The concept of "frustration" is different in each legal system.

Frustration is not the equivalent of force majeure or Unmöglichkeit nor is force majeure Unmöglichkeit; even force majeure under Belgian law is not force majeure under French law. Although all these concepts belong to the same family, the distinction between them is extremely important in drafting choice of law clauses in international contracts.

The reason is that the current state of the law is basically the result of very long national traditions which have been elaborated by the courts and sometimes translated into vague statutes by the legislature. The general rule is, of course, pacta sunt servanda, that is, agreements are to be respected.

This static philosophy of an agreement means that the party to an agreement is responsible for its non-execution even if the cause of the failure is beyond his Power and was not or could not be foreseen at the time of signing the agreement. This philosophy is still the heart of the matter in modern times for reasons of legal certainty and stability.

I. FRUSTRATION AND HARDSHIP

Early Common law approach

The typical example of the formalistic approach is the English case of Paradine v. Jane. Jane was the tenant of Paradine's estate for a number of years. The German prince Rupert however occupied the estate himself for three years by military force. The Kings Bench nevertheless decided that Jane had to pay rent for that period arguing that:
"When the party by his own contract creates a duty or Charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract."

This possibly explains why English and American contracts are much more detailed and factual, leaving less latitude to a judge to rule his own way in the absence of specific contractual provisions.

Such a rigid interpretation prevailed in the United Kingdom until 1863. It was in the case Taylor v. Caldwell that Blackburn J. first made a distinction between events which make the performance of a contract more difficult and those which render performance impossible: "Where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome or, even impossible".

Taylor was the tenant of Caldwell's music-hall for four consecutive days and as many performances. A couple of days before the first concert, the hall was accidentally destroyed by fire without the fault of either party. Taylor claimed damages because he lost the expected profit of the performance. The Queen's Bench rejected the claim, changing its traditional opinion: the strict rule should only apply when the contract is positive and absolute, and not subject to any condition either express or implied. A contract was not absolute where the parties must have known from the beginning that the obligation could not be fulfilled unless some particular specified thing continued to exist when the time for fulfillment of the contract arrived.

Having discussed several cases, the Court stated:

thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel."

This theory of the implied condition was the first inroad by an English judge into the static and formalistic wording of an agreement. Increasingly, judges focused attention on what the parties actually wanted, implying what was not expressly provided for. Very soon, however, legal scholars disagreed on whether judges should reconstruct what the parties actually wanted in a specific agreement or rather should simply rule in accordance with what normally could be expected, in the light of the circumstances, to be the implied terms of an agreement for reasonable men.

The doctrine of the implied condition was later applied to situations where the impossibility to perform the contract was not of a physical but of a legal nature e.g. expropriation as a consequence of a declaration of war, agreements with the enemy becoming void, etc.

A third line of cases where the agreement was to be considered as frustrated is based on the sole interpretation of the intent of the Parties. If, due to an Act of God, the performance of a contract is to take place under circumstances which are totally different from what the parties envisaged, then the agreement is frustrated. This is very surprising to a continental lawyer and will be illustrated with another famous example in the so-called Coronation cases.

An English royalist rents an apartment for one day because he wants to have a privileged view of the Coronation Parade of Edward VII. Both parties understand this to be the purpose of the letting, but this does not appear in the contract itself.

On Coronation day, however, the King is ill and the procession cancelled. Whereas a French judge would possibly enforce the agreement, for the English judge it is frustrated because its execution is fundamentally and essentially different from what the parties intended.
Most continental lawyers feel that this concept of frustration is certainly broader than the French concept of *force majeure* and encompasses to some extent features of the French concept *imprévision* and the German concept of *Wegfall der Geschäftsgrundlage*.8

Indeed, the apartment in question was available and in suitable condition for rent on Coronation Day: the act of God did not render the occupancy impossible. Consequently, a French judge would likely rule that the rent has to be paid and the royalist has to sign a second agreement if he wants to be sure to see his King. Herein appears the essential difference in nature between frustration and *force majeure*. This is made clear by an interesting definition of frustration which has been given by Lord Radcliffe in the case of *Davis Contractors, Ltd. v. Fareham U.D.C.*9:

"Frustration occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non foedera veni.* It was not this that I promised to do."

**Frustration and Force majeure**

The definition can be compared *mutatis mutandis* with the French doctrine of *force majeure*:

"*Force majeure* occurs when the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which the performance is called for *would render it impossible*. I promised to do this but I cannot due to some irresistible unforeseeable and uncontrollable event."

