Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration

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ICC ARBITRATION IS GENUINE international arbitration: The jurisdiction of the Court covers business disputes of an international character (Art.1(1) of its Rules) ; the arbitrators can be of any nationality (Art. 2), the parties are free to determine the law to be applied by the arbitrators to the merits of the dispute. In the absence of such determination by the parties, the arbitrators shall apply the law designated as the proper law by the rules of conflict which they deem appropriate (Art.13(3)). They shall have the power of an amiable compositeur only if the parties are agreed to give them such powers (Art.13 (4)). Finally, "in all cases the arbitrator[s] shall take account of the provisions of the contract and the relevant trade usages" (Art. 13 (5)).

This international character of ICC arbitration is also reflected by the statistics issued at the Court's 60th anniversary, in October last year: While in 1977 arbitrators under ICC Rules were nationals of 20 different countries, by 1982 the arbitrators involved in ICC cases came from 30 different countries; the 1982 break-down of the origin of parties according to geographic areas showed that 54 per cent came from Western Europe, 10 per cent from European socialist countries, 17 per cent from the Americas and Australia, 10 per cent from Arab coun-

(...)

ICC arbitration is therefore practiced by arbitrators coming from all over the world, who have to apply a large spectrum of national laws from many legal systems. As a consequence, the members of most ICC arbitral tribunals have different legal backgrounds. This marks a fundamental contrast with national State courts, where all judges have the same legal education and essentially apply domestic law only. The same difference exists as regards domestic arbitrations or arbitration courts, which both prohibit foreigners from acting as arbitrators.

This observation does of course lead to the question as to whether the decisions of such international tribunals, as set up under ICC Arbitration Rules, arrive at results which are identical to those reached by the State courts the laws of which they apply, or whether there are variations. Assuming such variations might occur in the application of domestic laws by arbitral tribunals and the competent national courts in a given country, this will not affect the recognition and enforcement of an award even in that country, provided that domestic arbitral awards enjoy a privileged treatment and can only be set aside on limited substantive grounds, as for instance breach of (domestic) public order.
The same principle applies in any case for foreign awards to be enforced under the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Art. V (2) of the Convention clearly limits the possibility for a member State to deny enforcement of a foreign award falling under the scope of the convention for substantive reasons only by providing that the recognition and enforcement of an arbitral award may be refused if

"(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
(b) The recognition or enforcement of the award would be contrary to the public policy of that country."

In a thorough study on the interpretation of the New York Convention, van den Berg has revealed that court decisions which have so far been rendered on Art. V (2) show a very restrictive interpretation of the term "public policy". This restrictive approach of national courts in denying enforcement of foreign arbitral awards on public policy grounds gives in fact international arbitrators a "supplemental margin of discretion" in the interpretation of the applicable law, which goes beyond the powers available to national judges.

International arbitrators are, as a rule, chosen amongst others because of their familiarity with the rules and practices of the business underlying the dispute at stake. Their confirmation of court practice would thus be an indication that the law still meets the requirements of the trade in question. On the contrary, deviations - within the tolerable margin - may indicate that the applicable body of law lays behind the development of such trade.

I. DEFINITIONS

*Force majeure* and "hardship" are exceptions to the basic rule *pacta sunt servanda*. However, a clear distinction of the meaning of both terms in commercial practice is not always easy. There are indeed borderline cases, which cannot be labelled as falling in one or the other basket exclusively. Practitioners of international arbitration will also agree that there is a great confusion as to the use of these two terms. Even in important international contracts, they are often inserted as synonyms.

**Force majeure**

As regards *force majeure*, it is often believed that this term is solely of a contractual nature, so that parties to a contract are free to stipulate that a certain event shall be regarded as *force majeure*, irrespective of the conditions which have to be met under the applicable law.

This view is for instance reflected in contract stipulations, which can often be found, that a determined event will be recognized as *force majeure* when a Chamber of Commerce or a similar organization issues a "*Force Majeure Certificate*". In the interpretation of the parties, the presentation of such a certificate will release them from their contractual obligations. They are often subsequently surprised and disappointed to learn, through a decision of an arbitration court, that a Chamber of Commerce or other body can only certify that a specific event has taken place but that the arbitrators are bound to the qualifications of the applicable law.

One of the reasons for this confusion may be that Standard contracts, which are largely based on common law conceptions, are used by parties coming from different legal systems. Such is the case, for instance, of the Conditions of Contract (International) for Works of Civil Engineering Construction of FIDIC which introduce expressions like "excepted risks"; "special risks"; "frustration" which have not always a strict equivalent in continental legal terminology.

The legal elements for the qualification of an event as *force majeure* (*vis maior*, act of God, etc.) are essentially the same in most legislations, and court decisions show a universal trend to a comparable restrictive interpretation. These elements are (i) that the event is of an external nature, (ii) that it could not be foreseen or prevented and (iii) that it renders performance of a contractual obligation impossible at all or for a certain time.

**Hardship**

This cannot be said for the term "hardship" in the meaning of an event that changes the contractual equilibrium between the rights and obligations of the parties in such a dramatic way that performance can become ruinous for one of them or cannot reasonably be expected. Although most legislations have rules to
cope with such situations (which roughly fall under the so-called *clausula rebus sic stantibus*), accepted solutions by national laws as well as court decisions and legal doctrine show a remarkable degree of variation.

One example among many others: Professor Strohbach, in a parallel study an the same subject, mentions para. 295 of the Gesetz über internationale Wirtschaftsverträge ("GIW") 1976 of the German Democratic Republic. This is a modern law, which takes into consideration the necessity to provide for adaptation to changing conditions during the performance of long term contracts. Its provisions primarily aim at an adaptation of the contract to the new situation and a continuation of the contractual relationship. Such a solution is not to be found in many other and often older laws: In the "model situation" there is not a long term contractual relationship requiring a continuous cooperation between the parties and even the re-negotiation of contractual provisions over a longer period of time, but a single transaction to be performed in the future, the execution of which becomes too onerous for one party due to changed circumstances. The logical legal solution to such a situation is rather the right of this party to be relieved of its obligations without having to bear the consequences of breach of contract. Although it is true that court decisions and legal doctrine have in most countries bridged the gap between unsatisfactory provisions of the law and the needs of modern contract practice, the results nevertheless differ largely from country to country.

**ICC Proposed Model Clauses**

As ICC work in the Field of legal standardization has always been influenced by the necessities of international trade reflected in the practice of its Court of Arbitration, its Commission an International Commercial Practice has set up a "Force Majeure and Hardship" working party with the mandate to draft model clauses which can be recommended to the business world to be incorporated in international contracts either as such or with amendments.

Its work is now about to be concluded. According to the last draft, two model clauses are foreseen:

1) a *Force Majeure* Clause, which lays down the conditions for release from liability when performance of a contractual obligation has become impossible; and

2) **Referring Principles:**

   - VI.3 - Force majeure
   - VIII.1 - Definition