The changing of the guard*

Force majeure and frustration in construction contracts: the foreseeability requirements replaced by normative risk allocation

Force majeure: "the precise meaning of this term, if it has one, has eluded the lawyers for years."

Donaldson J, *Thomas Borthwick (Glasgow) Ltd v. Bunge & Co Ltd*.[1]

"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 difference as to principle but agreement as to its application."

Diplock J,
Port Line v. Ben Line Steamers.[2]

1. Introduction

When dealing with concepts of "*force majeure*" and "frustration of contract", every author (and reader, I must add) will have difficulty in getting some structure in an almost boundless area of the law, a land where the climate seems to be cloudy all day, if not foggy. This description is also applicable to English law, which cannot be an incident. Reference to English textbooks generally does not give much relief, an observation that is supported by the above quotations of two well-known judges. What does one make of the statement of a learned author, and practitioner, Schmitthoff, discussing *force majeure* clauses, on the concept of *force majeure*: "this term has a clear meaning in law; it includes every event beyond the control of the parties." That does not prevent him from continuing: "Sometimes, however, the parties modify the normal meaning of the clause and it is therefore necessary to construe the clause in each case 'with close attention to the words which precede or follow [163] it, and with a due regard to the nature and general terms of the contract. The effect of the clause may vary with each

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* *International Construction Law Review*, 2002, p. 162-186.

[1] [1969] 1 *Lloyd's Rep* 17.

[2] [1958] 2 QB 146; [1958] 1 *Lloyd's Rep* 290.

instrument.'"[3]

Schmitthoff's view on frustration of contract is in the same firm line of consistency: "The principles on which the doctrine of frustration is based are well settled. However, the application of the doctrine is not without difficulty, for whether the circumstances in a particular situation amount to frustration is often difficult to decide" (at p. 104). In this statement it is not disclosed that the doctrine knows four theories, of which Schmithoff implicitly has chosen one ("radical change"), which illustrates the level of complexity in common law thinking on this matter. To the continental observer, the famous Luigi Pirandello play comes to mind, "Six Characters in Search of an Author", which in the present setting becomes: "Four theories in search of a doctrine." The common law traditionally being allergic to theory making and academic endeavours in general, the following observations from a continental lawyer may be a contribution to clear the legal thicket.

It is noted at the outset that, for reasons explained in due course, the concept of *force majeure* is taken together with that of frustration of contract. Practising law in The Netherlands, where until 1992 its Civil Code was taken literally from the French Civil Code (after Napoleon's brief visit), and where in the last century the development of the law increasingly was under influence of German law, which is reflected in its New Civil Code of 1992, these backgrounds seem to be helpful to put *force majeure* in its civil law context. In addition, present efforts to come to a unification or harmonisation of contract law in Europe, such as the 1994 Unidroit Principles of International Commercial Contracts and the Principles of European Contract Law (drafted by the Lando Committee in 1995), with its roots in the major systems of civil law and common law, will be taken into consideration, and compared with the Vienna Sales Convention of 1979 (CISG) *force majeure* clause. Furthermore, the American Restatement of Contract 2nd, also of 1979, and the Uniform Commercial Code are interesting from a comparative point of view. When discussing *force majeure*, the borderline with "frustration", *imprévision*, and hardship is easily passed. Therefore, these concepts will be discussed as well in our *tour d'horizon*.

So much for general introduction, I will now indicate which specific concepts and issues will be covered in this article.[4] After giving a description of the civil law roots of the *force majeure* concept, which are still recognisable in its modern guise, followed by a comparison with its common law counterpart, the position in French law is analysed. The comparative view is extended to the approach under German and Dutch law, which is reflected in [164] international treaties, such as the Vienna Sales Convention (CISG), and in Unidroit and other harmonisation projects in the field of contract law. The central concepts in this article are: *risks and risk-taking*, *control* and *foreseeability*. The focus is on the possibility of court-induced adaptation of contract in cases of *force majeure*, however, attention is also given to contract-based adaptation, through hardship clauses, changed conditions clauses, and the like, since they contain information

[3] Schmitthof's *Export Trade. The Law and Practice of International Trade* (10th ed., by d'Arcy, Murray and Cleave, 2000), citations omitted.