An interesting comparison of the differences of interpretation between frustration, *force majeure* and *Wegfall der Geschäftsgrundlage* can be made in the case of *Jackson v. Union Marine Insurance Co Ltd.*10

A ship was chartered for an urgent journey from Liverpool to New York but it was unable to sail due to sudden and extensive damage which kept it in port for several weeks. The English judge considered that the initial contract was discharged by frustration because a venture after so many weeks had elapsed would have been a totally different one from that originally envisaged and thus not what the parties initially agreed upon. A French judge would probably suspend the execution of the performance based upon *force majeure*,

since the performance is possible, all be it after some delay, whereas a German judge would probably adapt the contract because the *Geschäftsgrundlage*, that is the economic balance of the contract, has fundamentally changed.

These examples can be usefully illustrated with the so-called Suez Canal cases in 1962.11 Several ships were chartered at the very moment the Suez Canal was closed by military action. They had to cruise around the Cape of Good Hope and Lord Justice Hermann ruled against the frustration of the contract.12 Only in one case was frustration accepted, because the contract expressly provided for a routing through the Suez Canal.13

A French judge would probably consider that this situation is not *force majeure* but *Judgement* (and thus to be executed) and a German judge would certainly rule in favor of an amendment to the contract since, due to the changed circumstances, the contract essentially lost economic balance.

When a contract is frustrated, a judge cannot amend or adjust it to the new situation. Frustration simply discharges the contract and the defendant will be excused from paying.

The question thus arises as to what happens to the performances already executed.

Until recently, frustration had no influence on any contractual duty already performed or to be performed before the very moment of the frustration of the contract. This sometimes led to rather bizarre consequences like in one of the Coronation cases.

In the case of *Chandler v. Webster*,14 Chandler had made a down payment of 100 P.S. for his apartment and had to pay
the balance of 41 P.S. and 15 shillings before Coronation day. The Court decided that although the contract was frustrated, Chandler was not entitled to restitution and furthermore was liable to pay the balance, because both obligations were to be performed before Coronation i.e. frustration day!

The rule was simply that the parties should be placed in the position they should have been in at the occurrence of the frustrating event.

In the case *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.* the harsh consequences of the Chandler decision were overruled. The

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restitution of a down payment was not granted because of an argument based upon the contract - since when the money was paid it was due under an existing contract - but on the quasi-contractual right to recover money where there is a total failure of consideration. The consideration is said to be not the promise, but the performance of the promise.

This solution is partially unjust because the beneficiary of the obligation may have incurred expenses and, moreover, the problem of a partial execution is left unresolved.

In 1943 the English Parliament enacted legislation to remedy this uncertain situation. Based on this Statute, English judges can allow recovery of all expenses incurred before the contract became discharged by reason of frustration or impossibility, "if it considers it just to do so, having regard to all the circumstances". If one party has already obtained a benefit other than the payment of money before the moment frustration occurred, then the Court may order restitution or award a sum of money equal to the benefit.

It is important to note that the provisions of the *Frustrated Contracts Act* (like any other frustration problem) may be excluded by contract. Furthermore, a court may only give effect to the provisions of the Act to such extent, if any, as appears to be consistent with any provision in the contract concerning frustrating events. The Act more specifically does not apply to contracts for the carriage of goods by sea or to certain charter parties, nor to any contract of insurance. The terms of the Act are by no means mandatory, which means that the drafting of frustration and choice of law clauses remains essential in the conclusion of international contracts, which leads us back to the importance of the wording of the contract.

If the judge is not willing to help the shipping company in the Suez Canal case, it is because he feels that the parties could have helped themselves very easily by inserting a precise routing in the contract: after all, the judge is not a Godfather for poor contract lawyers! The Landlord of a "Coronation apartment" is free to expressly stipulate that the tenant will have to pay the rent even in the case of the Coronation being postponed or cancelled.

This explains why the French concept of *force majeure* also exists in English contract law although it does not as such exist in the legal tradition of English Common law. Indeed, many international contracts include a *force majeure* clause, and explain it in detail.

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Although it is rather risky to import wildlife into strange surroundings, it is legally speaking possible to do so. Hence, the problem arises of using a foreign concept and having it applied according to its actual meaning and consequences. The English judge will naturally be inclined to apply his doctrine of frustration to the *force majeure* concept.

