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Frustration of Contract in International Trade Law and Comparative Law

*Michael G. Rapsomanikis**

I. THE PROBLEM OF FRUSTRATION IN COMPARATIVE CONTRACT LAW

A. GENERAL INTRODUCTION

Whether one's preference is directed toward the term "frustration," "impossibility," or "changed circumstances," the situation expressed by all these words is basically the same; in all legal traditions it arises "when unforeseen occurrences, subsequent to the date of the contract, render performance either legally or physically impossible, or excessively difficult, impracticable or expensive, or destroy the known utility which the stipulated performance had to either party."¹ The problem created in such a situation is, of course, whether deviation from the stipulations of the contract should be allowed, by means of the contract's adjustment, postponement or termination.² This problem can be better viewed as a conflict between the principle of private autonomy, well expressed in the medieval maxim *reservanda sunt pacta*, and the modern need of attributing a social function to private contracts, thereby considering extra-contractual elements, such as good faith, reasonableness and practicality.³

On the other hand, the problem of frustration is not new, having known a considerable historic development. It became especially acute by the turn of the century due to serious political disturbances (World Wars), great economic upheavals (inflation, strikes, devaluations) and an amazing increase in the number and the subject of internal and international trade transactions. In order to fully understand the doctrine of frustration of contract, it is first necessary to examine the historical development of the doctrine in the various legal systems.

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1. Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287, 287 (1958) [hereinafter cited as Smit].

2. *Id.* at 287-88.

3. See Hay, *Zum Wegfall Der Geschäftsgrundlage im Anglo-Amerikanischen Recht*, 164 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 231, 232 (1964) [hereinafter cited as Hay].

B. CIVIL LAW JURISDICTIONS

1. *Background Prior to the Nineteenth Century*

Roman law, at least as *jus strictum*, did not recognize the problem of frustration, always abiding by the express terms of the agreement irrespective of how onerous for the debtor the contract could become. Only absolute and objective impossibility was a valid reason for discharge.⁴ Yet, relief would be given sporadically through the development of bona fide institutions like the *exceptio dolis generalis* and the relevant provision of the Justinian Digest,⁵ which can be traced as the origin of the *clausula rebus sic stantibus* theory.⁶ Many centuries later, under the influence of canon law, the post-glossators developed the theory of *difficultas*,⁷ which granted the debtor relief for excessive difficulty of performance.

The natural law jurists, in connection with their theory of the contract as a means of voluntary transfer of resources from one party to another, recognized three cases of discharge: physical impossibility, legal impossibility and excessive onerousness of performance.⁸ However, the prevailing medieval theory, adopted in the major eighteenth century codifications,⁹ is the aforementioned *clausula rebus sic stantibus*. The content of this theory, effectuating a subsequent condition of discharge, is that "contracts are made upon the tacit assumption that an existing factual situation having an important bearing on the contract will remain basically stable during the life of the contract."¹⁰ Although the *clausula* proved very useful in the field of public international law, in private law it was superseded and forgotten during the nineteenth century.¹¹

4. See R. LEE, *THE ELEMENTS OF ROMAN LAW* 349-50 (4th ed. 1956).

5. DIGEST 46.3.38.

6. This provision reads as follows:

When anyone stipulates that payment shall be made to him, or to Titius, the better opinion is that it will only be properly made to Titius, *when he remains in the same condition in which he was when the stipulation was entered into . . .* for this agreement, namely, "If he remains in the same condition," is understood to have been tacitly included in the stipulation.

X S. SCOTT, *THE CIVIL LAW* 193 (1932) (emphasis added).

7. See Mejers, *La Force Obligatoire des Contrats et Ses Modifications Dans les Droits Modernes*, in ACTS DU CONGRES INTERNATIONAL DE DROIT PRIVE 99, 101 (1950) [hereinafter cited as Mejers].

8. A. VON MEHREN & J. GORDLEY, *THE CIVIL LAW SYSTEM* 1040-43 (2d ed. 1977) [hereinafter cited as VON MEHREN & GORDLEY].

9. See Mejers, *supra* note 7, at 103.

10. R. SCHLESINGER, *COMPARATIVE LAW* 506 (3d ed. 1970) [hereinafter cited as SCHLESINGER].

11. See Hay, *Frustration and Its Solution in German Law*, 10 AM. J. COMP. L. 345-46 (1961) [hereinafter cited as *Solution in German Law*].

2. Germany

In Germany, the nineteenth century distinction between declaration of intention and motives, as well as the breakup of impossibility into subjective and objective, or original and subsequent, led to the oblivion of the natural law theories. The discharging effect of legal and physical impossibility, however, remained unaffected.¹² In 1852 the German jurist Windscheid presented a new doctrine, the so-called *Voraussetzung* (presupposition) theory. According to Windscheid, each party's contractual intention contains an "undeveloped condition" that the legal effect of the contract will remain in force as long as a certain situation exists; the situation being overthrown, the other party cannot claim performance if it was possible to trace the existence of the condition from the circumstances of the contract.¹³ However, this theory did not convince Windscheid's contemporaries.¹⁴

By the turn of the century various theories were advanced. Three were the most eminent among them, upon which the Reichsgericht repeatedly relied. First among them was the doctrine of *Unzumutbarkeit* (nonimputability) under which the obligor can no longer be required to perform the original contract when such a claim imposes an unreasonably heavy burden.¹⁵ This theory seems to have absorbed other notions like that of economic impossibility, financial ruin, and exploitation.¹⁶ Also advanced was the doctrine of *Wegfall der Geschäftsgrundlage* (disappearance of the contractual basis) whose basis can be defined as encompassing assumptions "concerning the existence, continued existence, or future occurrence of certain fundamental circumstances which, while not part of the contents of the contract . . . nor mere motive, have been made the basis of the transaction, either by both contracting parties or by one alone with the other acquiescing or not objecting."¹⁷ This doctrine, mainly presented as a legal weapon against the German inflation following World War I, proved useful in other cases as well.¹⁸ The third theory advanced was that of *Treu und Glauben* (good faith), which more or less underlies all of the other German doctrines and has been used most extensively by the Reichsgericht.¹⁹ Under sections 157 and 242 of the German Civil Code,

12. VON MEHREN & GORDLEY, *supra* note 8, at 1046-57.

13. *Id.* at 1045.

14. *Id.* at 1045-46.

15. Smit, *supra* note 1, at 297.

16. See *Solution in German Law*, *supra* note 11 at 359.

17. PALANDT, *BÜRGERLICHES GESETZBUCH KURZKOMMENTAR* 187 (18th ed. 1959) (translation in *Solution in German Law*, *supra* note 11, at 362).

18. An example is the change in the value of foreign currencies. See *Solution in German Law*, *supra* note 11, at 365.

19. See Smit, *supra* note 1, at 297.

requiring a "good faith" interpretation and performance of private contracts, the courts have in many cases supplemented contracts with reasonable provisions embracing the problem of changed circumstances.²⁰ Thus, German courts have proceeded to a "social" interpretation of the contract, in contrast to the old theories which purported to interpret the contract "per se," without regard to extra-contractual elements.²¹ The most noteworthy outcome of this trend is, of course, the widely adopted practice among the German courts of adjusting the contractual obligations following frustration²² in contrast to the common law flat rule of *ex nunc* termination.

Other theories, forwarded not only in Germany but also in other European countries, are the doctrines of mistake, unjust enrichment, abuse of right, and *Aequivalenz* (equilibrium).²³ The latter, understood as a "contra bonos mores" disturbance of the proportion between performance and counterperformance, seems to be gaining ground in current German theory.²⁴

3. France

Although the French jurists, like their German counterparts, broke with the natural law theories, they did not follow the same trends as the Germans. Rather, they employed an all-sweeping notion of fault with many extreme results, at the same time developing the typical French law doctrine of *force-majeure* (irresistible force).²⁵

According to this doctrine, expressed in Articles 1147 and 1148 of the French Civil Code, prerequisites for discharge are: (a) unforeseeability of a fortuitous event, (b) absolute impossibility of performance and not mere onerousness, and (c) no fault on the obligor's part.²⁶ These requirements have been strictly enforced by the civil courts and in the rare cases where relief has been granted, the contract has been treated as a nullity,²⁷ contrary to the German practice of adjustment.

After World War I, there emerged in the French legal literature the doctrine of *imprévision* (lack of foresight), purporting to relieve the parties, if the performance of their contract has subsequently become very onerous, by means of interpreting their will and the bona fide Ar-

20. See *Solution in German Law*, *supra* note 11, at 356-58.

21. See notes 1-3 and accompanying text *supra*.

22. See *Solution in German Law*, *supra* note 11, at 363-64.

23. For a general discussion of these theories see Smit, *supra* note 1, at 288-99.

24. See VON MEHREN & GORDLEY, *supra* note 8, at 1098-99.

25. *Id.* at 1047-48.

26. See David, *Frustration of Contract in French Law*, 28 J. COMP. LEGIS. & INT'L L. 11-12 (1946).

27. *Id.* at 12.

ticle 1134 of the French Civil Code.²⁸ This theory was adopted and repeatedly applied by the Conseil d'État in contracts between the government and private parties in an effort to preserve the public welfare.²⁹ Moreover, the Conseil d'État has been very flexible in its decisions, allowing a modification of the contractual obligations.³⁰ The civil courts, on the other hand, have always rejected the doctrine of *imprévision*; due to their inflexible attitude, special legislation has been employed in periods of great necessity.³¹

4. *The Jurisdictions of Adjustment—Italy and Greece*

As mentioned above, the central European legal systems and the French administrative courts have long recognized the modification of the contract and the apportionment of the loss between the parties as a means of relief in frustration cases. This practice was adopted by the courts in these countries under the influence of legal theorists, basing the result on the interpretation of general bona fide provisions of the respective civil codes. In Italy and Greece, however, the legislators have gone a step further, including special provisions to this effect in the codes in addition to the general good faith clauses.

Thus, in Italy, in addition to the *buona fede* Articles 1366 and 1375 of the Italian Civil Code of 1942, express provisions allowing the adjustment or the dissolution of the contract were included in Articles 1467 through 1469. Article 1467, dealing with contracts for mutual counterperformances, reads in part: "In contracts for continuous or periodic performance or for deferred performance, if extraordinary and unforeseeable events make the performance of one of the parties excessively onerous, the party who owes such performance can demand dissolution of the contract . . ." Article 1468, on the other hand, which involves contracts with obligations of only one party, provides: "In the case contemplated in the preceding Article, if the contract is one in which only one of the parties has assumed obligations, he can demand a reduction in his performance or a modification of the manner of performance, sufficient to restore it to an equitable basis."³² Thus, adjustment of the contract seems possible only in the case of unilateral contracts, whereas relief in the case of bilateral contracts is limited to dissolution.

28. *Id.*

29. *Id.* at 13.

30. See VON MEHREN & GORDLEY, *supra* note 8, at 551.

31. See *id.* at 1059-63.

32. See M. BELTRAMO, G. LONGO & J. MERRYMAN, *THE ITALIAN CIVIL CODE 372-73* (1969). See generally Gambino, *Eccessiva Onerosità Della Prestazione e Superamento Dell'Alea Normale Del Contratto*, in 58 RIVISTA DEL DIRITTO COMMERCIALE 416 (1960).

In contrast to the Italian statutory provisions, Article 388 of the Greek Civil Code of 1940 reads:

If the circumstances in which the parties, having regard to the rules of good faith and to business practice, decided to conclude a synallagmatic contract, subsequently change, for extraordinary reasons which it was impossible to foresee, and if, as a result of this change, fulfilment of the obligations, taking into account the counter-obligations, becomes inordinately burdensome for the obligor, the latter may request the judge to reduce the obligations at his discretion to a suitable extent, or to rescind the whole of the contract or the part not carried out.³³

Thus, the Greek Civil Code seems to be more flexible, allowing three forms of relief alternatively, including total dissolution, partial dissolution, or adjustment of bilateral contracts. In addition, the Code contains general good faith provisions in Articles 200 and 288, which are analogous to Articles 157 and 242 of the German Civil Code and Articles 1366 and 1375 of the Italian Civil Code.

C. COMMON LAW JURISDICTIONS

1. *England*

In England, the law of frustration has experienced an interesting and dynamic evolution. Unlike Roman law, the starting point has been the rule of absolute liability for performance, expressed in the seventeenth century decision of *Paradine v. Jane*.³⁴ A first rupture of this doctrine was brought about by the nineteenth century case of *Taylor v. Caldwell*,³⁵ which established the excuse for physical impossibility of performance, as well as the "implied condition" theory.³⁶ Two more grounds of excuse were later added, including the debtor's inability to carry out a personal services contract due to severe illness or death and the legal impossibility of performance.³⁷ These three exceptions were understood to encompass contracts the achievement of which had become absolutely impossible because of a supervening event. Yet, even before the time *Taylor v. Caldwell* was decided, a separate movement had started, later named frustration of contract, purporting to

33. See SCHLESINGER, *supra* note 10, at 511. See generally Zepos, *Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946*, 11 MOD. L. REV. 36 (1948).

34. 82 Eng. Rep. 897 (K.B. 1647). See Schmitthoff, *Frustration of International Contracts of Sale in English and Comparative Law*, in SOME PROBLEMS OF NON-PERFORMANCE AND FORCE-MAJEURE IN INTERNATIONAL CONTRACTS OF SALE 127, 131 (Int'l Ass'n of Legal Science, Helsinki, 1961) [hereinafter cited as Schmitthoff].

35. 122 Eng. Rep. 309 (Q.B. 1863).

36. See Hay, *supra* note 3, at 234.

37. *Id.* at 234-35.

release the obligor for a mere excessive difficulty to perform.³⁸ This category included a number of charterparty cases as well as the famous *Coronation cases* and, having in many instances overlapped with the true impossibility cases, it was finally amalgamated with the doctrine of impossibility. The case which combined the two trends, *F.A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co.*,³⁹ also introduced the "foundation of contract" theory,⁴⁰ analogous to the previously examined German doctrine of the *Geschäftsgrundlage*. Yet, the peak of the evolution was reached by the advance of Lord Wright's theory in 1939, according to which the courts impose on the parties what they think is "just and reasonable."⁴¹ The doctrine of frustration had thus expanded so much that, instead of interpreting the contract itself, it sought to base the excuse on extracontractual elements and considerations.⁴² Fearing that the principle of the sanctity of contracts was at stake, the House of Lords unanimously reversed a decision of the Court of Appeals⁴³ which had adopted Lord Wright's formulation.

A new construction of the doctrine of frustration was attempted in *Davis Contractors Ltd. v. Fareham Urban District Council*.⁴⁴ In that case, Lord Radcliffe enunciated the standard that "frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract."⁴⁵ This "radically different" test prevails in English law today, although its theoretical basis remains obscure and its application has been very strict, as the Suez Canal cases demonstrate.⁴⁶

Until 1943, there was only one form of judicial relief in frustration cases. Declaration of frustration meant *ex nunc* termination of the contract, with no down payments or reliance expenses being recoverable.⁴⁷

38. *Id.* at 236.

39. [1916] 2 A.C. 397. See Hay, *supra* note 3, at 238.

40. Smit, *supra* note 1, at 304-05.

41. See Schmitthoff, *supra* note 34, at 134.

42. Hay, *supra* note 3, at 244.

43. *British Movietonews Ltd. v. London and Dist. Cinemas Ltd.*, [1952] A.C. 166 (1951). See Schmitthoff, *supra* note 34, at 135-36.

44. [1956] A.C. 696. See Schlegel, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things—The Doctrine of Impossibility of Performance*, 23 *RUTGERS L. REV.* 419, 426-29 (1969) [hereinafter cited as Schlegel].

45. [1956] A.C. at 729.

46. See Hay, *supra* note 3, at 242-43; Schmitthoff, *supra* note 34, at 138-40. See also notes 226-230 and accompanying text *infra*.

47. See Schmitthoff, *supra* note 34, at 141-42 (characterizing this judicial practice as "black and white jurisprudence").

Down payments could be claimed under the rule of the decision in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour, Ltd.*,⁴⁸ and a more general settlement of the matter, including apportionment of the reliance costs, was achieved by the Law Reform (Frustrated Contracts) Act of 1943.⁴⁹ Nevertheless, this statute, which will be examined more fully in relation to international trade law,⁵⁰ did not touch the substantive law of frustration.

