The Power of Arbitrators To Adapt Contracts – A United States Perspective

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I. Introduction

Global financial crises can have a major impact on long-term contracts. Take, for example, a long-term supply contract under which a purchaser agrees to buy a commodity from a supplier at either a fixed-price or a price based on a formula or an index. The price established by the contract is typically based on what may have been fairly stable background economic conditions, and, in particular, the prevailing supply and demand for the commodity in question. As a result, the deal makes economic sense to the parties at the time they enter into it. When a major financial crisis occurs, however, it can dramatically alter the economic equilibrium on which the deal was based, with the result that the agreement no longer makes economic sense. In particular, the purchaser might find itself obligated to pay a much higher price for the commodity under the contract than it would pay were it to buy it on the spot market.

Consider, for example, an agreement between a purchaser and a supplier for the supply of iron ore over a term of 15 years at a fixed price entered into five years before a financial crisis hits. While there may have been some fluctuation in the spot market price of iron ore in the years prior to the agreement, that variation took place within fairly fixed parameters. There was a relatively stable floor and ceiling for the price of iron ore. Thus, when the parties entered into the fixed price long-term contract, they had some basis to be able to anticipate the price of iron ore in the spot market going forward. And by entering into a long-term contract at a particular fixed price, each party was gaining certainty – certainty, in the case of the supplier that it could sell and in the case of the purchaser that it could buy a particular quantity of iron ore at a particular price for a particular number of years into the future.

A global economic crisis hits. Consumers and businesses immediately cut back. There is suddenly a reduced demand for finished goods made with iron ore. There follows a large drop in the demand for iron ore, and, thus, a dramatic decrease in the price of iron ore on the spot market. It falls far lower than the established floor below which the spot price had not fallen for many years. The problem for the purchaser is that, notwithstanding this drop in price, it is obligated to purchase iron ore at the much higher price specified in the contract for the next ten years.

Many parties try to guard against this type of scenario in advance, by putting "price adjustment clauses" in their contracts, requiring the parties to negotiate a new price in the event of a fundamental change in economic conditions and giving arbitrators the authority to set a new price in the event that they cannot do so. Alternatively, they might base the price in their contract on an index, so the contract price would, hopefully, adjust to a fundamental change in conditions.

If, however, the parties enter into a contract at a fixed price without any contractual mechanism to adjust that price, they are left to appeal to each other or to a court or arbitrator in the event of a global financial crisis that fundamentally alters the economics of their deal.

The article concerns the power of arbitrators under United States law to alter contracts as a result of a fundamental change in circumstances of the type that may arise in a global economic crisis. Because contract law in the United States is a matter of state law, this article will consider some decisions of United States courts applying state contract law to the question of whether the terms of a contract can be adapted to reflect fundamentally changed conditions. It will begin by considering the enforceability of price adjustment clauses and then examine the power of arbitrators to alter contracts in the absence of a clause in the contract giving them the authority to do so.

II. Price Adjustment Clauses

It is clear that parties can include a price adjustment clause in their contracts ultimately giving arbitrators the authority to fix a new price, and that New York courts will uphold a decision by arbitrators to do so. The case of *Gas Natural Aprovisionamientos, SDG v. Atlantic LNG Co. of Trinidad and Tobago*[1]) is instructive.

That case involved a long term supply contract for the supply of liquefied natural gas ("LNG"). In 1995, Atlantic LNG Company of Trinidad and Tobago ("Atlantic") entered into a twenty-year contract with Gas Natural Aprovisionamientos, SDG, S.A. ("GNA"), requiring Atlantic to supply LNG to GNA. The parties expected that the LNG would be consumed in Spain and therefore tied the pricing formula in the contract to the European energy market. However, the parties also incorporated a price adjustment clause in their contract that required the parties to negotiate with each other to seek a "fair and equitable price" for the LNG in the event of substantial change to certain "economic circumstances":

> *If at any time either Party considers that economic circumstances in Spain beyond the control of the Parties, while exercising due diligence, have substan-*

[1]) No. 08 Civ. 1109 (DLC), 2008 WL 4344525 (S.D.N.Y. Sept. 16, 2008).

