In recent years, the procedural aspects of contract review have become the topic of an intensive international discussion. International agencies have, in addition to the already existing arbitration rules of the ICC and ICSID, promulgated new procedural rules - UNCITRAL on conciliation, ICC on adaptation - and are preparing new ones. The discussion is stirred up by an increasing need for the adaptation of long-term contracts and by the existence of certain restrictions on the adaptation procedures found in various national laws. Such restrictions can be identified both in the procedural and substantive law of contract. It is important to keep this close relationship between procedural and substantive law in mind during the following brief discussion of the main issues involved in contract review procedures.

I. The Procedural Aspects of Contract Adaptation

A. PARTIES' NEGOTIATIONS, INFORMAL AND FORMAL

The majority of contract reviews are most likely carried out by the parties in direct and informal negotiations. This method of contract review is, of course, most attractive since it is speedy, face-saving and very flexible, as the parties may freely agree on any change or gap-filling of the contract. These negotiations are carried out mostly in an informal way, guided more by the unwritten rules of diplomacy and bargaining psychology than by procedural law. A legal framework is provided by the original contract and the rules of good faith according to which parties should inform and consult each
other in case any obstacle, difficulty or conflict arises.

Informal renegotiations on changes in or amendments to the contract often follow rules dictated by circumstances such as the overall political situation, availability of diplomatic protection, etc. One can even discern certain strategies specifically employed for use in certain cases such as expropriation and the restructuring of mining agreements, among others. The many negotiations of international loans follow more or less similar patterns as will be discussed in Part IV of this book.

Direct negotiations between parties may also be subject to certain formalities prescribed by the contract itself. To cite a few examples, many

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hardship clauses establish duties regarding, *inter alia*, timely written Information, a waiting period, and a meeting of the parties. Variation clauses prescribe written orders. One may, in a broad sense, call such formalities a type of negotiation procedure.

Finally, the parties may have agreed in advance that one of them is empowered to make unilateral decisions on gaps or changes. Here, we are not in the presence of true negotiation but only decision-making by one party. Whether the parties can validly do this depends on the applicable municipal law and its concept of party autonomy.

B. INTERVENTION OF ARBITRATORS AND THIRD PARTIES

1. Procedural and Contractual Intervention

If the parties do not deem direct *ad hoc* negotiations as an adequate means for contract adaptation, they may have recourse to the intervention of a third party. For the lawyer, a procedure in the proper sense always implies such intervention of a third party or institution, *i.e.* of a court, arbitral tribunal or third party intervener. This is not only the essential idea of procedural law all over the world but also the main feature of many of the review and hardship clauses described as well as of the UNCITRAL Conciliation Rules and the ICC Adaptation Rules, both of which provide for the intervention of a third person endowed with experience and neutrality. The many different functions such third party intervention may serve can be grouped into two main types: (1) arbitration in the proper sense subject to special rules of the law of civil procedure, and (2) other contractual forms of third party intervention. This distinction is the declared starting point for the ICC Adaptation Rules which are designed to be of a contractual nature. We can, indeed, characterize arbitration in the proper sense as a procedural institution and other types of third party intervention as contractual ones, as Mezger does in his contribution. This distinction has nothing to do with the classical and rather futile doctrinal quarrel over whether arbitration is of a jurisdictional or contractual nature, as it clearly contains elements of both. Furthermore, the distinction is not identical with that of Roman law between an *arbiter* who acts similar to a judge and an *arbitrator* who decides with a broad discretion *ex aequo et bono*. We simply distinguish arbitration as a procedure subject to a special regime of procedural law while other types of third party intervention are not subject to these procedural rules.

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Such procedural rules exist in many countries and legislators and courts make, indeed, a more or less clear distinction between arbitration and other 'contractual' types of intervention. German courts have always maintained a clear distinction between the *Schiedsrichter* (arbitrator) and the *Schiedsgutachter*, and British courts have similarly drawn a line between the arbitrator and the valuer or certifier. In French law, we find the *arbitre* distinguished from the other contractual interventions of *expertise amiable* and *détermination du prix par un tiers*. Italian law and legal practice distinguish various contractual forms of intervention (*arbitraggio, perizia contrattuale, arbitrato irrituale*). The laws of socialist countries tend to disregard the distinction and consider the same arbitral institutions as fit to exercise both functions.

It is not surprising that the distinction is not always easy. A number of German authors, for instance, claim that certain forms of contractual third party intervention, e.g., the ascertaining of relevant facts or the clarifying of ambiguities in the contract, should be subjected to the procedural requirements of arbitration. British and American courts have sometimes treated valuers and certifiers as arbitrators, and in French law there are some complaints as to the uncertainties of the
described distinction.\textsuperscript{22}

René David and others, therefore, advocate a uniform legal regime for both arbitration and contractual third party intervention.\textsuperscript{23} However, although in a given case there may be difficulty in identifying the type of intervention meant, this is not a sufficient ground to argue for uniform treatment. It appears, instead, that we will have to live with these two types of intervention as they respond to different and distinguishable needs of the parties to be discussed in the following.

