International arbitration agreements and their adjustment clauses: are they in a state of evolution?

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Abstract:

This article examines the principal means of the dispute resolution mechanism which deals with the International Arbitration Agreements. It is focuses, on the drafting of arbitration agreements and their adjustment clauses. This agreements are usually subject of the parties' drafting skills, negotiations, and interests. Given the situation, almost all international arbitrations arise pursuant to these agreements clauses, which, typically, are concluded well before any dispute arises. However, the international arbitration agreements embrace a very short, a very long, or somewhere in between clauses. Yet, the arbitration agreements in multi-party or in long-term complex businesses transactions are almost always subject to many factors - occurrence or relevance of which was not envisioned at the time the agreement was formed. Is there a perfect clause designed to fit all circumstances and accepted by all parties? What approach serves best the interest of the parties? The article challenges an obscure attitude: that parties should negotiate stabilization, hardship, force majeure or price review clauses more often in their original agreements, regardless of the belief that the project is a success and they do not wish to include conditions to avoid unforeseen inconsistencies, conflicts, or similar problems. Moreover, the complex language of these clauses and the long-lasting negotiations makes it even more difficult to convince the parties of the utility and the economic implications of these clauses.

Finally, it sets out a suggested approach for determining the most common adjustment agreement clause in any given case.

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I. Preamble

International arbitrations 'most commonly turn to issues of contractual interpretation[1]'. One might expect therefore that matters of arbitration agreements negotiation and interpretation, even when parties and their lawyers have plenty of time, could not deal in the future with uncertain events that might imply uncertainty and speculation. However, the absolute perfect clause designed for any given cases and circumstances which could be accepted by all parties reflecting their differing interests views does not exist. Moreover, the more international the commercial relationship and the longer the term of the agreement, the greater the uncertainty and speculation[2]. As a leading Swiss arbitrator put it, contractual adjustment and interpretation 'is an issue that is often overlooked but is actually very important'[3].

Even when there are cases where the arbitration agreement has an adjustment clause it may be that they do not fit with the given situation which can occur later on. As Bockstiegel writes that: "Much more than with contract governed by a single national legal and economic system, international business relations are prone to the occurrence of events the parties did not foresee and therefore did not deal with directly in their contract, either because each party was not well acquainted with the political and legal system of the other or because international business relations and international commercial contracts are generally not performed in the stable political, economic, and legal framework normally governing business relations within one country."[4]

Again, even if the parties cannot foretell the happening of the events, even when they simply do not think of the risk, which is a common situation, they still have a choice by planning rationally. Gillette Clayton argues that they can keep in mind the inevitable uncertainty of oncoming issues and try to estimate and control the consequences of their future circumstances: "If a commercial actor is able to bargain with uncertainty in mind, (…) the law ought to consider a such bargain the product of a cognitive and analytical process for which the actor can be held accountable, notwithstanding the intervention of specific events that the actor did not predict. The failure of the law to respect decisions made under these circumstances is unjustifiably paternalistic toward individual actors and frustrates

1 Alan S Rau and Edward F Sherman, 'Tradition and Innovation in International Arbitration Procedure' (1995) 30 Texas Intl L J 89, 101. See also James Spigelman, 'The Centrality of Contractual Interpretation: A Comparative Perspective', The 2013 Kaplan Lecture (Hong Kong, 27 November 2013) "In my experience...the majority of commercial disputes involve questions of contractual interpretation. Often, such questions are at the heart of the dispute."

2 Burkhardt, Martin – Vertragsanpassung bei veranderten Umstanden in der Praxis des Schweizerischen Privatrechts, Bamberg 1996

3 See, Joshua Karton interview 12 June 2012

4 See, Bockstiegel, Karl-Heinz, Hardship, Force Majore and Special Risks Clauses in International Contracts, in: Horn (ed.), Adaptation and renegotiation of contracts in international trade and finance, Deventer 1985, p.159

individual effort that would otherwise generate greater personal and social welfare."[5] However, if the fluid circumstances could show a gap in the arbitration agreement, in this situation, there will be no "decision" made by the parties that the tribunals should respect.Gillette hisself acknowledges that "if commercial actors failed to consider certain risks not as part of a rational decision-making process (…) but because the actors were psychologically incapable of confronting the existence of those risks, application of the model would be inappropriate. - Literature concerning reactions of individuals facing situations of risk and uncertainty indicates that such circumstances do exist. Individuals, wishing to think well of themselves and believing that it should be irrational to confront situations fraught with risk, may rationalize their willingness to enter into such situations through cognitive dissonance; that is, by denying that the risk exists, notwithstanding substantial evidence to the contrary."[6]

That said, the argument that gains and losses resulting from court-imposed adjustments of contract are undeserved[7] is incontestable only when there is no substantial movement in the circumstances. For example, "if the original price term is enforced, the resulting enrichment for the respective party is "unbargained for" and therefore likewise "undeserved". This is important especially in the "operative situation" of long-term contracts where there are special factors such as idiosyncratic reliance, rational norms, complicated third party and public interests that should be taken into account."[8]

In particular cases, as visioned by energy long-term agreements, for instance, a lot may change over time which could affect public policy or have a significant impact over investors priorities and obligations. In sum, is important to offer investors any means of protection there can be against any unexpected or unforeseeable eloquent situations. For such type of protection in international arbitration agreements with reference to energy cases, for instance, clauses like hardship, price review, stabilization or force majeure are often renewed.

Furthermore, greater attention to the agreement adjustment clauses would not only be more accurate in the legal sense, but would be more likely to benefit with the intentions of the parties. A party can choose to reserve to itself sole discretion or to include in the agreement a more flexible clause. In those various private international agreements, parties can, for instance, agree on an open or an flexible agreement. Yet, what would be for a greater success formula is a classical example of "built-in contractual flexibility."[9]

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5 See, Gillette Clayton – Commercial Rationality and the Duty to Adjust Long-Term Contracts, 75 Cal. L.Rev.521 (1987)
6 Gillette, ad footnote 87
7 See, Speidel Richard – Court-Imposed Price Adjustments under Long-Term Supply Contracts, 76 Northwestern U. Law Review 396 (1981)
8 See, Speidel p. 395
9 Horn, Standard Clauses, p.111

II. Common adjustment of international agreements clauses

1. Introduction

As said, the aim of this article is to analyze this renegotiation elaborated scenario and the restrictive tools made available by practitioners for the grounds of dealing with situations of price review, hardship and force majeure clauses or stabilization provisions. What do we know about these essential adjustment clauses? What are the benefits that UNIDROIT Principles might offer in long-term agreements? To what extent these adjusment clauses could provide a blueprint by which parties can overcome the pitfalls without exposing the balance of the agreement? Or do they might leave 'the necessary determinations to a third party or to one of the parties.'[10] The most often used clauses are the following:

- automatic adjustment clauses;
- stabilization clauses;
- hardship and force majeure clauses
- price review clauses

2. Automatic adjustment clauses

Innuendo of the soft law and general principles of international law are most likely formulated to acquire commercially valuable results, even though national laws are recognized as rigid, conservative or inappropriate to the devoir of international commerce. However, these automatic adjustment clauses 'often seek to offer solutions...[and] feel less restrictive' by referring to an objective standard such as the price of labor or the relation between certain currencies or the safe retransfer of the investors invested money. In oil, gas and energy agreements, due to the fact that they are long-term[11] and complex pacts, parties mainly foresee at the outset that there will be changes in the clauses specified under the original contract. For instance, “maintenance of value clauses” are significant for the allay effects of the fluctuations in the exchange rates of currency of the sum which will be paid

10 Horn, Standard Clauses, p.111; he uses, however, a different classification and uses the term in a wider sense.

11 Definition given by the UNIDROIT Report on the second session of the Working Group on Long-Term Contracts, UNIDROIT 2016 – Study L – Misc.32 “ Long-term contract refers to a contract which is to be performed over a period of time and which normally involves, to a varying degree, complexity of the transaction and an ongoing relationship between the parties”, which can be found here: http://www.unidroit.org/english/documents/2016/study50/s-50-misc32-e.pdf

under the international agreement. In other words, the facile method for the creditor to avoid the exchange rate risk is to bill in a hard currency; yet national legislation's do restrict sometimes the use of such clauses or impose them as governmental authorities approval. In addition, maintenance-of-value-clauses are needed to enhance stability and confidence in international commerce relationships.

Finally, price adjustment clauses shifts the risk of future inflation costs or currency rates to one of the parties. Yet, a possible agreement solution is the stipulation of a cost-reimbursement-incentive-fee[12], or a price escalation clause, where increases in specific cost factors are considered to create a solid ground for the corresponding change.

3. Stabilization clauses

Or negative adjustment clauses are of a biggest importance especially in response to the prospect of changing agreements rights. In this contracts one party, for instance, the government of a host country has the power to modify the relevant legislation or the rules applicable to the agreement. Therefore, the purpose of these clauses is to provide no changes to the agreement and to make sure that everything will remain "stabilized". As well, due to this stabilization clause, this party grants not to modify its legislation or policy in a manner which will affect the agreements rights or will connect 'commercial benefits of the private investor or contractor.[13]

In addition, the single purpose of these stabilization clauses is "to preclude the application to an agreement of any subsequent legislative (statutory) or administrative (regulatory) act issued by the government or the administration that modifies the legal situation of the investor."[14]

In other words, such clauses do not prohibit a government of a host country to institute new legislation, but rather keep it from enforcing new rules and regulations against the other agreement party.

The effects of these clauses may include any regulations that could influence the economic conditions of the agreement, as follows: (i) fiscal regime; (ii) free transferability; (iii) property; (iv) import-export provisions; (v) the general regulations and agreement framework.

12 See, "Subpart 16.3 – Cost-Rembursement Contracts", U.S. Federal Acquisition Regulations, July 2010: "A cost-plus-incentive fee (CPIF) in a contract is a cost-reimbursement clause that provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs."

13 See, Horn, Standard Clauses, p.128

14 See, W. Peter, Stabilization Clauses in Arbitration and Renegotiation of International Investment Agreement (1995), p. 214.

As a matter of practice, "these clauses impose on the state an obligation to act in good faith and give rise to an obligation to compensate in case of their breach".[15] Furthermore, in most recent cases, arbitral tribunals did echo "the notion of the stability of the legal regime under which the foreign investor should operate is a part of fair and equitable treatment of investment."[16]

Examples of Stabilization clauses:

- "*The Host Government shall take all actions available to them to restore the Economic Equilibrium established under this Agreement and any other Project Agreements if and to the extent the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of any change (whether the change is specific to the Project or of general application) in [name of country] law (including any laws regarding Taxes, health, safety and the environment) occurring after the Effective Date*".[17]
- *"The tax regime, benefits, privileges and exemptions provided in any of the articles hereof, which shall be recorded in the special operation contract, shall remain invariable for the duration thereof."*[18]
- *"In case of modifications to the tax regime, including the creation of new taxes, or the labor participation, or its interpretation, that have consequences on the economics of this Contract, a corresponding factor will be included in the production share percentages to absorb the increase or decrease in the tax burden or in the labor participation of the previously indicated contractor. This correction factor will be calculated between the Parties and approved by the Ministry of Energy and Mines."*[19]
- *"... the State Authorities [i.e. the host government, local authorities and state controlled or owned entities] shall take all actions available to them to restore the Economic Equilibrium established under the Project Agreements if and to the extent that the Economic Equilibrium is disrupted or negatively affected, directly or indirectly, as a result of nay change (whether the*

15 A.F.M. Maniruzzaman, Damages for breach of stabilisation clauses in international investment law: Where do we stand today? Int'l Energy L. T. 246 (2007).

16 See, Occidental Exploration and Production Company v.The Republic of Ecuador, LCIA Case No UN3467, Final Award of 1 July 2004, para 183. Sempra Energy International v.Argentine Republic, Case No ARB/02/16. 28 September 2007, para. 300. Tecnicas Medioambientales TECMED SA v. United Mexican States, ICSID Case ARB (AF)/00/2. 29 May 2003, at para 154

17 See, Article 37.2 of the Energy Charter Treaty Secretariat's Model Host Government Agreement in Model Intergovernmental and Host Government Agreements for Cross-Border Pipelines (2ndedition).

18 See, Decree-Law 1089 of 1975, Art. 12 and 12.1 (Chile)

19 See, Article 11.7 of the Model PSC of October 2002 for the Exploration of Hydrocarbons & the Exploration of Crude Oil (Ecuador), Barrows.

change is specific to the project or of general application) in [Azerbaijan, Georgian, Turkish] Law (including any Azerbaijan Laws regarding Taxes, health, safety and the environment) occurring after [date of the HGA or its ratification]... The foregoing obligation to take all actions available to restore the Economic Equilibrium shall include the obligation to take all appropriate measures to resolve promptly by whatever means may be necessary, including by way of exemption, legislation, decree and/or other authoritative acts, any conflict or anomaly between any Project Agreement and such [Azerbaijan, Georgian, Turkish] Law"[20]

More importantly, in latest investment arbitration disputes, as some commentators contend that the application by host states of new legislation to an investment covered by a stabilization clause could be seen as an expropriation of the contractual right not to be subject to such new legislation without compensation.[21]

4. Hardship and Force majeure clauses

Provisions dealing with hardship are to be found in the outline of the UNIDROIT Principles of International Commercial Contracts 2010. Article 6.2.2 of said principles gives a definition to hardship as it follows:

There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and

(a) the events occur or become known to the disadvantaged party after the conclusion of the contract;

(b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;

(c) the events are beyond the control of the disadvantaged party; and

(d) the risk of the events was not as summed by the disadvantaged party.