[4] This article to a great extent is bases on a book on construction law that I wrote in 1998, in Dutch, unfortunately: *Acts of God, overmacht en onvoorziene omstandigheden in het bouwrecht* (Publikatie Vereniging voor Bouwrecht Nr 26) (Deventer: Kluwer, 1998) and also on my treatise on contract law: *Verbintenissenrecht, Deel 1, Contractenrecht* (Deventer: Kluwer, 4th ed., 2001), 723-795.

what parties had in mind in regard to changes to be made to the contract under circumstances that will jeopardise the performance of contract. Thus, the common practice in a business community can be established. Incidentally, the use of such clauses is advocated by the author, to avoid confrontation with an uncooperative court, or else, with solutions reached by understanding, if not left-handed judiciary, from a commercial perspective.

As will be demonstrated, in a number of civil law jurisdictions, among which those of France, Germany and The Netherlands, the role of *foreseeability* is increasingly diminished in the field of *force majeure* and frustration. This is reflected in the sections on that subject in treaties and harmonisation codes on contract law, and in a range of standard clauses used in practice as well. Apparently, this trend is contrary to what is put forward in recent publications from American authors, and it also may shed new light on the more traditional approach of *force majeure* and frustration under English law. As a consequence, it is suggested by me that the foundation of *force majeure* and frustration is in need of repair that is long over-due: the old-time philosophy of the sanctity of contract is cracking under the increasing force of finding a reasonable solution by amending the contract, not written for performance under the contingencies that happened to occur after its conclusion. That is not just a matter of contractual justice; as will be demonstrated, it also is a matter of economics and efficiency which is relevant to the business world, more, in particular, to the construction industry.

2. The roots of force majeure

From time immemorial, there has been a tension between what parties agree in contract, and what would be fair and reasonable, if performance of the contract is obstructed by supervening events, making its execution impossible or leading to the debtor's ruin. *Pacta sunt servanda*, the Roman maxim, serves to stress the sanctity of contract, as *vinculum iuris*, binding parties by their word, as one binds oxen by the horns, as it was said in the *travaux préparatoires* by the founding fathers of the French Civil Code. So far, so good, this principle is still of paramount importance in modern contract law. Every jurisdiction will have a leading case, of days gone by, which is the cornerstone of this legal principle. Thus, English law has its *Paradine v. Jane*,[5] of 1647, French law its *Canal at Craponne* of 1876, American law its *Dermott v. Jones* (1864),[6] [165] and Dutch law its *Sarong* case of 1926. A contract is a contract, and that is it; business as usual. However, justice also has to be served, which in contract law is known under the metaphor of *good faith*, or what is "fair and reasonable" between parties, under the circumstances. This principle of *bona fides*, another heritage of the Roman world, was to become a fundamental aspect of Western legal civilisation.

A description of this classic dichotomy can be cut from a few well chosen sentences, taken from the speech of Bingham LJ in the *Super Servant Two* case of 1990 (*Lauritzen v. Wijsmuller*[7]), in abridged form:

> "Certain propositions, established by the highest authority, are not open to question:
> 1. The doctrine of frustration was evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises. … The object of

[5] (1647) Aleyn 26; (1647) 82 ER 897.

[6] (2 Wall), 69 US 1; 17 L Ed 762 (1864) (Sup Ct).

[7] [1990] 1 *Lloyd's Rep* 1.

> the doctrine was to give effect to the demands of justice, to achieve a just and reasonable result, to do what is reasonable and fair, as an expedient to escape from injustice where such would result from enforcement of a contract in its literal terms after a significant change in circumstances. …
> 2. Since the effect of frustration is to kill the contract and discharge the parties from further liability under it, the doctrine is not to be lightly invoked, must be kept within very narrow limits and ought not to be extended. …
> 3. Frustration brings the contract to an end forthwith, without more and automatically…
> 4. The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it… A frustrating event must be some outside event or extraneous change of situation. …
> 5. A frustrating event must take place without blame or fault on the side of the party seeking to rely on it…" [citations omitted]

