rules governing the rights and obligations of parties to international sales contracts. The CISG has attracted more than 70 Contracting States that account for well over two thirds of international trade in goods, and that represent extraordinary economic, geographic and cultural diversity (with the sole exceptions of Japan, the United Kingdom, and India)[49].

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[48] Von Bar et al., *"Principles, Definitions, And Model Rules of Private Law, Draft Common Frame of Reference",* 2009*,* available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf, p. 8-9.

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[49] J. Honnold, "*The Sales Convention: Background, Status, Application"*, 1988, Reproduced with permission from 8 *Journal of Law and Commerce* p. 1-10, found in http://www.cisg.law.pace.edu/cisg/biblio/honnond-background.html , accessed on 10-01-2016.

The CISG is a project of the United Nations Commission on International Trade Law (UNCITRAL), which in the early 1970s undertook to create a successor to two substantive international sales treaties – Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) and the Convention relating to a Uniform Law for the International Sale of Goods (ULIS) – both of which were sponsored by the International Institute for the Unification of Private Law (UNIDROIT). The goal of UNCITRAL was to create a Convention that would attract increased participation in uniform international sales rules. The CISG was finalized and approved at the United Nations Conference on Contracts for the International Sale of Goods, held in 1980, in Vienna. The CISG entered into force in eleven initial Contracting States on 1 January 1988, and since that time has steadily and continuously attracted a diverse group of adherents.[50]

The CISG governs international sales contracts if (1) both parties are located in Contracting States, or (2) private international law leads to the application of the law of a Contracting State (although, as permitted by the CISG (article 95), several Contracting States have declared that they are not bound by the latter ground).

The Convention does not apply to sales: (a) of goods bought for personal, family or household use (where the buyer is considered a consumer), (b) by auction, (c) on execution or otherwise by authority of law, (d) of stocks, shares, investment securities, negotiable instruments or money, (e) of ships, vessels, hovercraft or aircraft, (f) of electricity (Article 2). Therefore, the CISG does not address issues that should be dealt with in contracts for services.

No special tribunals were created for the CISG; it is applied and interpreted by the national courts and arbitration panels that have jurisdiction in disputes over transactions governed by the Convention. To achieve its fundamental purpose of providing uniform rules for international sales, the Convention itself requires that it be interpreted with a view to maintaining its international character and uniformity.

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[50] Id.

a. The Contract of Sale.

The CISG, in order to provide a less complicated and user friendly environment, created a rather simple scheme. Article 30 identifies the principal obligations of the seller which are to deliver the goods, to hand over any documents relating thereto and to transfer the property in the goods. Although the Convention provides that the seller must transfer the property in the goods, article 4*(b)* specifies that, unless expressly provided, the Convention is not concerned with the effect which the contract may have on the property in the goods sold. This matter is left to the applicable national law. Also, since article 5 of this Convention permits the parties to exclude its application or, subject to article 11, to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and this Convention, the seller must fulfill his obligations as required by the contract. Therefore, Parties may easily form their obligations according to their contractual preferences.

Article 35 states the extent of the seller's obligation to deliver goods which conform to the contract[51]. This article differs from the National and European equivalent provision in an important respect. Under the aforementioned legal frameworks the seller had not fulfilled his obligation to "deliver the goods" where he handed over goods which failed to conform to the requirements of the contract in respect of quality, quantity or description. However, under this Convention, if the seller has

[51]Art. 35: "The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. (2) Except where the parties have agreed otherwise, the goods do not conform with the contract unless they: (a) are fit for the purposes for which goods of the same description would ordinarily be used; (b) are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement; (c) possess the qualities of goods which the seller has held out to the buyer as a sample or model; (d) are contained or packaged in the manner usual for such goods or, where there is no such manner, in a manner adequate to preserve and protect the goods. (3) The seller is not liable under subparagraphs (a) to (d) of the preceding paragraph for any lack of conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such lack of conformity."

handed over or placed at the buyer's disposal goods which meet the general description of the contract, he has "delivered the goods" even though those goods do not conform in respect of quantity or quality[52]. It should be noted, however, that, even though the goods have been "delivered", the buyer retains his remedies for the non-conformity of the goods[53]. Also, the seller's obligation under articles 39 and 40 to deliver goods free from any right or claim of a third party, including a right or claim based on industrial or intellectual property, is independent of the seller's obligation to deliver goods which conform to the contract.

Articles 38 and 39 provide for the consequences of the buyer's failure to examine the goods and give notice of non-conformity of the goods to the seller within a reasonable time. Article 39 provides that if the buyer fails to notify the seller of lack of conformity of the goods within a reasonable time after he has discovered it or ought to have discovered it, he loses the right to rely on the lack of conformity. The examination which this article requires the buyer to make is one which is reasonable in the circumstances[54].

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[52] See "*Hungarian Wheat Case",* Germany 8 February 2006 Appellate Court Karlsruhe found in http://cisgw3.law.pace.edu/cases/060208g1.html.

[53] Off specification (off spec) gas cannot be considered conforming to the contract according to Art. 35 CISG. The relevant notice requirements in the contract must be thoroughly considered under Art. 38, 39,44 CISG. The rejection rights of buyer must also be set out explicitly in the contract.

[54] The reference to "reasonable time" in Article 39(1) has captured the most judicial and arbitral attention. There are numerous reasons for this, the most significant of which is probably the vagueness of the term coupled with the fact that (unlike where Article 8(2) is concerned) criteria for determining this "reasonable" time period were never laid down in the Convention nor in the *travaux préparatoires*. It has thus been up to practitioners, scholars and jurists to determine what "within reasonable time" is. Consequently, Article 39(1) is a well suited provision for analysing and determining whether the reasonability-factor is a suitable one for making a provision flexible, or whether it will endanger the uniformity of the Convention. See C.B. Andersen, "*Reasonable Time in Article 39(1) of the CISG - Is Article 39(1) Truly a Uniform Provision?",* found in http://www.cisg.law.pace.edu/cisg/biblio/andersen.html, (accessed 10-01-2016).

Article 40 relaxes the notice requirements of articles 38 (examination of the goods) and 39 (notice of lack of conformity) where the lack of conformity relates to facts which the seller knew or of which he could not have been unaware and which he did not disclose. The seller has no reasonable basis for requiring the buyer to notify him of these facts.

Article 45 (Buyer's remedies in general: claim for damages; no period of grace) serves both as an index of the remedies available to the buyer if the seller fails to perform any of his obligations under the contract and this Convention (right to require performance, fixing of additional period for performance**,** right to avoid contract, reduction of the price etc) and as a source for the buyer's right to claim damages. Paragraph (1) *(a)* provides that in case of a seller's breach, the buyer may "exercise the rights provided in articles 46 to 50". The substantive conditions under which those rights may be exercised are set forth in the articles cited. Article 45 does not enumerate the buyer's remedies exhaustively. The Convention provides for further remedies, e.g., in articles 71-73 or 84 par. 1. However, article 45 is exhaustive in the sense that it pre-empts the buyer from invoking remedies for breach of contract otherwise available under the applicable domestic law, since the Convention excludes recourse to domestic law[55] where the Convention provides a solution.[56]

In addition, article 45 (1) *(b)* provides that the buyer may "claim damages as provided in articles 74 to 77" "if the seller fails to perform any of his obligations

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[55] *Geneva Pharmaceuticals Tech. Corp. v. Barr Labs. Inc.*, United States, 10 May 2002, found in http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020510u1.html, (accessed 10-01-2016).

[56] Al. H. Kritzer (ed), *"Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods",* Kluwer Law International, 1994, found in http://www.cisg.law.pace.edu/cisg/biblio/kritzer2.html, (accessed 10-01-2016).

under the contract and this Convention." In order to claim damages it is not necessary to prove fault or a lack of good faith or the breach of an express promise, as is the case in some legal systems. Damages are available for the loss resulting from any objective failure by the seller to fulfill his obligations. Articles 74 to 77, to which article 45 (1) *(b)* refers, do not provide the substantive conditions as to whether the claim for damages can be exercised but the rules for the calculation of the amount of damages. Therefore, the risk of liability for consequential damages under the Convention may prove to be greater than the risk of liability for consequential damages under other national law.[57]

Paragraph (2) provides that a party who resorts to any remedy available to him under the contract or this Convention is not thereby deprived of the right to claim any damages which he may have incurred. Paragraph (3) provides that if a buyer resorts to a remedy for breach of contract, no court or arbitral tribunal may delay the exercise of that remedy by granting a period of grace either before, at the same time as, or after the buyer has resorted to the remedy.

A number of important advantages flow from the adoption of a single consolidated set of remedial provisions for breach of contract by the seller. First, all the seller's obligations are brought together in one place without the confusion generated by the complexities of repetitive remedial provisions (see supra national and European). This makes it easier to understand what the seller must do, which is of prime interest to merchants. Second, problems of classification are reduced with a single set of remedies. Third, the need for complex cross referencing is lessened. [58]

Article 53 states the principal obligations of the buyer and introduces Chapter III of Part III of the Convention. The principal obligations of the buyer are: a. to pay the price for the goods (principal obligation) and b. to take delivery of them. The buyer must carry out his obligations "as required by the contract and this Convention."

[57] Ibid.

[58] Ibid.

Since article 5 of the Convention permits the parties to exclude its application or to derogate from or vary the effect of any of its provisions, it follows that in cases of conflict between the contract and the Convention the buyer must fulfill his obligations as required by the contract.

Article 61 serves again (as article 45) both as a coherent guide to the remedies available to the seller if the buyer fails to perform and as the source for the seller's right to claim damages.

Article 61 (1) *(a)* provides that in case of the buyer's breach, the seller may "exercise the rights provided in articles 62 to 65." Although the provisions on the remedies available to the seller in articles 62 to 65 (right to require performance, right to avoid contract, specification by seller, suspension of performance) are drafted in terms comparable to those available to the buyer in articles 46 to 50, they are less complicated because the buyer has only two principal obligations, to pay the price and to take delivery of the goods, whereas the seller's obligations are more complex. However, article 64 (1) allows the seller to declare the contract avoided as to one installment where the buyer's failure to perform in respect of that installment amounts to a fundamental breach, right to refuse to take delivery in case of delivery before the date fixed or of an excess quantity of goods (article 48).

Article 61 (1) *(b)* provides that the seller may "claim damages as provided in articles 70 to 73: if the buyer fails to perform any of his obligations under the contract of sale and this Convention." In order to claim damages it is, again, not necessary to prove fault or a lack of good faith or the breach of an express promise. Damages are available for the loss resulting from any objective failure by the buyer to fulfill his obligations.

a. Limiting Liability.

