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I. The Basic Questions: Changes in Circumstances in the Context of Contractual Liability

If a change in the circumstances surrounding a transnational commercial contract occurs, a party to that contract seeking relief from contractual liability or a modification of the contract, in the absence of any contractual provision on adaptation or review, may have recourse to the objective norms of the law applicable to the contract. The various legal systems contain very different responses. In order not to get confused and to dig out - perhaps - some common ground in this difficult area of basic problems of contract law, we should first identify our questions.

Changes in circumstances may have two different effects on a contract: they can render the contractual Performance either impossible¹ or (only) more burdensome for a party² so as to create a 'hardship' for it. Performance becomes impossible if, e.g. an import licence for the delivery of goods is not obtained or an embargo is imposed or the hired vessel is destroyed. Performance is more burdensome when, e.g., the closing of the Suez Canal forces a vendor of Sudanese peanuts to ship them around the continent of Africa at multiplied costs,³ or where the uranium price increases so much as to threaten to ruin a uranium supplier imprudent or cold-blooded enough to have committed itself to a long-term supply at a fixed price.⁴

Both types of situations seem to be clearly distinguishable - in theory at least - and only the second type, the hardship case, appears to constitute the specific legal problem of a change in circumstances, at least for the civil lawyer. The first type of situation, the case of impossibility, appears as a classical question of contractual liability (which in the civil law System is normally decided according to fault or non-fault). For a full picture, however, we must see our problem of change in circumstances in the context of the general principles of contractual liability and accordingly bear in mind the
impossibility situation. Moreover, some situations may have elements of both; e.g., if war or riots destroy machines at the construction site of the plant before risk has passed and the delivery of other machines of the same type is still possible, who bears the cost? Finally, in most laws overlapping legal concepts can be found; thus, English ‘frustration’ and American ‘impracticability’ contain elements of both impossibility and hardship. In the following brief survey we will focus on the ‘hardship’ situation (where performance is still possible yet burdensome), but always with an eye on the situation where performance is or has become impossible.

II. Legal Responses of the Private Laws of Some European Countries

A. CIVIL LAW

1. The Roman Law Tradition

Generally speaking, the Roman law tradition of civil law countries contains two quite different concepts of relief from contractual liability for a party hit by changes in circumstances. If contractual performance was impossible for everyone, no contractual liability existed; if impossible for the debtor only, the debtor was relieved if there was no negligence (negligentia, culpa) on his side. If performance was still possible but a fundamental change in the circumstances surrounding the contract had rendered performance much more burdensome so that continued contractual liability appeared as an unfair hardship for the debtor, the debtor could invoke the principle of clausula rebus sic stantibus, i.e. assert that the contract contained an implied term (clausula) that certain important circumstances must remain unchanged (sic stantes). The concept was recognized in international law and found its way into eighteenth century codifications of private law, but was subsequently criticized because of its vagueness and lack of certainty.

Nineteenth century liberalism, which accorded absolute priority to party autonomy and thus to the literal contents of a contract, either set aside the clausula rebus concept or sharply reduced its influence in most civil law countries. The rule that the will of the parties as freely expressed in their contract is the law of the parties and must not be changed by the courts, became the leading principle of contract law. The clausula rebus sic stantibus principle survived mainly in public international law (the law of nations). In our times, a backswing in legal thinking can be observed under the influence of the ideas of good faith and equity. The results of this backswing differ, however, from country to country.

2. French law: force majeure and imprévision

The French term force majeure (Roman law: vis maior) is not only used in public international law, but has also made its career as a term of art in private transactions and is often found in standard ‘change of circumstances’ clauses in transnational commercial contracts. In French private law, it plays its role in the context of contract liability for breach of contract. According to the Roman law tradition of French private law, a debtor is held liable for non-performance (or delay) only if there is a personal responsibility, normally some negligence (faute), on its side. Force majeure (or cas fortuit) denotes an event beyond the debtor’s control causing non-performance so that no negligence can be found and a breach of contract is excluded.

The concept of clausula rebus sic stantibus was not included in the French codification of private law and an undue burden on a party caused by an unforeseen and uncontrollable event - now called imprévision - was recognized as an excuse for non-performance only in government contracts. This strict position of French private law has been made more bearable for the parties through the use of adaptation clauses and commercial arbitration.

