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THE GOOD FAITH AND HARDSHIP CLAUSE IN BUSINESS CONTRACT

A CLÁUSULA DE BOA FÉ E DIFICULDADE NO CONTRATO EMPRESARIAL

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ABSTRACT

This paper aims to investigate the hardship clause in business contracts and its relationship with the principle of objective good faith. Initially, it explores the concept of the hardship clause, presenting different doctrinal classifications on the topic and the usefulness of this provision for business contracts. Subsequently, it examines the distinction between the hardship clause as an instrument created by private autonomy and the normative hypothesis of hardship provided in legal frameworks addressing the subject, concluding that the two concepts are neither identical nor mutually exclusive. Next, it discusses the relationship and application of objective good faith in the context of the obligation to renegotiate arising from the hardship clause, identifying a reinforced

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application of this principle during the renegotiation process. Finally, this paper examines the effects of breaching objective good faith in renegotiations resulting from the hardship clause, addressing both the concept of positive violation of the contract and Other doctrinal perspectives on the subject.

Keywords: hardship clause; business contracts; objective good faith; renegotiation; force majeure.

RESUMO
O presente trabalho tem por objetivo investigar a cláusula de hardship nos contratos empresariais e relação desse dispositivo contratual com o princípio da boa-fé objetiva. Inicialmente, o investiga-se o conceito da cláusula de hardship, apresentando as diferentes classificações doutrinárias a respeito do tema e a utilidade desse dispositivo para os contratos empresariais. Após, busca-se investigar a diferença entre a cláusula de hardship como instrumento criado pela autonomia privada e a hipótese normativa de hardship prevista nos diplomas legais que tratam do assunto, concluindo que os dois conceitos não se confundem e não se limitam. Após, aborda-se a relação e aplicação da boa-fé objetiva no âmbito da obrigação de renegociar decorrente da cláusula de hardship, constatando uma aplicação reforçada deste princípio no processo de renegociação. Por fim, o presente trabalho ainda examina os efeitos da violação da boa-fé objetiva nas renegociações advindas da cláusula de hardship, abordando tanto a ideia de violação positiva do contrato, quanto as demais posições doutrinárias a respeito do tema.

Palavras-Chave: *Cláusula de Hardship; contratos empresariais; boa-fé objetiva; renegociação; força maior.*

1. INTRODUCTION

Contracts are inherently incomplete, as there is an inevitable incompleteness in any cooperative relationship between two or more parties, particularly when they extend overtime. The parties have limited rationality, making it materially impossible to draft an agreement that accounts for all operational risks, especially in long-term contracts. Additionally, in the context of long-term contracts, time itself becomes a source of risks for the legal relationship. As the duration of the contract increases, so does the likelihood of disruptions to its foundational assumptions.

In this context, it is common for private autonomy to devise creative solutions to prevent unforeseen events from undermining the contract's structure and jeopardizing the continuity of the legal relationship. It is precisely within this scenario that the hardship clause, the subject of this study, emerges as a potential solution to ensure the continuity of the relationship amid uncertainties.

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However, for the hardship clause to achieve its purpose, the parties must adopt a high standard of collaboration from the very beginning of the obligation process. In this regard, objective good faith is called upon with greater intensity. After all, it would not be possible to fulfill the obligation to renegotiate without strict adherence to the ancillary duties imposed by objective good faith, particularly in long-term contracts. As a result, it is immediately evident that there is an intersection between the hardship clause and the ancillary duties imposed by objective good faith, which should be explored.

Thus, this academic endeavor aims to investigate how the hardship clause is incorporated into business contracts alongside objective good faith and how this principle, applied in the context of business contracts, operates to ensure the proper fulfillment of the obligation to renegotiate.

In essence, the four sections of this work will address two main points of intersection. The first is the intersection between the hardship clause and the normative hypothesis of hardship, which is provided for in various legal frameworks. The second is the intersection between objective good faith and the clause under analysis. Generally, the thematic scope of this academic work is relevant because the requirements that constitute the hardship clause share some similarities with those present in the normative hypotheses of hardship in legal frameworks.

Thus, it is necessary to clarify these points to distinguish the effects of the clause from those of the normative hypothesis. Additionally, the application of objective good faith in the context of the obligation to renegotiate also deserves greater attention. After all, in addition to its intrinsic connection to the duty to renegotiate, the effects of its breach remain unsettled in doctrinal thought. Hence, the need to systematize the different positions in order to present readers with a variety of perspectives on the subject.

To achieve this objective, the first section of this paper will examine the conceptualization of the hardship clause and its utility for business contracts. Next, the paper will address the differences between the hardship clause and the normative hypothesis of hardship provided in legal frameworks addressing the subject, as well as the points of intersection between these two concepts. Subsequently, the third section will delve into good faith as a guiding principle and standard for performance within the hardship clause. Finally, the last section will discuss the consequences of breaching objective good faith and the various doctrinal positions on the matter.

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The methodology employed in this study follows an inductive research method, using doctrinal understanding of the subject as its foundation. Without further ado, we proceed to the examination of the topic.

2. THE HARDSHIP CLAUSE IN BUSINESS CONTRACTS

2.1. CONCEPT OF THE HARDSHIP CLAUSE

According to Paula Greco[1], the hardship clause is a contractual provision that obligates the contracting parties to renegotiate the original terms of the agreement due to the occurrence of what is conventionally referred to as a hardship situation. In the teachings of Bruno Oppetit[2], the hardship clause is a type of “clauses de réadaptation” that allows the parties to request a contractual adjustment in the event of a change that subjects one of the parties to “unjust difficulties.”

Pinto Monteiro and Júlio Gomes[3] state that hardship clauses are "those that establish a duty to renegotiate a contract when there is a substantial change in circumstances, a change capable of affecting the overall balance of the contract." Frederico Glitz[4], in turn, describes the hardship clause as an example of creative activity in contractual practice, representing an original solution for preserving the contract. Through this clause, the contracting parties, aware that they may face significant unforeseen events, reserve the power to determine, by mutual agreement, how such supervening circumstances will affect the balance between their obligations[5].

With the hardship clause, contractual incompleteness becomes a mechanism for the negative management of risks[6] in complex economic operations, which are conducted in uncertain contexts and extend overtime. The burdensome event triggers

[1] BANDEIRA, Paula Greco. **Incomplete Contract**. Doctoral Thesis. State University of Rio de Janeiro, Faculty of Law. 2014, p. 78.
[2] OPPETIT, Bruno. **The Adaptation of International Contracts to Changing Circumstances: The Hardship Clause**. In Journal of International Law, No. 4. Paris: Editions Techniques, October-December, 1974, pp. 794-814.
[3] PINTO MONTEIRO, António, GOMES, Júlio Manuel Vieira, 1998 *apud* BRITO, Maria Lúcia Pereira de, 2014.
[4] GLITZ, Frederico Eduardo Zenedin. **An Interpretation of Contractual Contemporaneity: Lesion, Hardship Clause, and Contract Preservation.** Master's Dissertation. Faculty of Law (Department of Legal Sciences), Federal University of Paraná, 2005.
[5] MARTINS-COSTA, Judith. **The Hardship Clause and the Obligation to Renegotiate in Long-Term Contracts.** *Revista dos Tribunais*, 2010, p. 3.
[6] It is called negative because the contracting parties voluntarily decide not to allocate, *ex ante*, the supervening economic risk that may affect the contract.

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the clause, which, in turn, opens the contractual framework and imposes on the parties the duty to renegotiate the contract to restore its balance. Thus, when the stipulated event occurs, the economic risks arising from now understood by the parties in this context and, therefore, foreseeable—will be managed by the contracting parties through the renegotiation of contractual terms[7].