As common knowledge the most used agreement adjustment clauses are hardship and force majeure clauses. "In the traditional meaning of the term, an event of force majeure renders contract

20 This is an extract from the Baku-Tbilisi-Ceyhan (BTC) pipeline documentation. The clause above was contained in each of the host government agreements (with Azerbaijan, Georgia and Turkey).

21 See, Marshall, Fiona (2010), Climate Change and International Investment Agreements: Obstacles or Opportunities? International Institute for Sustainable Development. Available at: http://www.iisd.org/pdf/2009/bali_2_copenhagen_iias.pdf, (visited: 13 June 2013) p. 50; Shemberg, op. cit., p. 38

performance impossible, justifies contract termination, or serves as a limitation of liability for non-performance. (…) In its boarder meaning, force majeure gives rise to contract adjustment and not to termination. When parties fail to agree on the terms of a contract adjustment, however, hardship situations occasionally permit contract termination. In this way, the internationalized concepts of hardship and force majeure have become very close. Both lead to contract adjustment. (…) The line between force majeure or hardship clauses and hardship clauses is thus a fine one, and it is often difficult to distinguish between them."[22]

Although, as other "players" did observe and stated: "There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and 1) the events occur or become known to the disadvantaged party after the conclusion of the contract; 2) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract: 3) the events are beyond the control of the disadvantaged party; and 4) the risk of the events was not assumed by the disadvantaged party."[23]

If wanting to conclude hardship entity, must consider the main issues as follows:

- if the essential event has its specific or general details;
- if a price fluctuation it was anticipated when the agreement was concluded;
- in case of an event what is the impact over the parties;
- what types of adjustment is required to set in motion a hardship clause;
- if the parties are enforced to have a consent previously the agreement might be adjusted;
- the style of invitation to renegotiate[24]

Additionally, one must bear in mind that the obstacle of setting in motion the agreement outline are of great importance, and may be very high: the rules and regulations discretion of many countries demand that parties should be "bound to fulfill their duties, even if such fulfillment has become more onerous, either due to the raise of the costs for one fulfilling his duty or due to the diminishment of the value of the counter-performance.[25]" As well, according to the Article 1271 paragraph (2) letters (a) and (b) of the Romanian Civil Code, the consent of the hardship clause has the intent of strictly "distributing the losses and benefits resulting from the change of circumstances in a fair way between

22 See, Draetta, Ugo/Lake, Ralph/Nanda, Ved – Breach and Adaptation of International Contracts, 1992
23 See, Article 6.2.2 of the UNIDROIT Principles of International Commercial Contracts (2010).
24 See, **G. M. von Mehren and B. Holland,** *Beyond Price Reviews: Adjudicating Claims of Financial Hardship* in The Leading Practitioner's Guide to International Oil & Gas Arbitration (ed. J. M. Gaitis, 2015), p. 70-75
25 According to Article 1271 paragraph (1) of the Romanian Civil Code.

the parties" or the termination of the agreement. As the case may be in Italian Civil Code a party is required to provide situations that "threaten the debtor with exorbitant loss"[26] or to demonstrate that the obligations of one party have "become excessively onerous due to extraordinary and unpredictable events."[27] An important citation in this regard is the Brazilian Civil Code, due to the fact that Brazilian is a dominant investment market especially for finance infrastructure. Moreover, it has law regulations inspired by the theory of "excessive" onerousness: "Article 478: For contracts of continuing or deferred performance, if the performance by one of the parties becomes excessively onerous, providing an undue advantage to the other, and as a result of extraordinary and unforeseen events, the disadvantaged party may request the termination of the contract. The effects of a judgment of termination shall be retroactive to the date of the summons. Article 479: Termination can be avoided if the defendant agrees to modify equitably the terms of the contract. Article 480: If, in a contract, the obligations of performance apply only to one of the parties, such party may request that its obligations be reduced or modified as to its performance in order to avoid excessive burden."[28]

Examples of Hardship clauses

- "*(a) If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic Hardship then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanism contained in Clauses 4, 5 and 6 of this Article are justified in the circumstances in fairness to the parties to offset or alleviate the said Hardship caused by such change. (b) If the parties shall not within ninety (90) days after any such request have reached agreement on the adjustments (if any) in the said prices or price revision mechanism which are to be made then the matter may forthwith be referred by either party for determination by experts to be appointed in the manner set out in Article xviii hereof save that the appointment of the third expert referred to in Clause 1(c) of that Article shall in any event be made by the Minister of Power in consultation with the Lord Chancellor. (c) The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made for the*

26 According to Article 1467 of Italian Civil Code
27 According to Article 205, Law 43/1976 of the Civil Code of Jordan
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purposes aforesaid and any revised prices or any change in the price revision mechanism so determined by such experts shall take effect six (6) months after the date on which the request for the review was first made."[29]

- *When entering into this Agreement the parties contemplate that the* effects and/or *consequences of this Agreement will not result in economic conditions [which are substantial Hardship] to any of them; provided that they will act in accordance with sound marketing and efficient operating practices. They therefore agree on the following: Substantial Hardship shall mean if at any time or from time to time during the term of this Agreement without default of the party concerned there is the occurrence of an intervening event or change of circumstances beyond said party's control when acting as a reasonable and prudent operator such that the consequences and effects of which are fundamentally different from what was contemplated by the parties at the time of entering into this Agreement (such as, without limitation, the economic consequences and effects of a novel economically available source of energy), which consequences and effects place said party in the situation that then and for the foreseeable future all annual costs (including, without limitation, depreciation and interest) associated with or related to the processed gas which is the subject of this Agreement exceeded the annual proceeds derived from the sale of said gas. Notwithstanding the effect of other relieving or adjusting provisions of this Agreement the party claiming that it is placed in such position as aforesaid may by notice request the other for a meeting to determine if said occurrence has happened and if so to agree upon what, if any, adjustment in the price then in force under this Agreement and/or other terms and conditions thereof is justified in the circumstances in fairness to the parties to alleviate said consequences and effects of said occurrence. Price control by the Government of the state of the relevant Buyers(s) affecting the price of natural gas in the market shall not be considered to constitute substantial Hardship.*[30]

