LEX MERCATORIA AND Force majeure

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With the modern day increase in international trade and commerce, national commercial law has often proved inadequate to international business needs and the resolution of disputes involving international contracts. International contracts typically differ dramatically from their domestic counterparts in subject matter, size, duration, in the policy considerations involved, and with the participation of sovereigns as parties.

Against such a background, it is hardly surprising that some commentators and arbitrators seek to lift the arbitration process further above national constraints and inadequacies by "rediscovering" commercial law in the practices and customs of the business community the "new lex mercatoria". Proponents of the use of a lex mercatoria in arbitration claim that it can provide distinct advantages over the application of national commercial laws. Opponents of the lex mercatoria counter that it does not constitute a viable legal system capable of application to contract disputes. All commentators are in disagreement as to the definition, sources and content of the new lex mercatoria.

The inadequacies of national laws which have prompted both the growth of arbitration as a forum and the lex mercatoria debate are strikingly exhibited in the area of force majeure.

Force majeure is a doctrine that operates to excuse a party from performance of a contractually imposed obligation when "unforeseen occurrences, subsequent to the date of the contract render performance either legally or physically impossible, or excessively difficult, impractical or expensive, or destroy the known utility which the stipulated performance had to either party." Intervention of such an event relieves the obligor from the obligation to perform, and the contract is terminated.

The existence and operation of force majeure as an "excuse" doctrine assumes that the purpose of a contract is to ensure both enforcement of obligations and certainty in commercial transactions. The force majeure doctrine serves to mitigate this goal of strict contract enforcement with notions of justice and fairness.

Where and how the balance is struck between these competing values depends upon whether one places priority upon the certainty and predictability that the contract can provide or the inter-party relationship that the contract established. Placing priority upon certainty and predictability weighs the scales in favor of restricting excuse doctrines and providing all or nothing remedies. However, giving priority to the contractual relationship favors a broader excuse doctrine and remedies that in effect renegotiate the original contract.
While courts considering domestic contracts have often stressed certainty and accordingly limited the scope of the *force majeure* defence⁹, tribunals considering international contracts often have more vested in the inter-party relationship. Arguably, the attempt to maintain this relationship should lead to a wider *force majeure* defence in the international setting, which would more readily find that intervening circumstances mitigate strict enforceability of the original contract and would utilize remedies more flexible than the winner-takes-all approach that finds a contract either fully enforceable or a nullity.

Where and how such a doctrine would operate, and indeed whether such an extension is desirable at all, is in dispute¹⁰. However, in the search for the *lex mercatoria* of *force majeure*, the tension in contracts between predictability and practicality should continually be the backdrop. To remedy the deficiencies of its domestic counterpart, the *lex mercatoria* should provide more than a common denominator list of events capable of relieving the obligor. The *lex mercatoria* should provide: (i) a body of guiding principles, (ii) capable of practical application, and (iii) which strike a balance in the above-described tension that will meet the needs of the international businessperson.

This paper will examine four possible sources of the *lex mercatoria* for common threads of the *force majeure* concept: (i) general principles of law; (ii) public international law and uniform laws; (iii) reporting of arbitral awards: and (iv) customs and usage¹¹.

To the extent that a *lex mercatoria* emerges from these sources which fulfills, or fails to fulfill, any of the above goals, the entire *lex mercatoria* debate will be illuminated. In the words of Mustill J.: "The time has now arrived for the contestants to call a truce, and for the businessman to speak for himself."¹²

### I. GENERAL PRINCIPLES OF LAW: A COMPARATIVE STUDY

Lando notes, "The general principles of law recognized by the commercial nations are an important element of the law merchant."¹³ This section will examine *force majeure* in three types of legal systems: common law, civil law, and Islamic law. Any general principles that emerge could provide content to a *lex mercatoria* even if few common principles emerge, a comparative understanding of how *force majeure* concepts are defined and used in national legal systems and an understanding of the underlying theoretical rationales for excuse doctrines are necessary to facilitate any coherent discussion of the *lex mercatoria* of *force majeure*.

#### A. COMMON LAW COUNTRIES

The common law traditionally treats contracts as absolute, expressed in the maxim "pacta sunt servanda" (agreements are to be observed)¹⁴. Failure to perform a duty imposed by contract is presumptively a breach of contract unless in the circumstances failure to perform can be excused.

Two types of "excuse" can mitigate failure to perform. The doctrine of mistake deals with assumptions concerning the time the contract is made. The related doctrines of impossibility, impracticability and frustration deal with assumptions concerning facts that exist at the time the contract is to be performed. This section explores those concepts under the laws of England and the United States.

Under *force majeure* concepts, further performance of a valid contract is excused, and the contract itself is terminated, when performance becomes physically or legally impossible or possible only in a manner not originally intended by the parties¹⁵.

In both countries, apart from a few exceptions¹⁶, the doctrine has been applied narrowly with harsh results for the obligor. The underlying philosophy is that excuse doctrines are "not lightly to be invoked to relieve contracting parties of the normal consequence of imprudent commercial bargains."¹⁷ As a result, the doctrine of physical impossibility has only rarely been extended to cases of impracticability and frustration.
is not at fault and has not assumed absolute responsibility for performance.

In both England and the United States, impossibility traditionally encompassed the following occurrences: destruction of the subject matter\textsuperscript{18}, failure of sources where non-generic goods were involved\textsuperscript{19}, subsequent illegality of performance\textsuperscript{20}, and death or disability of a person where the contract was personal\textsuperscript{21}. In general, any impossibility due to an extraneous event will suffice\textsuperscript{22}.

2. Impracticability

"Impracticability" excuses performance where performance is unduly burdensome for a supplier of goods or services and the supplier is not at fault and has not assumed absolute responsibility for performance.

The possibility of excuse even in the absence of absolute impossibility was recognized early in this century by the California Supreme Court in \textit{Mineral Park Land Co. v. Howard}\textsuperscript{23}. The defendants in Mineral Park had contracted to remove a certain quantity of gravel from the plaintiff's land, but took only half the agreed amount because the remainder of the gravel was under water. Performance of the contract was held "legally impossible" because the parties had not contemplated the removal of gravel from below the water level and because it would have been 10-12 times as expensive for the defendants to remove the remaining gravel\textsuperscript{24}.

Section 2-615 of the Uniform Commercial Code ("Excuse by failure of Presupposed Conditions") explicitly adopts the doctrine of impracticability with respect to supervening events affecting sellers' performances\textsuperscript{25}. It provides that a seller's failure to perform a contract in whole or in part is not a breach of contract "if performance as agreed has been impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption an which the contract was made."\textsuperscript{26}

3. Frustration of Purpose

Frustration of purpose is the converse of impracticability and is often alleged by a recipient of goods or services bound to pay their price\textsuperscript{27}.

The doctrine starts from the presumption that in forming a contract, the parties contemplated that certain fundamental assumptions and conditions would remain intact. Frustration occurs when a basic, unexpected change in these assumptions and conditions "renders performance impossible or only possible in a very different way from that contemplated."\textsuperscript{28} This change must in turn prompt a "radical change in the character of the obligation" so that the terms of the original contract logically no longer bind the parties\textsuperscript{29}.

The doctrine has very rarely been successfully invoked in England except for the well-known cases arising from the postponement of the Corpnation of King Edward VII in relation to hire of rooms overlooking the proposed route\textsuperscript{30}. In the United States also, courts are extremely reluctant to grant relief on frustration grounds\textsuperscript{31}. For example, a contract to construct two schools was held not to have been frustrated even though the housing project that the schools had been intended to serve was canceled\textsuperscript{32}. The housing project was found not to have been "so intimately related to the schools that it may fairly be said that the discontinuance of the housing project is a legal frustration of the school construction contract."\textsuperscript{33}

4. Application of the Doctrines

In extending the doctrine of physical impossibility to cases of impracticability and frustration, the courts consider how the parties intended to allocate or assume risk on the occurrence of an intervening event. In \textit{National Carriers v. Panalpina Northern Ltd.}\textsuperscript{34}, Lord Roskill stated in discussing the doctrine of frustration:

"The doctrine is principally concerned with the incidence of risk; who must take the risk of the happening of a particular event especially when the parties have not made sufficient provision for the happening of that event? When the doctrine is successfully invoked, it is because in the event which has happened the law imposes a
solution, casting the incident of that risk an one party or the other as the circumstances of the particular case may require, having regard to the express provisions of the contract into which the parties have entered.

The courts have focused on two criteria as indicators of intention to allocate risk: (a) the magnitude of the burden imposed by the supervening event, and (b) the foreseeability of the event.

(a) The Magnitude of the Burden

As an indicator of what the parties must have intended, courts often measure the magnitude of the burden imposed by the intervening event and assess how different it is from the burdens for which the parties contracted.

The famous Suez Canal cases in both Britain and the United States illustrate this calculation. These cases all involved contracts to ship goods. With the closure of the Suez Canal, through which the ships were to have travelled, the obligor alleged that the contract was impracticable and sought relief. British courts held that the increased burden of shipping the goods via the Cape of Good Hope a journey more than twice as long and expensive did not frustrate the contract. U.S. courts presented with the same facts, concurred, stating:

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...

These cases were viewed in essence as situations where performance had become more expensive. Both British and U.S. courts have been reluctant to find impracticability an this ground. British courts generally find that the parties assumed the risk of unexpected price increases in making their bargain, unless the contract specifically stated otherwise. The courts have maintained this position even when price increases occurred because of war, government action, or other causes commonly categorized as force majeure.

In the United States, price increases also rarely constitute a great enough burden to warrant relief. For example, the court in Maple Farms, Inc. v. City School District refused to find the performance of a fixed-price contract commercially impracticable where the seller's acquisition cost had risen by 23%, raising its performance cost to 10.4% over the contract price. Although the court found that the seller had been aware of the possibility of price fluctuations and that the risk of a "substantial or abnormal increase in the [seller's acquisition cost] could therefore be allocated to the seller," the court recognized that there could "conceivably" be a point "at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to 'impracticability' in the commercial sense." The Maple Farms court refused, however, to find impracticability on the facts before it.

In Louisiana Power & Light Co. v. Allegheny Ludlum Industries, the court, holding that contract losses must be "especially severe and unreasonable" if commercial impracticability is to be shown, refused to excuse the defendant from performance of a contract where its performance costs had increased 38% over the original contract price due to rises in the costs of raw materials. The defendant's cost of performance, said the court, "did not increase to the extent necessary to excuse its performance under the doctrine of commercial impracticability."

The escalation of oil prices in the 1970's affected energy contracts worldwide, and in many countries cases were brought asserting that these price rises constituted force majeure. These now provide a useful point of comparison. One such "oil case," Aluminum Co. of America v. Essex Group, Inc., appears to be the only American case in which the risk of cost increases arising from economic changes was held not to have been allocated to the disadvantaged party. The court's finding an this point was based on the magnitude of the cost differential. The court distinguished the prior cases described above as ones where the cost differential was lower.

The Aluminum Company of America ("ALCOA") and Essex had entered into a long-term contract under which ALCOA was to smelt alumina provided by Essex and return molten aluminum to Essex for further processing. The contract called
for the escalation of a portion of the contract price in accordance with changes in the Wholesale Price Index ("WPI") to account for changes in non-labor production costs and the escalation of another portion of the contract price by reference to an index based on labor rates at one of ALCOA's plants. The contract was to run from 1967 until 1983; Essex had an option to extend the contract term until 1988.

Beginning in 1973, increases in oil prices due to actions by OPEC and "unanticipated pollution control costs" increased ALCOA's electricity costs, which comprised its "principal non-labor cost factor" under the contract, greatly and unforeseeably beyond the WPI-indexed increase in the contract price. The deviation between ALCOA's nonlabor costs and the WPI resulted in a difference between a $1.4 million profit for ALCOA in 1968 and losses of approximately $9 million on the contract by 1978. ALCOA projected total losses of $60 to $75 million over the term of the contract, and sought "reformation or modification of the price on the basis of mutual mistake of fact, unilateral mistake of fact, unconscionability, frustration of purpose, and commercial impracticability."

The court, applying Indiana common law, granted ALCOA relief on the grounds of mistake, impracticability and frustration of purpose. The court held that the parties, in choosing the WPI as a barometer of non-labor costs, had "injected a limited range of uncertainty into their projected return an the contract." Thus, "ALCOA neither assumed nor bore the risk of the deviation beyond the foreseeable limits of risk."

ALCOA, however, is a difficult case from which to generalize, as it turned on very specific facts (not the least of which was ALCOA's importance to the community), and it has been criticized. While parties seeking to avoid obligations have frequently sought to rely an it, few, if any, have been successful.

