

# Hardship and Force Majeure as Grounds for Adaptation and Renegotiation of Investment Contracts

## What Is the Extent of the Powers of Arbitral Tribunals?

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### Abstract

The change of circumstances impacting the performance of the contracts has been a widely commented issue. However, there seems to be a gap in legal jurisprudence with regard to resorting to such a remedy in the investment contracts setting, especially from the procedural perspective. It has not been finally settled whether arbitral tribunals are empowered to adapt investment contracts should circumstances change and, if they were, what the grounds for such a remedy would be. In this article, the author presents the current debates regarding this issue, potential grounds for application of such a measure and several proposals which would facilitate resolution of this procedural uncertainty.

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**Keywords:** contract adaptation, hardship, force majeure, investment contracts, arbitration

## 1 Introduction

Nearly 20 years ago, Berger expressed hopes that pragmatism would win over dogmatism and ‘doctrine, courts and arbitral tribunals alike will finally accept the international arbitrators’ power to fill gaps and revise contracts’.<sup>1</sup> Despite the time passing, hardly any developments have occurred in the field of investment. Hardship and force majeure have been frequently addressed in periods of crises.<sup>2</sup> The Covid-19 pandemic proved to be no exception and the issue of the change of circumstances which impacts contract performance became again one of the most frequently addressed topic. So far, both concepts received significant attention in the field

of international commercial contracts and international commercial arbitration. On the contrary, the issue of changed circumstances received little attention with regard to their investment counterparts. Given the particular characteristics of such agreements as well as growing dissatisfaction with the investor-State dispute settlement (ISDS), it is essential to further explore the impact of changed circumstances in relation to the performance of investment contracts and the remedies to which arbitral tribunals may resort. As noted in legal writing, not all findings applicable to long-term international commercial contracts ‘will hold true’ in the investment context,<sup>3</sup> and thus, it is essential to explore this field in greater detail.

This research article aims to fill the gap in legal scholarship on adaptation of investment contracts by highlighting the importance of this remedy in the foreign investment context. The author will tackle two research questions: (i) can arbitrators adjust investment contracts concluded between investors and the States in case of the change of circumstances, and, if answered in positive, (ii) what could constitute the grounds for such adjustment?

## 2 Investment Contracts: The Particularities

Protection of foreign investment may be based on two pillars: investment treaties concluded between the interested States, or investment contracts directly negotiated between investors and the States. Due to the growing number of bilateral investment treaties (BITs) concluded in the last decades, the importance of investment contracts protecting the investors has decreased.<sup>4</sup> However, with the rising discontent with the investors’ protection in foreign investment regime, conclusion of investment contracts may be on the rise.

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1. K.P. Berger, ‘Power of Arbitrators to Fill Gaps and Revise Contracts to Make Sense’, *Arbitration International* 17(1), at 17 (2001).  
2. D. Maskow, ‘Hardship and Force Majeure’, 40(3) *American Journal of Comparative Law* 657, at 659 (1992).

3. S. Kröll, ‘The Renegotiation and Adaptation of Investment Contracts’ in N. Horn (ed.), *Arbitrating Foreign Investment Disputes: Procedural and Substantive Legal Aspects* (2004) 425, at 426.

4. P. Dumberry, ‘International Investment Contracts’, *International Investment Law: the Sources of Rights and Obligations* (BRILL 2012), at 240.

In general, investment contracts are concluded for a considerably longer period of time than their commercial counterparts. Thus, they are more likely to be impacted by the change of circumstances. Such a change may involve a fundamental change of circumstances which leads to the performance of the contract being more onerous (hardship<sup>5</sup>) or render the performance of the contract impossible (force majeure<sup>6</sup>). The occurrence of these events is not uncommon, and thus 'there are probably very few investment contracts which during their existence have not been renegotiated and adapted by the parties to take account of changing circumstances or prerogatives'.<sup>7</sup> That is because long-term agreements are more exposed to 'geological, commercial and political risk' than the commercial contracts.<sup>8</sup> Nonetheless, given that investors assume certain risk under investment contracts, arbitral tribunals are faced with a difficult task to balance the so-called 'limit of sacrifice'. It means that they have to find a line between the risk assumed by the investor and too excessive disruption of the equilibrium of the contract.<sup>9</sup>

### 3 Contract Adaptation: Current Debate

The possibility of adapting contracts by arbitral tribunals has been highly debated in legal writing.<sup>10</sup> A distinction must be made between substantive and procedural requirements for contract adaptation. Indeed, the applicable substantive law (*lex causae*) sets forth conditions under which contracts may be adapted. The possibility to adjust contracts on the substantive level has not been disputed. Nonetheless, the substantive criteria do not 'authorise' arbitral tribunals to actually apply such a remedy. In other words, *lex causae* provides substantive basis for adjustment whereas the law of the seat (*lex arbitri*) enables the arbitrators procedurally to perform such a task.<sup>11</sup>