- *Where, however, as a result of exceptional and unforeseeable events, the full filment of the contractual obligation, though not impossible, becomes excessively onerous in such a way as to threaten the obligor with exorbitant loss, the judge may, according to the circumstances and after taking into consideration the interests of both parties, reduce the excessive obligation to a reasonable level. Any agreement to the contrary shall be void.*"[31]

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29 Superior Overseas Development Corporation and Phillips Petroleum (UK) Co Ltd v British Gas Corporation [1982] 1 Lloyd's Rep. 262, 264–265

30 The clause is an illustration from a gas agreement that is often quoted: originally cited in CM Schmitthoff 'Hardship Clauses' *1980 - The Journal of Business Law 84, 85

31 ICC Force Majeure Clause 2003 -ICC Hardship Clause 2003 find at http://store.iccwbo.org/t/ICC%20Force

- *(a) If at any time or from time to time during the contract period there has been any substantial change in the economic circumstances relating to this Agreement and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) either party feels that such change is causing it to suffer substantial economic Hardship then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanism contained in Clauses 4, 5 and 6 of this Article are justified in the circumstances in fairness to the parties to offset or alleviate the said Hardship caused by such change. (b) If the parties shall not within ninety (90) days after any such request have reached agreement on the adjustments (if any) in the said prices or price revision mechanism which are to be made then the matter may forthwith be referred by either party for determination by experts to be appointed in the manner set out in Article xviii hereof save that the appointment of the third expertreferred to in Clause 1(c) of that Article shall in any event be made by the Minister of Power in consultation with the Lord Chancellor. (c) The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made for the purposes aforesaid and any revised prices or any change in the price revision mechanism so determined by such experts shall take effect six (6) months after the date on which the request for the review was first made.*[32]

Effects of Hardship

(1) In case of Hardship the disadvantaged party is entitled to demand that the agreement should be adjusted. The demand shall be made in a flash and shall reveal the cause on which it has been made. (2) The demand for the adjustment does not in itself entitle the disadvantaged party to withhold performance.(3) Upon failure to reach agreement within a reasonable time either party may resort to the court. (4) If the court finds Hardship it may, if reasonable, (a) terminate the contract at a date and on terms to be fixed; or (b) adapt the contract with a view to restoring its equilibrium.

%20Majeure%20Hardship%20Clause (last visited 26 October 2015)

32 The illustration is an example of Hardship clause which is provided by clause 7 of the agreement between the parties in *Superior Overseas Development Corporation and Phillips Petroleum (UK) Co Ltd v British Gas Corporation* - [1982] 1 Lloyd's Rep 262, 264–265; the clause is also available in E McKendrick Contract Law(2ndedn OUP Oxford 2005) 439–440

4.1. Importance of Force Majeure

As well, provisions of Force Majeure are to be found in the UNIDROIT Principles Principles of International Commercial Contracts 2010. Article 7.1.7 of mention principles gives a definition to the Force majeure:

"(1) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

(2) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.

(3) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt.

(4) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due."

A hardship clause is most of the time linked to a force majeure provision in an international arbitration agreement. The force majeure clause is a particularly constant agreement stipulation. If there is a difference between the two notions it refers to the fact that hardship specifies the prejudice party performance which it has become a lot more of a oppressive, hence not useless, meanwhile force majeure deals with the agreement provisions which have become impossible to fulfill. Additionally, force majeure clauses exonerates a party if some unexpected events beyond human power and control might keep it from the agreements obligations. Hence, a hardship clause, on the other hand, it demands for an agreement intervention and maybe a renegotiation if the continued conduct of the party's agreement obligations had become extremely laborious due to an unexpected event beyond human control.

Illustration:

K *contracts to lay a natural gas pipeline across the Sweden territory has been signed. Climatic conditions are such that is not possible to work between 1 December and 30 April.*

The agreement must finish on 30 September but the start of the work is delayed for two months by an devastating Earthquake which makes it impossible to finish work in time. If the consequence is reasonably to prevent the completion of the work until its resumption in the following autunum, K may be entitled to the extention of six months even though the delay was only two months, based on the Article 7.1.7

Examples of Force Majeure clauses:

- *Sellers shall not be responsible for delay in shipment of the goods or any part thereof occasioned by any act of God, strike, lockout, riot, or civil commotion, combination of workmen, breakdown of machinery, fire or any cause comprehended in the term "force majeure." If delay in shipment is likely to occur for any of the above reasons, Shippers shall give notice to their Buyers by telegram, telex or teleprinter or by similar advice within 7 consecutive days of the occurrence, or not less than 21 consecutive days before the commencement of the contract period, whichever is later. The notice shall state the reason(s) for the anticipated delay. If after giving such notice an extension to the shipping period is required, then Shippers shall give further notice not later than 2 business days after the last day of the contract period of shipment stating the port or ports of loading from which the goods were intended to be shipped, and shipments effected after the contract period shall be limited to the port or ports so nominated. If shipment be delayed for more than one calendar month, Buyers shall have the option of cancelling the delayed portion of the contract, such option to be exercised by Buyers giving notice to be received by Sellers not later than the first business day after the additional calendar month. If Buyers do not exercise this option, such delayed portion shall be automatically extended for a further period of one month. If shipment under this clause be prevented during the further one month's extension, the contract shall be considered void. Buyers shall have no claim against Sellers for delay or non-shipment under this clause provided that Sellers shall have supplied to Buyers, if required, satisfactory evidence justifying the delay or non-fulfilment.*[33]
- *Wijsmuller has the right to cancel its performance under this Contract whether the loading has been completed or not, in the event of force majeur [sic], Acts of God, perils or danger and*

33 The present illustration is clause 22 of the Grain and Feed Trade Association (GAFTA) 100, quoted in Alfred C. Toepfer v Peter Cremer. [1975] 2 Lloyd's Rep 118; the clause is also available in E McKendrick Contract Law (2nd edn OUP Oxford 2005) 435. The contract terms of GAFTA NO 100 are available at www.medimedica.com

accidents of the sea, acts of war, warlike-operations, acts of public enemies, restraint of princes, rulers or people or seizure under legal process, quarantine restrictions, civil commotions, blockade, strikes, lockout, closure of the Suez or Panama Canal, congestion of harbours or any other circumstances whatsoever, causing extra-ordinary periods of delay and similar events and/or circumstances, abnormal increases in prices and wages, scarcity of fuel and similar events, which reasonably may impede, prevent or delay the performance of this contract. [34]

- *In the event that any party to this Agreement is rendered unable, wholly or in part, by Force Majeure to carry out its obligations under this Agreement, such party shall give notice by telex or telegraph to the other parties to this Agreement in the English language setting forth the full particulars of such Force Majeure and the estimated duration thereof as soon as possible after the occurrence of said Force Majeure. Upon the giving of such notice the obligations of such party, insofar as they are affected by such Force Majeure, shall be suspended, except for the obligations to make payments hereunder, during the continuance of any inability so caused, but for no longer period, and such cause shall so far as possible be remedied with reasonable dispatch. The party claiming Force Majeure shall exercise reasonable efforts to mitigate the effects of such Force Majeure on the performance of its obligations under this Agreement. The term "Force Majeure" as employed herein shall mean any event beyond the reasonable controlof the parties hereto, including without limitation, acts of God; forces of nature; perils of the sea; shipwrecks; collisions; stranding; bursting of boilers; breakage of shafts; acts of the public enemy; wars; blockades; civil wars...*[35]

- *Force Majeure*

  12.1 Consequences

  No failure, delay or omission by any party in the performance of any obligation under this agreement shall give rise to any claim against that party or to be deemed a breach of or default under this agreement if such performance is prevented or hindered due to the consequences of an event or circumstance of Force Majeure.

