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I. INTRODUCTION

Professor Dr. Klaus Berger, in *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators,* proposes that international investment contracts include a clause allowing the parties to renegotiate the terms of their contract if certain events take place.[1] If they are unable to reach an agreement, Professor Berger advocates that the parties agree to permit an arbitral tribunal to modify the terms of the contract to restore the economic equilibrium assumed by the parties when they concluded the agreement.[2] Although commentators have often championed these clauses, private parties involved in international transactions have included them infrequently.[3] This hesitancy may stem from fears that these clauses will make the contractual relationship unpredictable, raise the overall costs of the transaction, and be unenforceable or, if a tribunal is called upon to adapt the terms of the contract, will result in an unenforceable decision, or in the tribunal modifying the contract in a way that neither party

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1. Klaus Peter Berger, *Renegotiation and Adaptation of International Investment Contracts: The Role of Contract Drafters and Arbitrators,* 36 VAND. J. TRANSNAT'L L. 1347 (2003).
2. *Id.* at 1348-50.
3. *See* Jeswald W. Salacuse, *Renegotiating International Business Transactions: The Continuing Struggle of Life Against Form,* 35 INT'L LAW. 1507, 1536 (2001).

intended. Despite these concerns, I agree with Professor Berger that such clauses may be beneficial in international investment contracts, but in more limited circumstances than he posits.[4] Specifically, I argue that renegotiation clauses should not be included when one of the parties controls the event that triggers renegotiation and adaptation. The renegotiation and adaptation clause should provide a tribunal with criteria to guide any adaptation of the agreement.

II. RENEGOTIATION AND ADAPTATION CLAUSES

Renegotiation clauses are provisions in contracts that, upon the happening of a certain event or events, require all parties to return to the bargaining table and renegotiate the terms of their agreements. Professor Berger states that these clauses are particularly useful in international investment contracts between a private party and a government entity.[5] He argues that because these contracts typically are of long duration, the political, economic and social climate could change radically during this period and dramatically alter the economic benefits that the parties originally envisioned would flow from the agreement.[6] He also argues that a renegotiation clause may both protect a state's sovereign right to change laws that may affect the agreement and provide a measure of protection to the private investor. According to Professor Berger's argument, instead of mandating that a state not change its laws in a way that would disrupt the financial returns negotiated under the parties' agreement—as do many traditional stabilization clauses—the clause would allow the state unilaterally to take steps that would affect its contractual regime.[7] However, the investor would then have the right to renegotiate or adapt the contract with the aim of restoring the original equilibrium between the parties.[8] Professor Berger asserts that using a renegotiation and adaptation clause in this manner leaves a state's sovereignty intact and protects the investor against changes in the law governing the agreement.[9]

4. Berger, *supra* note 1, at 1348-50.
5. *Id.* at 1358-60.
6. *Id.* at 1348.
7. *Id.* at 1349.
8. *Id.* at 1349-51.
9. *Id.* at 1364.

III. THE POTENTIAL DRAWBACKS

Renegotiation clauses are not a panacea; they have a number of drawbacks. Investors may refuse to include them in their contracts for five reasons.[10] First, such clauses may reduce contract stability.[11] Second, including renegotiation clauses may raise the overall costs of the transaction.[12] Third, if the parties are unable to agree as a result of renegotiations and third-party adaptation of the contract is sought, an arbitral tribunal may decline to exercise jurisdiction or the adaptation may be unenforceable because of a lack of a "dispute" between the parties.[13] Fourth, if the parties' original agreement fails to provide the tribunal with sufficient parameters to adapt the contract, the tribunal may rewrite the agreement in a way that neither party intended.[14] Fifth, the events that trigger renegotiation may be within the control of the host state, raising the possibility that the process could be used unfairly to alter the agreement.[15]

The first potential downside is that a renegotiation clause may interject uncertainty into the contractual arrangement.[16] Businesses value certainty and predictability.[17] In fact, predictability has been identified as a key element to a favorable climate for foreign investment.[18] As one arbitral tribunal pointed out: "[O]ne of the primary goals of contracting is providing predictability and certainty for the parties. Only in highly exceptional circumstances is it

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10. *Id.*
11. *Id.* at 1363.
12. *Id.*
13. *Id.* at. 1372-73.
14. *Id.* at 1376
15. *Id.* at 1362.
16. One commentator notes:

> It is sometimes asserted that renegotiation clauses reduce, rather than increase, contract stability. In discussions on that subject a typical remark is: "Why should we include a renegotiation clause in our contract? Is it not more stable not to have one?" This is certainly right from a purely legal point of view.