The recognition of imprévision at least for contracts with the government or other public bodies (contrat administratif), decided by the Conseil d’Etat first in the Gaz de Bordeaux case, allows the court to adapt a contract which has become extremely burdensome for one party due to an unexpected change in circumstances, e.g., substantially increased costs in wartime under a long-term supply contract. The court normally expects the parties to first attempt to renegotiate the price. The concept of imprévision is of some significance for contracts in international business, where French law is applicable. Many contracts here are concluded with governmental agencies. Moreover, the concept has inspired corresponding provisions in the civil codes of many Arab countries such as Egypt, Algeria, Iraq, the United Arab Emirates and Sudan.
3. German law: Wegfall der Geschäftgrundlage

The concept of *force majeure* finds no specific counterpart in the German law of contracts but is taken care of by the general principle that contractual liability for non-performance requires at least the negligence of the debtor, unless strict liability (Garantie) has been clearly agreed to. Accordingly, in German law, a party is excused from breach of contract if non-performance ('impossibility' or delay) is due to an event beyond that party's control and, accordingly, he is found not to have been negligent.\(^1\) A case may illustrate this. In 1982, the German Federal Court had to decide on a contract for the delivery of equipment to Iran and the Installation of such equipment. Contractual Performance was stopped midway by the Iranian revolution. This event which easily can be characterized as a case of *force majeure*, was treated by the Court as just another case of 'impossibility of performance' where no fault of the obligor was found. The case did not differ in this respect from other cases of impossibility. There are special remedies in German law for fundamental changes in circumstances which will be discussed in a moment; but the court felt no need to resort to them. Instead, it discussed some detailed problems connected with the concept of impossibility: (a) whether the revolution was a temporary impediment only or amounted to a permanent (definite) impossibility; (b) whether, instead of a mere termination of the contract as the regular consequence of non-faulty impossibility, the contractor (who had been fully paid by Iran!) rather had to bear that risk and compensate the claimant subcontractor for partial performance.\(^2\)

The German Civil Code uses the concept of *force majeure* as a special form of an excuse from contractual liability only in the rare case of strict liability (art. 701 III BGB). The codification of 1900 does not recognize the rebus sic stantibus rule. The comparable concept of an implied condition (Voraussetzung) proposed by the famous lawyer Windscheid, was rejected. But the Code sanctions the principle of good faith as the basis of contract law (arts. 157, 242, 315 BGB) and this principle has been invoked by the courts when deciding on cases involving problems of *force majeure* and hardship. In the great inflation of 1923-24, the Imperial Court recognized that a fundamental disturbance of contractual equilibrium caused by inflation justifies an adjustment of a contract to the new situation, e.g., through an increase of the purchase price or the sum repayable under a mortgaged loan.\(^3\) These court decisions opened the way for the subsequent formulation of a general principle on contract revision accepted and widely used by German courts until the present. Under the somewhat strange formula of a 'collapse of the foundation of the transaction' (Wegfall der Geschäftgrundlage), the rule says that an uncontrollable change in the circumstances surrounding the contract that leads to a fundamental disequilibrium in the contract and puts an undue burden on the party who had not anticipated and accepted that risk in the contract, justifies an adaptation or termination of that contract.\(^4\)

The courts, relying on the principle of good faith as spelled out in art. 242 BGB (Civil Code) have applied this principle to a variety of situations and events, including political developments,\(^5\) changes in legislation,\(^6\) denial of permission for a contract by authorities,\(^7\) and frustration of the purpose of a contract, e.g. where a lease of a shop in a new shopping center is coupled with an obligation to run that shop but the shopping center is a failure.\(^8\) In rare cases, the federal Court has even adapted long-term contracts to creeping inflation; but this is seen rather as an exception from the principle of nominalism\(^9\) and was justified by the idea of social protection.\(^10\) In other cases, even substantial inflationary losses in long-term contracts have been declared irrelevant,\(^11\) and the courts take care to preserve the basic principle of the binding force of contracts.

In some cases, where the criteria of impossibility and hardship (collapse of the foundation of the transaction) are simultaneously met, the courts, guided by the principle of good faith, have given priority to the latter criterion. Thus, in a sale of real estate where the validity of the contract or the transfer of title depends on a grant of permission by the authorities that has been denied but would be given if the contract were modified, the transferor may be obligated to agree to such a modification.\(^12\)

4. Italian law: eccessiva onerosità and sopravenienza

As regards liability for breach of contract, including impossibility of Performance, the Italian *Codice civile* of 1942 follows principles similar to those in French and German law: liability for breach, as a rule, requires the negligence of the non-performing party.\(^13\) The Italian Civil Code contains a modern form of the clausula rebus concept in arts. 1467, 1468: if unforeseen developments (sopravvenienza) have an influence on a long-term contract so as to create an undue hardship
for a party (cessiva onerosità), the contract may be terminated or adapted to the new situation.33

B. BRITISH COMMON LAW: FRUSTRATION

The traditional position of the British and American common law of contracts is that the liability to perform a contract is absolute and that the promisor is liable for breach of contract even in non-performance is not due to any fault on his side.34 The court would award compensation for breach in the form of money damages. In addition, if the contractual stipulation not fulfilled ‘goes to the roots of the contract’35 and thus constitutes a condition, the right of the other party to terminate the contract is recognized.

