

"RENEGOTIATION AS A MECHANISM FOR ENSURING THE STABILITY OF INTERNATIONAL COMMERCIAL CONTRACTS"

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Abstract.

The hardship clause in international trade contracts is a flexible mechanism designed to maintain the balance of the contract in the face of unforeseen circumstances. This clause is included either within the contract or in a separate agreement, clearly defined to protect the parties from changes that may arise due to economic, political, or financial shifts. It is required that the event be beyond the parties' control, unpredictable, and have a significant impact on the economic balance of the contract. This clause may necessitate renegotiation if the event causes unreasonable hardship for one party in fulfilling its obligations. However, ordinary risks anticipated by each contracting party do not justify the application of this clause.

Keywords: Renegotiation, Contractual, balance, International, Contracts.

INTRODUCTION:

Contracts in the field of technology commerce face unique challenges and difficulties due to the fast-paced and advanced nature of the technology industry. In addition, the conflict between international trade practices and various domestic and international legislations and regulations adds to the complexity and difficulty of concluding and executing cross-border international commercial contracts. Another layer of complexity arises from the possibility of changing contractual circumstances, which may disrupt the contractual balance and expose parties to legal uncertainty. Therefore, there is a pressing need to explore mechanisms that ensure the proper performance of such contracts in the event of unforeseen changes.

These types of contracts do not always align neatly with classical legal theories. As society and technology evolve and as the commercial environment undergoes transformation, new forms of contracts may emerge that require a different legal perspective and analytical approach.

Undoubtedly, the bargaining power of the parties plays a pivotal role in drafting contractual clauses. However, contractual terms may sometimes be vague or ambiguous, making it necessary to renegotiate in order to clarify these terms and precisely define the rights and obligations of the parties. Hence, it may become essential for parties to renegotiate contract terms to ensure the continuity of the commercial relationship, particularly in instances where the contract no longer aligns with the evolving needs of the parties over time. In this context, renegotiation clauses represent an important mechanism, particularly when applied to modern technology contracts.

This has led us to investigate contractual techniques that aim to restore the balance of international commercial contracts, which are among the most susceptible to change. This raises a fundamental question : What are the most effective contractual mechanisms to ensure the stability and balance of international contracts? Can renegotiation clauses serve to restore this balance? And what is the legislative position regarding such contracts?

To address these questions, we have divided this study into two main sections. The first section will discuss the importance of negotiation in international commercial contracts. The second section will focus on the technique of renegotiation, highlighting it as one of the most critical contractual tools for safeguarding the interests of contracting parties, especially during the post-contractual phase when unforeseen changes occur.



Section One: The Importance of Negotiation in International Commercial Contracts.

Although pre-contractual negotiation takes place prior to the final conclusion of the contract, it serves as a safeguard even during the execution phase—particularly in transactions involving large-scale projects with significant financial value, which naturally carry substantial risk for the parties involved. Furthermore, such transactions often require numerous negotiation sessions and the exchange of detailed information and proposals, due to the technical and legal complexities that hinder immediate agreement without prior negotiation.

Through negotiation, parties are able to discuss and determine key contractual elements such as product or service specifications, quantity, quality, pricing, payment methods, satisfaction guarantees, and delivery timelines.

For instance, a supplier may include a clause exempting them from liability if non-performance was not due to negligence or fault on their part. The supplier may also argue that the recipient's failure to properly receive or integrate the technology contributed to the breach, thereby shifting liability. In cases where the contract does not explicitly address the issue of damages, courts are left to assess compensation—an often difficult task, particularly when the breach involves obligations such as performance guarantees or warranties¹.

Renegotiation is explicitly addressed in the provisions of the UNIDROIT Principles, particularly in situations involving changes that undermine the fundamental basis of performance. These changes need not merely create a minor imbalance in the contractual relationship; rather, they refer to significant economic disruptions that alter the contractual equilibrium to such an extent that they substantially affect the obligations of the contracting parties².

Contractual negotiations also allow the parties to define the level of confidentiality and ensure the protection of sensitive commercial information, such as product details, processes, or pricing structures.

Negotiations may further address dispute resolution mechanisms, including procedures for inspection, mediation, and arbitration, all of which help in mitigating the risk of potential future legal conflicts.