(b) Foreseeability of the event

Whether the parties have allocated the risk of loss arising from the event can also be framed as a question of the foreseeability of the supervening event. Where an event is deemed foreseeable, its occurrence will be considered a basic assumption upon which the contract was made, and the risk of its occurrence will be held to have been allocated to the disadvantaged party.

Other Suez Canal cases illustrate this approach. In *Gilden Co. v. Hellenic Lines Ltd.*, evidence revealed that in prior contracts with other similar transactions defendants had sought and obtained a clause specifically excusing performance by it in the event that the Canal was closed:

In its negotiations with Glidden, Hellenic urged that the charters include the same or a like provision, but Glidden, after consideration of the matter, rejected any such clause. Hellenic thereupon agreed to the charters without any frustration provision ... protecting the shipper against the eventuality ... In all likelihood the shipper did not suppose at the time of negotiations that the contract language excused his performance if the Suez Canal were closed, for there would then have been little reason to press for the inclusion of a specific clause.

In *Transatlantic*, the court had found that Transatlantic had assumed "some degree of abnormal risk," although not necessarily the risk of closure of the Canal, since the parties were probably aware at the time of contracting "that the Canal might become a dangerous area." Thus, Transatlantic's claim of impracticability was judged "in stricter terms than [it] would [have been] were the contingency unforeseen.

Another "oil" case where frustration was asserted, *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, reached the opposite result from ALCOA, based on notions of foreseeability. Here, Gulf asserted that the continued performance of a long-term contract to supply aircraft fuel at a price keyed to the price of a particular type of domestic crude oil had been rendered impracticable by a "two-tier" pricing system introduced by the American government in response to the changes in the world petroleum market in the early 1970's. Under the "two-tier" system, the price of certain domestic oil, including the chosen reference crude, was frozen at a level substantially below that to which market prices had risen in response to OPEC's actions. The longterm agreement in question had been entered into in June 1972. The court rejected Gulf's impracticability defense, observing that:
The record is replete with evidence as to the volatility of the Middle East situation, the arbitrary power of host governments to control the foreign oil market, and repeated interruptions and interference with the normal commercial trade in crude oil. [O]il has been used as a political weapon with increasing success by the oil-producing nations for many years, and Gulf was well aware of and assumed the risk that the OPEC nations would do exactly what they have done\(^6\).

*Eastern Air Lines v. Gulf Oil Corp.* illustrates the difficulty of establishing that even a radical change in economic circumstances resulting in increased costs is a contingency "the non-occurrence of which was a basic assumption an which the contract was made." As in Britain, courts have been particularly unreceptive to impracticability and frustration defenses based on losses arising from such changes. This may be because it is assumed that contracts are made in order to allocate economic risks\(^6\). Official Comment 4 to Section 2-615 of the Uniform Commercial Code suggests such a conclusion:

> 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 contracts made at fixed prices are intended to cover\(^6\).

Official Comment 4 suggests that the assumption that risks of adverse economic changes have been allocated to the disadvantaged party may be overcome by showing not only that such changes were unforeseen, but that they resulted in alteration of "the essential nature of the performance." Neither the Comment nor the cases shed light on the precise meaning of the phrase "essential nature of the performance."

### 5. Remedies

Traditional common law doctrine provides that the effect of supervening impossibility or frustration an the obligor is usually to discharge that party's remaining duties of performance.

In both Britain and the United States, common law doctrines have been modified to provide that money owed before the frustrating event occurred ceases to be payable after, and money already paid before its occurrence is recoverable. The courts can (1) allow either party to retain or recover expenses in whole or in part and (2) order a party to pay compensation for a valuable benefit obtained before the frustrating event occurred\(^6\). Despite this extension of remedies, commentators have argued that relief is still unnecessarily inflexible and judges should assume a power of "price adjustment."\(^6\) In the United States, both the Uniform Commercial Code and the Restatement (Second) of Contracts appear to provide for equitable adjustment of the contract\(^6\). Such remedies are rarely granted, but they were used in ALCOA, where the court noted that the usual remedies of recision and restitution are often not responsive to problems created by long-terms contracts\(^6\). The ALCOA court concluded that equitable reformation was "essential to avoid injustice," and modified the price escalation formula accordingly.

### B. CIVIL LAW COUNTRIES

While the common law focuses on the parties' intent regarding the contract in question, civil law focuses on the obligor's responsibility for the unforeseen event. In general, if the event preventing performance of the obligor's obligations happened without his fault or negligence, and he did not accept its risk in the bargain, his failure to perform is not a breach of the contract.

#### 1. French Law

French law exhibits a dual approach to *force majeure*. The Roman law focus an obligor's fault, outlined above as characteristic of civil law countries, is found in French private law relating to commercial contracts not involving the government. This is the French doctrine of *force majeure*.  

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French administrative law, which governs transactions with the government, relies on the principle *rebus sic stantibus*. This principle assumes into each contract an implied term that the continuation of each party's obligations is dependant upon the continued existence of certain important facts or circumstances. This is the French doctrine of *imprévision*.

(a) Force majeure

*Force majeure* under French commentary and case law has been construed strictly, often with harsh results for the obligor. This case law has been criticized for reflecting conceptions derived from texts in Roman Law that are ill-suited to present-day life, and that are neither in the historical tradition of French law nor imposed by the Civil Code. The characteristics of *force majeure* have been extrapolated by classical jurisprudential analysis from Articles 1147 and 1148 of the Civil Code, which provide the following:

Art. 1147: The obligor will be found liable for the payment of damages, either by reason of the inexecution of the obligation, or by reason of delay in the execution, at all times when he does not prove that the inexecution does not result from an outside cause which cannot be imputed to him, and further that there was no bad faith on his part.

Art. 1148: No damages arise when, as a result of *force majeure* or of a fortuitous event, the obligor was prevented from giving or doing that for which he had obligated himself, or did what was forbidden to him.

In its classical form, *force majeure* is a fact beyond the obligor's control, which may be a natural event, such as a hurricane, a flood, or an earthquake, or the act of a third-party, such as a strike, a war or a sovereign decree, which has made performance of the contract impossible, provided these facts were unforeseeable at the time of execution of the contract and could not be prevented during its performance.

However, attempts to define *force majeure* by providing examples have proved unsatisfactory because as the definition suggests:

No event constitutes, in and of itself, *force majeure*, whether it be action by the state, war, ice, storm, price increase, or flood. But any fact which cannot be imputed to a specific person or group can become *force majeure* if it shows certain characteristics. *Force majeure* is therefore better explained by defining these characteristics.

Classical jurisprudence has extracted three characteristics from Art. 1147 of the Civil Code, which provide relief from liability for the obligor, when non-performance arises from "an outside cause which cannot be imputed to [the obligor]." To relieve liability, the event must be (i) exterior, (ii) unforeseeable, and (iii) irresistible.

(i) Outside event

The event constituting *force majeure* must be an "outside" event: that is, it must occur outside the sphere for which the obligor is responsible.

(ii) Unforseeability

The event constituting *force majeure* must also be unforeseeable. This is stated unanimously in doctrinal sources. According to commentators and jurisprudence, the unforeseeability of an event is to be determined as of the time of the execution of the contract. In making this determination, all of the circumstances surrounding the event, including its time and place, must be considered. Thus, for example, a *fait du Prince* itself, often considered to be unforeseeable, can under certain circumstances be considered to have been foreseeable and thus provide no relief from liability.
The requirement of unforeseeability is primarily an objective test. However, the most recent treatises consider that while the determination of unforeseeability must take place in the abstract, an element of relativity is present:

It is not a question of foreseeing, but of foreseeability by a perspicacious and prudent man, namely, of what the obligor 'should have' foreseen\(^75\).

A recent analysis by Genevieve Viney elaborates:

If the courts were to refer themselves to an ideal and perfect type of man, they might occasionally acknowledge that an 'outside event' had imposed itself on the defendant in an unavoidable fashion. However, the courts would also never be in a position to determine unforeseeability, as most everything is foreseeable for an imaginative mind.

bon père de famille, as adapted to the defendant's activities and to their level of specialization\(^76\).

(iii) Irresistibility

Throughout French civil law doctrine, it is recognized that the characteristic of irresistibility constitutes the essential element in the notion of *force majeure*.

From the oldest classical works to the most modern doctrine, the following definitions are found:

Planiol: "The unavoidable character of the obstacle is manifested by the words 'force majeure'. It is a force superior to that of the obligor and which imposes itself on him ... If the obligor can, by his activity, divert such force or dominate it, then no *force majeure* exists."\(^77\)

Julliot de la Morandiere: "The primary condition is indeed that the obligor was prevented from performing; namely that the event raised an insurmountable obstacle to the performance of his obligation."\(^78\)

Chabas: "The irresistible event is that against which one cannot defend oneself even by foreseeing it, or which, when it occurs, leaves the obligor powerless."\(^79\)

Carbonnier: "Man encounters his master in the event which is stronger than him. It is that which is impossible, and which none can be obligated to perform."\(^80\)

H.L. Mazeaud: "If the defendant could foresee the event and thus avoid its consequences, or if he could resist the event, namely perform notwithstanding the event, then performance should be imputed to the defendant; it is not outside the defendant's possibilities: it remains his responsibility."\(^81\)

Le Tourneau: "If the event was insurmountable, it can be imputed to no one. This is the application of common sense: no one can be obliged to perform what is impossible. Man is faced with an event which dominates him and which he cannot master. He is fate's puppet."\(^82\)

As in the case of unforeseeability, the test of irresistibility is primarily an objective one: the obligor is compared to an abstract reasonable person. As Tunc notes, "[o]ne knows that the qualities in the philosophical sense of the word that the obligor shows can have a certain influence in the substance of the contractual obligation."\(^83\) To this extent, the analysis
permits some subjectivity.

Commentators have suggested ways to expand the limited scope of the force majeure doctrine and so mitigate its rigors. Some commentators have attempted to argue that the obligor should be released from liability even when faced with circumstances which do not present all the characteristics of force majeure. They have done this by attempting to distinguish between force majeure and fortuitous even through an analysis of Art. 1148. This analysis has been rejected by the majority of doctrinal sources and also by the jurisprudence of the Cour de Cassation, which does not distinguish between the two ideas. Another route to possible expansion of the doctrine lies in importing the notion of rebus sic stantibus, which recognizes that the parties would not have contracted the same way had they reasonably guessed how things would turn out. Commentators have noted the good faith provision in Art. 1134 of the Civil Code as reinforced by Art. 1135, which refers to equity and consideration, and they have argued that these illustrate the need to review a contract the consideration for which no longer provides a reasonable compensation for the performance. However "the French Cour de Cassation has remained adamant." For example, in contrast to German case law, French post World War I cases involving hyper-inflation had to be moderated through the legislature, rather than force majeure doctrine.

(iv) Remedies

Where force majeure is found, the obligor is not liable for damages. It is also well-settled that where an event of force majeure prevents performance of an obligation only partially, cancellation of the contract may be denied, and a proportional diminution in the obligee's performance may instead be allowed.

(b) Imprévision

The Conseil d'Etat and Administrative Courts have applied the law of force majeure more flexibly to administrative contracts. Administrative contracts encompass contracts concluded with a public corporation, most often for the purpose of carrying out a public service, such as public works contracts and public utility concessions.

The decisions of the Conseil d'Etat have provided that:

An "unforeseen contingency" may be defined as a situation in which the balance of a contract is upset as a result of an event of a general character, which is either political or most often economic, which is, in any case, independent of the intention of the parties, and which was unforeseeable an the signing of the contract, and which, without making performance by the administration's opposite contracting party impossible, makes the carrying out of his obligation intolerably onerous.

In such a situation, a judge will invite the parties to attempt to renegotiate the agreement, if necessary by fixing guidelines or giving new directives. If agreement is not reached, the judge will fix the indemnité d'imprévision, a monetary contribution by the administration, to restore the economic equilibrium. If the contingency becomes irreparable and cannot be treated as temporary, then the contract will be terminated as a case of economic force majeure.

The Conseil d'Etat originally justified these decisions as an attempt to preserve continuity of functioning of public utilities. However, commentators have argued that there is no longer a rationale for distinguishing between public and private contracts and that the basis for refusing to apply imprévision to private contracts is a political rather than a necessary one. They suggest that the doctrine of imprévision may provide a better solution for long-term international contracts than the present strict doctrine of force majeure.