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

The contract went on to provide that if the parties were unable to agree upon a new pricing formula within six months, either party had the right to "submit the matter to arbitration for decision in accordance with the criteria set out" in the contract. The arbitration clause in the contract provided for arbitration in New York City in accordance with the UNCITRAL Rules.

After the parties entered the contract, Spain liberalized its natural gas market. Because of the decrease in Spanish gas prices, GNA ended deliveries to Spain and entered into an agreement to resell LNG deliveries to New England, which had a more favorable market. Atlantic sought a revision to the pricing formula, and, after the parties could not come to an agreement, commenced an arbitration asking the arbitrators to fix a fair and equitable price.

The arbitration tribunal determined that the preconditions for price adjustment had been met, noting that "since New England should be the basis for determining the value of natural gas when the Train 1 LNG is being sold in New England on a sustained basis, the Contract Price needs to include a New England Market Adjustment factor".[2]) The tribunal instituted a two-part pricing scheme: it preserved the Spanish pricing formula in the contract but revised the base price component; and it added a "New England Market Adjustment" for quarters in which more than a certain percentage of Train 1 LNG was resold for delivery to the New England Receiving Facilities. The Tribunal made the new pricing scheme effective from April 21, 2005. As a result of this adjustment, Atlantic owed GNA over US$70 million for the period between April 21, 2005 through December 31, 2007.[3])

Atlantic moved to vacate the award, arguing that the tribunal exceeded its authority, violated Atlantic's due process rights under the Federal Arbitration Act and the New York Convention, and that the award was against public policy. The District Court for the Southern District of New York denied Atlantic's motion to vacate. Applying the deferential standard of review that United States apply to vacatur applications, the court found that the Tribunal had the power under the contract to decide whether the requirements for a price adjustment had been met.

2) *Id.* at *2.

3) *Id.*

Furthermore, the court noted that the tribunal did not ignore or refuse to apply the preconditions as set forth in the contract, and therefore did not violate public policy or disregard the law; rather, the tribunal's decision was "plainly grounded in its reading of the parties' contract".[4]

With respect to Atlantic's contention that the new "dual price structure" pricing scheme skewed the original bargain between the parties and rewrote the contract, the court noted that the contract required the tribunal only to reach "a fair and equitable revision" of the contract price and that no provision in the contract "set a structural limitation on permissible price revisions".[5] As such, the tribunal had broad authority and was not limited to the imposition of a single pricing formula. Furthermore, the court noted that Atlantic had not shown that the parties reached any agreement that limited the Tribunal's authority to impose a dual price structure.[6]

III. Changed Circumstances in the Absence of a Price Adjustment Clause

Sometimes parties do not include price adjustment clauses even in long term contracts, and the question arises as to whether arbitrators have the authority under United States law to adjust the price in a contract to reflect a fundamental change in economic circumstances in their absence. When it comes to United States law, the answer to that question is virtually never. Unlike other countries, United States has not generally adopted the doctrine of *rebus sic stantibus* that has developed in other countries and that is designed to excuse contractual performance when changed circumstances impose hardship on a party.[7] Rather, the overriding principle in United States contract law is *pacta sunt servanda* – promises must be kept.

Parties have relied on various doctrines to try to avoid contracts that made economic sense at the time of entry, but ceased to make economic sense in light of subsequent changed conditions, but rarely have they been successful under United States law. These doctrines include impossibility, frustration of purpose, commercial impracticality or mutual mistake.

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4) *Id.* at *5.

5) *Id.*

6) *Id.* at *6.

7) Swiss Civil Code: Article 2.2; Germany: BGB § 313; Netherlands: Dutch Civil Code (BW) Art 6:258; Italy: Civil Code, Art 1467 to 1469; Greece: Greek Civil Code, Art 388; Portugal: Portuguese Civil Code, Art 437; Austria: Austrian ABGB §§ 936, 1052, 1170a.