2. United States

In the United States, frustration still remains a vague and unsettled doctrine and the solutions advanced are not always consistent with the theories involved.⁵¹ American courts, in addition, are even more reluctant to grant relief than the reluctant English courts.⁵² The rule of *Paradine v. Jane* was transplanted from England in the nineteenth century⁵³ and was long sanctioned by the American courts, although exceptions with regard to certain important classes of contracts were recognized.⁵⁴ The breakdown of the absolute liability theory came about by the end of the nineteenth century⁵⁵ through the use of various methods.

First, a differentiation between subjective and objective impossibility was made, with only the latter entitling the obligor to an excuse. This distinction, adopted in the First Restatement of Contracts and maintained in the tentative draft of the Second Restatement,⁵⁶ has been strongly criticized.⁵⁷ Second, three cases of discharging impossibility, analogous to those of English law, were recognized: supervening illegality; death or illness of the obligor in a personal services contract; and disappearance of the essential person, thing or other means of performance.⁵⁸ Although the coherence of this systematization has been questioned,⁵⁹ it was incorporated in both the

48. [1943] A.C. 32 (1942).

49. See Hay, *supra* note 3, at 252.

50. See notes 139-144 and accompanying text *infra*.

51. Smit, *supra* note 1, at 307-08.

52. See Hay, *supra* note 3, at 245-46.

53. See G. GILMORE, *THE DEATH OF CONTRACT* 45-47 (1974).

54. *Id.* at 77-80.

55. *Id.* at 80-81.

56. See RESTATEMENT OF CONTRACTS § 455 (1932); RESTATEMENT (SECOND) OF CONTRACTS § 281, comment e (Tent. Draft No. 9, 1974).

57. See, e.g., Patterson, *The Apportionment of Business Risks Through Legal Devices*, 24 COLUM. L. REV. 335, 349-50 (1924) [hereinafter cited as *The Apportionment of Business Risks*].

58. Patterson, *Temporary Impossibility of Performance of Contract*, 47 VA. L. REV. 798, 799 (1961).

59. See *The Apportionment of Business Risks*, *supra* note 57, at 350-52.

Restatements.⁶⁰ Third, the concept of "impracticability" defined as "extreme and unreasonable difficulty, expense, injury or loss,"⁶¹ emerged as an excuse for nonperformance. The term was extensively used in the Uniform Commercial Code⁶² and it replaced the word "impossibility" in the tentative draft of the Second Restatement,⁶³ yet neither the text nor the comments of these major compilations offers an adequate clarification of this general and uncertain concept.⁶⁴

The variety of obscure, and to a large extent fictitious, theories which accompanied these developments,⁶⁵ the objections of some scholars to the liberalization of excuse,⁶⁶ and the unfortunate connection of the whole matter with the notion of unforeseeability in the courts⁶⁷ have contributed to the existing confusion and inability to draw a sharp line between impossibility and frustration in American law. The situation is not any better as to the form of judicial relief awarded in the rare cases where frustration is acknowledged. American courts adhere firmly to the "black and white"⁶⁸ rule of termination of the contract, despite the condemnation of this practice by American writers⁶⁹ and the legislative change in England,⁷⁰ from which the principle was adopted. It is only to be hoped, consequently, that the courts will reconsider their attitude in view of the comments to the Second Restatement of Contracts⁷¹ and to the Uniform Commercial

60. RESTATEMENT OF CONTRACTS §§ 458-461 (1932); RESTATEMENT (SECOND) OF CONTRACTS §§ 282-284 (Tent. Draft No. 9, 1974).

61. RESTATEMENT OF CONTRACTS § 454 (1932).

62. See U.C.C. § 2-614(a), 2-615(a) & comment 3. See also notes 145-154 and accompanying text *supra*.

63. See RESTATEMENT (SECOND) OF CONTRACTS § 281 & comment d (Tent. Draft No. 9, 1974).

64. See VON MEHREN & GORDLEY, *supra* note 8, at 1101.

65. See generally Smit, *supra* note 1, at 308-10. The "implied term" theory was rejected in the Tentative Draft of the Second Restatement in favor of the "basic assumption" test. See RESTATEMENT (SECOND) OF CONTRACTS, Reporter's Note to ch. 11 (Tent. Draft No. 9, 1974).

66. See Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1429, 1437-39 (1963) [hereinafter cited as *Excuse for Nonperformance*].

67. See Note, *The Fetish of Impossibility in the Law of Contracts*, 53 COLUM. L. REV. 94, 98 n.23 (1953) [hereinafter cited as *The Fetish of Impossibility*].

68. See note 47 and accompanying text *supra*.

69. See, e.g., Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 883 (1968) (using the expression "Procrustean choice") [hereinafter cited as Farnsworth]; Hay, *supra* note 3, at 252-53.

70. See text accompanying notes 49-50 *supra*. See also notes 139-144 and accompanying text *infra*.

71. RESTATEMENT (SECOND) OF CONTRACTS § 292, comment b (Tent. Draft No. 9, 1974) ("In a proper case recovery may go beyond mere restitution and include elements of reliance by the claimant even though they have not benefited the other party"). See VON MEHREN & GORDLEY, *supra* note 8, at 1103.

Code,⁷² proceeding to an adjustment of the contractual obligations of the parties, as required by equity.

D. CONCLUSION

Having briefly presented the development and the present condition of the way different legal regimes have faced the problem of frustration, it is now possible to compare the given solutions. First of all, it seems that despite the differences, the following general characteristics⁷³ can be traced in all national jurisdictions: (a) occurrence of an event after the making of contract; (b) exceptionality and unforeseeability of the event; (c) alteration of the contract in an intolerable degree; and (d) no fault on the obligor's part. Nevertheless, the existing antitheses, at least between the civil and the common law regimes, should also be noted. Professor Hay has argued that these differences are rooted in a dissimilar socio-political and jurisprudential background: namely, that common law views the contract as an instrument of liberalism and private autonomy, whereas civil law has ascribed a social function to private agreements, which are thereby affected by extra-contractual considerations.⁷⁴ This fundamental difference finds its expression in the unwillingness of the common law to recognize frustration on the one hand and the rejection of adjustment as a general form of relief on the other.⁷⁵

Still, the noticeable evolution of the question of frustration in England and the United States should not be underestimated. It is well enough to recall that common law started from a point opposite to that of the civil law regimes⁷⁶—namely, from an unexcepted liability rule—and it turned out to reach a contrary doctrine: impossibility or frustration is always an excuse, unless the obligor undertook the risk of the contingency.⁷⁷ With respect to the manner of relief, a considerable liberalization has also taken place.⁷⁸ Could that mean that common law is gradually being "civilianized?" Or, could the implication be that civil law and common law regimes are proceeding through different methods to the adoption of an identical frustration principle, such as

72. U.C.C. § 2-615 comment 6. See notes 153-154 and accompanying text *infra*.

73. See Mejers, *supra* note 7, at 111; Schmitthoff, *supra* note 34, at 128.

74. Hay, *supra* note 3, at 268.

75. See SCHLESINGER, *supra* note 10, at 512-14.

76. 18 S. WILLISTON, CONTRACTS § 1931 (3d ed. W. Jaeger 1978). See also *The Apportionment of Business Risks*, *supra* note 57, at 352.

77. See Berman, *Non-Performance and Force Majeure in International Trade Contracts*, in SOME PROBLEMS OF NON-PERFORMANCE AND FORCE MAJEURE IN INTERNATIONAL CONTRACTS OF SALE 31, 33-34 (Int'l Ass'n of Legal Science, Helsinki, 1961) [hereinafter cited as *Non-Performance and Force-Majeure*].

78. See text accompanying notes 47-50 & 68-72 *supra*.

the "gap-filling" doctrine?"⁷⁹ Since the development continues, perhaps these comparative questions cannot yet find an unquestionable and conclusive answer.

II. THE PROBLEM OF FRUSTRATION IN INTERNATIONAL TRADE LAW

A. GENERAL INTRODUCTION

If the problem of frustration is a central question of contract law in general, special attention should be given to its appearance in a particular class of contracts because of the distinctive risks and burdens parties in these contracts usually face. That class of contracts includes international trade contracts, involving the sale or transportation of goods beyond the national boundaries of a single country. The particularities of these contracts arise out of their two typical elements;⁸⁰ namely, the transnational character and the long-distance nature of the stipulated shipments. Specifically, with respect to the frustration issue, there are special complications of international trade contracts. For example, a change in the circumstances existing at the formation of the contract and relied upon by the parties is more likely to occur and more vital than in domestic transactions because of the stricter governmental regulations, the frequent fluctuation of exchange rates, and the greater risk of damage to the goods.⁸¹ Also, parties in international trade contracts often do not know and do not trust each other; this enhances the role of the contract in the transaction, as well as the draftsman's burden to delineate each party's duties in case of a subsequent change in circumstances as clearly as possible.⁸² Finally, foreign litigation for the resolution of the problem of frustration can be quite troublesome with respect to the contracts in question.⁸³ Application of unknown laws, difficulty of proof, high costs, and distrust of the foreign judge's impartiality are the major snags; while further complications might arise out of the common international trade phenomenon of "chain" of contracts, when the seller's foreign supplier defaults and the seller assigns his rights against the supplier to his buyer.

The examination of the problem of frustration and its confrontation in international trade law is the second and major theme of this article.

79. See Smit, *supra* note 1, at 288, 295, 297, 301-02, 306, 314-15.

80. See H. Berman, *The Law of International Trade* 31-32 (1978) (unpublished materials for the use of students at Harvard Law School; all quotations are made with the author's permission) [hereinafter cited as Berman].

81. *Id.* at 33-34.

82. See *Excuse for Nonperformance*, *supra* note 66, at 1419-20. See also notes 308-311 & 321 and accompanying text *supra*.

83. See Berman, *supra* note 80, at 417.

This section of the article will survey the solutions proposed in theory, statutory provisions, model contracts, individual contract practices, and finally, the much discussed Suez Canal cases.

B. THE SCHOLARS

Only one writer has argued that the problem of frustration in international trade should be treated under separate rules, independent from those of general contract law; the majority of scholars do not make this distinction. Rather, they regard international trade contracts as a subclass of all private agreements. Another group of theorists purports to resolve the issue of frustration by means of non-legal principles such as microeconomic analysis.

1. Professor Berman's "Enumerative" Test

Professor Berman has argued that the contractual practices in contracts for the international sale of generic goods reveal that the parties list specifically a certain number of discharging contingencies, intending that all other risks will be borne by the obligor (seller or shipowner).⁸⁴ Thus, the gap-filling principles of general contract law are inapplicable in these contracts since no gaps are left by the open-eyed and profit-seeking international merchants.⁸⁵ Moreover, according to Professor Berman, the applicability of a liberal doctrine of excuse in international trade contracts would impose a heavy burden of draftsmanship on the parties,⁸⁶ forcing them to list *non-excusing* events. Also, under Berman's theory, a liberalization of discharge would in the end become a loophole for the usually more powerful seller.⁸⁷ The question of excuse, according to the same view, lies in the contract itself, which reveals how the parties allocated the various risks between themselves.⁸⁸ Means of such a contractual interpretation should be the price-delivery term, the general or specific force-majeure clauses, the common understandings of the particular trade involved and other relevant factors, such as the nature of the stipulated performance.⁸⁹

Professor Berman's opinion is desirable in that it draws attention to the prevailing contractual practices in each trade, and to the nature of the transaction. However, there are a number of difficulties with the fundamentals of Professor Berman's theory. First, his methodological

84. *Excuse for Nonperformance*, *supra* note 66, at 1415.

85. *Id.* at 1416.

86. *Id.* at 1417.

87. *Id.* at 1437.

88. *Id.* at 1423-24.

89. *Id.* at 1429-31, 1434-36.

approach—namely, the solution of the problem of frustration in international trade through autonomous principles, to the exclusion of general contract law rules⁹⁰—is unacceptable. It is true that the legal analyst should take into account the particular characteristics of international commercial transactions, as it occurs whenever a subclass of similar contracts is involved (e.g., construction contracts or sale of commercial paper). However, this consideration of differentiating points is only a supplementary tool of interpretation and should not lead to an overall disregard of general contract law principles, the purpose of which is the formation of a framework encompassing *all* contracts. Moreover, certain fundamental general principles, such as the rules of offer and acceptance and the rules of the parties' capacity, cannot be ignored. It is not clear how one could arbitrarily pass over some rules and maintain others.

Second, Professor Berman's suggested solution is very strict, imposing an excessive burden on the promisor, seller or shipowner. Even if one assumes that "nothing is unforeseeable," as Professor Berman does,⁹¹ it does not necessarily follow that the parties "take it for granted that the risk of events not specifically referred to shall be borne by the obligor."⁹² The parties might instead have intended termination of the contract or application of general contract law or even nothing, fearing that their agreement might fall through.⁹³ Just because the seller is in many instances the most powerful participant in the bargain, he should not be made subject to such an absolute rule of liability.

Third, Professor Berman's argument about the draftsman's heavy burden to list all the contingencies that will *not* excuse, can just as well be inverted: the suggest approach would force the seller or shipowner, who has the bargaining power to minimize his liability, into listing specifically all the imaginable events that *will* excuse. Moreover, the burden of expression is not easily assignable to either party.⁹⁴ Professor Berman's view seems more supportable with regard to contingencies like export-import prohibitions⁹⁵ and insolvency.⁹⁶

90. *Id.* at 1416.

91. See *Travaux du Colloque de L'Association Internationale des Sciences Juridiques*, in *SOME PROBLEMS OF NON-PERFORMANCE AND FORCE MAJEURE IN INTERNATIONAL CONTRACTS OF SALE 261* (Int'l Ass'n of Legal Science, Helsinki, 1961) [hereinafter cited as *Helsinki Discussions*].

92. *Excuse for Nonperformance*, *supra* note 66, at 1416.

93. See text accompanying notes 236-237 & 310-311 *infra*.

94. See Farnsworth, *supra* note 69, at 884-85.

95. See Berman, *Force Majeure and the Denial of an Export License under Soviet Law: A Comment on Jordan Investments Ltd. v. Soizuznefteksport*, 73 HARV. L. REV. 1128, 1141-43 (1960).

96. See U.C.C. § 2-614(2).

However, the repudiation of general contract law, the severeness of the result, and the questionable basis of the theory do not allow for its adoption as the general controlling rule.

2. *The Helsinki Association*

Different tests were suggested in the 1961 International Association proceedings at Helsinki, in which problems of force-majeure and non-performance of international sale contracts were discussed.⁹⁷ Of the opinions given at the Helsinki Conference, some of the most interesting were expressed by the representatives of France and England.⁹⁸

Professor André Tunc disagreed with the enumerative test proposed at the meeting, on the grounds that these force-majeure lists are generally understood to be indicative and not exclusive. He also posited that the impact of a listed contingency on the contract can vary substantially. For example, a war might leave the contractual purpose unaffected or, on the contrary, might destroy it completely.⁹⁹ In lieu of the enumerative method, Professor Tunc's view favors the "diligent party" test, which focuses upon how assiduous the party should have been in the circumstances it faced and whether the party acted as required by diligence.¹⁰⁰

The enumerative standard was also discarded by Professor Schmitthoff as an illustration of what he calls the "normative" test. This test, he says, is old-fashioned, inflexible and has been abandoned by most legal regimes in favor of the so-called "qualitative" test.¹⁰¹ A uniform international standard is needed, however, to facilitate the application of the qualitative test in all national jurisdictions; such a standard, Professor Schmitthoff suggests, is to be found in the English doctrine of fundamental change in the obligation, which historically has been rarely and reluctantly applied.¹⁰² Schmitthoff argues that the extreme liberalism of excuse, which is noticed in the individual contracts of the parties, is compensated by the contractually stipulated effect of frustration, the latter being usually a delay of performance and not a termination of the contract.¹⁰³ Yet, according to Professor Schmitthoff, the strictness of the national legal regimes on the one hand and the

97. See note 91 *supra*.

98. Professor Berman also participated in the Helsinki Conference, but his theories are treated elsewhere in this article. See text accompanying notes 84-96 *supra*.

99. *Helsinki Discussions*, *supra* note 91, at 255-56.