Through the negotiation process, parties can build strong relationships and foster mutual trust, thereby promoting cooperation and contributing to the joint success of commercial ventures.

Negotiation also enables the clarification of warranty coverage, ensuring that the client fully understands their rights and responsibilities in the event of defects or performance issue.

In addition, the negotiation phase provides an opportunity to define cancellation and refund policies, which are particularly crucial in international commerce. Given the possibility of shippings issues or delays in product delivery, contractual negotiations help establish clear terms for order cancellations and refunds³.

In addition, contractual negotiations may be used to define how personal customer data and other sensitive or confidential information will be handled and protected.

Moreover, the negotiations may address amendments to the original contract, which are central to the present discussion. Such amendments typically arise due to changes in circumstances or external conditions, and contractual negotiations provide a framework for discussing and agreeing upon these modifications in a mutually acceptable manner.

¹ Alioui, K. (2010). Codification of the international commercial contract for technology transfer in Morocco. Moroccan Center for Studies and Research on Judicial and Legal Professions, Dar Al Qalam, First Edition, p. 214.

² <https://www.unidroit.org/fr/instruments/contrats-du-commerce/principes-dunidroit-2016/>.2021.

³ Belhadj, A. (2011). Problems of the pre-contractual stage in light of Algerian civil law: A comparative study. University Publications Office, Algeria, p. 100.



The concept of negotiation in international commercial contracts does not differ substantially from that in traditional contracts. However, the negotiation phase in international trade contracts is particularly critical, as it directly impacts the stability of the contractual relationship and the parties' ability to effectively fulfill their obligations. This is largely due to the legal and procedural complexities involved, which pose significant challenges—especially given the diversity of legal systems and the variation in commercial customs and practices across different countries⁴.

One of the most significant challenges facing the negotiation phase in this context is the difficulty in determining the applicable legal jurisdiction and the competent judicial authority in the event of a dispute. Each party typically seeks the application of its national law, which can lead to disagreements from the early stages of negotiation. Such disagreements may hinder the ability to reach a balanced agreement, especially when the applicable law or dispute resolution mechanisms have not been expressly agreed upon⁵.

In addition, some international contracts suffer from a lack of full disclosure of essential information regarding the product or service, such as the nature of the goods, packaging methods, transportation conditions, or the manufacturer. This leads to discrepancies in the parties' expectations during negotiations and increases the likelihood of breach of contract at a later stage.

Often, a suitable legal framework for regulating the negotiation phase independently is lacking. Most commercial legislations focus on completed contracts, creating a legal gap—particularly when one party withdraws unexpectedly after prolonged negotiations or makes misleading offers without a genuine intention to honor them.

Challenges also arise from the diversity of legal and commercial cultures. Concepts related to good faith, commercial customs, and the enforceability of negotiations vary from one country to another. In some legal systems, negotiations are not considered a source of obligation, while in others, a party acting in bad faith may be held liable even before the contract is signed⁶.

The negotiation phase, in practice, may encounter difficulties related to language barriers, currency differences, export and import procedures, customs regulations, and terms of transportation and insurance. These challenges make negotiations more complex than domestic negotiations, often requiring the parties to rely on legal advisors, translators, and international shipping specialists, which in turn increases costs and extends the time needed to reach an agreement.

In light of these challenges, it becomes essential to establish a clear international legal framework that governs the negotiation phase, taking into account the peculiarities of traditional commercial contracts while promoting the principles of transparency, disclosure, and good faith. It is also advisable for international trade agreements to include specific clauses that require the parties to act responsibly during negotiations and to clarify the legal obligations arising from the exchange of offers and promises before the final contract is signed.

There are various challenges and difficulties associated with negotiating international commercial contracts and applying the relevant laws. Sometimes, identifying the contracting parties can be difficult, and providing comprehensive information to the parties involved and consumers regarding the product or service offered can lead to issues during the contract execution phase.

⁴ Jawad, J. M. (2006). The framework contract: An analytical study. *Rafidain Journal of Law*, Vol. 8, No. 28, College of Law, University of Mosul, p. 10.