According to Judith Martins-Costa[8], there are generally four functions attributed to the hardship clause. The first is to prevent *pacta sunt servanda* from leading to excessive rigidity during contractual performance, enabling the preservation of economic balance and the continuity of the contract. The second function is to renegotiate and share the costs resulting from the unforeseen and uncertain event between the contracting parties. The third is to prevent termination due to excessive onerousness, avoiding the dissolution of a contract that may still be beneficial to both parties. Lastly, the fourth function is to establish a new framework to adapt the mutual interests of the parties (always within the limits of the principle of contractual atypicality), representing the "adaptive" function of private autonomy.

As a rule, the hardship clause is included in long-term contracts, whose performance will face increasing difficulties as time passes. These challenges, as noted by Oppetit, are particularly significant in international contracts involving raw materials or energy sources such as gas or crude oil. These contracts are situated in a constantly changing political and economic environment, creating significant uncertainties for the contracting parties[9].

This is why the hardship clause is frequently used in international business contracts. These are generally complex agreements, where challenges often stem from cultural differences, language barriers, distinct legal systems, and, most significantly, the effects of time[10]. Furthermore, in international contracts, it is considered that the parties are subject to different legal frameworks, which complicates and minimizes state control over such operations[11]. This explains why Perillo[12] asserts

[7] BANDEIRA, Paula Greco, *op. cit*, pg. 79.
[8] MARTINS-COSTA, Judith, *op. cit, pg. 4*
[9] OPPETIT, Bruno. Op. cit. pg. 10
[10] SZTJAN, Rachel. **Supply Chain and Contractual Incompleteness**. Available at: <https://www.yumpu.com/pt/document/view/12641767/supply-chain-e-incompletude-contratual-systemas-revista-de>. Accessed on: September 27, 2023.
[11] GLITZ, Frederico Eduardo Zenedin. *op. cit,* pg. 143
[12] PERILLO, Joseph M. **Force Majeure and Hardship under the UNIDROIT Principles of International Commercial Contracts**. Tulane Journal of International and Comparative Law, vol. 5, p. 116, 1997. Available at:

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that it is quite common for contracting parties to assign this responsibility to private autonomy. Although many legal systems do not explicitly provide for the possibility of contractual readjustment, most recognize the competence of private autonomy to do so.

However, nothing prevents national contracts from also including this type of clause. Ultimately, all long-term contracts, especially the more complex ones, such as business contracts, are subject to various external factors, whether international or not, particularly in countries whose economies and political landscapes are marked by instability. It is precisely in such environments of significant instability that contracts become subject to external factors that can disrupt the originally agreed contractual balance and place undue burdens on the performance of one or both parties[13].

When faced with such difficulties, contracting parties have various options for managing the risks of their relationship and restoring contractual balance. The two main options are judicial intervention and renegotiation[14]. According to Paula Forgioni, the specialized doctrine often identifies agreement between the parties as the most traditional method for addressing contractual gaps. It is precisely in this context that the hardship clause, the focus of this study, finds its place in business contracts[15].

Therefore, the hardship clause is a contractual renegotiation mechanism that operates through renegotiation. Its primary function is to restore to the contract what was disrupted by the burdensome event: the originally agreed balance. Once stipulated, renegotiation becomes mandatory. It should be emphasized that this does not mean forcing the parties to reach an agreement but obligating them to make serious, reasonable, and timely proposals[16].

As will be discussed in the following chapters, for renegotiations to be conducted appropriately, the obligation must, above all, adhere to the duties arising from the principle of objective good faith, which plays a heightened role in such cases[17]. This

<https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1782&context=faculty_scholarship>. Accessed on: October 16, 2023.

[13] MELO, Jairo Silva. **International Contracts and Hardship Clauses.** São Paulo: Aduaneiras, 1999.

[14] FORGIONI, Paula Andrea; IRTI, Natalino. **Business Contracts: General Theory and Application.** *Revista dos Tribunais*, 2016.

[15] FORGIONI, Paula A. **Integration of Business Contracts: Gaps, Role of Judges, Good Faith, and Its Limits.** *Revista dos Tribunais*, 2015, p. 2.

[16] FORGIONI, Paula A. **Integration of Business Contracts: Gaps, Role of Judges, Good Faith, and Its Limits.** *Revista dos Tribunais*, 2015, p. 2.

[17] SCHUNCK, Giuliana Bonanno. **Long-Term Contracts and the Duty of Cooperation.** PhD Thesis. University of São Paulo, 2013, p. 179.

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principle serves as a standard for assessing whether the parties fulfilled the obligation of means, failed to fulfill it, or fulfilled it inadequately.

However, before analyzing the *modus operandi* of good faith in the hardship clause, it seems important to examine the connection between this clause and the normative provisions that share elements typically found in the hardship clause, particularly Article 478 of the Civil Code. While the two concepts are distinct, their intersection merits analysis, especially to determine the overlap of their effects. This will be examined next.

2.2. NORMATIVE HYPOTHESIS OF HARDSHIP AND THE HARDSHIP CLAUSE

As noted, the hardship clause is a provision that obligates the contracting parties to renegotiate the terms of the contract whenever certain events disrupt the originally established contractual balance. However, it is not enough to foresee the possibility of renegotiation in light of a hardship hypothesis; it is also necessary (and recommended) to have at least a minimum consensus on the requirements that define such an event and the procedures to be followed before and after the event occurs. Should the event be unforeseeable? Or is it sufficient for it to be "substantial" in relation to the type of contract, what typically happens in similar situations, and the specific contractual framework considered? [18]

When seeking an answer in the applicable legal provisions, the conclusion reached seems not to align with the current doctrinal position on the subject. In Brazil, according to Paula Greco[19], the hardship clause somewhat corresponds to excessive onerousness, regulated in Articles 478 and following of the Civil Brazilian Code, whose requirements would be: (i) a contract for continuous or deferred performance; (ii) an extraordinary and unforeseeable event; (iii) excessive onerousness for one of the parties. In this sense, UNIDROIT's principles[20] also define hardship in a similar manner under Article 6.2.2 of the aforementioned document:

> ARTICLE 6.2.2 (Definition of Hardship) Hardship occurs when events fundamentally alter the balance of the contract, either because the cost of performance of one party's obligation has increased, or because the value of

[18] MARTINS-COSTA, Judith, *op. cit, pg. 3*
[19] BANDEIRA, Paula Greco, *op. cit*, pg. 197.
[20] UNIDROIT – International Institute for the Unification of Private Law. Principles ofInternational Commercial Contracts. Rome: Unidroit, 2016. Disponível em: <https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-Portuguese-bl.pdf> acesso em 16 out. 2023

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> the counter-performance has decreased, and (a) the events occur or become known to the disadvantaged party after the contract has been formed; (b) the events could not have been reasonably foreseen by the disadvantaged party at the time of the formation of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the occurrence of such events was not assumed by the disadvantaged party.

In line with the Principles of European Contract Law[21], Article 6.1.1 provides that if the performance of the contract becomes excessively burdensome due to a change in circumstances, the parties are required to enter into negotiations with a view to adapting the contract or its termination. For this to occur, the event must be (i) subsequent; (ii) unforeseeable; and (iii) the risk of the change in circumstances must not be one that, according to the contract, the affected party should be required to bear.

The United Nations Convention on Contracts for the International Sale of Goods – UNCITRAL, although it does not explicitly provide for the hardship clause, allows for the possibility of contract termination when the impossibility arises from a cause beyond the control of the contracting party and could not have been foreseen at the time of contracting[22].