2. Pros and Cons of Arbitration and Contractual Intervention. Award and Contract

Arbitration in the proper sense has advantages similar to those of a judicial procedure before a court. The parties are protected by minimum due process requirements established in the various national laws.\textsuperscript{24} Other ‘contractual’ forms of third party intervention\textsuperscript{25} often provide fewer safeguards for a careful and impartial procedure. Nevertheless, parties often accept this for practical reasons, for such contractual intervention is more flexible, more speedy and often more suited to the particular needs of managing a complex contract. When large and complex construction work is being carried out, a dispute as to the quality of a certain part of the work or its conformity with the design must often be decided on the spot by an expert. Otherwise, either the progress of the work would make later fact finding impossible or the necessary halting of the work for the duration of an arbitration procedure would produce an unacceptable and costly delay.

An arbitral award is both binding and subject only to limited judicial review.\textsuperscript{26} The question concerning under which conditions and in what sense the decision of a contractual third party intervener may be binding cannot find one simple and uniform answer. The various national laws contain differing and incomplete provisions,\textsuperscript{27} the details of which are controversial. Furthermore, the various forms used in practice probably deserve different answers. Certain decisions concerning the determination of relevant facts - e.g., the certifying of the quality, quantity or conformity of goods or work - can, by agreement, be made binding such that they constitute strong or irrebuttable evidence in subsequent court proceedings about contractual rights.\textsuperscript{28} The determination of a price can be made binding under the relevant contractual clause so that the price determined becomes a part of the contract. Such determinations may then be challenged only as any other contractual term might be (e.g., for error, mistake or fraud).

Decisions made in a contractually based third party intervention are normally subject to review by a court or arbitrator, according to the terms of the applicable law or the contractual clause. Thus, the decisions of the engineer, under the FIDIC General (C.E.) Conditions, are subject to subsequent arbitration.\textsuperscript{29} The scope of such review, however, is often unclear and depends on the binding force of such contractual intervention and the restrictions on the judicial review found in the applicable law.\textsuperscript{30} Courts and legal writers Claim that certain decisions - those containing a real conflict solution - should be treated as awards.\textsuperscript{31} This means that their revisability is very restricted. A logical consequence is that, in such cases, the parties need more protection through the observance of minimum procedural requirements.\textsuperscript{32}

Where such procedure is not practical, the parties may well be content with something less than an award, \emph{i.e.} a binding decision of a contractual nature only. The real problem does not often lie here. For factual reasons, the decision of a third party is often definite and final. For how can a party later challenge in a court or arbitral procedure the appraisal of an expert as to the quality or quantity of part of a construction work after the progress of work has covered any further evidence with tons of concrete? In many cases, the parties just have to rely on the expert, and their protection is in the careful choice of a neutral and experienced person (perhaps with the aid of the ICC rules on technical expertise) and the clear definition in the contract of his decision-making powers.

If a decision cannot be qualified as an award, it is not enforceable and not suitable for recognition under international conventions on the recognition of arbitral awards.\textsuperscript{33} In many cases, the question of enforceability is meaningless. This is true, say, where a single issue is decided that does not as such constitute an enforceable obligation - \emph{e.g.}, when it is not a payment claim but only the price applicable under a price formula that is ascertained. The same is true where a third party intervention on a legal question changes the legal situation - \emph{e.g.}, determining the time of payment. This effect, as such, is not enforceable. Where the decision brings about the adaptation of the contract, which is the main topic of this article\textsuperscript{34} (to be discussed \emph{infra} section II), the enforceability of the changed contract is irrelevant if further cooperation of the parties is
truly contemplated and not merely a distribution of cost and compensation.

The merits and disadvantages of the various procedures and their suitability for contract adaptation largely depend on the decision-making powers to be discussed in the following (section II). We should not forget, however, that the parties often wish not to be bound at all by the third party's decision. This is a question, more or less, of confidence in the third person, saving face and maintaining control over the procedure. Parties in the Far East, especially from China, dislike contentious adversary procedures. Parties from China tend to prefer informal direct negotiations or, as a second line alternative, a non-binding conciliation procedure with the intervention of a third party or institution; they usually agree to arbitration only as a last resort. Non-binding conciliation procedures are proposed by ICC and UNCITRAL. We now must discuss the different procedures as far as they relate to the adaptation of contracts.

II. Contract Adaptation Powers in the Views of Various National Laws

If an adaptation of the contract through the mutual agreement of the parties is neither envisaged in the contract nor possible in the immediate situation, it is still possible that a unilateral decision might bring about the adaptation. Accordingly, we must consider the requirements and the scope of such powers of decision. The powers of a court have already been discussed in Part I of this volume in connection with the legal responses of various laws to changes in circumstances. Courts can change a contract and adapt it to new circumstances if so allowed by the substantive law of contract. We must now discuss the adaptation powers of arbitrators, of other third party interveners, and those of one party. We are concerned with the question as to whether the powers of these persons provide the flexibility required in the business of contract adaptation.