However, in a number of cases involving impossibility of performance caused by an unforeseen event without fault of the promisor, the courts have recognized relief from contractual liability. Thus, the courts have relieved a party of the duty to perform where a thing necessary for Performance was destroyed (e.g., the music hall where the agreed concert was to take place burnt down,36 or the potatoes of a specified harvest perished because of a disease37 ) or where war or acts of governments rendered contractual performance impossible.38

In rare cases, courts have granted relief from contractual liability even in cases where performance as to the letter of the contract was still possible but the purpose of the contract had been 'frustrated', as in the famous coronation case.39 This doctrine of ‘frustration’ became the label also for the principle underlying the decision in the aforementioned cases where an indispensable component of the subject-matter of the contract had been destroyed - e.g., the music hall has been destroyed or, to cite another case, where a hired ship had been sunk,40 or where performance would be totally different from what the parties had anticipated.41

Since the doctrine of frustration has been explained by some courts reading into the contract an implied term 'in order to supply what the parties would have inserted had the matter occurred to them, on the basis of what is fair and reasonable',42 some cases come close to those involving a mutual mistake by both parties. In general, British courts construe the concept of frustration quite narrowly and have denied its application in cases where a change in circumstances has rendered performance much more burdensome for one party, e.g. where the closing of the Suez Canal multiplied the shipping costs for the vendor of peanuts,43 or where a long-term contract concluded in war-time had to be carried out in the entirely different postwar situation.44 The courts, however, do recognize force majeure and hardship clauses in the contract.45 Sometimes, the adaptation of a long-term supply contract has been attained by the court by assuming an implied right of the aggrieved party to give notice, thus opening the way for negotiations over an adequate price increase.46 This is nothing but adaptation labelled as interpretation.

C. TERMINATION OR ADAPTATION. RENEGOTIATION

To what extent do the various legal responses to a change in circumstances provide a legal basis for an adjustment of the contract to the new situation instead of mere termination? French law and British law appear not to be very promising in this respect; German and Italian law, in contrast, seem more encouraging.

As French law, in general, does not recognize changes in circumstances as grounds for relief from contractual liability, little remains to be said about a contract adaptation in this situation. We should note, however, that French courts, in rare cases involving a change in circumstances by force majeure rendering contractual performance impossible, have awarded a contract modification under the label of compensation for damages.47 Moreover, the concept of imprévision recognized for contrats administratifs provides for a real adaptation (e.g., an adequate price increase in a long-term contract to make good for extraordinary and unforeseeable cost increases).

In British common law, the regular legal consequence of frustration is the termination of the contract. Formulations such as 'the court imposes upon the parties the just and reasonable solution that the new situation demands'48 should not obscure the fact that British courts do not recognize the power of a court to modify a contract, i.e. to uphold it with changed terms.49 Only with respect to down payments made or expenses incurred before the contract was frustrated can an adjustment of the pre-existing contractual rights take place, mostly in compliance with the provisions of the Law
A cautious step towards more flexibility is shown by the aforementioned case where a right to terminate a long-term contract by notice was read into the contract by way of interpretation. The comparatively greater flexibility of American contract law both with respect to the recognized scope of commercial impracticability and its legal consequences for a contract modification will be analysed by Richard Buxbaum.

Under the German concept of the ‘collapse of the foundation of the transaction’, in contrast, the normal legal consequence is not the termination of the contract but its adaptation to the new situation. For example, such an adaptation may take the form of an increase in a retirement pension to make good for inflationary losses in value, or a modification of a contract an the transfer of real estate to obtain the permission of authorities. Under Italian law, where an event of sopravenienza results in hardship (eccessiva onerosità) for a party to a mutual (synallagmatic) contract the party put at a disadvantage can request termination. The other party, however, is then allowed to propose a fair or acceptable adjustment of the contract as an alternative to termination.

The question now arises as to who is to carry out the adaptation, the parties or the judge? To be sure, we discuss here not the case where both parties voluntarily come together to discuss and renegotiate the contract but rather the situation where the law confers a right to request an adaptation an one of the parties. Here, it makes a difference, whether the party is entitled immediately to ask the court to adjudicate the request for an adaptation, or whether the parties must first enter into good faith renegotiations with the court coming into the picture only if these talks fail.