Generally, in international contracts, many provisions are used to remedy unforeseeable situations or simply to adjust the contract to new situations. In a long-term gas or oil supply contract for example, the execution is spread over ten or even thirty years. Hence, the contract becomes a lifetime experience rather than a written document. Certainly, the prevailing law cannot deal with such written agreements, because basically, economic circumstances change and the initial value of assets varies. Currencies lose their value. Still the contract remains imperative because the law is not familiar with changing situations.

Fundamentally, a contract is only meaningful inasmuch as it provides for a mutual economic benefit. Should the general rule of international contracts be that they should be terminated without damages if one or both parties can reasonably maintain that the contract lost its economic equilibrium for reasons beyond the parties' control and that nobody can be obliged to work for nothing?
This question is one of the main problems to which a lawyer practicing international contract law is faced. Yet, only a suitable contract can help him.

In practice, specific clauses are used to give the possibility of adjusting the contract under certain circumstances.

The so-called "Government take clause" allows oil companies to automatically increase contract prices, in case OPEC decides to increase the oil price.

The so-called "first refusal clause" obliges the purchaser to adjust his price by a margin similar to the market.

In long-term supply or building contracts, it is often useful to insert such or similar provisions. They are essential because, as a general rule, courts do not consider that it is their duty to insert them in a contract once the parties have agreed upon the terms of the contract.

In a hardship clause it is important to stipulate when and how the parties will rearrange the contractual terms in case the contract loses its economic balance due to certain events which may or may not be specified.

Hardship clauses differ from "value maintenance" clauses in that they provide for a renegotiation of the contractual terms whereas "value maintenance" clauses adjust the price automatically in accordance with some prefixed monetary or economic standards. They are a revolution in the classic concept of the performance of a contract but prove their absolute necessity in modern times.

It is interesting to note that already in 1933 in the Polish Civil Code, now abolished, there was a provision allowing the frustration of a contract at the occurrence of certain events. The following clause was probably the first sophisticated frustration and amending clause in modern times. Article 269 provided expressly that:

"When, as a result of exceptional events, e.g. wars, epidemics, total loss of harvest and other natural catastrophes, the execution of the obligation will encounter excessive difficulties or would threaten one of the parties with enormous loss which the parties were not able to foresee at the time of the conclusion of the contract, the judge may, if he thinks it necessary, in accordance with the principle of good faith and after he has taken into consideration the interest of the two parties, determine the way in which the contract will be executed, and the amount of the importance of the obligation, or he may even decide to terminate the contract."

Hardship Clauses

In the Ekofisk case there is an interesting example of a typical clause of hardship which was inserted in a long-term contract for the supply of natural gas expressly stipulating that:

"Section 13-9 - HARDSHIP"

When entering into this agreement the parties contemplate that the effects and/or consequences of this Agreement will not result in economic conditions which are substantial hardship to any of them, provided that they will act in accordance with sound marketing and efficient operating practices. They therefore agree on the following:

which consequences and effects place said party in the situation that then and for the foreseeable future all annual cost (including, without limitation, depreciation and interest) associated with or related to the processed gas which is the subject of this Agreement exceed the annual proceeds derived from the sale of said gas. Notwithstanding the effect of other relieving or adjusting provisions of this Agreement the party claiming that it is placed in such position as afore-said may by notice request the other for a meeting to determine if said occurrence has happened and if so to agree upon what, if any, adjustment in the price then in force under this Agreement and/or other terms and conditions hereof is justified in the circumstances in fairness to the parties to alleviate said consequences and effects of said occurrence.
Price control by the Government of the state of the relevant Buyer(s) affecting the price of natural gas in the market shall not be considered to constitute substantial hardship."

II. FORCE MAJEURE - IMPRÉVISION

The hardship clause in the Ekofisk agreement (supra) may be an interesting bridge to the French side of the subject. Force majeure under French law is an irresistible and unforeseeable event which makes the performance of a contract impossible. Under French law the line is drawn between on the one hand the impossibility of the performance that is, force majeure, and, on the other hand, circumstances which destabilize the contract where economic conditions are such that fundamental and far-reaching changes occur, which is called the doctrine of imprévision.

The French law does not easily accept force majeure. The rule is pacta sunt servanda, as incorporated in Article 1134 of the French Civil Code. In principle, the judge cannot modify an agreement or order its non-execution unless the legislator expressly allows him to do so. A judge is not supposed to appraise the economic situation of the parties or to rule in equity against the wording of a contract.