A. Impossibility

The seminal common law case on impossibility is that of *Taylor v Caldwell.*[8]) In that case, plaintiffs Taylor and Lewis rented a particular music hall from defendants Caldwell & Bishop at which they intended to hold certain concerts on certain days in the summer of 1861. A week before the first concert was to take place, however, the music hall burned down. Because of this defendants could not perform their end of the deal, and plaintiffs sued for breach of contract. There was no force majeure clause in the contract that covered the burning down of the music hall.

Judge Blackburn held that the continued existence of the music hall was an implied condition essential for the fulfillment of the contract, and since it had been destroyed through no fault of either party, both parties were excused from performance. Judge Blackburn stated:

> *The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance. In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance. We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things.*

B. Frustration of Purpose

The doctrine of frustration of purpose is distinct from that of impossibility. The seminal case here is *Krell v Henry*[9]) in which plaintiff rented a flat on Pall Mall to defendant for the purpose of watching the coronation of Edward VII, scheduled for June 26 and 27, 1902. The coronation did not take place on those dates as a result of the King's illness. Defendant, who had paid a deposit to secure the flat, refused to pay the remaining rent due. Plaintiff then sued for the rent, and defendant counterclaimed for the return of the deposit.

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[8]) (1863) 3 B & S 826; 122 Eng. Rep 309 (Q.B.); [1863] EWHC Q.B. J1.

[9]) [1903] 2 K.B. 740

The Court relieved the parties of their obligations under the contract. The Court stated the doctrine of "impossibility" did not apply because the essential obligation under the contract – that the defendant take possession of the flat on two particular days – could technically be fulfilled despite the illness of the King. Rather, the Court held that the purpose for which the contract was originally made – the viewing of the coronation of King Edward VII – was frustrated, and so the parties should be relieved of their performance.

C. Commercial Impracticability

The doctrine of commercial impracticability has its roots in the doctrines of frustration of purpose and impossibility. The doctrine of commercial impracticability has been understood as "excus(ing) delay or nondelivery when the agreed upon performance has been rendered 'commercially impracticable' by an unforeseen supervening event not within the contemplation of the parties at the time the contract was entered into".[10]) It does not require a showing that performance is literally "impossible".

Section 261 of the Restatement (Second) of Contract describes the doctrine in this way: ."Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or circumstances indicate the contrary."

Courts have held that three conditions must be met in order to find commercial impracticability: 1) a contingency must occur, (2) performance must thereby be made "impracticable" and (3) the non-occurrence of the contingency must have been a basic assumption on which the contract was made.[11]) The rationale behind the doctrine of commercial impracticability is that when an event occurs which renders performance so "vitally different" from that which was anticipated, the contract cannot be reasonably considered to govern and performance under that contract is excused.[12])

Parties have relied upon the doctrine of commercial impracticability in various cases that arose out of the various closings of the Suez Canal and the consequent increases in shipping costs around the Cape of Good Hope. But, the courts set a very high standard for a party to be relieved of its obligations on the ground of commercial impracticability. In one British case arising out of closing of the Suez Canal, the court noted that the unforeseen cost increase that would excuse performance "must be more than merely onerous or expensive. It must be positively unjust to hold the parties bound."[13])

[10]) *Eastern Airlines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 988 (5th Cir. 1976).
[11]) *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974).
[12]) *Eastern Air Lines, Inc.*, 532 F.2d at 991.
[13]) *Ocean Tramp Tankers v. V/O Sovfracht (The Eugenia)*, [1964] 2 Q.B. 226, 239.

D. Mutual Mistake

A leading case concerning mutual mistake is *Sherwood v. Walker.*[14]) Walker sold both fertile cows and barren cows, with the cost of the former being approximately ten times that of the latter. Sherwood decided to buy an apparently barren cow, Rose 2nd of Aberlone, at a price in line with that for barren cows. But before Walker received the money and delivered the Rose, Walker discovered that Rose was pregnant and refused to perform the contract. Sherwood sought to enforce performance of the contract through an action in replevin. The court held that if both parties thought the cow was barren (a question for the jury), the contract was voidable on grounds of mutual mistake, *i.e.* that both parties were mistaken about the fact that Rose was barren.