Italian legal doctrine holds that it is a duty of the party requesting the adjustment to make an equitable proposal and this cannot be left to the court. The court only decides on the fairness of the offer if no agreement is reached. This is at least a halfway legal obligation based on the assumption that the collapse of the foundation of the transaction brings about an adaptation as an automatic consequence.

However, if the attempt to reach an adaptation through renegotiations fails and a party now seeks termination of the contract, the German Federal Court requires at least a declaration by the party to this effect. Other courts have recognized a right to give notice and to request renegotiations, and the federal court has given priority to renegotiations and a voluntary adjustment in cases where a long-term partnership agreement had to be adjusted. In other words, in these cases, the change in circumstances does not automatically bring about the desired adaptation (a change in the rights of the parties) but only a right to request renegotiations. A similar duty to renegotiate and thus to attempt to bring about the required adaptation is also provided by a number of special laws (e.g., regarding the adaptation of money obligations under apartment leases, retirement pensions etc.). If we consider this legislation and the philosophy of many court decisions, it is not difficult to conclude that, in German law, the regular legal consequence of a collapse of the foundation of the transaction is that the parties are initially obligated to attempt to renegotiate in good faith.

American courts appear to follow this idea even more clearly in recent cases of commercial impracticability as, later in this book, Buxbaum points out. French courts have, in cases where imprévision was recognized, pointed to a duty of the parties to themselves negotiate an adaptation, and the same can be said about the recent British case, previously cited, where the court recognized a right to terminate a long-term contract by notice only to open the way for renegotiations.

Even where the law permits the court itself to modify the contract, as in German law, there are two reasons for judicial restraint in this respect. First, courts are called upon to render a decision based on law, not to make a plan for the future cooperation of the parties in general. Second, in attempting to plan the future cooperation of the parties, a court is inherently unable to take into account all of the factors applicable to the deal in the Same manner the parties would. Accordingly, if the adaptation problem is not just a change in price or similar measurable adjustment, the court is not capable of writing an adapted contract for the parties. Therefore, there exist some legal and factual boundaries on the capacity of courts to adapt a complex long-term contract the performance of which will continue into the future. We will come back to this question when we discuss the powers of arbitrators and third party interveners.

D. THE LAW OF THE GERMAN DEMOCRATIC REPUBLIC
The GDR's law on international economic contracts of February 5, 1976, contains a sort of modernized concept of *rebus sic stantibus* or 'collapse of the foundation of the transaction'. In article 295, it provides that where circumstances relevant for attaining the purpose of the contract and presupposed by the parties but beyond their control have changed fundamentally, the party does not accept the offer or, if the adjustment is not such that the contractual purpose can be attained, the aggrieved party is entitled to terminate the contract immediately; the other party may claim compensation for its own performance and for costs incurred with respect to outstanding parts of its performance. If the law of GDR is applicable to the contract, the parties may specify particular cases of changed circumstances and special risks. The provision demonstrates the willingness of the legislator to recognize such clauses as well as hardship clauses (to be discussed *infra* Part II) as valid. Under the provisions of article 295, the court is called upon only to decide on the compensation owed in the case of termination, it may not undertake to adapt the contract. One can presume that a hardship clause which gives such powers to a court would be valid because the law in other cases recognizes the ability of a court to effect such an adaptation - e.g., where a third party has been empowered to make such a determination yet fails to do so (article 41(2)). The role of such a court decision in the adaptation of a complex long-term contract must be seen, however, within the previously mentioned boundaries of the court’s ability to effect an equitable adaptation.66

III. Recognized Transnational Rules on Changes in Circumstances in Commercial Contracts?

Our question whether there exist uniform transnational rules an how changes in surrounding circumstances affect a contract is not intended to resuscitate the famous debate on autonomous sources of *lex mercatoria*. We do not question here that the majority of contracts in international business are still subject to a specific national law and we leave aside the questions regarding the conditions under which a contract may be insulated from the application of any such law. Transnational rules, accordingly, are relevant here only if compatible with and recognized by the applicable national law either as standards of interpretation or as commercial customs and usages. We therefore simply ask whether there is a *de facto* transnational uniformity of legal patterns in the use of contractual clauses in international commerce, backed by some uniform ideas about the legal concepts involved, and whether this provides uniform standards of interpretation as do uniform customs and usages.67 This could have two legal effects: first, it could aid in the interpretation of clauses on changes in circumstances (*force majeure*, hardship and special risk clauses to be discussed in part II of this book) where these clauses have ambiguities or shortcomings. Second, it could perhaps help to identify implied terms to the same effect where the parties have not inserted those clauses. Finally, if the parties have expressly excluded the legal effects of such implied terms, a court may still have recourse to overriding rules of the applicable law or principles of equity and good faith. Here, the answers of the various national laws differ,68 and our search for uniform transnational rules will be rather difficult.