The autonomy of the parties to international sales contracts is a fundamental issue of the Convention: the parties can, by agreement, derogate from virtually any CISG

rule, or can exclude the applicability of the CISG entirely in favor of other law. When the Convention applies, it does not govern every issue that can arise from an international sales contract: for example, issues concerning the validity of the contract or the effect of the contract on the property in (ownership of) the goods sold are, as expressly provided in the CISG, beyond the scope of the Convention, and are left to the law applicable by virtue of the rules of private international law (article 4).

In specific, Article 4 stipulates*: "This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."*

Therefore, if the Parties drafting a contract (in which the CISG applies) wish to include a limitation of liability clause and the circumstances included in such clauses are addressed by the Convention, the Convention permits parties to limit liability for claims which arise from such circumstances, without regard to national law. If, however, the circumstances that occur are not expressly provided for in the Convention, applicable national laws or public policy can affect the validity of certain limitations of liability (Article 4(a)[59]). Examples include domestic prohibitions against exclusions of liability for gross negligence or for the consequences of intentional acts (see supra national and European).[60]

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[59] *"This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage; (b) the effect which the contract may have on the property in the goods sold."*

[60] Ibid.

Article 5 of the CISG providing that the Convention *"does not apply to the liability of the seller for death or personal injury caused by the goods to any person"* actually excludes from the scope of the convention non contractual liability. Therefore it is up to the applicable domestic law the limitation or exclusion of non contractual liability (tort liability) in cases of death and personal injury.

The non-mandatory character of the Convention is explicitly stated in article 6. The parties may exclude its application entirely by choosing a law other than this Convention to govern their contract. They may also exclude its application in part or derogate from or vary the effect of any of its provisions by adopting provisions in their contract providing solutions different from those in the Convention.[61]

Questions concerning matters governed by the Convention that are not expressly addressed therein are to be settled in conformity with the general principles of the CISG or, in the absence of such principles, by reference to the law applicable under the rules of private international law.[62] It is probable though that a tribunal construing this provision would make every effort to find applicable general principles in the Convention before applying the rules of private international law because Article 7(1) states that *"In the interpretation of this Convention, regard is to be held to its international character and to the need to promote uniformity in its application."* However, the Convention does not seek to promote the uniform resolution of matters not governed by the Convention.[63]

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[61] *"The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."*

[62] Ibid.

[63] M. J. Bonell , "*The CISG, European Contract Law and the Development of a World Contract Law*", American Journal of Comparative Law, Winter 2008, p. 1-28, found in http://cisgw3.law.pace.edu/cisg/biblio/bonell4.html (Accessed 10-1-2016).

b. Statute of Limitations

The more general problem of the statute of limitations is not addressed by the CISG. Determining the proper limitation period can be troublesome in view of differing limitation periods and different approaches to the question of whether a Statute of Limitations is substantive or procedural. The delegates to the Vienna Conference approved a response to this problem which took the form of a Protocol to a 1974 UNCITRAL Convention on the Limitation Period in the International Sale of Goods. The key period recited in the Limitation Convention is four years. Where the Limitation Convention is not in effect, a recommended response to the problem of is to have the parties incorporate their own "Statute of Limitations" in their contracts.[64]

c. Conclusion

Some scholars indicate that the CISG has not been very useful for the vast majority of commercial parties and for others that it has at best a very limited use. Indeed, it has been costly for society, not only because of the negotiations of it, but also for the increase in complexity of the law of the Contracting States and "the extra burden on judges who must apply alternative or mixed legal regimes" as Gilles Cuniberti underlines[65].

But the CISG must be approached as a first step towards complete harmonization- some day. This complete harmonization could not be achieved immediately but probably will be one day, and the quality of the harmonization will also improve. To reach that point, a first step had to be taken, and that was the CISG.

Therefore it is clear that the CISG is not a perfect instrument, but in the same time it is rather doubtful whether a perfect instrument could ever exist. The legal system

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64 http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_limitation_period.html.

65 G. Cuniberti, *"Is the CISG Benefiting anybody?",* Vanderbilt Journal of Transnational Law, 2006, found in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1045121, (accessed 10-01-2016).

relating to international sales law can certainly be improved, but the efforts to do so must be realistic and achievable.[66]

II. The Unidroit Principles.

a. General Remarks

The Unidroit Principles of International Commercial Contracts (the Principles or PICC) are designed as a neutral instrument to facilitate international business transactions and consist of specific rules as well as general principles and statements. The work went beyond simply codifying the existing principles and laws in international trade law, that are common to the majority of states, but instead there was an active selection and innovation process.[67] They do not apply in consumer transactions and contracts.

The Preamble to the Principles suggests that they shall be applied if chosen by the parties. They could be applied as a manifestation when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria etc. or when the parties have not chosen any law for their contract. They may also be used to interpret or supplement international uniform law instruments or domestic law or as a model for national and international legislators. Other possibilities could include the use of the principles as a guide for drafting contracts or as a substitute for domestic law.[68]

The Principles provide in general for the binding character of the contract and the pacta sunt servanda principle (Art. 1.3). All though, given the particular nature of the PICC as a non legislative instrument, neither the Principles nor individual contracts concluded in accordance with them, can be expected to prevail over

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[66] C. Kee & E. Munoz, *"In Defense of the CISG",* Deakin Law Review, Vol. 14 No 1, found in *https://ojs.deakin.edu.au/index.php/dlr/article/view/133*,(accessed 10-01-2016).
[67] M. J. Bonell, "An International Restatement of Contract Law", 3rd edn, Transnational Publishers Inc., 2004, p. 24-25.
[68] Id, p. 46-48.

mandatory rules of the domestic law (national or international) that are applicable in accordance with the relevant rules of international law (Art. 1.4[69]).

The rules laid out in the principles are in general of a non mandatory character i.e. the Parties may in each individual case exempt or include their application in whole or partly, so as to adapt them in their specific needs (Art. 1.5[70]). A few provisions though have a quasi mandatory character, namely: Art. 1.7 on good faith and fair dealing[71], Art.1.8 on inconsistent behavior[72] , Art. 7.4.13 on agreed payment for performance[73] and Art. 10.2 on limitation periods[74].

The PICC contain no general rule permitting a court to declare null and void abusive contract terms. Apart from the principle of good faith and fair dealing (see supra Art. 1.7) which may exceptionally be invoked in this respect, there is only one

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[69] *"Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law."*

[70] ***"****The parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided in the Principles."*

[71] "*(1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty."*

[72] ***"****A party cannot act inconsistently with an understanding it has caused the other party to have and upon which that other party reasonably has acted in reliance to its detriment."*

[73] *"(1) Where the contract provides that a party who does not perform is to pay a specified sum to the aggrieved party for such non-performance, the aggrieved party is entitled to that sum irrespective of its actual harm. (2) However, notwithstanding any agreement to the contrary the specified sum may be reduced to a reasonable amount where it is grossly excessive in relation to the harm resulting from the non-performance and to the other circumstances."*

[74] *"(1) The general limitation period is three years beginning on the day after the day the obligee knows or ought to know the facts as a result of which the obligee's right can be exercised. (2) In any event, the maximum limitation period is ten years beginning on the day after the day the right can be exercised."*

provision permitting the avoidance at any time of the contract as a whole as well as of any of its individual terms when they unjustifiably give one party an excessive advantage (sees Article 3.2.7 gross Disparity[75]). The reason for the inclusion of Art. 7.1.6 on exemption clauses[76] is that they are particularly common in international contract practice and tend to give rise to much controversy between the parties. This provision has opted in favour of a rule which gives the court a broad discretionary power based on the principle of fairness. Therefore, in general, terms regulating the consequences of non performance are in principle valid but a party may not invoke clauses which are grossly unfair since a court may ignore them.

This will, above all, be the case where the term is inherently unfair and its application would lead to an evident imbalance between the performances of the parties. Moreover, there may be circumstances in which even a term that is not in itself manifestly unfair may not be relied upon: for instance, where the non performance is the result of grossly negligent conduct or where the aggrieved party could not have obviated the consequences of the limitation or exclusion of liability by taking out appropriate insurance. In all cases regard must be held to the purpose of the contract and in particular to what a party could legitimately have expected from the performance of the contract. If a party is not entitled to rely on an exemption clause, its liability is unaffected and the aggrieved party may obtain full

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[75] *"(1) A party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage. Regard is to be had, among other factors, to (a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or of its improvidence, ignorance, inexperience or lack of bargaining skill; and (b) the nature and purpose of the contract. (2) Upon the request of the party entitled to avoidance, a court may adapt the contract or term in order to make it accord with reasonable commercial standards of fair dealing. (3) A court may also adapt the contract or term upon the request of the party receiving notice of avoidance, provided that that party informs the other party of its request promptly after receiving such notice and before the other party has reasonably acted in reliance on it. The provisions of Article 3.2.10(2) apply accordingly."*

[76] *" A clause which limits or excludes one party's liability for non-performance or which permits one party to render performance substantially different from what the other party reasonably expected may not be invoked if it would be grossly unfair to do so, having regard to the purpose of the contract."*

compensation for the non-performance. Contrary to the rule laid down with respect to agreed payment for non-performance in Art. 7.4.13, the court has no power to modify the exemption clause.

The Principles have a very interesting approach on standard terms. Even though such terms, which are drafted in advance for general and repeated use (Art. 2.1.19[77]) are generally accepted, the said article provides that they are binding only on acceptance (that is when properly accepted). Also, a distinction is made between standard and surprising terms. The latter are terms of such character that the other party could not reasonably have expected it and they are effective only if expressly accepted by that party Art. 2.1.20[78]); this term is comparable to the unfair terms of Art. II.-9:405 (see supra-Chapter 1, B, iii) of the DCFR. In case of conflict between a standard and a non standard term the latter prevails (Art. 2.1.21[79]).

b. Conclusion.

The idea of avoiding a strict "localization" of international commercial contracts within the framework of a single national legal system, and subjecting them instead to principles and rules of a supranational or a-national character has so far met more criticism than approval. One of the objections most frequently raised was that in the absence of a more precise definition of the nature and content of such principles and rules, recourse to them would inevitably lead to unpredictability, if not arbitrariness, in the solution of each and every individual case.

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[77] (1) "*Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22. (2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.*"

[78] *"(1) No term contained in standard terms which is of such a character that the other party could not reasonably have expected it, is effective unless it has been expressly accepted by that party. (2) In determining whether a term is of such a character regard shall be held to its content, language and presentation."*

[79] ***"****In case of conflict between a standard term and a term which is not a standard term the latter prevails."*

The UNIDROIT principles in order to weaken this argument were established as a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied.[80]

The UNIDROIT Principles are not intended to operate in isolation or in direct competition with the other forms of harmonizing commercial law. On the contrary, the Principles support and coordinate the other layers of law and provide a coherent approach to many of the practical issues that arise in commercial practice and they are likely to harmonize outcomes when they have influence.