2. German Law

The German law of contractual impossibility falls into two distinct branches. In both, impossibility arises when contractual performance is thwarted by obstacles or changed circumstances that threaten the basic contractual relationship (Schuldverhältnis), and neither the obligor nor obligee is responsible for these circumstances. The distinction between the two is based on whether performance has become subsequently impossible due to objective or subjective circumstances on one hand, or the "bases of the contract" (Grundlage des Vertrages) have been shattered on the other. The German doctrine of "impossibility" approximately corresponds to the doctrine of force majeure in French law, and the collapse of the bases of the contract broadly corresponds to imprévision or hardship.
(a) Impossibility

Section 275 of the BGB governs this area. Entitled "nicht zu vertretende Unmöglichkeit" (impossibility due to an event for which the obligor is not responsible), this provision states:

The obligor becomes free of the duty to perform to the extent that the performance becomes impossible after the obligation arose as a result of a circumstance for which he is not responsible.

An inability of the obligor to perform, intervening after the obligation arose, is equivalent to impossibility.

In general, German law approaches questions relating to impossibility by reference to categories or types of performance which have become impossible: subjective, objective, economic, relating to performance of goods in kind (Gattungsschuld), rather than grouping types of disturbances or events which lead to such impossibility.

(i) Objective Impossibility

The German concept of factual or objective impossibility is closest to French force majeure. In contrast to the concept of the collapse of the bases of contract (Wegfall der Geschäftsgrundlage, hereinafter GG), which is only loosely based on a code provision, objective impossibility is governed closely by the BGB and is less a product of judicial construction or case law. Objective impossibility is subdivided into several branches: (1) physical (or factual) impossibility, where the thing to be delivered has been destroyed or can no longer physically be produced, e.g., when a painting to be sold has burned; (2) impossibility due to impediments of law (Rechtshindernisse), where a change of law or some part of the legal framework prohibits an act, e.g., a prohibition against the export of works of art; (3) practical impossibility notwithstanding theoretical or abstract possibility, e.g., when a ring contracted to be sold has been cast into the ocean, making performance impossible as a practical matter; and (4) impossibility of accomplishing "true performance," i.e., where performance, while possible, would no longer accomplish the intended ends of the contract.

The circumstances in which objective impossibility is recognized are, like the circumstances for which force majeure is recognized in France, rather limited. For example, unless performance is permanently, rather than temporarily, impossible, the obligor is still bound to perform, unless a special fixed-time contract (Fix-Geschäfte) is involved.

As in French law, German law focuses on the responsibility of the obligor. The BGB heading for this provision in the code "impossibility due to an event for which the obligor is not responsible" indicates this. If the obligor is directly responsible for the impossibility, he is liable for damages under BGB 280. The question of whether or not he is directly responsible is treated as one of fault (Verschulden). For example, if the obligor directly creates the situation which brought about the impossibility, he is considered to be at fault and is liable for damages. Similarly, the obligor may be indirectly responsible if he specifically considered the obstacles when he negotiated and drew up the contract.

The legal consequence of objective impossibility (Unvermögen) is elimination of the duty of the obligor to perform. According to Larenz, "the obligor, whose performance ... later becomes impossible ... due to circumstances for which he is not responsible, becomes free from his duty to perform under BGB 275." A contractual relationship is not entirely dissolved by impossibility, but any specific contractual duty to perform is dissolved: "Any survival of the duty to perform, which has become impossible to fulfill, would be an empty formality; such a duty to perform has lost its sense.

(ii) Economic Impossibility

Some German jurists have recognized a branch of objective impossibility that they call "economic impossibility." Economic impossibility was a product of the era after World War I when severe and unprecedented economic changes...
brought first hyperinflation and then depression to Germany. This concept encompasses changes in economic climate and severely unsettling economic events as “objective” or “factual” causes of impossibility an the basis of which the obligor may seek relief from an obligation\textsuperscript{99}. According to this doctrine, circumstances imposing contractual obligations an the obligor above and beyond the “bounds of sacrifice” (\textit{Opfergrenze}) entitle him to step away from his contractual obligations. The supporters of this view agree that the events leading to the “bounds of sacrifice” on the part of the obligor must be “extraordinary” in nature and must result from general unusual or catastrophic economic changes that have occurred since the formation of the contract. However, this doctrine has been widely and severely criticized as resting an vague criteria such as the “extraordinary” (\textit{aussergewöhnliche}) nature of obligations and the determination of what performances will be beyond the “bounds of sacrifice” (\textit{Opfergrenze})\textsuperscript{100}. According to Larenz, such amorphous concepts give “no usable legal yardstick for deciding the numerous cases in which business conditions bring the obligor into circumstances resulting in severe losses.”\textsuperscript{101} The concept of “economic impossibility” is now generally treated as an anachronism and has been supplanted by another product of the post World War I era, the doctrine of the “economic bases of contract” (GG)\textsuperscript{102}. This provides for adjustment of the contract and is considered a more economically just solution\textsuperscript{103}.

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### (iii) Subjective Impossibility (Unvermögen)

Subjective impossibility occurs when performance can be rendered by someone, but not by the obligor himself. Under BGB 275, subsequent subjective impossibility has the same legal consequences as subsequent objective impossibility. Like objective impossibility, subjective impossibility can rest an either factual or legal grounds. For example, “factual subjective impossibility” occurs when an obligor has contracted to work for two people at the same time and performance is therefore physically impossible. “Legal impossibility” occurs, for example, when the seller contracts to sell something that does not belong to him, without the permission of the real owner and therefore cannot perform without breaking the law\textsuperscript{104}. In general, subjective impossibility plays a fairly small role in German contract law, because it is rare that all the technical prerequisites necessary for its application especially lack of fault are satisfied.

### (iv) Impossibility in Relation to the Supply of Generic Products or Products in Kind (Gattungsschuld)

Performance is not excused as impossible under German law if the obligor can still fulfill his obligation by supplying generic goods that are functionally identical to the specific goods for which delivery has become impossible. BGB 279 states:

> If the promised article is designated only as to kind [or genre], the obligor, as long as performance is possible from articles of that kind, is still responsible for his incapacity to perform, even if fault cannot be imputed to him.

Thus, where an obligor has contracted to deliver goods that have been destroyed, such as a particular cargo of grain, he still must deliver the goods. German law holds to the principle that “everyone is responsible for seeing that he is able to pay or perform under a contract,”\textsuperscript{106} even if the obligor can no longer afford to buy substitute goods.

However, 275, rather than 279, again comes into play when performance in kind is objectively impossible, such as when the goods are no longer marketed, or when government confiscation, export or import restrictions or general shortages severely affect the ability to perform. Thus, the obligor is free from the duty to perform where he is not personally responsible for the intervening circumstances and they are not part of the risks which he has consciously undertaken.

### (b) The Doctrine of the Collapse of Objective Bases of Contract (Wegfall der Geschäftsgrundlage)

German treatment of the collapse of the economic bases of the contract is a response to the same concerns that prompt exoneration by reason of \textit{force majeure}. After World War I, the impositions of the Versailles Treaty, overwhelming debt obligations, hyperinflation and economic depression caused Germany severe economic hardship verging an total economic collapse. In the face of such unprecedented disasters, German courts were faced with contracts that could not reasonably be performed, because the stated terms or obligations of such contracts had become meaningless. The doctrine of the “collapse of the bases of the contract” was the result. This doctrine allowed courts to “adjust” contractual terms to new circumstances to reflect as fairly as possible the original contractual meaning, a result that seemed
preferable to discharging all obligors an the ground of force majeure.

In more general terms, the concept of the collapse of the bases of contract was founded an the idea that certain crucial matters of wide application to the contract are usually not embodied within the four corners of the contract. The parties negotiating a contract usually do not question that certain legal norms or economic conditions prevailing at the time of the contract will continue to prevail. However, when the economic or legal order undergoes a completely unforeseen change that erodes the “objective” economic bases of the contract, performance may become extremely burdensome. Under these changed circumstances, German law may be unwilling to exact performance from the obligor because to do so would offend against good faith Treu und Glauben. This development in German law took place under the rubric of BGB 242, the general, openended good faith provision of the German code which states: “(t)he obligor is bound to carry out his performance in the manner required by good faith with due regard to prevailing usage.” The drafters of the German Code consciously rejected the proposal of some jurists to include an explicit clause concerning GG like the medieval notion of clausula rebus sic stantibus. As a result, it was necessary for GG to come into German law more obliquely, as an interpretation of BGB 242.

Although developed as a response to the hyperinflation crisis of the 1920’s, because of the doctrine’s flexibility and its ability to adjust contractual terms to new, changed circumstances (Anpassung), German judges have continued to use BGB 242 even though the circumstances at issue have not been as severe as those of the 1920’s and 1930’s.

Theorists, who have great influence an the practical application of German law, differ in their interpretations of the types and extent of GG. One important approach is that of Karl Larenz, a leading German contracts scholar. Larenz has analyzed GG as related to the “objective bases of contract” and has set forth two sub-categories of types of disturbance to contractual stability: (i) disturbance to the equilibrium or equivalency of a contract (Äquivalenzstörung) where the remedy is "adjustment" of the contract terms, and dissolution of the contract results only if fair adjustment becomes impossible to accomplish, and (ii) frustration of purpose (Zweckvereitelung) where the remedy is dissolution of the contract. For all types of objective GG, certain preliminary requirements must be met: (a) the party must not be responsible for the events that led to the disturbance; (b) the risk must be one that the party did not specifically assume as part of his assumption of risk; and (c) the extent of the disturbance to the contract must be great, not merely temporary or insubstantial.

(i) Disturbance to Equilibrium of the Contract (Äquivalenzstörung)

In addition to the preliminary requirements for GG, events relied an must have been ones which the parties did not foresee, which are not normally calculated as part of the risks of ordinary business but are so extensive that they produce "gross disproportion" between performance and counter-performance. A disproportion is "gross" when it is so great "that a reasonable judge could no longer evaluate the performance of one party as the rightful consideration (or equivalent) of the other." The notion of disturbance to equilibrium assumes that there is balance in a contract between performance and counter-performance, somewhat akin to consideration. This is part of the notion of fairness, good faith and reasonableness in contractual obligations.

According to Larenz, when a "gross disproportion" results from a sudden event or change in circumstance, the contract loses its "sense" and equilibrium. Such a "gross disproportion" may be the result of depreciation of the currency or changes in the law or political system. Long term contracts (Dauerschuldverhältnis) are particularly risky in this regard and give rise to GG when severe fluctuations in price, fees, costs, or changes in market conditions profoundly affect performance.

The legal consequence of application of GG to disturbance of the equilibrium is adjustment of the performance to bring the consideration in line with counter-performance.

(ii) Frustration of Purpose (Zweckvereitelung)

Frustration of purpose occurs when the fundamental purpose of the contract for the parties concerned has become permanently unachievable. This may happen, for example, in labor law when a contract for hire is no longer fruitful or sensible for both the employer and the employee because of changed circumstances. As in the case of disturbance to the
equilibrium of the contract, such events must be extraordinary in nature, such as a general economic collapse, a lost war or an invasion (i.e., force majeure in the French mode), rather than everyday business occurrences. The commentaries to the German Code show few examples of frustration of purpose. Most of the cases used as examples for the application of GG are from the category of disturbance to contractual equilibrium.

Frustration of contractual purpose leads to the dissolution of the contract, not to its adjustment.

(iii) Application of the Doctrines

Certain characteristic types of cases have arisen within the category of disturbance to contractual equilibrium. Although German law commentators usually are less concerned with categorizing such cases under types of v n than with the effects produced by these events, the characteristic situations summarized below are significant because they give some notion of the range of the application of the doctrine. They are not "precedents" in the Anglo-American sense of the word.

- Depreciation of Currency. This is the clearest example of disturbance to contractual equilibrium, because depreciation tangibly destroys the parties' negotiated measurement or yardstick. No bright-line absolute standard has evolved in this area, but it is clear that the judge has great leeway in adjusting the price to conform to new currency values. The judge is less inclined to make such adjustments if the business is speculative.

- Changes in Law and Interventions from Higher Authority. When acts of higher authority affect the worth of performance or counter-performance, this may lead to collapse of GG, because such events are usually unforeseeable and are not part of normal business risks.

- Changes in Economic Laws. When franchises are sold by the government and the terms of those franchises are changed, GG principles may be used to assist the purchasers of such franchises.

- Changes in Value of Goods Due to Economic Developments. In general, each party bears the risk of economic change. However, an unforeseeable change that produces great effects, such as dramatic increases in price, may lead to application of GG. This is particularly true when a great disturbance to contractual equilibrium produces unusually significant consequences. For example, if a complete or very extensive loss of value of performance results from a general economic or political event and the event producing the loss is extraordinary, GG principles will apply.