A. A COMPARATIVE LOOK AT PUBLIC INTERNATIONAL LAW

A comparative look at public international law (the law of nations) is justified by the experience that general problems of contract law are more or less the same in private law and public international law. For instance, the principle of *clausula rebus sic stantibus* is still recognized in public international law on the basis of an uninterrupted legal tradition.69 This principle has found a modern important and clear expression in article 62 of the Vienna Convention on the Law of Treaties of 1968-69 which deals with ‘Fundamental Change of Circumstances’.70 The legal effect of such a fundamental change of circumstances is the ‘termination and withdrawing the treaty’, subject to a procedure prescribed by article 65 (notification of the claim to the other parties). Treaties on boundaries are excluded and the article is carefully worded so as not to encourage the over-use of the principle and thus to avoid uncertainties as to the sanctity of international contracts. The Vienna Convention is applicable only to treaties between sovereign states. It is not applicable to contracts between private parties or to contracts with an international institution such as the World Bank. But article 62 is a strong argument for the existence of a general legal principle which might also be relevant to transnational contracts with or between private parties.

B. EMERGING INTERNATIONAL CONCEPTS OF FORCE MAJEURE AND HARDSHIP
This leads us to the important and crucial question as to whether there already exist recognized transnational rules on hardship and force majeure useful for the interpretation of adaptation clauses and even relevant to adapting contracts in the absence of such clauses. With respect to such an international concept, we have to distinguish at least two of its main functions: first, as an extraordinary relief from contractual duties - an exception to the normal contract liability as discussed above; second, as a source of duties to find a new solution, i.e., to adapt a contract to a new situation with a view toward furthering the cooperation of the parties.

The first function is expressed in article 62 of the Vienna Convention. In the United Nations Convention on Contracts for the International Sale of Goods of 1980, which is directly relevant to the kind of (private) contracts we are discussing here, this concept has found its expression in article 79. According to this provision, a party is not liable for a failure to perform if the failure was due to an impediment beyond his control. The same kind of relief is provided in many contractual clauses used in international commerce which can be termed as the traditional or 'old fashioned' form of force majeure clauses to be discussed later. This contractual practice must be seen and construed in the context of an international communis opinio regarding the legal concept of force majeure. The contours of this communis opinio are described in our discussion of comparative law on the subject, and confirmed, in a way, by a constant jurisprudence of the European Court of Justice where a concept of force majeure or 'greater might' is applied which is derived from a comparative look at various European laws. This communis opinio says that a fundamental change in the circumstances beyond the control of the parties affects the existing contractual obligations and is ground for relief form some or all contractual duties. This does not necessarily mean that the contract is totally voided and all prior obligations are to be discarded. Such legal effect would be particularly difficult to accept in cases where one party has performed and the other party not, e.g. where the lender has disbursed the credit, in other words, where the contract is in part executed and in part executory. Even where termination can be accepted as the proper remedy, there remain duties on the parties concerning the method of liquidation.

But in the many cases where either or both parties maintain an economic interest in continued contractual cooperation as is typical for long-term contracts interrupted halfway in their execution, there is a sort of consensus that other solutions must be found. No general concept on how to adapt a contract has yet emerged and it is hard to imagine what the parameters of such concept would be. Only for specific problems of an adaptation such as price adjustments to changing market prices or currency exchange rates, can such concepts be found in special adaptation clauses or in adaptation formulas established by legislators and courts. In less 'quantifiable' situations, only the parties can really negotiate and execute the necessary changes. There is some evidence to assume that, generally, the parties have a duty to renegotiate in good faith on the needed adjustment. Witnesses for this are not only found in many modern force majeure and hardship clauses (to be discussed later), but also in a number of international texts and proposals. Both the UNCITRAL Conciliation Rules and the ICC Adaptation Rules, without defining the legal concept of frustration, hardship or force majeure, nevertheless promote the idea of adapting contracts through negotiations. The UN-ECOSOC Draft Code on Transnational Corporations postulates that, in, long-term contracts between governments and transnational corporations, review or renegotiation clauses should be included. The draft goes a step further and states that, in the absence of such clauses, where there has been a fundamental change of the circumstances on which the contract or agreement was based, the parties should act in good faith to review or renegotiate such contract or agreement (art. 11). This concept is in accordance with those national laws (e.g. German, French and American law), where the courts faced with situations of force majeure or frustration have pointed to a duty on the parties to themselves negotiate a solution.