A. POWERS OF ARBITRATORS

1. Rules of Law and Rules of Fairness

As arbitrators fulfil functions similar to judges, they must, as a rule, observe the law which is applicable to the contract according to conflict of law rules. The flexibility which might be necessary to adapt a contract can be provided in three ways. First, the applicable law can explicitly provide for changing a contract in light of changed circumstances, as discussed in Part 1 of this book. Second, the applicable law, without expressly allowing such flexibility, may tolerate arbitral decisions in a certain deviation from a strict application of the law, by limiting judicial review of the award to violations of ordre public. Third, the applicable law may expressly allow a decision according to general rules of fairness and equity without a strict application of the law, again within the boundaries of ordre public.

The idea of allowing an arbitrator to render an equitable award without strict observance of the law or contractual terms has an old tradition. It is found in medieval Roman law with its distinction between the arbitrer, bound by the law like a judge, and the arbitrator, called to render an equitable decision as an amicabilis decisor vel compositor. The need for a more flexible arbitration procedure is widely felt in international commerce. International conventions an arbitration as well as other (unofficial) international arbitration rules accordingly provide for the possibility that arbitrators may decide ex aequo et bono, if the parties expressly so agree. We find such provisions in the European Convention of 1961 as well as in the arbitration rules of ICSID (1965), UN ECE (1966), ICC (1975) and UNCITRAL (1976). All rules - with the exception of the ICC rules - contain the caveat that such possibility must be allowed by the applicable law. Article 33.2 of the UNCITRAL rules reads:

This leads to a number of questions: first, can the parties validly choose the transnational rules of lex mercatoria as the law primarily or exclusively applicable to the contract even to the extent that general principles of force majeure and hardship which might be found there can be applied and the contract adapted to changed circumstances? Notwithstanding the growing practical significance of lex mercatoria, most courts would recognize such choice only to the extent that the applicable national law so allows. This leads to a second question: does the national applicable law allow the parties to agree that an arbitral decision is to be made ex aequo et bono and does this endow the arbitral tribunal with the power to modify the contract as regards the future cooperation of the parties? The applicable law may recognize such
powers of an arbitrator, at least if the parties have agreed an a type of force majeure or hardship clause providing for parties’ renegotiations and subsequent arbitration, as discussed.\textsuperscript{42}

2. The Views of Various National Laws

An arbitrator, similar to a court, has to decide according to the rules of the applicable law; thus, he is empowered to adapt the contract only if the applicable law so allows. Such adaptation is possible under German and Italian law, as discussed.\textsuperscript{43} Under German law, the arbitrator can adapt the contract, if the requirements of a collapse of the foundation of the transaction (\textit{Wegfall der Geschäftsgrundlage}) are met. Moreover, German law allows a decision \textit{ex aequo et bono} and, finally, gives the arbitrator some flexibility because of the limits on the judicial review of awards.\textsuperscript{44}

Both British and French law have traditionally taken a rather restrictive view as to the power of a court to adapt a contract, because, as British jurisprudence puts it, the courts are not called upon to write the contract for the parties.\textsuperscript{45} The powers of arbitrators are not considered as differing from those of courts in this respect in British common law.\textsuperscript{46} Traditionally, however, arbitrators have preserved some flexibility by not giving the reasons for their decision, and the new British legislation on arbitration has strengthened the independence of arbitration from judicial control.\textsuperscript{47} Nevertheless, it is still difficult to argue that such flexibility gives arbitrators the legal power to adapt a contract as to the future cooperation of the parties. On the other hand, a hardship-with-subsequent-arbitration clause is certainly valid under British law and widely in use.\textsuperscript{48} The scope of powers as to the kind of arbitral award that may be made under such a clause is not entirely clear.\textsuperscript{49}

French courts traditionally have conferred a certain flexibility on arbitral tribunals in their dealings with international commerce.\textsuperscript{50} Judicial review is restricted to protecting the larger boundaries of ‘ordre public international’. The amiable compositeur deciding \textit{ex aequo et bono} is a well-known institution. The French legislation of 1980 and 1981\textsuperscript{51} has established a special legal regime for international commercial arbitration. Under Article 1496 of the \textit{Code de procédure civile},\textsuperscript{52} the parties may freely choose the applicable legal rules or, failing this, the arbitrator can make this choice. This has been interpreted as also including the freedom to combine an applicable national law with transnational legal rules of international commerce. In any event, the arbitrator must have due regard for the customs and usages of international commerce. Thus, one could argue that the arbitrator is entitled to apply the rules of force majeure in the broad sense reflected in standard clauses used in international commerce.\textsuperscript{53} Moreover, in Article 1497, the new legislation provides the traditional institution of the amiable compositeur. This person is an arbitrator who is to render a decision based on law but who is not strictly bound by the existing legal rules, and Mezger submits that neither is he bound by the terms of the contract.\textsuperscript{54}