[80] A. I. Rosett et al, "The UNIDROIT Principles of International Commercial Contracts: A New Approach to International Commercial Contracts" American Journal of Comparative Law, 1998, p. 347-360.

SPECIAL PART

3. Special Clauses in LNG Contracts.

During the last two decades the LNG industry has experienced the signing of an unprecedented number of SPAs. While the first decades of LNG history were dominated by a few players, recent years have opened the industry to many more participants.

Narrowing it down to more recent developments the following should be noted. During 2014, 48 new contracts were concluded 7 of which were short-term (that is less than 4 years duration)[81]. In the vast majority of recent SPAs, New York and English law were chosen as the applicable law. Arbitration provisions in both Asian and Atlantic SPAs have followed similar paths, with common choices being UNCITRAL[82] arbitration in London or New York, International Chamber of Commerce[83] arbitration in Paris or London, or, in at least one instance, American Arbitration Association[84] in New York.[85]

International Business practice has formed several invaluable clauses that are included in all LNG contracts. The presentation of the contemporary and recent form of these clauses along with the relevant case law will be the subject of the following part.

i. Take-or-Pay Clause

Perhaps the most notorious and widely discussed clause in LNG contracts is the Take-or-Pay (ToP). There are various types of take-or-pay clauses, although the key

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[81] "The LNG Industry", 2014, pages 6-11, found in http://www.giignl.org/, accessed 10-01-2016.

[82] www.uncitral.org

[83] www.iccwbo.org

[84] www.adr.org

[85] https://www.lawinsider.com/

mechanism of these provisions is always essentially the same: the buyer is obliged to either take (and pay for) or pay for (even if not taking) a minimum quantity of gas specified in the contract.[86] Given, however, commercial pressures and the ever-present concern that these provisions may be challenged as (unenforceable) penalties, the industry has usually softened the potentially harsh effects of take-or-pay.

The following elements are examples of the main variables that can alleviate the mechanism of each take-or-pay obligation:

(i) Take-or-Pay percentage: a take-or-pay commitment is generally based on a percentage of the contract quantity, typically expressed as percentage of the deliverable quantity under the contract in the normal course of events. A higher percentage obviously means higher guaranteed cash-flow for the seller. (The take-or-pay percentage in gas supply agreements is generally set at between 75% and 95% of the contract quantity).[87]

(ii) Periodicity: the frequency of application defines the periodicity of the imposition of the take-or-pay obligation on the purchaser (monthly, quarterly or yearly). Longer periods provide additional flexibility to the purchaser, at the expense of reduced protection for the seller.

(iii) Make-up Quantities: very often, the buyer has the right to reclaim the gas for which it has paid at a later date, usually subject to a final deadline after which the right is lost (and the right is generally exercisable only once its ongoing obligations have been satisfied in any given year).

(iv) Adjustments: adjustments involve circumstances set out in the contract that, if they occur, may result in a reduction of the contract quantity. Such adjustments include, for instance, *force majeure* events, shortfall gas (i.e.,

[86] In this regard, take-or-pay clauses should not be confused with take-and-pay clauses, which require the purchaser to pay for the minimum quantity of gas and take it. Under a take-and-pay provision, the buyer is in breach of the contract if it pays for the gas, but fails to take delivery of it.

[87] G. Picton-Turbervill, ed., D. O'Neill, "*Gas sale and purchase agreements, in Oil and Gas – A Practical Handbook"*, Globe Business Publishing Ltd., 2009, p. 130-135.

quantities that the seller was unable to deliver), or maintenance (i.e., quantities which were not delivered because the facilities were undergoing maintenance).[88] Another "softening" mechanism could be the application of hardship provisions either by way of contract or applicable law. Recently, DEPA SA has reached an agreement with Gazprom, after negotiations, to pay a significantly reduced amount (36 m. instead of 82 m. USD) for the agreed take or pay amounts due to low demand in the Greek Market caused by the economic recession[89].

Although take-or-pay clauses are widely used, the rules applicable to such clauses, under most national laws, are not fully settled. The concern frequently expressed is whether these provisions constitute a form of penalty which a court or arbitral tribunal should not enforce.

a. ToP clauses in Common Law Systems

The validity of take-or-pay conditions is generally not challenged in the US, as courts have frequently upheld this type of provision in principle.[90] But the possibility of the seller recovering the full amount under the take-or-pay clause has in some cases been subject to question.

This uncertainty stems from the application of the Uniform Commercial Code ("UCC"), in force in most of the US States, which applies to gas sale contracts. Section 2-708 of the UCC provides that in the event that the buyer refuses to take

[88] Id., p. 147-148.
[89] http://www.capital.gr/tax/3108315/depa-den-tha-plirosei-ritra-take-or-pay-sti-gazprom-export-gia-to-2015

[90] *See*, e.g., *Prenalta Corp. v. Colorado Interstate Gas Co.,* 944 F.2d 677 (10th Cir. 1991) http://openjurist.org/944/f2d/677/prenalta-corporation-v-colorado-interstate-gas-company, *Universal Resources Corp. v. Panhandle E. Pipeline Co.*, 813 F.2d 77 (5th Cir. 1987), http://openjurist.org/944/f2d/677/prenalta-corporation-v-colorado-interstate-gas-company, (accessed 10-01-2016).

delivery of the goods, the seller is entitled to "*the difference between the market price at the time and place of tender and the unpaid contract price together with any incidental damages"*.

In certain cases, US courts have held that Section 2-708 applied to the calculation of damages arising out of the breach of a take-or-pay obligation (i.e. where the buyer has not taken or paid for the gas), thus entitling the seller only to the difference between market price and contract price.[91] However, other courts have found that take-or-pay clauses are derogations from the general rule of Section 2-708, and the payment obligation is enforceable in full.[92]

Uncertainties also exist in English law, regarding whether ToP obligations are subject to the rule against penalties. The rule provides that English courts will not allow the enforcement of a provision which imposes a penalty on a party which has breached a contract. Penalties, which are unenforceable, must of course be distinguished from liquidated damages, which are *per se* enforceable. The main difference between penalties and liquidated damages is that liquidated damages are intended to be a genuine pre-estimate of the damage that a breach would cause, whereas penalties primarily operate to deter a breach.

This issue was discussed in *M&J Polymers v. Imerys Minerals Ltd*,[93]26 which concerned an agreement for the supply of chemicals subject to a take-or-pay obligation. Burton J in the English High Court appeared to consider the true nature of the claim as an action for damages, and not – as was argued – an action for a simple debt (where the normal damages rules would not apply). Accordingly, the Court found that "*as a matter of principle, the rule against penalties may apply*" to

[91] *See Roye Realty & Dev., Inc. v Arkla, Inc.*, 863 P.2d 1150 (Okla, 1993), http://law.justia.com/cases/oklahoma/supreme-court/1993/15759.html

[92] *Colorado Interstate Gas Co., Inc., v. Chemco, Inc.*, 833 P.2d 786, 788 (Colo. Ct. App. 1992), http://law.justia.com/cases/colorado/court-of-appeals/1992/89ca0594-0.html, (accessed 10-01-2016).

[93] *See M&J Polymers v. Imerys Minerals Ltd*. [2008] EWHC 344 (Comm), found in http://uk.practicallaw.com/D-000-4054?source=relatedcontent, (accessed 10-01-2016).

take-or-pay clauses. The Court then proceeded to examine whether the take-or-pay obligation infringed the rules on contractual penalties.

In conducting this test, the Court considered the following four factors:

(i) Whether the take-or-pay clause was oppressive;

(ii) Whether the take-or-pay clause was commercially justifiable;

(iii) Whether the primary purpose of the take-or-pay clause was to deter breach of contract; and

(iv) Whether the parties enjoyed equal bargaining power.

Based on these four criteria, the Court held that the take-or-pay clause included in the agreement between *M&J Polymers* and *Imerys* was reasonable[94] and did not amount to a penalty.[95]

[94] "*commercially justifiable, did not amount to oppression, were negotiated and freely entered into between parties of comparable bargaining power and did not amount to a provision in terrorem*".
[95] See A. Oladotun, *"M & J POLYMERS LTD v. IMERYS MINERAL LIMITED: Can Take Or Pay Clause in gas contract be considered a contractual penalty?", 2008*, found in www.dundee.ac.uk, (accessed 10-01-2016).

b. ToP clauses in Civil Law Systems

In France, although regulations in the energy sector seem to accept the principle of take-or-pay conditions in energy contracts, the French Competition Council ("Conseil de la concurrence") indicated that such provisions could raise competitive concerns in the context of the liberalization of the gas market.[96] In addition, and reminiscent of our discussion above, take or-pay conditions are exposed to the risk of being construed as contractual penalties ("clauses pénale") in the sense of Article 1152 of the French Civil Code.[97] Where a clause is deemed to be penal, a court may review the amount of the penalty and is entitled to reduce or increase it if it is "excessive or derisory". A decision, issued by the Court of Appeal ("Cour d'appel") of Angers in 2005, has addressed the validity of Take-or-Pay clauses under French law.[98] In this decision, the Court upheld the annual take-or-pay obligation accepted by one of the parties, and found that this provision was justified in the general context of the agreement. The Court noted, in particular, that the take-or-pay undertaking (i) was made in consideration of the seller's obligation to supply natural gas, and (ii) constituted a "mode of performance of the [buyer's] obligation to take". The Court rejected the argument that this take-or-pay clause could be construed as a penalty under French law. For these reasons, the Court awarded damages to the seller in the amount specified in the take-or-pay clause, as a result of the buyer's failure to take the contract quantity.

The German courts have not yet taken a position on the precise legal rules governing take-or-pay clause. Certain decisions[99] rendered in the context of antitrust cases

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[96] French Competition Council, Opinion No. 99-A-15, dated 5 October 1999, found in www.autoritedelaconcurrence.fr/pdf/avis/99a15.pdf, (accessed 10-01-2016).

[97] *See* Article 1152 of the French Civil Code: *"Where an agreement provides that he who fails to perform it will pay a certain sum as damages, the other party may not be awarded a greater or lesser sum.*

Nevertheless, the judge may even of his own motion moderate or increase the agreed penalty, where it is obviously excessive or ridiculously low. Any stipulation to the contrary shall be deemed unwritten."

[98] *See* Court of Appeals of Angers, 15 June 2005, *SA Styrpac c/ Gaz de France*, No. 04/01783.

[99] http://juris.bundesgerichtshof.de/cgibin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2003-2&Seite=3&client=2&anz=235&pos=97&nr=26574, (accessed 10-01-2016).

have touched upon the subject and appear to indicate that take-or-pay clauses are enforceable under German law.