100. *Id.* at 256.

101. Schmitthoff, *supra* note 34, at 146-47.

102. *Helsinki Discussions*, *supra* note 91, at 252.

103. Schmitthoff, *supra* note 34, at 150.

liberalism of the contractual regimes on the other might be reconciled; this could be done by means of employing a distinction between "major frustrating events," which automatically terminate the contract, and "minor frustrating events," which simply postpone the contractual performance.¹⁰⁴

The standards suggested by these two professors reflect the legal traditions of their own countries and it is therefore difficult to accept them as international criteria. The test of the "radically different" obligation, proposed by Professor Schmitthoff, completely disregards the reasonableness or diligence of the parties' conduct. On the other hand, the "diligent party" test, recommended by Professor Tunc, ignores the nature of the contingency, which might have destroyed the contractual purpose despite the parties' perfectly reasonable behavior. In other words, the former standard is too objective, the latter too subjective. Moreover, the test of "fundamental difference" has long troubled the English courts, who are still uncertain which theory underlies the standard, and whether it refers to the obligation or to the kind of performance.¹⁰⁵ Also, the endless calculations and comparisons which the application of this test requires have always been a nuisance for the courts and have led to bizarre and controversial results.¹⁰⁶ It would appear, therefore, that both criteria are unsatisfactory as such and that a possible combination of their requirements—perhaps like Article 65 of UNCITRAL¹⁰⁷—would be preferable. Nevertheless, Professor Schmitthoff's suggestions about the adoption of "minor frustrating events," "secondary duties," and "adjustment rights"¹⁰⁸ in all national legislations, should be welcomed as very desirable developments of the law of frustration and as satisfying important commercial needs.

3. The "Better Loss-Bearer" Theory

Another solution has been proposed by John Henry Schlegel. Tracing the historical origin of frustration and its distinct elements in comparison with impossibility and breach of contract, Schlegel concludes that the essence of frustration is the undesirability—both socially and

104. *Id.* at 157.

105. *Port Line Ltd. v. Ben Line Steamers Ltd.*, [1958] 2 Q.B. 146, 162 (Judge Diplock) ("It would appear to be the fate of frustration cases when they reach the highest tribunals that either there should be agreement as to the principle but differences as to its application, or differences as to the principle but agreement as to its application") (quoted in Schlegel, *supra* note 44, at 429 n.64).

106. For a discussion of the varying results in the Suez Canal cases, see Part II-F *infra*.

107. See text accompanying note 161 *infra*.

108. Schmitthoff, *supra* note 34, at 157-58.

economically—of enforcing some contracts after an extraordinary situation has arisen.¹⁰⁹ Although Schlegel feels that all the theories about frustration—his own included—fail to provide the judge with a practical standard with which to decide cases, he thinks that such a guide can be found in the following formulation:

Where an unusual event occurs and frustration is alleged, contracts should be enforced only when the contract in question is essentially similar to the archetypical contract situation: the contract between brokers, each essentially speculating on a narrowly fluctuating market Thus, an event should be held frustrating when it is not one within that narrow range of events normally incidental to the average broker's or wholesaler's contract—slight delay and small market fluctuations.¹¹⁰

Schlegel suggests that when the contract deviates from the "archetypical" model, the loss should be split between the parties, whereas in the opposite case, the loss should be placed upon the obligor.¹¹¹ Applying his proposed standard, Schlegel concludes that in an international sales contract the buyer is the better loss-bearer, while in an international charterparty the loss should generally be borne by the seller-charterer.¹¹²

Schlegel's approach is very similar to an early suggestion that "relevance should be attributed to such considerations as to who is in the better position to bear the loss, what effect alternative allocations of the loss will have upon the current of commerce and the reasonableness or unreasonableness of the conduct of the parties."¹¹³ The argument is that the social policy underlying the principle of sanctity of contracts can in many instances be subordinated to other social policies and considerations, like fairness and promotion of business efficiency. The weighing of these competing policies and the selection among them in each particular case is left upon the "courageous" judge.¹¹⁴ In commercial cases, particularly, this method suggests that the best loss-bearer is the party who can subsequently spread the loss among its customers.¹¹⁵

Professor Schlegel purports to resolve the problem of frustration through the case-by-case identification of the "better loss-bearer." The basic defect of this approach, as Schlegel himself recognizes, is its arbitrariness; namely, the lack of any reliable standard for the determination of who should bear the loss. In addition, Schlegel's guide is, if

109. Schlegel, *supra* note 44, at 442, 447.

110. *Id.* at 447.

111. *Id.*

112. *Id.* at 437, 448.

113. *The Fetish of Impossibility*, *supra* note 67 at 99.

114. *Id.* at 99-102.

115. *Id.* at 101-02.

not "incomprehensible,"¹¹⁶ at least uncertain and complicated. Schlegel acknowledges frustration when a *contract* deviates from the "archetypical situation," and adds that the same result should be upheld when an *event* varies his model. Yet, there are many instances where the contract exists between speculating dealers (thus falling within the "archetypical situation") but in which the event is entirely extraordinary even for those profit-seeking middlemen. What should the result be in such a case or in the converse case?

If just the formation of a contract between a manufacturer and consumer gives rise to frustration, even when the contingency is not so abnormal, the standard seems too liberal; if, on the other hand, a contract between brokers can never be frustrated, irrespective of how exceptional the event is, the standard seems too strict. The other problem with the "better loss-bearer" theory, especially critical in the international trade field, is its assumption and its justification: that the buyer or charterer can subsequently spread the loss among his customers. Merchants in international business, however, very rarely enter into one transaction at a time; rather, they buy when they have already agreed to sell, thereby forming a "chain" of simultaneous sale and purchase contracts.¹¹⁷ Therefore, in the usual case the theory of the "better loss-bearer" is not helpful; the buyer or the charterer has already entered into contracts of subsequent performance, being thus unable to increase the agreed price in order to spread the loss. Only in very rare cases would the theory seem realistic.

4. The "*Casus Omissus*" Theory

Another approach has been suggested by Professor Farnsworth, as part of his attempt to solve the problem of gaps in the contract. Farnsworth distinguishes between "absence of expectations," related to a first process of selection in the parties' minds and "understatement of expectations," pertaining to a second process of selection. If a certain situation, such as a frustrating event, does not survive both these processes, then it is a "*casus omissus*."¹¹⁸ When such a gap is established, it should be filled by means of either using the actual expectations of the parties (extracted from the negotiations or course of dealing), or by appealing to basic principles of fairness and justice irrespective of the parties' expectations (such as rules of thumb or socially desirable

116. See Posner & Rosenfield, *Impossibility and Related Doctrines in Contract Law: An Economic Analysis*, 6 J. LEGAL. STUD. 83, 87 & n.18 (1977) [hereinafter cited as Posner & Rosenfield].

117. See *Ian Stach Ltd. v. Baker Bosley Ltd.*, [1958] 2 Q.B. 130, 138.

118. Farnsworth, *supra* note 69, at 871-73.

allocation of risk).¹¹⁹ Especially important for the issue of frustration is Farnsworth's proposed solution in cases involving the qualification of a duty which was expressed in absolute language. According to his method, entitled "extension by analogy,"¹²⁰ the court is free to extend the situation actually contemplated by the parties to cover other similar situations. This approach, argues Farnsworth, gives the court more leeway to adjust the parties' contractual obligations in cases of frustration than might exist under other proposed theories.¹²¹

Professor Farnsworth's approach embraces a much wider issue than the problem of frustration: the mental processes by which people come to contracting with each other and the reasoning steps that a court employs, in order to reach its decision. Since that is the case and since Farnsworth uses many complex abstractions and psychological arguments, there is not much to be commented upon his theory here. What can be noted with regard to the frustration issue is that Professor Farnsworth reaches the right result at the following three points: (a) that principles of fairness and justice are the ultimate justification of discharge; (b) that it is time for common law to abandon the absolute rule of termination of the contract, and to employ the equitable measure of adjustment; and (c) that foreseeability of the frustrating event is neither to be considered the decisive factor, nor to be discarded as completely irrelevant, but is rather to be considered together with the other circumstances of the case.¹²² Yet, whether the intellectual process and standards suggested by Farnsworth can be easily employed as a means of attaining a just result is a question which each court must answer for itself.

5. The "Economic" Analysis of Frustration

Another version of the "better loss-bearer" theory is the recent attempt to resolve the problem of frustration by means of economic principles. This view purports to employ the "implicit economic logic of common law,"¹²³ which, in contrast to the approaches of the various legal scholars, has followed the standard of economic efficiency in deciding cases. The argument is based upon a type of *ex ante* allocation of contractual risks made by the court if the contract contains no

119. *Id.* at 877-79.

120. *Id.* at 881-82.

121. *Id.* at 883-84.

122. *Id.* at 885-87. Foreseeability is no longer generally regarded as a condition of release. See note 67 *supra*. See also Schmitthoff, *supra* note 34, at 151-52; RESTATEMENT (SECOND) OF CONTRACTS, Introductory Note to ch. 11 (Tent. Draft No. 9, 1974).

123. Posner & Rosenfield, *supra* note 116, at 84.

relative provision.¹²⁴ According to this view, the standard which the courts should apply in such a case requires the identification of "the party that is the more efficient bearer of the particular risk in question, in the particular circumstances of the transaction."¹²⁵ With the reservation that the contingency be unavoidable through a reasonable cost, the better loss-bearer is the "superior insurer;" namely, the party that was in the better position to estimate both the extent of the loss and the probability of the event and provide self- or market insurance against it.¹²⁶ This view rejects the notion of unforeseeability as decisive of frustration cases,¹²⁷ concluding that unforeseeability fails to indicate which party is the better loss-bearer.

A similar but more liberal approach has been proposed by another supporter of risk allocation¹²⁸ in terms of economic analysis. Under this approach, it is argued that "since frustration remedies can in many cases be applied or withheld with almost equal justification, they permit the judge some freedom in allocating gain or loss between contracting parties"¹²⁹ and that the "normal approach that 'the loss, whether great or small, must generally fall on one party or the other,' is unduly simplistic. What appears to be injury when inquiry is narrowly confined may be revealed as disguised gain to one or both parties if viewed from a broader economic perspective."¹³⁰ This view basically purports to examine two of the typical Suez Canal cases, namely the *Gaon* decision (sales contract) and the *Sidermar* decision (charterparty), in light of microeconomic theory. The conclusion is that both cases were in all likelihood wrongly decided, because the courts cast the apparent loss on one of the parties only, whereas a broader economic analysis reveals that there were other "disguised" losses, which should have been apportioned between both parties.¹³¹

Since the proposers of the theory admit that it is still "incomplete" and its purpose is "to guide not the decision of particular cases but the formulation of rules to decide groups of similar cases,"¹³² it seems that this view cannot serve as a reliable standard in its present form and

124. *Id.* at 98, 113.

125. *Id.* at 90.

126. *Id.* at 91-92. See also R. POSNER, *ECONOMIC ANALYSIS OF LAW* 74-79 (1973).

127. Posner & Rosenfield, *supra* note 116, at 99-100.

128. For a more "legal" formulation of the risk-allocation theory, see *The Apportionment of Business Risks*, *supra* note 57, at 336, 352 & 359.

129. Birmingham, *A Second Look At The Suez Canal Cases: Excuse For Nonperformance Of Contractual Obligations In The Light Of Economic Theory*, 20 HASTINGS L.J. 1393, 1397 (1969) [hereinafter cited as Birmingham].

130. *Id.* at 1400.

131. *Id.* at 1405-06, 1412-15.

132. Posner & Rosenfield, *supra* note 116, at 96, 118.

that a thorough evaluation of its arguments should await its final crystallization. It should be noted, however, that the premise of the theory, that the purpose of contract law is the maximization of economic efficiency, is very doubtful. Indeed, even assuming that the parties' chosen allocation of contractual risks is the most efficient that can be achieved—otherwise, a new allocation would at least make one party better off without hurting the other¹³³—the most efficient allocation might have undesirable distributional effects.¹³⁴ Contract law cannot approve of any risk allocation that is beyond certain limits of justice and which results from undesirable inequality of bargaining power. The example of contracts declared unenforceable due to unconscionability¹³⁵ establishes that some risk allocations, though efficient in the above sense, might be held by the courts to be unduly onerous.

Also, acceptance of the suggested formulation, especially in the international trade field, would disturb well established business practices, expressed in clearly defined trade terms. For example, if the buyer in a c.i.f. contract were the "superior insurer" in a particular case and was therefore required to buy insurance himself, this would turn upside-down the content of the term "c.i.f.," as it has long been understood and used by all international merchants.¹³⁶ Moreover, judges and lawyers are not economists and would certainly feel puzzled facing the numerous assumptions and calculations that an "economic" analysis of cases calls for; the uncertainty caused thereby would be much greater than the problem purported to be solved. This is especially true with regard to the latter version of this theory, which is full of guesses and questionable estimates; surely, a case cannot be decided like that without serious doubts about its reliability.

C. STATUTES

1. *The English Statutes*

The English Sale of Goods Act of 1893 covered only a small area of the substantive law of frustration, providing that an agreement to sell specific goods is avoided if the goods perish without any fault of the parties before the risk has passed to the buyer.¹³⁷ Thus, all the cases

133. *Id.* at 89.

134. See P. SAMUELSON, *ECONOMICS* 633-35 (10th ed. 1976).

135. See J. CALAMARI & J. PERILLO, *CONTRACTS* 325-28 (2d ed. 1977) [hereinafter cited as CALAMARI & PERILLO].

136. See, e.g., *International Rules for the Interpretation of Trade Terms*, International Chamber of Commerce Brochure No. 166 (Incoterms 1953) ("Seller must . . . Procure, at his own cost and in a transferable form, a policy of marine insurance against the risks of the carriage involved in the contract") (emphasis added).

137. Sale of Goods Act, 1893, 56 & 57 Vict. c. 71, § 7.

involving frustration of a contract to sell generic goods, and all the other casualties to specific goods, other than perishing, remained unaffected by the 1893 statute.¹³⁸ A limited treatment of these cases was provided by the Law Reform (Frustrated Contracts) Act of 1943.¹³⁹ That statute excluded from its application only the above provision of the Sales Act, thereby extending its scope to all instances of frustration not due to the vanishing of specific goods.¹⁴⁰

The 1943 statute constituted a great innovation against the previously absolute rule of terminating the contract in case of frustration. Not only did it provide for the recovery of any down payments or other benefits exchanged between the parties before the time of frustration, thereby affirming the *Fibrosa* decision,¹⁴¹ but it also allowed the judge freedom to divide between the parties reliance expenses incurred in contemplation of the performance of the contract.¹⁴² Unfortunately, the substantive rules of frustration were left intact by the Law Reform Act, since it only dealt with the forms of judicial relief *after* the recognition of frustration.¹⁴³ This defect, as well as the exclusion of charterparties and insurance contracts from the application of the Law Reform Act,¹⁴⁴ lessens its significance in the field of commercial international law.

2. *The American Uniform Commercial Code*

The Uniform Commercial Code (UCC) is more oriented toward the needs of international trade than any other internal legislation.¹⁴⁵ Section 2-613 of the UCC contains a provision similar to section 7 of the English Sale of Goods Act, under the title "casualty to identified goods." The basic frustration article, however, is section 2-615, entitled "excuse by failure of presupposed conditions." It provides that a delay in performance or nonperformance by the seller is excused under three conditions: (a) a contingency must have occurred, including governmental orders or regulations, (b) the non-occurrence of the contingency must

138. See Schmitthoff, *supra* note 34, at 130.

139. Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40, §§ 1-3.

140. See *id.* § 2(5)(c).

141. See note 48 and accompanying text *supra*. See also G. TREITEL, *THE LAW OF CONTRACTS* 605, 697-98 (4th ed. 1975) [hereinafter cited as TREITEL].

142. See Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40, §§ 1(2), (3).

143. See Hay, *supra* note 3, at 262.

144. See Law Reform (Frustrated Contracts) Act, 1943, 6 & 7 Geo. 6, c. 40 §§ 2(5)(a), (b). See also TREITEL, *supra* note 141, at 610. The Act, however, expressly grants the same power of adjustment to arbitral tribunals. See 6 & 7 Geo. 6, c. 40 § 3(2).

