Is the Duty to Cooperate in Long-term Contracts a Substantive Transnational Rule in International Commercial Arbitration?

I. INTRODUCTION

The title of this article merits some initial comments. First, the title is phrased as a question, which is meant to indicate from the very outset that the author doubts that the rule mentioned therein exists as an autonomous principle of transnational law.

Second, the reference to international commercial arbitration implies that the question is to be examined not only with regard to the practice followed by arbitrators and parties to arbitral proceedings but also with due regard to the practical advantage for all involved in an arbitration proceeding of having resort to the rule in question.

Finally, the author is convinced that the paramount duty of arbitrators is to meet the legitimate expectations of the parties and that, accordingly, they are authorized to apply the so-called "transnational rules" only if the parties have so agreed and provided that the specific rule to be applied is endowed with the constituent elements of a "rule of law".

This last remark suggests that utmost care should be taken in the process leading to the identification of a transnational rule and that any liberal - not to say loose - attitude in that regard should be avoided.

II. INTERNATIONAL COMMERCIAL ARBITRATION CASES
Given the bounds of this contribution, we shall limit our reference to a few examples of arbitral awards which illustrate the views currently held by international arbitrators concerning the duty to cooperate in long-term contracts.

The principle that each party to a contract owes a duty not to cause prejudice but rather to cooperate with its partner in order to solve the numerous and complex problems which arise in long-term contractual relationships has been repeatedly affirmed by international arbitral tribunals.

In an award rendered in 1975, an ICC arbitral tribunal stated that:

"the parties... must be aware that only a loyal, complete and continuing cooperation between them may assist in resolving, beyond the difficulties inherent to the performance of each contract, the many problems arising from the extreme complexity and entanglement of the litigious obligations... [T]his obligation to cooperate, which the modern doctrine rightly found on the good faith which has to govern the performance of any obligation, must be complied with..."\(^1\)

It remains to be seen how these principles have been applied in the context of international commercial arbitration.

Three examples of such application will be explored, relating respectively to: (A) the duty to renegotiate long-term contracts in case of changed circumstances; (B) the duty of full disclosure to the partner; (C) the duty to negotiate in good faith.

A. THE DUTY TO RENEGOTIATE LONG-TERM CONTRACTS

The first example covers those transactions which, being of along duration, may be subject to supervening circumstances affecting the financial and economic conditions existing at the time of their conclusion.

An award rendered by an ICC arbitral tribunal in 1975 established a link between the obligation to cooperate and the asserted customary character of the renegotiation of any long-term contract in case of change of circumstances. The award states that:

any commercial transaction is founded on the balance of the mutual obligations and that to deny such principle would transform a commercial transaction into a hazardous and speculative contract .... The contract must be interpreted in good faith, each party having the duty to behave in a manner which avoids causing prejudice to the other party, the reasonable renegotiation being customary in international economic transactions.\(^2\)

The renegotiation of the contract is thus considered as a natural consequence of the parties' obligation to cooperate. The generality of this principle cannot fail to surprise as it has far-reaching implications. It must, however, be understood in the context of the case in question, as the contract contained a clause providing for a price revision on the basis of parameters reflecting the variation of the value of the service provided under the contract.

More numerous are the awards which refuse to recognize that a change of circumstances may justify non-performance of contractual obligations or which refuse to recognize that such a change implies a duty to renegotiate the contract also if the contract is silent in that respect.

This is the conclusion reached by the ICC arbitral tribunal in case No. 2404 of 1975, where it is stated that the principle rebus sic stantibus only applies in exceptional circumstances since "the international commercial operators are presumed to undertake their engagements with full knowledge... and may not claim that they were not in a position to be conscious of the importance of the obligations undertaken by them"\(^3\). The absence of an adaptation clause in the contract to take account of the changed circumstances leads the international arbitrator to reject the application of the principle rebus sic stantibus. The silence of the parties is in fact interpreted as a decision by the parties to run a commercial risk\(^4\).