In the framework of the Greek Law of Obligations the ToP clause may be enforceable especially if it doesn't raise anti-trust issues or if it is not considered arbitrary according to Art. 281 and 288CC. The boundaries are, therefore, set by the good faith principle after taking into account business usage. It is possible that a ToP clause may be considered as a penalty clause[100] (Art. 404 CC) but the non fulfillment of the agreed performance must be due to the Debtors fault regardless of whether the creditor has in fact suffered a prejudice (Art. 405 CC)[101]. What may be considered as debtors fault in the case of non acceptance of a scheduled LNG cargo is a matter to be interpreted ad hoc.

c. Take-or-Pay Clause under EU Law.

Take-or-pay conditions fall within the ambit of EU legislation regulating the gas sector along with the application of general EU competition law.[102] The three directives are intended to set out the basic rules governing the gas market within the EU, by establishing common rules for the distribution, transmission, supply and storage of natural gas. One of the key principles of the Third Gas Directive is third party access to gas transmission systems. This principle, set out under Article 32 of the Third Gas Directive, provides, in essence, that the owner of the grid must allow any supplier non-discriminatory access to its gas transmission and/or distribution system.

The Second Gas Directive does not directly address ToP conditions. However, ToP clauses are listed as one of the possible justifications for derogation from third party acces. In this context, Article 48(1) of the Third Gas Directive provides that a party to a gas undertaking may request derogation from third party access under Article 32 of

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[100] Art. 404 CC "*The Debtor may promise the Creditor as a penalty a sum of money or something else, in case he does not fulfill or does not fulfill properly the performance owed."* See supra chapter Chapter 2.A. v.

[101] M. Stathopoulos-A. Karampatzos,*"Contract Law in Greece"*,3rd edn, Ant. N. Sakkoulas Publishers, 2014, p. 118-121.

[102] The EU adopted Directive No. 2009/73/EC (the "Third Gas Directive") in 2009, as a replacement for Directive No. 2003/55/EC (the "Second Gas Directive") in 2003 itself preceded by Directive No. 98/30/EC (the "First Gas Directive") in 1998, found in http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0073, (accessed 10-01-2016).

the Third Gas Directive, in case it is subject to serious economic and financial difficulties as a result of its take-or-pay obligations. All of this suggests that ToP obligations are prima facie valid, so far as EU legislators are concerned. Another angle from which ToP conditions may be tackled is EU competition law, notably Articles 101 and 102 of Treaty on the Functioning of the EU (TFEU). Article 101 TFEU prohibits agreements or other concerted practices which restrict or distort competition within the Common Market. Article 102 TFEU prohibits abuse by undertakings of a dominant position within the Common Market. Both articles are directly effective provisions of EU law: national courts are thus entitled to cancel contracts that breach either.[103] Take-or-pay conditions, as part of long-term gas supply contracts, may fall within the ambit of the European Commission policies regarding market foreclosure and/or restriction of competition in the Common Market. The main rule applied by the commission for gas supply contracts was defined in the 2007 Distrigas decision,[104]long-term gas supply contracts are not per se prohibited, but their impact must be appreciated on an individual basis, in order to determine whether they restrict competition to an unacceptable extent. In assessing the effects of the agreement on competition, the European Commission focuses on various objective criteria (market position of the supplier, availability of the buyer for other suppliers, duration of the long-term supply contract, overall market share and benefits arising from the new contract etc.).

d. Take-or-Pay clause under the CISG

Articles 8 and 9 of the CISG[105] govern the interpretation of take or pay commitments. The CISG also governs the classification of the clause as buyer's right to optional

[103] N. Farantouris (ed.), T. Galanis, "Competition and Anti-competitive Practices in the energy sector", found in "ENERGY, Law, Economy &Politics", NOMIKI BIBLIOTHIKI, 2012, p. 132-135.
[104]Case COMP/B-1/37.966 — Distrigaz, found in http://eurlex.europa.eu/legalcontent/EN/ALL/?uri=CELEX:52008XC0115(02).

[105] *Article 8*(1) *"For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was. (2) If the preceding paragraph is not applicable, statements made by and other conduct of a party are to be interpreted according to the understanding that a reasonable person of the same kind as the other party would have had in the same circumstances."*
Article 9(1) *"The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.(2) The parties are considered, unless otherwise*

performance (pay instead of take) or as seller's remedy for breach of contract- that is failure of buyer to off take the minimum annual quantity. In any event, the CISG cannot bar applicable domestic law from raising legal issues against ToP commitments viewing them as a penalty clause, as liquidated damages or as an anticompetitive practice (Article 4 CISG).

d. Conclusion

Whilst take-or-pay clauses have generally been accepted as enforceable in most jurisdictions, some recent decisions of common law courts do open the way for their validity to be questioned. In particular, English and Australian courts now appear willing to look through the form of contractual obligations and engage in substantive analysis of whether clauses should be unenforceable as penalties.

In practice, this means that the mechanisms which mitigate the effects of take-or pay clauses may become more important than has previously been assumed. Contract drafters should therefore carefully consider the level of the take-or pay percentage, the formulation of make-up provisions and the rights to resale the late cargos. The general rule is that the clause as a whole must be commercially justifiable. The existence of a reasonably crafted makeup right makes it much harder for a buyer to later assert a defense claiming the clause amounts to an unenforceable penalty. The inclusion of burdensome conditions or barriers to the buyer's ability to receive makeup quantities, such as overly restrictive time periods or notice requirements may of course cut against the use of makeup rights as a defense.

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agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned."

ii. **Price Reopener/ Price Review Clauses**

Usually, long term contracts for the sale and purchase of LNG have duration of 15 years or longer. Such long term contracts give comfort to investors that they will be able to recover the immense capital required for the construction and operation of gas production facilities, and also provide stability for purchasers by allowing them to commit to purchase a firm quantity of gas which can then be further sold.

These long term contracts typically provide for a formula calculating the price of LNG over the life of the contract, by reference to different market factors[106]. Many contracts include in the formula references to the market price of crude oil, thus linking the price of LNG under the contract to the oil market. However, although these formulae attempt to allow for adjustment of the price of LNG in accordance with market conditions, there are inevitable difficulties in attempting to set a price (or price formula) when a contract will last for such a long period. Accordingly, most long-term LNG contracts also include a price review clause which allows one or both parties to instigate a review of the contractual price formula in response to unforeseen changes in the market[107].

A general price review clause should be distinguished from other clauses which provide for a review of the price or other conditions of the contract in response to certain issues or events such as hardship clauses, which usually allow for a review if a party is experiencing substantial hardship as a result of a significant change in circumstances, and can involve a review of all terms of the contract, rather than just the price and clauses which address legislative or taxation changes. It is a fact though that both price review and hardship clauses are often triggered by the same events and use the same defenses. For example, in the case of a contract where the Parties

[106] N. Farantouris (ed), S. C. Bikos, *"Transportation and Supply of Liquefied Natural Gas: Security of Supply and the Role of Greece"*, found in "ENERGY Shipping & Marine Transportation", 2013, NOMIKI BIBLIOTHIKI, p. 224-229.
[107] Id, p. 230.

have chosen the CISG as the applicable Law, the Price Review clause would be dealt according to Art. 79[108] and 7 par. 1 [109].

In contrast, price review clauses tend to be of a more general nature, and respond to changes in the market rather than dealing with a specific issue.

An effective price review clause will usually contain the following elements:

a. A "trigger" event (or events) allowing for the invocation of the price review mechanism[110];
b. A procedure to be followed in carrying out the price review (including what happens if no agreement is reached); and
c. The Methodology of the review (including parameters for the amendment of the price formula, and when any amendment takes effect).[111]

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[108] *(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.*

(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention.

[109] See infra chapter 4C.

[110] **Periodic trigger**: Under a periodic trigger, parties can agree either that the price will be automatically reviewed at certain dates during the life of a contract or that parties have the right to elect for a price review to take place at certain milestones.
Special trigger: Parties will often combine a periodic trigger with a special trigger, or include only a special trigger, which allows parties to respond more quickly to changes in the market.

[111] *(ii) Example of a price review clause "a) If the circumstances beyond the control of the Parties change significantly compared to the underlying assumptions in the prevailing price provisions, each Party is entitled to an adjustment of the price provisions reflecting such changes. The price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation.*
(b) Either Party shall be entitled to request a review of the price provisions for the first time with effect of dd/mm/yyyy and thereafter every three years.
(c) Each Party shall provide the necessary information to substantiate its claim.
(d) Following a request for a price review the Parties shall meet to examine whether an adjustment of the price provisions is justified. Failing an agreement within 120 days either Party may refer the matter to arbitration in line with the provisions on arbitration of the Contract.

A typical price review clause will provide for a period or special triggers, or a combination of both. Under a periodic trigger, parties can either agree that the price will be automatically reviewed at certain dates during the life of a contract or that they have the right to elect for a price review to take place at certain milestones.

Parties will often combine a periodic trigger with a special trigger, or include only a special trigger, which allows parties to respond more quickly to significant and material changes in the market.

However, such generality can also lead to difficulties in interpreting and establishing whether the trigger event has in fact been enabled. Particular difficulties are experienced in determining whether there has been a “material” or “significant” change in the market. Clearly, in order to establish whether there has been a “significant” change in the market, it is necessary to define precisely what constitutes the relevant “market” for the purposes of the contract. This may be by reference to geographical location, user or some other factor.

Establishing whether there has been a significant change in the market will require comparison of the present circumstances with a historical period – whether this is the date of entry into the contract, the last price review, or some other agreed date. However, simply taking a snapshot of the circumstances on one date will often not be sufficient as it is unlikely to be representative of the period as a whole. A more accurate picture will be derived from looking at a spread of dates, and using the average as a comparator. Unless this is agreed in the contract, deciding which period and spread of dates is to be used can lead to disputes.

(e) As long as no agreement has been reached or no arbitration award has been rendered all rights and obligations under the agreement – including the price provisions – shall remain applicable unchanged. Unless otherwise agreed or decided by the arbitral award, differences to the newly established price shall be retroactively compensated inclusive of interest on the difference calculated at a rate reflecting the conditions on the international financing market.”

a. Case law

The price reopener dispute in *Gas Natural Aprovisionamientos SDG SA v. Atlantic LNG Company of Trinidad and Tobago*[112] highlights the issue of price revision clauses, how they operate and whether the intention of the parties is reflected in the way arbitration panels are instructed to adjust a pricing mechanism.