In one case, for example, shortly after a manufacturer delivered five expensive, difficult-to-seil tools to a dealer under a resale contract, it came out with new models that made sale of the old models virtually impossible. Under these circumstances, the dealer was permitted to dissolve the resale contract.

In general, higher costs are usually part of the risk borne by a party, even if that party failed to calculate the costs correctly. In certain circumstances, for example, where there is a contract with a fixed price and external changes produce higher costs with catastrophic consequences, there is room (according to the application of the principle of good faith and reasonableness) for adjustment. Such cases are very rare.

(iv) Oil Cases

One area where German practice does not apply GG is in energy supply contracts. During the oil crisis in the mid-1970's, when obligors had undertaken long-term heating contracts, German courts held that the obligors were bound by the strict terms of those contracts. The risk of those higher fuel prices was borne by the obligor, since such risks were familiar to such suppliers. Such judicial insistence an fulfillment of a contract, even when it has become onerous, shows that Germans are still normally obedient to the principle of "loyalty (or fidelity) to contract" (Vertragstreue).

3. Swiss Law

The Swiss concept most closely related to the force majeure defense is the concept of impossibility of performance. The Swiss Code des Obligations ("Code" or "C.O.") contains numerous provisions concerning excuse for non-performance of a contract, and these have been further developed by legal doctrine and court decisions.
The concept of impossibility appears where performance was impossible at the time the contract was formed (initial impossibility) and also where the contract became impossible to perform after it had been formed (subsequent impossibility). It is the latter events that may give rise to force majeure.

(a) Impossibility

(i) Liability

The basic Swiss Code provision regarding impossibility is Article 97(1):

When the promisee cannot obtain performance of the contract, or can only obtain partial performance, the promisor is bound to compensate [the promisee] for any resulting damages, unless [the promisor] demonstrates that no fault may be imputed to him.

Article 119 of the Code also contains a provision concerning impossibility, which provides:

An obligation is discharged to the extent of its performance becoming impossible by circumstances for which the debtor cannot be made responsible.

However, an obligor excused from performance under this article must return all unearned payments made to him by the promisee, in order to avoid unjust enrichment, unless applicable laws or contract provisions require him to assume the risks of non-performance.

To be excused from non-performance under either provision, performance must be objectively impossible, and the obligor must not be responsible for the circumstances rendering performance impossible.

Performance is objectively impossible when no one can render it. The fact that a third party could theoretically still perform remains irrelevant when the third party cannot be determined or reached. Therefore, delivery of stolen, irreplaceable goods is considered as being objectively impossible, although in theory, the thief could still deliver.

Objective impossibility also encompasses (1) performance which by the terms of the contract is personal to the obligor, when such person becomes incapacitated: (2) performance that is so severely impractical that "no reasonable person would ever consider to attempt to tender such performance;" (3) situations where the objectives of the contract have been fulfilled before the obligor had a chance to perform (e.g., where the illness is cured before the physician arrives); or (4) where the objectives of the contract become obsolete prior to performance (e.g., where the patient dies prior to arrival of the physician).

As in German law, generic performance (delivery of goods in kind) is not considered as being objectively impossible so long as goods of the same kind are still available from another source.

Performance must be permanently impossible unless construction of the contract shows that the parties' original intention was that temporary impossibility should have the same effect as permanent impossibility.

For the obligor to be excused, he must not be responsible for the circumstances that rendered performance impossible. The term "responsible" must be understood in a broad sense. If an obligor makes a risky promise that he knows he may not be able to fulfill, he will be at fault if he cannot perform.

Even if the obligor is not at fault, he must not be responsible under a statutory or contractual provision. Under Article 101 of the Code, the obligor is responsible for the acts of any person whose assistance he seeks to perform the contract. Thus, if impossibility results from the acts of an employee of the obligor, the obligor is responsible for it and not excused under Article 97 or 119, although he is not at fault himself.

Moreover, if the obligor is in default and performance becomes impossible without his fault, he will not be successful with
a *force majeure* defense unless he proves that he was not at fault for falling into default, or that performance would have been impossible even if he had performed in time.\(^{135}\)

**(ii) Remedies**

If a performance is deemed to be objectively impossible and the obligor is not responsible for the impossibility, the contract is discharged. Both the obligor and the obligee are excused from performing and are not liable for any damages. If consideration has already been given, the obligor must return it to the extent required by the rules regarding unjust enrichment.\(^{136}\) The obligor may, however, keep the consideration if by the terms of the agreement, or pursuant to statutory provisions, the obligee bears the risk of the transaction.\(^{137}\)

In cases where impossibility arises after partial performance by the obligor, a court will not rescind the executed portion of the contract if partial performance appears acceptable from the obligee's point of view and if it can be reasonably assumed that the parties would have entered into the partial agreement had they known that full performance would not be possible.\(^{138}\)

If the obligor is compensated by a third party for the loss caused by impossibility (such as insurance), he must offer such compensation to the obligee. The obligee may choose to accept it, in which case he must give full consideration.

**(b) Hardship or Economic Impossibility**

In the duration of a long-term contract, if the surrounding circumstances change in a manner that renders performance excessively burdensome, but not impossible, relief may be granted. This concept is based on Article 2 of the Swiss Civil Code (“CC”), which requires each subject to act in good faith and which prohibits the exercise of individual rights in an clearly abusive manner.\(^{139}\)

Early legal developments treated such instances under the doctrine of the *clausula rebus sic stantibus*, rejected in German law but similar to the related German concept of the collapse of objective bases of contract.

If the surrounding circumstances of a contract change so as to render performance extremely burdensome, a court will adjust the terms of the contract provided that (i) the change took place after the contract became effective, (ii) the change was unforeseeable and beyond the obligor’s control, and (iii) the obligor did not assume the risk of the change and is in no way at fault. Performance in the new circumstances must be so burdensome that no reasonable person would expect a party to perform in the manner provided by the original agreement. This applies if unforeseeable circumstances require the obligor to take such excessive efforts in performance that the increased burden of performance can no longer be viewed as being covered by the contractual promise and the relation of value between performance and consideration has become entirely unreasonable and grossly disproportionate. Insisting on performance in such circumstances is considered as violating good faith principles set forth in Article 2 CO.

As in "collapse of the bases" in German law, in cases of hardship judges can adjust the terms of the contract. If the situation cannot be remedied by mere adjustment of the contract's terms, the court will terminate the agreement.

Nevertheless, parties entering long-term agreements must take into account that circumstances might change during the term of their agreement. If the agreement does not provide for mechanisms dealing with such changes, the contract will generally be enforced in accordance with its original terms, unless both parties at the time of entering into the contract clearly and evidently assumed that the surrounding circumstances would not change.

4. **Italian Law**

Both in cases of (a) supervening impossibility (*impossibilità sopravvenuta*) and (b) severe hardship (*ecceiva onerosità*), a party may petition for the remedy of dissolution (*risoluzione*).

**(a) Supervening Impossibility**
(i) Liability

The topic of supervening impossibility is first addressed in the opening, general section of Book IV of the Civil Code, *De Obligazioni*, and taken up again in the second title, *De contratti in genere*. According to Article 1256 in the general section, "an obligation is extinguished when it becomes impossible to perform for reasons which cannot be charged to the debtor." If the object that is the subject matter of performance disappears, it creates legal impossibility even when the destruction of the object cannot be definitely established. It is standard doctrine among Italian legal scholars that impossibility must be absolute and not relative. The requirement of "absolute impossibility" has been interpreted through a balancing of interests between the performance of the specific contract and potential harm to the public economy (conseguenze notevolmente pregiudizievoli) if performed. For instance, an employer may be able to plead the defense of impossibility during the time of a strike if his efforts to hire new workers could lead to sabotage or other forms of labor unrest.

The Italian Code allows for partial as well as total impossibility; the party whose performance is due may win release from his or her obligation only by performing the obligation that is still possible, and the other party has a right to a corresponding reduction of his or her performance and may exercise the right of withdrawal (recesso) if he is no longer interested in the performance.

(ii) Remedies

Under Italian contract law, there are several remedies in the event of supervening impossibility: nullity (nullità), annulment (annulamento), recision (recissione), and dissolution (risoluzione). In the language of Italian legal scholarship, the remedy of risoluzione is "constitutive": the remedy is not self-operative, and a judicial determination is required, in the absence of contractual provisions to the contrary, for the party seeking release to cease performance without prejudice. The release of the obligor, according to Mosco, is an automatic result (un effetto riflessivo) of the extinction of the performance that has become impossible. Doctrinal subtlety aside, either party to a contract may bring an action for dissolution to eliminate uncertainty about their respective responsibilities. In such an action, the creditor or person to whom the performance is due may secure his right to restitution for the extent of his own performance.

(b) Severe Hardship (eccessiva onerosità)

(i) Liability

For bilateral contracts (contratti a prestazioni corrispettive) that require periodic or continuous performance, Article 1467 of the Italian Code provides a remedy of dissolution in cases of severe hardship (eccessiva onerosità). The party claiming that it would suffer a severe hardship can win dissolution only if the hardship results from extraordinary and unforeseeable circumstances and the intervening hardship is not part of the normal risk (alea normale) of the contract. Article 1467 of the Code incorporates the provisions of Article 1468: a party may petition for discharge from unfulfilled obligations, not from performance already rendered. Finally, the party against whom risoluzione is requested may arrest the action by offering to equitably modify the contractual conditions.

The inclusion of Article 1467 in the revised Code of 1942 introduced a major source of tension with the settled doctrines of contractual certainty and pacta sunt servanda. According to Rescigno (1979), the provision of relief in the case of severe hardship was a response to the experience of inflation after World War I. On the other hand, many scholars have argued that the 1865 Code already included an implicit principle of *rebus sic stantibus*.

Some commentators sought from the start to circumscribe closely the effect of Article 1467. They emphasized that while the provision for severe hardship incorporates considerations of equity in the application of the remedy of dissolution, Article 1467 does not authorize courts to release or revise contracts on the basis of equity itself once the existence of severe hardship is ascertained. They stressed that the aim was to correct imbalances that upset the initial exchange of values established by the contract, not to reform the initial balance of or proportion between the values themselves.

Although some scholars have continued to object to applying the rule of severe hardship according to the principle of...
contractual assumptions or presuppositions, the courts have been more liberal. It seems clear that relief for severe hardship is available under the principle of *rebus sic stantibus* so long as the changed conditions are of major import, substantially change the initial allocation of risk, and could not have been reasonably foreseen and provided for in the contract itself. For example, Italian courts took a more relaxed view of the requirement of unforeseeability in cases of severe hardship that arose from the inflation of prices after World War II. The Court of Cassation in 1948 declared unforeseeable - and thus sufficiently burdensome to discharge obligations - "not the increase in prices but rather their precipitous (vertiginosa) rise." The period of inflation after 1970 did not give rise to a great number of cases based on Article 1467 because it became a constant factor in financial calculations.

An Italian "oil case" further illustrates this concept. The case arose from the failure of an oil company to deliver petroleum products after the 1973 Arab oil embargo. The Tribunal of Milan found that price controls imposed by the Italian government caused a sufficiently significant shift of economic burden to excuse performance, while declining to find that the dramatic rise of prices resulting from the embargo amounted to a situation of impossibility. The court also found the contract void, because the supervening price controls constituted a *factum principis*, an act of government that made application of the price-adjustment mechanism illegal.

Although the court rejected the argument of impossibility based on the price rise itself, as this rise had not inhibited oil production and the contract contained a price adjustment clause, the court found the price controls to be proof of severe hardship excusing performance because their application effectively prohibited the price-adjustment mechanism from reestablishing the contractual balance.

In another "oil case," the Court of Cassation not only allowed relief for a rise in prices, under Article 1467, but also granted relief when the contractual mechanism for adjusting prices for market changes proved inadequate to cope with the drastic price changes after 1973.

This decision has been criticized by Roberto Pardolesi, an the grounds that a major increase in prices could lead to a new round of judicial dissolution of contracts: "[T]he tendency to close one's eyes to the predictability (of inflationary price rises) grows with the growth of the magnitude of such disturbances."

There has been considerable doctrinal discussion about the method by which a court should evaluate the alleged onerosità. Some would look to the added burden on the obligor alone. This so-called "subjective approach," looking to the economic sacrifice required for a given party to perform, has been criticized for opening the rule to cases of mere difficulty or relative impossibility of performance. Proponents of the so-called "objective approach" insist that the burden can be assessed only by comparing the relation between respective performances at the time when the contract was made.

