Painel IV – Arbitragem e Desequilíbrio Contratual

Rodrigo Garcia da Fonseca

Mariana França Gouveia

Giovanni Ettore Nanni

Christoph Brunner

Rodrigo Garcia da Fonseca: Bom dia a todos. Antes de mais nada, queria agradecer ao CBAr pelo convite para estar aqui, na pessoa do André Abbud. Aliás, um parêntese em nome do CAM-CCBC, gostaríamos de parabenizar o CBAr pela iniciativa das novas Diretrizes, temos uma nota de apoio no *site*, e dar a notícia também que o conselho do CAM-CCBC aprovou um novo questionário para a aceitação do encargo de árbitro, que menciona explicitamente as Diretrizes do CBAr e que vai ser divulgado nos próximos dias para passar a ser utilizado nas próximas arbitragens. E, a próxima vez que algum de nós preencher um questionário desses, é bem possível que o tema seja um desequilíbrio contratual, que é o tema desse painel, já que um grande número de arbitragens acaba sendo gerado por esse tipo de problema. Nós vamos ouvir, então, inicialmente, o Professor Christoph Brunner, da Suíça, que vai falar sobre arbitragem e renegociação de contratos empresariais, dever transnacional. Depois, a Professora Mariana França Gouveia vai falar sobre a impossibilidade de desequilíbrio superveniente na experiência recente, abordando temas como pandemia, guerra e outros similares. E, por fim, o Professor Giovanni Nanni falará sobre a intervenção dos árbitros nos contratos empresariais e a lei de liberdade econômica. Eu, sendo moderador, a minha função é não falar muito, então, eu passo a palavra ao Professor Christoph. Obrigado.

ARBITRAGEM E RENEGOCIAÇÃO EM CONTRATOS EMPRESARIAIS: DEVER TRANSNACIONAL?

Christoph Brunner

Christoph Brunner: Thank you Rodrigo for the nice introduction, and thank you to the organizers for inviting me and allowing me to participate virtually. It's an honor and a pleasure to speak to you this morning.

INTRODUCTION

We undoubtedly live in a fragile world. Think of events such as pandemic, climate change, natural disasters, energy transition, acts of public

authority, state intervention, war and international sanctions. Such disruptions may fundamentally alter the equilibrium of the contract and thus bring about the situation of hardship.

The title of my presentation is "*Arbitration and renegotiation of business contracts: transnational duty*?" To put it differently, if a party asserts that the contract is affected by hardship, are the parties under a duty to renegotiate, and if so, at what point in time, what does it imply, and what are the sanctions in case of infringement? We are looking at the scenario where the contract does *not* include a contractual renegotiation or hardship clause.

There is a short and a long answer to this question. I will start by giving you a "short answer", but legal research shows that there is not only one, but two short answers.

The *first "short answer"* is reflected in a decision of the Amsterdam District Court of 2020. The court held that *article 6.2.3* of the UNIDROIT Principles of International Commercial Contracts ("*UNIDROIT Principles*") dealing with the effects of hardship is "*the general international standard on this topic*" (Netherlands Commercial Court, Amsterdam, NCC 20/014, C/13/681900, 29.04.2020). There is also support for this in several arbitral awards and legal doctrine (see, e.g., Award in ICC Case 20757, 2017, Unilex; Brödermann, UPICC Commentary, 2023, 321).

Article 6.2.3 (1) of the UNIDROIT Principles provides that in case of hardship the disadvantaged party is entitled to request renegotiations and paragraph (3) stipulates that upon failure to reach agreement within a reasonable time, either party may resort to the court, and the court may then terminate or adapt the contract (paragraph 4).

The *second "short answer"* to the question has been given in the CISG Advisory Council Opinion No 20 (rapporteur: Professor Edgardo Muñoz, Mexico, 2020). The Opinion states that *under the CISG* the parties have *no duty to renegotiate* the contract in case of hardship. Professor Schwenzer and Professor Muñoz in an article published at about the same time submit that in general terms, "*imposing such a duty is neither necessary nor desirable in international trade transactions*" (Schwenzer & Muñoz, *Duty to renegotiate and contract adaptation in case of hardship*, Unif. L. Rev., Vol. 24, 2019, 149-174).

As you probably know, article 79 of the CISG on its terms does not deal with hardship, it deals with force majeure. As of today, the clearly prevailing opinion expressed by legal commentators and case law is that the CISG also governs cases of hardship, and the CISG Advisory Council Opinion No 20 has also recognized this principle. However, the applicability of article 6.2.3 of the

UNIDROIT Principles by analogy to cases governed by the CISG is a matter of contention and debate.