From a practical point of view, the adaptation or modification of a contract is 'a sensitive process' as it touches upon one of the critical values of arbitration, i.e. the

heart of the party autonomy principle and the freedom of choice.<sup>12</sup> Whilst adjusting a contract, arbitral tribunals 'rewrite' its original provisions. By doing so, they interfere with the intentions of the parties reflected in the agreement between them. Moreover, when resorting to such a remedy, a tribunal is not acting within its usual scope of functions, which is to produce an enforceable award.<sup>13</sup> It has been debated whether contract adaptation falls under the notion of a *dispute*, especially with regard to ICSID framework.<sup>14</sup> The authors have been denying such a possibility by stating that 'disputes regarding conflicts of interest between the parties, such as those involving the desirability of renegotiating the entire agreement or certain of its terms, would normally fall outside the scope of the Convention'.<sup>15</sup> To justify such a position, references have been made to the wording of Article 25 ICSID Convention and a definition of 'legal disputes' included in the report of the executive director, which provides that a legal dispute 'must concern the existence or scope of a legal right or obligation, or the nature or extent for the reparation to be made for a legal obligation'.<sup>16</sup>

It may be the case that the parties themselves decide to include such an adaptation clause into their contract, which serves as a mechanism to reinstate its equilibrium. The more difficult issue, however, occurs when there is no such agreement. With relation to investment contracts, the issue has only been addressed *obiter dicta* by the arbitral tribunal in *Kuwait v. Aminoil*.<sup>17, 18</sup> The tribunal found that theoretically, it is possible to authorise the tribunal to act in such a capacity; however, it requires an explicit consent from the parties.<sup>19</sup> Another dispute which dealt with the issue of contract adaptation arose out of the Exploration and Production Sharing Agreement ('EPSA') between Wintershall and Qatar. Without referring to the process as adaptation or adjustment, the arbitral tribunal revised the terms of the EPSA by finding that relinquishment provision contained therein should be extended. The EPSA did not contain any authorisation for the tribunal to adapt the contract. However, it adjusted the terms based on interpretation of parties' obligations in accordance with good faith principle. Pursuant to the EPSA, 'a contract shall only bind a contracting party to the contents thereof, but it still shall also extend to all its requirements in compliance with law, usage and equity depending on the

5. E.g. Art. 6.2.2 Unidroit Principles on International Commercial Contracts 2010.

6. E.g. Art. 7.1.1 Unidroit Principles on International Commercial Contracts 2010.

7. Kröll, above n. 3, at 425.

8. A. Kolo and T.W. Wälde, 'Renegotiation and Contract Adaptation in International Investment Projects', (1)1 *The Journal of World Investment & Trade* 5, at 5 (2000).

9. K.P. Berger, 'Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators', 36(4) *Vanderbilt Journal of Transnational Law* at 1352 (2003).

10. For example, Berger, above n. 1; Kröll, above, n. 3; C.H. Brower II, 'Mind the Gap', 54(1) *BYU Law Review* (2016); J.G. Frick, *Arbitration and Complex International Contracts* (2001); R.A. Hillman, 'Court Adjustment of Long-Term Contracts: An Analysis under Modern Contract Law', 1 *Duke Law Journal* (1987); C. Brunner, *Force Majeure and Hardship Under General Contract Principles: Exemption for Non-Performance in International Arbitration* (2008).

11. Brower II, above n. 10, at 18.

12. P. Muchlinski, F. Ortino & C. Schreuer, *The Oxford Handbook of International Investment Law* (2008), at 598.

13. *Ibid.*, at 599.

14. G.R. Delaume, 'ICSID Arbitration: Practical Considerations', 5(3) *J Intl Arb* 103 at 116 *et seq* (1984).

15. *Ibid.*, at 116 *et seq*.

16. Report of the Executive Directors on the ICSID Convention, [https://icsid.worldbank.org/en/Documents/resources/2006%20CRR\\_English-final.pdf](https://icsid.worldbank.org/en/Documents/resources/2006%20CRR_English-final.pdf), at 44.

17. *Kuwait v. The American Independent Oil Company (AMINOIL)* (1982).

18. Kröll, above n. 3, at 452.

19. *Kuwait v. The American Independent Oil Company (AMINOIL)*, (Ad-hoc award) (1982), at 1015: 'A tribunal cannot substitute itself for the parties in order to make good a missing segment of their contractual relations- or to modify a contract - unless that right is conferred upon it by law, or by the express consent of parties.'

nature of the obligation'.<sup>20</sup> In the tribunal's view these were sufficient grounds to extend the EPSA. Doubts were raised in legal writing whether such an extension actually constituted an 'interpretation'.<sup>21</sup> In the author's view, by doing so, the tribunal escaped uncertainty surrounding contract adaptation and resorted to a safe practice of contract interpretation. However, it seems to constitute a disguised modification of the contractual provisions between the parties, and in order to avoid the risk of an unenforceable award, it should have examined whether it is procedurally authorised to do so.