The "demands of justice", and "achieving a just and reasonable result" hereby is placed in the centre of attention, which seems justified, and above all, may serve as a bridge spanning the Channel between the common law and the civil law traditions in this respect. Interestingly enough, when consulting English textbooks on contract law, it strikes one that most authors have little consideration for this "reasonable solution" approach to *force majeure* and frustration (as indicated, here taken in combination), which is theory number four of the doctrine of frustration. It is common to find a description of the development of the frustration of contract, where three theories are distinguished. The oldest is that of the implied condition (*Taylor v. Caldwell*, 1863,[8] and Lord Loreburn, in the *Tamplin* case, 1916[9]), via the foundation of the contract that had been destroyed, this leads to the final option of the "change in the obligation" (or "radical change") theory, the radically different substance of contract, which was not originally agreed between parties (thus, above all, Lord Radcliffe, in *Davis Contractors*, of 1956).[10] At first sight, it seems that the courts have found an objective [166] criterion for establishing frustration with the "change in the obligation theory"; in Lord Radcliffe's speech, however, the relation with the principle of reasonableness is loud and clear, in the following illuminating passage, a standard text in most books on contract law:

> "By time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself. So perhaps it would be simpler to say at the outset that frustration occurs whenever the law recognises 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. *Non haec in foedera veni.*[11] It was not this that I promised to do."[12]

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[8] (1863) 3 B&S 826 (QB): [1861-73] *All ER Rep* 24 (HL).

[9] *Tamplin v. Anglo-American Petroleum* [1916] 2 AC 397.

[10] *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696. See, for example, the textbooks in n. 17.

[11] Compare: *Aeneid*, Book 4, lines 338 and 339, regarding Aeneas's complicated relation with Queen Dido, so splendidly put to music by Purcell.

[12] *Davis Contractors Ltd v. Fareham UDC* [1956] AC 696 at 728-729; see also at 719-720

Here we find an interesting reference to the just and reasonable solution, which was advocated by Lord Wright in the *Denny, Mott and Dickson* case of 1944[13] (and other cases), an approach after the war followed by Lord Denning in the *British Movietonews* case of 1951,[14] which however was rejected by the House of Lords, in a decision in which the Law Lords reiterated Lord Loreburne's famous statement (in *Hirji Mulji*, 1926[15]) that "no court has an absolving power". Interestingly enough, that same 1926 case contains a statement by Lord Sumner, which forecast the approach by Lord Wright and Lord Denning decades later, namely, that the doctrine of frustration is "a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands". Thus, the dichotomy of legal certainty and contractual justice is well illustrated, a distinction aptly described in Anson as a dispute of "a conservative or radical approach to the problem".[16]

For most authors of treatises on contract law, habitually leaning to the conservative side in law, the Denning episode was the end of the fourth theory of discharge by frustration, see for instance Anson's *Law of Contract*. Cheshire and Fifoot's treatise, by Furmston, however, from the 1970s on, has propagated "the just and reasonable solution" as the "more realistic view" of what courts do, which is "the more generally accepted view".[17] I have the [167] impression that this view is not commonly held by English textbook writers; be that as it may, as we will see shortly, Cheshire, Fifoot and Furmston currently best matches the modern civil law approach to frustration.

The same holds, however, in regard to the approach of some authors, as Treitel and, recently, Beatson in Anson's 27th edition, stress construction of contract as the central element of the doctrine of frustration. Since in the civil law tradition construction of contract is based upon the principle of good faith, or reasonableness and fairness, there clearly is a strong connection between these frustration theories. This aspect, to be further explored below (in para. 5), is by no means a novel one. It colours the discussion and criticism of the oldest theory, the "implied term", with its attachment to "reasonable persons", giving rise to the accusation of using "fiction", or disrespect for the facts and circumstances of the case concerned. As said, we will return to this matter later.

In this context, it must be noted that Lord Wright did not give justice and reasonableness a predominant or solitary role in the doctrine of frustration, as is illustrated in his speech in the 1944 case, where the relation to the contents of the contract is stressed:

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per Lord Reid. *Ocean Tramp Tankers Corp. v. V/O Sovfracht, The Eugenia* [1964] 2 QB 226 at 238-239; [1964] 1 All ER 161, at p. 166, *per* Lord Denning. In *National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] AC 675; [1981] All ER 161, Lord Radcliffe's statement was treated as the preferred views by Lord Hailsham of St Marylebone LC and Lord Roskill.

[13] *Denny, Mott and Dickson Ltd v. James Fraser & Co Ltd* [1944] AC 265.

[14] *British Movietonews v. London and District Cinemas* [1951] 1 KB 190; [1952] AC 166.