145. See Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 70, 83-87 (Int'l Ass'n of Legal Science, London, 1964).

have been a basic assumption of the contract, and (c) the contingency must have rendered the seller's performance impracticable.¹⁴⁶

The relation between section 2-613 and section 2-615 is not so clear as in the case of the English statutes. For example, when an exclusive source of supply has been agreed upon and the supplier fails to perform, without responsibility on the seller's part, only section 2-615 applies;¹⁴⁷ the seller's discharge in that case is conditioned on his turning over to the buyer his rights against the supplier. On the one hand, although an increase in the cost of production or a rise or collapse of the market do not normally excuse, they might become good discharge grounds if they are due to unforeseen contingencies, which "alter the essential nature of performance" or cause "a marked increase in cost or altogether [prevent] the seller from securing supplies necessary to his performance."¹⁴⁸ The effect of these liberal rules of excuse is mitigated through the subjection of the provision to the obligor's assumption of greater liability by agreement, which is to be found "not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like."¹⁴⁹

The UCC also provides for very interesting obligations on the excused seller's part; these include the tender of a commercially reasonable substitute, if available;¹⁵⁰ the duty to notify the buyer about the delay or the non-delivery seasonably;¹⁵¹ and the obligation to allocate the part of the production unaffected by the contingency among all his customers in a fair and reasonable manner, with the option to include regular customers not under contract at that time.¹⁵² Finally, it is stated in comment 6 to section 2-615 that where the absolute common law rule of "discharge or non-discharge" might produce unjust or absurd results,

adjustment under the various provisions of this Article is necessary, especially the sections of good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith.¹⁵³

Application of this principle by the courts might lead to results analogous to those intended by the English Law Reform Act, despite some pessimistic anticipations.¹⁵⁴

146. U.C.C. § 2-615(a).

147. *Id.* comment 5. *But see id.* comments 1 & 9.

148. *Id.* comment 4.

149. *Id.* comment 8. *See Non-performance and Force Majeure, supra* note 77, at 35-36.

150. U.C.C. §§ 2-614 & 2-615.

151. U.C.C. § 2-615(c).

152. *Id.* § 2-615(b) & comment 11.

153. *Id.* comment 6.

154. *See Hay, supra* note 3, at 265-66. More generally, Hay doubts whether the Code's

3. *The International Conventions*

The Uniform Law on the International Sale of Goods (ULIS), adopted in the 1964 Hague Conference and ratified by eight countries—exclusive of the United States¹⁵⁵—provides in Article 74:

[W]here one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.¹⁵⁶

As extracted from the language of the provision, first preference is given to the subjective standard of the parties' intention, in the absence of which appeal is made to the objective standard of the reasonable person's intention in similar circumstances.¹⁵⁷ The ULIS was welcomed as "a successful compromise between Anglo-American and Civil legal thought,"¹⁵⁸ and as "an excellent definition of excuse for non-performance,"¹⁵⁹ although it did not include any duties of notification or alternative performance, nor did it permit adjustment of the contractual obligations.

Since it became obvious that the ULIS would not be universally accepted because of various inherent defects, the United Nations Commission on International Trade (UNCITRAL) undertook a revision¹⁶⁰ of the ULIS provisions. In 1976 a working group presented a first draft

standards can seriously influence the common law of frustration. See *id.* at 266-67. Yet, it cannot be denied that the Code brought about some developments. See text accompanying notes 61-63 & 72 *supra*.

155. However, application of ULIS to international sales with a United States citizen as a party is not impossible. See Berman & Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 265 (1978) [hereinafter cited as Berman & Kaufman].

156. Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, [1972] Gr. Brit. T.S. No. 74 (5029) with Annex I, Uniform Law on the International Sale of Goods, art. 74, para. 1 [hereinafter cited as ULIS], *reprinted in* 13 AM. J. COMP. L. 453 (1964).

157. See *Helsinki Discussions*, *supra* note 91, at 257 (André Tunc).

158. *Id.* at 251 (Clive Schmitthoff).

159. Berman, *The Uniform Law on International Sale of Goods: A Constructive Critique*, 30 L. & CONTEMP. PROB. 354, 357 (1965) [hereinafter cited as *A Constructive Critique*].

160. See Berman & Kaufman, *supra* note 155, at 270. For a general review of the Commission's work and perspectives on international trade law, see Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, 27 AM. J. COMP. L. 201 (1979); Rohwer, *The United Nations Commission on International Trade Law (UNCITRAL)*, in Berman, *supra* note 80, at 556-63.

Law of Sales which was revised in 1978, and is to be completed and approved by 1980. Article 65 of the 1978 UNCITRAL Draft deviates from the ULIS formulation, providing that "[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."¹⁶¹

It would appear that UNCITRAL achieves a better compromise between common and civil law traditions than ULIS, since UNCITRAL permits consideration of the diligence shown by the obligor in the circumstances he faced. Moreover, the burden of proof that such diligence was shown is shifted to the obligor, thus protecting the other contracting party. Unfortunately, the question of diligence is connected with that of foreseeability, since the same paragraph requires that the party "could not reasonably have been expected to have taken the impediment into account at the time of the conclusion of the contract."¹⁶² Moreover, comment 5 to the 1976 UNCITRAL Draft states that "all potential impediments to the performance of a contract are foreseeable to one degree or another" and that the foreseeability of the contingency can be extracted not only from the explicit contractual language, but also "from the content of the contract."¹⁶³

As previously noted, however, foreseeability should not be regarded as the crucial factor in a frustration case.¹⁶⁴ It is just an element to be taken into account along with the other circumstances. To attach so much importance to foreseeability, so as to make it conclusive of fault, as UNCITRAL does,¹⁶⁵ is certainly a misconception—many foreseeable contingencies are unavoidable even with utmost diligence. A mitigation of this imperfection could perhaps be achieved through the position taken by UNCITRAL that "in the final analysis this determination [of foreseeability] can only be made by a court or arbitration tribunal on a case-by-case basis."¹⁶⁶

161. Draft Convention on Contracts for the International Sale of Goods (1978), art. 65, para. 1, *reprinted in* 27 AM. J. COMP. L. 325 (1979) [hereinafter cited as 1978 UNCITRAL Draft]. The 1976 UNCITRAL Draft used the phrase "without fault" instead of "beyond control," apparently to connote the same requirement of diligence. See 1976 UNCITRAL Draft, art. 50, para. 1, *reprinted in* Berman, *supra* note 80, at 603. Compare the excuse clause of E.C.E. Contracts 574 and 574A, which is quoted at text accompanying notes 174-175 *infra*. See also text accompanying note 183 *infra*.

162. 1978 UNCITRAL Draft, art. 65, para. 1, *supra* note 161, at 340. Compare the analogous provision of the 1976 Draft, art. 50, para. 1, *reprinted in* Berman, *supra* note 80, at 603.

163. Commentary on the Draft Convention on the International Sale of Goods, March 17, 1976, art. 50, para. 1, comment 5, *reprinted in* Berman, *supra* note 80, at 604 [hereinafter cited as Commentary on the 1976 UNCITRAL Draft].

164. See note 122 *supra*.

165. See Commentary on 1976 UNCITRAL Draft, art. 50, comment 4, *supra* note 163, at 603.

166. *Id.* comment 6.

Another interesting provision of the 1978 UNCITRAL Draft is that of Article 65(2), stating that in the usual case of nonperformance by the seller's supplier the seller can be excused only if the impediment is beyond the control of *both* the seller and his supplier.¹⁶⁷ Thus, the innocent seller cannot escape liability by assigning to the buyer his rights against his defaulting supplier, in contrast to section 2-615 of the Uniform Commercial Code. This rule might seem strict, but it is perhaps useful in view of the problem of foreign litigation.¹⁶⁸

Finally, the UNCITRAL excuse provision imposes upon the discharged party the duties to notify the other party, as well as to tender a commercially reasonable substitute.¹⁶⁹ Unfortunately, the UNCITRAL drafters did not give the parties any right to claim adjustment of their contractual obligations.

D. MODEL CONTRACTS

A study of the problem of frustration in international trade cannot ignore relevant clauses contained in model or standard contracts, drafted by individual firms, trade associations or international agencies, with the purpose of removing the uncertainties caused by the variety of dissimilar legal systems.¹⁷⁰ This section of the article deals with the contracts drafted by the United Nations Economic Commission for Europe (E.C.E.)¹⁷¹ for the optional use by international merchants in their dealings; individual and trade association contracts will be examined in the next section.

E.C.E. Contracts 188¹⁷² and 188A¹⁷³ provide as follows:

The following shall be considered as cases of relief if they intervene after the formulation of the contract and impede its performance: industrial disputes and any other circumstances (e.g., fire, mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumstances are beyond the control of parties.

167. 1978 UNCITRAL Draft, art 65, para. 2, *supra* note 161, at 340.

168. See text accompanying notes 83-84 *supra*. See also *Excuse for Nonperformance*, *supra* note 66, at 1433.

169. 1978 UNCITRAL Draft, art. 65, para. 4, *supra* note 161, at 340; Commentary on 1976 UNCITRAL Draft, art. 50, para. 4, comments 7 & 12, *supra* note 163, at 604-05. For a more detailed comparison between the excuse clauses of ULIS and UNCITRAL see Nicholas, *Force Majeure and Frustration*, 27 AM. J. COMP. L. 231 (1979).

170. See Berman, *supra* note 80, at 47-48.

171. Contract No. 188 is reprinted in *id.* at 66-71. The relief provisions of the other E.C.E. contracts referred to in this article are reprinted in *Helsinki Discussions*, *supra* note 91, at 235-36.

172. E.C.E. Contract No. 188, cl. 10.1 (General Conditions for the Supply of Plant and Machinery for Export, 1953).

173. E.C.E. Contract No. 188A, cl. 25.1 (General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, 1957).

The excuse provisions in E.C.E. Contracts 574¹⁷⁴ and 547A¹⁷⁵ read:

Any circumstances beyond the control of the parties intervening after the formation of the contract and impeding its reasonable performance shall be considered as cases of relief. For the purpose of this clause circumstances not due to the fault of the party invoking them shall be deemed to be beyond the control of the parties.

E.C.E. Contracts 312¹⁷⁶ and 410¹⁷⁷ also contain identical excuse clauses, providing:

Any circumstance beyond the control of the parties, which a diligent party could not have avoided and the consequences of which he could not have prevented, shall be considered a case of relief where it intervenes after the formation of the contract and prevents its fulfillment whether wholly or partially.

Finally, E.C.E. Contract 1A¹⁷⁸ includes the following exculpatory provision:

[W]here the fulfillment of the contract in whole or in part is rendered absolutely and permanently impossible by exceptional circumstances beyond the control of the parties and arising after the conclusion of the contract, the contract or the unfulfilled part thereof shall be cancelled but neither party shall be liable to pay damages.

A comparison of these clauses shows that only Contracts 188 and 188A employ Professor Berman's preferable "listing method." However, even in those clauses, the enumeration is not exclusive, as is recommended by Professor Berman.¹⁷⁹ All the other E.C.E. contracts utilize a qualitative standard.¹⁸⁰

Also, even within the second category of contracts the tests used vary from more to less lenient, including "impeding its reasonable performance," "which a diligent party could not have avoided," and "absolutely and permanently impossible by exceptional circumstances."¹⁸¹ Moreover, all the E.C.E. relief clauses include two common re-

174. E.C.E. Contract No. 574, cl. 10.1 (General Conditions for the Supply of Plant and Machinery for Export, 1955).

175. E.C.E. Contract No. 574A, cl. 25.1 (General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, 1955).

176. E.C.E. Contract No. 312, cl. 13.1 (General Conditions for the International Sale of Citrus Fruit; General Conditions for the Export and Import of Solid Fuels).

177. E.C.E. Contract No. 410, cl. 18.1 (General Conditions for Export and Import of Sawn Softwood).

178. E.C.E. Contract No. 1A, cl. 19 (Contract for the Sale of Cereals C.I.F. (Maritime)).

179. See text accompanying note 84 *supra*.

180. See Schmitthoff, *supra* note 34, at 148.

181. See Tunc, *Inexécution et Force Majeure Dans la Vente Internationale*, in *SOME PROBLEMS OF NON-PERFORMANCE AND FORCE MAJEURE IN INTERNATIONAL CONTRACTS OF SALE* 179, 183-85 (Int'l Ass'n of Legal Science, Helsinki, 1961) [hereinafter cited as Tunc].

quirements: that the frustrating event must take place after the formation of the contract and that it be "beyond the control of the parties." Attempts have been made to interpret the first requirement as implying that only events that are unforeseen at the making of the contract can excuse under the E.C.E. provisions.¹⁸² As already discussed, this argument is not persuasive. Apart from the question of foreseeability, however, the issue of excuse should not be made dependent on the subsequent character of the event, for contingencies existing at the formation of the contract might simply be ignored by the parties.¹⁸³ As to the second common prerequisite of the E.C.E. clauses, that the event be "beyond the parties' control," the implication, expressly stated in Contracts 574 and 574A, is that there must be no fault involved. It should also be noted that all the E.C.E. contracts impose on the party claiming frustration a notification duty and that instead of termination of the contract as the effect of frustration, the contracts mandate a reasonable delay in the contractual performance; only thereafter can the contract be terminated.¹⁸⁴

One of the purposes of the E.C.E. contract drafters has been the reduction of the difference in bargaining power between the parties, by treating them on an equal basis.¹⁸⁵ This trend is clearly reflected in the frustration provisions just examined, which refer to "parties" instead of "seller" or "buyer." On the other hand, the employment of broader or narrower rules of excuse in different E.C.E. contracts can only mean that these contracts reflect the different character and needs of each particular trade.¹⁸⁶ It is therefore questionable whether the E.C.E. experts, who correctly decided to take into account the differences of the various trades, should have attempted to obliterate the distinctions in bargaining power within each particular trade.¹⁸⁷ Equalization of the parties' bargaining positions cannot be achieved through optional model contracts; it only makes them unrealistic and deters contractors from adopting them in their dealings.

E. INDIVIDUAL CONTRACT PRACTICES

In addition to the model contracts discussed above, standard contracts drafted by trade associations or individual firms are also relevant to an examination of the doctrine of frustration in international

182. See *Non-Performance and Force-Majeure*, *supra* note 77, at 38.

183. See *id.* at 40.

184. See, e.g., clauses 10.2 and 10.3 of E.C.E. Contract No. 188 in Berman, *supra* note 80, at 66-71.

185. Berman, *supra* note 80, at 49.

186. See *Helsinki Discussions*, *supra* note 91, at 250 (P. Benjamin).

187. See also Berman, *supra* note 80, at 49.

trade law. These contracts serve the same purpose as those drafted by international agencies, like the E.C.E. contracts examined in the previous section. The only difference is that they reflect the great or small inequalities in bargaining power of the parties. For that reason, individual standard contracts are more subject to alteration, based upon changes in the parties' bargaining positions due to market and regulatory conditions.¹⁸⁸

1. *Contracts Protecting the Seller*

The relatively short and nonelaborate Godfrey Cabot, Inc. contract for the sale of carbon black and pine distillates contains the following provision: "The filling of all orders is dependent upon strikes, accidents, fires, floods, inability to procure cars, war, insolvency of the buyer, failure of any third party to supply us the above described merchandise, or other causes beyond our control."¹⁸⁹ As one can easily see, this clause safeguards the seller against all events beyond his control, even against failure of his supplier, whereas the buyer is by no means protected. Another provision of the contract gives the seller the option to cancel any undelivered portion in case of governmental regulations affecting the performance of the contract.¹⁹⁰

Another standard contract which carefully shelters the seller's interest is the Stein, Hall & Co. c.i.f. contract for the resale in the United States of jute and other commodities bought in Asia. Clause 9 of that contract broadly subjects a seller's performance "to all contingencies beyond the seller's control." Clause 10 makes the seller's performance dependent upon all laws, regulations, orders and instructions of the United States or any foreign government. Finally, clause 11 excuses the seller for nonperformance by his manufacturer or supplier.¹⁹¹

The United States Steel International, Inc. c.i.f. and f.a.s. vessel contracts provide yet another example of contracts drafted to the advantage of the more powerful seller. Clause 7 of the c.i.f. contract, which is identical to clause 3 of the f.a.s. vessel contract, gives the seller the right to reasonably extend the time of his performance, if the latter is delayed

due to fire, explosion, breakdown or accident, war or civil commotion, strike or other difference with workmen, shortage of utility, facility,

188. *Id.* at 48-49. The contracts discussed in this section are reprinted in *id.* at 51-65, 72-86.