In other words, in general, it can be seen that the traditionally applicable legal instruments share common requirements for characterizing the situation as hardship, i.e., a situation of imbalance that subjects the parties to “unjust difficulties”. As a rule, most instruments treat the hardship situation as an unforeseeable, subsequent event that can significantly alter the contractual circumstances, thus excessively burdening one or both parties. According to the legal norms, there are, therefore, certain requirements that must necessarily be fulfilled for the situation to be recognized as the normative hypothesis of hardship. Broadly speaking, the different instruments analyzed, as well as the Unidroit Principles for international contracts (in which the hardship situation is even referred to by this name), identify some common elements, notably the presence of a subsequent event capable of significantly altering the circumstances and generating an imbalance in the contractual relationship. The

[21] Principles of European Contract Law – PECL. Available: <https://www.trans-lex.org/400200/_/pecl/#head_101> Acessed on 28 out. 2023.
[22] GLITZ, Frederico Eduardo Zenedin, op. cit, pg. 155

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presence of other requirements, such as unpredictability and extraordinariness, varies across legislative options[23].

On the other hand, when it comes to the hardship clause, the requirements established in the normative hypothesis may or may not correspond to those contained in the clause. Currently, part of the doctrine argues that, being a result of private autonomy, the hardship clause may or may not share the same requirements. In this regard, for example, Gerardo Marasco[24] states that the content of the hardship clause does not present itself as a standard, so the conditions for the configuration of hardship vary according to the imagination, capacity of the parties, and the interests at stake. Hence, for example, the requirement of unpredictability may be waived by the parties in the specific case, which is supported by most of the doctrine according to Judith Martins-Costa[25]:

> For some time, it was understood that the event causing hardship (and, therefore, triggering renegotiation) should be an unforeseeable event. Currently, the majority doctrine dismisses this requirement, agreeing that the hardship must be 'substantial,' as expressed, for example, by Bruno Oppetit and Regis Fabre in France, Ole Land in the Netherlands, Aldo Frignani in Italy, and, in Portuguese literature, Julio Gomes. (...) Today, it is accepted that such clauses may refer not only to unforeseeable circumstances but also to circumstances foreseen in the agreement, though uncertain in their magnitude, allowing the parties to foresee the possibility of an uncertain event occurring, as well as considering the possibility of an uncertain and indeterminate event impacting the contract in its predictability.

In the same doctrinal line, Leonardo Aquino[26] observes that the parties, in addition to modulating the requirements that make up the clause, can also specify the events that characterize the hardship situation or even exclude certain events, which can be either objective, subjective, or a combination of both. Furthermore, the parties can also detail the procedures to be adopted before and after the renegotiation.

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[23] According to Luis Renato Ferreira da Silva, there would also be the requirement of "extreme advantage" as stated in Article 478 of the Civil Code, which is a typically Brazilian presumption and subject to criticism. Furthermore, the author relates other requirements classified as implicit, that is, not exactly provided for in the letter of the law. For examination, consult the article: DA SILVA, Luis Renato Ferreira. **Resolution due to Excessive Burden: Presumptions and Availability.** *Revista de Direito Civil Contemporâneo-RDCC (Journal of Contemporary Private Law)*, vol. 19, 2019.

[24] MARASCO, Gerardo, 2006, apud BANDEIRA, Paula Greco, 2014, pg. 80.

[25] MARTINS-COSTA, Judith. *op. cit.* pg. 5

[26] AQUINO, Leonardo Gomes. **The Conceptual Particularities of the Hardship Clause.** *Revista Jurídica*, IJP - Portucalense Legal Institute, 2012, apud FRIGNANI, Aldo, *La Hardship Clause nei Contratti Internazionali e le Tecniche di Allocazione dei Rischi negli Ordinamenti di Civil e di Common Law*, in *Revista di Diritto Civile*, vol. 25, Padova, Cedam Ed., 1979, pp. 680–712, p. 702.

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From these observations, it is noted that part of the doctrine defends that the hardship hypothesis contained in the legal system may or may not correspond to the hardship clause created by the parties under their private autonomy. The hypotheses contained in legal instruments are not exhaustive, and their requirements can be modified in the specific case. Additionally, it is important to note that the hardship clause obligates the parties to renegotiate the contract, while the hardship hypothesis authorizes judicial review (heteronomous intervention) or contract termination.

Regarding the process for triggering the clause, as a rule, the duty to renegotiate the contract in the hardship clause begins with a communication made by the affected party to the other party, which must be done within a specified timeframe and with justification[27]. Once the hardship situation is established, the parties may also provide for the suspension or continuation of the contract's performance during the negotiations, and the path to follow in case the negotiations fail, which may range from contract termination to judicial or arbitral readaptation of the agreement[28]. In fact, at this point, the parties may even set criteria for judicial intervention in the agreement[29]. In other words, the hardship clause is a clear manifestation of the private autonomy granted to the contracting parties, in which both will have the possibility to establish the guidelines that best satisfy and assist in the maintenance of the contractual relationship[30].

In other words, even though the hardship clause shares some similarities with the hardship hypothesis provided in legal instruments, the freedom of private autonomy to alter these requirements and adjust the effects according to the best contractual interests is infinitely greater. However, a question could arise regarding this point: if the parties can remove, for example, the unpredictability requirement or even exclude certain situations of excessive burden in the respective clause, would they be disregarding the requirements set forth in Article 478 of the Civil Code? This question is relevant because if the hardship hypothesis established by legal instruments directly influences the creation of the hardship clause, the contracting parties may or may not be bound by the pre-established legal framework, depending on the binding nature of

[27] AQUINO, Leonardo Gomes. **The Conceptual Particularities of the Hardship Clause.** *Revista Jurídica*, IJP - Portucalense Legal Institute, 2012.
[28] GLITZ, Frederico Eduardo Zenedin, *op. cit,* pg. 157
[29] MARTINS-COSTA, Judith, *op. cit*. pg. 9
[30] DOS SANTOS, André Luiz Rigo Costa. **Hardship Clause: The Possible Solution to Ensure International Contractual Relations in Times of Crisis, Such as the Brazilian Crisis.** *Journal of International Law and Economic Globalization*, vol. 1, no. 01, p. 146, 2017.

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the legal rule. And this, in turn, could limit the private autonomy of the parties, leaving them vulnerable to judicial intervention.

Regarding the binding nature of this provision, Anderson Schreiber observes that the doctrine is divided on its normative force. According to Schreiber, part of the doctrine allows for broad scope for private autonomy, restricting or even completely removing the application of the legal regime for the protection of contractual balance, in an authentic exercise of "self-regulation." On the other hand, there are also authors who argue that the protection of contractual balance is based on non-derogable rules, constituting an instrument for "limiting the free disposal of the parties" and "guaranteeing action according to criteria of substantial justice, based on the fundamental values" of the legal system[31].

In line with those who defend the binding nature of the rule, Arnold Wald, for example, argues that the rules in Articles 317 and 478 to 480 of the Brazilian Civil Code, as well as similar rules in our special legislation, are public order norms that cannot be disregarded[32]. Likewise, Paulo Nasser argues that "the maintenance of the balance inherent to the internal social function of the contract ensures the parties access to a mechanism for restoring equity in the face of excessive burden affecting the performance of contracts with a long duration," so that any eventual removal of such balance by the parties would be prohibited by the sole paragraph of Article 2,035 of the Civil Code, according to which "no convention shall prevail if it contradicts public order provisions[33]."

