Hardship in an Age of Systemic Disruption
Plus ça change…

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Foreseeability occupies a central place in the doctrine of hardship; but its prominence sometimes obscures the question at the heart of the law of exceptional relief more broadly: which risks belonged to the bargain and which did not? At its core, hardship is a doctrine of risk allocation; foreseeability has often served as a means of identifying that allocation and, at times, as a proxy for it. It is therefore an important part of the enquiry, but it is not the enquiry itself: the central question is invariably whether the consequences of the relevant development belonged to the sphere of risks that the parties should reasonably be taken to have assumed when they contracted, such that the resulting loss should remain where it falls or the law should intervene to re-allocate it.

That proposition is hardly revolutionary. The notion that hardship concerns the allocation of risk rather than the contents of the parties' contemplation is embedded, in one form or another, in most of the world's principal hardship regimes. Yet reminders are useful where familiar language begins to obscure familiar ideas. Contemporary discussion often treats foreseeability as though it were the organising principle of hardship; more often than not, it is merely one of the means by which the law seeks to identify a deeper allocative judgment.

The point becomes clearer when one steps back from doctrinal vocabulary. French law on *imprévision* speaks of the assumption of risk; German law asks whether adherence to the original bargain remains reasonable having regard, among other matters, to the contractual allocation of risk; Italian law distinguishes between ordinary and extraordinary risk through the concept of *alea normale*; the UNIDROIT Principles refer expressly to assumption of risk; Arab codifications frequently invoke exceptional and unforeseeable events producing excessive onerousness; the common law traditionally rejects any general doctrine of hardship but reaches many of the same solutions through force majeure provisions, price-adjustment mechanisms, and contractual hardship clauses. These are not distinct intellectual enterprises: each is attempting, in its own way, to identify the boundary between those developments that belong to the ordinary hazards of commercial life and those sufficiently remote from the bargain to justify adjustment. The vocabulary differs; the enquiry remains recognisably the same.

Seen in that light, the role of foreseeability becomes easier to understand. Foreseeability invites questions about knowledge, imagination, contemplation, and prediction: did the parties foresee the event; could they have foreseen it; should they have foreseen it? Yet hardship cases rarely turn upon such matters in any straightforward sense. A tribunal does not usually care whether a contractor could imagine a war; every competent contractor presumably can. Nor does it care whether

a trader can imagine sanctions, inflation, supply disruption, regulatory change, banking instability, or geopolitical upheaval; every competent trader can imagine those too. What the tribunal seeks to determine is whether the consequences of those developments belong to the sphere of risks the parties accepted when they contracted. Foreseeability therefore functions less as a destination than as a signpost; it is evidence pointing toward allocation, not allocation itself.

The distinction is not merely conceptual; it is visible in outcomes. An event may be foreseeable and yet remain outside the risks the parties should reasonably be taken to have assumed; equally, an event may be unforeseeable and yet remain within risks allocated by the structure of the transaction itself. That is why doctrines employing very different vocabularies so often converge in practice: they are travelling by different routes toward substantially the same destination—the identification of those losses that remain where they fall because they belong to the bargain and those that do not. It is against that background that the significance of modern systemic disruption should be understood.

Modern disruption has not altered that enquiry; what has changed is the environment within which the enquiry must now be performed. That environment has changed in two important respects. The first concerns transmission. Earlier eras were hardly strangers to severe disruption—wars, revolutions, embargoes, inflations, financial crises, sovereign defaults, banking collapses, and geopolitical realignments have accompanied commerce for centuries—but disruption now travels through systems of interconnectedness whose density has few historical precedents. A sanctions regime imposed in one jurisdiction reverberates through banking networks in another, through insurance markets in a third, through shipping routes, commodity markets, financing arrangements, global compliance systems, and contractual chains spanning half the globe, until geographical remoteness becomes an increasingly poor measure of commercial exposure and commercial proximity progressively detaches itself from physical location. The manufacturer far removed from the originating event may nevertheless find himself directly exposed to its consequences through supply-chain disruption, insurance restrictions, payment difficulties, commodity-price movements, regulatory obligations, or the distress of counterparties several steps removed from the original shock; transmission, rather than containment, has become the normal condition of economic life.

The second development is temporal rather than spatial, and may ultimately prove even more significant: what has changed is not merely the transmissibility of disruption but the collapse of the intervals between disruptions. Hardship doctrine historically emerged against a background in which severe disturbances were ordinarily separated by periods long enough for equilibrium assumptions to recover their practical force; a war interrupted peace; an embargo interrupted trade; a financial crisis interrupted normal commerce. Increasingly, however, one disruption succeeds another before the effects of its predecessor have dissipated: sanctions yield

to tariffs; tariffs to supply-chain dislocation; supply-chain dislocation to energy shocks; energy shocks to inflation; inflation to conflict; conflict to regulatory fragmentation; regulatory fragmentation to some fresh uncertainty. The significance lies not in the gravity of any individual event but in their rapid cumulative succession. Exceptional disruption remains exceptional only when viewed in isolation; taken together—as they must—successive disruptions increasingly resemble a recurring condition of commercial life rather than a departure from it. The doctrine remains concerned with extraordinary developments; the difficulty is that extraordinary developments increasingly arrive in such varied and rapid succession that they begin to resemble the ordinary condition of commercial life.