3. Is Arbitration a Suitable Means for Contract Adaptation?

Our discussion seems to indicate that arbitration is a suitable means for the adaptation of contracts. This is, indeed, the idea put forward by a leading scholar, René David, as the general reporter to the international congress of comparative law in Budapest, 1978, where this problem was a main subject.\textsuperscript{55} David advocates a broad and flexible concept of arbitration comprising both the procedural and contractual types and bound more by some procedural rules and not so much by strict rules of substantive law, thus enabling the arbitrator to adapt the contract under changed circumstances to the future needs of cooperation. Here, some sceptical reservations must be made. First, the existing national laws on arbitration do not yet provide every aspect of the flexibility required, as David himself indicates. It is doubtful, indeed, whether the \textit{ex aequo et bono} powers of an arbitrator or those conferred by substantive law of contracts to change a contract (e.g., \textit{Wegfall der Geschäftsgrundlage}) really include all adaptation functions needed in practice. The crucial question is whether an arbitral award can change a contract to the effect that it can serve as the legal basis for the complex future cooperation of the parties. Even if we consider that the German concept of \textit{Wegfall der Geschäftsgrundlage} and perhaps the French concept of compositeur amiable entail the power to change a contract, there are situations where an arbitrator would be rather helpless if called upon to write a changed contract for such complex future cooperation. From a technical point of view, there is no problem in empowering a court or an arbitrator to change, say, a price in accordance with a price formula or, more generally, a change of circumstances such as market or cost development. It would be much more difficult, if not impossible, to rewrite a complex contract on, e.g., a mining venture,
harbour construction or delivery of a plant after the occurrence of a war, earthquake, entirely changed world market and the like. If we look, for example, at the apparently rather flexible German *Wegfall der Geschäftsgrundlage*, we find that the courts have exercised a judicial self-restraint in this respect. They have changed prices, rents and pensions, but when it came to the restructuring of the complex future cooperation of a partnership, the federal court declared that the parties have a duty to renegotiate themselves, *i.e.* to make proposals on their future cooperation.\(^56\) In summary, even where the old civil law concept of *clausula rebus sic stantibus* has survived in a modified form, the courts will restrain the use of their adaptation powers to changing the contract where such changes can be measured or quantified or controlled in some other way. An arbitrator, even if an expert in the kind of business concerned, will encounter the same limits.

There is another reservation closely connected with the first one. Arbitration, by definition, serves as a substitute for a judicial proceeding and provides a conflict solution on the basis of an adversary procedure. The parties are no longer negotiating with each other, but claiming and pleading against each other. Very often, one party is no longer willing to continue the cooperation after the award. In such a case, no award in the world can serve as the starting point for a fruitful future cooperation.

Some of the big international arbitration cases of the recent past can demonstrate this. In the case *British Petroleum v. Libya*, BP claimed specific performance of a concession agreement after Libya was allegedly in breach of contract and the international rules applicable to the contract conferred such a right. The arbitrator observed that regardless of whether a right to specific performance could be ascertained, it would make no sense to hold the other party, a sovereign government, as bound to continue a complex cooperation for another forty years under the concession where it was unwilling to do so.\(^57\) The case was not an adaptation case in the proper sense but rather a default case, and a sovereign party was involved. Nevertheless, the case might teach us that no court or arbitrator in the world, at least in international business transactions, can render an award that could serve as the legal basis for a complex future cooperation against the will of one of the parties. There are definite limits to the powers of arbitrators to adapt a contract.

**B. POWERS OF THIRD PARTY INTERVENERS**

1. The Different Functions

Many clauses on contract adaptation provide for third party intervention, and the great variety of such clauses as discussed\(^58\) indicate that such intervention is not a uniform phenomenon but rather a label for very different functions. This variety can be demonstrated easily by two little lists,\(^59\) one outlining the main types of subject matters involved in adaptation, the other detailing the different functions the intervention may have with respect to the existing contract.

The subject matter of adaptation may be:

(a) technical questions, as can be defined by drawings, designs, estimates of quantities, quality requirements, etc.;
(b) values - *e.g.*, the value of a certain portion of work, a market price, cost estimates, etc.;
(c) contractual terms - *e.g.*, time for delivery, manner of payment, and other duties of the parties.

Third party intervention can have the following functions with respect to the existing contract:

(1) Filling gaps in the contract, *e.g.*: (a) determining the technical design or parts thereof that must be delivered; (b) in a cost reimbursable contract, ascertaining the costs to be reimbursed; (c) determining the time for delivery of materials for construction work or start of such work (usually by a consulting engineer).

(2) Changing the contract: (a) making changes in the construction design or quality standards to adapt the work, *e.g.*, to newly discovered subsoil conditions; (b) changing a price under a price formula pegged to cost increases or under a maintenance-of-value clause pegged to exchange rate developments; (c) postponing the time for completing the work and/or ordering additional repair work after a special risk has materialized (normally done by engineer).