On the other hand, among those who defend availability, the doctrine of Luis Renato Ferreira da Silva[34] holds that Article 478 of the Civil Code is an available rule because, unlike the Consumer Defense Code (CDC), it governs civil-business contracts, i.e., parity contracts. This view seems to align with the thinking of Flávio Tartuce[35], who argues that extraordinariness and unpredictability should not represent an independent requirement, abstractly assessed based on an event more or less distant from the actual impact on the contract. It would suffice for the contract's

[31] SCHREIBER, Anderson, *op. cit*, pg. 404.
[32] WALD, Arnold. 2013, *apud* SCHREIBER, Anderson, op. cit, pg. 404.
[33] NASSER, Paulo Magalhães. **Excessive Burden in Civil Contracts.** São Paulo: Saraiva, 2011, apud SCHREIBER, Anderson, op. cit., p. 404.
[34] DA SILVA, Luis Renato Ferreira. **Resolution due to Excessive Burden: Presumptions and Availability.** *Revista de Direito Civil Contemporâneo-RDCC (Journal of Contemporary Private Law)*, vol. 19, 2019.
[35] TARTUCE, Flávio. **Manual of Civil Law.** Single Volume. 12th ed. Rio de Janeiro: Método, 2022, p. 145.

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imbalance to be excessive, which in itself should imply the unpredictability and extraordinariness of the causal antecedents that led to the imbalance[36]. Ultimately, as Schreiber teaches, the normative hypothesis ends up being set aside not by express derogation by the parties, but by the failure to meet the prerequisites established in the legal rule, so that the alleged imperative nature of the rule ends up being purely fictitious[37].

But there is also a third approach between those who defend the binding nature of the legal protection of contractual balance and those who argue for broad possibilities for its derogation by private autonomy. According to this line of thought, contracting parties can distribute among themselves the risks inherent to fulfilling the contract, including the risks of supervening changes to the contractual balance, including those arising from fortuitous events or force majeure. However, this risk allocation would be subject to legitimacy control, assessing its compatibility with the legal system and, therefore, with its fundamental values, including social solidarity. Generally speaking, clauses that remove or waive renegotiation, revision, or contract termination for an imbalanced contract through abstract language that does not sufficiently specify the assumed risk would not be accepted. Private autonomy is recognized in assuming risks, but the assumption of that risk must be unequivocal, which usually occurs only when the risk is specifically defined and precisely delimited[38].

In short, even if the more restrictive approach were accepted, i.e., one that considers Article 478 to be a binding rule, its normative force does not prevent private autonomy from stipulating in the hardship clause different elements or events from those provided in the legal hypothesis. As seen, the hardship clause does not need to replicate the requirements of Article 478. When the parties agree to the hardship clause, they are taking on the burden of resolving the contract themselves. The eventual binding nature of the rule only asserts that the judge cannot revise the contract outside the requirements of Article 478 of the Civil Code[39], and that judicial

[36] According to Tartuce, even excessive burden can be relativized, as depending on the specific situation, even a small economic fluctuation could trigger excessive burden.
[37] SCHREIBER, Anderson, *op. cit,* pg. 404
[38] SCHREIBER, Anderson. **Contractual Balance and Duty to Renegotiate**. (2nd edition). Saraiva Publishing House, 2020. p. 408.
[39] PEREIRA, Fabio Queiroz; DE PÁDUA ANDRADE, Daniel. **The duty to renegotiate and the consequences of its non-performance.** Revista de Direito Civil Contemporâneo-RDCC (Journal of Contemporary Private Law), v. 15, p. 209-238.

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revision may occur independently[40] of the parties' will if the exact terms of the provision are met, even if a hardship clause exists. In the case of the coexistence of the normative hypothesis and the clause, there would be hierarchy. First, the solution would be sought within the terms of the contract itself, and only afterward would the legal provisions aimed at regulating the matter be resorted to. According to Fábio Queiroz and Daniel de Pádua, this seems to be the understanding that best aligns with the very nature of the clauses[41].

Regarding the new wording introduced in the legal system by the Economic Freedom Law, this position seems to be the most coherent with the new regulation. After all, Article 421-A and its subsections provide that the parties can establish interpretative parameters for the interpretation, revision, and resolution of business contracts, so that their risk allocation should be respected, and judicial revision should occur only in exceptional circumstances.

In conclusion, the hardship clause goes beyond the legislative hypothesis provided in the legal system for situations of supervening excessive burden, and in specific cases, it may provide differently from the requirements typically established in the legal hypotheses. After all, in the contractual field, private autonomy must be respected to allow business to develop freely[42].

3. GOOD FAITH AND PERFORMANCE IN HARDSHIP CLAUSES

3.1. GOOD FAITH: CONTENT, GUIDANCE, AND CRITERION FOR PROTECTION AGAINST ABUSE OF RIGHTS IN HARDSHIP CLAUSES

According to the teachings of Judith Martins-Costa[43], good faith is a semantically open concept that imposes a duty of intersubjective collaboration

[40] It is said that it may be, as the issue is controversial. As will be seen ahead, some authors believe judicial review is allowed, while others do not.
[41] EREIRA, Fabio Queiroz; DE PÁDUA ANDRADE, Daniel. **The duty to renegotiate and the consequences of its non-performance**. Op. cit.
[42] NETO, Francisco dos Santos Amaral. **Private autonomy as a fundamental principle of the legal order.** Structural and functional perspectives. 1989. Senate Library. Available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/181930/000444811.pdf?sequence=1&isAllowed=y. Accessed on November 21, 2023.
[43] **The Normative Fields of Objective Good Faith: The Three Perspectives of Brazilian Private Law.** In: AZEVEDO, Antonio Junqueira de; TÔRRES, Heleno Taveira; CARBONE, Paolo (Eds.). *Principles of the New Brazilian Civil Code and Other Topics: A Tribute to Tullio Ascarelli.* São Paulo: Quartier Latin, 2008, pp. 388-421.

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between contracting parties[44]. In the field of obligations, good faith is a source of secondary obligations, such as honesty, loyalty, probity, cooperation, and the protection of legitimate trust[45]. Hence, Clovis Couto e Silva[46] asserts that good faith opens a *hortus conclusus* in the legal system, that is, "windows to ethics."

In general, doctrine suggests that one of the main functions of good faith is to protect the trust that the parties place in the contractual relationship[47]. Not by chance[48], Menezes Cordeiro stated that the good faith, since Roman law, has been associated with the protection of the word given in commercial and international contracts, specifically concerning the protection of trust. After all, in business, legitimate trust is the primary driver of market relationships[49]. Thus, Orlando Gomes[50], when addressing the principle of good faith in contracts, teaches that to reflect the social interest in the security of legal relations, the parties must act with mutual loyalty and trust, as specified in the German Civil Code.

In the context of business contracts, according to the doctrine of Paula Forgioni[51], good faith is one of the most traditional institutions. Behavior guided by good faith implies cost efficiency for both the parties and the market. After all, in addition to reducing the need for excessive guarantees and lowering transaction costs, good faith strengthens the institutional environment for developing and receiving business, which can only thrive in markets supported by trust.

As noted in the cited doctrine, good faith acts as a true catalyst for commercial relations, as it enhances market exchanges, reduces transaction costs, facilitates business, and stimulates the flow of economic relations[52]. Not surprisingly, the principle of good faith is expressly provided in Article 1.7 of the UNIDROIT Principles, which states that "each party must act in accordance with good faith in international trade" and that "the parties may not exclude or limit this obligation."