Article 1467 requires that the hardship imposed an a party by the obligation to perform his or her contractual duties exceed the range of difficulty one might ordinarily risk by entering the contract. Not every change in the balance between contractual performance merits the remedy of *risoluzione*, but only those "that imply real difficulties in execution" (*Che importino reali difficoltà di esecuzione*). Both Turnaturi and Tartaglia insist that the inquiry about the nature of the risk encompasses not only the risk incurred by the specific contract in controversy but also the risk appropriate to that type of contract (Tartaglia) or the costs of production that are typical for the required performance (Turnaturi).

(ii) Remedies

The court's decision is constitutive, not merely declarative, in actions for *risoluzione* an account of severe hardship, but a court does not have a free hand in fashioning remedies and damages. The obligor has the responsibility to identify the bases for dissolution, and the obligee has the burden of harmonizing proposed modifications with the contract. The court's role is to rule on the suitability of the petitions, not to propose amendments an its own motion. The effect of a grant of *risoluzione* in the case of an extended or periodic contract - of special importance in case of non-performance for severe hardship - is not retroactive.

In contracts where only one party has undertaken an obligation to perform, that party may also request relief an the ground of the severe hardship of performance. The same requirements of unforeseeability and hardship beyond the normal risk of the contract for dissolution of bilateral contracts apply to contracts that require performance only of one
party. The remedy, however, has different contours. The party may require a change of the form or conditions of the contract that would make the contract fair (*per recondurla ad equità*), but may not obtain a complete discharge\(^{168}\).

The remedy of dissolution is unavailable under aleatory contracts such as insurance contracts, annuities, and stock agreements that are not based on a firm offer\(^{169}\).

**C. ISLAMIC LAW**

Islamic government is traditionally a theocracy, and Islamic principles underlie the systems of law in all Islamic countries. There are four sources of law that together make up the *Shari’a*.

Because law occupies a primordial position within the Islamic system, the rulers and the ruled are equal subjects under the law. The law does not express the will of the rulers; its rules are not established by legislative vote, and its effect does not turn on formal promulgation. If the common law can be considered "a law of judges," whose rules are established by judicial precedent, and if Roman-Germanic law is

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essentially "a law of legislators," established by legislative authority, Islamic law is a "law of jurists." The work of the jurists is the exercise of finding and formulating the law on the basis of original sources, the *Qur’an* and the practices of the prophet (*Sunna*), in accordance with a well-established methodology, whose tools include analogy (*qiyas*), consensus (*ijma*), consideration of the general interest (*maslaha*), and recourse to principles of equity (*ishtihan*). The specific rules of Islamic law are scattered throughout the numerous works of jurists whose authority is accepted and in numerous compilations of specific solutions formulated in response to often hypothetical questions, known under the general title of *fatawa*. The codifications published in the last century, certain of which are official (the Majallah of the Ottoman Empire) and others private, are only intended to facilitate the identification of particular rules of law; they do not create these rules.

This section will examine first specific *force majeure* provisions in the Egyptian Civil Code, as an example of specific code provisions. In 1948, Egypt modernized its civil law by promulgation of its Civil Code. This represented an amalgam of traditional *Shari’a* law drawn from the different schools and modern European code formulations. Its chief architect, al-Sanhouri, asserted that not one provision of the *Shari’a* which could reasonably have been incorporated within the Code had been omitted. All the Civil Codes that have since appeared in the Muslim countries of the Middle East have been modeled on this Egyptian legislation\(^{170}\).

Secondly, this section will examine the *Shari’a* as the more general basis for understanding *force majeure* concepts in Islamic law. Since 1949, a widespread movement for the revitalization of Islam or the reassertion of a particular Islamic identity has given the *Shari’a* an enhanced role as the law to be applied in the absence of a specific provision of the Codes. This inevitably entails a growing tendency to interpret the provisions of the Code itself against the background of traditional *Shari’a* doctrine.

**1. Egyptian Law**

Provisions in the Egyptian Civil Code specifically provide for *force majeure* situations. They provide an interesting comparison to civil law systems, for while they contain similar provisions to those in European codes, they should not be understood and interpreted by reference to foreign scholarship and case law, but must be understood and interpreted as integral parts of a homogenous and harmonious national legal system\(^{171}\).

Article 147 permits the terms of a contract to be changed, without the consent of both parties, where an unforeseen event occurs:

debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to a reasonable limit, the obligation that has become excessive. Any agreement to the contrary is void\(^{172}\).

The theory underlying this provision is based on sayings in the *Qur’an* and upon the *Hadith* (traditions of the Prophet). To suffice, the event must be unforeseeable, of a general nature, and impose an excessive burden.
(a) The requirement of unpredictability

To trigger relief, the supervening events must be unforeseeable. "In most contracts, the standard is that of the average man, taking account of general external circumstances as opposed to circumstances peculiar to the debtor." Thus, the event must only be "reasonably unforeseeable." A mere vague idea of the occurrence of an event in the future would not keep it from being reasonably unforeseeable.

Sanhouri concurs with this opinion and adds an important observation with regard to the point in time from which unforeseeability must be determined:

An event is not considered foreseeable simply because similar events occurred in the past. An event which has already occurred may nonetheless remain unforeseeable in the future if it is so rare that no particular reason exists to expect that it will occur [again]. With regard to contractual liability, unforeseeability is determined by reference to the time of the execution of the contract. If a certain event was unforeseeable at that time, the requirement is satisfied even if it becomes foreseeable after the execution of the contract and before its performance is required.

(b) The condition of a general nature

The event must not be specific to the obligor. "Unforeseeability can be distinguished from force majeure precisely because its consequences are overwhelming for a large number of people at the same time." This requirement has been explained the following way:

The event must be of a general nature. It is not enough that the exceptional event, as grave as it might be, affect only the debtor or a small number of people. The debtor could not for example invoke his sickness, the death of his son, or the burning down of his house to obtain a revision of the contract. On the other hand, it is not necessary that the event affect everyone. It suffices that the debtor feels the effects of an event that affects a large number of people. A fire that destroys a city or an entire neighborhood constitutes an exceptional event of a general nature. Likewise, an event which affects a whole category of merchants or industries.

(c) The requirement of impossibility of performance

However, Sanhouri adopted as a standard for impossibility of performance that of a "person who finds himself in the same position as the debtor." If it becomes impossible for such a person to perform, the requirement of impossibility is satisfied, even if another person in a different position could have performed. What matters is that impossibility of performance not be due to a failure or a defect peculiar to the obligor, but to a cause which cannot be attributed to him. The provision assumes absence of fault an the part of the obligor.

(d) The requirement of an excessive burden

It suffices that performance, in the new circumstances, threatens the obligor "with an exorbitant loss." This loss has been defined as that exceeding normal losses in the ordinary course of business. The loss is measured in the narrow context of the transaction that gave rise to the contract. It does not matter that the obligor has large resources which would allow him to bear the loss with no great pain. "The excessive burden of a debtor's obligation is judged in relation to the sole transaction that is the subject of the contract. If the obligor is menaced with a loss several times as large as an ordinary loss resulting from such a contract, the requirement of an excessive burden is met even if such a burden is not great in relation to the debtor's overall wealth." The evaluation of the loss is made under an objective standard and only takes account of the transaction that is the subject of the contract, without considering the subjective resources of the debtor ... . As a result, an objective evaluation of the burden of an exorbitant loss can be made even if its amount is negligible in relation to the resources and the wealth of the debtor.

(e) Remedies

In applying Article 147, the judge may amend the agreement by reducing the obligation of one party or temporarily suspending the requirement to perform the obligation.
The meaning of the original Arabic word "reduce," which figures in the French translation, covers much more than a quantitative reduction of the obligation.

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The final draft of the New Egyptian Code provided that the judge could 'reduce' to a reasonable extent an obligation which had become excessive. What was meant was not a quantitative reduction but a modification of the obligation to attenuate its burdensome character. This is why the Commission du Senat in charge of the new code decided to make the text more precise by substituting the terms 'return to a reasonable limit.' This dispelled any doubt as to the power of the judge; he could remedy the situation by suspending performance until the disappearance of the event which had arisen, just as he could quantitatively increase the corresponding obligation or quantitatively reduce the obligation which had become excessive. The judge will choose to suspend performance of the contract until the disappearance of the event which arose if this event is temporary and may soon disappear. 

Article 149 reads as follows:

When a contract of adhesion (where one party is required to accept without discussion a standard set of conditions drawn up by the other party) contains "leonine" conditions, the judge may modify these conditions in accordance with the principles of equity. Any agreement to the contrary is void.

Article 165 provides that in the case of breach of contract no damages are payable if the debtor can establish one of the circumstances listed:

In the absence of a provision of the law or an agreement to the contrary, a person is not liable to make reparation, if he proves that the injury resulted from a cause beyond his control such as unforeseen circumstances, force majeure, the fault of the victim or of a third party.

2. The Shari'a

In Islamic civil law, the binding force of a contractual promise is viewed with less sanctity than in the common law and civil law systems described above. As a religious system, Islamic law is concerned above all with questions of the individual conscience, with motive, aspiration, good conscience and good faith. In such a system, good faith requires that an obligee not take advantage of the misfortune that afflicts his obligor when events arise that neither party foresaw, because these events were not part of their bargain. To hold the obligor to performance in circumstances in which he had never visualized performance would be, in the Muslim view, unconscionable and inequitable.

Many authors have drawn a parallel between the dictum pacta sunt servanda and the Islamic maxim deriving from the words of the Prophet Mohammed himself: "al-Muslimun ala shuruthim" ("Muslims must honor their agreements"). It was extremely popular to equate the two in the immediate post-war period, when comity between the Muslim Middle East and the West was the goal. The equation appears, however, to be a false one. The Roman phrase is the bulwark of a business-oriented scheme of sacrosanct contract law; the Arabic phrase means broadly that good faith requires the fulfillment of obligations where no serious change in circumstances affects the desire or ability of the obligor to perform as he intended. In short, Islamic contractual philosophy centers upon the doctrine of personal expectations. The promise is dominated by the circumstances: man's late and the vicissitudes of life lie in the hand of Allah, the Al mighty. This stands in distinction to those Western systems that insist that the circumstances are dominated by the promise.

Compared with most modern codifications, the Shari'a adopts a much more liberal attitude toward events that affect the performance of contractual obligations. The cardinal principle in this area is set forth by the Majalla in its Article 17, which provides: "difficulty [for example, in the performance of contractual obligations] brings about alleviation (of the debtor's burden)." The Majalla contains a number of specific provisions that give effect to this general principle. It should be noted that the Majalla remained in force as the civil code until 1948 in Palestine, until 1951 in Iraq, until 1976 in Jordan, and until 1980 in Kuwait.
Moslem jurists have elaborated a "doctrine of excuses," according to which a party's performance of contractual obligations could no longer be required if circumstances have changed in a radical way. Ibn 'Abidin expresses this doctrine in the following way: "Each event which intervenes (literally 'excuses') and which makes the performance of a contractual obligation impracticable without harming the debtor in his person or in his pecuniary interests, justifies a request for rescission by the debtor."184 Al-Kasani furnishes additional explanations; when he writes: "If the binding force of the contract was maintained in the face of an excuse, the debtor would suffer a harm which he had not agreed to suffer under the contract. In such a case, rescission would reflect the debtor's justified refusal to suffer such a harm."185 Later, the jurist gives the example of a lessor who must sell his building unencumbered by a lease in order to pay his debts and avoid being incarcerated in the prison reserved for defaulting debtors186. Rescission of the lease is then justified, because maintaining it in force in the new circumstances would expose the lessor to a risk which he had not assumed when he signed the lease. Likewise, rescission of a commercial lease before its expiration is permitted if the lessee changes profession. A residential lease can be rescinded if the lessee must leave town before the expiration of the lease. The tenant of premises which are used as public baths is no longer required to pay rent when, for any reason, the inhabitants of the town in which the public baths are situated leave it en masse to settle elsewhere187.

The malekite jurists recognized the effect of unforeseeable events on the sale of a future crop, whether such events were due to natural forces or to man-made forces, under the sole condition that such events were irresistible188. The malekite alMawwaq explains that the actions and the orders of a government, such as an administrative order closing shops in a specific neighborhood, constitute unforeseeable events that relieve the contracting party of the effects of non-performance of its obligations189. Thus, the Shari'a contains a broad notion of relief for the obligor which expansively informs modern codes such as the Egyptian Civil Code.