Wolfgang Peter, *Arbitration and Renegotiation Clauses*, 3 J. INT'L ARB. 29, 31 (1986).

17. *See generally A Report on the ICC Rules of Contractual Relations*, 5 ICC BULL. 31 (1994) (noting that businesses disliked clauses providing for third-party adaptation of contracts because they saw such clauses as intruding into the contractual relationship).

18. Jeswald W. Salacuse, *Direct Foreign Investment and the Law in Developing Countries*, 15 FOREIGN INVEST. L.J. 382, 387 (2000).

permissible to deviate from these considerations, which apply in particular in the international context."[19]

History verifies the significance of creating uncertainty.[20] In 1978, the International Chamber of Commerce (ICC) promulgated rules for the adaptation of contracts.[21] In 1994, however, the ICC withdrew these rules because they had never been used.[22] An ICC Report noted that practitioners viewed adaptation clauses with skepticism, preferring instead the principle of *pacta sunt servanda*.[23]

U.S. businesses in particular may be reluctant to include compelled renegotiation and adaptation clauses both because of the legal system's reliance on the principle of *pacta sunt servanda* and because such clauses are not regularly used in common-law countries, as they are in civil-law countries, like Germany and the Netherlands.[24] One commentator noted that the "reason for the difference between the common-law approach and the modern civil-law approach is that the leading common-law countries have not suffered from the unmanageable inflation that has ravaged much of the civil-law world."[25] However, he adds that "U.S. law should realize that international trade is different from domestic trade, and the modern civil-law solution . . . deserves respect."[26]

The second potential drawback is that renegotiation clauses may come at a cost.[27] When confronted with uncertainty of economic return, an investor may abstain from entering into the investment agreement or "structure the investment in such a way as to increase returns to offset the risk created by the environment."[28] Accordingly,

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19. Interim Award in Case No. 1694 of 1996, *reprinted in* 23 Y.B. COM. ARB. 97, 110 (1998); *see also* First Award on Force Majeure and Final Award in Case No. 4462 of 1985 and 1987, *reprinted in* 16 Y.B. COM. ARB. 54, 59 (1991).

20. *See* INTERNATIONAL CHAMBER OF COMMERCE, ADAPTATION OF CONTRACTS (ICC Publication No. 326, 1978).

21. *Id.*

22. *Id.*

23. *See id.*; *see also* W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 710-11 (3d ed. 1998) (discussing the ICC adaptation procedure). *Cf.* OPPENHEIM'S INTERNATIONAL LAW 1306-07 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) (noting that, with regard to treaties, the doctrine of *rebus sic stantibus* "is necessarily limited, because it is the function of the law to enforce contracts or treaties even if they become burdensome for the party bound by them" and thus "almost all cases in which the doctrine of *rebus sic stantibus* has been invoked before an international tribunal, the latter, while not rejecting it in principle, has refused to admit that it could be applied in the case before it").

24. *See* Joseph M. Perillo, *Force Majeure and Hardship Under the UNIDROIT Principles of International Commercial Contracts*, 5 TUL. J. INT'L & COMP. L. 5, 26-27 (1997) (noting that the duty to accept equitable adjustment "approximates the law in countries such as Argentina, Germany, and Italy").

25. *Id.* at 27.

26. *Id.*

27. Salacuse, *supra* note 18, at 387.

28. *Id.*

if a host state mandates such a clause in any foreign investment contract, the state may lose the foreign investment or have to pay more for the investment of capital. In the latter case, in light of the increased uncertainty, the investor would seek a higher return on the investment than that investor would otherwise require, thus raising the overall transaction costs.