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[44] MARTINS-COSTA, Judith. **Commentaries on the New Civil Code.** Grupo Gen-Editora Forense, 2007.
[45] In this regard, the following rulings: Special Appeal No. 1.367.955 - SP (2011/0262391-7) and Special Appeal No. 1.862.508 - SP (2020/0038674-8);
[46] SILVA, Clóvis do Couto e. **Obligation as a Process.** Rio de Janeiro: FGV Press, 2007.
[47] Consultation was made with Menezes Cordeiro, Paula Forgioni, Judith Martins Costa, Clovis do Couto e Silva, Orlando Gomes, and Marcos Ehrhardt.
[48] MENEZES CORDEIRO, A. M. *The Goog Faith in Civil law*. Coimbra: Almedina, 1989. p. 74.
[49] FORGIONI, Paula Andrea; IRTI, Natalino. Op. cit.
[50] GOMES, Orlando. *Contracts*. 26th ed. Forense Publishing, Rio de Janeiro, 2008.
[51] FORGIONI, Paula Andrea; IRTI, Natalino. **Contratos empresariais: teoria geral e aplicação**. Revista dos Tribunais. 2016.
[52] *Ibidem,* pg. 135

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Thus, as a traditional institution in business law, the good faith also extends its ancillary duties of cooperation to the obligation to renegotiate[53]. After all, the duty to renegotiate is closely tied to the duty of cooperation imposed by good faith, which is why, for some authors[54], good faith operates even more intensely in these cases[55]. The hardship clause, by imposing the duty to renegotiate as a solution to restore contractual balance, has an intrinsic relationship with the principle of good faith.

Moreover, good faith also manifests as a means of preventing abuse of rights by one of the parties. The supposedly disadvantaged party cannot invoke the clause as a way to delay or suspend the fulfillment of the contract[56]. Nor may a party invoke the clause without a substantiated request, beyond the timeframe established in the contract, or without justification, or use it as an argument in court to justify silent non-performance, as if the clause were a "hidden card[57]. Similarly, the more advantaged party is prohibited from using the clause's prerogative to increase its enrichment at the expense of the other party, as renegotiation cannot be the source of a new imbalance. Such behavior constitutes a clear abuse of rights, treated as an unlawful act[58].

Protected by good faith, the obligation to renegotiate is, in fact, one of the many stages comprising the complexity of obligations[59], as the path to performance often does not end with the fulfillment of the obligation. Between the birth of the obligation and its extinction, there is a journey that may reveal various obstacles, and to resolve these, good faith is often called upon. The situation of hardship is one such obstacle.

Indeed, the connection between the hardship clause and the principle of good faith is so strong that part of the doctrine argues that the duty to renegotiate[60]does not even require the hardship clause because it is already grounded in the principle of good faith. In this sense, Menezes Cordeiro teaches that "in the face of a supervening gap, the duties of loyalty and trust protection, which accompany various agreements,

[53] For Couto e Silva, in *The Obligation as a Process*, all ancillary duties can be considered as duties of cooperation.
[54] Consulted were Paula Greco, Orlando Gomes, Antonio Junqueira de Azevedo, and Menezes Cordeiro.
[55] PEREIRA, Fabio Queiroz; DE PÁDUA ANDRADE, Daniel. Op. cit. pg.7
[56] NANNI, Giovanni Ettore. **The Obligation to Renegotiate in Brazilian Contract Law**. Revista do Advogado, vol. 116, pp. 88-97, 2012.
[57] SCHREIBER, Anderson. 2020. *Op. cit*. 374
[58] PINHEIRO, Rosalice Fidalgo. **Abuse of Rights and Contractual Relations**. Master's Thesis. Department of Legal Sciences. Law School of UFPR, 2000.
[59] CORDEIRO, António Menezes, op. cit. pg. 587.
[60] CORDEIRO, António M. **Treaty of Civil Law II**. Coimbra: Grupo Almedina (Portugal), 2021. E-book. ISBN 9789724091266. Available at: <https://integrada.minhabiblioteca.com.br/#/books/9789724091266/>. Accessed on: Oct. 1, 2023.

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may obligate the parties to seriously work toward finding a mutually appropriate solution".

Similarly, authors such as Anderson Schreiber[61], Thiago Rodovalho[62], and Giovani Nanni[63] also argue that renegotiation is an ancillary duty imposed by good faith itself, regardless of any renegotiation clause. For Schreiber, the duty to inform the other party of the identified contractual imbalance, as well as the duty to enter into renegotiation to achieve contractual balance, are conduct duties stemming from the necessity for the parties to cooperate to fulfill the contractual purpose. This, in turn, allows the conclusion that the recognition of the duty to renegotiate in Brazil finds normative basis in the general clause of good faith, specifically in Article 422 of the Civil Code[64]. Not by chance, Paula Greco Bandeira cites as justification both the relational contract theory[65], applicable in common law systems, and the principle of good faith in civil law systems.

In Brazil, relational contracts were extensively studied by Ronaldo Porto Macedo Jr. [66], whose doctrine identifies them as long-term contracts with open clauses and continuous renegotiation. According to Orlando Gomes, relational contracts are characterized mainly by their long duration and the strong collaboration required between the parties. In these contracts, the principle of good faith should be more strongly emphasized, considering their open-ended nature and significant uncertainty about future projections, which impose intense loyalty between the parties to achieve their goals[67].

Thus, it can be seen that the duty to renegotiate is sometimes invoked even in contracts that do not include a hardship clause, all based on the principle of good faith.

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[61] SCHREIBER, Anderson. 2020. *Op. cit.* pg. 396
[62] RODOVALHO, Thiago. **The Duty to Renegotiate in the Brazilian Legal System**. In: RAMOS, Roger Vidal (Org.). *Libro de Ponencias del IXº Congreso Nacional de Derecho Civil*. Lima: Lex & Iuris, 2014, pp. 83-114
[63] NANNI, Giovanni Ettore. Op. cit. pg. 95
[64] SCHREIBER, Anderson. 2020 *Op. cit.* pg. 374
[65] Paula Greco Bandeira: *"According to this theory, market subjects are not autonomous and independent operators who occasionally meet and conclude isolated operations, but are members of a community, who establish associative relationships among themselves, of a continuous nature, marked by the spirit of reciprocity and solidarity"*. BANDEIRA, Paula Greco. *Incomplete Contract*. PhD Thesis. Universidade do Estado do Rio de Janeiro, Faculty of Law, 2014.
[66] MACEDO, J. R. Ronaldo Porto. **Relational Contracts and Consumer Protection**. São Paulo: Max Limonad, 1998.
[67] AZEVEDO, Antonio Junqueira de. "**Legal Nature of the Consortium Contract. Classification of Legal Acts According to the Number of Parties and Effects. Relational Contracts. Good Faith in Relational Contracts. Contracts of Duration. Alteration of Circumstances and Excessive Burden. Sinalagma and Contract Termination. Partial Termination of the Contract. Social Function of the Contract."** *Revista dos Tribunais*, no. 832, Feb. 2005, pp. 345-374.

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This observation, in turn, leads to the conclusion that hardship clauses merely ratify, recognize, and explicitly bind a duty that is already protected by the principle of good faith. In Thiago Rodovalho[68] perspective, "it has the advantage of not only reflecting the parties' intentions but also providing them with the opportunity to outline the scope and areas of operation of the clause in question and, especially, the manner to be observed in the joint effort to readjust the contract to its original foundations." It represents a genuine recognition and commitment not only to the duty to renegotiate but also to all ancillary duties of objective good faith. This is why it is said that the hardship clause is strongly guided and substantially shaped by good faith, particularly in long-term business contracts.