34 See, [1990] 1 Lloyd's Rep 1; the clause is also available in E McKendrick Contract Law (2nd edn OUP Oxford 2005) 434-435; the Force Majeure clause 17 (Cancellation) of the contract between the parties in J Lauritzen AS v Wijsmuller BV

35 See, Article XIII in a 1982 *liquefied natural gas sales agreement involving the Canadian Petroleum Company and Japanese buyers.*

12.2 Definition

In this agreement Force Majeure means (a) acts of God, explosions, fires, flood, earthquakes or other natural calamities; (b) insurrection, rebellion, or sabotage and acts of war or public enemy whether war be declared or not; (c) public disorders, riots or demonstrations; (d) strikes, lockouts and other labor disorders; (f) breakdown of machinery and equipments; (g) any other event or circumstance but only if the event or circumstance of Force Majeure is beyond the reasonable control of the party.

12.3 Notification

A party affected by an event or circumstance of Force Majeure shall (a) give notice to other parties of the occurrence of the vent or circumstance; (b) use reasonable diligence to rectify or overcome the event or circumstance and minimize the loss caused hereby to other parties; and (c) give notice to the parties forthwith upon the ending of the vent or circumstance of Force Majeure.

12.4 Mitigation

Upon the giving of notice, the parties shall meet to discuss what action, if any, is practicable to take to mitigate or overcome the effects of the event or circumstance of Force Majeure. If the event or circumstance arises in the State of Qatar, the parties shall, if appropriate, seek the assistance of the Government in removing or mitigating such event or circumstance.

12.5 Extension of Time
Any period during which performance of any obligation is prevented or hindered due to the occurrence of an event or circumstance of Force Majeure shall be added to the period or periods set out in this agreement for the performance of such obligation.[36]

- *"Force Majeure Event" means the occurrence of:*
  (a) an act of war (whether declared or not), hostilities, invasion, act of foreign enemies, terrorism or civil disorder;

36 See, Ras Laffan Liquefied Natural Gas Company Limited, Joint Venture Agreement 2002 (in English)

(b) ionising radiations, or contamination by radioactivity from any nuclear fuel, or from any nuclear waste from the combustion of nuclear fuel, radioactive toxic explosive or other hazardous properties of any explosive nuclear assembly or nuclear component thereof;

(c)pressure waves from devices travelling at supersonic speeds or damage caused by any aircraft or similar device;

(d) a strike or strikes or other industrial action or blockade or embargo or any other form of civil disturbance (whether lawful or not), in each case affecting on a general basis the industry related to the affected Services and which is not attributable to any unreasonable action or inaction on the part of the Company or any of its Subcontractors or suppliers and the settlement of which is beyond the reasonable control of all such persons;

(e) specific incidents of exceptional adverse weather conditions in excess of those required to be designed for in this Agreement which are materially worse than those encountered in the relevant places at the relevant time of year during the twenty (20) years prior to the Effective Date;

(f)tempest, earthquake or any other natural disaster of overwhelming proportions; pollution of water sources resulting from any plane crashing into [ ];

(g) discontinuation of electricity supply, not covered by the agreement concluded with the [utility company];or

(h) other unforeseeable circumstances beyond the control of the Parties against which it would have been unreasonable for the affected party to take precautions and which the affected party cannot avoid even by using its best efforts,which in each case directly causes either party to be unable to comply with all or a material part of its obligations under this Agreement;

(1)Neither Party shall be in breach of its obligations under this Agreement (other than payment obligations) or incur any liability to the other Party for any losses or damages of any nature whatsoever incurred or suffered by that other (otherwise than under any express indemnity in this Agreement) if and to the extent that it is prevented from carrying out those obligations by, or such losses or damages are caused by, a Force Majeure Event except to the extent that the relevant breach of its obligations would have occurred, or the relevant losses or damages would have arisen, even if the Force Majeure Event had not occurred (in which case this Clause 20 shall not apply to that extent).

(2)As soon as reasonably practicable following the date of commencement of a Force Majeure Event, and within a reasonable time following the date of termination of a Force Majeure Event, anyParty invoking it shall submit to the other Party reasonable proof of the nature of the

Force Majeure Event and of its effect upon the performance of the Party's obligations under this Agreement.

(3)The Company shall, and shall procure that its Subcontractors shall, at all times take all reasonable steps within their respective powers and consistent with Good Operating Practices (but without incurring unreasonable additional costs) to:

(a)prevent Force Majeure Events affecting the performance of the Comp any's obligations under this Agreement;

(b)mitigate the effect of any Force Majeure Event; and

(c)comply with its obligations under this Agreement.

The Parties shall consult together in relation to the above matters following the occurrence of a Force Majeure Event.

(4)Should paragraph (1) apply as a result of a single Force Majeure Event for a continuous period of more than [180] days then the parties shall endeavor to agree any modifications to this Agreement (including without limitation, determination of new tariffs (if appropriate) in accordance with the provisions of Clause 7(4)(e)) which may be equitable having regard to the nature of the Force Majeure Event and which is consistent with the Statutory Requirements."[37]

- *"1. Any Party liable for non-performance or delay in performance with respect to any obligation or any part thereof under this Agreement, other than an obligation to pay money, shall be excused liability for such non-performance or delay in performance to the extent that it is caused or occasioned by Force Majeure, as defined in this Agreement.*

  2.Force Majeure with respect to the Host Government shall be limited to:

  (a) natural disasters (earthquakes, landslides, cyclones, floods, fires, lightning, tidal waves, volcanic eruptions and other similar natural events or occurrences),

  (b) wars between sovereign states where [insert name of the State] has not initiated the war under the principles of international law, acts of terrorism, rebellion or insurrection and

  (c) international embargoes against sovereign states other than [insert name of the State];provided, in every case, that the specified event or cause, of the type set forth in (a), (b) and/or (c) above and any resulting effects preventing the performance by theHost Government, the State Authority and/or any State Entity of their obligations, or any part thereof, are beyond their control; and provided, concerning those events or causes of the type set forth in (a), (b) and/or (c) above which are reasonably foreseeable, that these are not caused or contributed to

37 See, WorldBank.org.

by the negligence of the Host Government, the State Authority and/or any State Entity or by their breach of this Agreement or any other Project Agreement.