[15] *Hirji Mulji v. Cheong Yue SS Co* [1926] AC 497.

[16] See 23rd ed., by Guest, 1971, 471.

[17] Cheshire, Fifoot and Furmston, *Law of Contract* (8th ed., 1972, 543; 14th ed., 2001, 631 *et seq.*) Compare Anson's *Law of Contract*, by Guest, 23rd ed., 1971, 469 *et seq.*; 27th ed., by Beatson, 515; Treitel, *The Law of Contract*, 5th ed., 1979, 682; 10th ed., 1999, 858.

> "Where, as generally happens, and actually happened in the present case, one party claims that there has been frustration and the other party contests it, the court decides the issue and decides it *ex post facto* on the actual circumstances of the case. The data for decision are, on the one hand the terms and construction of the contract, read in the light of the then existing circumstances, and on the other hand the events which have occurred. It is the court which has to decide what is the true position between the parties.[18]
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> …
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> The event is something which happens in the world of fact, and has to be found as a fact by the judge. Its effect on the contract depends on the meaning of the contract, which is a matter of law. Whether there is frustration or not in any case depends on the view taken of the event and of its relation to the express contract by 'informed and experienced minds'."[19]

When we now turn to the continent, it is interesting to observe that some civil law jurisdictions have known a comparable development of the doctrine of frustration; in German law, for instance, in the 1920s the theory of an *aliud* was adhered to by some authors: the contents of the contract becoming something different, compared to the original agreement, due to subsequent conditions. In the 1930s, the theory of "Wegfall der Geschäftsgrundlage" or "Äquivalenzstörung" (disappearance of the foundation of contract) was proposed (Oertmann, followed by Larenz) which found support among authors in the after-war period, but never was accepted by the German Supreme Court (Bundesgerichtshof). Instead, the use of the principle of good faith ("Treu und Glauben") was at the base of a number of post-war [168] frustration cases, a line of case law extending until present times: performance of the contract in unamended form could not reasonably be required from the debtor ("Zumutbarkeit").[20] In France, the doctrine of *imprévision*, developed by the highest administrative Court, the Conseil d'Etat, for government contracts, was based on the idea of "bouleversement du contrat", the upheaval of contract. This doctrine, it must be noted, was never followed by the civil courts in frustration cases.[21]

In The Netherlands, the Supreme Court (Hoge Raad) in its landmark decision in *Fokker Airplane Wing*, of 1968,[22] also placed the principle of good faith at the centre of the handling of a *force majeure* or frustration defence, in juxtaposi-

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[18] *Denny, Mott and Dickson Ltd v. James Fraser & Co Ltd* [1944] AC 265 at 274-275, [1944] 1 *ALL ER* 678 at 683. In an extra-judicial utterance Lord Wright was more outspoken. "The truth is", he said, "that the court or jury as a judge of fact decides the question in accordance with what seems to be just and reasonable in its eyes. The judge finds in himself the criterion of what is reasonable. The court is in the sense making a contract for the parties, though it is almost blasphemy to say so": *Legal Essays and Adresses*, 259.

[19] *Ibid.* at 176 and 684, respectively.

[20] Reference is made to German treatises of contract law, in particular those by Larenz and Fikentscher; compare, Wolfgang Fikentscher, *Schuldrecht* (9th ed., 1997), Nr 170 *et sep.*, for further literature.

[21] See for this doctrine, apart from French textbooks on contract law, for the English reader: Barry Nicholas, *The French Law of Contract* (Oxford, 1992), 202 *et seq.*; Donald Harris and Denis Tallon, Eds, *Contract Law Today. Anglo-French Comparisons* (Oxford, 1991), 228 *et seq.* (French report by Isabelle Lamberterie).

[22] Hoge Raad, 5 January 1968, *NJ* 1968, 102, note Scholten. Compare for a similar view on insurance and liability: House of Lords, *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 827, a subject discussed in my book *Verbintenissenrecht I*, 417.

tion with the nature of the contract and societal views as regards liability. It was explicitly held that the last view could contain, as was the case here, that the fact that the creditor of the obligation was carrying insurance against damage caused by the contingency in question, was an indication that liability for such damage should lie with that party.