Similarly, the remedies provided by these modern codes, such as rescission, modification and suspension, are in accord with the spirit of the Shari'a in its concern for the plight of a contracting party overwhelmed by circumstances that were unforeseeable when the contract was executed.

II. INTERNATIONAL CONVENTIONS AND UNIFORM LAWS

Because international conventions and uniform laws reflect the common understanding of the international business community, they are a source of lex mercatoria.

A. VIENNA CONVENTION ON THE LAW OF TREATIES (1969)

The Vienna Convention an the Law of Treaties, promulgated in 1969 and which entered into force in 1980, governs the relationship between states an a political level190. However, several articles of the convention provide a principle for treaty obligations capable of application to private contracts. Art. 26 states: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith." Art. 61 provides for supervening impossibility of performance, and Art. 62 for a fundamental change in circumstances.

Several arbitral decisions have cited the principle pacta sunt servanda as a basic principle of international law, often using the Vienna Convention for support191. An interesting example of its application to a force majeure situation occurred in the Iran - United States Claims Tribunal decision of Questech, Inc. v. Ministry of National Defence of the Islamic Republic of Iran192.

This case is one of several involving military contracts entered into by Iran with U.S. companies in the mid-1970s193. In the disputed contract, the claimant U.S. company was to provide equipment and training to the Iranian Air Force. The claimant provided these services until February 10, 1979, when, due to the Iranian Revolution, it had to suspend operations and withdraw its personnel from Iran. Both parties alleged breach of contract.

The Tribunal decided that "for a certain period around 10 February 1979 [each party was] excused from its respective obligations by the existence of force majeure conditions preventing its performance."194 The Tribunal then rejected the Respondent's claim that force majeure conditions continued for several months, but concluded that "the Iranian
Government made a deliberate policy decision not to continue with American contractors in a project that related to secret military intelligence operations. ¹⁹⁵

However, in a unique analysis the Tribunal decided that the Respondent had terminated the contract on grounds of "change of circumstances." The Tribunal, noting that the military sensitivity and the political considerations involved were very significant, stated:

> If, during the performance of a contract like the present one, these circumstances undergo fundamental changes which the parties had not foreseen, then a consequence may be that a contract party is not barred from opting for a termination of the contract in such a situation. ¹⁹⁶

The Tribunal identified this concept as one of *clausula rebus sic stantibus*, as expressed in Art. 62 of the Vienna Convention on the Law of Treaties of 1969. Interestingly, the Tribunal commented that "in view of wider and narrower formulations of the *clausula* in different legal systems and of certain differences in its practical application, it would not be easy to establish a common core of such a General principle of law."

In the unique situation of the Iran-U.S. Claims Tribunal, however, the Tribunal held that "the consideration of changed circumstances in the present context [was] warranted by the express wording of Article V of the Claims Settlement Declaration." ¹⁹⁷ This provision mandated the Tribunal to "take[ ] into account relevant usages of trade, contract provisions and changed circumstances". ¹⁹⁸ The Tribunal held that "fundamental changes in the political conditions as a consequence of the Revolution in Iran, the different attitude of the new government and the new foreign policy especially towards the United States ..., the drastically changed significance of highly sensitive military contracts as the present one, ... brought about such a change of circumstances as to give the Respondent a right to terminate the contract." ¹⁹⁹ The Respondent was held liable for reimbursement for Claimant's costs, but not for future profits.

Howard Holtzman, the American arbitrator, dissented from this analysis, as he argued that "[a]ll systems of law that recognize changed circumstances as an excuse

to contractual Performance require that the changed circumstances shall not have been caused by the Party who invokes them." ²⁰⁰ The policy conditions cited by the Tribunal could not be regarded as external to the Respondent and could not therefore justify the doctrine's invocation. However, Holtzman reached the same result through Interpretation of another of the contract's provisions ²⁰¹.

### B. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE SALE OF GOODS

Many of the same Pressures that have fueled the *lex mercatoria* debate have also led to attempts to harmonize and even unify international commercial law. ²⁰² The United Nations Convention on Contracts for the International Sale of Goods (the "Vienna Convention"), drafted in 1980 and effective in 1986, is a major product of these attempts. ²⁰³

This convention was the product of negotiations throughout the 1970's under the supervision of the United Nations Commission on the International Trade Law ("UNCITRAL"). Thirty-six member states of UNCITRAL participated in the annual meetings concerning the Convention and unanimously approved the draft convention. In 1980, the Plenipotentiary Conference of 62 states unanimously approved the final text of the Convention.

The Convention addresses *force majeure* in Art. 79:

> A Party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

This Provision was a compromise between the civil law doctrine, which bases impossibility an the lack of fault of the obligor and bars an award of damages, and the common law approach, which views impossibility as an exception from absolute liability and therefore terminates the contract.

Like the 1969 Uniform Law on the International Sale of Goods ("ULIS"), the CISG in general, and its *force majeure*
Provision in particular, have been widely criticized as linguistic compromises lacking in substance\(^{204}\). As the comparative law analysis in Section I showed, the common, civil, and Islamic law approaches for *force majeure* are quite distinct, reflecting different starting points and assumptions. It has been suggested that "the outcome of a dispute governed by this CISG Provision may ultimately turn on whether a court chooses to emphasize the common law or civil law" view, or that of the other legal systems throughout the world\(^{205}\). The provision's malleability may undercut its ability to guide the international business person. Nevertheless, its existence demonstrates the universally held view that in certain circumstances, at least, a *force majeure* event should excuse an obligor from performance.

III. ARBITRAL AWARDS

Like the decisions of mercantile courts of old\(^{206}\), the decisions of arbitral tribunals could be a valuable source of the law of the merchant. However, arbitral awards are often not published, and indeed secrecy is often cited as an advantage of arbitration as the choice of dispute resolution\(^{207}\). Furthermore, of the cases reported, it has been noted that they "display a multitude of approaches, which offer the arbitrator useful guidance but do not provide him with the firm hand of settled case law."\(^{208}\)

The general trend in ICC arbitrations has been to interpret excuse doctrines strictly and to accept a plea of *force majeure* or of *rebus sic stantibus* only reluctantly. These awards reflect the general requirements, described above, of (i) impossibility and (ii) foreseeability. In addition, two further factors come into play: the presumption of competence an the part of "international traders" and the primacy given to the intent of the parties as expressed in the contract.

A. IMPOSSIBILITY

This requirement is interpreted strictly: impossibility must be final and absolute. In Award No. 1782 of 1973, a German company performed only half of its obligations and invoked the fact that its agents, who were Jewish, had been refused their visas by the Yugoslavian authorities. The German company claimed that this refusal constituted a *force majeure* event. The arbitrators disagreed, as they held:

a subjective impossibility for a person to perform its obligations does not excuse this person if its obligation could have been performed by an agent. This is even more true for contracts concluded by a company. The claimant has not given evidence of a real impossibility to have a neutral agent fulfill its contractual obligations.\(^{209}\)

In Award No. 3740 (unpublished)\(^{210}\), an Indian defendant failed to deliver the goods contracted for. He asked for relief by virtue of a *force majeure* clause, an the grounds that the government of India had requested him to meet domestic requirements in priority to export commitments. A sole arbitrator denied his claim, taking the strict view that the defendant had relied only an a confidential person-to-person letter from the Under Secretary of a ministry, and there was no official sanction for failing to respond.

B. FORESEEABILITY

In Award No. 2142 of 1974, subsequent to the nationalization of raw materials in a developing country, former owners threatened with attachment all products sold by the state enterprise. Prospective purchasers of these products refused to take delivery arguing that the circumstances constituted *force majeure*. Relief was denied because the contracts between the state enterprise and purchasers had been entered into faster nationalization took place, and so the element of unforeseeability was lacking\(^{211}\).

C. PRESUMPTION OF COMPETENCY AND PRIMACY OF THE CONTRACT

The presumption of the parties' competence, together with the primacy given to the contract, limit further the scope of the *force majeure* excuse doctrine. In Award No. 2708 of 1976, arbitrators stressed the fact that the parties had had the
possibility to include in the contract a force majeure or a "hardship" clause. Since they refrained from doing so, the arbitrators concluded that the contractual clause had a binding force, disregarding the evolution of the economic circumstances claimed as force majeure.

In Award No. 2546 (unpublished)\textsuperscript{212}, an Israeli buyer evoked force majeure to excuse failure to deliver raw material, an the grounds that due to the Yom Kippur War he had kept the plant closed until March 1974, that transportation facilities were in disarray, and that market prices had gone dramatically up meaning that the defendant would be "selling the product at one third of its production cost ... ."\textsuperscript{213} The sole arbitrator, sitting in England under English law, rejected the defenses noting that "there is little room for the doctrine of frustration in cases where there is an elaborate force majeure clause."

ICC "oil cases" have generally held that price fluctuations are not force majeure\textsuperscript{214}. The underlying reason for this may be the assumption made explicit in Award No. 3952 of 1982 (unpublished)\textsuperscript{215} where the arbitrators, after having declared that delivery of such a generic product as crude oil was never impossible, decided

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that non-performance of delivery by a third supplier could only be force majeure if expressly stipulated in the contract.

Analysis of these ICC decisions has led commentator Werner Melis to conclude that "ICC arbitrators apply at least the same restrictive criteria for admission of force majeure or hardship as do Courts in the country whose law they apply."\textsuperscript{216}

However, there is evidence that arbitral tribunals on Occasion apply the force majeure doctrine less narrowly than the domestic Courts of the State whose law they are applying, given the international nature of the contract. In the previously discussed decision in Award No. 2546\textsuperscript{217}, the arbitrator although rejecting the argument that a rise in prices was a force majeure event based his decision on the specific facts of the case and paused to note that, "[n]o doubt it is possible that a contract may be frustrated through becoming more costly to perform." In a recent international arbitration, applying New York law, a liberal view of the doctrine of frustration of purpose was taken. The claimant had entered into a long-term contract for the supply of uranium to a nuclear Power plant which although planned, was not constructed by the time the contract was concluded. The sole purpose of the formation of the claimant company was the construction and Operation of the Power plant. The pricing provisions of the contract were based on the market prices in force in 1976, the date of the contract's conclusion. The Parties subsequently learned that the Power plant's construction would be delayed beyond the end of the contract term because a necessary license was not available. In addition, the market price for uranium collapsed so that the prices to the claimant under the contract were two to three times as high as the Spot market price, and the respondent received corresponding Profits of two to three times its costs.

The Claim of frustration of purpose was based on both contingencies. The Panel held that neither contingency had been foreseen by the Parties and that, while it did not need to decide whether either contingency alone would have been sufficient to support relief an the grounds of frustration, the combined effect of the two sufficed. Interestingly, the Panel did not identify the "purpose" that had been frustrated.

Some arbitral tribunals have gone further and purported to base their decisions an "general principles" of Law, or some type of lex mercatoria. This can be a "micro-lex mercatoria" where the tribunal, rather than wade through complex conflict of law analysis, purports to apply a common denominator of the allegedly applicable laws\textsuperscript{218}. Or, it can be a more complex attempt, again sparked by choice of law difficulties, to decide the question in accordance with general principles of law.

Perhaps the most famous of these decisions are those from the Iran-U.S. Claims Tribunal, which made frequent reference to general principles of law. These decisions shed less light than could be hoped for an the application of the lex mercatoria, or indeed an its rules for governing force majeure. This is perhaps due to the political circumstances surrounding the Tribunals operations. Such political considerations influenced both the use of the lex mercatoria as the governing law, and the invocation of force majeure by the tribunal.

J. Crook, the United States Agent at the Tribunal from 1983 to 1987, has noted that "[t]he Tribunal ... has typically avoided reference to national systems of law as

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the source of controlling rules. Instead, it ... regularly applied non-national principles derived from the parties' contracts,
general principles of law or public international law.” This was often at the expense of party selection of applicable law or detailed analyses or explanations for choice of law.\textsuperscript{219} The reluctance of the Tribunal to apply the law of either party at the procedural stage was mirrored in substantive discussions by a reluctance to find contractual "termination an account of breach, even in factual circumstances perhaps justifying such a determination."\textsuperscript{220} This reluctance, coupled with the dramatic events of the Iranian Revolution, inflated the use and importance of the force majeure excuse doctrine to the Tribunal, but was not conducive to building up an authoritative, reasoned body of law.