In July 1995, Atlantic LNG entered into a long-term SPA with Gas Natural, which provided for Atlantic to sell LNG to Gas Natural beginning in 1999, and continuing for a period of 20 years. The pricing formula was tied to the European energy market, consisting of a base price and a multiplier indexed quarterly to European prices for certain substitute petroleum products. The SPA also included a price reopener provision[113] which provided that either party could request price renegotiations if it believed that the contract price did not reflect the value of gas in the buyer's end-user market due to a substantial change in economic circumstances. Atlantic LNG initiated arbitration, seeking a revision to the contract price on the grounds that none of the cargoes were being delivered into Europe, and thus, the formula should be raised to reflect the higher U.S. gas prices. Because the LNG was being sold in New England on a consistent basis, the arbitration panel found that New England was to be the basis for determining the value of the LNG, meaning that the contract price "need[ed] to include a New England Market Adjustment factor." As a result of the price revision, Atlantic owed Gas Natural over $70 million for LNG cargoes sold after the date Atlantic had first

[112] *Gas Natural Aprovisionamientos SDG SA v. Atlantic LNG Company of Trinidad and Tobago*, 2008 WL 4344525(SDNY Sept. 16, 2008) found in https://casetext.com/#!/case/gna-v-atlantic-lng-co-of-trinidad-tobago, (accessed 10-01-2016).

[113] *"If at any time either Party considers that economic circumstances in Spain beyond the control of the Parties, while exercising due diligence, have substantially changed as compared to what it reasonably expected when entering into this Contract or, after the first Contract Price revision under this Article 8.5, at the time of the latest Contract Price revision under this Article 8.5, and the Contract Price resulting from application of the formula set forth in Article 8.1 does not reflect the value of Natural Gas in the Buyer's end user market, then such Party may, by notifying the other Party in writing and giving with such notice information supporting its belief, request that the Parties should forthwith enter into negotiations to determine whether or not such changed circumstances exist and justify a revision of the Contract Price provisions and, if so, to seek agreement on a fair and equitable revision of the abovementioned Contract Price provisions in accordance with the remaining provisions of this Article 8.5."*

triggered the reopener clause. The arbitration award was affirmed by the U.S. District Court for the Southern District of New York.

On 27 June 2013, an ICC Arbitral Tribunal partially upheld RWE's claim to adjust the contract price formula in its long term contract with Gazprom Export[114].

As is to be expected in such a case, full details of the arbitration are not publically available. However, a press release issued by RWE provided significant details of the award. In particular, the press release stated *"In its final award, the tribunal awarded RWE a reimbursement for payments made since May 2010 and adjusted the purchase price formula of the contract by also introducing a gas market indexation, which according to the arbitral tribunal reflects the relevant conditions on the gas market at the time of the price revision in May 2010."*[115]

The contracts have not been seen by parties outside the arbitration, and it is possible that the amendment was made on the basis of terms contained in the contract. However, in the absence of further information, commentators have described the decision in *RWE v Gazprom* as *"a significant and potentially alarming award, for the simple reason that the parties to the gas supply contract did not agree to link the contract price to gas spot prices: they agreed to link it to oil prices, for better or for worse."*

It is thus evident that recent price review arbitrations indicate that tribunals are willing to depart from express contract terms when undertaking a price review, particularly under long-term SPAs with oil-indexation pricing.

On 31 March 2004, the English High Court handed down its decision in *Esso Exploration & Production UK Limited v Electricity Supply Board* [2004] EWHC 723 (Comm), in which the High Court rejected a challenge by the ("ESB") to an

[114] *RWE v. Gazprom (ICC 2013), found in http://globalarbitrationreview.com/news/article/31718/icc-panel-revises-gazprom-export-price-formula*

[115] RWE Press Release, July 1 2013, found in https://www.rwe.com/web/cms/mediablob/en/2402170/data/1360742/2/rwe-supply-trading/press/press-archive/Analysis-of-the-Arbitral-Award-Concerning-the-Price-Revision-Proceedings-Between-RWE-Supply-Trading-CZ-and-Gazprom-Export-Completed.pdf

arbitrator's jurisdiction[116]. On 27 November 1997, Esso and ESB entered into a contract for the sale and purchase of natural gas each year for a period of 15 years from the date when deliveries began (which was 1 October 1999). The contract contained a price review clause, and a dispute arose between the parties as to the meaning of that clause. Esso sought to refer the dispute to arbitration, but ESB challenged the arbitrators' jurisdiction on the grounds that certain prerequisites to a valid reference to arbitration have not been satisfied.

The contract provided that the price was to be reviewed and adjusted every 6 months by reference to four markers: (i) the price of gasoil (ii) the price of low sulphur fuel oil, (iii) the price of natural gas and (iv) the rate of inflation in Ireland as reflected in the industrial wholesale price index. In addition, a further clause allowed the parties to give Price Review Notices requiring a separate review – a Price Review Notice could not be given by the seller unless *"… it is reasonably satisfied in good faith that the Energy Charge … is at the time of giving such Price Review Notice eighty five per cent (85%) or less than the Comparator"*, the "Comparator" being defined as the market price at the date of the relevant Price Review Notice for natural gas being supplied.

In November 2002, Esso wrote to ESB requesting a review of the Energy Charge, which was rejected by the ESB on the basis that Esso had based the market price on the price for 12-month contracts rather than long-term contracts. As the parties could not agree, arbitrators were appointed. ESB challenged the jurisdiction of the arbitrators on the grounds that as Esso's market price calculation was flawed, the price review notice was invalid and the therefore the arbitrators lacked jurisdiction. In an application to the English High Court, Esso argued that confidentiality obligations in long terms contracts meant that the parties were aware that obtaining such market information would be difficult, and accordingly a market price such as the one Esso had used was appropriate. Mr Justice Moore-Bick rejected this argument, holding that the arbitrators did not have jurisdiction and dismissing Esso's application.

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[116] *Esso Exploration & Production UK Limited v Electricity Supply Board* [2004] Found in http://alrr.oxfordjournals.org/content/2004/1/243.extract.

b. Recent Arbitrations.

There has been an increasing number of arbitration cases over the last few years concerning gas price reviews. In the majority of cases, the details of the dispute and relevant documentation have been kept confidential, and therefore little information is publicly available[117].

Notable cases include those between gas suppliers such as Qatar's RasGas, Russia's Gazprom (and subsidiary Promgas), Norway's Statoil ASA, Algerian Sonatrach, and the Netherlands' GasTerra and gas importers like Edison, Eon, Distrigas and Endesa.

Edison has commenced a number of gas price review arbitrations against various suppliers, with a number of challenges resulting in a favourable adjustment to the contract price. In 2011, Edison successfully challenged Russian gas export monopoly Gazprom to reduce the cost of long-term gas supplies for 2 billion cubic meters[118]. In September 2012, Edison, which is owned by France's EDF, won in arbitration a 450 million euro discount on its LNG supplies from Qatar's Rasgas[119]. In October 2012, Edison won a dispute with Eni to review the price of its long-term gas contract from Libya, its second gas arbitration victory in less than a month[120]. The overall impact on its 2012 accounts was estimated at more than 250 million euros. On 23 April 2013, the Court of Arbitration of the ICC decided the award related to the dispute between Edison and Sonatrach for the revision of the price of the long term gas contract from Algeria, finding in favour of Edison[121]. The price reduction will have an overall

[117] S. Osuntokun-L. Allenden, "Gas Price Reviews-Is Arbitration the Problem?", 6 March 2014, found in www.globalarbitrationreview.com.

[118] C. Spalton, "Edison-Gazprom pricing dispute at an end", November 19 2014, published and found in http://globalarbitrationreview.com/news/article/33185/

[119] EDISON Press release, September 11 2012, found in http://www.edison.it/sites/default/files/documenti/press-release11september2012.pdf

[120] EDISON Press Release, November 27 2015, found in http://www.edison.it/sites/default/files/documenti/press-release27november2015.pdf

[121] EDISON, Press Release, April 30 2013, found in http://www.edison.it/sites/default/files/documenti/PR_Arbitration_with_Sonatrach30aprile2013.pdf

estimated impact of about 300 million Euros on Edison's 2013 EBITDA[122]. In July 2013 Edison filed an arbitration claim against Gazprom's unit, Promgas, after seeking price revisions since 2012. The price reduction in favour of Edison will have an overall positive impact on 2014 Edison's accounts of 80 million Euros on the EBITDA[123].

In July 2012, Russia's Gazprom agreed to amend long-term supply deals for Germany's EON in July after the utility lost hundreds of millions of euros on contracts linked to oil prices. The settlement included a retroactive adaptation of pricing conditions for the price review period since 2010. The settlement had a positive impact of about 1 bilion Euros on the Group's half-year results.[124]

c. Conclusion.

It is clear that the LNG market is going through a period of significant development on both the supply and demand side, which will make it difficult to predict with any certainty pricing trends and market requirements in the coming years and decades. Historically, gas prices have been linked to oil prices. However, in recent years, prices have diverged significantly, in part due to technological developments and increased gas production. Moreover, supply agreements are now more frequently being entered into on a spot or short-term basis, with the International Group of Liquefied Natural Gas Importers reporting that the proportion of cargoes being traded on such a basis has risen from less than 5% in 2000 to 25% in 2012[125]. Purchasers and suppliers entering into long term agreements for the supply of LNG should ensure that the price review clauses are carefully drafted in order to minimise their exposure.

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[122] EBITDA is an accounting measure calculated using a company's net earnings, before interest expenses, taxes, depreciation and amortization are subtracted, as a proxy for a company's current operating profitability.

[123] Press Release, August 29 2014, found in http://www.edison.it/sites/default/files/documenti/PR_Promgas_2014.pdf.

[124] E.ON Press Release, March 3, 2012, found in http://www.eon.com/en/media/news/press-releases/2012/7/3/eon-reaches-settlement-and-raises-group-outlook-for-2010.html.

[125] "The LNG Industry", 2014, pages 4-5, found in http://www.giignl.org/.

iii. Destination Restriction/Diversion right Clauses.

Long-term SPAs may provide for delivery of LNG at the liquefaction terminal (FOB[126] sale) or at a designated import terminal (DES[127] or DAP/DAT [128]sale). A third method of shipping, common in long-term SPAs is known as "cost insurance and freight" (CIF[129]), in which the buyer takes title and bears the risk of loss beginning at the port of export (essentially taking possession)[130].

Destination restriction clauses apply once the buyer takes possession of the LNG, and diversion right clauses apply before the buyer takes possession. Not only can destination restriction clauses apply after LNG is regasified for sale to end consumers, the restrictions can also apply to FOB and CIF shipments of LNG. In such case, the ability to change the destination of LNG will be a right of "destination flexibility." By contrast, a "diversion right" generally refers to the ability of a seller or

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[126]"Free On Board, FOB" means that the seller delivers the goods on board the vessel nominated by the buyer at the named port of shipment or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel, and the buyer bears all costs from that moment onwards (INCOTERMS 2010).

[127] "Delivered ex Ship, DES" means that goods are delivered ex ship, the passing of risk does not occur until the ship has arrived at the named port of destination and the goods made available for unloading to the buyer (INCOTERMS 2000).