Schwenzer & Muñoz have taken the view that not only the duty to renegotiate, but also the remedies of contract adaptation or termination by the court, as opposed to a declaration of termination by a party, is neither necessary nor desirable.

So, which of these two answers is correct? Let's come back to this at the end of the "long answer". Here is an overview of what I'm going to cover in the next few minutes.

OVERVIEW

First, we look at international instruments and domestic rules on hardship and whether they include a duty to renegotiate or not. Then I'll address the nature of the duty to renegotiate and the consequences in case of infringement. Next, we shall look at the need for a distinction between the pre-litigation and the litigation phase. Importantly, in the litigation phase, there is the option of a tribunal-directed renegotiation. Finally, I will conclude by providing a summary of the key reasons for the "long answer".

INTERNATIONAL INSTRUMENTS ON HARDSHIP AND DUTY TO RENEGOTIATE

Article 6.2.3 of the UNIDROIT Principles provides that the disadvantaged party is entitled to request renegotiation. This is formulated as a "*pre-litigation requirement*" because it is only upon failure to reach agreement within a reasonable time that either party may resort to the court and request adaptation or termination of the contract by the court. This principle is included in all versions of the UNIDROIT Principles (1994, 2004, 2010, 2016). The same principle is reflected in the ICC hardship clause in the versions of 1985, 2003 and 2020, as well as in other soft law instruments such as Trans-Lex Principle No. VIII.2, IV.6.7 and article III-1:110(3)(d) of the draft common frame of reference ("DCFR") which includes soft law principles and model rules of European Private Law and was produced by a network of academics.

On the other hand, as already noted, article 79 of the CISG, which was adopted in 1980, on its terms does not address hardship, and does not provide for a duty to renegotiate either. As I have said before, it is contested whether article 6.2.3 of the UNIDROIT Principles nevertheless applies by analogy under article 79 CISG. The question was denied by the CISG Advisory Council Opinion No 20, but a number of legal commentators have taken a different view.

DOMESTIC RULES ON HARDSHIP AND DUTY TO RENEGOTIATE

Let us examine some national rules on hardship and the duty to renegotiate. Of course, this is only a brief snapshot. Perhaps one of the most recent domestic provisions is art. 1195 of the French Civil Code. As you may be aware, French law did not previously recognize the principle of hardship in commercial contracts. However, since 2016, a provision on hardship has been introduced, which includes an *express* duty to renegotiate. In civil law, some legal systems include a hardship rule that does not expressly provide for renegotiation, but a duty to renegotiate is *implied*, especially based on the principle of good faith (e.g., Italy; Brazil: art. 317, 422, 478/479 Civil Code). In other civil law jurisdictions, it is generally acknowledged that the parties are *not* bound to renegotiate. For example, this is the case in Germany, Switzerland and China, according to a statement by the People's Supreme Court of 2009. Furthermore, the common law position is that it does not provide for a renegotiation duty. This is exemplified by § 2-615 of the UCC on impracticability, which also addresses situations of hardship.

Overall, the picture is somewhat mixed. The requirement for a duty to renegotiate is not generally accepted in civil law systems and is not developed in common law. Before discussing the purpose and desirability of a duty to renegotiate, it is first necessary to examine the content and consequences in case of infringement.

NATURE OF THE DUTY TO RENEGOTIATE

If we think of the duty to renegotiate as a "pre-litigation requirement", as set out in article 6.2.3 of the UNIDROIT Principles and mentioned earlier, two main points need to be made.

Firstly, in good faith, the other party may take the view that the requirements of hardship are not met. Cases of hardship are often complex and involve a number of factual considerations, making it difficult to determine whether a party has acted in bad faith in refusing or breaking off negotiations. For instance, the issue of threshold, foreseeability or risk assumption is frequently open to debate in good faith. In particular, the required threshold may not be reached due to the speculative nature of the transaction. Indeed, international case law, especially arbitral case law, shows that the requirements of hardship are only met in very rare and exceptional circumstances.

Secondly, when a request for renegotiation is made "pre-litigation", there may not only be a good faith dispute about the legal requirements of hardship, but the underlying facts may also not be clear due to a lack of verified or verifiable data. Such data is often only obtainable through the process of taking of evidence during arbitral or court proceedings.