Furthermore, Article 1142 stipulates that any obligation to do or not to do is dissolved by damages whenever the debtor does not execute the obligation. However, Article 1148 specifies that damages are not due in the case of force majeure or cas fortuit.

Although the courts have applied those Articles in a strict way, some change and more flexibility is noticeable in recent case law. The application of Article 1148 requires simultaneously the fulfillment of the following four conditions:

- the event is "irresistible": this clearly distinguishes the force majeure from imprévision. If the event simply makes the performance of the contract more difficult or more expensive, then the obligation shall nevertheless remain due;
- the event must be unforeseeable: can a tornado on the Caribbean Islands be foreseen in certain periods of the year? Surely it can, nevertheless recent case law considers such events as rather unforeseeable. One can argue that shipping contracts should keep an eye on tornados;
- the event is to be an outside one: the failure of suppliers or subcontractors or associates is no excuse for the contractor;
- the debtor is not at fault. The event should be unavoidable and absolutely beyond the control of the debtor.

The latter was for example the case in the abovementioned Suez Canal cases.22

It is worth mentioning here that the Cour d'Appel of Paris held in its decision of June 9, 1951,23 that a sudden change in the case law is not an unforeseeable event for an informed lawyer.

Article 1148, in recognizing that a contract can be discharged due to force majeure, is not mandatory law. Parties are free to give their definition to force majeure events and the judge has to respect such definition.

The latter also applies to the French counterpart of "hardship", which is the doctrine of imprévision. This doctrine of unforeseen events, that is, lack of foresight, is in French law only accepted under exceptional circumstances. If the circumstances which the parties agree to recognize as unforeseeable events are not expressly and clearly stipulated in the given contract, the judges will not agree to adjust the terms of the contract. This is not the case however in contracts where administrative law would apply.

If, for example, the motorway building company cannot obtain the expected compensation for its investment because of a lack of toll paying traffic alter construction, then the Conseil d'Etat can remedy this situation inviting the parties to renegotiate the contractual terms in the interest of the public service.

The interest of public service is probably not the sole ground for these decisions since the administrative courts granted an indemnity for "lack of foresight" even after the building contractor had executed the work. Can one reasonably sustain that the courts wanted to
prevent the spreading of fear among building contractors for public utility contracts? Or is the reason for this unique case law simply equity?

Article 1134 of the French Civil Code indeed binds the parties of a contract not just to what they commit themselves to, but also to what custom stipulates and to what equity prescribes. In 1978, the Cour d'Appel of Paris delivered an interesting opinion on the matter in the E.D.F. v. Shell Française.24

Several oil companies signed a long term contract with E.D.F. for the supply of fuel oil for thermal Power stations. A price revision clause was inserted to the effect of linking the price to a rather complicated index system. However, the price of crude oil jumped so high after the Kippour war that the Index formula left E.D.F. nevertheless with a substantial loss, in the case of having to perform the contract.

The index formula was insufficient because it contained a maximum and minimum variation. The contract also contained a hardship clause stipulating that parties would meet "to study possible modifications to be made in the contract in case the fuel price increased by more than six francs per ton". The court naturally noted the absence of a suitable revision formula although the parties declared their intention to "meet in order to study possible modifications". In fact the parties continued the performance of the contract leaving the fixing of the price open to a later decision which indicated that they basically considered the contract as valid. The court finally fixed a rule of reason in accordance with the basic intentions of the parties:

"It therefore is up to the parties to calculate the price and variations of it, to replace a no longer evident or applicable reference by a formula which would ensure for E.D.F., for each category of fuel, a reduced purchase price in relation to deliveries of an exceptional amount both in quantity and duration and to the public service task of this body, whilst leaving the refiner with a sufficient profit margin".25

It is interesting to note the allusion made to "the public service task of E.D.F.". E.D.F. is certainly a public undertaking, but with an industrial and commercial character and its contracts with the companies are undoubtedly private contracts. The reference to the public interest argument was the Court of Appeal's way of walking in the footsteps of the Conseil d'Etat. It was not necessary.

The Court goes on to say that it was necessary, before deciding on the merits "to send the parties away to conclude an agreement on this point, as they had undertaken, under the aegis of an observer", which it appointed to this effect, and finally it declared:

"that it is only in a case of failure of these negotiations, and bearing in mind the proposed solution, that the Court will say if the formula which might possibly be suitable from the financial point of view modifies the elements of the current contracts and consequently prohibits the judge from imposing it, or whether, as the parties intended, it restricts itself to adjusting the price to the fluctuations of the market (without altering the economy of the contract) and may therefore be substituted automatically".26

Here the step is explicit. One does not want to replace what the parties want, but they are set a line of conduct with the strong recommendation that it should be followed. E.D.F. and the companies are thought to have found common ground in the end.