(3) Clarifying ambiguities. This kind of decision may relate either to questions of facts or to contractual duties. If it relates to facts, it is often linked with a monitoring of the execution of the contract: (a) *e.g.*, a certifier ascertains whether the quality or quantity of goods or work is in conformity with the contract; (b) a valuer ascertains costs; (c) a third party clarifies ambiguities in the contract.

A combination of these lists gives some idea of the great variety of functions the third party intervener may serve. A further illustration of this will be given by the cases described by Glossner.\(^60\) The last-mentioned category of functions, *i.e.*
the clarifying of ambiguities and the ascertaining of relevant facts, is also not far from the functions of an arbitrator; this explains why the same legal regime for arbitration and other third party intervention is sometimes claimed. Moreover, in real life distinguishing between gap-filling, modifying and clarifying is not so easy. Sometimes the parties may disagree on whether there is an actual gap to be filled or, alternatively, whether the decision to be made by the third party constitutes a modification or merely a clarification of the meaning and contents of an existing clause.

2. The Views of National Laws

In German law (article 317 BGB), the parties may entrust a third person with the power to determine the contractual performance. This determination can be an ‘equitable’ or a ‘free’ one. If the parties do not provide some guidance as to how the third person should reach his decision, the clause is void.61 In the first case of an equitable decision, the parties may have the decision reviewed by a court for obvious unfairness. The court may decide the matter itself also where the third person has refused to render a decision or has delayed doing so. It is also commonly held that a ‘free’ determination is void and can be substituted by a court decision if it grossly violates the principles of fairness or is against ordre public.62 German jurisprudence and doctrine try to distinguish and classify different types of contractual third party intervention: (1) the filling of gaps in the contract, be it legal terms or relevant facts such as the value or market price of goods; (2) adapting the contract to a change in circumstances (always only insofar as the contract allows and prescribes); (3) ascertaining relevant facts such as costs, values, measured quantities and (4) clarifying ambiguities in the contract. As the last two functions are somewhat similar to those of arbitrators, some authors claim that the procedural law of arbitration should be applied here.63 German courts have constantly applied articles 317-319 BGB in all four cases and, because of the contractual nature of such intervention, have refused to apply the procedural law of arbitration to the last mentioned types of decision.64 Accordingly, the intervener is not subject to the procedural rules of arbitration and his decision is no award. The intervener enjoys a certain freedom of discretion as indicated in article 317 BGB. On the other hand, the courts do not recognize clauses termed that broadly as to allow total arbitrariness by the third party, as Mezger rightly points out.65 Instead, some guidance as to the determination in the clause itself is required; these requirements depend on the function of the clause and the circumstances.

As discussed above,66 British and American laws are familiar with various contractual forms of third party intervention distinct from arbitration: third party appraisal, valuation and certification. The decision of a certifier or valuer is subject to judicial control and can be voided by the court for unreasonableness.67 A third party intervener such as a valuer may also decide a legal dispute and the parties may agree that this decision should be final and binding.68 Whether a third party can be empowered to change the contract through a unilateral decision, depends on the guidance for and the limits on such a decision provided by the parties in their contract. If the clause is sufficiently precise, the courts can be expected to respect it.69

French law does not contain a general concept of contractual third party intervention. There is a special provision in article 1592 of the Code civil that the parties to a purchase contract can entrust a third party with the determination of the price. This ‘détermination d’un prix par un tiers’ is generally recognized for other contracts, too. If this determination is not made, the contract is void. The determination is binding and can be nullified by the court only in case of obvious mistake or of fraud. French legal practice uses various forms of expert opinion (expertise amiable) in any question relevant to the contract. This opinion is normally not binding for the parties. If the parties wish to agree on the binding effect of such expertise, courts consider this as a form of arbitration subject to the relevant procedural rules.70 The same is true if a third party is empowered to change an existing contract.71 Such power presupposes a rather precise adaptation clause.

Italian law recognizes the determination of contractual performance by a third party (arbitraggio; article 1949 Codice civile) and the third party valuation (perizia contrattuale). Italian jurisprudence clearly considers the gap-filling functions of both types of third party intervention to be distinct from any form of arbitration.72 We should note, in this context, that Italian legal practice has developed an informal type of ‘contractual’ arbitration (arbitrato irrituale) to avoid the formal requirements which procedural law provides for arbitration.73

3. Typical Cases of Third Party Intervention: The Expert and the Amiable Compositeur
Two types of such interveners are particularly important in international contractual practice: the technical expert and the amiable compositeur; these interveners may be the same person, depending on the case at hand. In this section, we discuss only the formal decision-making functions of such a person and not his mere assistance in parties' negotiations.