CONSEQUENCES IN CASE OF INFRINGEMENT

With regard to the consequences of infringement, it is important to highlight two key aspects. *Firstly*, most domestic laws and international instruments do not provide a remedy to enforce the duty to renegotiate imposed upon the parties. Consequently, there is no liability for damages and no right to terminate the contract in the event of infringement (with the exception of extreme cases). In particular, it is not feasible to impose liability for damages in such cases, given that the circumstances in which hardship is claimed are often complex and it would be very difficult to determine whether a party has in fact failed to act in good faith. This is also recognized by international instruments and domestic laws, which normally do not provide for such sanctions.

Secondly, should a party fail to renegotiate or use best efforts to do so, this may have adverse consequences for the cost allocation, which could result in a cost sanction. To illustrate, in the *Himpurna award* the tribunal (presided by Jan Paulsson) held that the failure of the party invoking hardship to articulate its position clearly to the other party prior to the arbitration and to enter into any significant renegotiation discussion meant that there was no reason to deviate from the general principle that the unsuccessful party (in Himpurna the party invoking hardship, the respondent) should bear the costs (Himpurna award, Y.B. Com. Arb. 2000, 11). The tribunal noted in particular: "*To recover its claim, even in the limited amount upheld by the Arbitral Tribunal, the claimant had no choice but to bring these proceedings*".

Furthermore, the party who is willing to make an offer for alternative contractual terms may inform the other party that it intends to rely on the offer in connection with a possible future determination of costs by the arbitral tribunal. For instance, a *sealed offer* may be made with the wording "*without prejudice save as to costs*". At the outset of the arbitration, a party may submit a sealed offer. The sealed offer is openly sent to the other party on a "without prejudice" basis because it is not to be brought to the attention of the tribunal before the determination of the substantive dispute.

It follows that, in essence, the pre-litigation duty to renegotiate is comparable to a "negotiation obligation" in a multi-tiered dispute resolution clause. Incidentally, English law also recognizes the effectiveness of multi-tiered dispute resolution clauses including a negotiation obligation. This was confirmed by the English High Court in 2014 in the case of *Emirates Trading Agency v. Prime Mineral Exports*.

When conducting pre-litigation negotiations, it should be clarified whether the negotiations, their outcome or the parties' last positions are on a "*without prejudice*" basis. This means that they may not be produced in the proceedings, or only (if so stipulated) "*save as to costs*".

If the proceedings are initiated without the pre-litigation negotiation step being fulfilled, the tribunal may *suspend* the proceedings until that step is completed. At this juncture, a straightforward attempt at renegotiation is typically deemed sufficient.

Let us pause for a moment to consider the broader context. What is the purpose of the duty to renegotiate, and how can this purpose be achieved in the pre-litigation phase on the one hand, and in the litigation phase on the other hand?

NEED FOR DISTINCTION BETWEEN PRE-LITIGATION AND LITIGATION PHASE DUE TO INCENTIVES OF PARTIES

If the courts are allowed to adapt (revise) the contract, there is a concern that they might unduly "rewrite" the contract. The principle that parties should work out their own solution is based on the overarching principle of party autonomy and efficiency. Typically, the parties of the contract have an interest in maintaining control over the adaptation result or in avoiding termination. Nevertheless, there is a necessity for incentives for both parties to renegotiate. In the pre-litigation phase, the parties' incentive to renegotiate may not be strong. As previously discussed, there are often conflicting positions on legal requirements and factual prerequisites that are arguable in good faith. Furthermore, there is frequently a lack of verified or verifiable data. However, the situation may change once litigation has commenced ("litigation phase").

TRIBUNAL-DIRECTED RENEGOTIATION DURING THE LITIGATION PHASE

Tribunals may decide to render an interim decision, deciding some preliminary questions regarding the dispute, and then directing the parties to resume renegotiations themselves. This option is also mentioned in the official comment on article 6.2.3 of the UNIDROIT Principles.

To illustrate, I will present three examples. The first two examples, the *Westinghouse* litigation (*Florida Power and Light Co. v. Westinghouse Elec.*, 597 F. Supp. 1456, E.D. Va. 1984) and *Gasum v. Gazprom Export* (award of 14 November 2022, reported in GAR), are cases of court-compelled (*Westinghouse*) or tribunal-directed (*Gasum*) renegotiation following an interim decision. The third example involves a case where the arbitral tribunal did not make use of the option of a tribunal-direct renegotiation (*Gas Natural Aprovisionamientos (GNA) v. Atlantic*, 2008 WL 4344525 S.D.N.Y.).

