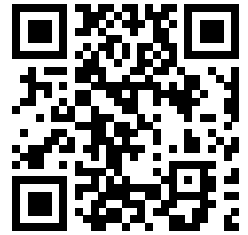


Title:

Goldman, Berthold, The Applicable Law: General Principles of Law - the Lex Mercatoria, in: Lew (ed.), Contemporary Problems in International Arbitration, London 1986, at 113 et seq.



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The main issue here is the choice to be made between the strict application of *pacta sunt servanda* and the possible application of the *clausula rebus sic stantibus*.

No doubt international arbitrators stick, in principle, to *pacta*, and one could contend that this has nothing to do with *lex mercatoria*, since this principle is embodied in practically all municipal legislations (however, not without differences as to its strength, and consequently as to its effects). It is to be noted, nevertheless, that very frequently, when they apply *pacta sunt servanda* arbitrators do not refer to a particular municipal legislation; they see the principle as a general one, which means that it is applied as an element of the *lex mercatoria*, and therefore, that its actual consequences are not to be taken from any municipal law whatsoever.

This trend explains that certain awards have admitted, albeit in exceptional cases, the application of *rebus sic stantibus*. Thus, an international award, while referring to Swiss law, which admits under severe conditions the revision of contracts, decided that these conditions were to be applied in a more flexible manner in respect of international contracts.²⁵ Another previous award did not exclude the principle of *rebus sic stantibus*, however, stating that its application should be limited to cases where constraining reasons justify it, taking into account not only the fundamental character of the changes in circumstances which are invoked, but equally the particular type of contract involved, the requirements of fairness and all the circumstances of the case.

My last example will be the obligation for a creditor to *minimise the damage* he suffers because of the non-fulfilment by the debtor of his own commitments. This obligation, generally admitted, as far as I know, in Common Law, is not so largely and clearly consecrated in Civil Law.

Now, a number of international awards have applied it as a general principle of international trade, not referring in particular to a Common Law system.²⁶ Moreover, the principle may be combined with the obligation to renegotiate the contract in good faith.²⁷

²⁵ [ICC Award, Case No 1512 /71](#) , 101 *Clunet* 902 (1974); 2748/74, 102 *Clunet* 905 (1974).

²⁶ ICC Award, Case Nos 2103/72, 101 *Clunet* 902 (1974); 2748/74, 102 *Clunet* 905 (1975); [2291/75, 103 Clunet 989 \(1976\)](#) ; [2520/75, 103 Clunet 992 \(1976\)](#) .

²⁷ ICC Award, Case No 2748/74, 102 *Clunet* 905 (1975).

Referring Principles:

IV.1.2 - Sanctity of contracts

VII.4 - Duty to mitigate

VIII.1 - Hardship: Requirements