Comparing the doctrine of imprévision with hardship clauses, the latter can be considered as an agreed adjustment of imprévision: it covers circumstances which are not be foreseen, and provides for the ensuing consequences particularly concerning readaptation of the contract.

The similarity with the theory of imprévision is at least the case in as far as the hardship clause is considered in its pure form. The study of the clauses employed in practice shows that, in certain contracts, the parties have provided for the occurrence of events which bear no relationship to imprévision in the true sense of the word.

To the extent that hardship clauses bear a relationship to impréversion, the scope of the clauses cannot be fully appreciated without referring to the treatment of imprévision by the governing law of the contract.
If the governing law does not accept *imprévision*, hardship clauses assume their widest scope. When, on the contrary, *imprévision* is recognized by the legal system of the law of the contract, the scope of the clause is merely to adjust by agreement on already existing legal concept.

In the latter situation, hardship clauses can clearly still be used by the parties, in so far as they consider the existing provisions too restrictive or indeed too flexible and/or wish to substitute an individual procedure for readaptation other than that provided for by the law or more in particular to avoid the jurisdiction of the courts.\(^{27}\)

As a function of their general task in French law, the courts have expressed some reservation on vague price fixing clauses. The French *Cour de Cassation* rejected their application on the basis of Articles 1591, 1592\(^{28}\) as well as on Article 1129 of the French Civil Code.\(^{29}\)

The two first Articles provide that the price of a sale must *be fixed by consent of the contracting parties*, if not by a third person, but never unilaterally by one of the parties. Only Article 1129 is more general, stipulating that any obligation must have as its object a thing specified at least as to its kind. The *Cour de Cassation* seems to maintain that prices which are not clearly and objectively fixed make a sales contract void. The wide scope of Article 1129 seems to indicate that hardship clauses are void in French contracts where the price fixing is essential and where the fixing refers to custom or equity.

Therefore, it is appropriate to provide either for a clear calculation method (but this is a value maintenance clause, not a hardship clause) or for the appointment of a third intervener being the agreed representative of the parties with the specific mandate of adjusting the price in case of contractual hardship conditions.

Under such circumstances, the defendant can only avoid the rebalancing of the price in sustaining that the contractual hardship conditions do not prevail.

### III. UNMÖGLICHKEIT UND WEGFALL DER GESCHÄFTSGRUNDLAGE

The German approach to the problem is rather flexible.

Under German law the rule *pacta sunt servanda* is certainly not adhered to any more in the strictest sense. This is not surprising in a country where, after the first world war, the value of the menu in a restaurant sometimes altered between the placing of the order and the arrival of the bill!

As a general rule, section 275 of the *Bürgerliches Gesetzbuch*\(^{30}\) discharges the debtor of his obligation if, after the conclusion of the contract, its performance became impossible for reasons other than his negligence, his fault or the negligence of his employees. The impossibility of performance can be of a physical or legal nature. The performance is later still possible without unreasonable damage to the other party.

It is interesting to note that obligations which become impossible as a consequence of war, for example, cannot be considered as suspended in as far as their execution after an *Erfüllungszeitraum* - that is, after a long delay due to war time - would completely alter the economic basis of the contract.\(^{31}\) This approach comes very close to the live of hardship, *imprévision* and *Wegfall der Geschäftsgrundlage*.

Thus far, there is very little difference - and if so, not an essential difference - between the French reasoning in *force majeure* cases and the German reasoning in the *Unmöglichkeit*. However, the similarity ends there.