On the other hand, even if there was a general acceptance for such a practice, so far no general concept on how the contract adaptation would look like has emerged.<sup>22</sup> The most feasible proposal could consist in an increase or decrease of a price but we are still about to find out what the exact parameters would be. As of now, the lack of guidelines provides a lot of discretion for tribunals to come up with a model. For example in *ICC Case no. 2508*, the respondent was seeking adaptation of the contract under Swiss law because the world market petroleum prices had tripled after the conclusion of the contract.<sup>23</sup> The seller proposed to increase the purchase price to reach the new world petroleum prices. The tribunal did not agree with such a solution. It stated that price adjustment would need to be limited to 'what was strictly necessary so that performance of the contract did not become manifestly unfair'.<sup>24</sup> It means that the adjustment of a contract should 'not be designed to make the injured party whole, but only what was strictly necessary to make the performance bearable'.<sup>25</sup>

## 4 The Grounds for Contract Adaptation

Before addressing the issue of the empowerment of arbitrators, one should answer a question regarding the very nature of the contract adaptation. A useful insight in this regard has been provided by drawing distinction between 'adaptation' and 'gap filling'. That starting point of discussions on the power of arbitrators to adapt contracts is nonetheless often disregarded in the aca-

demical debate. Most scholars did not make that distinction, 'arguing either that it is not helpful to make the distinction, or that it is not possible to draw the line between adaptation and gap filling'.<sup>26</sup>

If unexpected circumstances occur which demand the adjustment of contract provision, the contract shows an 'ex post gap' since the parties failed to provide a provision for dealing with the unexpected event. In other words, the contract concluded between the parties is incomplete. In that case, the parties have a reasonable expectation for the contract to be adjusted as there is a real gap in the contract. This model is based on the notion of fairness that the parties should share the burden of unallocated losses.<sup>27</sup> Such adjustment does not violate the principle of *pacta sunt servanda* as the parties have a reasonable expectation of equal risk sharing which was not allocated at the formation stage.<sup>28</sup> Whereas adaptation – 'agreement model' – occurs when a party reasonably expects to adjust the contract in case of a serious disruption either based on the express adjustment clause (which demonstrates that parties have foreseen that unexpected circumstances may impact the performance of a contract) or in the lack thereof, the circumstances indicate that there is an underlying duty to adjust the contract. That may be the case if

- (i) the parties enjoy relatively equal bargaining power, (ii) are familiar with each other; (iii) have previously dealt with each other; (iv) the subject matter of the contract is not unusual and the parties are therefore comfortable with little formality; (v) and the parties want to continue to deal with each other because they are aware of the costs of finding a market substitute after investing in a relationship and after forming understandings that lower the cost of doing business.<sup>29</sup>

The competence of arbitrators to fill the gaps of the contract is widely accepted whilst adaptation of the contract, possibly against one of the parties' will, remains highly controversial.<sup>30</sup> It has been advocated that contract adaptation is only possible if the parties expressly authorised the tribunal to do so. Therefore, based on the proposed differentiation, one may assume that the process of gap filling deals with the issue of contract interpretation and intends to specify the obligations of the parties based on the express terms, parties' testimonies, implied terms derived from the structure of the agreement, dealings between the parties, etc.,<sup>31</sup> whereas adaptation of the contract, in the proposed distinction, would concern the adjustment of its terms to a new situation, i.e. rewriting the obligations the parties have agreed upon.

20. *Wintershall AG v. The Government of Qatar*, (28 ILM 795) (Partial Award and Final Award) (1989), at 823.

21. J. Carver and K. Hossain, 'An Arbitration Case Study: The Dispute That Never Was', 5(2) *ICSID Review – Foreign Investment Law Journal* at 321 (1990).

22. Frick, above n. 10, at 225.

23. ICC Case No. 2508, (Award) (1976); see also: M. Scherer, 'Economic or Financial Crises as a Defence in Commercial and Investment Arbitration', in A. J. Belohlávek, N. Rozehnalová (eds), *Czech Yearbook of International Law – Second Decade Ahead: Tracing the Global Crisis* (2010) 219; see F.R. Fucci, 'Hardship and Changed Circumstances as Grounds for Adjustment or Non-Performance of Contracts Practical Considerations in International Infrastructure Investment and Finance', <https://www.transnational-dispute-management.com/article.asp?key=1037>.

24. ICC Case No. 2508, (Award) (1976).

25. Fucci, above n. 23.

26. Frick, above n. 10, at 147.

27. Hillman, above n. 10, at 3.

28. Frick, above n. 10, at 148, 151.

29. Hillman, above n. 10, at 3.

30. Frick, above n. 10, at 148.

31. Brower II, above n. 10, at 5.

The provided differentiation does not find vast approval in legal writing. Despite making a differentiation between gap-filling and adaptation process, Berger indicates that both of them ‘involve the evaluation of economic issues and the rewriting of the parties’ contract’ and thus constitute a creative task that is considered by many scholars to be incompatible with the procedural notion of arbitration.<sup>32</sup> Brower II argues that placing an equal sign between gap filling and interpretation means ‘vesting arbitrators with virtually unrestricted powers to pluck fundamental terms for arbitration agreements out of thin air under the rubric of contractual interpretation’.<sup>33</sup> There is, however, a minority view that a doctrinal separation of notions of gap filling and interpretation lacks coherence, stability and utility. Rau argues that both interpretation and gap filling serve the same purposes – they aim to specify the obligations of the parties but differ only in the degree of interference, and thus they should be treated as one concept.<sup>34</sup>

Therefore, even though distinction between contract adaptation and contract gap filling could potentially resolve the issue of the powers of arbitral tribunals to adjust the contract, as of now, the proposal is met with resistance as there is a thin line between the two notions.