189. *Id.* at 51.

190. *Id.*

191. *Id.* at 54. Clause 1 of this contract absolves the seller from any duty with respect to export-import licenses. *See id.* at 53.

material or labor, delay in transportation, compliance with or other action taken to carry out the intent or purpose of any law or regulation of the Government of the United States of America or any other Government, or any cause beyond manufacturer's or Seller's reasonable control . . .¹⁹²

An interesting element of the same clauses—under perhaps the model of section 2-615(b) of the U.C.C.¹⁹³—is the seller's right, under the same circumstances, to apportion his products among his customers in the manner which he thinks equitable. According to the different trade terms of the contracts, export licenses are to be procured by the seller and import permits by the buyer in the c.i.f. contract, whereas the buyer has to obtain both of them in the f.a.s. vessel contract. However, in both cases the buyer is made liable to pay for the materials in production if the previously granted licenses or permits are invalidated or revoked;¹⁹⁴ this adds even more to the seller's bargaining leverage.

2. *Contracts Protecting Both Parties*

Slightly different from the above excuse provisions are those of the Bethlehem Steel Export Corp. f.o.b. mill contract; although the seller maintains his more powerful position vis-à-vis the buyer, one can find some provisions in the latter's favor. Thus, the seller is excused, as in the United States Steel contracts, for any delay due to listed contingencies or other causes beyond his or his supplier's control and he is given the same right to reasonably suspend his performance. Nevertheless,

the buyer may, subject to previously obtaining the consent of the seller, cancel the purchase of such portion of the material for which details and shipping instructions have been duly furnished in accordance with the contract, as may have been subjected to such delay, provided such portion of the material has not been manufactured nor is in the process of manufacture. . . .¹⁹⁵

Also, although the seller's acceptance is made subject to the difficulty in obtaining any required export licenses, these licenses are to be procured by the seller as the buyer's shipping agent; moreover, if the previously granted licenses are invalidated, the stipulation is more lenient than in the United States Steel contracts since "the buyer shall, at seller's option, be required to accept delivery."¹⁹⁶

A good example of a well-balanced contract, protecting both the seller's and the buyer's interests, is the c.i.f. Contract for Hides,

192. *Id.* at 56, 61. An earlier standard contract of the same company protected it even more. *See id.* at 87-88.

193. *See* text accompanying note 152 *supra*.

194. Terms of Payment, reprinted in Berman, *supra* note 80, at 55, 60.

195. *Id.* at 62 (clause 6).

196. *Id.* at 62, 63 (clauses 1-c, 12) (emphasis added).

drafted by the International Council of Hide and Skin Seller's Associations, a trade association. Clause 12 of that contract, entitled "Force Majeure," reads in part:

Should shipment within the stipulated period be prevented by Act of God, strikes, lock-outs, labour disturbances, trade disputes, war, government action, riots, civil commotions, fires, flood or epidemic, the time of shipment shall be extended for six weeks after which this contract will be void . . . unless a further extension is granted by mutual agreement.¹⁹⁷

Like the analogous clauses of the E.C.E. contracts, this provision carefully avoids terms like "seller" or "buyer," employing instead words such as "mutual agreement."¹⁹⁸ Also, the clause follows the "listing method," which is favored by most individual contract drafters but not by the E.C.E. contract drafters.¹⁹⁹ The enumeration seems to be exclusive here, thus offering a basis for Professor Berman's theory.²⁰⁰ Yet, it is noteworthy that the majority of individual standard contracts—as well as the E.C.E. Contracts 188 and 188A—employ an indicative list of contingencies, adding the phrase "and any other causes beyond the Seller's control." Consequently, if an event other than those listed occurs, it should not *a priori* encumber the seller, as the above theory asserts, but it should be judged according to the applicable national law or international convention.

3. East-West Contracts

An examination of two Soviet standard contracts, a purchase contract and a sales contract, reveals the "nationalistic" character of these contracts; namely, that they are carefully drafted so as to protect the Soviet parties' interests.²⁰¹ Thus, the discharge clause of the purchase contract²⁰² contains a very narrow definition of force-majeure, listing only fire, flood, and earthquake. The analogous provision of the sales contract,²⁰³ on the other hand, is much broader, and includes "such circumstances as fire, natural calamities, war, military operations of any character, blockade, export or import prohibitions or other circumstances beyond the control of the parties."

Also, both contracts provide for an extension of the time of performance, in case one of the listed events occurs, but this period is three

197. *Id.* at 65.

198. *See also id.* ("If either party . . .") (clause 14).

199. *See* text accompanying notes 179-180 *supra*.

200. *See* text accompanying notes 84 & 179 *supra*.

201. *See* Berman, *supra* note 80, at 89.

202. *Id.* at 74 (Standard Purchase Contract Form of V/O "Technopromimport," clause 12).

203. *Id.* at 76 (Standard Sales Contract Form of V/O "Technopromimport," clause 9).

months in the purchase contract and six months in the sales contract. Moreover, if the purchase contract is cancelled by reason of force majeure, "the Sellers must immediately reimburse the Buyers for all the amounts received from the latter . . . plus 4% per annum." The only proper evidence of force-majeure events is, under both contracts, certificates issued by the Chamber of Commerce in each party's country; this is, of course, in accordance with the planned character of the Soviet economy.

The most manifest indication, however, of the drafters' effort to secure Soviet contractors is found in the export-import license provisions.²⁰⁴ Despite the express character of the purchase contract being f.o.b., the duty to procure the necessary export licenses and to incur the expenses thereof is cast on the foreign seller. In addition, if the seller cannot fulfill this duty, or if the granted export-license is revoked, not only is the Soviet buyer entitled to cancel the contract, but the seller also has to pay liquidated damages. Under the sales contract, on the other hand, all the export-import prohibitions or restrictions are characterized as force-majeure, thereby excusing the Soviet seller, whereas the procurement of import licenses remains a duty of the foreign buyer. Thus, the protection of the Soviet parties is absolute in both contracts.

Also relevant to an examination of individual standard contracts are the relief provisions of two Chinese contracts, a purchase contract and a sales contract. These are not as one-sided as the Soviet contracts, perhaps reflecting the different character and needs of the Chinese economy compared with the Soviet economy. A common characteristic of both contracts is the generality of their excuse provisions. Thus, clause 18 of the purchase contract²⁰⁵ reads in part: "Force Majeure: The Sellers shall not be held responsible for the delay in shipment or non-delivery of the goods due to Force Majeure . . ." In this way, the foreign seller is given ample protection but at the same time he is obliged, under the same clause, to notify the Chinese buyer immediately and mail to him a certificate of the accident, with the Chinese buyer being entitled to cancel the contract if the delay exceeds ten weeks. Similarly, clause 3 of the sales contract²⁰⁶ states: "In the event of force majeure or any other contingencies beyond the Seller's control, the Sellers shall not be held responsible for late delivery or

204. *Id.* at 74, 76 (Standard Purchase Contract Form of V/O "Technopromimport," clauses 9, 11; Standard Sales Contract Form of V/O "Technopromiport," clause 11(1)).

205. *Id.* at 85 (Machinery-Individual Purchase Contract, China National Machinery Import & Export Corporation).

206. *Id.* at 80 (Textiles—Sales Confirmation, China National Textiles Import & Export Corporation).

nondelivery of the goods." The broad language of this clause favors the Chinese seller since no notification duty or cancellation right is stipulated. In short, it can be said that the Chinese contracts purport to facilitate trade with other countries without, however, making too many concessions to the foreign contractors.

F. THE SUEZ CANAL CASES

Since the Suez Canal was opened for navigation in 1869,²⁰⁷ it has become one of the most important commercial arteries, so as to be considered as "the usual and customary route" for all shipments from Middle East to European ports. Due to serious political disturbances in the area, however, the Canal was twice closed in the past twenty-five years, thereby causing substantial problems to commercial transportation, as well as acute legal disputes. On July 26, 1956 the Egyptian government nationalized the French-managed Suez Canal Company. During the subsequent hostilities with Israel, France, and Great Britain, the Egyptians blocked the Canal on November 2, 1956. In April 1957 the Canal was reopened, through the aid of a United Nations mission. Thereafter, the Egyptian government took over the collection of navigation fees, compensating the shareholders of the Suez Company. Ten years later, however, the "six day" war against Israel broke out and President Nasser closed the Canal again on June 6, 1967. This time, fewer problems and disputes were brought about, as is demonstrated by the fact that only two cases were litigated in contrast to the seven cases litigated in 1956. Finally, the Canal was reopened on June 5, 1975, and since that time it has been owned and operated by the Egyptian government. The Suez cases deal with international sales contracts or charterparties entered into before the closings of the Canal and allegedly frustrated thereafter.

1. *Cases Involving C.I.F. Contracts*

The first of the Suez Canal cases, *Carapanayoti & Co. v. E.T. Green Ltd.*,²⁰⁸ involved a contract for the sale of Sudanese cottonseed cake to be shipped from Port Sudan c.i.f. to Belfast during October or November, 1956 at seller's option. The contract, which was entered into on September 9, 1956, incorporated standard contract forms and provided in clause 17: "In case of . . . blockade or hostilities . . . preventing

207. This short introduction is drawn from the facts of *Société Franco Tunisienne d'Armement v. Sidermar S.P.A. (The Massalia)*, [1961] 2 Q.B. 278, 282 (1960) and *Palmco Shipping, Inc. v. Continental Ore Corp. (The "Captain George K")*, [1970] 2 Lloyd's List L.R. 21, 25 (1969). See also F. ELLIOT, A DICTIONARY OF POLITICS 443-44 (7th ed. 1975) ("Suez Canal").

208. [1959] 1 Q.B. 131 (1958).

fulfillment, this contract or any unfulfilled portion thereof so prevented shall be cancelled."²⁰⁹ After the closing of the Canal the seller (and his supplier) refused to ship, claiming either frustration or excuse under the above clause. In arbitration proceedings the umpire and the Board of Appeals found for the buyer. On review before the Queen's Bench Division, Justice McNair reversed the award and held the contract frustrated.²¹⁰ The basis of this ruling was the "fundamental difference" test; although Justice McNair felt that the twenty-five percent increase in freight needed for a voyage around the Cape was not of itself substantial, the difference in distance (more than two and one-half times) was enough to frustrate the contract. Moreover, the availability of the Canal was a "fundamental assumption" of the parties, who could by no means have foreseen the contingency.²¹¹ Alternatively, Justice McNair implied that the contract could well be excused by means of the hostilities clause.²¹²

The decision does not seem unreasonable. First, disregarding the question of frustration, clause 17 of the contract clearly discharged the seller. Second, since the contract was concluded long before the starting of any actual hostilities and the case is the first one in the history of the Suez litigation, at least here the closure of the Canal was unforeseeable. Third, the test of "fundamental difference" of performance that was applied in this case can also justify the result, since a distance of 10,793 miles, as compared with an original distance of 4,068 miles,²¹³ is dissimilar enough to be considered within the contemplation of the test. These considerations sufficed, in Justice McNair's opinion, to compensate for the fact that the sellers had not attempted to ship by the emergency route via the Cape, since such shipment would have exposed them to the dangers of a much longer trip than they had agreed to.

It has, of course, been argued that "a c.i.f. contract casts the risk of nonshipment upon the seller even when shipment is rendered physically impossible . . . unless by an event covered by the excuse clause or by some other clause in the contract."²¹⁴ Such an assumption, however, would impose a very heavy burden on c.i.f. sellers and would make them hard pressed to anticipate all possible risks and list them in endless contracts. A c.i.f. term might cast upon sellers-charterers the risk of a normal freight increase; it cannot, however, lock them in the prison of absolute liability, forcing them to bear tremendous freight

209. *Id.* at 132.

210. *Id.* at 148-49.

211. *Id.* at 149.

212. *Id.*

213. *See id.* at 142.

214. *Excuse for Nonperformance*, *supra* note 66, at 1422 n.21.

fluctuations or other hazards that might be involved, such as deterioration of goods of guaranteed quality or quantity, or compensation to shipowners for the resulting delayed performance of other already undertaken charterparties. The principles of general contract law might properly discharge the seller when an event does not fall within the relief provisions of the contract.

Although the *Carapanayoti* decision seems logical, it was—in a weakly reasoned decision—overruled one year later by the Court of Appeals, which tried two similar cases together. Both of these cases involved c.i.f. sales of Sudanese groundnuts to be shipped to European ports. In the first case, *Tsakiroglou & Co. v. Noble Throl G.m.b.H.*,²¹⁵ the contract had been made on October 4, 1956 for shipment to Hamburg during November/December. In the second case, *Albert D. Gaon & Co. v. Société Interprofessionnelle des Oléagineux Fluides Alimentaires*,²¹⁶ two contracts had been made on October 12 and 31, 1956 for shipment to Nice and Marseille respectively, during October/November. All the contracts incorporated standard forms and contained the following excuse clause:

In case of . . . blockade or war . . . and in all cases of force majeure preventing the shipment within the time fixed, or the delivery, the period allowed for shipment or delivery shall be extended by not exceeding two months. After that, if the case of force majeure be still operating, the contract shall be cancelled.²¹⁷

Following the closure of the Canal the sellers asked for an extension under the above clause, but buyers refused and claimed a right to arbitration. Trying the cases separately, both the umpire and the Appeal Board found the sellers in default and awarded damages. The Queen's Bench Division, which also tried the cases separately, felt bound by the umpire's finding that the route via the Cape was not "commercially or fundamentally different" and held the contracts not frustrated;²¹⁸ nor did the court think that the sellers were excused by the force-majeure clause, because "there were hostilities but not war in Egypt at the material time."²¹⁹ The Court of Appeals, which heard the cases together, affirmed. The three appellate judges agreed that shipment means "just placing the goods on board for the port of destination"²²⁰ and that since there was an alternative route when the customary one

215. [1960] 2 Q.B. 318 (1958), *aff'd*, [1960] 2 Q.B. 348 (C.A.), *aff'd*, [1962] A.C. 93 (H.L. 1961).

216. [1960] 2 Q.B. 334 (1959), *aff'd*, [1960] 2 Q.B. 348 (C.A.).

217. [1960] 2 Q.B. at 326, 335.

218. *Id.* at 333, 346-47.

219. *Id.* at 333.

220. *Id.* at 359.

was closed, the sellers were obliged to follow it. As Harman Lord Justice said:

[N]either the date of arrival nor the physical circumstances of the voyage can be supposed to be circumstances vitally affecting the practicability of the adventure. Both these events affect the interest of the buyer and are indifferent to the seller, who is not warranted in sheltering behind them in order to save, what is alone affected, his pocket.²²¹

The court also felt that the difference in the dates of making the contracts was not so important as to distinguish the *Carapanayoti* case from the cases before it; the former was, therefore, overruled.²²²

Finally, the House of Lords, to which the sellers in the *Tsakiroglou* case appealed, also affirmed.²²³ The Lords held that the question of frustration should be determined with regard to the time of performance, not of the formation of the contract, and applying either the "fundamental or radical difference" or the "commercial nature and purpose of the adventure" test, found no frustration.²²⁴ The only party who could object against the longer voyage, the Lords said, was the buyer, who had no interest to do so in this case and did not. The Lords also agreed that the excuse clause of the contract could not discharge the sellers. Finally, approval was given to an earlier attempted distinction between c.i.f. contracts and charterparties.²²⁵

The decision leaves a number of questions. Although the unforeseeability of the Canal closure is doubtful in the cases in question, this could have been a ground for distinguishing *Carapanayoti*, where unforeseeability seems established.²²⁶ Furthermore, the rejection of the force-majeure clause is objectionable: The distinction between "hostilities" and "war" seems contrived in view of the 1956 international conflict in Suez; also, the contingency was clearly covered by the word "blockade" in the provision. Moreover, the argument that shipment means "just placing the goods on board" is rather formal and literal. In addition to loading the goods and procuring the necessary documents, a c.i.f. seller-charterer might be confronted with considerable dangers, as was noted in the analysis of the *Carapanayoti*

221. *Id.* at 372.

