In view of these contractual trends, it seems clear that, when provision is made to anticipate the consequences of force majeure events, the parties tend, to depend much more on the terms of their agreement than an the subjacent rules of the system of law applicable to the contract. This raises the question whether there are now in existence, rules of contractual origin sufficiently independent from municipal law to reveal the existence of a new "law-merchant" or Lex mercatoria in the making. As yet, there is no definite answer to the question.

[Set out in detail.]

[...]

Hardship clauses are usually highly complex and vary significantly from case to case. However, in general terms, it can be stated that the provisions in current use have two basic common features, namely the determination of the events which may trigger the readjustment process and the establishment of an appropriate procedure for the adaptation of the relationship to new circumstances.¹⁴

[Set out in detail.]

[...]

This Party must inform the other Party within a time limit of -- from the moment when it became aware of the event. at the same time precisely describing the event relied on and explaining in what way it falls under the provisions of the present article: it will communicate to the other Party without delay every element required for an assessment in the matter of its possession.

[citing the ICC Hardship-clause, ECC Doc. 460 233, 1978 - II - 15 - 50]

[...]

The modern view is to consider that the arbitration clause is "separable" from the main contract and that if one of the parties challenges the validity of the main contract, the issue ought to be determined by the arbitrators rather than the courts. In other words, the authority of the arbitrators to decide all disputes between the parties would stem from the arbitration clause itself rather than from the agreement in which it is contained and the alleged invalidity of that agreement would be subject to arbitral settlement rather than judicial determination.

[...]

309 et seq.

One of these [new issues] relates to the situation, which is now frequent, where a group of companies are involved in the carrying out of certain transactions, but the arbitration clause is signed only by one company or by other companies. In this case, the question is whether the clause can be invoked by, or against, the companies which have not formally consented to it. Société Isover de Saint Gobain v. Société Dow Chemical France et al.³ illustrates the nature of the problem.
Considering that the concept of "group of companies" is acknowledged by the usages of international trade, the arbitral tribunal estimated that the non-signatories could also be parties to the proceedings.


Referring Principles:

- II.2 - Agent acting on behalf of group of companies
- IV.6.9 - Duty to notify / to cooperate
- VI.3 - Force majeure
- VIII.1 - Definition
- XIII.2.4 - Principle of separability of the arbitration clause