Indeed, as a consequence of the first world war, some judges and legal scholars started advocating the doctrine of *Unmöglichkeit* for application on "economic impossibility."\(^{32}\)

This doctrine was rather heavily criticized because it removes the legal certainty from the *Unmöglichkeit* scene. It brings the *Unmöglichkeit* within the scope of the so-called "*Unzumutbarkeit*.\(^{33}\) According to those advocating a broad interpretation of the concept of *Unmöglichkeit*, the debtor cannot be forced to efforts or sacrifices which are beyond what parties reasonably envisaged in good faith. This doctrine is also called the "*Opfergrenze".\(^{34}\) The contracting party acts contrary to basic good faith if he demands the execution of the obligation.
The doctrine of Opfergrenze is a suitable stepping stone to the famous German doctrine of the Wegfall der Geschäftsgrundlage.\textsuperscript{35}

According to the latter doctrine, any contract has a basic aim and emanates from a basic intention of the parties which cannot be achieved or realized in the absence of an existing environment, for example, the prevailing economic and social order, the value of the currency, normal political conditions, etc. This definition of the Geschäftsgrundlage sounds very much like the rebus sic stantibus doctrine in international public law treaties. German legal scholars agree that commenting on this doctrine is like skating over one night's ice.\textsuperscript{36}

From the outset, a line should be drawn between the so-called "ergänzende Vertragsauslegung\textsuperscript{37}" and the Geschäftsgrundlagenlehre. The distinction is not so easy and currently a set of German Professors and legal scholars are involved in a dramatic struggle on the subject.

After reading some of their publications,\textsuperscript{38} one is indeed left with the idea that the whole discussion is very theoretical since no cases are discussed. The function of the judge to complete a contract means that he should give an interpretation of what the parties actually would have wanted if a given event had been contemplated.

In other words, the judges have to consider the parties themselves in the real environment of the specific contract. The Geschäftsgrundlagenlehre is normative in the sense that the new events automatically change the whole social and economic environment of the contract, allowing the judge not only to complete but also to change the terms of the contract.

IV. IMPOSSIBILITY AND THE DOCTRINE OF CHANGED CIRCUMSTANCES - THE RULE UNDER JAPANESE LAW

The most flexible judge probably is the Japanese judge, although there is no formal statutory law ruling changed contractual circumstances in Japan.

Before the second World War, Japanese law strongly underwent the influence of the German and French legal tradition.\textsuperscript{39} An entire interpretation of the concept of good faith in the execution of a contract made it possible for legal scholars, soon followed by the courts, to import into Japanese law the German flexibility in the adaptation of contracts to changing circumstances. The Japanese Civil Code indeed does not contain any specific rule giving the courts leeway to adapt contractual provisions.\textsuperscript{40}

Unlike French law, the concept of "impossibility" under Japanese law\textsuperscript{41} is broader and not limited to "material impossibility". It is construed as to mean that a performance would be impossible according to "common sense". The Japanese concept of "impossibility" thus will cover also cases in which there is an "economic impossibility" of execution.\textsuperscript{42}

Given such a flexible standard, a Japanese judge will find it often very hard to decide whether there is "impossibility" in a case where a performance of the obligation is materially possible but, in whatever sense, has become extremely difficult. An important element in such decision can be the question whether the judge wants to give the parties a chance to continue their contractual relationship or not. If he judges that there exists "impossibility", the obligation concerned will extinguish.\textsuperscript{43} If, however, he decides that there is no "impossibility", a Japanese judge may apply a different legal concept, to wit the "principle of changed circumstances", which gives leeway to adapt contractual relationship.\textsuperscript{44}

Generally speaking, this principle of changed circumstances will be a tool providing more equity than the harsh distinction between "possibility" and "impossibility" of performance of an obligation.\textsuperscript{45}

The promoter of the latter doctrine of changed circumstances was Katsumoto Masaaki in his book \textit{The principle of changed circumstances in civil law} (1926) which had a fundamental influence on subsequent case law. The book is a thorough analysis in comparative law and legal history especially in the German legal tradition after the first World War. Its definition of the principle of changed circumstances became traditional in Japan:
the act and before expiry of its consequences, due to the influence of facts not attributable to the parties, with the result that the creation of legal consequences in the original sense, or their continuation, is to be considered as unreasonable in the light of the rule of equity and good faith, then such legal consequences are to be adapted in equity and good faith.\textsuperscript{46}

The success of the Katsumoto doctrine was primarily due to its use of the "good faith" concept as a foundation which made it possible to incorporate this principle into civil law and in its clearly defining the conditions for and consequences of application of the rule from the beginning.\textsuperscript{47}

The Japanese Supreme Court adopted this doctrine in 1944.\textsuperscript{48} but has been very restrictive in its application. The lower courts proved to be more lenient and in quite some cases application of the principle was granted.