It appears justifiable to speak today of an internationally accepted concept of force majeure or rebus sic stantibus and, with respect to complex long-term contracts, of a duty on the parties, to renegotiate in good faith. We must be careful, however, not to regard these generally accepted concepts as, already operational rules of law. We have seen in our little comparative view of national laws as we will further see in our discussion of standard clauses that the difficulties often are in the details of defining a situation of force majeure. In this respect, however, the standardized use of relevant clauses may help to define the criteria which are necessary to protect the basic principle of the binding force of contracts. These criteria will be discussed in greater detail in Part II.

But we can state here that international contractual practice is oriented towards uniform general concepts of force majeure and a duty to renegotiate.
C. INTERNATIONAL STANDARDS OF FAIRNESS

One of the most crucial problems is to provide guidance for an adaptation, the direction it should take and the measures it can be based on. This problem arises both in the context of extrajudicial negotiations and in the case of an adaptation brought about by a court or arbitral tribunal. We cannot expect very clear rules. Nevertheless, we can discover in international contractual practice at least some general ideas that are partially supported by the formulations of some national laws regarding force majeure. One leading idea is that the equilibrium of the original contract should be maintained and therefore neither party should be allowed to profit or forced to suffer a loss as a result of the renegotiation. This ‘no profit - no loss’ rule is widely recognized. Another approach is to not simply look back to the original contract but to determine what is fair in the new situation. This rule should be observed, however, only if it does not contradict the ‘no profit - no loss’ rule.83 The UNCITRAL Rules, when describing the task of a conciliator, give him (and thus to the parties) similar guidance by referring to ‘principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties’.84

D. CONTRACT ADAPTATION IN THE NORTH-SOUTH RELATIONSHIP

In the years following decolonization, many developing countries, after they had obtained political independence, made strong efforts to achieve economic independence as well. One of the most important steps towards this goal was seen in the restructuring of long-term contracts an economic cooperation, particularly contracts involving the exploitation of natural resources. In 1974 and 1975, the UN promulgated resolutions an permanent national sovereignty over natural resources and on the economic rights and duties of states and declared the establishment of a New International Economic Order (NIEO) as a goal of the UN and its member states.85 The concept of NIEO, the normative implications of which remain the subject of an ongoing discussion, has nourished the idea that developing countries may use their economic weakness as an additional legal argument to justify either the termination or the adaptation of long-term contracts in a manner advantageous to them.86

We must make a distinction here. The special case of the liquidation of old colonial regimes and concessions and other contracts inherited from them through adaptation processes forced by political acts is today a closed chapter and hardly a lesson for the future of international contracts. The broad and difficult discussions on the legal implications of NIEO have till today brought about no more than a certain revival of the traditional concept of clausula rebus sic stantibus.87 Within this concept, however, the poor economic health of the debtor is no legal argument.88 The economic weakness of developing countries can be significant as a political argument. However, treating it as a legal argument would lead an to all kinds of dangerous implications. No country can in the long run deny that it is subject to the same legal principles - including the binding force of contracts - as its partners. This is, indeed, the opinion internationally prevailing.89 Accordingly, it would make no sense to define special excuses from contractual liability for developing countries. Such a concept would be a mixed blessing for the countries concerned. Every country likely to use this argument would run the risk of earning the reduced credit standing of a debtor who does not take contracts seriously. Nevertheless, the crisis in international lending has revived this line of argument, i.e. pleading weakness as an argument in its own right. This problem will be discussed later in part IV. Suffice it to say that such an argument, though it might be a very strong one in a given situation, is clearly not a legal one.

E. WHAT COURTS WILL DO

The real test for the legal weight and significance of a transnational concept concerning changes in circumstances (force majeure) arises when an adaptation problem comes before a national court. Predictably the court will first look at the applicable national law. The question is whether it will allow a further-reaching concept of adaptation than that provided by the applicable law on the grounds that the contract is an international commercial transaction. We must make a distinction here. Every court would probably honor an adaptation clause agreed to by the parties, and would thus apply international standards of interpretation, if necessary. In the absence of such a clause, however, a court would primarily look at the scope of adaptation concepts provided by the applicable national law. If these are very narrow (as is the British common law concept of frustration and the French law concept of the special situation of imprévision) it is an open question, to say the least, whether the court will go the further step of adapting the wider and more flexible concept of adaptation found in international commercial practice.
To keep our discussion simple, let us assume that the concept of 'impossibility of performance' also extends to cases involving mere delays of performance, e.g., where a debtor finds it impossible to perform at the agreed time. Nevertheless, it should be noted that the German law on breach of contract makes a clear distinction between impossibility and delay. See arts. 280, 284, 325, 326 BGB.