Thus, it can be asserted that **objective good faith**, together with private autonomy, is one of the main pillars of the hardship clause. It is based on these two principles that contracting parties are bound to the duty to renegotiate in the face of adverse circumstances. Private autonomy binds the parties, while good faith serves as the guiding thread of this obligation, directing it toward satisfactory performance. Regardless of which party the hardship situation benefits, the primary goal is to restore contractual balance - this is the standard by which the behavior of the contracting parties should be guided[69].

When contracting parties opt for a hardship clause, the duty to renegotiate becomes more than a mere guideline; it becomes an express obligation, doubly protected by both objective good faith and the principle of *pacta sunt servanda*. When an event stipulated in the clause occurs, the obligation to renegotiate arises *ipso facto*. When the parties establish the duty to renegotiate as a priority over any other solution, it creates the subjective right to immediately demand renegotiation[70].

This right, in turn, generates for the other party not an obligation detached from any guiding principle. What happens in the case of the hardship clause is an obligation substantially shaped by good faith (especially as a duty of cooperation). Furthermore, this principle also acts as a safeguard against abuses and as a guiding thread, that is, as a foundational rule that evaluates proper performance (improper performance or

[68] RODOVALHO, Thiago. The Duty to Renegotiate in the Brazilian Legal System. *In: RAMOS, Roger Vidal (Ed.).* Libro de Ponencias del IXº Congreso Nacional de Derecho Civil. Lima: Lex & Iuris, 2014, pp. 83-114.
[69] SCHREIBER, Anderson, 2020 op. cit. pg. 403
[70] MARTINS-COSTA, Judith. *op. cit.* pg. 6

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non-performance) of the obligation to renegotiate[71]. This obligation, in turn, aims to restore to the contract what was taken away by the supervening event: the original balance.

Renegotiation should realign the "functional or dynamic *synallagma*—that is, what accompanies the life of the contract during its execution—with the genetic *synallagma*, which marked the moment of the agreement's conclusion"[72]. Along this journey, it can be said that good faith acts as the guiding principle of the duty to renegotiate; it provides direction, safeguards against abuse, and gives content to the obligation to renegotiate, whose primary function is to bring the contract back to its (re)equilibrium, adapting it to the new circumstances brought about by the supervening event.

3.2. VIOLATION OF GOOD FAITH IN RENEGOTIATIONS DERIVED FROM THE HARDSHIP CLAUSE

As discussed in the previous topics, once a supervening event occurs, the hardship clause operates automatically, obligating the contracting parties to renegotiate the affected contractual terms. This renegotiation, as seen, is substantially shaped and strongly guided by objective good faith. The affected parties must join efforts and cooperate to restore contractual balance as quickly as possible to minimize hardship.

This does not mean, as noted by Giovana Bonanno[73], compelling a party to accept the renegotiation proposal. However, objective good faith requires that any proposal be responded to within a reasonable time and that the parties engage in negotiations seriously and with a cooperative spirit[74]. Therefore, opportunistic and unfounded invocation of the clause is not permitted, nor is it acceptable for the party benefiting from the hardship to adopt delaying tactics or make unreasonable propositions or objections during negotiations. If this does not occur, several

[71] PEREIRA, Fabio Queiroz; ANDRADE, Daniel de Pádua. Op cit. pg. 7
[72] MARTINS-COSTA, Judith, *op. cit, pg. 6*
[73] SCHUNCK, Giuliana Bonanno. Long-Term Contracts and the Duty of Cooperation. PhD Thesis. University of São Paulo, 2013.
[74] SCHREIBER, Anderson, 2020 op. cit. pg. 374

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alternatives are available to the judge or arbitrator responsible for deciding any ensuing dispute[75].

Indeed, the violation of the obligation to renegotiate may stem from an outright refusal to renegotiate, but it often takes subtler forms. According to Judith Martins-Costa[76], this refusal can be seen in the subtle behavior of a negotiator who engages in obstinate and disloyal negotiations, often thinly veiled as procrastination tactics. In any case, once positive default (poor compliance with renegotiation) or negative (refusal to renegotiate) of the renegotiation obligation within the hardship clause is identified, the important question is to determine the effects of such non-performance, as the consequences may vary depending on its nature and interpretation.

In the case of positive default of objective good faith (improper compliance with the obligation), two distinct approaches can be taken. First, if we consider that the obligation to renegotiate is an obligation of means, as Schreiber argues[77], and that obligations of means are immediately shaped by the duties of good faith, as Clóvis do Couto e Silva[78] asserts, the conclusion is that a violation of objective good faith in this case constitutes strict contractual non-performance, with effects akin to non-payment. This is not an absolute or relative non-performance but rather poor compliance with the obligation—a *sui generis* category borrowed from German law[79].

Thus, even if the contracting party participates in negotiations and makes proposals, any identified violation of objective good faith in their behavior would justify applying typical remedies for contractual breaches, such as compensation for damages and invoking the rule of exceptio non adimpleti contractus[80]. This was the understanding expressed by the Superior Court of Justice in its judgment of Special Appeal n. 1655139/DF[81]. In assessing non-compliance with ancillary obligations, the Court, under Justice Nancy Andrighi, ruled that failure to observe ancillary duties could result in contractual non-performance. As such, “if the respondents, through their fault, failed to fulfill their obligation, they cannot demand the fulfillment of the obligation by

[75] MARTINS-COSTA, Judith. The Hardship Clause and the Obligation to Renegotiate in Long-Term Contracts. *Revista dos Tribunais*, 2010, p. 6.
[76] Ibidem, pg. 6
[77] SCHREIBER, Anderson, 2020 op. cit. pg. 378
[78] SILVA, Clóvis do Couto e. Obligation as a Process. Rio de Janeiro: FGV Press, 2007.
[79] CORDEIRO, António Menezes. op. cit. pg. 594
[80] SCHREIBER, Anderson, 2020 op. cit. pg. 391
[81] Brazil, Superior Court of Justice - STJ. Special Appeal No. 1655139/DF (2015/0093630-4). Appellant: Cesar de Paula Cesar and Others. Appellee: Caroline Bittencourt Barbosa. Rapporteur: Justice Nancy Andrighi. Date of Judgment: 12/05/2017, Third Panel (T3). Date of Publication: Official Gazette, 12/07/2017.

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the appellants, thus establishing in favor of the latter the exception of non-performance."

Similarly, Giovanni Nanni posits that the non-performance of the obligation to renegotiate justifies liability for damages, judicial intervention to equitably restore balance, invoking the *exceptio non adimpleti contractus*, and even the possibility of contract termination[82]. However, Nanni asserts that termination should be a last resort, as long-term contracts often involve significant investments, and termination could cause considerable harm to the contracting parties[83].

On the other hand, Marcos Ehrhardt Jr[84] argues that civil liability for breaching the duties arising from objective good faith is situated within the scope of positive contract violation[85] (imperfect performance of the obligation). However, according to Ehrhardt, such breaches imply extra-contractual (or non-contractual) liability, as the fact that good faith duties are imposed by law does not justify classifying them as contractual liability. As such, breaches of ancillary duties would fall under the general regime of civil liability.

Conversely, Giuliana Bonanno[86] argues that breaches of ancillary duties fall within the domain of contractual liability, not extra-contractual liability. Otherwise, the breach of ancillary duties could not legitimize contract termination, the invocation of the exceptio non adimpleti contractus, or damages. However, Bonanno contends that failure in renegotiations does not justify judicial revision by a third party, as it would violate the parties' private autonomy. Addressing this issue, Renata C. Steiner[87] also leans toward the position that breaches of ancillary duties fall within the realm of contractual liability, allowing for mechanisms such as the exceptio non adimpleti contractus.