#### 4.1 Contractual Grounds

Majority of legal scholars express the view that contract adaptation should be permitted if the parties expressly authorise the arbitrators to do so.<sup>35</sup> Adaptation clauses appear especially in energy contracts – the parties may wish to include price adjustment clauses to adapt the contract to changes concerning the value of, e.g. gas.

Adaptation clauses provide for adjustment of terms of an original contract in the presence of change of circumstances beyond control of the parties. It entails a fundamental alteration of the equilibrium of the contract. The onerousness in performance of the obligations and thus the need of such an adjustment can be raised by both an investor and a State.<sup>36</sup> Automatic adaptation clauses are one of the examples of adaptation clauses. These provisions are connected to objective standards such as exchange rate of certain currencies, the minimum wage, cost index for a particular commodity, etc.<sup>37</sup> Instead of agreeing on a fixed price in a contract, the payment is oftentimes calculated based on a formula that takes into account such a change in circumstances.<sup>38</sup>

Some authors argue that standard arbitration clauses are sufficient to empower tribunals to adjust contracts and additional express authorisation is not required.<sup>39</sup> Yet, it

still remains doubtful whether such a practice falls under a typical arbitration clause referring to ‘all disputes arising out of or in connection with the present contract’.<sup>40</sup> Adaptation of a contract does not involve a simple yes or no decision but rather constitutes a complex creative task, which may fall out of the scope of a notion of a dispute.<sup>41</sup> Under a standard arbitration clause, the arbitrators are vested with powers to resolve a dispute and not amend the contract concluded between the parties. It can be argued that adaptation of the contract amounts to a ‘rewriting of the contract’ for the parties and reshaping the rights and obligations, which does not fall under the notion of a legal dispute and cannot be arbitrated.<sup>42</sup> In a commercial dispute, an ICC tribunal found that the standard ICC arbitration clause may actually be interpreted as allowing for the adaptation of the contract. Such would apply to cases in which the contract was concluded for a long term and if that contract includes provisions that would need to be adjusted over a period of time.<sup>43</sup> Such a view was shared by Mann who viewed that a limited function for contract adaptation is ‘inherent in the arbitration clause’.<sup>44</sup> On the other hand, Bernardini argues that it is sufficient enough to confer to arbitral tribunal powers to adapt contracts by making a reference to certain texts such as, e.g. the UNIDROIT Principles, which under Article 6.2.3(4) allow for such an adaptation.<sup>45</sup> It means that the choice-of-law clauses pointing to the law which allows for such a mechanism would be sufficient to empower an arbitral tribunal. Some tribunals hold a more restrictive approach to this issue. In one of the commercial cases, the arbitral tribunal was requested by a party to adjust the contract on the basis of a force majeure clause, which did not provide for any adaptation as a remedy. The tribunal found that:

It is not for the Arbitral Tribunal to question the motives or judgement of the Parties, but to assess their rights and obligations in light of their legally significant acts or omissions. That is all; that is enough. To go beyond this role would be to betray the legitimate expectations reflected in the Parties’ agreement to arbitrate, and indeed to impair the international usefulness of the arbitral mechanism.<sup>46</sup>

Similarly, even an inclusion of a hardship clause into a contract without specifying a remedy may be insufficient for seeking contract adjustment.<sup>47</sup>

32. Berger, above n. 1, at 1.

33. Brower II, above n. 10, at 2.

34. A.S. Rau, ‘“Gap Filling” by Arbitrators’, in *International Council For Commercial Arbitration* (2015), at 464.

35. N. Horn, *Adaptation and Renegotiation of Contracts in International Trade and Finance* (1985).

36. P. Bernardini, ‘Stabilization and Adaptation in Oil and Gas Investments’ 1(1) *Journal of World Energy & Business* 98, at 99 (2008).

37. Frick, above n. 10, at 174.

38. Kröll, above n. 3, at 438.

39. J-Q. De Cuyper and W. Peter, ‘Renegotiation of Long Term International Agreements and Flexibility: Consideration on the Ground of the Ghana/Valco Case’, *IBLJ* 775, at 794 (1995).

40. Standard ICC arbitration clause reads: ‘All disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.’

41. Berger, above n. 1, at 8.

42. A. Al Faruque, 9(2) ‘Renegotiation and Adaptation of Petroleum Contracts: The Quest for Equilibrium and Stability’, *The Journal of World Investment & Trade* 113, at 140 (2008).