222. *Id.* at 367.

223. [1962] A.C. 93 (1961).

224. *Id.* at 115, 119, 122-23. The increase in distance and freight was 150% and 100% respectively in *Tsakiroglou*, see [1960] 2 Q.B. at 327, and 350% and 200% respectively in *Gaon*, see *id.* at 336.

225. [1962] A.C. at 116, 133-34. This distinction between c.i.f. contracts and charterparties was first recognized in *Société Franco Tunisienne d'Armement v. Sidermar S.P.A. (The Massalia)*, [1961] 2 Q.B. 278 (1960). For a discussion of the *Sidermar* decision, see notes 237-247 and accompanying text *infra*.

226. See Schlegel, *supra* note 44, at 432.

decision. In contrast to the reasoning in *Carapanayoti*, the Lords thought that more weight should be attached to the non-shipment by the emergency route than to any other conflicting consideration. Nevertheless, as has been pointed out, the first true frustration cases also involved a delay and a considerably increased cost of performance, so that if the result in the cases in question were generalized, there would be very few frustration cases.²²⁷ If the changes in the performance of these contracts really "fell far short of justifying a finding of frustration,"²²⁸ as the Lords thought, the doctrine would be confined to extremely rare instances of enormous alterations.²²⁹ This is, in all probability, the purpose and the message of the decision—namely, that very heavy limitations should be imposed on every frustration finding.²³⁰ Such an objective, however, is not easily accepted.

2. Cases Involving Charterparties

The first decision dealing with frustration of international charterparties was an American case, *Glidden Co. v. Hellenic Lines, Ltd.*,²³¹ tried one year after the *Gaon* case. In *Glidden*, an American manufacturing company entered into four charterparties with a carrier for the transportation of ilmenite from India to an American port. The first charterparty was executed on September 7, 1956 and the other three about November 1 of the same year; all of them included a force majeure clause excusing "restraint of princes and rulers" and also incorporated section 4 of the 1936 Carriage of Goods Act, excusing the carrier for losses resulting from "act of war" or other causes arising without his fault.²³² The charterparties also specified the route of the trip as being "via Suez Canal or Cape of Good Hope, or Panama Canal, at Owner's option . . . to one safe U.S. . . . port at Charterer's option, to be declared not later than on vessel's passing Gibraltar;" the last phrase was typed later on the printed contracts.²³³ The carrier refused to perform after the closure of the Canal and the charterer brought libel in admiralty. The trial court, relying on the *Carapanayoti* decision, held the charterparties frustrated. The United States Court of Appeals for the Second Circuit reversed, however, holding that the

227. *Id.* at 433.

228. [1962] A.C. at 119.

229. See note 224 *supra*.

230. See Schlegel, *supra* note 44, at 434.

231. 275 F.2d 253 (2d Cir. 1960).

232. *Id.* at 255. Section 4(2) of the 1936 Carriage of Goods Act, 46 U.S.C. § 1304(2) (1976), provides that neither the carrier nor the ship owner is liable for loss or damage arising from certain circumstances beyond their control.

233. 275 F.2d at 255-56.

carrier was obliged to perform by one of the alternate routes specified in the contract.²³⁴ In reaching that result, the court dismissed the route provision as ambiguous and examined the negotiations between the parties. It found that the carrier had unsuccessfully pressed for the insertion of a specific clause, subjecting its performance to the availability of the Canal, in accordance with its contract practice.²³⁵ From this evidence the court concluded that the carrier did not expect to be excused without an express provision, having thus undertaken the relative risk. Moreover, because there was an obligation to perform by an alternate route, neither the force-majeure clause nor section 4 of the Carriage of Goods Act was applicable.²³⁶

The result is acceptable but the court's reasoning is doubtful. The fact that the carrier unsuccessfully tried to insert an express exculpatory clause does not necessarily mean that the carrier assumed the risk in question. The carrier might have attempted to insert the clause to avoid future disputes and litigations about its excuse, which it was always taking for granted; finding, however, strong opposition by its new customer, the carrier did not insist, lest the agreement fall through. This is, perhaps, the implication of the stipulation that the ship should pass Gibraltar, which the charterer finally accepted. The court reached the "fair and reasonable result" in this case, since the carrier did not claim a remuneration for the performance of the longer voyage, but decided not to perform at all; however, one should not generalize from the court's rationale.

The first English charterparty case, *Société Franco Tunisienne d'Armement v. Sidermar S.P.A. (The Massalia)*,²³⁷ involved the carriage of iron ore from India to Genoa, agreed upon October 18, 1956. Clause 2 of the voyage charterparty stated that the ship was to proceed to Genoa "with all convenient speed," while clause 37 required the captain "to telegraph to 'Maritsider Genoa' on passing Suez Canal."²³⁸ The ship was loaded in India and sailed for Genoa on November 19, but one day later the shipowner claimed frustration and a higher freight in order to proceed via the Cape of Good Hope. The charterer refused and the dispute was submitted to arbitration, while the vessel went on around the Cape. The arbitrators held the contract not frustrated. On appeal, the Court of Appeals (Queen's Bench) reversed and awarded the shipowner a reasonable remuneration in quantum meruit. Judge

234. *Id.* at 257.

235. *Id.* Additional distance and freight involved in the longer voyage were not mentioned in the opinion.

236. *Id.*

237. [1961] 2 Q.B. 278 (1960).

238. *Id.* at 281.

Pearson felt that even though the parties anticipated the possibility that the Canal might be closed—because of the late date of their agreement—this did not necessarily prevent the frustration of their contract, since it was only “one of the surrounding circumstances to be taken into account in construing the contract, and [would], of course, have greater or less weight according to the degree of probability or improbability and all the facts of the case.”²³⁹ The basis of the decision, however, was the existence of clause 37 in the contract, which was interpreted to mean that the shipowner was obliged to pass the Suez Canal.²⁴⁰ Judge Pearson also ruled that the route via the Cape was a highly circuitous and unnatural one, so as to satisfy the test of “fundamental difference” in performance.²⁴¹ The previous Suez cases dealing with c.i.f. contracts were distinguished as involving only an increase in freight and the duration of the voyage, whereas charterparty cases also involve additional hazards to the crew, the ship or the goods. The *Glidden* decision was also distinguished as concerning a particular charterparty with different terms.²⁴² Finally, the court denied that the shipowner was estopped from alleging frustration just because it sailed for Genoa with knowledge of the blockade of the Canal.²⁴³

The *Sidermar* decision has been the subject of controversy among various commentators.²⁴⁴ Certainly, it was not an easy decision. Although it can be said that the clause “Captain also to telegraph to ‘Maritsider Genoa’ on passing Suez Canal” clarifies the intention of the parties as to the intended route, it could also be interpreted as meaning “if passing Suez Canal.”²⁴⁵ The difficulty in *Sidermar* arose because the parties did not specify the route in the contract, but instead inserted the ambiguous and vague provision “the ship . . . shall with all convenient speed proceed to Genoa.” Although the court tried in vain to show any true difference between c.i.f. contracts and charterparties as to the significance of a longer voyage,²⁴⁶ it certainly reached the “fair and reasonable result.” In contrast to the *Glidden* case, the shipowner in *Sidermar* did not refuse to perform, thereby damaging

239. *Id.* at 303.

240. *Id.* at 303-04.

241. *Id.* at 304, 307. The increase in distance was two-fold, and the shipowner was granted forty-five percent additional freight.

242. *Id.* at 307-08.

243. *Id.* at 310. As previously noted, the Canal was blockaded on November 2, 1956. The ship in *Sidermar* sailed on November 19, 1956.

244. Compare *Excuse for Nonperformance*, *supra* note 66, at 1426-27 (disagrees with the decision) with Schlegel, *supra* note 44, at 436-37 (agrees with the decision).

245. *Excuse for Nonperformance*, *supra* note 66, at 1427.

246. See notes 299-300 and accompanying text *infra*.

the charterer, but instead agreed to go around the Cape demanding only a reasonable remuneration. The case is a perfect example of the tendency of the courts, when they deal with frustration issues, first to reach what they consider the most just conclusion and then to try and "rationalize" that result with legal rules and standards.²⁴⁷

The rule of *Sidernar* did not survive long. Three years later, in *Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*,²⁴⁸ it was overruled by the Court of Appeals. On September 9, 1956, the owner of the vessel *The Eugenia* chartered her to a Soviet state organization "for a trip out to India via Black Sea."²⁴⁹ A war clause of the contract prohibited the vessel to enter dangerous zones without the shipowner's permission.²⁵⁰ The ship was delivered at Genoa, sailed to Novorossisk and Odessa for loading and then proceeded to the Suez Canal. The shipowner tried to prevent the vessel's entrance into the Canal because of the warlike situation (October 30th), but in accordance with the charterer's orders she did enter, being thereafter blocked in the Canal for two and one-half months. The charterer claimed frustration; the shipowner denied it, treated the contract as repudiated, and after the vessel's release chartered her to one of the shippers to complete the voyage (via the Cape). The questions with which arbitrators and courts were faced in the case were two: whether the charterparty had been breached by the charterer's conduct and whether it had been frustrated. The umpire answered the first question in the affirmative and the second in the negative. The trial court agreed as to the question of breach, holding that the charterer could not rely on the "self induced" blockade of the vessel as relevant to frustration.²⁵¹ The court looked upon the matter as if the vessel had not entered the Canal, applied the "fundamental difference" test and, relying on the *Sidernar* precedent, held the contract frustrated.²⁵²

On appeal, the Court of Appeals, speaking through Lord Denning, affirmed the trial judge's decision that the charterer had breached the war clause by proceeding into the Canal without the owner's permission.²⁵³ That determination, however, did not necessarily resolve the controversial question of frustration. In attempting to decide this lat-

247. See Schlegel, *supra* note 44, at 439. See also Thomas, *Have the Judges Done Too Much?*, TIME, Jan. 22, 1979, at 92.

248. [1963] 2 Lloyd's List L.R. 155, *aff'd*, [1964] 2 Q.B. 226 (C.A. 1963).

249. *Id.* at 169.

250. *Id.* at 170.

251. *Id.* at 172.

252. *Id.* at 173-76.

253. [1964] 2 Q.B. 226, 236-37 (C.A. 1963).

ter issue, Lord Denning first discarded the "unforeseeability" requirement, stating that "cases have occurred where the parties have foreseen the danger ahead, and yet made no provision for it in the contract."²⁵⁴ What counts, Lord Denning concluded, is the existence or non-existence of a contractual provision relative to frustration. Finding no such provision in the charterparty, Lord Denning felt free to apply the "radical difference" test. Considering the entire voyage from Genoa to India, he found the additional thirty days needed for sailing via the Cape to be insufficient to frustrate the charterparty.²⁵⁵ Thus, he reversed the lower court's decision and rejected the rule Judge Pearson had enunciated in *Sidermar*.²⁵⁶ Finally, although Lord Denning felt that a charterparty was different from a c.i.f. contract, he stated that things would be complicated "if, in the case of a ship loaded with cargo, the contract of affreightment was frustrated by the closure of the canal and the contract of sale was not frustrated."²⁵⁷

The Eugenia is further proof that when faced with the difficult issue of frustration, courts first attempt to find the "just result" before proceeding to the formulation of legal arguments. As Lord Denning stated, "it must be positively unjust to hold the parties bound."²⁵⁸ There is no factual similarity between *Sidermar* and *The Eugenia* that would justify the overruling of the former by the latter, except that in both cases the parties had not specified the vessel's route. However, in *Sidermar* there was at least one ground supporting the court's holding, namely the clause "Captain to telegraph . . . on passing Suez Canal," an analogue of which was absent in *The Eugenia*. Apart from that, however, the great difference between the two cases is that in *Sidermar* the action was brought by a performing shipowner, asking for a reasonable compensation, whereas in *The Eugenia* it was the charterer who was trying to avoid his liability for breaching the war clause. The trial court in *The Eugenia* thought that the provisions of the Law Reform Act, combined with a late fixing of the date of frustration (November 16th), would make up for any injustice.²⁵⁹ The Court of Appeals correctly chose to hold the contract not frustrated, in order to

254. *Id.* at 239.

255. *Id.* at 240. There was a disagreement as to the computation of the additional distance involved since the Queen's Bench Division computed the additional mileage from Odessa to Vizagapatam, whereas the Court of Appeals computed the mileage from Genoa to Madras. Data as to the increase needed in freight was not included in the reported decisions.

256. *Id.* at 240-41.

257. *Id.* at 241.

258. *Id.* at 239.

259. *See* [1963] 2 Lloyd's List L.R. at 177.

allow the shipowners to collect the two and one-half months' hire.²⁶⁰ By doing so, however, the court caused two undesirable consequences. First, it cast on the shipowner both the expenses of the thirty-day longer voyage and the costs of maintenance during the two and one-half month period, both of which might have been substantial. Second, the court overruled the *Sidermar* decision, which represents the usual case, without any special reason for doing so. As it has been pointed out, the court could simply have held the charterer estopped from alleging frustration,²⁶¹ leaving it to the shipowner to judge the advantages and disadvantages of claiming frustration. Thus, in *The Eugenia*, as in many of the frustration cases, the right result was reached, but the wrong reasoning was applied.

The last decision involving contracts concluded before the first closure of the Canal was an American case, *Transatlantic Financing Corp. v. United States*.²⁶² On October 2, 1956, a shipowner entered into a voyage charterparty with the American government for the carriage of wheat from the United States to Iran. Although the route was not specified in the contract, the vessel sailed on the Gibraltar-Suez route.²⁶³ After the blockage of the Canal, the shipowner sent the ship around the Cape, and asked for a reasonable increase in the freight. When the charterer refused, the shipowner filed suit claiming frustration. In affirming the dismissal of the action, the United States Court of Appeals for the District of Columbia Circuit enunciated a three-step method of constructing a "condition of performance based on the changed circumstances."²⁶⁴ The first two steps of this method, involving the occurrence of a contingency and the non-allocation of its risk, were easily found in the facts of *Transatlantic*. The court could not, however, find the third requirement met: namely, the commercial impracticability of the performance.²⁶⁵ The court therefore concluded that relief under quantum meruit should not be granted; the differences in cost (one-seventh of the contract price) and in distance (one-third more than the original) were not deemed sufficient to constitute "legal impossibility."²⁶⁶ The court also relied on *Tsakiroglou* and *The Eugenia* in concluding that "where the time of the voyage is unimportant, a charter party should be treated the same as a C.I.F. contract in determining impossibility of performance."²⁶⁷

260. Namely, the hire for the period the vessel had been blocked in the Canal. See Schlegel, *supra* note 44, at 437-38.

261. *Id.* at 438.

262. 363 F.2d 312 (D.C. Cir. 1966).

263. *Id.* at 314.

264. *Id.* at 315.

265. *Id.* at 316.

266. *Id.* at 319-20.

267. *Id.* at 320 n.16.

In the series of the Suez charterparty decisions, *Transatlantic* is perhaps the only one in which the difference between the performance rendered and that originally undertaken was not so great as to justify frustration under the strict common law standards. Nevertheless, the problem involved in the majority of these cases, that of performance by a shipowner of additional services than those originally contemplated, was present in *Transatlantic* as well. Since the contract was insufficiently altered to become "a nullity," the court felt unable to grant relief on a restitution basis. The court apparently felt that *Transatlantic* was attempting first to take its profit on the contract, and then to force the government to absorb the cost of the additional voyage: "Apparently the contract price in this case was advantageous enough to deter appellant from taking a stance on damages consistent with its theory of liability."²⁶⁶ Yet, it is not clear why the shipowner should in equity lose its contractual profit or even incur part of its additional costs, while the charterer keeps its own benefits. The shipowner was not in breach; on the contrary, it had transferred valuable services to the charterer. The *Transatlantic* decision demonstrates the inadequacy of American law, which generally requires impossibility of performance in order to grant relief for unjust enrichment²⁶⁹ and, in contrast to the continental legal systems, does not recognize adjustment of the parties' obligation.²⁷⁰ Partly for this reason, and partly because of the reliance on *The Eugenia* (which involved a different situation) and *Tsakiroglou* (where the seller had not performed at all), the *Transatlantic* court failed to grant reasonable relief.²⁷¹ As for the remainder of the decision, the court correctly recognized that "foreseeability or even recognition of a risk does not necessarily prove its allocation,"²⁷² thereby agreeing with the English courts as to the relevance of foreseeability to frustration issues.

