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Title:
VIII.2 - Hardship: Legal consequences

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(a) In case of the occurrence of an event as defined in Principle VIII.1, the disadvantaged party may claim from the other party renegotiation of the contract with a view to reaching agreement on alternative contractual terms which reasonably allow both parties the continuation of the contract.

(b) If the parties fail to reach agreement on these alternative terms within reasonable time, either party may apply to a court or arbitral tribunal in order to have the contract

i) adapted to the changed circumstances (provided the applicable procedural law gives the court or arbitral tribunal the authority to decide on such adaptation) with a view to restoring the initial equilibrium of the contract or, if such restauation is not feasible, to distributing the losses caused by the hardship event equally between the parties, or

ii) terminated at a date and on terms to be determined by the court or arbitral tribunal.

Commentary:

1 See for the guidelines which must be observed by parties in a contractual renegotiation process Trans-Lex Commentary to Principle IV.6.7, Para 3.

2 If an arbitral tribunal is called upon to adapt the contract under Subsection (b) i), the question arises whether in these cases a "dispute" or "legal dispute" exists as a prerequisite for arbitral decision making. The reason for this is to be found in the special nature of the renegotiation process. Because the possible negotiation outcome is so open, a difference of opinion between the parties as to the way to adjust the contract is not suited to classical arbitral adjudication in the sense of a clear "yes or no" decision of a legal disoute. Rather an agreement between the parties on changing individual contractual obligations or adapting them to the changed economic conditions should be replaced by a ruling by the arbitral tribunal. With regard to the openness of the possible decision, however, the arbitrators are no longer being called upon to make a legal decision but rather, to shape the contractual relationship for the parties. This is a commercial, rather than a legal decision.

3 A multitude of modern developments supports the assumption of a more extensive jurisdiction for arbitral tribunals, including the authorization to adjust and adapt contracts. Factors in support of this view are the significantly greater arbitration-friendliness of national arbitration acts in recent years combined with increasingly equal treatment of adjudication by arbitral tribunals and by national courts, and the comprehensive recognition of party-autonomy as the leading maxim of arbitration. Even under English law, which has traditionally rejected every interference with the contract by the arbitral tribunal, arbitrators today are authorized to undertake such legal creativity to quite a broad extent. Apart from the extremely arbitration-friendly attitude of the English Arbitration Act 1996, this flows above all from the broad term "dispute", which forms the basis of the English arbitraiton law. As well as genuine legal disputes ("disputes") it includes mere differences of opinion ("differences") and hence permits the express transfer of the completion and adjustment jurisdiction to an arbitral tribunal. Even without an express transfer of jurisdiction under English law, in the case of contracts where performance has already begun a so-called "implied term" can be assumed, according to which the contract should be amended by a subsequent agreement. Consequently, in most cases, the arbitral tribunal will be procedurally authorized to adapt the contract if the parties have included a hardship clause in the contract. This procedural authorization is governed by the arbitration law at the seat of the arbitration ("lex arbitri"). It must be distinguished from the substantive legitimacy of the contract adaptation which follows from the principles of substantive law applicable to the contract.