In other words, even within the group that includes the violation of good faith under the concept of positive breach of contract, there are those who argue that this type of non-performance characterizes contractual non-performance (justifying

[82] NANNI, Giovanni Ettore. The obligation to renegotiate in Brazilian contract law. Revista do Advogado (Lawyer's Journal), v. 116, p. 88-97, 2012.
[83] Ibidem.
[84] EHRHARDT JR, Marcos. Civil liability for the breach of good faith. Belo Horizonte: Fórum, 2014.
[85] According to the author, positive breach of contract refers to a new category of non-performance inspired by the German BGB, which represents defective performance of the obligation, that is, in disagreement with good faith.
[86] SCHUNCK, Giuliana Bonanno. Long-term contracts and the duty of cooperation. Doctoral Thesis. University of São Paulo, 2013.
[87] STEINER, Renata C. Contractual Breach: good faith and positive breach of contract. São Paulo: Quartier Latin, January 2014.

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mechanisms like the exception of non-performance of the contract, for example), and others who believe it falls within the realm of extracontractual non-performance, which would not justify such actions.

In another perspective, Judith Martins-Costa[88] advocates for a more in-depth analysis to resolve impasses. Martins-Costa suggests considering criteria for addressing negotiation impasses and the possibility of third-party intervention—such as experts, conciliators, mediators, or arbitrators. Additionally, she highlights the importance of examining whether the contract defines the causes and criteria for modifying its content or suspending obligations and assessing the impact of non-performance on the contractual program. For Martins-Costa, it would not be problematic for an arbitrator or judge to adapt the contract to comply with negotiation duties based on the criteria and procedures stipulated in the agreement, aligning with Article 421-A introduced by the Brazilian Economic Freedom Act.

This view aligns with the positions of Fábio Queiroz and Daniel de Pádua[89], who argue that the effects of non-performance depend on the contractual provisions. They note that only in the absence of specific contractual provisions should general rules on non-performance apply. However, they caution that assessing damages from failed negotiations may be challenging, making the theory of loss of chance prudent. They also argue that the exceptio non adimpleti contractus is inapplicable to good faith non-performance, as interrupting the contract risks enabling opportunistic behavior[90].

Finally, regarding the specific enforcement of the renegotiation obligation, Brazilian law has allowed indirect enforcement through coercive measures (e.g., monetary fines). This approach aligns with the UNIDROIT Principles, which permit the imposition of penalties for non-compliance under Article 7.2.4[91].

Therefore, when examining the issue of the violation of good faith in negotiation obligations, it is observed that the doctrine presents varying positions regarding the effects of such non-performance and how to resolve negotiation impasses. It is a topic of practical relevance but remains unclear in theory[92]. While most of the authors reviewed classify the breach of good faith as a positive breach of contract, the effects and consequences of this non-performance are not yet settled in specialized doctrine.

[88] MARTINS-COSTA, Judith, 2010. op. cit. pg. 8
[89] PEREIRA, Fabio Queiroz; ANDRADE, Daniel de Pádua. 2018. *op cit.* pg. 7.
[90] Ibidem, pg. 9
[91] MARTINS-COSTA, Judith, 2010, pg. 10
[92] PEREIRA, Fabio Queiroz; ANDRADE, Daniel de Pádua. 2018. op cit. pg. 7.

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Regarding the possibility of heteronomous intervention, there are those who argue against judicial revision in cases of a breach of good faith or negotiation impasses, as well as those who advocate for the possibility of heteronomous intervention. For the purposes of this article, it is understood that heteronomous intervention should occur only in cases where the legal requirements are met, but always with due regard to any criteria established by the parties in the contract.

4. CONCLUSION

Without any pretension of exhausting the present topic, it is possible to draw some conclusions at the end of this study based on the research conducted. As observed, the hardship clause is highly useful in business contracts. Through it, the parties aim to protect themselves against the vicissitudes of time, fostering the continuity of long-term contracts, especially in scenarios where the contracting parties are more vulnerable to political, economic, and even legal instabilities.

The clause obligates the parties to renegotiate the contract terms that were disrupted by a supervening and extraordinary event capable of excessively burdening one of the parties. In essence, it serves as a middle ground between the blind adherence to *pacta sunt servanda* and the unrestrained application of *rebus sic stantibus*. In the name of preserving the contract, the primary function of this clause is to restore to the contract the balance originally agreed upon, which had been disturbed by the burdensome event.

Furthermore, it was found that the hardship clause is not limited to what is conventionally referred to as the normative hypothesis of hardship, as it is distinct from it. The requirements established in the normative hypothesis may or may not correspond to those contained in the clause since the latter's freedom is supported by the principle of private autonomy. Within the clause, the contracting parties can modulate the requirements constituting the hardship event, specify, or even exclude certain events, which may be either objective or subjective, or a combination of both. Additionally, the parties can detail the procedures to be adopted before and after the renegotiation. It is recommended that they do so, as specifying these procedures avoids undesirable heteronomous interference.

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Moving forward, it was also concluded that the normative hypothesis of hardship provided in legal instruments does not directly influence the creation of the hardship clause. Even acknowledging the binding nature of Article 478 of the Civil Code, the fact is that its normative force does not prevent private autonomy from structuring in the hardship clause elements or events different from those set forth in the normative hypothesis. When there is an overlap between the normative hypothesis and the clause, part of the doctrine supports the necessity of a hierarchy: first seeking a solution within the provisions of the contractual adjustment itself, and only then resorting to the legal norms addressing the matter.

Regarding the application of good faith, it was observed that, in the case of the hardship clause, there is an obligation substantially shaped by good faith (particularly as a duty of cooperation). Additionally, this principle also serves as a guiding rule for evaluating the proper performance of the renegotiation obligation and as a safeguard protecting the parties against unfounded opportunism. Thus, it can be affirmed that good faith, in addition to being a criterion for fulfilling the obligation, is also a shield against abuse of rights and the substance of the renegotiation obligation in the hardship clause. Even in inter-enterprise contracts, within the hardship clause, good faith plays a prominent role. First, because the contract is long-term; and second, because renegotiations rely on good faith to conclude with considerable integrity.

Finally, arriving at the most challenging aspect of this study: the effects of the breach of good faith in the obligation to renegotiate arising from the hardship clause. Upon examining the respective controversy, it was noted that most authors tend to classify the violation of good faith as positive non-performance—a distinct category of non-performance imported from the German *BGB*. Among those who adopt the concept of positive non-performance, some argue that the responsibility is non-contractual, justifying this position by stating that good faith is a binding principle whose effects cannot be chosen or excluded by the parties. On the other hand, some authors contend that the responsibility is contractual because, otherwise, the aggrieved party would not have access to typical remedies associated with this category of liability.

Moreover, it was also found that some authors advocate for a more case-specific analysis to address non-performance of the obligation and even impasses in negotiations. This line of thought suggests evaluating whether the contract provides internal criteria for resolving impasses and the impact of non-performance on the structure of the contract. Furthermore, in cases of absolute non-performance, part of

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the doctrine recommends applying the theory of loss of a chance instead of resolving through the imposition of damages, given the difficulty of quantifying the harm arising from the failure to conduct negotiations.

Finally, regarding the enforcement of the obligation, it was observed that specific performance of the obligation is possible, but only indirectly through coercive methods, such as the imposition of fines. However, considering that the negotiator cannot be replaced by a third party, the benefits of a *manu militari* renegotiation are questionable.

REFERENCES

AQUINO, Leonardo Gomes. **The conceptual particularities of the hardship clause.** Revista Jurídica, IJP - Instituto Jurídico Portucalense, 2012.