3.Force Majeure with respect to the Project Investors shall be limited to those events or causes and any resulting effects that prevent the performance of the obligations of the Project Investors or any part thereof which are beyond its (or their) control, and, concerning events or causes which are reasonably foreseeable, are not caused or contributed to by the negligence of any Project Investor, Operator or Contractor or by the breach by any such person of this Agreement or any Project Agreement. Force Majeure under this paragraph shall include the following events and causes to the extent they otherwise satisfy the requirements of this Article: natural disasters (earthquakes, landslides, cyclones, floods, fires, lightning, tidal waves, volcanic eruptions and other similar natural events or occurrences), wars, strikes or other lab our disputes not limited to the employees of the Project Investors or of any Contractor or Operator, rebellions, acts of terrorism, international embargoes, the inability to obtain necessary goods, materials, services or technology, the inability to obtain or maintain any necessary means of transportation, the application of laws, treaties, rules, regulations and decrees, the actions or inactions of the State Authority and other events or causes, whether of the kind enumerated or otherwise, which are beyond the control of the Project Investors."[38]

5. Price review clauses

The price review clause (also called price reopener clauses) is the one that usually stipulates means for the price to be reviewed. Moreover, practically it can be reviewed at specified intervals (e.g. every four years) or when demanded by one of the parties. In essence, price revision mechanism clauses give the parties the chance to review and adjust agreement provisions for a periodic sequence of time. Due to the movement of the energy markets and the absence of clear market-wide indicators of price, long-term energy agreements (often up to 30 years) usually have included a price revision clause.[39] Sometimes the test "includes a materiality threshold, e.g. requiring that the party seeking to reopen the price establish that it is materially worse off".[40]

38 See, Article 35 of the Energy Charter Treaty Secretariat's Model Host Government Agreement in Model Intergovernmental and Host Government Agreements for Cross Border Pipelines (2nd edition).

39 See, M. Polkinghorne, Predicting the Unpredictable: Gas Price Re-openers. The Paris Energy Series (June 2011)

40 Remarks made by K. S. C U LOTTA/M.HWA N G, Uncertain LNG Price Environment Turns Focus on Price Revision Clauses, in: LNG Journal (April 2008) 25

In many situations of long-term agreements parties try to prevent challenging meetings of price renegotiation and pursue a formula that will confer a predefined market flows when prices tend to oscillate. For instance, in a gas price revision clause formula, the gas price will normally be linked to a benchmark. "Indexes exist, e.g. the Henry Hub index or Platts Indexes. A European buyer may prefer a more accurate benchmark, e.g. the European Bulk prices "CIF NWE Basis ARA" 2 Parties may also want to link the prices to the market for alternative sources of energy, such as fuel oil or coal. For long–term contracts, the standards of calculation and the format of the publication may eventually change from time to time.

The contractual equilibrium between the parties might need to be re-established after structural changes in the underlying market. This is the reason why "price review provisions" are common in long-term gas supply agreements. The main difficulty is that changes of circumstances are difficult to foresee at the drafting stage. If at a certain point the parties' views on price revisions differ and settlement negotiations fail, the agreement usually calls for arbitration, the most accepted dispute resolution mechanism in the energy sector. In such a situation, however, not all changes of circumstances will require the same solution. Technical issues or the suspension of the reference publication must be quickly addressed by the parties or by an independent panel to allow the contract to continue to operate.

The question as to whether the economic circumstances have changed and the formula no longer reflects the market as initially intended by the parties, will obviously take longer and be more difficult to assess. Similar complexity will arise with regard to the importance of alternative sources of energy. Who could have predicted that the US market share of "shale gas" would increase from 1% in 2000 to over 20% today?"[41]

Examples of Price review clauses:

- *"(a) If the circumstances beyond the control of the Parties change significantly compared to the underlying assumptions in the prevailing price provisions, each Party is entitled to an adjustment of the price provisions reflecting such changes. The price provisions shall in any case allow the gas to be economically marketed based on sound marketing operation.*
  (b) Either Party shall be entitled to request a review of the price provisions for the first time with effect of dd/mm/yyyy and thereafter every three years.
  (c) Each Party shall provide the necessary information to substantiate its claim.

41 See, Sandra De Vito Bieri "Arbitration clauses in gas supply agreements.", http://kluwerarbitrationblog.com/2014/05/15/arbitration-clauses-in-gas-supply-agreements/

(d) Following a request for a price review the Parties shall meet to examine whether an adjustment of the price provisions is justified. Failing an agreement within 120 days either Party may refer the matter to arbitration in line with the provisions on arbitration of the Contract.

(e) As long as no agreement has been reached or no arbitration award has been rendered all rights and obligations under the agreement –including the price provisions–shall remain applicable unchanged. Unless otherwise agreed or decided by the arbitral award, differences to the newly established price shall be retroactively compensated inclusive of interest on the

difference calculated at a rate reflecting the conditions on the international financing market."[42]

- *(a) If at any time either Party considers that economic circumstances in Spain beyond the control of the Parties, while exercising due diligence, have substantially changed as compared to what it reasonably expected when entering into this Contract or, after the first Contract Price revision under this Article 8.5, at the time of the latest Contract Price revision under this Article 8.5, and the Contract Price resulting from application of the formula set forth in Article 8.1 does not reflect the value of Natural Gas in the Buyer's end user market, then such Party may, by notifying the other Party in writing and giving with such notice information supporting its belief, request that the Parties should forthwith enter into negotiations to determine whether or not such changed circumstances exist and justify a revision of the Contract Price provisions and, if so, to seek agreement on a fair and equitable revision of the above-mentioned Contract Price provisions in accordance with the remaining provisions of this Article 8.5.*

  (b) In reviewing the Contract Price in accordance with a request pursuant to sub-Article 8.5(a) above the Parties shall take into account levels and trends in price of supplies of LNG and Natural Gas [redacted] such supplies being sold under commercial contracts currently in force on arm's length terms, and having due regard to all characteristics of such supplies (including, but not limited to quality, quantity, interruptability, flexibility of deliveries and term of supply).

  (c) The Contract Price as revised in accordance with this Article, shall in any event, allow the Buyer to market the LNG supplied hereunder in competition with all competing sources or forms of energy.... And such Contract Price Shall allow the Buyer to achieve a reasonable rate of return on the LNG delivered hereunder."