Performance is more burdensome for the debtor where (a) it is at higher cost or (b) the consideration received in return is of lesser value.


On the Westinghouse uranium case, see Joskow, Commercial Impossibility, The Uranium Market and the Westinghouse Case, 6 J. Legal Stud. 119 (1977); Buxbaum, Modification and Adaptation of Contracts, infra this volume, at 31 et seq.

For a comprehensive view, see Zweigert & Kötz, II Introduction to Comparative Law, chs. 13-14 (1977).

The relevant FIDIC model contract clauses are reproduced infra at Part V at 351-55. For a general appraisal of the problem, see Oberreit, Turnkey Contracts and War: Whose Risks?, in The Transnational Law of International Commercial Transactions 191 (N. Horn & C. Schmitthoff eds. 1982). For a quite different approach to risk distribution, See Feliciana, The Role of Investment Agencies, infra this volume, at 141.

On frustration, see infra this contribution section II B and C. On impracticability, see Buxbaum, supra note 4, at 44 et seq.

Celsus, D. 50.17.185: impossibilium nulla obligatio. The impact of this rule can be traced in French law in article 1601 of the Code civil, in Italian law in articles 1346 and 1418 (2) of the Codice civile.

On the role of negligence in the Roman law of contractual liability, see Kaser, II Das römische Privatrecht, ch. 258 (2d ed. 1975).

On the historical formation of the clausula unknown in ancient Roman law but developed within the Roman law tradition, see infra note 69.


See infra this volume Part II.

Code civil, art. 1147.

Id. art. 1148. The debtor is not liable for damages resulting from non-performance if this was caused 'par suite d'une force majeure ou d'un cas fortuit'. See Tunc, Force majeure et absence de faute en matière contractuelle, 43 Rev. trim. clv. 235 (1945); Zweigert & Kötz, supra note 5, ch. 13.

Planiol & Ripert, VI Traité du droit civil français, nos. 391-98 (2nd ed. 1952). The leading decision rejecting imprévision as an excuse from liability, even in long-term contracts, was the Craponne case, Cass. D.P. 1876 I. 197.


Egyptian Civil Code, art. 147(2) ; Algerian Civil Code, art. 107; Iraqui Civil Code, art. 146; Oberreit, supra note 6, at 198; Fontaine, Hardship Clauses, D.P.C.I. 51, 84-87 (1976).

See El Sheikh, Legal Criteria, infra this volume, at 99, 104-105.


BGHZ 83, 197. The Court considered compensation for partial performance per analogiam art. 645 I 2 BGB.

RGZ 103, 328; 107, 78; Rheinstein, The Struggle between Equity and Stability in the Law of Post-War Germany, 3 U. Pitt. L. Rev. 91-103 (1936/37).

Horn, Kötz & Leser supra note 19, at 141 et seq. See also infra section C (text accompanying notes 47-65).

OLG Düsseldorf NJW 1955, 1797.

BGH NJW 1951, 836.

BGHZ 38, 146, 149; 67, 34, 36.

BGH NJW 1978, 2510.


BGHZ 61, 31, 30 (concerning a retirement pension).

BGH LM § 242 (Bb) BGB Nr. 34 (1959); Nr. 39 (1960); Nr. 49 (1965) (concerning long-term mining contracts); BGHZ 86, 167 (concerning a rent for an inheritable building right (Erbbaurecht)).

BGHZ 38, 146, 159; 67, 34, 36. See also infra C.

Codice civile Art. 1218.


On details of adaptation see infra C.


Fibrosa Spolka v. Fairbairn, Lawson, Ltd. [1943] A.C. 32; Bank Line Ltd v. Arthur Capel & Co [1919] A.C. 435. It is an open question whether denial of export and import licenses and quotas will always be recognized by the courts as a frustrating event; Schmitthoff, Export Trade, 116 et seq. (7th ed. 1980). The same problem has been discussed under
New York law as regards governmental decrees barring repayment of credits; See D. Lindskog, Act of State or Act of [f]
Desperation, IFL Rev. Dec. 1983, 4-8.