The third downside is that, even if a renegotiation clause is included in an investment contract, in the event the parties are unable successfully to renegotiate the terms of their contract, it is unclear whether a "dispute" would exist between the parties.[29] Without a "dispute," the arbitral tribunal may not exercise jurisdiction and, even if it does, the tribunal may be unable to decree an enforceable award.[30]

Some tribunals have concluded that when parties are unable to reach an agreement in renegotiation, there is no breach of contract because "[a]n obligation to negotiate is not an obligation to agree."[31] As a result, there may exist no real "dispute" between the parties.[32] Some commentators also believe that there is no dispute when the parties request an arbitral tribunal to adapt a contract; others disagree.[33] This may be a critical issue because the existence of a "dispute" is a prerequisite for arbitration under the ICSID Convention and the UNCITRAL Model Law, upon which many national arbitration laws are based.[34] If the applicable national law

29. *See* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION 22-29 (Emmanuel Gaillard & John Savage eds., 1999).

30. *Id.*

31. Award in the Matter of an Arbitration Between Kuwait and the American Independent Oil Company (Aminoil), Mar. 24, 1982, *reprinted in* 21 I.L.M. 976, 1004 (1982).

32. *See* Gaillard, *supra* note 29, at 25.

33. *See id.* at 26-29 (citing authorities for both propositions); *see also* Georges R. Delaume, *ICSID Arbitration: Practical Considerations*, 1 J. INT'L ARB. 101, 117 (1984) (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 [ICSID] Convention"); Christoph Schreuer, *Commentary on the ICSID Convention*, 11 FOREIGN INVESTMENT L.J. 318, 339-40 (1996) (stating that "[t]he dispute will only qualify as legal [under the ICSID Convention] if legal remedies such as restitution or damages are sought and if legal rights based on, for example, treaties or legislation are claimed").

34. *See* Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 25(1) ("The jurisdiction of the Centre shall extend to any legal dispute arising out of an investment, between a Contracting State . . . and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre"); United Nations Commission on International Trade Law Model Law on International Commercial Arbitration, June 21, 1985, art. 7(1) *reprinted in* HOWARD M. HOLTZMANN & JOSEPH E. NEUHAUS, THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 258 (1989) (stating that "'Arbitration Agreement' is an agreement by the parties to submit to

does not consider the request for a tribunal to adapt the terms of a contract to be a "dispute," then the tribunal may not have the authority to adapt the contract.[35] Further, if the tribunal exercises jurisdiction improperly, any decision adapting the contract may be unenforceable under the New York Convention.[36] As one commentator noted, "decisions which are not considered as the result of arbitration proper in the country of origin [are] not . . . within the purview of the New York Convention and cannot be enforced as a foreign arbitral award under it."[37] The lack of a definitive answer to this question alone may cause parties not to include such a clause.

The fourth problem is of a practical nature for the arbitral tribunal: the adaptation clause may provide the tribunal with little or no guidance upon which to modify the terms of the contract. In such case, a tribunal may be reluctant to adapt the contract.[38] Even if the tribunal adapts the contract, without any criteria to apply, the result could be one to which neither party would have agreed at the outset.[39] Thus, such a clause may result in a fundamentally different arrangement than originally envisioned by the parties.

The fifth concern arises from Professor Berger's position of allowing the renegotiation and adaptation clause to be triggered by events that are within the control of the host government.[40] He views these clauses as operating in place of stabilization clauses by allowing the host state to change its laws in ways that can affect the economic equilibrium of the contract.[41] Doing so would, in turn, give the investor the right to seek renegotiation or adaptation of the agreement. Applying a renegotiation and adaptation clause in this circumstance might increase the likelihood of a host state taking some action that would cause the investor to invoke the renegotiation provision. If the contract contained such a clause and the project

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arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not").

35. *See supra* note 33.