Section 152 of the Restatement (Second) of Contracts describes the doctrine of mutual mistake in the following way:

> *Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in 154.*

Section 154 of the Restatement (Second) provides that a party "bears the risk of mistake when":

> *(a) the risk is allocated to him by agreement of the parties, or*
>
> *(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or*
>
> *(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.*

IV. A Discussion of Some Cases

Parties have relied on the above doctrines in US courts to try to avoid contractual performance, or seek damages arising from the increased costs of performance, as a result of changed circumstances. They have rarely been successful.

A leading case is *Maple Farms, Inc. v. City School Dist. of City of Elmira.*[15]) That case arose out of an agreement by a farm to supply milk to a school district for the period 1973–1974 at a fixed price. In the year prior to the contract, there was a relatively fixed floor and ceiling for the price of milk, with the price fluctuation within a calendar year ranging from 1% to 4.5% over the years from 1969–1972. The parties entered the contract in June 1973, after which the price of milk rose steadily, and in December 1973 the price was 23% higher than its price

[14]) 66 Mich. 568, 33 N.W. 919 (Mich. 1887).

[15]) 76 Misc.2d 1080, 352 N.Y.S.2d 784 (NY Sup. 1974).

in June. The plaintiff sought to be relieved of its obligations under the contract, relying on the doctrine of impossibility. It argued that the cause of the substantial increase in the price of raw milk could not have been foreseen by the parties because it came about in large measure from the agreement of the United States to sell huge amounts of grain to Russia and to a lesser extent to unanticipated crop failures.

The Court rejected plaintiffs' argument. It started with a general principle that market changes do not render a contract impossible to perform. It cited *407 East 61st Garage, Inc. v. Savoy Fifth Ave. Corp.,*[16]) where the New York Court of Appeals held "Generally, however, the excuse of impossibility of performance is limited to the destruction of the means of performance by an act of God, Vis major, or by law […] Thus, **where impossibility or difficulty of performance is occasioned only by financial difficulty or economic hardship, even to the extent of insolvency or bankruptcy, performance of a contract is not excused**". (emphasis added.) In *Maple Farms,* the court also quoted with approval an official comment to the Uniform Commercial Code to the effect that a fundamental change in market conditions is precisely the type of business risk that parties enter into fixed priced contracts to avoid and, as a result, a party cannot simply escape its contractual obligations if such a change occurs:

> *Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover. But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.*

In *Transatlantic Financing Corp. v. US,*[17]) the court considered a claim of commercial impracticability and impossibility in connection with a suit seeking additional compensation for transport of a cargo of wheat around the Cape of Good Hope, as a result of the closure of the Suez canal. Plaintiff sought the additional cost of delivery resulting from having to travel around the Cape of Good Hope. The Court held: "[…] While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone."[18])

[16]) 23 N.Y.2d 275, 244 N.E.2d 37 (1968).

[17]) 363 F.2d 312 (DC Cir. 1966).

[18]) *Id.* at 319.

The Court affirmed the dismissal of the plaintiff's action because performance under the contract had not been rendered legally impossible.

In *Helms Construction and Development Co. v. State of Nevada,*[19]a party constructing a highway in Nevada sought to recover the increased costs of construction resulting from the dramatic increase in the cost of petroleum-based products following the oil embargo imposed by the Arab bloc nations. It relied on the doctrines of commercial impracticability or impossibility of performance and mutual mistake.

The Court rejected its arguments. It noted that although the Arab oil embargo was perhaps "not within the contemplation of the parties", it had held by other courts to have been "reasonably foreseeable". Moreover, it held that "in order for an unforeseen cost increase to excuse performance, the increase must be more than merely onerous or expensive, it must be positively unjust to hold the parties bound".[20] And it noted that the parties cost overrun in the case was a mere fraction (less than 3 per cent) of the entire contract price, such that it would not be unjust to hold the performing party to pay that cost.