3. Disputes Due To the Second Closing of the Canal

The two cases which arose after the second Canal closure on June 6,

266. *Id.* at 320.

269. See RESTATEMENT (SECOND) OF CONTRACTS § 292(1) & comment b (Tent. Draft No. 9, 1974). See also CALAMARI & PERILLO, *supra* note 135, at 508.

270. See notes 68-72 and accompanying text *supra*.

271. Another argument, adopted by the *Transatlantic* court in estimating the impracticability of the plaintiff's performance, was that the plaintiff was a better insurer against the contingency than the defendant: "[I]t is more reasonable to expect owner-operators of vessels to insure against the hazards of war." 363 F.2d at 319. Yet, this position, used by the supporters of the economic analysis of frustration, see Posner & Rosenfield, *supra* note 116, at 104, is not very convincing. Article 4(2)(e) of the Hague Rules, see Berman, *supra* note 80, at 236, exempts the carrier for loss or damage arising from "acts of war." See also text accompanying notes 132-136 *supra*.

272. 363 F.2d at 318.

1967 (one English case and one American case) both involved charterparties. Both decisions adhered to the precedents established in connection with the first Suez closure. The first case, *Palmco Shipping, Inc. v. Continental Ore Corp. (The "Captain George K")*,²⁷³ involved a voyage charterparty which was entered into on April 10, 1967, for the carriage of sulphur from East Mexico to West India. The contract contained a clause requiring the master of the vessel to wire New York, both before and after the passage of the Canal.²⁷⁴ After the ship had crossed Gibraltar and was lying only three miles off Port Said, the master was notified that the Canal had been closed to navigation. The shipowner, claiming frustration and additional freight, sent the vessel to India through the Cape. In arbitration proceedings, the umpire did not decide the frustration issue, expressing puzzlement over how to distinguish the "positively unjust" from the simply unjust and the "radically different" from the simply different.²⁷⁵ Relying upon *The Eugenia*, however, the umpire found in favor of the charterer, although he admitted that the voyage performed was "commercially not comparable" with that originally contemplated.²⁷⁶

In the Queen's Bench Division, Justice Mocatta, after analyzing the decisions in *Tsakiroglou*, *Sidermar*, and *The Eugenia*, concluded that he should apply the "radically different" test. Attaching no special weight to the fact that the Canal closure was unforeseeable in *The "Captain George K,"* he felt unable to distinguish *The Eugenia* on that ground. On the other hand, the distinction between c.i.f. contracts and charterparties, made in *Sidermar* and *Tsakiroglou*, was of no help to the shipowner, because the contract was not on c.i.f. terms. Judge Mocatta also thought that the clause "Master to give estimated dates of arrival . . . before . . . and to again wireless . . . New York . . . after passing Suez" was immaterial.²⁷⁷

Thus, the only possible way to distinguish *The Eugenia* would have been to rely on the difference in the mathematics of each case. Justice Mocatta concluded that this difference (twenty-five percent additional time in *The Eugenia* compared with fifty-seven percent in *The "Captain George K"*) was not enough.²⁷⁸ Therefore, the charterparty was held not frustrated, although very unwillingly, with Justice Mocatta

273. [1970] 2 Lloyd's List L.R. 21 (1969).

274. *Id.* at 22-23.

275. *Id.* at 23.

276. *Id.* at 23, 26, 28.

277. *Id.* at 30.

278. *Id.* at 32. Analytically, the increase in distance in *The "Captain George K"* was ninety percent, thus necessitating a voyage that was approximately fifty days longer. See *id.* at 25. Data as to the freight difference was not reported.

stating: "But for *The Eugenia* . . . I would have concluded that the voyage performed was fundamentally different in kind from that clearly contemplated by the charter . . . [and] I would have held the latter frustrated and the owners entitled to succeed"²⁷⁹

The "Captain George K" may be considered an exception to the general tendency of the courts to follow standards of fairness and justice in deciding frustration cases. Certainly, a more courageous judge would not have reached a result which in his opinion was not reasonable, just for the purpose of following an easily distinguishable precedent. Indeed, the dissimilarities between *The "Captain George K"* and *The Eugenia* are not limited to only an "immaterial" difference in figures. First of all, this difference is not at all immaterial. As was similarly noted in relation to the *Gaon* case, if an increase of fifty-seven percent in time and ninety percent in distance is considered insufficient to produce frustration, the test of the "radically different" performance becomes nothing more than a dead letter. Second, Justice Mocatta stressed how much *The "Captain George K"* had deviated from what later became the customary route, but he did not distinguish *The Eugenia* on this ground, a case in which the ship could easily have switched from the route via Suez to the route via the Cape. Third, the provision requiring the master to telegraph to New York before and after passing the canal was held immaterial, much like *The Eugenia* held with regard to the analogous clause in *Sidermar*. This telegraph provision, however, absent in *The Eugenia*, could have been interpreted differently. Finally, the judge in *The "Captain George K"* failed to see that *The Eugenia* purported to prevent the defaulting charterer from escaping the liabilities caused by his breach.²⁸⁰ In *The "Captain George K,"* however, the situation was different, because the action was brought by the performing shipowner who was seeking reasonable reimbursement for the additional costs of his performance. *The "Captain George K"* is a good example of the power of precedents at common law, and is a clear demonstration of the evils caused by the unfortunate overruling of the *Sidermar* holding in *The Eugenia*.

The last in the series of the Suez frustration cases was an American case, *American Trading Production Corp. v. Shell International Marine Ltd.*,²⁸¹ involving a voyage charterparty for the carriage of lube oil

279. *Id.* at 32. The reason for the judge's reluctance was the clever remark of the shipowner's counsel that in *The "Captain George K,"* unlike *The Eugenia*, the vessel had to sail an additional 6,000 miles before she could gain the new customary route via the Cape. Justice Mocatta acknowledged that "the vessel here was therefore committed to what became the wrong route," took this fact into account in estimating the ship's additional voyage, but hesitated to distinguish *The Eugenia* on this ground. *Id.*

280. See notes 258-260 and accompanying text *supra*.

281. 453 F.2d 939 (2d Cir. 1972).

from Texas to India. The parties entered into the charterparty on March 23, 1967, and included the following "Liberty clause":

In any situation whatsoever and wheresoever occurring and whether existing or anticipated before commencement of or during the voyage, which in the judgment of the Owner or Master is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to or loss of the Vessel or any part of her cargo . . . the Vessel may proceed or return, directly or indirectly, to or stop at any such port or place whatsoever as the master or the Owner may consider safe or advisable under the circumstances, and discharge the cargo, or any part thereof, at any such port or place . . . For any service rendered to the cargo as herein provided the Owner shall be entitled to a reasonable extra compensation.²⁸²

The vessel sailed from Texas on the route via the Suez Canal and the charterer paid the agreed freight; just before the ship had entered the Mediterranean, the master was notified by the shipowner about the various disturbances in Egypt. After the Canal closure, the shipowner sent the vessel around the Cape, reserving its rights for extra compensation, which the charterer refused to pay. The shipowner's claim before the district court was dismissed and, on appeal, the Court of Appeals for the Second Circuit affirmed. The court basically relied on the *Transatlantic* case, which it found not distinguishable, although in *American Trading*, the agreed tanker rate was based on a Suez passage and the invoices contained a specific Suez Canal toll charge. These facts, according to the court, showed an expectation of a voyage through Suez, but not the fixing of a specific route.²⁸³

Next, the court estimated the difference in performance caused by the Canal closure (thirty days delay, eighty-five percent additional distance, thirty-two percent additional expenses) and found it insufficient to frustrate the charterparty. Although recognizing that in *American Trading*, the vessel had substantially deviated from the route via the Cape, the court found no frustration, relying on the analysis in *The "Captain George K,"* as well as on the fact that the disturbances preceding the closure were known to the master before he had crossed Gibraltar.²⁸⁴ Finally, the court denied the shipowner compensation on the basis of the "Liberty clause," concluding that this provision would be applicable only if the ship had not reached the port of destination.²⁸⁵

The decision in *American Trading* further demonstrates that *Sidermar* represents the usual situation—a shipowner asks for proper compensation—and of how unfortunate it was that the court in *The*

282. *Id.* at 943 n.6.

283. *Id.* at 941-42.

284. *Id.* at 942-43.

285. *Id.* at 943-44.

Eugenia failed to see a significant difference in the facts before it and consequently overruled *Sidermar*. The holding in *The Eugenia* caused a chain of unfortunate decisions: in both *Transatlantic* and *The "Captain George K,"* the courts followed *The Eugenia*; in *American Trading*, the court relied on *Transatlantic* and *The "Captain George K."* The charterparty in *American Trading* could have been declared frustrated on the ground of the vessel's commitment to the wrong route. Moreover, the argument based upon the master's knowledge of the trouble in the Canal is not very convincing. Why should he have left the still customary route or even delayed the trip for an uncertain period, in view of a mere possibility of the Canal closure? Nevertheless, even if the court in *American Trading* should not have been expected to show more courage than Justice Mocatta in *The "Captain George K,"* relief could have been granted irrespective of frustration. The "Liberty clause" of the contract gave the master or shipowner the right to discharge the cargo at any port without notifying the charterer, such discharge being complete delivery and entitling the shipowner to an extra compensation. It is submitted that this provision cannot be construed so literally as to deprive the owner of its right if the ship reached her port of destination. According to the court's logic, if the shipowner had ordered the master to stop at an intermediate port and to discharge the cargo, or even to go back to a previous port, the owner would still be entitled to a reasonable compensation for any deviation; if, however, the owner had ordered the master to reach the final port by another route—as it did—thereby minimizing all delays to the charterer's benefit, then the owner should not be remunerated. It is unlikely that this was the intention of the parties in including the "Liberty clause" in their contract.

4. *The Leavell & Co. Case—Final Remarks*

In the context of a discussion of the Suez Canal cases, reference should also be made to *C.H. Leavell & Co. v. Hellenic Lines, Ltd.*,²⁸⁶ a case tried before the Federal Maritime Commission involving the legality of surcharges included in tariffs filed with the Commission. Hellenic Lines, the carrier, undertook to transport construction materials on behalf of Leavell & Co. (the charterer) from the United States to the Red Sea by two separate consignments. The first ship sailed from New York on May 27, 1967, following the route via the Canal; at the time of the Canal's closing she was in Alexandria, and was directed to proceed via the Cape. On the same day the second ship sailed from New York for the Red Sea, directly on the Cape route.

Hellenic added to the normal freight rates surcharges of sixty-five per cent for the first trip and twenty-five percent for the second. On the charterer's complaint, the examiner found the surcharges reasonable and justifiable. On exception by the charterer, the Federal Maritime Commission relied on two provisions of Hellenic's tariffs on file with the Commission; the first of them entitled Hellenic to levy a surcharge without notice, in case the expenses of Suez transit increased through any cause, except for carrier's fault; the second clause was included in Hellenic's bill of lading and read as follows:

Without limitation of any other provision herein, in any situation whatever or wherever occurring and whether existing or anticipated before commencement of, or during the voyage, which, in the judgment of the carrier is likely to give rise to risk of capture, seizure, detention, damage, delay or disadvantage to, or loss of the ship or any part of the cargo or to make it unsafe, imprudent or unlawful for any reason to . . . continue the voyage . . . the carrier, whether or not proceeding toward or attempting to enter the port of discharge, may proceed by any route or return directly or indirectly to or stop at such other port or place whatever as the carrier may consider safe or advisable under the circumstances, once or oftener, backwards or forwards in any order and discharge the goods . . . The carrier shall be entitled to a reasonable extra compensation for any services in connection with the foregoing above the agreed freight²⁸⁷

On the basis of these provisions,²⁸⁸ the Commission found that Hellenic had the right to add surcharges on the normal freight rates,²⁸⁹ proceeding then to the examination of the reasonableness of the added surcharges.

Taking into account the examiner's findings that in the first trip there was an increase of 193% in mileage and 164% in time, whereas in the second the figures were 94% and 71% respectively, the Commission concluded that the surcharges were reasonable²⁹⁰ and dismissed

287. *Id.* at 81. The *American Trading* court distinguished *Leavell* on the basis of this second clause. That court relied on the slight difference between the excuse clauses in the two cases—namely, that the clause in *American Trading* did not contain the words “by any route” included in the provision in *Leavell*. Yet, the difference between “may proceed by any route” (*Leavell*) and “may proceed . . . to . . . any such port or place whatsoever” (*American Trading*) is not so great as to justify this distinction. The two clauses are almost identical and they probably reveal the same contractual intention of vesting the shipowner with liberty to proceed by any appropriate route in the event of any emergency.

288. Hellenic relied on the “Baltic Stop Clause 1956,” incorporated in its bill of lading and entitling the carrier to change the route and increase the freight proportionally if navigation were interrupted on the Canal after loading. 13 Dec. Fed. Mar. Comm’n at 81. The Commission disregarded this provision since it was not on file with the Commission and shippers could have no notice of it. *Id.* at 89-90.

289. *Id.* at 86.

290. *Id.* at 89-91.

the complaint. As the Commission emphasized in its discussion, "Hellenic rendered services, obviously at increased cost to itself Hellenic did not merely return the goods to the port of loading as it might have done under the bill of lading clause, but carried them on to the port of destination" ²⁹¹

The Commission reached the right result. Of course, it did not have jurisdiction to decide the issue of frustration—although the examiner found that the passing of the Canal had become "impossible" ²⁹²—and it decided the case on the basis of specific clauses in the tariffs on file. Nevertheless, it keenly noticed that the carrier had performed not only what it had originally undertaken by the contract, but something more, something beyond the scope of its initial obligation, for which it should not be left uncompensated. This element is typical in the majority of the Suez charterparty cases.

Sidermar, The "Captain George K," Transatlantic, American Trading, and Leavell, all presented the same basic problem: a shipowner had performed additional services than those required under the contract, thereby transferring benefit to the charterer, who nevertheless refused to pay additional freight. Under these circumstances the declaration of frustration would seem appropriate in order to enable the shipowner to collect a reasonable remuneration on a quantum meruit basis; unless, of course, there were overwhelming considerations, such as contrary contractual stipulations, immaterial alterations of performance or fault on the shipowner's part. ²⁹³ Such a result is justified not only by principles of restitution and unjust enrichment, but also by fairness in commercial dealings, as well as by the need to minimize risks of delay and damage to the cargo.

Indeed, the shipowner should not be deprived of his contractual profit to make up for his increased expenses, as was held in *Transatlantic*, while the charterer keeps his own gains in full. Moreover, if the shipowner had discharged the cargo at an intermediate port on the basis of a "liberty clause," like those in *Leavell* and *American Trading*, or if he had suspended performance relying on a clause "telegraph after passing Suez," considerable delay and dangers to the cargo could have been caused. In addition, even if the charterer had succeeded in making a new charterparty immediately, he would still have had to pay a higher freight for the employment of an emergency route, name-

291. *Id.* at 83.

292. *Id.* at 82.

293. The only case in which the changes in the circumstances of performance might not justify frustration is *Transatlantic*. Yet, even in that case, were it not for the strictness of American law, an adjustment of the parties' obligations would seem to be appropriate. See notes 268-270 and accompanying text *supra*.

ly via the Cape; why then should he be excused from paying the additional freight claimed by his original shipowner? Finally, the shipowner should not be required to run the risk of defaulting from already undertaken charterparties of subsequent performance²⁹⁴ without the incentive of a reasonable remuneration for his additional voyage. It has, of course, been argued that the shipowner should bear the risk of all contingencies affecting his expenses, unless otherwise specifically agreed;²⁹⁵ however, as already discussed, such a strict rule is undesirable.²⁹⁶

This factor was, in all likelihood, seriously taken into account by the courts in *Sidermar* and *Glidden*; the different factual settings of these cases justifies their opposite holdings. *Sidermar* stands for the above described situation of additional performance, beneficial to the charterer; holding the charterparty frustrated, the court enabled the performing shipowner to collect extra freight. In *Glidden*, on the other hand, the shipowner had not performed at all, nor did he intend to do so; denying frustration, the court obliged the defaulting shipowner to pay damages. Thus, the element of performance or nonperformance seems to have substantially influenced the courts in their effort to achieve a fair and reasonable result.²⁹⁷

In the later *Eugenia* decision, however, although it appears that the House of Lords was also motivated by the purpose of reaching a just solution, the doctrine of frustration was improperly employed. The Lords failed to detect that they were essentially trying an action for breach of contract, in which the defaulting charterer counterclaimed frustration in order to escape the liability resulting from its own wrongful behavior. To prevent this undesirable result the court denied frustration, but at the same time improperly overruled the *Sidermar*

294. This point was raised in *Sidermar*, although Justice Pearson did not attach much importance to it. [1961] 2 Q.B. at 305.