36. See Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 21 U.S.T. 2518, 330 U.N.T.S. 38 (codified at 9 U.S.C. §§ 201-08 (1988)). It should be noted that the 1986 Netherlands Arbitration Act provides that parties may agree to submit to arbitration "the filling of gaps in, or modification of, the legal relationship between the parties." Netherlands Code of Civil Procedure art. 1020(4).

37. ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 46 (1981); *see also* Whitney Debevoise, *The Arbitrability of Gaps in Long-Term Scientific, Technical and Industrial Development Contracts*, 17 HARV. INT'L L.J. 122, 128 (1976).

38. *Cf.* Final Award of 4 May 1999 (Ad hoc), *reprinted in* 25 Y.B. COM. ARB. 13, 61; Award in Case No. 1512 (ICC 1971), *reprinted in* COLLECTION OF ICC ARBITRAL AWARDS, 1974-1985 3, 4 (Sigvard Jarvin & Yves Derains eds. 1990).

39. Final Award of May 4, 1999, *supra* 38, at 58-61.

40. Berger, *supra* note 1, at 1351.

41. *Id.* at 1352.

turned out to be profitable, there would seem to be little downside for a state to take some action that might change the economic structure of the arrangement.[42] Of course, by doing so, the state would entitle the investor to seek renegotiation of the contract. However, the best the investor could then hope for would be a restructuring of the deal that would put it in the same position, economically, as if the host state had not taken such action. On the other hand, the downside for the host state would be minimal, because the tribunal would be unlikely to restructure the transaction to make it worse for the state in light of the profitability of the project. Moreover, the upside could be very lucrative if the deal were restructured to provide the host government with more economic benefits than originally envisioned.

The following hypothetical illustrates this point. Assume that a foreign investor (the Contractor) enters into an investment contract with the host state (the Government) and the agreement contains a renegotiation clause similar to Article 34 of the Qatar Model Exploration and Production Sharing Agreement. It provides:

> Whereas the financial position of the Contractor has been based, under the Agreement, on the laws and regulations in force at the Effective Date, it is agreed that, if any future law, decree or regulation affects Contractor's financial position, and in particular if the customs duties [increase] during the term of the Agreement, both Parties shall enter into negotiations, in good faith, in order to reach an equitable solution that maintains the economic equilibrium of this Agreement. Failing to reach agreement on such equitable solution, the matter may be referred by either Party to arbitration.[43]

Assume that after the agreement has been executed but before performance has been completed, the Government enacts a law increasing the customs duties and, as a result, the Contractor incurs an additional one million dollars in customs duties. At this point, the investor could pay the additional duties or seek renegotiation. If it seeks renegotiation, the best result for the Contractor would be that it would not have to pay the one million dollars; that is, it would be restored to its original position. By contrast, if the tribunal adjusted the terms of the agreement, the Contractor could be required to pay some or all of the additional duties. Thus, the Government has nothing to lose by imposing the duties. At worst, it would not be able to collect any of them, and the possibility remains that the tribunal would permit it to collect some of them.

A renegotiation and adaptation clause is not the only legitimate method of protecting a foreign investor from adverse changes in a

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42. *See* Peter, *supra* note 16, at 32 (stating that a "host country is more likely to invoke [a renegotiation] clause first").

43. Piero Bernardini, *The Renegotiation of Investment Contracts*, 13 FOREIGN INVEST. L.J. 411, 416 (1998).

host state's laws.[44] Stabilization clauses have undergone substantial evolution since the debates over their validity in the 1970s.[45] Scholars argue that the modern stabilization clauses are more akin to valid risk allocation provisions.[46] Another method used to ensure stability of the agreement is the enactment of a special law granting supremacy to the provisions of the contract, notwithstanding any subsequent legislation that is contrary to the provisions of the agreement.[47] One commentator states that

> such 'freezing of the applicable system' governing the contractual relation, effected by virtue of a promulgated special law, is currently considered by international lawyers as the most effective legal method for securing the 'stabilization' of the regime created by the provisions of [an agreement for the exploration and development of national petroleum resources].[48]