The need for the wide use of independent technical consultants with respect to complex technical projects is reflected in the Guidelines for the Use of Consultants by World Bank Borrowers and by the World Bank as Executive Agency (1981) and in the establishment of the ICC Center for Technical Expertise discussed by Glossner. 74 These consultants are normally hired by the employer and their services are not only needed for the preparation of the contract (project design), but also in contract management, i.e. in monitoring the execution of the project and supervising the contractor. In the context of contractual management, the independent engineer has to make a number of ad hoc decisions including gap-filling and adapting the contract to unknown or changed circumstances. Some details of these functions will be further illustrated by Glossner. 75 The wide and various decision-making powers of such an engineer are reflected in the FIDIC (C.E.) General Conditions as cited. 76 As the engineer is hired by the employer, his neutrality and impartiality in decision-making is sometimes questioned. 77 In their contract and procurement regulations, many governments as employers today prefer a solution in which the independent engineer plays no role, as Feliciano points out. 78 Nevertheless, even if the parties confine contract management - including the necessary day-to-day decision-making - to a normal two-party cooperation without an independent engineer, where the employer exercises his contractual monitoring right through his own technical staff, there is still a widely felt need to employ the independent expert at least for some more important and unexpected technical questions. The ICC Rules on Technical Expertise as described by Glossner are designed as a response to this need. 79

The practical requirements for effecting such an expert's intervention (be it on 'small' or 'big' issues) are manifold and somewhat contradictory. First, the decision-making power must be broad enough to allow the necessary flexibility, as provided by the Italian arbitraggio and the German concept of performance determination by third parties (article 317 BGB); the English valuation of appraisal and the French expertise amiable also may meet this requirement. Second, the decision must be quick and therefore not bound by strict procedural rules. This requirement of mere 'contractual' (as opposed to 'procedural') intervention is met by Italian, German and British law, and by French law only if the expertise is not binding. Third, the decision should be binding if it is to bring about a quick and solid settlement of a dispute. Binding in this context means, as discussed, 80 having the effect of a contract and not an award. This requirement is again clearly met by German law, and also by Italian and British law. As we have seen, French law seems to recognize the binding force only if the procedural requirements of arbitration are met, thus qualifying the decision as an award. Fourth, a decision, if binding, should be subject to some subsequent control by courts or arbitrators. This requirement is again met by German, Italian and British law, perhaps to varying degrees. It is not met if the decision is qualified as an award, because an award is subject only to limited judicial review. It seems that here again the project of the référé arbitral could be an answer to these requirements.

Sometimes, the ad hoc decisions to be made by an expert or any other third party relate more to contractual terms and implied legal questions; thus, the decision in this respect is similar to one of an arbitrator. We have seen that, to a certain extent and depending on the applicable law, arbitrators can have flexible decision-making powers enabling them to adapt a contract to a new situation; the French institution of the amiable compositeur is just such an arbitrator. But the parties may feel a need for a more informal procedure, and for that reason might be willing to have no enforceable award but only a decision with the binding force of a contract. This might also be desirable because of the possibility of subsequent review by courts or arbitrators. It is this type of procedure which is offered by the ICC Adaptation Rules under its clause B as will be discussed in some detail by Mezger, and by the projected rules on an arbitral referee discussed by Glossner.

C. POWERS OF ONE PARTY

As discussed supra in Part II of this volume, 81 transnational business contracts not infrequently confer on one of the parties (and its representatives) the right to determine specific aspects of contractual performance in its scope, manner
and details. For example, work contracts often provide employers with the right to give instructions as to the details of the work, or to issue change orders; a hired engineer may many times act in this respect as the representative of the employer and not as a third party. The contract laws of most countries appear to tolerate this kind of open or flexible contract or clause, but only a few have special provisions on this kind of agreement. In French law, the courts have held that if one party accepts the performance of the other party but the consideration has not been determined, the court is entitled to determine the price. The German civil code expressly recognizes the right of the parties to entrust one party with the task of determining contractual performance (article 315 BGB). It distinguishes the case of an equitable determination by one party from that of a free one. In the first case, the other party may challenge the determination if it is, indeed, not equitable; recourse to the court may also be had in the case of a delay. In both cases, the court instead of the party is empowered to determine the performance. But even where a party is entitled to determine freely, courts and legal doctrine agree that the determination is subject to judicial review if it amounts to sheer arbitrariness and violates good morals or ordre public.

German law points to the problem of such clauses. Even through they may be necessary to provide the required flexibility in a complex long-term contract, there is a danger that one party will deliver itself entirely into the hands of the other party. Necessary protection can be provided in the contract itself - insofar as it defines the aim, scope and limits of the determination - or by subsequent control by courts or arbitrators. If no such safeguards exist, a court could, under the applicable law, void a contract which opens the way for arbitrariness and thus constitutes a self-defeating use of contractual freedom.

III. Adaptation Through Renegotiation: Procedural Duties and Sanctions

If the parties are unwilling to entrust one party or a third person (an arbitrator or another kind of intervener) with the power to resolve their contract adaptation problem, they may still resort to direct negotiations as mentioned in an effort to reach agreement. This procedure is particularly preferable where the parties envisage a future long-term and complex cooperation as is often the case when an arbitration problem arises during the execution of a long-term contract. In such renegotiations, third party interveners may still have an important role in assisting the parties in their renegotiations, and this is, indeed, the idea behind the UNCITRAL Conciliation Rules and the ICC Adaptation Rules under clause A.