The force majeure analysis rested almost entirely an general principles of law, with limited reference to national laws. The Tribunal consistently held that the events around the first six months of 1979 when the Iranian revolution was taking place "had created classic force majeure conditions at least in Iran's major cities."\textsuperscript{221}

The Tribunal asserted that force majeure was a general principle of law and defined it as: "social and economic forces beyond the power of the state to control through the exercise of due diligence."\textsuperscript{222} The Tribunal recognized force majeure as a general principle of law.\textsuperscript{223} However, the Tribunals analysis varied from case to case. For example, in Gould Marketing, Inc. v. Ministry of National Defense of Iran, the Tribunal found force majeure even though both parties alleged breach of contract and denied that force majeure had affected performance. The force majeure was held to suspend obligations and eventually to have "ripen[ed] into termination." In Sylvania Technical Systems, Inc. v. Government of the Islamic Republic of Iran, a more cautious approach was used. The Tribunal emphasized that force majeure defenses "must always be analyzed in the context of the circumstances causing force majeure, taking into account the particular party affected by those circumstances and the specific obligations that party is prevented from performing." The Tribunal found that force majeure events existed, thereby excusing non-performance until mid-February 1979. The Tribunal found that by this date non-performance was a deliberate policy choice of the Iranian government, and that therefore the Government had in effect terminated the contract.

D. REMEDIES

In Gould, the Tribunal found that force majeure suspended the contract, citing this as a general principle of law.\textsuperscript{224} The Tribunal fairly consistently held that when the contract did not provide otherwise, "the guiding rule concerning costs attributable to force majeure situations is that the loss must 'lie where it falls'."\textsuperscript{225}

In application, this involved apportioning between the parties costs already incurred, in a manner similar to common and civil law restitution provisions.\textsuperscript{226}

IV. CUSTOMS AND USAGE

Customs and usage of force majeure in international relationships is another possible source of the lex mercatoria. Many different international forums have recognized and used some form of force majeure.\textsuperscript{227} As such, it is a recognized international principle. However, rather than providing general rules for force majeure, customs can often circumvent the legal debate about the scope of the doctrine by shaping both the contractual relationship and the obligation at the contract formation stage. For example, commentators have suggested that business norms have begun to emerge that reflect the special problems of force majeure and the international transaction. Considerations particular to the special features of international agreements often generate starting points different from those of national law. For example, in discussing economic development agreements, Delaume notes the new role for the force majeure clause: "force majeure clauses are essentially conceived as a form of insurance against the abrupt termination of a long-term, and hopefully profitable, association."\textsuperscript{228} Where sovereigns are involved, the effect an traditional force majeure doctrine is more dramatic. Delaume writes of intergovernmental loans:

[Parties] do not usually attempt to anticipate the possible impact of supervening events upon the relationship between the parties. This apparent absence of concern for future ability of the borrower to honor its contractual commitments is in most cases based on considerations of prestige and the intimate conviction of the parties that, should an unexpected difficulty occur, the issue would be the object of consultation between the parties leading...
to a mutually acceptable adaptation of their contractual relationship. In his discussion of French law, Devolvé notes that "[b]usiness enterprises themselves have devised rules and methods of adaptation," especially in international contracts. These include clauses such as those that trigger the application of new prices, thereby safeguarding against price variation.

Second, customs and usage, in tandem with the increased popularity of standard form clauses, may eventually unify the law of force majeure more effectively than uniform laws or decisions based on general principles. This lex mercatoria may subtly emerge over time as a standard form force majeure clause becomes incorporated with frequency and then is elucidated by interpretation. The ICC has recently promulgated a force majeure clause for incorporation in international contracts. It is specifically intended to cope with long term agreements and to take the place of national force majeure provisions, which "vary from country to country and may not meet the parties' requirements in international contracts."

There are two sets of provisions:

[T]he first lays down the conditions for relief from liability when performance has become literally or practically impossible ("force majeure"). The second covers the situation where changed conditions have made performance excessively onerous ("hardship").

Paragraph 1, which takes its wording in part from Art. 79 of the Vienna Sales Convention, provides:

A party is not liable for a failure to perform any of his obligations insofar as he proves:

- that the failure was due to an impediment beyond his control; and
- that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform into account at the time of the conclusion of the contract; and
- that he could not reasonably have avoided or overcome it or at least its effects.

According to the comments and observations following the clause, it assumes a breach of contract and then decides whether the obligor should be relieved essentially a civil law approach. In discussing the criteria of an impediment beyond the failing party's control, the ICC notes, "[I]t could be argued that almost anything could have been foreseen at the time of the conclusion of the contract. However, the ... clause refers to what a party could reasonably be expected to take into account and to make contingency plans for when he enters into the contract."

The ICC also notes that for the criteria of reasonably avoiding or overcoming the impediment "fair test of commercial reasonableness should be applied ... as well."

Paragraph 2 of the ICC clause sets out a list of events that would normally qualify as unforeseeable events, typical examples of which are war and natural disasters. Paragraph 4 provides that the party seeking relief must notify the other party of the "impediment and its effect on his ability to perform."

A ground of relief under clause (i) relieves the obligor from damages, and one under clause (ii) postpones the time for performance, "for such a period as may be reasonable." If the grounds for relief continue after a "reasonable period" the parties can terminate the contract with notice. Paragraph 9 provides that "[e]ach party may retain what he has received from the performance of the contract carried out prior to the termination," and that "[e]ach party must account to the other for any unjust enrichment resulting from such performance."

The second set of provisions dealing with hardship do not provide a draft clause suitable for incorporation, but rather drafting suggestions. This is in recognition of the fact that "[t]he concept of 'hardship' is relatively recent in international contract law and practice. It is still in the course of development and is found mainly in long-term contracts which require detailed individual drafting in all their aspects."

The hardship provision contemplates that parties confronted with events that "fundamentally alter the equilibrium of the
present contract, thereby placing an excessive burden an some of the parties in the performance of its contractual obligations," attempt to revise the contract "on an equitable basis." The provisions then provide different ways of resolving a stalemate when the parties are unable to agree an revision within a 90-day period.

Customs and usage may play a still further role as interpretations of these clauses themselves start to shape practice at the contract formation stage.

For example, in a proceedings before the Soviet Foreign Trade Arbitration Commission, a buyer argued that refusal of an export license was not mentioned in a force majeure clause and could not therefore be invoked to relieve performance. The argument failed as the Arbitration Commission decided that although not specifically mentioned, denial of a license was included in the clause's final catch-all provision. This reshaped the subsequent actions of Soviet export agencies who, after the decision, insisted an including in their standard form contracts a provision officially excepting denial of a license.

CONCLUSION

If lex mercatoria is to prove useful in arbitration, it must provide a body of guiding principles that can be applied in concrete instances. In the case of force majeure, the "new lex" must strike a delicate balance between the often competing values of certainty in commercial transactions and a more general sense of equity.

The lex mercatoria of force majeure has by no means crystallized into an algorithmic formula for determining when a Party ought to be excused from performing contractual duties. The four sources of the lex mercatoria of force majeure examined in this paper (i) general principles of law; (ii) public international law and uniform laws; (iii) reported arbitral awards; and (iv) customs and usage are divergent in both the scope and the justification for excusing a Party from the Performance of a contractual Obligation. But among the divergence, there is a significant overlapping consensus which provides grounding for an emerging lex mercatoria in this area.

There is an overlapping consensus an a doctrine that operates to excuse the Performance of contractual obligations when unforeseen events beyond the panty's control occur which make the party's Performance impossible. However, there are substantial differences among national laws as to the nature of events that qualify, whether or not extreme impracticality is sufficient, and the nature of relief, among other things. Thus, while the doctrine is common to each of the four sources of lex mercatoria and it may therefore provide some guidance to the international Business Person, reference to individual legal systems still provides greater certainty and depth in the resolution of international disputes.

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3 E.g., Lando, The Lex Mercatoria in International Commercial Arbitration, 34 Int'l & Comp. L.Q. 747 (1985). Historically domestic commercial law evolved from the practices of ad hoc merchant tribunals - this is the original or "old" lex mercatoria.

4 Id.
6 Id. at 87-88 (collecting definitions).
9 See generally infra at Section I.
10 See Berman, Excuse for Non-performance in the Light of Contract Practices in International Trade, 63 Colum. L. Rev. 1413, 1414-1420 (1963) (arguing that extension of the doctrine is undesirable and will lead to uncertainty).
These sources for the lex mercatoria are taken in part from Lando who provides one of the most comprehensive lists, supra note 3.

Mustill J., supra note 5 at 119.

Lando, supra note 3 at 749.


See Aluminum Co. of America v. Essex Group, Inc. infra note 45.


Restatement (Second) of Contracts § 263 (1981).

England: Under Sale of Goods Act 1979 provisions relating to risk, a contract is not frustrated merely because particular goods which seller intended to supply are destroyed before risk had passed. The seller must find other goods to fit contract description. U.S.: Restatement (Second) of Contracts at § 263 comment a; see Bende & Sons v. Crown Recreation, 548 F. Supp. 1018, 1021 (E.D.N.Y. 1982) (Since "any combat boots would have fit the general description outlined in the purchase orders, ... the boots were not identified to the contract.").

Restatement (Second) of Contracts at § 264.

Id. at § 262.

407 East 61st Garage, Inc. v. Savoy Fifth Avenue Corp., 23 N.Y.2d 275, 281, 296 N.Y.S.2d 338, 343-44, 244 N.E.2d 37, 41 (1968) (performance of contract obligation was rendered impossible by destruction of the means of performance. Party seeking excuse from its contractual obligations was not at fault. Failure to perform was not considered breach of contract).


Restatement (Second) of Contracts § 261 sets forth common law grounds for "Discharge by Supervening Impracticability" as follows: "Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary".

Although the provision only explicitly covers sellers, it has been held applicable to buyers as long as they comply with all of the statutory requirements. Northern Illinois Gas Co. v. Energy Cooperative Inc., 122 Ill. App. 3d 940, 954, 461 N.E.2d 1049, 1060 (Ill. App. Ct. 1984). U.C.C. § 1-103 further preserves common law principles unless displaced by specific Code provisions. Because impracticability and frustration of purpose are common law defenses, § 1-103 therefore appears to permit a buyer's assertion of these defenses even if not strictly available to buyers under § 2-615. See Comment, Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective, 51 Temple L.Q. 518, 542-44 (1978) ("Buyer's Perspective") and cases cited therein.

U.C.C., Official Comment 3; see also Eastern Air Lines, Inc. v. McDonnell Douglas Corp., 532 F.2d 957, 988 (5th Cir. 1976) ("[S]ection 2-615 excuses 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."); accord, Eastern Air Lines, Inc. v. Gulf Oil Corp., 415 F. Supp. 429, 438 (S.D. Fla. 1975).

Restatement (Second) of Contracts at § 265 provides as follows: "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or circumstances indicate the contrary".

Hailsbury's Laws supra note 15 at 314, 450.

Id., citing Davis Contractors Ltd. v. Fareham [1956] 2 All E.R. 185, 155; see also British Movietonews, Ltd. v. London and District Cinemas, Ltd. [1951] All E.R. 617, 625 (House of Lords, opinion of Viscount Simon) (the parties must find themselves in, "a fundamentally different situation which now has unexpectedly emerged.").


See E. Farnsworth, contracts § 9.7 at 561 (1990) ("Courts have been much more reluctant to hold that a party has been excused on the ground of frustration than on the ground of impracticability") and cases cited therein.


Id. at 521, 391 N.Y.S.2d at 119.


Id. at 712; Judge Friendly has observed that the test of whether the "non-occurrence of [a contingency] ... was a basic assumption on which the contract was made" seems to be "a somewhat complicated way of putting [the] ... question of how much risk the promisor assumed." United States v. Wegematic Corp., 360 F.2d 674, 676 (2d Cir. 1966).


Transatlantic Financing Corp v. United States, 363 F.2d 312, 319-20 (D.C. Cir. 1966) (claim that increase of approximately $44,000 over the $305,000 contract price entitled obligor to relief on grounds of impracticability rejected).
See, e.g., Greenway Brothers (Ltd.) v. S.F. Jones & Co., 32 T.L.R. 184, 185 (K.B. 1916); Congimex SARL (Lisbon) v. Continental Grain Export, [1979] 2 Lloyd's Rep. 346 (refusal to recognize exchange control as a ground for frustration).


Id. at 1085, 352 N.Y.S.2d at 790.


Id. at 1085, 352 N.Y.S.2d at 790.

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46 Id. at 76 (distinguished on grounds of "the gravity of the harm which the aggrieved contracting party was liable to suffer"). Cf. Westinghouse II, 597 F. Supp. 1456 (E.D. Va. 1984); Westinghouse I, 517 F. Supp. 440, 453 (E.D. Va. 1981) (although there was major loss on one contract term, Westinghouse had not shown a loss on the entire contract).