⁵ Jaziri, H. (2020). *Negotiations in international commercial contracts*. University Publications Center, University of Souk Ahras, p. 22.

⁶ Tekouache, K., & Boukmash, M. (2018). The legal effects of electronic negotiations. *Journal of Legal and Political Studies*, Ammar Thléji University of Laghouat, Issue 08, p. 159.



In many jurisdictions, there is no adequate legal framework for negotiations, which means that current laws may not be sufficient to address the challenges arising from this type of negotiation⁷.

The practical importance of this technique lies in the fact that it is a contractual freedom not dependent on the fulfillment of other conditions, such as the requirement for impossibility of performance to be independent of the will of the contracting parties⁸.

On the contrary, renegotiation is a reflection of the parties' will.

It is also important to note that the documents and data exchanged during the negotiation phase of contracts are crucial for the parties to understand the technical and technological capabilities of the contracting party. However, these documents may merely represent voluntary statements that are not subject to any judicial follow-up, meaning that there could be risks regarding the enforceability of these obligations during the actual execution phase of the contract. Therefore, there is a need to develop more effective contractual techniques, as the documents accompanying negotiations are not sufficient to ensure the proper performance of these contracts⁹.

Section II: The Role of Renegotiation Techniques in Establishing the Balance of International Commercial Contracts.

This clause is agreed upon either within the contract itself or in a separate agreement in anticipation of unforeseen circumstances outside the control of the contracting parties. It must be clear and explicitly referenced in the contract. As it is an agreement-based clause, its formulation and content vary depending on the nature of the contract, as there is no specific meaning or content derived from any particular law. Instead, it depends on what the parties agree upon in their contract.

As for the scope of events to which this clause applies, the parties have complete freedom. Through contractual practices, the necessary elements for the event have emerged. The event must be general, completely independent of the debtor, and it must be unforeseeable. This condition is linked to the debtor's inability to prevent it.

The most important condition for applying this technique is that the event must result in a disruption of the contract's balance and the obligations of the parties during the execution phase. The event should cause an economic disturbance in the contract. Therefore, the contracting parties should include a certain level of risk in which the debtor becomes excessively burdened in fulfilling their obligation.

Ordinary risks associated with contracts do not lead to a severe disruption in the contractual balance. The natural disruption caused by these ordinary risks, which each party anticipates when contracting, does not justify the application of the renegotiation clause¹⁰.

International commercial contracts are among the most susceptible to disruptions and economic, political, and social changes, due to their complex nature and their close relationship with the global economy. These contracts are often long-term and involve the exchange of strategic goods or services, making their balance particularly sensitive. In such an unstable environment, the need arose to develop new, more flexible contractual mechanisms that can respond to unexpected changes, with renegotiation techniques being at the forefront.

⁷ Brag, A. (2018). The particularities of negotiations in international commercial contracts. *Journal of Law and International Business*, Issue 37, p. 88.

⁸ Morouk, A. (2014-2015). The renegotiation clause in international commercial contracts. PhD Dissertation in Private Law, Faculty of Law, University of Algiers, p. 38.

⁹ Belhadj, A. (2011). *Op. cit.*, p. 100.

¹⁰ Boukhalfa, A. K. (2018). The renegotiation clause : A mechanism for restoring economic balance in international investment contracts. *Journal of Legal and Economic Research*, Vol. 01, Issue 03, University of Kasdi Merbah, Ouargla, December 2018, P181.



It became necessary for parties involved in these contracts to seek alternative means to protect the debtor and all parties from issues arising during the execution phase when the conditions change unexpectedly. These contractual techniques emerged after the classical solutions, such as the theory of changed circumstances and force majeure, were found to be insufficient in protecting the parties from changes that affect the smooth running and execution of the contract. These contracts often face various economic conditions that prevent them from being executed as originally agreed upon¹¹.

The renegotiation clause, also known as the Hardship Clause, arises when included in an international commercial contract. It reflects the parties' readiness to return to the negotiating table if unforeseen circumstances disrupt the balance of the contract.

This obligation is a legal contractual tool that grants the party affected by significant economic or political changes the right to request renegotiation of the contract terms, without it being considered a breach or failure to perform.