The tribunal's decision in *Award of 22 April 1978* illustrates this practice.[49] There, an agreement between Petrola Hellas, a Greek company established by foreign investors, and the Greek government provided that any new legislation concerning taxation or customs duties would not apply to the agreement between the parties.[50] This agreement was confirmed by legislative decree and thus became law.[51] Thereafter, the government imposed a one-time tax and, when the government sought to collect the tax, Petrola sought arbitration.[52] The tribunal ruled that the one-time tax could not be applied to Petrola because it was exempted by the parties' agreement, which had the effect of law.[53]

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44. In practice, a renegotiation/adaptation clause may accomplish the same thing as a stabilization clause if one of its functions is to restore the equilibrium that existed between the parties at the outset of the contract following a change in the host state's laws.

45. *See* Thomas W. Waelde & George Ndi, *Stabilizing International Investment Commitments: International Law Versus Contract Interpretation*, 31 TEX. INT'L L.J. 215, 215-20 (1996).

46. *Id.* at 265.

47. *See, e.g.*, Law No. 218 Authorizing the Concession Agreement for Petroleum Exploration and Exploitation between the Arab Republic of Egypt, EGPC and SA., AM OIL & GAS, OFFICIAL GAZETTE, July 27, 1995, at 30, *reprinted in pertinent part in* Ahmed S. El-Kosheri, *The Particularity of the Conflict Avoidance Methods Pertaining to Petroleum Agreements*, 11 FOREIGN INV. L.J. 272, 274-75 nn. 1-2 (1996).

48. El-Kosheri, *supra* note 47, at 277.

49. Award of 10 April 1978, *reprinted in* 11 Y.B. COM. ARB. 105 (1986).

50. *Id.* at 105-06.

51. *Id.* at 105.

52. *Id.*

53. *Id.* at 106-07.

> [Another] technique [ ] by which foreign parties have striven to protect their investment, particularly in the field of natural resources exploration and production, consisted in removing their contractual relationship from the reach of the host state's municipal law, the latter being of potential application under one of the most common rules of conflict, the one connecting the contract with

In short, there may be significant drawbacks to the use of renegotiation and adaptation clauses in international investment contracts and alternative methods may achieve the same results with fewer potential problems.

IV. BENEFITING FROM THE USE OF RENEGOTIATION AND ADAPTATION CLAUSES

Despite the potential drawbacks, investors may find useful, in certain circumstances, a renegotiation clause combined with a provision calling for a third party to adapt the contract in the event the parties are unable to reach an agreement through renegotiation. Today, businesses are generally open to renegotiating certain terms of a contract in limited circumstances.[54] They reason that a clause allowing for renegotiation in light of changed circumstances may provide parties with the flexibility to modify their agreements rather than to terminate their relationship.[55] Thus, renegotiation clauses may ultimately reduce the likelihood of a dispute between the parties that culminates in the termination of their ability to work together on the current project and on future endeavors.[56] In this way, the renegotiation clause may be seen as a means of stabilizing the relationship between the parties.[57]

Perhaps renegotiation clauses would be more acceptable to investors if their scope were limited to unforeseeable matters not within the control of one of the parties. Indeed, *force majeure* clauses

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> the law of the place of its performance. This result was achieved in a first phase of the parties' relations by making the agreement subject to the general principles of law or to principles of law common to the countries of which the parties are nationals or to principles of law common to civilized nations.

Bernardini, *supra* note 43, at 412.

54. *See* Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 16-17 (noting that, in responding to a survey question asking if their companies included a renegotiation clause in long-term contracts to protect against substantial changes in market prices, 41.9% of the general counsels of U.S. businesses said yes); *see also* Jeswald W. Salacuse, *Renegotiating International Project Agreements*, 24 FORDHAM INT'L L.J. 1319, 1319 (2001) ("The renegotiation of business deals is a constant and common phenomenon"); Final Award in Case Nos. 6515 and 6516 of 1994, *reprinted in* 24a Y.B. COM. ARB. 80, 96 (1999) (stating that parties' agreement provided for renegotiation of the original contracts in the event the contractual balance which they had defined at the inception of their relationship was substantially modified by unforeseen circumstances).