As generally accepted, the four prerequisites justifying application of the rule are as follows:

(a) The circumstances at the origin of the legal act changed substantially.
(b) Such change was not and could not reasonably be foreseen.
(c) Such change was not due to the parties themselves.
(d) As a consequence of the changed circumstances, execution or continuation of the original obligations substantially violates good faith and equity.\textsuperscript{49}

The first condition implies that there is a change in the "objective" circumstances at the origin of the legal act, meaning that only "subjective" circumstances personal to the contracting parties cannot be taken into account.\textsuperscript{50} For example: the seller of a second residence lost his own residence in the war and therefore claimed dissolution of the sale of his other house. The Supreme Court rejected his claim.\textsuperscript{51} The change in circumstances in this case was merely personal to the seller and a dissolution would cause an unjustified damage to the buyer.\textsuperscript{52}

Execution or continuation of the original legal obligations will be deemed to substantially violate good faith and equity if, for example, the \textit{equilibrium} between the respective contributions of the parties to the contract is seriously disturbed, if execution of the contract has become meaningless for one of the parties, or if due to some external circumstance, the performance has become extremely difficult.\textsuperscript{53}

A typical application of the principle is the following case: the parties agreed in 1935 in a sales contract concerning a piece of land that the seller would, during 20 years, have the right to buy the land back against a fixed price of 520 Y. When the seller exercised this right in 1955, the actual value of the land was estimated to be 323,440 Y (about 620 times the fixed price), this due to the skyrocketing inflation and soaring land prices after Japan's defeat in the Second World War. This change of circumstances could not be foreseen by the parties in 1935. In such case the exercise of this right was judged to substantially violate good faith and equity.\textsuperscript{54}

An important restriction is that a change in circumstances will not be taken into account if it occurred during a delay in performance of the person alleging application of the doctrine, this because the principle is based on the "good faith" concept: X paid to Y part of the price for a house at the time of conclusion of the sales contract in July 1945. The parties agreed that the balance would be paid after Y fulfilled the formalities of registration of the transfer of property. Y failed to fulfill this formality and when X asked about one year later performance of this obligation, Y claimed a higher price based on the principle of changed circumstances. The Court found that due to the serious Inflation and housing shortage after the defeat of Japan, the price agreed upon in the contract was indeed very low and such change in circumstances couldn't be foreseen nor was due to the parties themselves. The question remained whether the claim of X for performance according to the original contract would violate good faith. But since the change in circumstances occurred during a delay in performance of Y the Court reasoned that if Y had normally performed his obligation of registration, he wouldn't have received the profit of the rise in price, while now, because he did not perform his obligation in due time, he would receive such profit if the principle of changed circumstances was to be applied. Such application would violate good faith and consequently the claim for application of the principle of changed circumstances was rejected.\textsuperscript{55}

The four conditions being fulfilled, the possible consequences of application of the principle of changed circumstances are an adaptation of contractual provisions or a dissolution of the contract. Although some cases can be mentioned in which the judge himself adapted the contractual provisions,\textsuperscript{56} and some authors put forward that a judge can do so even against

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the will of the other party to the contract. the majority opinion seems to be that first the adaptation of the provisions has to be claimed and if refused by the opponent or if an adaptation is impossible, dissolution of the contract will be granted.

V. CONCLUSION

Lawyers like facts: a wine connaisseur signs a contract for the construction under his house of a very sophisticated wine cellar, air and humidity conditioned. The house is burned down before execution of the contract, leaving the basement part in perfect condition.

Under English law, this would certainly be considered frustration; in French law probably imprévision e.g.: to be performed, possibly after a delay because the house can be rebuilt.

The question arises whether a German judge will consider that the parties’ intention in this specific contract is clear although not expressed: no wine cellar without a house. Is this completion of the contract? Or is it simply a normative problem: the very economic basis of the contract has disappeared and so the contract itself burned away with the house. What happens if the owner moves to another house of his own with a cellar? Will the judge adjust the contract and invite the building contractor to build a wine cellar in the other basement? What if the owner moves to an apartment? Depending on the answers, the flexible Japanese judge, will rule in accordance with common sense.

Many questions arise in such a complex situation. The later is clearly confirmed by Burkhard Schmiedel in his conclusion on the Festschrift für Ernst von Caemmerer: As already often explained in academic articles, the legal concept Geschäftsgrundlage hides factual problems of a very different kind. From the methodological approach, they can only be classified in groups of cases, possibly of well-defined particular sets of facts, not by means of “uniform formula”.