42 See, ECT Paper, Putting a Price on Energy (2007),p. 161.

III. Conclusions

Given the international law provisions, a host state public policy if violates or influences the essence of the investment project equilibrium of the international agreement might suffer fundamental alterations. Moreover, some considerations might as well be given to the extent to which parties of an international agreement can address adjustment clauses due to the mix of all the variables that imposed changed circumstances. As well, an important factor that is deemed by the drafters of a long-term agreement is their need to provide for a better inevitability in the performance. After all, in means of economic development in terms of raising investment finances in infrastructure, the better the means that the parties' expectations will be fulfilled, the easier it will be to provide the economic development, which is a purpose that both host countries and the investors share.

In order to ensure the awareness of changes in circumstances as a concept it does not mean that parties can use adjustment clauses by means of renegotiation. Yet, it means that drafters of international arbitrations agreements should not expect their agreement provisions to be easily adjusted, even in times of a well-defined rule of law framework which does entitles the modifications in this circumstances concepts.

This is the reason that led me to pick other means on which the drafters of international arbitration long-term agreements may rely to reinforce adjustment clauses and renegotiation, such as Stabilization clauses, Hardship and Force Majeure clauses or Price review clauses.

Reasoning first with not the most argued clauses – stabilization provisions are usually present as stated earlier in the present study, in international arbitration long-term agreements concerning investments in energy sector, infrastructure and extractive industries. These clauses are used as an alternative, or in addition, to an investment treaty (BITs). The pursuit of these clauses is to protect the investment from disfavored circumstances to legislation framework of the host state. Moreover, the wording of the international agreement should not be changed by the host state in a way that would be in disfavored for the investor. Additionally, these stabilization clauses can make such long-term agreements enforceable by means of international arbitration and refrain from reliance on the domestic court system in the host country.

It has not escape to my notice that there are more exceptions to be found in modern agreements. When the stabilization clause, and in addition, the international arbitration agreement are governed by publically-regulatory, the investor’s interest could suffer as governments could act by changing their

laws in an framework legislation opportunism, by reducing the effectiveness of the stabilization clause, thus most governments cannot sustain investors compensations to comply with the regulatory changes in the domestic framework legislation applicable to the investment.

A contrario, critics of arbitration investment provisions have argued that in the foreign investors interests come the investment treaties due to a particularly interpretation by pro-shareholder arbitratos. They argue that, in fact, in most cases where investors did received compensation, the host state acted out of legislation's framework opportunism, charming the investor into the international agreement with parole of favorable and stable legislative framework, only to threaten that foundation in order to force adjustments clauses and renegotiate the terms and conditions of the agreement, only after the investment was ratified.

It should also be mentioned that in the context of exploitation and exploration of extractive natural resources, the principle of permanent supremacy of the state over his natural resources is well accepted. The results of these supremacy for the public welfare regarding the stabilization clauses will be rest on the type of those clauses and the applicable law. If the stabilization clause is invalid under the law of the host state, international law may not come to its rescue.[43]

It is noteworthy that stabilization clauses do not protect permissible expropriation or, statutory nationalization. For that matter, they demand an obligation to governments to act in good faith and as well to an obligation in case of their noncompliance to compensate the foreign investors.[44]

Furthermore, in a numbered of investment cases, it has been echoed by investment tribunals that the aim of regulatory framework stability under which an investment should operate is part of "fair and equitable treatment" of investment[45]:

"that it would be wrong to believe that fair and equitable treatment is a kind of peripheral requirement. To the contrary, it ensures that even where there is no clear justification for making a finding of expropriation, as in the present case, there is still a standard which serves the purpose of justice and can of itself redress damage that is unlawful and that would otherwise pass unattended. Whether this result is achieved by the application of one or several standards is a determination to be made in the light of the facts of each dispute. What counts is that in the end the stability of the law and the observance of legal obligations are assured, thereby safeguarding the very object and purpose of the

43 See, T. Walde and G. Ndi, Stabilizing international investment commitments: International law versus contract Interpretation. Tex Int'l L J Vol. 31, 215, 242 (1996).

44 See, A.F.M. Maniruzzaman, Damages for breach of stabilisation clauses in international investment law: Where do we stand today? Int'l Energy L. T. 246 (2007)

45 See, Occidental Exploration and Production Company v.The Republic of Ecuador, LCIA Case No UN3467, Final Award of 1 July 2004, para 183; Tecnicas Medioambientales TECMED SA v. United Mexican States, ICSID Case ARB (AF)/00/2. 29 May 2003, at para 154.

protection sought by the treaty."[46]

Additionally, older or recent arbitration awards that directly or indirectly concerned stabilization clauses suggest that this is a well known practice considered as tool for investment protection to which governments do engage to elite foreign investments. Thus, no arbitral tribunal put the binding nature and the legitimacy[47] of these stabilization clauses in question. Currently, in CMS v. Argentina[48], the arbitral tribunal, after asking the question "however, is that concerning the right to benefit from the stabilization clauses"[49] and after observing that "this discussion is well known in international law"[50], gives the right to the investor to properly invoke the stabilization mechanism. Nevertheless, it could be a side effect essentially with regard to broadly discussed "tough cases", when investment regulatory and other areas of international law[51] go beyond their range.

Finally, we conclude that international arbitration agreements should be negotiated with transparency, especially these stabilization clauses and safeguarded by the host states administrative regulation framework. As well, incentives should be clearly illustrated mentioning the content, the extent and the expiration, moreover, those profit sharing basis who should be, as well, negotiated with transparency[52] and be clearly defined provisions, most of all, those adjustment clauses. The stabilization clauses, in our opinion, should highlight the host state's right to regulate in good faith and fair and equitable treatment likewise the foreign investor's due diligence with regard to international provisions. Moreover, a mechanism that could nurture the transparency, risk management, and due diligence of investments are those dispute settlement instruments, such as mediation or methods of dispute resolution.[53]

This article has attempted to illustrate that an unanticipated change in circumstances is an imminent risk in international commercial and investment agreements, and that there is a urgency to strengthen the harmony of the agreement and so protect the extension of the trade relationships to the

46 Award Sempra Energy International v. Argentine Republic, Case No ARB/02/16. 28 September 2007, para. 300.

47 See Wälde, Thomas, op. cit., p. 37 et seq.; Cotula (2008a), op. cit., p. 8. *Although the legitimacy of stabilization mechanism was not questioned by arbitrators, it has been noted by commentators that such clauses would not be generally enforceable under the domestic laws of common law countries and might also be difficult to enforce in civil law jurisdictions.*

48 See, CMS Gas Transmission Company v. Argentina, Award, ICSID Case No ARB/01/8, IIC 65 (2005), signed 12 May 2005, (hereinafter, "CMS v. Argentina"), para. 151.