Still, none of this requires a new doctrine; nor does it demonstrate that traditional concepts of hardship have somehow ceased to function. It does, however, make the allocative enquiry more difficult. The more frequently severe disruptions occur, the more readily their effects propagate through interconnected systems, and the more persistently commercial actors operate under conditions of cumulative instability, the harder it becomes to distinguish ordinary commercial exposure from genuinely exceptional dislocation. The question remains the same; the factual environment has become more demanding.

It is at this point that pricing becomes relevant—not because pricing supplies a replacement for foreseeability, still less because markets define legal obligations, but because pricing frequently reveals something about how commercial actors themselves understand the allocation of risk. Commercial life is saturated with allocative mechanisms: contingencies are built into bids; insurance is purchased; exposures are hedged; suppliers are diversified; contracts are indexed; adjustment clauses are negotiated; risks are transferred, retained, fragmented, pooled, or distributed. These mechanisms matter because they illuminate the practical boundary between ordinary and extraordinary risk; they do not determine that boundary. A party may assume a risk and price it badly; equally, a party may price a risk carefully without assuming it in the juridical sense. Pricing therefore cannot define assumption of risk; neither, however, can it be dismissed as irrelevant. It frequently reveals what commercial actors ordinarily treat as belonging to the bargain and what they do not.

Furthermore, commercial actors do not merely allocate risk individually; they frequently reveal, through their collective behaviour, a shared understanding of which risks ordinarily belong to the bargain and which do not. In many markets, particularly those characterised by vigorous competition, sophisticated actors recognise the existence of certain exposures, yet decline, almost uniformly, to price them in full. The explanation is not ignorance; nor is it optimism: it is that the cost of fully pricing the relevant exposure would render participation commercially unattractive, if not virtually impossible, across the field. The risk is recognised; its consequences are understood; yet it remains only partially incorporated into price because full allocation

would produce bids so far removed from prevailing market expectations as to cease to be commercially viable.

The significance of pricing should be handled with care. The law does not relieve a party merely because it chose to bid aggressively, nor because it omitted a contingency that a more cautious competitor might have included. Equally, however, there may be circumstances in which the near-universal absence of pricing for a particular category of severe exposure reveals something important about commercial expectations. Where sophisticated bidders converge around a range of prices that omits a particular contingency; where the omitted contingency is understood by all participants; where its incorporation would have produced materially higher bids across the field; and where the employer nevertheless proceeds without requiring express pricing of the exposure, the resulting pattern may reasonably be treated as evidence—not conclusive evidence, but evidence nonetheless—that the risk was not generally understood as forming part of the ordinary bargain.

The significance extends beyond the bidders themselves. Commercial transactions do not occur in an informational vacuum: an employer receiving a cluster of broadly convergent bids is ordinarily entitled—indeed, expected—to infer something from that convergence; equally, it may be taken to understand that certain extraordinary exposures have not been comprehensively priced where their inclusion would have produced a markedly different commercial result. Indeed, had the employer wished to transfer such an exposure unequivocally, the natural course might have been to do so expressly: to identify the risk, allocate it in terms, and require bidders to price it accordingly. The absence of such a requirement is not decisive; nor does it reverse the burden of proof. It may, however, form part of the wider evidentiary picture through which tribunals determine what risks the parties should reasonably be taken to have allocated to the bargain.

Once again, the point is not that markets determine legal obligations; still less that collective pricing behaviour creates legal rules. The point is narrower. Where a market of sophisticated actors consistently treats a category of extreme exposure as lying beyond the contingencies ordinarily incorporated into price, that behaviour may provide valuable evidence of where commercial participants themselves locate the boundary between ordinary and extraordinary risk. A tribunal may ultimately place that boundary elsewhere; but it ought not lightly to disregard the practical judgment of the very actors whose bargain it is being asked to interpret.

Ultimately, no comprehensive formula exists by which tribunals can reliably determine the boundary between assumed and excluded risks; nor is one likely to emerge. In practice, tribunals understand that, at its core, hardship concerns risk allocation, and that price has an important signalling function in that enquiry. They gravitate toward three forms of price evidence. The first is the claimant's own pricing: contingencies, bid assumptions, internal risk assessments, costing models, and pricing memoranda frequently reveal what the claimant itself regarded as lying within the

ordinary sphere of the bargain. That is useful intelligence but insufficient by itself to ground analysis. The second is the competitive field: as already noted, rival bids may disclose what the market regarded as commercially assumable; a development that overwhelms every serious bidder presents a materially different picture from one that undermines only the claimant's unusually aggressive assumptions. The third is the history of the variable that moved: labour rates, freight costs, exchange rates, commodity prices, energy costs, and similar metrics frequently exhibit historical distributions against which the disputed movement may be measured. None of these price sources is decisive; each illuminates the allocative enquiry from a different angle; together they provide a more reliable guide than abstract debates concerning foreseeability conducted at a distance from commercial reality.

Price signals, important though they are, remain only part of the allocative enquiry. Whether they acknowledge it or not, tribunals engage in a fundamentally synthetic exercise: they examine the structure of the bargain, the nature of the transaction, the express allocation of risk, the foreseeability of developments, the magnitude of the disruption, the extent of the resulting burden, the commercial expectations against which the contract was concluded, and the practical evidence—including price evidence—revealing how the relevant market ordinarily allocates exposure.

And so it has always been; it is just that the enquiry into how far a promise extends into a rapidly deteriorating and increasingly interconnected world has become a good deal harder.