In fact all these cases go back to a basic error made at the moment of signing a contract. Due to changing circumstances, this error subsequently makes it very hard for one of the parties to perform the contract. The risk involved in contracting should not be such that it covers also totally unforeseeable and dramatic changes in the contractual environment. To what extent those changes have to be identified or simply mentioned in the contract, is recognized differently in every country. Knowledge of this is rather important for lawyers practicing international law, if they want to avoid frustration and hardship for their client and for themselves.

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1 Litteral translation of this term is "impossibility".
7 Krell v. Henry (1903) 2 K.B. 740, See also Chandler v. Webster (1904) 1 K.B. 493.
8 Litteral translation of these terms are respectively "lack of foresight" and "loss of the basis of the business".
14 Chandler v. Webster, supra note 7.
15 The Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. (1943) A.C. 32; (1942) 2 All E.R. 122.
16 Law Reform (Frustrated contracts) Act, 1943, 627 Sev. 6, c.40.
18 Law Reform (Frustrated contracts) Act, 1943, Supra note 16.
19 Oppelit, L’adaptation des contrats internationaux aux changements de circonstances; la clause de hardship, 4 Journal de Droit International (Journ. Dr. Intern.) 784-814 (1974).
20 Polish Civil Code of 1933.
22 See cases cited supra note 11.
25 Free translation of the author.
26 Free translation of the author.
30 B.G.B. Article 276 et seq.
32 Id. at 261.
33 Meaning that under the prevailing circumstances, it would be unfair to expect performance of the obligation.
34 A similar concept, representing the very limit of sacrifice beyond which performance cannot be expected.
35 K. L[a]renz (note 31) Id. at 262.
37 Litteral translation of this term is an interpretation of the contract which fills its gaps.
40 The research for the Japanese law has been undertaken by Mr. Paul Waer, Lic. in Law (Antwerp), Dr. in Law (Tokyo).
41 Article 415 of the Japanese Civil Code stipulates: "If an obligator fails to effect performance in accordance with the tenor and purport of the obligation, the obligee may demand compensation for damages; the same shall apply in cases where performance becomes impossible for any cause for which the obligor is responsible". According to the a contrario interpretation, compensation for damages is not due in case the performance becomes impossible for any cause for which the obligor is not responsible. Igarashi, K. Keiyaku to jijohenko, 3 ed., Tokyo, Yuhikaku, 1983, 167.
42 Igarashi, K. Jijohenko no gensoku su saikento, Hogaku Kyoshitsu Dai ni ki, 1975, 37. There are, however, few cases reported. An example: an increase in the demand for ships due to the war between Japan and China makes performance of the promise of the seller to transport goods from Korea to Japan "impossible", see Igarashi, K. Keiyaku to jijohenko, 3 ed., Tokyo, Yuhikaku, 1983, 169.
43 In such case the assumption of risk is regulated by art. 534 C.C.: "Where the creation or transfer of a real right over a specific thing is made the object of a bilateral contract and the thing is lost or damaged by any cause for which the obligor is not responsible, such loss or damage shall be borne by the obligee". Art. 536 C.C. stipulates that: "Except in the . . . (case mentioned in 534) . . ., if the performance for which neither of the parties is responsible, the obligor is not entitled to counter-performance".
44 Nakayama, M. Jijohenko no gensoku, Gendaikeiyakuhotaiei Vol. 1, Tokyo, Yuhikaku, 1983, 75-76.
45 Katsumoto, M. Kigyo no torihikihippaku to jijohenko no gensoku, NBL No. 55 (1974), 9.
47 Ibidem, 149.
48 Decision of December 6, 1944, Minshu Vol. 23 No. 19, 613-621.
50 Endo, H., o.c. 270; Uchiyama, S., o.c., 31.
51 Supreme Court January 28, 1954, Minshu Vol. 8 No. 1, 235.
52 Igarashi, K. Jijohenko to kaiyo. Juristo Minpohanrei hyakusen II (1982), 157; Yabu, S. Joken-kigen to keiyaku no koryoko Shinpan Minpo Enshu, Tokyo, Yuhikaku, 1978, 218; some authors however put forward that in non-commercial transactions such personal circumstances are very often decisive for conclusion of a contract and thus should, in some cases, be taken into account. Fukuchi, T. Minporeidai Kaisetsu II, Tokyo, Yuhikaku, 1959, 37.
53 Igarashi, K. Keiyaku jijohenko, 3 ed., Tokyo, Yuhikaku, 1983, 154. This text is similar to the German Zumutbarkeit or
Referring Principles:

VI.3 - Force majeure