43 Tsakiroglou v. Noble Thörl, supra note 3.
44 British Movietonews Ltd. v. London and District Cinemas Ltd. [1952] A.C. 166.
47 Cass. 27. nov. 1950, Gaz. Pal. 1951.1.132. See also Landfermann, Die Auflösung des Vertrages nach richterlichem
Ermessen als Rechtsfolge der Nichterfüllung im französischen Recht (Contract termination by discretion of the judge as
the legal consequence of non-performance in French law), 60 et seq. (1968).
49 British Movietonews Ltd., supra note 44.
50 Schmitthoff's Export Trade, supra note 38, ch. 11 at 120.
51 Supra note 46.
52 See infra at 44-50.
53 Horn, Kötz & Leser, supra note 19, at 141 et seq.
54 BGHZ 61, 31, 38; 64, 34-36.
55 Codice civile art. 1467 III.
57 BGH, LM § 242 (ba) BGB Nr. 38; BGH NJW 1972, 152 et seq.
58 BGH LM § 242 (Bb) BGB Nr. 57; BGH WM 1958, 700 et seq.
59 OLG Karlsruhe, DB 1980, 254 (concerning the long-term delivery of energy).
60 BGHZ 10, 44, 51; 18, 350 f; BGH NJW 1967, 1081; BGH WM 1975, 769.
62 Infra this volume at 46-50.
63 Gaz de Bordeaux, supra note 16.
64 Staffordshire, supra note 46.
65 Infra this volume Part III.
66 A similar view has been expressed by Maskow in his report for Tagung für Rechtsvergleichung, 1983, Bonn (German
Congress on Comparative Law).
67 Horn, Uniformity and Diversity in the Law of International Commercial Contracts, in: The Transnational Law of
International Commercial Transactions (Horn & Schmitthoff eds.) 3-18, at 13 et seq. (1982).
68 Cf. infra Part III of this volume, at 180 et seq. (Horn).
69 Omnis conventio intelligitur rebus sic stantibus; R. Zouche, Juris et Judicii Fecialis, sive, Juris inter Gentes, et
Questionum de eodem Explicatio (1650), 1911. p. 102. Schwarzenberger, A Manual of International Law, 169 et seq. (5th ed. 1967); Verdross-Simma, Universelles Völkerrecht, 418-424 (1976); Brownlie, Principles of Public International Law
599 (2nd ed. 1973).
70 Brownlie, supra note 69. Art. 65 prescribes a notification of the claim to the other parties.
71 Cf. supra part I and II C of this article.
72 Infra Part II of this volume Horn, at 131 et seq.; Böckstiegel, at 159 et seq.
73 See supra parts II A-D of this article. It should be noted, that the European Court has constantly adopted a comparative
method to find legal concepts of frustration and force majeure commonly accepted within the European community.
74 For recent decisions of the European Court, cf. e.g., Ministero delle Finanze v. Esercizio Magazzini Generali SpA et
Mellina Agosta (5 Oct. 1983, No. 186 and 187/82); Bundesanstalt für landwirtschaftliche Marktdnung v. Firma H. und J.
Brueggen (16 Dec. 1982, No 71/82); for a narrow construction of 'greater might' see re Acciaierie et Ferriere Busseni di
75 Infra this volume IV at 310-12 (Horn).
77 See supra text accompanying notes 19-33. For a discussion of adaptation clauses, see generally infra this volume, Part
II; on adaptation procedures, see generally infra this volume, Part III.
78 See infra this volume, Horn, Standard Clauses, at 130-137; Böckstiegel, Hardship, Force Majeure and Special Risks
Clauses, at 159 et seq.
79 See the introduction to this volume, supra at 8-10. See also Mezger, infra this volume, at 205 et seq., 215; Herrmann,
infra this volume, at 218 et seq.; Lando, Renegotiation and Revision of International Contracts, 23 G.Y.I.L. 37, 57 (1980).
81 For a discussion of the American approach on this matter, see Buxbaum, infra at 31.
See Horn, Standard Clauses, infra this volume, at 111 et seq.; see also Böckstiegel, Hardship, Force Majeure and Special Risk Clauses, and Feliciano, The Role of Investment Agencies, infra at 159 and 141.

On this problem, see also Schmitthoff, Hardship and Third Party Intervener Clauses, 1980 J. Bus. Law 409.

Art. 7(2). The text of the Rules is reproduced infra part IV of this volume.


See, e.g., some of the contributions in: Legal Aspects of the New International Economic Order (K. Hossain ed. 1980).

Horn, infra at 346.

On this problem, see also infra this book, Part IV at 305, 310-12 (Horn).


Referring Principles:

- VI.3 - Force majeure
- VIII.1 - Definition