A. DUTIES OF THE PARTIES

Duties of the parties to renegotiate in case of an adaptation problem, as discussed, can be established through an express adaptation clause. In particular, modern hardship clauses contain such a provision. But also in the absence of such a clause, a duty to renegotiate in the case of an adaptation problem can be assumed to be part of the contractual relationship and based on the principle of good faith, at least in some civil law countries. It is still an open question to what extent the violation of such duties could lead to a claim for damages. We will see that there are additional de facto sanctions which guarantee, to a certain degree, the effectiveness of such duties.

Furthermore, we may ask what particular duties are involved in the process of renegotiation. Such particular duties are defined in both the ICC and UNCITRAL Rules. They include timely and fair information and general cooperation in appointing and supporting the third party. Details will be discussed by Mezger and Herrmann.

B. CONCILIATORS

The procedural functions of third parties or conciliators in the process of renegotiation are equally defined in the ICC Adaptation and UNCITRAL Conciliation Rules. The main task of the conciliator is to assist the parties in every respect in reaching a settlement and, to this end, the conciliator is to issue a recommendation (article 12(1) ICC Rules) or to formulate and reformulate the terms of a possible settlement (art. 13(1) UNCITRAL Rules).

C. THE RESULT: AN ADAPTED CONTRACT

Both under a typical hardship clause and under the ICC and UNCITRAL Rules, the result of successful renegotiations is an adapted contract, or, as the UNCITRAL Rules put it, a ‘settlement agreement’. This means that the parties do not
have an enforceable award or comparable instrument unless they agree, according to the applicable law, to have an enforceable agreement. In many cases, this is not what the parties want in the first place. Instead, they reach an agreement with a view to further cooperation which would not be enhanced by such sanctions.

D. RENEGOTIATION IN THE SHADOW OF THE COURT OR ARBITRAL TRIBUNAL

If the parties do not reach an agreement, they may have recourse to the courts or to an arbitral tribunal. A hardship clause typically is linked to an arbitration clause. Courts or arbitral tribunals, however, even if they may act under flexible legal concepts of contract adaptation (e.g., as provided in German or Italian law) or as an amiable compositeur (under French law) do not necessarily have the same wide scope of flexibility the parties would themselves have in a private renegotiation. This is so because a court or arbitrator, even if given wide discretionary powers, must render a decision based on law or, at least, legal standards of fairness and equity. Moreover, a court or tribunal is often not able to understand all of the practical implications of an adaptation problem to the extent necessary for rewriting a complex contract for the parties. It is at least an open question whether a court or arbitrator becomes entitled, through a hardship clause, to render a decision containing a new complex contractual scheme for the parties’ future cooperation. It may be entitled only to fairly distribute costs and burdens and/or to fairly liquidate the contract in light of the changed circumstances. The more complex a contract is and the more the future cooperation of parties is in question, the less a court decision or an arbitral award appears to be an adequate answer. Recourse to such proceedings seems, rather, to be a fall-back position, a substitute solution of last resort when renegotiations fail and the spirit of cooperation has faded.

This inadequacy of a decision or award in this respect is a good reason for the parties to try hard to reach a decision on their own. Even in cases where no contractual duties to renegotiate had been established, the mere fact that a court or arbitral tribunal might otherwise decide, has helped bring the parties back to the conference table. In some of the strongest adaptation cases, such as the Westinghouse Uranium Supply case, where a two billion dollar price adaptation and the possible bankruptcy of the supplier were at stake, negotiations for the adaptation of long-term supply contracts were conducted and settled pending court proceedings, i.e., so to speak, in the shadow of the court. The study of many important arbitral awards under international commercial contracts shows that most were preceded by renegotiation efforts, and many arbitral awards were avoided by the mere imminence of arbitral proceedings.

This, of course, is a factual rather than a legal mechanism. One could add here that all kinds of threats, such as the imminent insolvency of a borrower or the danger to the world monetary system, have brought about renegotiations on international loans. Indeed, one could conclude with an observation more of legal philosophy: necessitas facit ius. But if we stay on the legal side of the problem, we may state that the aforementioned duty to renegotiate influences the court decision. Unfairness in renegotiations or a party’s demonstrated but unfounded unwillingness to renegotiate may well be an argument underlying the decision. Thus, the broad legal concepts described - force majeure, collapse of the foundation of the transaction, impracticability - are flexible enough to sanction the violation of such duty, although such sanction might be available in extreme cases only.