43. Berger, above n. 1, at 8.

44. Cuyper and Peter, above n. 39, at 794.

45. Bernardini, above n. 36, at 107.

46. UNCITRAL Award of 4 May 1999, 25 Y.B. COM. ARB. 13, 61 (2000), mentioned in Berger, above n. 9, at 1353.

47. Faruque, above n. 42, at 128.



Therefore, the parties should include a precise and explicit adaptation clause in the contract to procedurally authorise the arbitrators to apply such a remedy.

#### 4.2 Powers of the Arbitral Tribunal in the Absence of Adaptation Clause in the Contract

The possibility of contract adaptation becomes even more questionable due to the lack of an express authorisation in the contract. There is a concern that in case arbitrators decide to adapt the contract despite the lack of an express authorisation from the parties, the principle of *pacta sunt servanda* and the principle of party autonomy could be at stake.<sup>48</sup> Several possibilities have been discussed in legal writing but no indications were made by arbitral tribunals even *obiter dicta* in this regard.

*Lex arbitri* could constitute a possible source of necessary empowerment. *Lex arbitri* also referred to as the law of the seat of arbitration is the law which ‘governs the validity of arbitration and arbitral award’.<sup>49</sup> There is a general consensus that in case the contract remains silent on the empowerment of the tribunal to adapt the contract such implicit authorisation can be derived from the law of the seat of arbitration.<sup>50</sup>

Berger refers to the notion of contract adaptation as an ‘adaptration’.<sup>51</sup> He underlines that the contract concluded between the parties may provide a general authorisation for the arbitral tribunal; however, it is a matter of *lex arbitri* to determine whether the arbitrators are empowered to adapt the contract from a procedural perspective. If *lex arbitri* does not provide for such an authorisation, the arbitral award will most likely be unenforceable under the New York Convention. Therefore, tribunals do not only require an authorisation from the parties themselves but also provisions allowing them to do so under *lex arbitri*.<sup>52</sup> It renders the choice of the seat of arbitration of crucial importance.

Nonetheless, Berger points out that in case *lex arbitri* remains silent with regard to powers of arbitral tribunals to adapt the contracts, one may look into the competence of domestic courts’ competence in this regard. Thus, if domestic courts enjoy the competence to adapt the contracts, the arbitral tribunal acting under the arbitration law of that jurisdiction will be granted the same powers.<sup>53</sup> By such a comparison, Berger refers to the principle of ‘synchronised competences’.<sup>54</sup> In case domestic procedural law remains silent on that issue as well, Berger’s standpoint is that as a rule of last resort, one should look for the answer under the substantive law (*lex causae*), which is ‘an indicator for contract adap-

tation and gap-filling by national courts, and accordingly, for arbitral tribunals’.<sup>55</sup>

Frick disagrees with such a solution. He argues that the question of the power of arbitrators to adapt the contracts is solely answered by *lex arbitri* and one should not resort to the competence of domestic courts or *lex causae*.<sup>56</sup> At the same time, he argues that adaptation is possible when the parties include an express provision in a contract. He also allows for adaptation in ‘exceptional circumstances as defined by the applicable substantive law’.<sup>57</sup> In his view, the applicable substantive law sets forth conditions for contract adaptation; however, the question of the power of arbitrators constitutes a separate procedural issue which can be answered solely by *lex arbitri*.<sup>58</sup> He further purports that ‘if there is no rule of the *lex arbitri* prohibiting adaptation of contracts, one can assume that arbitrators in fact have such authority as part of their general decision making power derived from the arbitration clause’.<sup>59</sup> Therefore, in his view, an express authorisation from the parties is not required.<sup>60</sup>

Conflicting provisions of empowering arbitrators under the contract in case *lex arbitri* prohibits such a remedy have not been the subject of legal discussions in literature nor arbitral awards. However, one must bear in mind that such could create a risk of non-enforcement, especially if contract adaptation against *lex arbitri* would violate public policy.

## 5 Contract Adaptation: Opportunities and Threats

Contract adaptation attracted a lot of attention in international arbitration. Despite the potential procedural difficulties and current lack of guidelines for arbitral tribunals, legal scholars have been advocating the use of such a remedy. Before addressing the ways to reduce the uncertainty surrounding this legal mechanism, it is necessary to address first the opportunity and threats it entails.

First and foremost, contract adaptation provides more flexibility to the contractual relationship. Such a flexibility cannot be achieved through resorting to other remedies such as, e.g. renegotiation or termination of the contract. Renegotiations conducted by the parties are rarely successful since majority of conflicted parties are not able to reach an agreement.<sup>61</sup> In this event, tri-

48. Frick, above n. 10, at 146; Faruque, above n. 42, at 139.

49. L. Russi, ‘Chronicles of a Failure: From a Renegotiation Clause to Arbitration of Transnational Contracts’ 24(1) *Connecticut Journal of International Law*, 77 at 77 (2008).

50. Berger, above n. 1, at 5.

51. *Ibid.*, at 17.