[128] "Delivered at Terminal, DAT" means that the seller delivers when the goods, once unloaded from the arriving means of transport, are placed at the disposal of the buyer at a named terminal at the named port or place of destination (INCOTERMS 2010).

"Delivered at Place, DAP" means that the seller delivers when the goods are placed at the disposal of the buyer on the arriving means of transport ready for unloading at the named place of destination. The seller bears all risks involved in bringing the goods to the named place (INCOTERMS 2010).

[129] "Cost, Insurance and Freight, CIF"means that the seller delivers the goods on board the vessel or procures the goods already so delivered. The risk of loss of or damage to the goods passes when the goods are on board the vessel. The seller must contract for and pay the costs and freight necessary to bring the goods to the named port of destination (INCOTERMS 2010).

[130] *See, e.g.,* LNG Sale and Purchase Agreement (FOB) Between Sabine Pass Liquefaction LLC and GAIL (India) Limited, dated Dec. 11, 2011 ("LNG SPA Between Sabine Pass Liquefaction and GAIL"), at § 6.2.

a buyer — who does not have possession of the LNG — in a DES sale to change the destination of the LNG shipment[131].

a. Case Law.

Destination restrictions on purchased LNG have been the subject of a recent arbitral dispute. In *Atlantic LNG 2/3 Company of Trinidad and Tobago Unlimited v.Repsol YPF SA and Naturcorp Multiservicios SA/Sociedad de gas de Euskadi* (2007). Atlantic LNG (which is the Trinidad investment company of several energy firms including BP PLC and BG Group PLC) claimed that LNG intended for sale in Spain had been diverted from Trinidad to the U.S. East Coast in pursuit of higher prices, violating the parties' long-term SPAs. BP filed the arbitration under U.N. trade law seeking new pricing. Repsol, on the other hand, contended that the LNG SPAs allowed destination flexibility. An initial hearing was held to determine whether or not the agreements gave Repsol the flexibility to divert cargoes without BP's participation in the profit[132]. In November 2009, the arbitrators ruled in BP's favor, finding that extraordinary income was owed by Repsol from the diverted cargoes. Shortly thereafter, BP and Repsol entered into a settlement agreement. While the parties did not reveal the amount of the settlement, publications have reported that $500 million was at stake in the controversy.[133]

b. Destination Restriction Clauses under EU Law.

Notably, destination restrictions in long-term SPAs have been found to violate[134] European competition law[135] in the TFEU[136]. The European Commission has aimed its investigations toward contracts with destination restrictions imposed on buyers with possession of the LNG, meaning that there is a distinction between SPAs that provide for FOB and CIF delivery and those that provide for DES (or DAP & DAT) delivery.

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[131] *See* J. Atkin-R. Lal, *Optimising the Value of LNG Sale Agreements by Formulating Strategic Cargo Diversion and Destination Flexibility Clauses*, Bloomberg Law Reports 22, p. 22–23.

[132] *Arbitration Scorecard 2007: Top 50 Contract Disputes*, American Lawyer, June 13, 2007.
[133] Id.
[134] COMP/38.662,
[135] N. Farantouris (ed.), T. Galanis, "*Competition and Anticompetitive Practices in the Energy Sector",* found in ENERGY Law, Econimics & Politics,2013, NOMIKI BIBLIOTHIKI, p. 121-122.
[136] Article 101 TFEU.

Restrictions, particularly on the initial delivery location, are more likely to be allowed under European law if the SPA provides for DES delivery.[137]

The European Commission has also dealt with profit-sharing mechanisms included within, or as an alternative to, destination restriction clauses. These profit-sharing mechanisms allow for buyers to sell gas outside of the specified geographic area only if the original seller can participate in the profit. In 2007, the European Commission settled an investigation of Algeria and Algerian gas producer Sonatrach involving destination restriction clauses and profit-sharing mechanisms.[138]

In relation to cargoes lifted on an FOB basis in Algeria, Sonatrach sought to have a consent right to the diversion of such cargoes from one destination in the EU to another, which the European Commission took to be a restriction on the free transfer of goods within the EU. The released summary of the "common understanding" indicates that both territorial restriction clauses and profit-sharing mechanisms will be removed from Sonatrach's existing LNG contracts and not included in future contracts, at least with regard to European buyers. The European Commission's press release also states that profit-sharing mechanisms are only allowed to be applied "in LNG contracts under which the title of the gas remains with the seller until the ship is unloaded" — in practice, sales under DES (DAP/DAT) terms.

Many SPAs[139] (especially those of an ex ship nature) for supply into Asia continue to have some restrictions on the ability of the buyer to alter the destination of the cargo; however, some contracts for supply into the U.S. are becoming more flexible[140]. Moreover, a change in destination for deliveries to a North American port in an ex-ship agreement, in addition to requiring seller's permission to divert, may

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[137] E. Waktare, "*Territorial Restrictions and Profit Sharing Mechanisms in the Gas Sector: the Algerian Case"*, EC Competition Policy Newsletter no. 3, 2007, p. 19.

[138] Press Release, EU Commission, *found in* *Commission Settles Investigation into Territorial Sales Restrictions with Nigeria Gas Company NLNG* (Dec. 12, 2002) (IP/02/1869).

[139] https://www.lawinsider.com/

[140] https://www.lawinsider.com/contracts/21Vtn4EFOTB1tIvHEO7FzI/cheniere-energy-inc/lng-sale-and-purchase-agreement/2014-07-01#s2C2C44778C70E30922DABAFCB1F4C1DB

result in the use of a pre-agreed (or agreed at the time of the proposed diversion) alternative pricing approach or formula.

iv. General Remarks on Special Clauses

SPAs today vary in complexity, influenced by a variety of factors such as: the parties concerned and their creditworthiness, the pricing basis for LNG sold (market index or other)[141], the depth of buyer's downstream gas market and its competing fuels, the delivery point, LNG transportation structures, take or pay flexibility, influences by gas competition regulators, concerns of lenders, sufficiency of seller's gas reserves, and the allocation of commercial, operational and political risks related to performance of the agreement. Legal professionals drafting and negotiating SPAs have to consider both past LNG precedent gained from decades of experience with LNG issues and the need to develop new techniques to appropriately deal with the multitude of challenges presented by the rapidly expanding LNG trade.

4. Force Majeure - hardship clauses.

A. National Law.

In general, impossibility of performance, for all obligations, which is not due to fault of the debtor, is regulated in the Greek Civil Code in Art. 336 et seq. for supervening impossibility and Art. 363 et seq for initial impossibility. In both cases the debtor is released from the agreed obligation and from the obligation for compensation, he has however two collateral obligations: first to inform the creditor of the impossibility and second he owes the creditor any substitute or benefit which he may have acquired due to the impossibility.

As far as it concerns reciprocal contracts (as it is the case in the sale contract) the Civil Code in Art. 380 also provides that the debtor of the impossible performance is released and that the creditor is accordingly released from the agreed counter-

[141] N. Farantouris (ed.), S. C. Bikos, , *"Transportation and Supply of Liquefied Natural Gas: Security of Supply and the Role of Greece"*, found in ENERGY Shipping & Marine Transportation, 2013, NOMIKI BIBLIOTHIKI, p. 224-231.

performance. However, if the latter has already fulfilled the counter-performance it may be retrieved by means of the provisions of unjust enrichment (Art. 904 CC).

A few words must be said at this point about what constitutes a failure to perform an obligation not due to fault. As mentioned above if the failure is not due to fault then it will be due to chance events. Chance events (fortuitous) include as a category chance events stricto sensu[142] and force majeure events. The term force majeure includes, in general, the extreme cases of events which cannot be averted by human powers. The prevailing theory as far as it concerns force majeure events tends to include events that could not be foreseen and averted even by measures of extreme care and prudence on the part of the perpetrator[143] (subjective theory). Whereas the objective theory focuses on the event as such and requires that they are completely and utterly external to the debtor.[144] Greek case law has characterized and accepted as force majeure several different events (eg. grave and unexpected illness, storm, strike) but always in relation to the damage of the suffering party since even when facing extreme events there is always an obligation to take beforehand precautionary measures[145].

As already mentioned, liability is excluded when the failure to perform is due to chance events. However, a party's liability may be extended to include by contract all or some such fortuitous events. It is also possible to extend liability to certain or all force majeure events.[146]

Article 388 CC regulating hardship in contracts is a pioneer provision of the Greek Civil Code. The Greek Legislator acknowledged the compelling need for an equilibrium between the pacta sunt servanda principle and the clausula rebus sic

[142] Anything which is not willful conduct or negligence of the person responsible for a certain performance.
[143] M. Stathopoulos-A. Karampatzos, *"Contract Law in Greece",* 3rd edn, Ant. N. Sakkoulas Publishers, 2014, p. 172.
[144] A. Georgiadis-M. Stathopoulos, *"Civil Code"*, Vol. II, General Law of Obligations, Law & Economy P.N.SAKKOULAS, 2009, p. 182.

[145] Lamia Court of Appeal (CoA) 186/2011, Athens Administrative CoA 1895/2009 found in NOMOS, (accessed 10-1-2016).
[146] A. Georgiadis-M. Stathopoulos, *"Civil Code"*, Vol. II, General Law of Obligations, Law & Economy P.N.SAKKOULAS, 2009, p. 183-4.

stantibus doctrine. Article 388 CC is actually a special expression of the general principle of good faith (Art. 288 CC). The basic conditions for its application are: a. a reciprocal contract, b. a change in the circumstances upon which the Parties based the conclusion of the contract, c. the change must have occurred after the conclusion of the contract, d. the causes of the change must be exceptional and unforeseen, that is unusual events outside the normal course of events, e. as a result of the change the performance of the contract becomes excessively onerous. The contracting Party for whom the contract has become exceedingly burdensome has the right (formative right) to seek judicial adjustment or total or partial dissolution of the contract[147]. The latter, though, must serve as a last resort for the Judge since his primary obligation is to find a solution within the framework of the contract[148].

Even though, it is disputable whether Art. 388 CC is, a mandatory provision, the prevailing view is that it is and therefore it may not be (ex ante) waived by the contracting parties since it constitutes a special expression of the good faith principle. Of course it is possible for the contracting parties to include and provide for the undertaking of a certain (extra) risk. The contracting Parties though should not circumvent the provision by specifying an extended list of risks and events. What is crucial in such cases is serving the purpose of the contract by shifting the risk on to one of the contracting parties accordingly (proper risk allocation). Of course the ex post waiver of the provision is valid.[149]

[147] M. Stathopoulos-A. Karampatzos, *"Contract Law in Greece",* 3rd edn, Ant. N. Sakkoulas Publishers, 2014, , p. 194.
[148] Id., p. 196.

[149] A. Georgiadis-M. Stathopoulos, *"Civil Code"*, Vol. II, General Law of Obligations, Law & Economy P.N.SAKKOULAS, 2009, p. 368.