499 F. Supp. at 57-59.

48 Id. at 57.

50 Id. at 58.

51 Id. at 59, 73.

52 Id. at 70.

53 Id. at 69-70.

54 Id. at 72.

55 See Printing Indus. Assoc. v. Int'l Printing and Graphic Communications Union, 584 F. Supp. 990, 998 and n.9 (N.D. Ohio 1984), and cases cited therein.


275 F.2d 253 (2d Cir. 1960).

57 275 F.2d at 257; see also, Berman, Excuse for Nonperformance in the Light of Contract Practices in International Trade, supra n.10 at 1422 et seq.

363 F.2d at 318-19 (footnote omitted).

60 Id. at 318.

59 Id. at 319.


62 Id. at 441-442 (emphasis added).

64 See White & Summers, Uniform Commercial Code § 3-9, at 133 (2d ed. 1980) ("In our judgement an increase in price, even a radical increase in price, is the thing that contracts are designed to protect against.").


68 U.C.C. Comment g. refers to situations in which excuse or nonexcuse may serve "neither sense nor justice." Restatement (Second) of Contracts at § 272, provides that court can grant relief "on such terms as justice requires".

69 ALCOA, supra note 45 at 78-79.

70 See André Tunc, Force majeure et absence de faute en matièreet contractuelle, Rev. Trim. Dr. Civ., 235 et seq. (1945).

71 Force majeure, Dalloz Encyclopedia, Civil Law, by F. Chabas, 1973, no. 3.


Dalloz Encyclopedia supra note 71 at no. 17.


G. Viney, Civil Law Treatise, supra note 73 at no. 398; see also Mazeaud and Tunc, 6th ed. supra note 73 at no. 1576.

Planiol, supra note 73 at p. 249.

Julliot de la Morandiere, supra note 73 at p. 92.

Chabas, Dalloz Encyclopedia, supra note 71 at no. 30.

Carbonnier, supra note 72 at p. 245.

Mazeaud, supra note 73 at p. 627.


Dalloz Encyclopedia, supra note 71 at no. 3; Mazeaud and Tunc, supra note 73 at no. 1551; Philippe Le Torneau, supra note 83 at 704; Art. 1146 to 1155, Jurisprudence, Civil Law, Book VII, by Charles Rieg, p. 9, no. 23.


Id.

Art. 1148 supra at 28 (in text).

See cases cited in Denison Smith, Impossibility of Performance as an excuse in French Law: The Doctrine of Force majeure, 45 Yale L.J. 452, 462-63 (1936).

Devolvé, supra note 85 at 5.

Id. at 7.

Translation by Dawson, Judicial Revision of Frustrated Contracts: Germany, 63 B.U.L. Rev. 1039, 1041 n.3.

Cf. French approach of listing certain events constituting force majeure, such as fait du prince, acts of God, etc.

Palandt, Kommentar ("Palandt"), BGB § 275(l)(a)-(d); Larenz, Schuldrecht ("Larenz"), § 20(I)(A).

These categories bear some similarity to the common law doctrine of "impossibility".

Compare with the common law doctrine of "impracticality".

Compare with the common law doctrine of "frustration of purpose".

Larenz, § 20(l)(B).

Larenz, § 20(l)(b).


See Larenz § 20(l)(d); Palandt § 275(l)(e).

Id.

BGB § 242; see Section I.B.2(b)(iii) infra.

Palandt § 275 (l)(e); Larenz, § 20(l)(d) at pp. 245-46.

Palandt, § 275(2)(b).

Larenz, § 20(l)(c).

BGB § 242.

Dawson, supra note 91 at 1046.

See generally Dawson, supra note 91.

Larenz, § 20(11), pp. 248-49; Münkner Kommentar zum BGB (Roth) ("MK BGB") § 242(D)(l).

MK BGB § 242(D)(II)(1f), p. 198ff.


Id.

MK BGB § 242(D)(IV)(1).

BGH LM (Bb) Nr. 36, cited in MK BGB § 242(D)(IV)(2)(b).

MK BGB § 242(D)(IV)(3).


These latter are not a primary source but provide a commentary and interpretation of the law.

Cf., Common Law doctrine of mistake supra.

All citations to the Code herein refer to the 1972 Payot Lausanne edition.
121 "Lorsque le créancier ne peut obtenir l'exécution de l'obligation on ne peut l'obtenir qu'imparfaitement, le débiteur est tenu de réparer le dommage en résultant, à moins qu'il ne prouve qu'aucune faute ne lui est imputable." C.O. art. 97 (1), at 48.

122 "L'obligation s'éteint lorsque l'exécution en devient impossible par suite de circonstances non imputables au débiteur." C.O., art. 119(1), at 58.

123 C.O. at 119(2).

124 Id., at 119(3).

125 There are no provisions in the Code dealing especially with subjective impossibility, and controversy exists over whether it should be treated similarly to objective impossibility. The majority applies the same rules to both instances. However, an interesting minority observer that subjective impossibility is in fact default - performance is not absolutely impossible, only the obligor himself cannot perform. Wolfgang Wiegand, Die Leistungsstörungen, in: Recht, No. 1, 1983, p. 7. In any event, the same evaluations of scope of contractual provisions and obligor's fault govern each case.

126 The classical example is the painting sold but destroyed before reaching the buyer. No one is capable of delivering the painting anymore.


129 E. Gauch, supra note 127 at 1868.

130 Decision of the Federal Supreme Court ("DFSC") 43 II 784.

131 E. Gauch, supra note 127 at 1854.

132 DFSC 88 II 195.

133 For example: the risk provisions in the sections of the code dealing with individual types of contracts, which deal with issues not provided for by the parties. E.g., Art. 185 C.O. states that in regard to a contract for the sale of goods the benefit and risk with regard to the object of the sale passes to the buyer on conclusion of the contract. Therefore, if goods are destroyed by force majeure prior to their delivery, vendor is excused from performing while the buyer still has to pay purchase price to vendor. (Cf. Art. 119 where contract would be discharged and neither vendor nor buyer required to perform, and loss is borne by vendor); Art. 324 a C.O. requires an employer to continue payment of wages for "a reasonable length of time" to an employee who has worked or been employed for more than 3 months, and who can no longer perform for reasons beyond the employee's responsibility (sickness, injury, etc.).

134 Wiegand, supra note 125, p. 4.

135 Article 103 CO.

136 E.g., Article 119, subsection 2 CO.

137 Article 119, subsection 3 CO.

138 Bucher, supra note 128 at 420.

139 Id. at 396.

140 Id. at 418.

141 DFSC 101 II 19.

142 DFSC 107 I 347.

143 1257 c.c.

144 Mosco, 1973, 429.


146 1258 and 1464 c.c.

147 1258 i c.c.

148 1464 c.c.

149 1418-1424 c.c.

150 1441-1446 c.c.

151 1447-1452 c.c.

152 1453-1469 c.c.


154 1463 c.c.

155 See De Martini, 1-13 (1950).

156 See especially Pino (1952): see also discussion of remedies infra at pp. 50-51.

157 See e.g., Tartaglia (1980).

158 Id.

159 See, e.g., Commune di Reggio Emilia c. Messori ed altri, Cort. di Cass. 1976 n.1738, 100(1) For. It. 2335 (1977), and earlier cases cited by Tartaglia.

160 Sentenza, 23 gennaio 1948, 71(1) For. It. 298, 303 (1948).


162 See also the reference in the marginal notes to the arbitral decision, Compagnie Générale Méditerranéenne de


164 See Tartaglia (1980) at 169; on the comparison between Arts. 1467 and 1468 see Tornaturi (1973); see also discussion of remedies infra in following section.


166 Cian-Trabucchi, 609 (1978).

167 1458 c.c.

168 1468 c.c.

169 c.c., see Cian-Trabucchi, 609 (1978).

170 See, for example, the Civil Codes of Syria (1949), Iraq (1951), Libya (1953), Sudan (1971), Algeria (1975), Jordan (1976), Yemen (1979) and Kuwait (1980).

171 Sanhouri, Traité de Droit Civil ("al-Wassite"), Vol. 1, pp. 73-79, 3rd Ed. (Cairo, 1981); see also Travaux Préparatoires, Vol. 1, pp. 132-133 (These furnish information and clarification for the application and interpretation of the Codes, and warn against the use of foreign sources for the understanding and the interpretation of provisions of the Code having any verbal similarity with certain foreign provisions).

172 Art. 147, Egyptian Civil Code, as translated in M. Davies, Business Law in Egypt (1984).

173 Hussein Amer, La responsabilité civile délictuelle et contractuelle (Cairo, 1956), 377, pp. 360-61.

174 Sanhouri, supra note 171 at pp. 1227-28 (Traité de Droit Civil).


177 Sanhouri, supra note 171 at p. 1228.


179 Sanhouri, supra note 171 at p. 877.

180 Hasabo al-Fazari, L'effet des circonstances inattendues sur l'obligation contractuelle, Alexandria, 1979, p. 368, and the numerous judicial decisions cited by the two authors.

181 Sanhouri, supra note 171 at pp. 878-79.

182 Conditions which benefit only one party.

183 Radd, Cairo, s.d., t. V, p. 55, cited in al-Zuhaily, La doctrine de la nécessité dans la loi islamique, 315 (Damascus 1969); see also, Sanhouri, supra note 171 in the margin at pp. 856-57).

184 Radd, Cairo, s.d., t. V, p. 55, cited in al-Zuhaily, La doctrine de la nécessité dans la loi islamique, 315 (Damascus 1969); see also Sanhouri, op. cit., in the margin at pp. 856-57).

185 Al-Bada'i This was Font/Pitch 1,10 - Off. This was Font/Pitch 1,10 - On., Cairo, 1910, t. IV, p. 49.

186 Id. at 198.

187 Al-Fatawa al-Hindiyya, t. 4, p. 463.

188 Malek, Muaddawwana, Cairo, 1323 A.H., t. 12, p. 37-38; Ibn Ruchd, Bidaya, Cairo, 1329 A.H., t. 2, p. 156.


193 For discussion of other decisions see infra at Section III.


195 Id. at 120.

196 Id. at 121-22.

197 Id. at 122.

198 Id. (emphasis in original).

199 Id. at 123.

200 Id. at 138, 141.

201 Id. at 147.


Unification and Certainty, supra note 204 at 1993.


Lando, supra note 3 at 751.


See Melis supra note 209 at 220.

See also, cases 2139, and 2138 (same facts) 216 and 3092/3100 (similar result where foreign exchange authorizations were refused, no force majeure because of sharing that exchange control legislation had been in force before the contracts had been concluded.).

Melis, supra note 209 at 217-18.

Id.

Award No. 2478 in 1974 and No. 2216 in 1974.

See Melis, supra note 209 at 221.

Id. at 221.

Supra at note 212.

E.g., Award No. 1512 of 1971. Arbitrators decided that result was the same under laws of either India or Pakistan.

Crook, Applicable Law in International Arbitration; The Iran-U.S. Claims Tribunal Experience, 83 Am. J. Int'l L. 278 (1989).

Id. at 291.


Gould at 895.

See, e.g., Mobil Oil Iran, Inc. v. Iran. 16 Iran-U.S. C.T.R. 3; Anaconda-Iran, Inc. v. Iran, 13 Iran U.S. C.T.R. 199, 211 (1986 iv) ("Under a variety of names most, if not all, legal systems recognize force majeure as an excuse for contractual non-performance. Force majeure therefore can be considered a general principle of law ... [T]he right to invoke force majeure does not depend on, or arise out of, an express contractual provision").

Gould at 895.


Gould at 895.

Delaume, "Excuse for Non-Performance," supra note 2 at 252.

Id. at 244.

Delaware, supra note 2, "Change of Circumstances" at 344.

Devolvé, supra note 85 at 8.

Id.

It is interesting to note that the civil code of the U.S.S.R. provided that in foreign trade contracts international laws and international customs and usage regarding force majeure could be used as a source of law. These sources to include UN convention 1980, Vienna Convention 1969, ICC Force Majeure Clause and draft of U.S.-U.S.S.R. Trade Council Force Majeure Clause.


Id. at 7.

Id. at 10.

Id. at 11.

Id. at 12 (emphasis supplied).

Id. at 12 (emphasis in original).

Id.

Id. at 9, 6.

Id. at 9, 7.

Id. at 10, 8.
Referring Principles:

VI.3 - Force majeure