> "A small contractor, in possession of only two cranes, was hired by Fokker, the airplane manufacturer, to hoist wings on a truck when they came in by river barge, for a sum of Dfl 17.50 per hour, when damage to one wing occurred, in the order of Dfl 80,000, due to a defective steel bolt in the crane which caused the wing to fall down, a defect that only could be established afterwards by electron microscopy. Defence of *force majeure* of the crane operator was awarded, although as a general rule of Dutch contract law, an operator is liable for damage caused by equipment used in the performance of contract, since he warrants its good condition."

This case was taken by the legislature as a model for the *force majeure* article in the New Civil Code, Article 6:75. For policy reasons, however, no reference to good faith was made in its text, but the article generally is read to include that basic principle, which governs all contractual obligations, in good continental tradition. It states:

> *"Article 6:75 Dutch Civil Code (force majeure)*
> A failure in the performance cannot be imputed to the debtor if it does not result from his fault, and if he cannot be held accountable for it by law, juridical act or common opinion either."

From the above, the conclusion may seem justified that upon closer scrutiny, English law as a common law system is not that much apart from the civil law approach to *force majeure*. It must be old roots, the splendid isolation of English law (thwarted by the Chunnel, these days, not to mention [169] Brussels), with its peculiarities that are one of its attractions to the foreigner, therefore has had its longest day. This perhaps is realised better on the continent than on the British Isles.

Meanwhile, this leads me to the intriguing remark of Nael Bunni, who in his discussion of the new *force majeure* clause in FIDIC (1999 ed.), clause 19.1 (and 19.7, for frustration), has made the observation that the new FIDIC conditions represent "a swing from the common law approach towards a civil law concept".[23] A statement by another writer, Seppälä, also leaves the reader puzzled: "the French Civil Code is far narrower in scope than the doctrine of frustration under English law".[24] This clearly asks for a reaction from my side, as a true continental, which must be based on further investigation of the civil law tradition in this respect. Once again, we will have to cross the Channel, and take a closer look at the first jurisdiction we find there upon landing: French law.

Before disembarking, I would like to make a historical note on the distinction between *force majeure* and frustration under English law, which as already was said, is happily disregarded in this article. That distinction, so characteristic for English contract law, dates back to *Paradine v. Jane* of 1647,[25] leaving the

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[23] Nael G. Bunni, "Indemnity and *Force Majeure*" [2001] *ICLR* 523 at 527.

[24] Christopher Seppälä, "FIDIC's New Standard Forms of Contract – *Force Majeure*, Claims, Disputes and Other Clauses" [2000] *ICLR* 235 at 242, n. 8

[25] (1647) Aleyn 26; (1647) 82 ER 897.

concept of *force majeure* practically under-developed, contrary to the doctrine of frustration. In that seventeenth century decision the court laid down a rule, that when *the law* casts a duty upon a man which, through no fault of his, he is unable to perform, he is excused for non-performance. If on the other hand, he had bound himself *by contract* absolutely to do a thing and events make performance futile or even impossible, he cannot escape liability for damages. The alleged justification for this harsh principle is that a party to a contract can always guard against unforeseen contingencies by express stipulation; as a consequence, there is no reason to complain if events turn to his disadvantage. A common example is a contract undertaken by a builder to construct a house, which he fails to do, because of strikes or soil defects. That case law took a different turn with *Taylor v. Caldwell*[26] in 1863 (the physical destruction of the subject matter of the contract), where the development of the frustration doctrine found its origin.

Meanwhile, every common law contracting party has learned not to trust the courts, but to mind his own business, that is, have *force majeure* clauses put into his contract, as elaborate as possible. This is a common law tradition foreign to civil law contracts, where parties are used to trust the general principle of good faith to govern *force majeure* disputes, and to keep such clauses brief (already by custom keeping contracts as concise as possible, in the same faith).

To my mind, this historical incident has for ages blurred the view of the [170] common law contract lawyer when considering the relation between *force majeure* and frustration of contract. In addition, the rule of absolute contracts affected the idea of construction of contract, forbidding the judiciary to get involved in what was seen as the autonomy of the parties. For better and worse, so be it. However, the end of the splendid isolation of Albion that nowadays seems to be in sight, in an optimistic scenario at least, with the European adventure, may also bring change in this respect. But let us leave further philosophies aside, and cross the Channel now.