1 See Reports to the Tenth International Congress of Comparative Law Budapest 1978, §II.A (Péteri & Lamm eds., 1978), especially the general report by David, La technique de l’arbitrage comme procédé de révision des contrats. in id. at 269; Arbitration to Adapt International Economic Contracts to Changed Circumstances, in Seventh International Arbitration Congress Hamburg, June 7-11, 1982 (1983) (ILCA Congress Series No. 1).
4 On the ICC project of a référet arbitral, see infra text accompanying notes 80-83; Glossner, infra this volume, at 191
5 UNCITRAL has promulgated a draft Model Law on Arbitration that includes a contract adaptation provision.
7 Schmitthoff’s Export Trade, ch. 11 (7th ed., 1980).
8 See supra at 124 and 149 et seq.
9 See infra text accompanying notes 81-86.
10 See supra 138; Glossner, infra this volume, at 191 et seq.
11 See Mezger, infra this volume, at 205; Herrmann, infra this volume, at 217.
12 ICC Adaptation Rules, supra note 3, at 8.
12 *Infra*, this volume at 205.


14 On these categories, see *infra* text accompanying note 37.

15 BGHZ 6, 335; 48, 25.


20 See *infra* note 63 and accompanying text.

21 See *infra* notes 67-68 and accompanying text.


23 David, *supra* note 1, at 271 *et seq*.

24 For a comparative overview, see Schlosser, *supra* note 13.

25 For a more detailed discussion of third party intervention, see *infra* II.B, at 183-87, and III.B, at 189; see also Glossner, *infra* this volume, at 191 *et seq*.

26 This applies traditionally to all civil law countries. For details, see Schlosser, *supra* note 13. Until recently, Great Britain had subjected awards to full judicial review; however, in practice such review had tended to be avoided through the issuance of awards without a written opinion. The new Arbitration Act 1979 opens the possibility of excluding full judicial review. *See Arbitration Act 1979, reprinted in 18 Int'l Legal Mat's 1248 (1979)*.


28 As in the case of *Arenson v. Casson*, *supra* note 16.


30 *See infra* II.B 2 at 184 *et seq*.

31 *See infra* notes 63, 69 and accompanying text.


33 This is a question not only of the applicable law, but also of the convention itself, *i.e.* of its uniform interpretation. Schlosser, *supra* note 13, No. 634 *et seq*.; Löwenheim, *supra* note 32, at 87.

34 *See infra* text accompanying notes 36-89.


39 The relevant law is that applicable to the contract and not the law of procedure. Schlosser, *supra* note 13, No. 621.

40 *See supra* this volume, Part I.

41 On the effects and application of *lex mercatoria*, see generally The Transnational Law of International Commercial Transactions, Part I (N. Horn & C. Schmitthoff eds., 1982).

42 *See supra* this volume, Part II, at 130 *et seq*.

43 *See supra* this volume, Part I, at 22-23.

44 *See supra* text accompanying note 36.

45 *See supra* this volume, Part I, at 22.


47 *See supra* note 26.

48 Schmitthoff, *supra* note 46.

49 Schmitthoff, as cited. See also *infra* section 3.


51 Décret no. 81/500 of May 12, 1981.

52 Cf., in general, C. pr. civ. art. 1492 *et seq*.

53 *See supra* this volume, Part II, at 130 *et seq*.
55 See supra note 1.
56 BGH WM 1975, 769.
58 Supra this volume, Part II.
59 See also the lists provided by van Ommeslaghe, *Les clauses de force majeure et d'imprévision dans les contrats internationaux*, 57 Rev. dr. int. dr. comp. 7, 41 et seq. (1980).
60 Infra this volume, at 191 et seq.
61 BGHZ 55, 248, 250.
62 Staudinger/Mayer-Maly Kommentar zum BGB, § 319 Rz. 30 (12th ed., 1979); OGHZ 4, 39, 45.
64 RGZ 152, 201, 204; BGHZ 6, 335; 48, 25.
65 Infra this volume at 211.
66 See supra text accompanying notes 43-48.
68 See Arenson v. Casson, supra note 16.
70 Judgment of July 24, 1892, Conseil d'Etat, D. 1893.3.4; Cass. R.D. V Arbitrage No. 55.
74 Infra at 195 et seq. Text infra Part V at 393.
75 Infra at 191 et seq.
76 Supra note 29; for a general description of these conditions, see supra this volume, Part II, at 113-15.
78 Supra this volume, at 148.
79 Infra this volume, at 191 et seq., 197-98.
80 Supra text accompanying notes 26-32.
82 On these different functions, see Glossner, infra this volume, at 191 et seq.
83 Schmitthoff, supra note 46.
85 Staudinger/Mayer-Maly, supra note 62, § 315 Rz 60.
86 See supra at 184.
87 Supra Section 1.A, at 174 et seq.
88 Supra note 3. Text reprinted infra this volume, at 409.
89 Supra note 3. Text infra at 385.
90 Supra this volume, Part II, at 129 131.
91 Supra this volume, Part I, at 22-23.
92 Infra this volume at 205 et seq. and 217 et seq., respectively.
93 UNCITRAL Conciliation Rules, supra note 88, art. 13.

**Referring Principles:**

- IV.6.7 - Duty to renegotiate
- IV.6.9 - Duty to notify / to cooperate