This is indicative of the international arbitrators' attitude not intervening to rewrite a contract on behalf of the parties, as
the latter are presumed to have the necessary professional qualifications to directly provide for the contractual regulation of their affairs. The absence of a trade usage concerning the readaptation of any long-term contracts thus excludes the corresponding duty of the parties to negotiate such adaptation, except where such adaptation is expressly provided in their contract.

B. THE DUTY OF FULL DISCLOSURE

The most significant application of this principle may be found in the award in Klöckner Industrie-Anlagen GmbH, Klöckner Belge S.A. et Klöckner Handelsmaatschappij c/ République unie de Cameroun et Sté. camerounaise des engrais (SOCAME). This was an award rendered under the Washington Convention of 1965 (the ICSID Convention).

The dispute arose out of a certain number of contracts providing for the construction by Klöckner of a fertilizer factory in Cameroon supported by a feasibility and profitability study prepared by Klöckner.

After eighteen months of unprofitable operation, the factory was shut down in 1978. It finally closed in 1981 after an economically unsuccessful attempt to start it up again in 1980.

Klöckner filed a request for arbitration claiming the balance of the price for supplying the factory. The award declared the debt of the Cameroonian Republic cancelled by reason of Klöckner’s failure to perform its contractual obligations.

The Tribunal, presided over by Eduardo Jimenez de Arechaga, former President of the International Court of Justice, answered many of the issues which have a bearing on determining the parties' obligations under an economic development agreement, including the notion of investment and the duties of the partners.

Concerning this latter aspect, which was determinant for the rejection of Klöckner's claim, the Tribunal held that the corporation “failed to meet its obligations to deal frankly with its Cameroonian partner”. After having recalled that "[t]his was a joint venture between Klöckner, a multinational European Corporation, and a developing country" the Tribunal went on to list the various occasions when Klöckner failed to satisfy its duty of frankness and loyalty. The legal conclusions as to the characteristics and content of the "duty of full disclosure to a partner" were as follows:

We take for granted that the principle according to which a person who engages in close contractual relations, based on confidence, must deal with its partner in a frank, loyal and candid manner is a basic principle of French civil law, as, indeed, is the case under the other national codes which we know of . . . . We do not intend to apply new or exceptional legal principles to turn-key operations only because they concern projects affecting the economic and social development of a given country. But we are convinced that it is particularly important that universal requirements of frankness and loyalty in dealings between partners be applied in cases such as this one, where a multinational company seeks and freely undertakes the obligation to supply an overall package of feasibility, analysis, design, management, bidding, construction and marketing for an industrial plant, and obtains in return the agreement of the Government to pay for the factory, whether or not it is profitable. In the present case, as we have suggested, we do not feel that Klöckner has dealt frankly with Cameroon. At critical stages of the project, Klöckner hid from its partner information of vital importance . . . . When a partner in a financially complex international venture learns of certain facts which could influence the attitudes and the actions of the other partner with respect to the project; when the first partner fails to disclose this information to the other; and the second thereupon continues with the project and incurs additional costs, the first partner has not acted frankly and loyal vis-a-vis his partner, and he cannot rightly present a claim to funds whose expenditure would perhaps never have been necessary if he had been frank and candid in his dealings."

The Tribunal’s reasoning, criticized by one of its members in a dissenting opinion, was examined by the “ad hoc” Committee established pursuant to Article 52 of the ICSID Convention to decide on the request for the annulment of the award filed by Klöckner.

The grounds for annulment of an award under the ICSID Convention are limited to those listed in Article 52. With specific
regard to the Tribunal's ground for rejecting Klöckner's claim for compensation, namely the breach of the duty of full
disclosure, the conclusion of the Committee was that the Tribunal had manifestly exceeded its powers in that regard by
failing to supply "any indication, evidence or reference" of the existence of the rule relied upon.

In addition to this simple statement, the decision contains a number of interesting passages.

First of all, one learns that neither the claimant nor the defendant devoted particular attention and elaborated arguments
to the issue in question. Secondly, the ad hoc Committee, when investigating whether the Tribunal had actually applied
a rule of French law (the latter being the proper law of the contract), affirms that undoubtedly the principle of good faith
exists and is even at the basis of the French system, thus admitting that the duty of disclosure might constitute an application of the principle in question.