49 Id., para 151

50 Id., para 151

51 Human rights or rules of environmental protection

52 The most discussed research on stabilization clauses was made in 2008 by John Ruggie and the International Financial Corporation (IFC) of World Bank where it was concluded that transparency in terms of negotiation it will be a strong prevention instrument.

53 For example ICC alone offers a few methods of dispute resolution such as: arbitration, conciliation, technical expertise and pre-arbitral referee procedure.

bilateral advantage of the parties. Besides the use of a hardship clause in an long-term agreement is not absolutely adequate, as it expects that the parties will give 'certain and well-defined solutions for uncertain and undefined situations'.[54]

Several writers have argued, though, that the popular use of hardship clauses especially in international long-term agreements has develop a practice: the hardship clause must be included in the international agreement even though it was not precisely implied by the parties.[55] On the other hand, the fact that in the agreement there is a hardship clause included by the parties proves a contrario – no practice stands.[56] As argued in the present study, the diversity of the hardship clauses which implies their application, scope and remedy makes hard to establish a customary practice on them. Moreover, arbitral tribunals have always refused to reason in international long-term agreements on conventional hardship clauses. In fact, they have ruled that this hardship clauses should be interpreted and analyzed in their *sensu stricto:* when a clause stipulates "specific changes" it should be interpreted as "no other changes should be taken into account."[57]

In this scenario, we did found a general trend on the part of arbitrators[58] to dismiss the request for adjustment of the agreement when the hardship clause was absent or even when it has been included, but it was not suitable to deal with the results of the given situation. Further, on the agreements principles of non-aleatory nature, equity and good faith, there have also been disputes[59] where the decision recognized the need and favor the adjustment of the agreement in spite of the absence of a hardship clause. This direction shows that there is also an arbitration tendency to rule each dispute on its own merits and to classify the most suited solution in accordance with the interpretative tools mentioned above.[60]

In conclusion, in the field of hardship clauses there is a strong argument the UNIDROIT Principles can be seen as an important progressive success from the rigid part of the principles of pacta sunt servanda and the failed of CISG.[61]

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54 See, W Den Haerynck, 'Drafting hardship clauses in international contracts', in Campbell (ed), Structuring International Contracts (The Hague: Kluwer Law International, 1996) 242.

55 A. KASSIS, "Théorie générale des usages de commerce" L.G.D.J. Paris, 1984, 367-369; Ph. KAHN, "L'interprétation des contrats internationaux", J.D.I., 1981, 5 at 21.

56 , J.D.I., 1990, 1056 at 1059.

57 ICC award No. 2216 (1974), J.D.I., 1975, 917; I.C.C. award No. 2291 (1975), J.D.I., 1976, 989; Arbitration Court of the Japan Shipping Exchange, award September 20, 1975, *Yb. Comm. Arb.*, 1983, 153 at 154.

58 ICC Award No 1990 of 1972 Clunet 1974, 901; ICC Award No 1512 of 1971 Clunet, 1974, 905, reprinted in Jarvin and Derains, Collection of ICC Arbitral Awards (1990), 3

59 S Arbitral Award 2 July of 1956 Clunet 1959, 1074; ICC Award No 2291 of 1975 Clunet 1976, 989; ICC Award No 1512 of 1971 Clunet, 1974, 905; ICC Award No 3267 of 1984 Yearbook Commercial Arbitration, 1987, 87; ICC Award No 4761 of 1987 Jarvin and Derains, Collection of ICC Awards (1986–90), 519

60 See ICC Award No 1512 of 1971, Clunet, 1974, 905, reprinted in Jarvin and Derains, Collection of ICC Arbitral Awards (1990), 3.

61 Is the United Nations Convention on Contracts for the International Sales of Goods (better known as CISG or the Vienna

Given the fact that most international arbitration long-term agreements include force majeure clauses, we choose to envisage some practical guidance. Inasmuch, if a company wants to invoke force majeure provisions should take the following into consideration:

1. the situations or the events with their particular effects they might have on the investment or on the project or on the agreement should be precisely documented. It might be crucial to establish a concrete link between the situations or the events and the breach of the agreement or the suspension of the project;
2. an important attention should be given to the notification requirements and timelines of the force majeure clause and the agreement;
3. when the agreement does not includes a detailed, specific force majeure clause, it is better to agree on the suspension amendment of the international agreement with the other party, to the possible length;
4. given the situation to the end of the force majeure state as well it should be prudently mentioned.

Finally, the clauses that are most of the time present in international long-term agreements, due to the structural market changes especially in energy field and sue to the parties need of an contractual equilibrium, named as “price review provisions”.

Notwithstanding, when designing arbitration clauses for international long-term agreements with emphasis on energy sector, a due regard should be given to arbitral tribunal. Moreover, to the arbitrators' powers to adjust price provisions. For instance, if an arbitral panel is called to rule whether the price provisions need to be adjusted, it might as well have to modify the price clause itself. A maneuver worth trying is the choice of arbitrator(s), especially those with extensive insight in energy market, its prices and the operating price formula. Furthermore, it is not compulsory to include in the arbitration clause specific conditions an arbitrator should have, as the inconvenience might be 'more detrimental to the resolution of the dispute than the problem of arbitrators surpass the parties' intentions'.[62] In fact, if the parties do wish to maintain some consistency over their needs and agreements, they might outline an arbitration clause which will limit the arbitrators' powers to adjust the price formula. As well, arbitrators powers might be limited using another solution by excluding the

62 For instance, the parties in the arbitration clause could require the arbitrators to consult a specific agreed institution for specific matters.

usance of the "hybrid formula[63]". Finally, another view that parties should consider would be to include the type of clause so-called "baseball arbitration"[64] or "pendulum approach"[65]. In both situations, the arbitral panel is constrained by the parties' claims and positions and cannot apply a distinct formula.

In conclusion, given the usual price adjustment clauses situations, which cloud have a great financial importance, by generating huge financial changes, our recommendation is to choose a three-member arbitral tribunal to assure a balance expectation of the parties.

63 For instance, in the Atlantic LNG Company of Trinidad and Tobago v. Gas Natural LNG SPA, the arbitral tribunal came forth with a hybrid formula, which had elements from both parties' formulae, but the result was not acceptable for either party.

64 As defined by other writers, in baseball arbitrations (or final offer arbitrations) each party submits a proposed monetary award to the tribunal. After the final hearing, the tribunal chooses one award from those submitted, without modification.

65 The pendulum approach obliges each party to provide their "best guess" of the true value or adjustment required. The arbitrators then select the suggestion of one party.