295. *Excuse for Nonperformance*, *supra* note 66, at 1426.

296. See text accompanying note 214 *supra* for the analogous statement made in the case of a c.i.f. seller. See also note 299 *infra*.

297. This concept is well established in contract law:

A covert influence of the desire to reimburse detrimental reliance is not only discernible in the "restitution" cases, where it is assumed that the party is excused from the contract, but also in the determination of the issue of excuse itself. When a court is faced with the question whether the circumstances of the case warrant excusing the defendant from his contract, there is every reason to suppose that the decision will be influenced by the type of relief demanded by the plaintiff, and particularly by the consideration *whether the plaintiff . . . seeks essentially only to obtain reimbursement* (in the form of the promised price or otherwise) *for expenditures actually made in performing the contract*.

Fuller & Perdue, *The Reliance Interest in Contract Damages* (pt. 2), 46 YALE L.J. 373, 381 (1936) (emphasis added). See also TREITEL, *supra* note 141, at 706.

decision, thereby causing a sequence of unfortunate decisions. The prestige of precedent prevailed over the court's tendency to pursue the just result, despite the shown hesitation. Yet, the House of Lords could have achieved the same solution by other means,²⁹⁸ or it could simply have distinguished *Sidermar*. The vice of the doctrine of frustration is that it can be used in many dissimilar situations and that is precisely what happened in *The Eugenia*.

The factor of performance or nonperformance by the party claiming frustration most probably played a significant role in deciding the Suez c.i.f. cases as well. Indeed, there is no great difference between charterparties and c.i.f. contracts, as the courts in *Sidermar* and *Tsakiroglou* purported to show. The manner of performance is, of course, distinct between these two contracts, since the former concerns transportation and the latter sale of goods; once, however, performance has started, the c.i.f. seller might be faced with considerable risks, as was noted earlier,²⁹⁹ approaching those of a shipowner. Had the seller in the *Tsakiroglou* case shipped the goods contracted for, the House of Lords might have held the contract frustrated. Whether, nevertheless, this reason was sufficient to outstrip other conflicting elements present in *Tsakiroglou*³⁰⁰ is to be doubted.

G. CONCLUSION

After the presentation of proposed theories, statutory provisions, standard contracts, individual contract practices and landmark cases, one can unhesitatingly conclude that a uniform standard, apt to resolve the problem of frustration in international trade universally, can hardly be found. The suggested scholarly tests are either too strict, too objective or too subjective, are sometimes vague, and it is often difficult to comply with them. Also, the different needs and practices of each

298. See text accompanying note 261 *supra*.

299. See text accompanying note 214 *supra*. A shipowner's performance is relatively prolonged and involves responsibilities such as maintenance expenses, crew payments, crew fitness, and readiness of the ship to make subsequent voyages at an agreed date. See *Sidermar*, [1961] 2 Q.B. at 305. Performance by a c.i.f. seller, on the other hand, is simpler and mainly consists of loading the goods, procuring the necessary documents, and sending them to the buyer. See *Biddell Bros. v. E. Clemens Horst Co.*, [1911] 1 K.B. 214 (1910). Yet, after shipment, the seller-charterer might bear serious dangers, such as deterioration of the goods under a clause "to arrive" or "guaranteed quantity or quality," liability against a foreign buyer to whom the first buyer assigns his rights, and remuneration to the shipowner for default in the performance of subsequent charterparties. See U.C.C. §§ 2-324 comment 4, 2-321(2), 2-615 comment 5. Thus, it would appear that the nature, but not the gravity, of the risks involved differs in the performance of each contract.

300. See text accompanying notes 226-230 *supra*.

local trade cannot easily fall within them.³⁰¹ Standard and individual contracts, furthermore, employ very dissimilar standards, reflecting factors such as the kind of commodities involved and the superior or inferior bargaining position of the parties.³⁰² Moreover, the courts of each national jurisdiction show a preference for their domestic statutes and contract principles, disregarding laws and theories advanced in other countries. Thus, adjudicating international trade cases, courts will abide by the "fundamental difference in performance" test in England; by the "basic assumptions" or the "commercial impracticability" doctrine in the United States; by the requirements of "good faith" in Germany; or by the "force-majeure" standards in France. Of course, the courts in almost every national regime take into account trade customs, commercial understandings, or business practices, but these can never supersede the applicable domestic law.³⁰³ It would seem, in this way, that a viable practical standard of frustration, satisfying the purposes of universality and uniformity in international trade, does not exist.³⁰⁴

Nonetheless, as the Suez Canal cases demonstrate, courts often use the doctrines of frustration as a means of reaching what they consider the fairest solution, unless their national frustration standards or fundamental principles (*e.g.*, the *stare decisis* rule) do not so permit. In addition, several scholars, contractual clauses and statutory provisions directly or indirectly refer to doctrines like "fairness" or "reasonableness."³⁰⁵ Thus, Lord Wright's finding that the achievement of the "just and reasonable result" is the underlying principle of all frustration tests would appear to have at least some basis.³⁰⁶

Even if one subscribes to the above theory, however, fairness and justice alone cannot guarantee the parties in an international commercial contract that any future disputes over discharge will in fact be resolved in a just and fair manner,³⁰⁷ absent an homogenous universal

301. A liberal doctrine of excuse, incompatible with that of Anglo-American law, can be found in the practices of the Japanese trade. See Birmingham, *supra* note 129, at 1394; *Excuse for Nonperformance*, *supra* note 66, at 1424 n.27.

302. See text accompanying notes 186 & 188 *supra*.

303. See note 312 and accompanying text *infra*.

304. See *Helsinki Discussions*, *supra* note 91, at 264 (Berman). *Contra, id.* at 252 (Schmitthoff).

305. See, *e.g.*, Farnsworth, *supra* note 69, at 377-79; Tunc, *supra* note 181, at 184; *Fetish of Impossibility*, *supra* note 67, at 100; U.C.C. §§ 2-614 to -615; ULIS, *supra* note 156, art. 74, para. 1; E.C.E. Contracts Nos. 574 & 574A, *supra* note 171, at 235; United States Steel *c.i.f.* and *f.a.s.* vessel contracts, *supra* note 188, at 56 & 61; Bethlehem Steel Export Corp. *f.o.b.* mill contract, *supra* note 188, at 62.

306. See Schlegel, *supra* note 44, at 444.

307. *Id.*

standard. The best possible solution, therefore, seems to lie in the contract itself. Indeed, the only unquestionable way in which the law of international trade has managed to penetrate the various national legislations is the clear expression of the parties' will in their international commercial contract;³⁰⁸ the harsh questions of frustration should above all be answered by the contractors themselves. So, the international merchants should carefully and unambiguously indicate in their contracts all the contingencies which they intend as excuse grounds for either party. Any way of expression, enumerative or more general,³⁰⁹ is acceptable, provided that it clearly manifests the parties' will. Failure to do so means that the parties will be subject to the vagaries and unknown peculiarities of the applicable national law, in case a controversy over excuse arises.³¹⁰ Since the courts of any forum will apply national law standards including the forum's conflict of laws rules, the parties of a vague international commercial contract might find themselves in the gears of the "implied term," or the "Geschäftsgrundlage," or the "legal impossibility," or any other of the numerous and unreliable frustration doctrines.

Thus far, nobody disagrees. Both courts and legal scholars agree that in the international trade field the parties create the law applicable to their relationships through their contract and that only when nothing can be found therein should appeal be made to other principles. This is, however, the heart of the problem for, despite their efforts, draftsmen of international trade contracts do not often cover the subject of frustration fully. This might happen, because they either did not foresee a certain event (foreseeable or unforeseeable), or they feared failure of their agreement, or they simply regarded the matter as "going without saying," with no need for special reference.³¹¹ The question then arises as to how the aforementioned danger of the parties' subjection to the peculiarities of some unknown national legislation could be avoided. This is the target to which all the suggested scholarly approaches aim.

The answer is, of course, not all simple. Everyone is free to choose among the numerous existing theories or to add to those theories a new one. Since, however, the courts in every national jurisdiction will

308. See Lagergren, *The Limits of Party Autonomy*, in *THE SOURCES OF THE LAW OF INTERNATIONAL TRADE* 201, 201-04 (Int'l Ass'n of Legal Science, London, 1964).

309. See *Helsinki Discussions*, *supra* note 91, at 237 (Heikki Jokela).

310. Thus, it would appear that the second part of Professor Berman's conclusion (that "general doctrines of excuse for nonperformance should yield to express contractual provisions for excuse and should not go beyond them," see *Excuse for Nonperformance*, *supra* note 66, at 1420), is unsatisfactory.

311. See Farnsworth, *supra* note 69, at 871-73. See also *The Eugenia*, [1964] 2 Q.B. at 239.

not apply any other standard than that enacted or prevailing in the forum, all these attempts are in vain as far as uniformity and universality are concerned. They would rather contribute to a further breakup of the law of international trade than to its unification and autonomous application as a distinct, transnational body of law. Another method, perhaps less satisfactory than the contractual stipulation approach, but necessary as its supplement, should be found.

In view of the above considerations, the only way to create a uniform standard which will defeat the courts' insistence upon their own national principles is the inclusion of a frustration provision in an international treaty, carefully drafted so as to be ratified by most countries. Only then will the courts yield to the adopted transnational standard, and only then will the uniform customs and practices of the international merchants "pierce" the national boundaries. One can argue that the law merchant exists irrespective of any recognition by domestic regimes, and in fact it is so, but in its present form this law can hardly supersede the existing national laws; it can only be employed—as it is done in practice—as a supplementary source. The autonomy and supremacy of the *lex mercatoria* will not be honored by the courts, especially with respect to frustration, unless this *lex* is made respectable to them in the form of an international norm, officially acknowledged by national legislation.³¹²

This would appear to be a reasonable method to apply when the contractual stipulations do not suffice themselves to resolve a certain dispute over frustration. Of course, the parties would be free to select among other alternatives, devised to promote the unification of international commercial law, such as model contracts or trade terms.³¹³ These methods, however, are not secure.³¹⁴ The best way to avoid the

312. These issues involve the difficult problem of the autonomy and enforcement of the law of international trade. For a discussion of the many views on this subject, see Berman & Kaufman, *supra* note 155, at 272-77 & 273 n.197. None of these views are in complete agreement with the arguments advanced in the text. Professors Berman and Kaufman argue that the distinct and independent law merchant is "in fact enforced in national courts and in arbitral tribunals," *id.* at 273 n.197, although admitting that "national courts have been reluctant to accept, in terms, the concept of a body of international commercial customary law," *id.* at 275. See also E. LANGEN, *TRANSNATIONAL COMMERCIAL LAW* 2-12, 20-22 (1970) (denies the autonomy and clearness of the international trade rules); C. SCHMITTHOFF, *UNIFICATION OF THE LAW OF INTERNATIONAL TRADE* 6-8 (1964) (rejects the continuity of the ancient *lex mercatoria* and uniform custom as its primary source, in favor of a new law merchant based on the similarities of the various national commercial laws); Scott, *The Risk Fixers*, 91 *HARV. L. REV.* 737 (1978) (confines his theory about groups of common interests to the field of banking law). See generally Berman & Kaufman, *supra* note 155, at 273 n.197.

313. See Parts II-D and II-E *supra*.

314. For problems related to the adoption of trade terms see Trakman, *Contractual*

whims of unfamiliar domestic legislations is the adoption of an international norm which embodies universal mercantile practices, customs, and understandings, thereby supplementing³¹⁵ the provisions of the contract with certainty and uniformity. No one, of course, should overlook the problems and the snags of unification through an international convention. Because of the many compromises that have to be made, the resulting rules are often inflexible and unsatisfactory.³¹⁶ Yet, so long as we believe that a separate and autonomous *lex mercatoria* exists, we must also admit that its unification is to a great extent possible. On the other hand, the recent efforts which were previously examined in the context of frustration, as well as the general trend to entrust tough problems to international conferences, must encourage us to proceed.³¹⁷

Such a transnational standard should, of course, primarily be based upon the usages and customs of the international commercial community,³¹⁸ but it should also achieve a successful reconciliation of the Anglo-American and the Continental legal systems, so that it could be more acceptable to both.³¹⁹ This transnational standard should aim at the following points: (a) combination of both an objective and a subjective standard and not an exclusive appeal, such as to a "fundamental difference of performance" or "the parties' diligence"; (b) avoidance of extremely strict or liberal tests; (c) practicability, comprehensibility, and flexibility, so that the special circumstances of each case can also be considered; (d) disregard of foreseeability as the decisive factor, but consideration of it as an additional element; (e) recognition of the courts' power to adjust the contractual obligation of the parties, a

Allocation of Risks in International Oil Sales 76-80 (1978) (unpublished S.J.D. dissertation in Harvard Law School Library).

315. The parties may, of course, select *ab initio* the international norm to be applied to their relationships, regardless of their citizenship, see ULIS, *supra* note 156, art. 4, and irrespective of whether the norm permits application by agreement, see 1978 UNCITRAL Draft, arts. 1 & 4, *supra* note 161, at 326-27. In these cases, application of the international rule is based upon the power of the contract itself. See text accompanying note 308 *supra*.

316. For a general discussion of the problem of unification of international trade law see Eörsi, *Measures for Unifying the Rules on Choice of Law*, in UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALE OF GOODS 293, 295-304 (Int'l Ass'n of Legal Science, Paris, 1966) [hereinafter cited as Eörsi].

317. See notes 155-169 and accompanying text *supra*. See also Honnold, *The Uniform Law for the International Sale of Goods: The Hague Convention of 1964*, 30 L. & CONTEMP. PROB. 326, 351 (1965) ("the importance and difficulty of the problems justify the extra effort") [hereinafter cited as Honnold].

318. *A Constructive Critique*, *supra* note 159, at 368.

319. Another compromising effort should be made with respect to the differences between capitalist and socialist countries. See Eörsi, *supra* note 316, at 297-98.

noticeable defect of the common law systems; and (f) provision for the so-called "secondary obligations" of the claimant,³²⁰ namely, the duty of notification and tender of a commercially reasonable substitute which, although of minor significance, facilitate the resolution of disputes and lead to more just results.

For present purposes, until the optimal standard is achieved and adopted by the majority of the trading countries, the only possible suggestion that can be made to draftsmen of international trade contracts, so that the undesirable results of the application of an unfamiliar legal system are eliminated, is to incorporate excuse clauses as clearly and indisputably as possible. As an additional safeguard, in case a controversy does arise, it would also be advisable that the draftsmen specifically refer to a certain national law—directly or through listed conflict of laws rules³²¹—which both parties know and agree to entrust, for the interpretation or supplementation of their own force-majeure provisions.

320. See Schmitthoff, *supra* note 34, at 157.

321. According to the best view, the private international law rules should supplement the adopted international norm as well. See Nadelmann, *The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglia*, 74 YALE L.J. 449, 456-59 (1965); *A Constructive Critique*, *supra* note 159, at 359-60. But see Honnold, *supra* note 317, at 334; Tunc, *The Uniform Law on the International Sale of Goods: A Reply to Professor Nadelmann*, 74 YALE L.J. 1409, 1411-12 (1965). In this respect, Article 1(b) of the 1978 UN-CITRAL Draft should be more successful than Article 2 of ULIS. See Berman & Kaufman, *supra* note 155, at 271. Unification of the conflict of laws rules is a distinct matter. See Eörsi, *supra* note 316, at 293; von Caemmerer, *Measures for Unifying the Rules on Choice of Law*, in UNIFICATION OF THE LAW GOVERNING INTERNATIONAL SALE OF GOODS 313 (Int'l Ass'n of Legal Science, Paris, 1966).