In the famous Westinghouse litigation, Westinghouse was contractually obliged to remove irradiated uranium from a nuclear power station. However, it later became apparent that this removal became excessively costly. The Court,

in order to encourage contract revision through renegotiation by the parties, explicitly refused to consider the critical problem of remedies in order not to "*result in standing in the way of these cases ending, as I think they ought to end, in settlement*". The Court, having found Westinghouse liable, determined that rather than attempt to order a specific remedy, it would give the parties a further opportunity to attempt to negotiate a solution to the question of how Westinghouse could best fulfill its obligations to remove the irradiated uranium.

The second example is a recent award in the case of *Gasum v. Gazprom Export*. The award was issued on 14 November 2022. It is not published, but it has been reported in the Global Arbitration Review and involves alleged force majeure related to Russia's war against Ukraine. Further details of this case will be provided by Mariana during her presentation. However, it is crucial to note that Gasum asserts that the tribunal ordered the parties to continue negotiations following the issuance of an interim award by the tribunal to resolve the situation following that interim award.

The third example involves the *GNA v. Atlantic* arbitration and the related New York District Court decision in annulment proceedings against the award. It is an example where no compelled renegotiation took place. The case is illustrative as it shows the practical difficulties that tribunals may face when they have to adapt the contract. The contract in that case had included a *price reopener clause*. The tribunal adjusted the mechanism to determine the price of liquefied natural gas to include a dual price scheme in Spain and the US, which had not been requested by any of the parties. The New York District Court denied the request to set aside the award on the ground that the tribunal had exceeded its powers and therefore breached article V(1)(c) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The District Court concluded that the contract required to reach "*a fair and equitable revision*" of the price without referring to a specific scheme. The District Court concluded that the formula in the contract provided the tribunal with a broad discretion to choose the particular mechanism for making the price adjustment.

It follows from the procedural history set out in the award that in advance of the post-hearing arguments which took place after two rounds of post-hearing submissions, the tribunal submitted a detailed list of questions to both parties and also requested the parties to submit the specific language of proposed price revisions. In that regard, the District Court held in particular: "*It is true that when the Tribunal requested post-hearing briefing from the parties as to "[w]hether it is possible to have two different prices based on two different markets", both parties argued against such a scheme. GNA argued in favor of a single Spanish price for all deliveries; Atlantic contended that a single price based on the New England market should apply to all deliveries. These arguments over the*

wisdom of a dual pricing scheme, however, cannot be reasonably construed as an agreement to restrict the Tribunal's authority to adopt that scheme. Indeed, in opposing the Tribunal's suggestion of a two-price system, Atlantic limited its analysis to "the present facts", while accepting that under certain circumstances "it might, in theory, be possible to 'have two different prices based on two different markets'".

This case illustrates that the parties may, rightly or wrongly, be dissatisfied with the approach of the tribunal in cases of "its own adaptation". Neither party requested the tribunal's approach during the proceedings. The case therefore demonstrates the potential need for and the usefulness of a directed renegotiation, with an outcome that aligns with the parties' requests.

Thus, following the issuance of an interim order or a procedural order determining preliminary issues, there is a possibility of tribunal-directed renegotiation. If renegotiation fails, there is another option or case management technique that may be applied: *the final offer rule*. Once both parties have made their final offers, the decision-maker is required to accept one of the two final offers. The decision-maker must select one of the two final offers, but cannot adopt a solution in between. The final offer rule is commonly used in professional sports negotiations and labor arbitrations in the US. One question that may arise is whether a tribunal can also apply that rule in the absence of an agreement by the parties. It can be argued that the duty to renegotiate gives the tribunal an inherent power to direct the parties to submit the final offers.

In addition to the aforementioned case management techniques, there are a number of other potential options that can be considered. It is important to note that the suitability of these options will always depend on the specifics of the case in question. These options may include the tribunal requesting comments on the other party's final offer, including tribunal questions, or at the deliberation stage, the tribunal requesting the support of the party-appointed experts from both sides, as may be appropriate in complex cases.

INCENTIVE TO RENEGOTIATE BASED ON THE "ITALIAN RULE"?

I will now address a rule that I call the Italian rule. This rule was first enacted in the Italian Civil Code (article 1467 Italian CC, 1942: "*eccessiva onerosità*"). The rule provides that in the event of hardship, the only remedy is termination by the court. It does not allow for adaptation by the court. However, the party against which termination of the contract is sought may avoid termination if it offers to modify the terms of the contract in an equitable manner. The objective of this rule is to provide an incentive for the parties to work out their own solution, i.e. to revise the contract on their own. It also excludes the revision of the contract by the court, thereby excluding the risk that the court might unduly "rewrite" the contract.