The Court also rejected an attempt to rely on mutual mistake, noting that "There is nothing in the record of the instant case, however, to indicate that the parties at any time entertained an express or implied agreement concerning petroleum price increases and concommitant contract modifications; nor can belief in the continuing availability of reasonably priced oil be perceived as a mutual mistake of fact in this case".[21]

Although most cases where parties seek to avoid their contractual obligations on the grounds of changed circumstances take the approach of the cases discussed above, there are a handful of cases where courts have granted relief as a result of changed circumstances, one of which is *Aluminum Co. of America v. Essex Group, Inc.*[22]

Plaintiff Aluminum Company of America ("ALCOA") entered into a contract with Essex Group, Inc. ("Essex") in 1967 in which ALCOA promised to convert specified amounts of alumina into aluminum for Essex. The contract contained an escalation formula in which the original price of alumina would be adjusted in accordance with the Wholesale Price Index-Industrial Commodities ("WPI-IC") to reflect changes in the non-labor items utilized by ALCOA in its production of aluminum. The adjusted price was subject to ceiling, but not a floor.[23]

Beginning in 1973, OPEC actions to increase oil prices and other pollution control costs increased ALCOA's electricity costs, causing a dramatic increase in ALCOA's production costs.[24] Because of the extreme deviation of the WPI-IC

19) 634 P.2d 1224 (1981).
20) *Id.* at 1225.
21) *Id.* at 1225–1226.
22) 499 F. Supp. 53 (W.D. Pa. 1980).
23) *Id.* at 58.
24) *Id.*

pricing scheme from ALCOA's actual costs, ALCOA stood to lose in excess of $75 million for the remainder of the contract.[25] The court noted that "a significant fraction of Essex's advantage [under the contract] is directly attributable to the corresponding out of pocket losses ALCOA suffers".[26]

ALCOA requested reformation or equitable adjustment of the contract so that the pricing-formula with respect to non-labor items would be changed to eliminate the WPI-IC index and substitute the actual costs incurred by ALCOA. The court found that ALCOA was entitled to some form of relief on the grounds of commercial impracticability and frustration of purpose.[27] Noting the overlap in these doctrines, the court stated that "the non-occurrence of the extreme deviation of the WPI-IC and ALCOA's non-labor productions costs was a basic assumption on which the contract was made", adding that "it is clear that ALCOA neither assumed nor bore the risk of the deviation beyond the *foreseeable* limits of risk".[28]

The court determined that the gravity of the harm that ALCOA had and would suffer was sufficient to constitute "severe disappointment" under the doctrine of impracticability.[29] The court further focused on the fact that the risk of a large discrepancy between the price under the WPI-IC and ALCOA's actual costs was unforeseeable at the time of contract and was not allocated to ALCOA in the contract.[30] Regarding the doctrine of frustration, the court noted that ALCOA's primary purpose in making the contract had been to earn money, which had been severely disappointed given the severity of ALCOA's losses.[31]

As a remedy, the court sought to reform the contract in a way that was "suitable to the expectations and to the original agreement of the parties".[32] Rather than discharging ALCOA of its obligations under the contract, the court eliminated the original pricing plan based on the WPI-IC index and implemented a new pricing plan.[33] In doing so, the court sought to grant Essex "the benefit of its favorable bargain, [while] reduc[ing] ALCOA's disappointment to the limit of risk the parties expected in making the contract".[34] One interesting aspects of the *ALCOA* case, is that in reaching its decision, the Court relied on the fact that courts of other countries had developed doctrines to adjust for hardship resulting from changed circumstances. The Court noted that "Although the facts in this case do not require us to address the problem, the Court has studied various remedies utilized by courts in foreign countries, when beset with contracts that are no longer