52. *Ibid.*, at 10.

53. *Ibid.*, at 10.

54. J.D. Lew et al., *Comparative International Commercial Arbitration* (2003), at 652.

55. Berger, above n. 1, at 10. Similarly Bernardini argues that there is a widespread view that ‘that if the judge is so empowered the arbitrator is also empowered’ see Bernardini, above n. 36, at 108.

56. Frick, above n. 10, at 193.

57. *Ibid.*, at 148.

58. *Ibid.*, 194.

59. *Ibid.*, at 197.

60. The view has been accepted by majority of the legal scholars. It was also adopted by arbitrators in *Kuwait v. Aminoil*.

61. G.H. Daniel, ‘Adaptation of Clauses in North Sea Oil Supply Agreements’, 2 *Journal of Energy & Natural Resources* 100, at 102 (1983).

bunals would only be left with the option to terminate the contract (which may not serve the parties) or confirm the terms of the agreement and thereby allocate the risk to one of the parties, perhaps against the original terms of the contract.<sup>62</sup>

The adjustment of investment contracts results out of their vulnerability to changes of circumstances due to their long-term character and operation in fields highly subject to regulatory changes such as, e.g. petroleum industry.<sup>63</sup> The parties entering into investment contracts do not have the ability to predict all the events that may affect the contract in the future. If such circumstances materialise, the parties should have the space to make the necessary adjustments and level the playing field. Therefore, in literature, the commentators are putting forward adjustment arguments from a view of rational and ethical commercial behaviour.<sup>64</sup> In accordance with such a view, ‘the disadvantaged party does not “deserve” the loss and the party benefitted does not “deserve” the gain’.<sup>65</sup>

Another factor in favour of contract adjustment that the States should take into consideration is the risk of additional costs associated with finding a new business partner. If the parties are not able to reach an agreement on contract renegotiation and tribunal is left with the only viable remedy, i.e. termination of the contract, the parties will usually decide to pursue a new investment project. However, finding a new investor may be time consuming, more expensive and overall less beneficial for the State. From another perspective, a failure of the investment project, and a failure to adjust the terms of the original contract, may affect both of the parties’ goodwill and reputation.<sup>66</sup> Thus, since an attempt to renegotiate the contract by the parties themselves oftentimes is futile, adaptation by arbitral tribunals can salvage the contractual relationship and save the parties from negative repercussions.<sup>67</sup>

With the opportunities also come threats. It has been expressed in legal writing that arbitral tribunals may be overstepping their powers with regard to contract adjustment, i.e. adjust the contract’s provisions against the parties’ will.<sup>68</sup> These concerns, however, seem to be at least somewhat unsubstantiated. Arbitrators will only adjust provisions of the contract if one of the parties included such a request in the prayer for relief and reasonably motivated its standpoint.<sup>69</sup> The tribunals will not grant such a remedy *ex officio*. The fear that tribunals will unduly rewrite contracts has not materialised in practice.<sup>70</sup> Nonetheless, the concern cannot be simply overlooked. If the States remain under the impression that there is a risk of overstepping, it is fair to assume

that they will be more reluctant to enter into investment contracts containing arbitration clauses. With the adaptation practice becoming more established, the parties may knowingly exclude adaptation from the scope of tribunals’ powers.<sup>71</sup>

With tribunals overstepping their powers, another threat materialises. If authorisation of arbitral tribunals to adapt the contract remains doubtful, there is a risk that a court will refuse to enforce an arbitral award under the New York Convention. That risk is especially relevant in cases where the contract as well as *lex arbitri* remain silent on the issue of adjustment.<sup>72</sup>

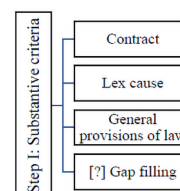
Lastly, the parties themselves fear that inclusion of any type of adjustment clauses may provide ‘an easy way out’ of the contractual obligations.<sup>73</sup> What must be nonetheless emphasised is that arbitral tribunals will only adjust terms of the contract if there is a fundamental alteration of its equilibrium (unless the parties lower the threshold of hardship in their respective agreement). The contract will not be adapted simply because it stopped to be profitable – the change has to reach the so-called ‘limit of sacrifice’ in commercial setting.<sup>74</sup> Providing a detailed description of which events may cause such a burden as to give grounds to contract alteration by the parties may actually provide more stability to the contractual relationship and encourage the parties to refrain from seeking contract amendments without grounds to do so.

## 6 Adaptation: Steps and Possible Scenarios

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The first step is to establish the substantive criteria regulating the change of circumstances, i.e. hardship or force majeure. The arbitrators must first look into the contract to examine whether the parties themselves included hardship and force majeure clauses and decide whether the supervening event satisfies the requirements under the contract.

### *Step II: Procedural Empowerment*



62. C.P. Gillette, ‘Commercial Rationality and the Duty to Adjust Long-term Contracts’, 69 *Minnesota Law Review* 521, at 539 (1985).