B. European Law

Force majeure is not addressed as such in the DCFR. It may be regulated though by application of the general provisions of Book III (Obligations and corresponding rights) and in specific Chapter 3 providing for the available remedies for non-performance. According to par. 4 of Art. III-3:104 (Excuse due to an impediment)[150] if a permanent impediment for the performance of the sellers obligation to deliver the subject of a sales contract has occurred the sellers obligation to deliver it is extinguished and so is the buyers reciprocal obligation.

In the case of non contractual liability an event beyond control may serve as a defence in the framework of strict liability[151]. An event beyond control is an abnormal occurrence which cannot be averted by any reasonable measure and which is not to be regarded as the realisation of a risk for which a person is responsible under Chapter 3, Section 2 (Accountability without intention or negligence)[152].

An event beyond control is thus characterised by two elements : the fact that the cause of damage would not have been discovered or precluded even if as much care had been taken as could possibly be expected in the circumstances and the fact that damage must not have resulted from the realisation of the very risk on account of which liability is rendered strict.[153]

The provision does not address the distinction between “force majeure” and an “inescapable event”. The defence under the Article does not depend on whether the actual cause of the damage is a natural occurrence or human behavior (that of a third party or the victim), but on the fact that even where extraordinary care and

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[150] *“(4) Where the excusing impediment is permanent the obligation is extinguished. Any reciprocal obligation is also extinguished. In the case of contractual obligations any restitutionary effects of extinction are regulated*
by the rules in Chapter 3, Section 5, Sub-section 4 (Restitution) with appropriate adaptations.”

[151] VI.–5:302: Event beyond control: *A person has a defense if legally relevant damage is caused by an abnormal event which cannot be averted by any reasonable measure and which is not to be regarded as that person’s risk.*

[152] This definition follows the corresponding rules provided by CISG art. 79(1) and III.–3:104 (Excuse due to an impediment) in the case of contractual liability (see supra).

[153] Von Bar et al., *“Principles, Definitions, And Model Rules of Private Law, Draft Common Frame of Reference”,* 2009, available at: http://ec.europa.eu/justice/contract/files/european-private-law_en.pdf , P. 3538-3539.

even if prudence was exercised, it could not have been foreseen or, though foreseeable, could not have been avoided.

In contrast to the defence of contributory fault, the defence of an event beyond control always leads to a complete exclusion of liability and never merely to an apportionment of damage. Where the victim's contributory fault is totally dominant the result can, however, be the same because a reduction of liability "to zero" will then also come about by the application of VI.–5:102 (Contributory fault and accountability).[154]

The DCFR expressly provides for rules in case of a change of circumstances (Art. III-1:110[155]). The approach of the DCFR can be considered to be more restrictive since not only it requires that the performance has become excessively onerous, but it also has to be manifestly unjust for the debtor to perform the obligation as agreed.81

The assessment of the onerousness of the performance as being excessive or severe is difficult. It has to be made by comparing the situation at the time of concluding the contract with the situation at the time of its execution, with the evaluation being made with regard to the whole transaction and not only the obligation of the affected party. Therefore, a comparison between the counter performances is required in order to determine whether the economic balance of the contract has been fundamentally altered as was intended by the parties upon its conclusion. Thus, even when the supervening events have made the performance of the

[154] Id.

[155] III. – 1:110: Variation or termination by court on a change of circumstances
(1) An obligation must be performed even if performance has become more onerous, whether because the cost of performance has increased or because the value of what is to be received in return has diminished.
(2) If, however, performance of a contractual obligation or of an obligation arising from a unilateral juridical act becomes so onerous because of an exceptional change of circumstances that it would be manifestly unjust to hold the debtor to the obligation a court may: (a) vary the obligation in order to make it reasonable and equitable in the new circumstances; or (b) terminate the obligation at a date and on terms to be determined by the court. (3) Paragraph (2) applies only if: (a) the change of circumstances occurred after the time when the obligation was incurred; (b) the debtor did not at that time take into account, and could not reasonably be expected to have taken into account, the possibility or scale of that change of circumstances;(c) the debtor did not assume, and cannot reasonably be regarded as having assumed, the risk of that change of circumstances; and (d) the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation.

affected party excessively onerous, if the counter-performance is also severely burdened by the new circumstances, the relevant provisions are not applicable.

The DCFR also requires that the change of circumstances must be 'exceptional. Taking into account the requirements of unforeseeability, one can link the exceptional nature of the change of circumstances to objective standards capable of external and even neutral assessment. For instance, the event should be unusual (not frequent or not regular over time) and of a general nature (affecting society as a whole or at least an entire category of parties in the same situation). This has been the approach of domestic jurisdictions having provisions with a similar requirement. The requirement of reasonable foreseeability is sufficient both to protect the general principle of the sanctity of contracts and the interests of the creditor.

The DCFR requires that the affected party did not assume the risk of a change of circumstances. Such an assumption may be express or implied, arising from the nature of the transaction or other relevant circumstances of the particular case. Thus, if the change of circumstances was reasonably foreseeable and the debtor did not take any measures to protect himself, it can be considered that he assumed the risk of that change. The parties are in principle free to agree on the allocation of risks in the contract, e.g. stating that one or more particular risks are exclusively assumed by one of the parties. In that case, the party who assumed the risk of the change of circumstances cannot later rely on the remedies provided for that situation. However, because that assumption implies an aggravation of the responsibility of the debtor, it should be strictly and narrowly construed (stricto sensu) and in good faith.

The last assertion is linked to the problem concerning the mandatory or dispositive nature of the provisions on a change of circumstance. The DCFR comments on the principle of security (see supra-Chapter 2Bii.)[156] seem to imply that the rules on a change of circumstances are not mandatory, since, as already stated, "the parties remain free, if they wish, to exclude any possibility of adjustment without the

[156] SGECC, "Acquis Group", adited by C. Von Bar et al, "Principles, Definitions and Model Rules of European Private Law", Sellier European Law Publishers, 2009, p. 60-61.

consent of all the parties"[157]. Therefore, the parties could exclude the application of Art. III. - 1:110 to their contractual relationship, which would imply that the party affected by a change of circumstances would have to bear the risk of such a change in all cases.

However, the best option is to consider the rules on a change of circumstances to be mandatory for the parties. Those rules are a reflection of the principle of justice (as a qualified exception to security) and more particularly of the duty to act in accordance with good faith and fair dealing, which "may not be excluded or limited by contract or other juridical act"[158]. Hence, the rules on a change of circumstance are contained in the mandatory nature of the mentioned duty. It is contradictory to state, on the one hand, that the parties cannot themselves avoid the duty of good faith, but on the other, that this is possible in specific cases that are a consequence of such a duty. A conclusion such as this would imply that the content of the duty to act in good faith would be vacuous and its practical application would be denied.

Paragraph (2)(d) of the aforementioned article expressly states as a condition for its application that "the debtor has attempted, reasonably and in good faith, to achieve by negotiation a reasonable and equitable adjustment of the terms regulating the obligation".

The attempted renegotiation has to be reasonable and in good faith, which implies that renegotiations must be requested without undue delay and the grounds on which the request for renegotiation is based must be indicated. The DCFR expressly states that Art. III.-1:110 does not impose an obligation to negotiate but, instead, 'in order to encourage negotiated solutions' the debtor has to request renegotiations if he wants to rely on the remedies provided by the article. Regardless of that intention, it is difficult to see how negotiated solutions will be encouraged if the DCFR states that "there is no question of anyone being forced to negotiate or being held liable in damages for failing to negotiate".

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[157] C. Von Bar, *"A Common Frame of Reference for European Private Law - Academic Efforts and Political Realities",* Electronic Journal of Comparative Law, vol. 12.1 (May 2008), available in http://www.ejcl.org (accessed 15-01-2016).

[158] *"Party autonomy, good faith and a dirigiste DCFR?",* European Private Law News,2009, http://www.epln.law.ed.ac.uk/2009/06/21/party-autonomy-good-faith-and-a-dirigiste-dcfr/,(accessed 10-01-2016).

If the conditions stated above are fulfilled, and the parties could not reach an agreement concerning the contract's adjustment to the new circumstances, either of the parties may bring the matter before the courts. The courts have wide powers and can either modify the contract or terminate it whichever is the more suitable in a specific case.

C. International Law

The CISG

The CISG does not contain a provision dealing with either force majeure or hardship explicitly. Article 79 of the CISG[159] relieves a party from paying damages only if the breach of contract was due to an impediment beyond its control.

In specific, Art. 79 (1) provides that a party is exempted from liability for damages only if the failure to perform is due, first, to an impediment beyond its control and, second, that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or, third, to have avoided or overcome it or its consequences.

Paragraph (5) restrains the effects of the exemption to one remedy alone and reserves to the party who did not receive the agreed performance all of its remedies except damages. These remedies include the right to reduce price (Article 50), the

[159] *"(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if: (a) he is exempt under the preceding paragraph; and (b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him. (3) The exemption provided by this article has effect for the period during which the impediment exists. (4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt. (5) Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."*

right to compel performance (Articles 46 and 62), the right to avoid the contract (Articles 49 and 64) and the right to collect interest as separate from damages (Article 78). It could be argued that paragraph (5) entails unrealistic results, since It would allow an action for specific performance in a case where the goods are destroyed and thus, the performance is physically impossible. The general belief expressed at the Vienna Conference that judgment for a physically impossible performance would neither be sought nor obtained should lead to a reasonable limitation of Article 79(5)[160].

As mentioned earlier, there is no rule contained in the CISG that specifically refers to situations, where as a result of radically changed circumstances, the performance of one of the parties has become much more onerous and difficult. This problem, therefore, has to be considered in the context of Article 79 as well. The question of whether situations of hardship are covered and provided for by Article 79 is probably the most discussed problem concerning Article 79[161]. [162]

[160] I. Schwenzer, *"Force Majeure and Hardship in International sales Contracts",* 2008, found in http://www.austlii.edu.au/nz/journals/VUWLawRw/2008/39.pdf, (accessed 10-01-2016), p. 712-713.
[161] H. Rosler, *"Hardship in German Codified Private Law-In comparative Perspective to English, French and International Contract Law",* 3-2007, European Review of Private Law, Kluwer Law international, p. 503.