The difference between this clause and classical theories (such as force majeure) lies in the fact that renegotiation does not require impossibility of performance. It is sufficient for the performance to become excessively burdensome and unforeseen.

Therefore, it is necessary to understand the renegotiation clause and its practical application within the context of Algerian Civil Law, as this clause provides a degree of security for the parties and allows them to renegotiate at any time they deem necessary.

Here, the principle of good faith plays a crucial role, as the parties must refrain from any actions that could hinder or cause the failure of negotiations. They should adopt an honest approach that serves the interests of both parties without causing harm to the other. The principle of good faith is reflected in preventing fraud and deception, not exploiting the weakness of the other contracting party, and fostering cooperation, information exchange, and advice.

This principle is more of a legal obligation than a contractual one and is part of the public order governing cooperation between the parties. It allows for the reconsideration of contract terms when unforeseen changes impact its performance.

The main function of the renegotiation clause is to maintain the balance of the contract, especially in its financial aspects. It ensures the continuity of international contracts and is an effective tool compared to classical legal theories.

As for the conditions required to activate this clause, they include the occurrence of an unexpected event¹².

CONCLUSION:

In light of the rapid and successive changes in the international economic and commercial environment, international trade contracts have become vulnerable to imbalances that affect their stability. Experience has shown that traditional solutions are no longer sufficient to address the issues arising from these transformations, necessitating the development of flexible contractual mechanisms that allow parties to adapt and respond positively to emerging circumstances.

The renegotiation technique is one of the most prominent adaptive mechanisms, as it allows for revisiting the terms of the contract in a friendly and cooperative manner without the immediate recourse to the courts, while adhering to the principles of good faith and contractual balance.

¹¹ Ben Drees, H. (2020). Renegotiation as a flexible contractual technique to address the impacts of the COVID-19 pandemic on contract performance. International Scientific Conference on the Substantive and Procedural Legal Aspects of the COVID-19 Pandemic, Faculty of Law, University of Sharjah, October 20, 2020, p. 02.

¹² Boukhalifa, A. K, op, cit., p. 178.



However, the success of this technique largely depends on its legal recognition, careful drafting within the contract, and the provision of a legislative framework that regulates its conditions and activation mechanisms, ensuring the protection of all contracting parties.

The key recommendations that can be made from this discussion are as follows:

Legal Framework Flexibility: There is a need for legal provisions that are more flexible to address the continuous changes in commercial practices and to shift away from traditional methods of dealing with contracts and their execution.

Legislative Reforms: Legislative amendments are needed to protect parties involved and ensure balance in contracts, taking into consideration the realities of global commerce and the unpredictability of international relations.

Development of Legal Mechanisms: It is essential to develop legal frameworks that facilitate negotiation and guarantee the protection of all parties involved. This includes establishing mechanisms to verify the correct implementation of international contracts, especially during the execution phase.

Application of CISG Principles: Some principles derived from the United Nations Convention on Contracts for the International Sale of Goods (CISG) can be applied, ensuring balance of rights and obligations between contracting parties in international contracts. This also provides greater legal protection for weaker parties, such as consumers or small businesses.

Legal Mechanisms for Negotiation and Execution: Modern legislations should incorporate flexible and updated legal mechanisms that align with new approaches to negotiation and contract execution. For instance, legal frameworks should regulate the use of Artificial Intelligence techniques and electronic systems in negotiations and execution, facilitating the rapid and effective application of international commercial contracts while protecting parties from potential legal risks.

Monitoring the Execution of International Contracts: During the execution phase, it is crucial to monitor the fulfillment of the obligations outlined in international contracts, particularly those involving multiple parties from different countries. Electronic tracking techniques and legal guarantees can ensure proper implementation, enhancing the role of regulatory bodies, whether governmental or private.

For example, creating detailed laws regarding the verification of compliance with contract terms using modern technologies, such as shipment tracking systems, can help easily monitor the obligations of the parties. This will reduce legal risks and enhance trust between contracting parties.

Establishing a flexible legal framework that updates the legislations governing international trade contracts and enhances the protection of all parties is vital for businesses to respond to changing challenges. These legislations should align with the latest global technologies and safeguard the rights of all stakeholders involved.

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