63. Faruque, above n. 42, at 115.

64. Gillette, above n. 62, at 524.

65. *Ibid.*, at 575.

66. Kolo and Wälde, above n. 8, at 31.

67. *Ibid.*, at 32.

68. Brunner, above n. 10, at 496.

69. *Ibid.*, at 496.

70. *Ibid.*, at 497.

71. Such exclusion was included in a contract between Tiffany and Swatch (*Tiffany & Co v. The Swatch Group Case*). The arbitral clause read: ‘The arbitral tribunal may not change, modify or alter any express condition, term or provision of this Agreement and to that extent the scope of its authority is expressly limited. The arbitral tribunal shall make its award in accordance with the rules of law and not as amiable compositeur.’

72. Berger, above n. 1, at 10.

73. Kröll, above n. 3, 441.

74. Berger, above n. 9, at 1354.

*Step II: Procedural Empowerment*

Contract*	<i>Lex arbitri</i>	Can arbitrators adapt the contract?
Π	Π	Π
Π	<<silent>>	?
Π	O	?
<<silent>>	Π	?
O	Π	O

Further, based on the Claimant's prayer for relief, the tribunal will look into the available remedies under the contract and the applicable law, and decide whether or not to grant the remedy. If a party requests contract adaptation, and such remedy is available under the substantive law, the tribunal will need to assess whether it is authorised to modify the contract. As mentioned hereinabove, even though the use of adaptation disguised as gap filling has not been widely accepted in legal literature, the tribunal in *Wintershall AG v. the Government of Qatar* resorted to such a practice. In such a case, since gap filling is connected to the interpretative powers of the arbitrators, theoretically, the tribunal would not be required to seek procedural empowerment.

Thus, there are several procedural uncertainties with regard to the arbitrators' powers to adapt contracts. When it comes to empowerment included in a contract when *lex arbitri* remains silent, it has been generally accepted that contract adaptation could be allowed. The tribunal should nonetheless make its decision taking all circumstances into consideration, i.e. the risk of non-enforcement of the award and the approach of courts at the potential place of enforcement. The same remarks apply to the opposite scenario, i.e. when the contract remains silent on the issue and *lex arbitri* allows it. Arbitrators should also take precaution if an award will be enforced against a State and take into consideration political landscape. In developing countries where pro-enforcement regime under the New York Convention has not been effective yet, the risk of non-enforcement of an award against the State magnifies. In China it has been found that it is 'difficult to enforce a foreign arbitral award in the PCR against a State owned Chinese company'.<sup>75</sup> Enforcing an award against the State itself may be even more difficult.

The situation is more complicated when the parties empower the tribunal to adapt the contract in the agreement itself; however, the law of the seat of arbitration forbids such a practice. For example there is a traditional view in common law that neither courts nor arbitrators have the power to adjust the terms of the contract.<sup>76</sup> In such a case the risk of non-enforcement of the award

is significant, and thus arbitrators should be discouraged from engaging in contract modification. What could be encouraged, however, is supporting the parties to engage in renegotiation of the contractual terms or mediation in order to adapt the contract themselves. To overcome the procedural issue, Brunner advocates for the so-called 'Italian rule'. If an arbitral tribunal is not procedurally empowered to adapt the contract, the party should be entitled to request termination of the contract instead.<sup>77</sup>

Besides the highlighted procedural uncertainty, the very first step with regard to searching for empowerment under the contract is establishing what type of empowerment is needed. It is an express adaptation clause or, as mentioned earlier, an arbitration clause would suffice. Some scholars even argue that it is sufficient enough to include a choice-of-law clause on substantive level, such as, e.g. the UNIDROIT Principles, which under Article 6.2.3(4) allow for such an adaptation in order to confer such power.<sup>78</sup> That could be deemed as sufficient to determine the parties' will to empower the tribunal to act in such capacity. Similar view may be expressed about inclusion of a hardship clause which does not set forth the remedies. In the author's view, there is room for arguments that it indicates the parties' will to use the remedies generally available in case of hardship.

Lastly, there is uncertainty with regard to the actual modification process. There are no guidelines as to how such adaptation should be carried out. Therefore, arbitrators may be reluctant to grant the parties such a remedy.

## 7 Reducing the Uncertainty

The issue of change of circumstances impacting performance of contracts has been discussed in legal writing for quite some time now.<sup>79</sup> However, with the benefits of hindsight, it seems that hardly any progress in the context of investment contracts has been made since 1985 when the arbitral tribunal in *Kuwait v. Aminoil* theoretically recognised the powers of arbitral tribunals

75. A.G. Maurer, *The Public Policy Exception Under the New York Convention: History, Interpretation, and Application* (2013), at 344.

76. Brunner, above n. 10, at 491.

77. *Ibid.*, at 498.

78. Bernardini, above n. 36, at 107.

79. For example, Berger, above n. 1; Kröll, above n. 7; Brower II, above n. 10; Frick, above n. 10; Hillman, above n. 10; Brunner, above n. 10.

to adapt contracts under express authorisation. The arbitrators are in general reluctant to address the doctrine of changed circumstances.<sup>80</sup> It may be the case that arbitrators are hesitant to adjust the contracts because they are not equipped with any guidelines or tools on how to actually proceed with the issue. Ultimately, it is in the arbitrators' hands to recognise the remedy and use it in practice.

