Much has already been said on the subject of "adaptation of contracts" and its relation with arbitration so that further original contributions can hardly be expected.

However, some remarks may still be usefully made to bring into focus certain aspects of this problem, thus permitting a better appreciation of the role and limits of the arbitrator’s intervention in this field.

1. The questions which have to be highlighted in this connection are few, but essential, namely:

   a. whether the law applicable to the particular contract provides for a regulation of the "hardship" both as to the description of the conditions for its relevance to the contract and to the determination of its effects on the residual life of the contract;
   
   b. what powers, if any, has the national judge in case the national law applicable to the contract regulates the hardship situation;
   
   c. whether the specific contract contains a hardship clause and how detailed is the regulation by such a clause of the effects of the hardship and of the powers of the arbitrator in that connection.

2. It seems hardly objectionable that in the absence of any express provision, both in the contract and in the applicable law, regulating the intervention in a hardship situation, the principle of the respect of the contract should prevail. This requirement arises from the need to ensure the certainty of legal relations in the international trade. It may also be added that in the today’s world the contractual know-how is sufficiently developed and accessible so as to permit the parties to an international contract, experienced as they normally are and assisted by skillful legal counsels, to appreciate in advance the advantages and disadvantages of incorporating in their contract a hardship clause, due consideration being given to the system of law which would govern such a contract.

In the situation under consideration, therefore, the arbitrator, called upon to determine the rights and duties of the parties, should base his decision on the assumption that the financial reward stipulated in the contract already discounts the business risk resulting from the particular transaction rather than presume the applicability of the rebus sic stantibus clause as being inherent in any international contract. The latter approach has been adopted by some arbitral awards which, assuming the exclusive applicability to the specific contract of the so-called lex mercatoria, have concluded that since any international commercial transaction is based on the balance of the parties' respective obligations (this being one of the rules of the lex mercatoria) and since it is customary in such type of transactions to provide for the renegotiation of the contract in case such balance is modified, also the specific contract had to be renegotiated by the parties notwithstanding the absence of any clause to that effect.

The kind of reasoning put forward by these decisions may not be shared in as much as it does not appear to be founded on serious legal grounds.

3. Where the municipal law applicable to the contract regulates the hardship situation\(^1\), the resulting problems should find
their solution on the basis of such a law, subject to any contractual provisions which might, within the limits set by the law to the parties’ autonomy\(^2\), restrict or widen the legal regulation in various respects.

In the absence of an express regulation by the applicable law, certain national courts have applied other principles of their legal system to a hardship situation in order either to declare the contract discharged or to provide for its adaptation to the new circumstances\(^3\). To the extent that national jurisprudence may be considered as a part of the system of law chosen by the parties in their contract or otherwise applicable, the arbitrator will validly found his award on such judicial precedents.

[...]

7. In conclusion, it may be remarked that the very characteristics of an international long-term contract demand a type of regulation which, rather than facilitating the parties’ release from their obligations, should create the basis for the revision of the contractual terms in order to ensure the continuation of the parties’ relation also in the presence of a change in the circumstances contemplated by the parties at the time of concluding their transaction. The international long-term contract itself tends therefore to constitute more and more a frame of reference for the parties’ intent, susceptible to adaptation in view of maintaining between their opposite interests the original equilibrium, rather than a document evidencing fixed rights and obligations.

International arbitration has become an essential component of this regulation.

Its traditional function as a means for the settlement of legal disputes between the parties as an alternative to the jurisdiction of national courts has in fact progressively widened to include functions required by the needs of the international trade and which make it an essential means of co-operation between the parties for the stability of their contractual relation.

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\(^1\) This is the case of: - Italy (arts. 1467 and 1664 of the Civil Code of 1942) - Greece (art. 388 of the Civil Code of 1940) - Egypt (art. 147 of the Civil Code of 1948) - Ethiopia (art. 3.183 of the Civil Code of 1960) - Poland (art. 269 of the Code of Obligations) - Czechoslovakia (art. 275 of the International Trade Code of 1964) - Hungary (art. 241 of the Civil Code of 1960, confirmed by the new Civil Code of 1977) - German Democratic Republic (art. 295 of the Law on the international trade contracts of 1976) - Portugal (art. 437 of the Civil Code of 1966) - Algeria (art. 107 of the Civil Code of 1975) - The Netherlands (art. 6.5.3.11 of the proposed Civil Code).
\(^2\) Algerian law, for example, considers the provisions on hardship as mandatory.
\(^3\) The principle of adaptation of a contract on account of supervening and unforeseeable circumstances is applied by the courts of some national system on the strength that in such a case it would be contrary to the "good faith" in the contractual relations to request performance of the original obligation when this will cause substantial hardship to one party (Spain, Federal Republic of Germany, Switzerland). In certain cases national courts have also made resort to the theory of the Geschäftsgrundlage (Germany) or of the "unjust enrichment" (Scandinavian countries) to justify a revision of the contractual terms. Other national systems (France, Belgium, United Kingdom, USA, USSR) appear not to be receptive to the notion of "hardship" as a situation leading possibly to an adaptation of the contract to the changed circumstances, except that in France and Belgium - as it is known - the theory of the imprévision permits the taking into account of the upheaval of the contractual economic balance in case of contracts with the Public Administration.

Referring Principles:

VIII.1 - Definition