Finally, the ad hoc Committee appears to exclude that a legal system may impose a duty of full disclosure, even to the
parties' prejudice, without at the same time placing limits on such an obligation.

The Committee's conclusion is that the obligation of full disclosure appears founded on equitable considerations and
universal principles of justice and loyalty, "the same which would be relied upon by amiables compositeurs", rather than
on a specific rule of law.

The same line of reasoning is shared by G. Delaume, formerly ICSID's General Counsel, who, in commenting on certain
arbitral awards concerning State contracts, refers to the Klöckner v. Cameroon award to mention that although French
law provides in certain situations, such as those concerning consumer contracts, "that the party in dominant position has
an obligation to give certain information to the other contracting party. . . it would be wrong to assume that in regard to
contracts which are conducted at arm's length, there would be a general duty of "full disclosure" such as the one
advocated by the majority of the tribunal going beyond the elementary requirements of good faith.

C. THE DUTY TO NEGOTIATE IN GOOD FAITH

As it will be mentioned, this example of an application of the "duty to cooperate" may overlap with the situation of a
renegotiation of a contract in a case of change of circumstances.

It is commonly held that the obligation in question implies not only a duty to start negotiations with the other party in view
of finding a solution to a problem arising during the contractual performance but also to conduct such negotiations in an
active manner, with the intent to reach an agreement. This obligation is of particular importance in a joint venture
agreement where the partners owe each other a fiduciary duty.

What is the extent of this obligation? According to an arbitral award,

parties are unable to implement their contract by reason of an objectively justifiable disagreement, the contract in question
is terminated.

In the case examined by the arbitrators, the issue concerned the determination of the price of crude oil under a long-term
supply contract. Neither a third party nor the arbitrators had been granted the power to make such a determination, the
parties had reserved to themselves the possibility of concluding a supplementary agreement to that effect. The arbitral
tribunal rejected the defendant's argument that the contract was void ab initio due to the absence of initial agreement on
the price formula and concluded that the parties were obliged to negotiate in good faith.

The solution given by the award following the failure by the parties to reach an agreement reflects a principle already
affirmed in an arbitral award rendered in 1967, which stated that when "the parties do not reach agreement on a point of
substance, as to which a common decision is necessary, and this for valid reasons but without fault attributable to any
party, such failure to reach agreement, if essential and continuing, constitutes a valid reason to terminate the contract."

The same principle may be applied in all cases in which the parties have entered into negotiations in view of the
adaptation of their contract to a change of circumstances. Should such negotiations fail to produce an agreement, and
provided they have been conducted in good faith, the contract will either be terminated or will continue to be performed according to its terms, depending upon the parties’ stipulations and the applicable law.

The basic idea underlying the rule under examination is that a person who engages in a contractual relationship characterized by a long duration must deal with its partner in a frank and loyal manner.

The constituent elements of the rule are the long-term contractual relationship and the closer confidence generated between the parties by such type of relationship, particularly in case of a joint venture.

An examination of the arbitral decisions on this subject permits the conclusion that:

1. In the absence of a contractual provision to the contrary, the rule does not consist of an obligation to renegotiate the economic conditions of the contract in order to adapt it to a change of circumstances;
2. it is doubtful whether a duty of full disclosure of information during the contractual performance may be said to exist beyond the elementary requirements of good faith; and
3. even if, in specific situations, the parties may be under an obligation to negotiate in good faith in view of the continuance of their contractual relationship, there clearly is no duty to reach agreement on the revision of the contract or on the addition of essential elements which were not originally contained in the contract.

Bearing in mind these qualifications and limitations, the rule concerning "the duty to cooperate" may be considered as one out of the many practical applications of the more general principle whereby a contract must be performed in good faith. This principle is deeply rooted in civil law countries and is certainly not unknown in common law jurisdictions although it may have a less general application in some of them.