AZEVEDO, Antonio Junqueira de. **"Legal Nature of the Consortium Contract. Classification of legal acts regarding the number of parties and effects.** Relational contracts. Good faith in relational contracts. Long-term contracts. Change of circumstances and excessive burden. Synallagma and contract resolution. Partial resolution of the contract. Social function of the contract." Revista dos Tribunais, no. 832, Feb/2005, p. 345-374.

BANDEIRA, Paula Greco**. Incomplete Contract.** Doctoral Thesis. Universidade do Estado do Rio de Janeiro, Faculty of Law, 2014.

BRAZIL, Superior Court of Justice - STJ. **Special Appeal No. 1655139/DF (2015/0093630-4).** Appellant: Cesar de Paula Cesar and Others. Appellee: Caroline Bittencourt Barbosa. Reporter: Minister Nancy Andrighi, Date of Judgment: 05/12/2017, T3 - THIRD PANEL, Date of Publication: DJe 07/12/2017.

CAMINHA, Uinie; LIMA, Juliana Cardoso. **Incomplete contract**: a perspective between law and economics for long-term contracts. Revista Direito GV, v. 10, p. 155-200, 2014.

CORDEIRO, A. M. Civil. **On Good Faith in Law**. Coimbra: Almedina, 1989.

CORDEIRO, António M. **Treatise on Civil Law II.** Coimbra: Grupo Almedina (Portugal), 2021. E-book. ISBN 9789724091266. Available at: https://integrada.minhabiblioteca.com.br/#/books/9789724091266/. Accessed: Oct. 01, 2023.

DA SILVA, Luis Renato Ferreira. Termination due to excessive burden: prerequisites and availability. **Revista de Direito Civil Contemporâneo** - RDCC (Journal of Contemporary Private Law), v. 19, 2019.

Submetido em: 02/03/2024
Aprovado em: 30/03/2024
Avaliação: Double Blind Reviewe
ISSN: **2316-2880**

DOS SANTOS, André Luiz Rigo Costa. *Hardship Clause: A Possible Solution to* Ensure International Contractual Relations in Times of Crisis Like the Brazilian One. **Revista de Direito Internacional e Globalização Econômica**, v. 1, no. 01, p. 146, 2017.

EHRHARDT JR, Marcos. **Civil liability for the breach of good faith.** Belo Horizonte: Fórum, 2014.

FORGIONI, Paula A. Integration of business contracts: gaps, judges' role, good faith, and its limits. **Revista dos Tribunais**, 2015.

FORGIONI, Paula Andrea; IRTI, Natalino. Business Contracts: General Theory and Application. **Revista dos Tribunais**, 2016.

GLITZ, Frederico Eduardo Zenedin. **A Reading of Contemporary Contractuality: Injury, Hardship Clause, and Contract Conservation**. Master's Dissertation. Faculty of Law (Sector of Legal Sciences), Universidade Federal do Paraná, 2005.

GLITZ, Frederico Eduardo Zenedin. International contract in crisis: reflections on force majeure and hardship clauses in times of Covid-19. **Revista da Faculdade de Direito da Universidade Federal de Uberlândia,** 2020.

GOMES, Orlando***. Contracts.*** 26th edition. Editora Forense, 2008.

MACEDO, J. R. Ronaldo Porto. **Relational Contracts and Consumer Protection**. São Paulo: Max Limonad, 1998.

MARTINS-COSTA, Judith. **The hardship clause and the obligation to renegotiate in long-term contracts.** Revista dos Tribunais, 2010.

MARTINS-COSTA, Judith. **Comments on the New Civil Code.** Grupo Gen-Editora Forense, 2007.

MELO, Jairo Silva. International **Contracts and Hardship Clauses**. São Paulo: Aduaneiras, 1999.

NANNI, Giovanni Ettore. The obligation to renegotiate in Brazilian contract law. **Revista do Advogado**, v. 116, p. 88-97, 2012.

NETO, Francisco dos Santos Amaral. **Private Autonomy as a Fundamental Principle of the Legal Order: Structural and Functional Perspectives**. 1989. Senado Library. Available at: https://www2.senado.leg.br/bdsf/bitstream/handle/id/181930/000444811.pdf?sequence=1&isAllowed=y. Accessed: Nov. 21, 2023.

OPPETIT, Bruno. Adapting international contracts to changing circumstances: the hardship clause. In **Journal du Droit International,** no. 4. Paris: Editions Techniques, Oct-Dec 1974, p. 794-814.

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Avaliação: Double Blind Reviewe
ISSN: **2316-2880**

The normative fields of Objective Good Faith: the three perspectives of Brazilian Private Law. In: AZEVEDO, Antonio Junqueira de; TÔRRES, Heleno Taveira; CARBONE, Paolo (Orgs.). **Principles of the New Brazilian Civil Code and Other Topics.** Homage to Tullio Ascarelli. São Paulo: Quartier Latin, 2008, p. 388-421.

PEREIRA, Fabio Queiroz; DE PÁDUA ANDRADE, Daniel. *The obligation to renegotiate and the consequences of its breach.* **Revista de Direito Civil Contemporâneo** - RDCC (Journal of Contemporary Private Law), v. 15, p. 209-238, 2018.

PERILLO, Joseph M. **Force majeure and hardship under the UNIDROIT Principles of International Commercial Contracts.** Tul. J. Int'l & Comp. L., v. 5, p. 116, 1997. Available at: https://ir.lawnet.fordham.edu/cgi/viewcontent.cgi?article=1782&context=faculty_scholarship. Accessed: Oct. 16, 2023.

PINHEIRO, Rosalice Fidalgo. **Abuse of rights and contractual relations.** Master's Dissertation. Legal Sciences Sector. Faculty of Law, Universidade Federal do Paraná (UFPR), 2000.

Principles of European Contract Law – PECL. Available at: https://www.trans-lex.org/400200/_/pecl/#head_101. Accessed: Oct. 28, 2023.

RODOVALHO, Thiago. The duty to renegotiate in Brazilian legal order. In: Roger Vidal Ramos (Org.). **Libro de Ponencias del IXº Congreso Nacional de Derecho Civil.** Lima: Lex & Iuris, 2014, pp. 83/111.

SCHREIBER, Anderson. Building a duty to renegotiate in Brazilian law. **Revista Interdisciplinar de Direito,** v. 16, no. 1, Jan./June 2018.

SCHREIBER, Anderson. **Contractual Balance and Duty to Renegotiate.** Available in Minha Biblioteca (2nd edition). Editora Saraiva, 2020.

SCHUNCK, Giuliana Bonanno. **Long-term contracts and duty of cooperation**. Doctoral Thesis. Universidade de São Paulo, 2013.

SILVA, Clóvis do Couto e. **Obligation as a process.** Rio de Janeiro: Editora FVG, 2007.

STEINER, Renata C. **Contractual Breach:** Good Faith and Positive Contract Breach. São Paulo: Quartier Latin, January 2014.

SZTJAN, Rachel. **Supply chain and contractual incompleteness**. Available at: https://www.yumpu.com/pt/document/view/12641767/supply-chain-e-incompletude-contratual-systemas-revista-de-. Accessed: Sept. 27, 2023.

TARTUCE, Flávio**. Civil Law Manual**. Single Volume. 12th edition. Rio de Janeiro: Método, 2022.

Submetido em: 02/03/2024
Aprovado em: 30/03/2024
Avaliação: Double Blind Reviewe
ISSN: **2316-2880**

UNIDROIT – International Institute for the Unification of Private Law. Principles of International Commercial Contracts. Rome: Unidroit, 2016. Available at: https://www.unidroit.org/wp-content/uploads/2021/06/Unidroit-Principles-2016-Portuguese-bl.pdf. Accessed: Oct. 16, 2023.