The Italian rule is of some relevance because it has been adopted in the ICC Hardship Clause 2003, and as option 3C in the ICC Hardship Clause 2020. Furthermore, the rule can be found in article 479 of the Brazilian Civil Code. However, I have been informed by Giovanni Ettore Nanni that in Brazil, article 479 of the Civil Code is not implemented in practice.

It is evident from Italian case law that the second objective of the rule, namely the exclusion of a court-ordered revision, is not achieved in practice. The party against which termination is sought may submit several alternative prayers or even seek generic relief. This effectively requires the court to adapt the contract terms in accordance with its judgment. This is essentially a form of adaptation by the court.

It thus appears that the primary objective of the Italian rule, which is to provide an incentive for the parties to work out their own solution, is best achieved in the litigation stage through a court-compelled renegotiation following the issuance of an interim or preliminary decision.

CONCLUSION

This brings me back to the question posed in the title of my presentation: is there a transnational duty to renegotiate in hardship situations in the absence of an express renegotiation or hardship clause? As you may recall, we saw two short answers at the beginning. The question is a controversial one.

I believe there are compelling reasons to accept a transnational duty to renegotiate in hardship situations. The nature and complexity of hardship situations, especially in long-term contracts, require flexible legal consequences. In contrast to force majeure, hardship does not automatically excuse non--performance and associated damages. The occurrence of a fundamental alteration of the equilibrium of the contract does not render performance physically impossible, though it may render performance impracticable under the terms of the contract as originally agreed upon. It therefore requires flexible legal consequences. articles 6.2.1-6.2.3 of the UNIDROIT Principles dealing with hardship are included in Chapter 6 entitled “Performance”, while article 7.1.7 of the UNIDROIT Principles on force majeure is included in Chapter 7 entitled “Non-performance”. The different systematic settings demonstrate that the drafters’ intention was to situate hardship in a context of contract performance. The legal consequences are sufficiently flexible so as to make contract performance still possible, even though on modified terms (Brunner, *Force Majeure and Hardship under General Contract Principles*, KLI 2009, 400). For one-off transactions (as opposed to long-term contracts), the situation may be different once the performance window is definitively closed. Nevertheless, this does not provide a sufficient rationale for the abandonment of the flexible legal consequences of hardship.

It is appropriate to accept a transnational duty to renegotiate in hardship situations because it reflects the desirability of the parties working out their own solution. It is important to distinguish between the pre-litigation phase and the litigation phase:

In the pre-litigation phase, the duty to renegotiate is comparable to a "negotiation obligation" in a multi-tiered dispute resolution clause. The effects of the duty are limited, similar to those in a negotiation phase under a multi-tiered dispute resolution clause. Breach may result in cost sanctions in subsequent litigation. Nonetheless, just as these limited effects do not dissuade parties from agreeing to a mandatory "negotiation obligation" as a pre-litigation requirement, they do not justify the conclusion that a duty to renegotiate would be unnecessary or undesirable.

At the litigation stage, the duty to renegotiate may be a decisive factor in the outcome of the case, particularly in case of an interim award on preliminary issues and a tribunal-directed renegotiation. There is a substantial likelihood that, following an interim award, a tribunal-directed renegotiation will result in a settlement, rather than a court-ordered outcome. The duty to renegotiate (even if formulated as a pre-litigation requirement) provides a sufficient legal basis for tribunal-directed renegotiation at the litigation stage.

In the event of hardship, it is generally accepted that the parties should, to the extent possible, work out their own solution. A transnational duty to renegotiate makes it clear that the parties should engage in such negotiations. This duty preserves the possibility of a party-driven outcome in the pre-litigation phase, and significantly increases the likelihood of such an outcome in the litigation phase.

Thank you for your attention.

Rodrigo Garcia da Fonseca: Thank you, Christoph, for your very interesting presentation. We'll save questions for later. Passo a palavra, então, para a Professora Mariana.

IMPOSSIBILIDADE E DESEQUILÍBRIO SUPERVENIENTE NA EXPERIÊNCIA RECENTE: UM BALANÇO DOS EFEITOS DA PANDEMIA, DA GUERRA, DO IGP-M E OUTRAS SUPERVENIÊNCIAS

Mariana França Gouveia

Mariana França Gouveia: Muito bom dia para todos. É um gosto estar aqui. Queria agradecer o convite ao André Abbud e a toda a comissão diretiva do CBAr. É sempre um gosto enorme estar no Brasil e estar com tantos amigos. Espero que entendam o meu português. Vou fazer o esforço e falar, então, so-