55. *See* Salacuse, *supra* note 3, at 1513-14.

56. *Id.*

57. *Id.* at 1514.

are common in long-term contracts.[58] The UNIDROIT Principles of International Commercial Contracts also provide a framework in which renegotiation can occur and, if that fails, for possible third-party adaptation of the contract, in the event of a "hardship." The UNIDROIT Principles define a "hardship" as:

> [T]he occurrence of events [that] 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 assumed by the disadvantaged party.[59]

In the event a "hardship" occurs, the disadvantaged party is entitled to request a renegotiation of the terms of the contract with the aim of modifying them in light of the changed circumstances.[60] If the parties are unable to renegotiate the terms of the agreement within a reasonable time, the UNIDROIT Principles call for a third party either to terminate the contract or to adapt the contract with a view to restoring its equilibrium.[61] The hardship provisions of the UNIDROIT Principles permit both investors and host governments to modify their agreements in the event of unforeseen circumstances not

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58. *See* Gerhard Wagner, *In Defense of the Impossibility Defense*, 27 LOY. U. CHI. L.J. 55, 62 (1995) ("[A]n examination of case law indicates that contingency clauses, such as the *force majeure* clause, are frequently used. Contingency clauses that provide explicit allocations of risks are especially prevalent in long-term business contracts"); *see also* Dionysios P. Flambouras, *The Doctrines of Impossibility of Performance and Clausula Rebus Sic Stantibus in the 1980 Convention on Contracts for the International Sale of Goods and the Principles of European Contract Law: A Comparative Analysis*, 13 PACE INT'L L. REV. 261, 278-79 (1991), *quoting* Karl-Heinz Böckstiegel, *Hardship, Force Majeure and Special Risks Clauses in International Contracts*, 3 ADAPTATION AND RENEGOTIATION OF CONTRACTS IN INTERNATIONAL TRADE AND FINANCE 159, 159 (Norbert Horn ed., 1985):

> Experienced businessmen . . . normally insert in their contract documents *force majeure*, hardship clauses, or special risks clauses, thus "attempting to anticipate and deal with the situation where unforeseen circumstances fundamentally change the contractual equilibrium such that an excessive, normally economic, burden is thrust upon one of the parties.

59. International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts, art. 6.2(2) (1994), 34 I.L.M. 1067 (1995) [hereinafter UNIDROIT Principles].

60. Art. 6.2(3).

61. Art. 6.2(3).

within the parties' control.[62] Thus, investors may view these provisions as facilitating the contractual relationship, not as interjecting unpredictability into the contract. Accordingly, this provision may not raise the cost of the agreement. This method does not eliminate the potential issue of a tribunal's adaptation of the contract not being seen as a "dispute." However, a number of arbitral tribunals have determined that they would have the power under hardship provisions to equitably modify an agreement.[63]

If parties decide to include a clause allowing an arbitral tribunal to modify the terms of the contract in the event the parties are unable to reach an agreement through renegotiation, it would be helpful to the tribunal if the parties provided some sort of criteria to guide the extent of the adaptation. Indeed, as noted above, without any guidance, a tribunal may be reluctant to adapt the contract.[64]

Some have suggested that arbitrators use the criteria of fairness or equity in adapting contracts.[65] One U.S. federal district court sets forth four criteria to consider in deciding whether a contract should be adapted in light of impracticability and frustration of purpose: "(1) the parties' prevision of the problems which eventually upset the balance of the agreements and their allocation of the associated risks; (2) the parties' attempts at risk limitation; (3) the existence of severe out-of-pocket losses; and (4) the customs and expectations of the particular business community."[66] Professor Berger posits that the tribunal should attempt to restore the economic equilibrium that existed at the outset of the contract.[67]

In this regard, one Comment to the UNIDROIT Principles may be particularly helpful to tribunals:

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62. Art. 6.2(3), cmt. 7.