25) *Id.* at 59.
26) *Id.* at 59.
27) *Id.* at 70.
28) *Id.* at 72 (emphasis added).
29) *Id.* at 73.
30) *Id.* at 76.
31) *Id.* at 76–78.
32) *Id.* at 80.
33) *Id.*
34) *Id.*

deemed 'fair' in light of changed circumstances: that is, when it is determined that fairness requires a change in a contract because events occurring subsequent to the execution of the contract have made its performance unfair. These approaches 1) try to establish the original economic position and intent of the parties; 2) try to distribute the consequences of the unforeseen burden equally between the parties; 3) try to determine what the parties would have agreed to had they been aware of what was going to happen, and 4) order termination unless the party against whom relief is sought makes an equitable offer to modify the contract."[35]) Thus, the Court examines doctrines that have arisen in, among other countries, Germany, Italy, Argentina, Switzerland, Japan and Brazil.

It is worth noting, however, that many courts have rejected the approach taken by the district court in *ALCOA*.[36])

V. Conclusion

Under US law it is very difficult to adapt a contract to respond to changed circumstances, unless the parties to the contract have specifically included a clause in their contract giving the arbitrators or courts the authority to do so. The rationale for the reluctance of US law to alter contracts in the light of changed circumstances lies in the values of certainty and predictability. It is viewed to be essential to the orderly functioning of the marketplace that parties are free to order their relationships by contract and that their reasonable expectations be protected. As a result, rather than taking the view that it is appropriate to adjust a contract in the face of a fundamental change of economic conditions, the dominant ethos in US law is the reverse – that parties enter into contracts, especially fixed priced contracts, precisely to guard against the risk of a fundamental change in economic conditions, and they should be bound by their contracts.

However, as the *ALCOA* case demonstrates, US law is not devoid of legal doctrines that a party to a contract may be able to invoke to avoid the harsh consequences of fundamentally changed economic circumstances. Moreover, arbitrators may be more willing than courts to rely on such doctrines. First, US courts are often reluctant to allow a party to escape its contractual obligations on the ground of changed circumstance for fear of creating a precedent that might undermine the values of certainty and predictability in contract law. Arbitrators applying US law do not have that constraint. Thus, while courts in common law countries have to consider both what would be the just result in the particular case before them

[35]) 499 F.Supp at 93

[36]) *See Beaver Creek Coal Co. v. Nevada Power Co.,* 968 F.2d 19 (10th Cir. 1992) ("*ALCOA* has generally not been found convincing by other courts"); *Wabash, Inc. v. Avnet, Inc.,* 516 F. Supp. 995, 999 n.6 (N.D. Ill. 1981) ("Under the logical consequences of *[ALCOA]* there would be no predictability or certainty for contracting parties who selected a future variable to measure their contract liability.")

but also the impact on future cases of the principle that they adopt to decide that case, arbitrators are free to focus exclusively on the case before them.

Second, it is possible to appeal against the decision of a US court on the ground of error of law. By contrast, it is very hard to vacate the decision of an arbitral tribunal seated in the United States on the ground of an error of law. Even the doctrine of “manifest disregard of law” that some courts in the United States have applied requires a much stronger showing than an arbitrator made an error of law. To vacate on grounds of “manifest disregard”, there must be “some egregious impropriety on the part of the arbitrators”[37]) Garden variety legal error is insufficient, it is necessary to show that an “arbitration panel intentionally and erroneously disregarded a clear and plainly applicable law”.[38])

Because arbitrators are not subject to the same constraints as national courts, they may be more willing to accept an argument that a contract be adjusted on grounds for fairness.

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[37]) *Duferco Int’l Steel Trading v. T. Klaveness Shipping A/S,* 333 F.3d 383, 389 (2d Cir. 2003).

[38]) *Goldman Sachs Ex[redacted]ion & Clearing, L.P. v. Official Unsecured Creditors’ Comm. of Bayou Grp.*, 758 F. Supp. 2d 222, 226 (S.D.N.Y. 2010), aff’d, Nos. 10-5049-cv (Lead), 11-2446-cv (XAP), 2012 WL 2548927, at *1 (2nd Cir. July 3, 2012).