The first step is to increase awareness of the legal community, and through them of the parties, concerning negotiation of contractual provisions and hardship and force majeure clauses. With the Covid-19 pandemic outbreak, this goal has been partially achieved so far. The law firms have been organising many virtual webinars on the issue as well as providing overview of change of circumstances under major jurisdictions. The awareness regarding the contract adaptation clauses among legal practitioners would certainly facilitate contract drafting. Since arbitrators are currently lacking any guidelines, parties are advised to provide concrete criteria for contract adjustment. Instead of using soft references such as 'fair and equitable', 'reasonable' or 'restoring or maintaining the equilibrium of the contract', parties should specifically express what they expect from arbitral tribunals.<sup>81</sup> Another option, parallel to individually negotiated clauses, would be to encourage arbitral institutions to work out a model clause dealing with adaptation of contracts by arbitrators.<sup>82</sup>

On a bigger scale, the current discussions may constitute an incentive for issuing guidelines on contract adaptation by arbitral tribunals, such as, e.g. International Bar Association ('IBA') Guidelines.<sup>83</sup> They are defined as 'guidelines' as opposed to 'rules' in order to underline their contractual and somewhat consensual nature. The guidelines are applicable, and also a portion thereof, if the parties decide to adopt them in the original agreement. Arbitral tribunals may use them at their discretion as guidance.<sup>84</sup> Ultimately, the need for a change prompted by the pandemic may start discussions on inclusion of proper provisions into arbitration rules. Providing such a regulation would constitute a stepping stone in the development of the doctrine.

## 8 Concluding Remarks

Gillette stated that in case of change of circumstances the parties 'can do little better than to throw up their hands in despair and place themselves at the mercy of future events'.<sup>85</sup> The same wish can be applied to arbi-

tral tribunals. In order to effectively resolve disputes, arbitrators cannot face procedural uncertainty.

The issues of hardship and force majeure appear in literature in waves.<sup>86</sup> In these unprecedented times, it is therefore necessary to revisit the concept of contract adaptation and the scope of arbitral tribunals' powers. There is still a lot of uncertainty and hardly any developments have been made in this area. The grounds for contract adaptation remain unclear – it is still questionable whether arbitral tribunals can resort to such a remedy in case the contract lacks respective provisions with regard to change of circumstances and whether *lex arbitri* has to expressly allow for adjustment. Therefore, the current obstacle to making such a mechanism a standard (yet only available in exceptional and unforeseen circumstances creating distortion of the equilibrium of the contract) practice is the procedural empowerment.

In order to provide more clarity in this regard, the author of this research article proposed several solutions which may facilitate the process such as building awareness of the legal community (and improving the drafting process by inclusion of explicit and precise adaptation clauses) and introducing guidelines for arbitrators. Even though there is no 'one-size-fits-all' formula, which could be applied by arbitral tribunals, it would be beneficial to provide arbitrators with guidelines as to how such adjustment should be conducted. Certainly, the most attractive solution would be for the parties to provide the tribunal with more concrete expectations than 'restoring the equilibrium of the contract'. Such a change can be brought about by introduction of model clauses as well as familiarising the legal industry with a possibility to include such provisions in the contracts.

'Adaptation' has been advocated nearly 20 years ago.<sup>87</sup> Already then, Berger has been underlying that after decades of confusion, pragmatism should win with dogmatism. Hardship and force majeure have been largely recognised in many jurisdictions and requirements to adjust contracts from a substantive dimensions did not give rise to controversy. It seems that due to the complexity of international arbitration and multitude of applicable laws that might come into play, the obstacle that remains is the empowerment of arbitral tribunals, i.e. a procedural dimension of contract adaptation. With consequences of Covid-19 fast approaching, arbitrators might be faced with the issue much faster. Thus, this article calls upon the arbitration community, i.e. arbitral institutions, scholars and practitioners, to take the lead in facilitating the process – by introduction of appropriate guidelines and drafting better clauses concerning the change of circumstances. With the common effort, more clarity can be brought into adaptation of investment contracts. It is high time to once again revisit the discussions and work out practical solutions which might be implemented in practice.

80. Cuyper and Peter, above n. 39, at 787.

81. Berger, above n. 1, at 13.

82. H. Strohbach, 'Filling Gaps in Contract', 27(2:3) *American Journal of Comparative Law* 479, at 485 (1979).

83. [www.ibanet.org/Publications/publications\\_IBA\\_guides\\_and\\_free\\_materials.aspx](http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx).

84. P. Ashford, *The IBA Guidelines on Party Representation in International Arbitration: A Guide* (2016), at 3.

85. Gillette, above n. 62, at 542.

86. Maskow, above n. 2, at 659.

87. Berger, above n. 1, at 10.