Based on this principle, one may consider that each long-term contract creates between the parties such close links as to imply that there is a duty upon them to cooperate towards a common aim, i.e., the performance of the contract according to the express and implied terms, so as to permit to each party to attain its own objectives\(^\text{18}\). The good faith principle is normally applied in a manner which is undisputably wide enough to embrace the various duties which have been reviewed in this report\(^\text{19}\). In particular, the Italian doctrine recognizes that the principle of good faith operates to integrate into the contract specific duties, including those of information, solidarity and protection.

### III. CONCLUSION

It may be said, by way of conclusion, that unless a transnational rule may be clearly elucidated by arbitral practice, which does not seem yet to be the case for the rule examined herein, it would be in the parties' best interest to rely upon solidly rooted principles of national laws which are universally recognized. This would enable the arbitrators to have recourse to the judicial application of such principles to found their decision while at the same time giving due consideration to the specific characteristics and requirements of transnational commercial transactions.

2. Award in the ICC case No. 2291 of 1975, quoted in note (1).
4. See awards quoted by Jarvin-Derains, op.cit., p. 299. The same line of reasoning is adopted by national courts. Thus, the Swiss Federal Court, in a decision of September 18, 1981 (BGE 107 II p.347 seq. E2) considered the following: "In long-term contracts the parties must reckon with the fact that circumstances which existed at the time of contract formation can subsequently change. If they explicitly or obviously refrain from excluding the influence of such changes on their mutual contractual obligations, then it corresponds to the essence of the contract that it must be fulfilled the way it has been concluded" (quoted in an award of July 6, 1983, ICCA Yearbook, vol. IX (1984), p.68).
7 In J. Paulsson, op.cit., pp.157-158.
8 The dissenting opinion may be read in Journ. droit int., 1984, p.441 ss.
10 Paragraph 75 of the decision.
11 Paragraph 74 of the decision.
12 Paragraph 72 of the decision.
13 Paragraph 72 of the decision.
14 Paragraph 77 of the decision.
15 In the article quoted in note (5), pp. 96-97. The eminent scholar adds that the annulment of the award "reveals the dangers inherent to the neglect of thorough comparative analysis in the formulation of the transnational substantive rules applicable to State contracts" (p.97).
16 Award (unpublished, original in French) of April 3, 1987, in the case Swiss Oil c. Gabon. The award was made subject to an annulment proceedings in France (the decision of the Court of Appeal of Paris of June 16, 1988, is published in Rev. Arb., 1989, p.309 ss).
17 Translated from the French original of the award. The latter, unpublished, was rendered by an arbitral tribunal composed of Mr. P. Cavin, President, Prof. R. Ago and Sir Hartley Shawcross and is quoted by C. Reymond, Le contrat de "Joint Venture", in Innominatverträge, Festgabe zum 60. Geburtstag von Walter R. Schlupe, Zurich 1988, p.394.
18 "The contracting parties form a kind of microcosme; it is a small society where each one has to work for a common purpose which is the sum of the individual purposes pursued by each of them, exactly like in a corporation or an association" ("les contractants forment une sorte de microcosme; c'est une petite société où chacun doit travailler dans un but commun qui est la somme des buts individuels poursuivis par chacun, absolument comme dans la société civile ou commerciale": Demogue, Traité des Obligations en général, t. VI, n.3).
19 Suffice it to refer to the "Treu und Glauben" principle of Article 242 of the German BGB and to the application made by Italian courts of the parallel Article 1375 of the Civil code ("The good faith, in its ethical meaning as a requirement of conduct, constitutes one of the cornerstones of the legal regulation of the obligations and is the object of a true legal duty, which is infringed not only if one of the parties acts with the intent to prejudice the other but also if its behaviour has not been inspired by the diligence, care and social solidarity which integrate the content of the good faith" (Cass., 18.2.1986 n.960, in Mass. Foro it., 1986, p.182); "Concerning the contractual performance, the good faith expresses a duty of solidarity imposing on each party to keep that behaviour which..., without appreciably sacrificing its interests, is apt to safeguard the other party's interests" (Cass., 9.3.1991 n.2503, Foro it. 1991, p.2077).

**Referring Principles:**

IV.6.9 - Duty to notify / to cooperate