[162]*"The meaning of Art. 79 CISG cannot be that it lends a helping hand to a party that, because of its own negligence, did not provide for this situation in its contracts.*

Art. 79 CISG cannot be invoked by [Seller], given that the circumstances it relies on could and should have been reasonably foreseen, and could have been perfectly inserted by it in the agreements between the parties.In these circumstances, it should be decided that [Seller] unrightfully stopped its obligations flowing from the contract of sale, such that the decision in summary procedure, by which [Seller] was ordered to perform, should be confirmed.However, it should be noted that [Seller] continued deliveries under constraint, because of the order in summary procedure, so that the original price agreements cannot be maintained, and it should be ordered that deliveries, both those performed after the order and the future ones, can be charged at the price as determined in summary procedure, being the original price plus one-half of the extra price. An exception should be made for the orders that should have been delivered before the decision on summary procedure: these should be charged according to the original price agreements, without increase. This solution is also compatible with equity. Equity is, according to Article 1135 BW, a source of supplementary law for contracts: one can rely on equity to determine the contents of a contract, namely to determine which obligations the parties have based on their agreement and the supplementation thereof." Rechtbank van Koophandel [Commercial Court] Tongeren *Scafom International BV & Orion Metal BVBA v. Exma CPI SA,* 25 January 2005, found in http://cisgw3.law.pace.edu/cases/050125b1.html, (accessed 10-1-2016).

The fact that Article 79 presents problems of application might tempt one to consider solving that problem by applying Article 7(2). Article 7(2) permits recourse to the applicable law by virtue of the rules of private international law when questions are not expressly settled by the CISG. The problem of hardship could thus be regulated by rules of domestic law if there was a gap in the CISG regarding the promisor's invocation of radically changed circumstances, making its performance more onerous. The history of Article 79, however, rules out the assumption of the existence of such a gap[163].

The problem of hardship has thus been considered during the drafting process of Article 79, but a provision which specifically dealing with it has been deliberately omitted from the CISG[164]. The history of Article 79 excludes the possibility that there is an unstated hardship in the Convention. Article 79's purpose of establishing definite limits as to a promisor's responsibility for breach of contract supports this conclusion. Resort to domestic laws is precluded by Article 7(2). If the domestic law applicable under conflicts rules were applied to fill a supposed gap, there would be a danger of the CISG's liability system "bursting." This is due to the fact that domestic legal systems differ greatly from each other in regard to rules of hardship. Contract drafters are therefore highly recommended to include their own carefully crafted impossibility or hardship clauses and not to rely exclusively on Art. 79.

The Unidroit Principles

The Unidroit Principles offer a rather safe and anticipated environment for both cases of impossibility and hardship. Artcle 7.1.7[165] providing for the excused non

[163] J. Rimke, "*Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts",* Reproduced with permission of Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer, 1999-2000, p. 197-243, found in http://www.cisg.law.pace.edu/cisg/biblio/rimke.html#iv, (accessed 10-1-2016).

[164] Id.

[165] "*(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome*

performance of a contract covers the ground covered in common law systems by the doctrines of frustration and impossibility of performance and in civil law systems by doctrines such as force majeure but it is not identical with any of these doctrines. The provision does not restrict the rights of the party who has not received performance to terminate if the non-performance is fundamental; it only excuses the non-performing party from liability in damages.

The definition of force majeure in paragraph (1) of this Article is necessarily of a rather general character. International commercial contracts often contain much more precise and elaborate provisions in this regard. The parties should therefore adapt the content of this Article so as to take account of the particular features of the specific transaction.

Article 6.2.3 on Effects of hardship[166] regulates the right of the disadvantaged party to request renegotiations without undue delay. Since hardship consists in a fundamental alteration of the equilibrium of the contract, paragraph (1) of this Article entitles the disadvantaged party to request the other party to enter into renegotiation of the original terms of the contract with a view to adapting them to the changed circumstances. Of course, a request for renegotiations is not admissible where the contract itself already incorporates a clause providing for the automatic adaptation of the contract eg. a price revisiting clause. However, even in such a case

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it or its consequences.(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due."

[166] *"(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."*

renegotiation on account of hardship would not be precluded if the adaptation clause incorporated in the contract did not contemplate the events giving rise to hardship.[167]

Paragraph (1) of the article imposes also on the disadvantaged party the duty to indicate the grounds on which the request for renegotiations is based, so as to permit the other party better to assess whether or not the request for renegotiations is justified. An incomplete request is to be considered as not being raised in time, unless the grounds of the alleged hardship are so obvious that they need not be explicitly mentioned in the request.

Paragraph (2) of this Article provides that the request for renegotiations does not of itself entitle the disadvantaged party to withhold performance. The reason for this lies in the exceptional character of hardship and in the risk of possible abuses of the remedy. Withholding performance may be justified only in extraordinary circumstances.

If the parties fail to reach agreement on the adaptation of the contract to the changed circumstances within a reasonable time, paragraph (3) of this Article authorises either party to resort to the court. According to paragraph (4) of this Article a court which finds that a hardship situation exists may react in a number of different ways.[168]

Paragraph (4) of this Article expressly states that the court may terminate or adapt the contract only when this is reasonable. The circumstances may even be such that neither termination nor adaptation is appropriate and in consequence the only reasonable solution will be for the court either to direct the parties to resume

[167] H. Rosler, *"Hardship in German Codified Private Law-In comparative Perspective to English, French and International Contract Law",* 3-2007, European Review of Private Law, Kluwer Law international, p. 503-505.

[168] Id, p. 507-8.

negotiations with a view to reaching agreement on the adaptation of the contract, or to confirm the terms of the contract as they stand.[169]

Another possibility would be for a court to adapt the contract with a view to restoring its equilibrium (paragraph (4) (b)). In so doing the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve a price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive a performance may still benefit from that performance.

D. Effects of Force Majeure on Take-or-Pay Clauses.

In any take-or-pay clause, careful structuring is needed in order to avoid the possibility that a buyer may be required to pay for a quantity of commodity that it failed to take due to a force majeure event (that prevented performance by either the seller or the buyer) and the subsequent dispute.

The occurrence of a force majeure event may excuse the buyer's failure to take the ToP quantity, but does it excuse the buyer from paying the seller for such quantity not taken? As long as payment can be made, the seller will argue that the buyer can fully perform its contract obligations by making payment of the applicable take-or-pay deficiency amount at year end.[170]

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[169] Id, p. 508.

[170] B. Smith &J. Rogers, "Excusing Performance: The Force Majeure Provision", October 2012, Norton Rose Fulbright Newsletter, found in

As discussed above, force majeure preventing the buyer from taking the commodity is one of the most common deductions to the ToP quantity, thus eliminating any take-or-pay obligation covering that particular quantity. In absence of a specific provision on how force majeure affects the buyer's take-or-pay obligation, both sellers and buyers may find themselves testing the effectiveness of the contractual dispute resolution clause when a force majeure event occurs, and the parties have different views as to whether payment remains due.[171]

E. General Remarks on recent Force Majeure clauses

Force Majeure provisions are tending to lengthen as more detail is devoted to the Parties' obligations to take actions to resume deliveries of LNG (*e.g.* procuring additional shipping). Noteworthy developments with regard to force majeure in recent SPAs are: 1. In SPAs providing for multiple delivery destinations: (i) coverage of certain downstream facilities or events in a different manner for each receiving terminal; and (ii) if force majeure prevents deliveries at buyer's nominated terminal, the obligation for buyer to use reasonable endeavors to receive LNG at another LNG terminal that seller approves (with seller having the right to refuse to unload at such other terminal due to potential additional cost or risk to seller, scheduling

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http://www.nortonrosefulbright.com/knowledge/publications/93413/excusing-performance-the-force-majeure-provision, (accessed 10-1-2016).

[171] J. Rimke, "*Force majeure and hardship: Application in international trade practice with specific regard to the CISG and the UNIDROIT Principles of International Commercial Contracts",* Reproduced with permission of Pace Review of the Convention on Contracts for the International Sale of Goods, Kluwer, 1999-2000, p. 200, found in http://www.cisg.law.pace.edu/cisg/biblio/rimke.html#iv, (accessed 10-1-2016).

difficulties, or safety / operational issues). 2. The express obligation of the seller, in the event of an accident affecting gas production, to take “such measures that are required to resume deliveries”, including “new investments and also temporary deliveries of LNG from [other LNG terminals].”3. The obligation of the buyer to “use reasonable endeavors to take any quantity of LNG not taken previously as a result of Force Majeure.” [172]

Force majeure provisions form the basis of almost every defense of a party’s failure to comply with its take or pay obligations and typically detail parties’ obligations to take actions to resume deliveries of LNG (e.g., by procuring additional shipping). Force majeure events are generally defined as: (1) reasonably unforeseen occurrences, (2) outside the control of the affected party, (3) which prevent, hinder or delay performance. The “traditional” events covered by typical force majeure clauses in long-term SPAs include transportation events, construction-related events and political events — but may leave open the question of coverage of upstream liquefaction, wellhead risks or reservoir failure or expressly declare these circumstances not to be force majeure events. An obligation to pay money is rarely covered by force majeure based on the reasoning that one can always pay.

[172]P. R. Weems «*EVOLUTION OF LONG-TERM LNG SALES CONTRACTS: TRENDS AND ISSUES*», found in *http://www.kslaw.com/imageserver/KSPublic/Library/publication/evolutionoflngsales.pdf, 2005, (accessed 10-1-2016).*

5. CONCLUSION

In the present analysis an effort has been made to present the available legal possibilities in limiting the liability of the seller and the buyer in the sale contract within the Greek, European and International legal framework -binding or not-. A prima facie observation would be that the principle of the freedom of contract has not prevailed to the anticipated degree in national, regional or international level.

Greek law is highly influenced by the legislation for the Protection of the Consumer and the principle of “favouring the feebler party”, even though businesses negotiate at arms length, and has therefore adopted a rather strict scheme which intervenes and finally predetermines the liability terms. The DCFR, while struggling to include all European legal cultures and systems in its general principles, definitions and model rules, has not managed to avoid certain cumbersome approaches. The CISG is highly prone to national law interventions since it often entails the application of a mixed legal regime. The UNIDROIT Principles seem to offer the most eligible transnational legal proposal, at the present time, in the sense that it represents a reasonable and integrated legal regime.

As highlighted earlier, people feel more secure with solutions which are familiar, tried and traditional. This aspect of security and efficiency is particularly valued in the legal and commercial sphere. The aspirers and supporters of the modern lex mercatoria and international and regional contract law have attempted to create such an environment, detached from the mere notion of “State Law”. It is debatable whether social and therefore legal progress has been achieved to an adequate degree so as to accept such “stateless” solutions, even at a regional level. The fact that in the vast majority of contracts in the energy sector, only certain national laws were chosen as the applicable law, highlights rather clearly that we are still far from achieving legal solutions “beyond the state”. In that sense, legal practitioners have attempted to create such conditions that will create a safe environment for either the seller or the buyer by using specific legal clauses. The systematic application of these clauses for several decades has led to the creation of a widely accepted

content and scheme for most of the sale contracts in the energy industry and has created an interesting and rather consistent case law. It is thus high time that commercial needs align with the aforementioned legislation and lead to a new era in contract law based on the principle of the freedom of will.

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