63. *See* ICC Award No. 9479 (Feb. 1999), *reprinted in* THE UNIDROIT PRINCIPLES IN PRACTICE: CASELAW AND BIBLIOGRAPHY ON THE PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 589 (Michael Joachim Bonell ed., 2002); *see also* FOUCHARD, GAILLARD, GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION, *supra* note 29, at 28 (citing awards).

64. *See supra* note 38 and accompanying text. On the question of whether an arbitrator has the power to impose an agreement which the parties were unable to reach, Dr. F.A. Mann noted:

> It is not to be doubted that normally a judge or arbitrator cannot make or modify a contract for the parties. The question in such cases is whether on its true construction the clause, combined with the arbitration clause, exceptionally confers such powers. This can only be so where an objective standard such as reasonableness is set and it is a specific and narrow point such as a price which on the basis of evidence can judicially be decreed.

Frederick A. Mann, *The Aminoil Arbitration*, 54 BRIT. Y.B. INT'L L. 213, 218 n.7 (1983).

65. *See* Peter, *supra* note 16, at 45 (citing authorities).

66. Aluminum Co. of Am. v. Essex Group, Inc., 499 F. Supp. 53, 92 (W.D. Pa. 1980).

67. Berger, *supra* note 1, at 1358.

> In [adapting the contract,] the court will seek to make a fair distribution of the losses between the parties. This may or may not, depending on the nature of the hardship, involve price adaptation. However, if it does, the adaptation will not necessarily reflect in full the loss entailed by the change in circumstances, since the court will, for instance, have to consider the extent to which one of the parties has taken a risk and the extent to which the party entitled to receive performance may still benefit from that performance.[68]

In addition, in some circumstances it may be more efficient for the tribunal to terminate the agreement in light of the changed circumstances.[69]

V. CONCLUSION

The complexity and long duration of international investment contracts make these agreements particularly susceptible to political, economic, and social changes that may significantly affect the economic success of the endeavor. Professor Berger is correct in noting that these factors may encourage parties to include a renegotiation and adaptation clause.[70] However, the parties should recognize that such a clause may have drawbacks. If the parties wish to include a renegotiation and adaptation clause, they should pay particular attention to three considerations: (1) the scope of events that trigger renegotiation, specifically whether the events must be unforeseen and beyond the parties' control; (2) whether the applicable law or laws recognize the ability of an arbitrator to adapt the terms of a contract in the event that the parties are unable to reach an

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68. UNIDROIT Principles, *supra* note 59, art. 6.2(3), cmt. 7; *cf.* Richard A. Posner & Andrew M. Rosenfeld, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEG. STUD. 83, 88-97 (1977).

69. The UNIDROIT Principles provides the following illustration:

> A, an exporter, undertakes to supply B, an importer in state X, with beer for three years. Two years after the conclusion of the contract new legislation is introduced in state X prohibiting the sale and consumption of alcoholic drinks. B immediately invokes hardship and requests A to renegotiate the contract. A recognises that hardship has occurred, but refuses to accept modifications of the contract proposed by B. After one month of fruitless discussions B resorts to the court.
>
> If B has the possibility to sell beer in a neighboring state, although at a substantially lower price, the court may decide to uphold the contract but to reduce the agreed price.
>
> If on the contrary B has no such possibility, it may be reasonable for the court to terminate the contract, at the same time however requiring B to pay A for the last consignment still en route.

UNIDROIT Principles, *supra* note 59, art. 6.2(3), illus. 5.

70. Berger, *supra* note 1, at 1357-58.

agreement through renegotiation; and (3) the criteria that the arbitral tribunal should use in adapting the contract.[71]

During its life, an international investment contract can raise complex issues. These complexities can force the termination of an arrangement that could potentially continue to benefit the parties. Professor Berger is to be complimented for encouraging us once again to consider a way of preventing such a premature demise.

71. *See* Salacuse, *supra* note 3, at 1533 (setting forth principles to follow in renegotiating international business transactions).

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