3. The French origin of force majeure

It is not difficult to see that the concept of *force majeure* is derived from the Roman concept of *vis major*, a great force (of nature), and therefore, insurmountable for mortal men. In most jurisdictions that relation is still preserved: in German law it is known as “höhere Gewalt”, in Dutch law as “overmacht”, and in England, being a pious country, as “Acts of God”, and being a martial country as well, also known as: “Acts of the King’s Enemies”. (Compare also the *fait du prince* in French law, related to legislative action only.) Therefore, *force majeure* means: disasters, floods, wars, and the like (Prince Rupert and his troops, in *Paradine v. Jane*, 1647). In the nineteenth century it was common in most countries to take physical impossibility of performance of contract as the basis of *force majeure* (“Unmöglichkeit”, in German law). The term “impediment” is still a relic of that view. Not for long, however, it became clear that also commercial impossibility should be accepted as a ground for the defence of *force majeure*. In many jurisdictions a special doctrine was developed for that purpose: “frustration of contract”, “imprévision”, “change of circumstances”, “impracticability”, etc. A striking feature is, that the norms for awarding the defence did not significantly differ from what was accepted by the courts in the field of *force majeure*. As a consequence,

[26] (1863) 3 B&S 826 (QB); [1861-73] *All ER Rep* 24 (HL).

in this paper these concepts are taken together in our discussion of "*force majeure*".

We are in search of the origins of *force majeure*, and will now turn to the country of origin, France. Traditionally, a contingency will constitute *force majeure* on the condition that three requirements are fulfilled: *imprévisibilité* (unforeseeability, also expressed as *cas fortuit*), *extériorité* (it must be "une cause étrangère", or foreign cause), and finally, *irrésistibilité* (an irresistible force of nature). The first requirement contains two elements, both related to prevention of damages by the debtor: he could have taken measures to prevent the occurrence of detrimental consequences of the contingency, or he could have contracted out his liability for the damage caused. The externality of the cause of damage was subject to the "théorie des risques" which was developed alongside the *force majeure* doctrine: it will depend on the risks allocated to the debtor, whether the cause really is considered to be "foreign" to him. This is well illustrated in the leading case, as French as French can be, of the infected turbot, served to a visitor of a restaurant (Poitiers, 1969). The bacillus causing illness is not seen as an exterior [171] element, even if unforeseeable and insurmountable, it is within the restaurateur's "sphère d'activité".

So far for the traditional doctrine of *force majeure*, still found in most French textbooks on contract law. Over the last decades, however, the French courts have attached less value to the foreseeability requirement, in comparison to the requirement of the unavoidable and insurmountable character of the contingency. In a number of decisions of recent years, including those of the highest civil court, the Cour de Cassation, foreseeability as a test is dropped altogether, where it is established that the event was irresistible for the debtor. This development has found a climax in the decision of 28 April 1998, a transport case.[27]

In the civil law jurisdictions, this development is not restricted to French law. Also in Dutch law, the legislature in introducing the new "imprévision Article" of the New Civil Code, has stressed that foreseeability of a contingency is not required; what is decisive is whether the debtor had taken that contingency into account, by making a specific contract clause dedicated to that event. A confusing element here is, that in its text, the article contains a reference to "unforeseen circumstances", which is meant to be, as it is explained by the legislature in its comment to the article, circumstances not taken into consideration by the parties in the drafting of their contract, and therefore no part of its contents. As a consequence, an "unforeseen circumstance" is taken in the sense of a circumstance *not provided for in the contract* (not "verdisconteerd", in the Dutch wording of the legislature's comment). The article reads as follows:

> *"Article 6:258 Dutch Civil Code (frustration)*
> 1. Upon the demand of one of the parties, the court may modify the effects of a contract or it may set it aside in whole or in part, on the basis of unforeseen circumstances of such a nature that the other party, according to standards of reasonableness and fairness, may not expect the contract to be maintained in unmodified form. The modification or setting aside may be given retroactive effect.

[27] Cour de Cassation, Com. 28 avr. 1998, D. 99, 469, note BM-FL, about transport of rice from Vietnam to West Africa; for further case law, see the note. Compare for this development: A Sériaux, *Droit des obligations* (Paris, 1992), 223 *et seq.*; J Carbonnnier, *Droit civil, Tome 4, Les obligations* (Paris, 22nd ed., 2000), nr 166.

2. The modification or the setting aside shall not be pronounced to the extent that it is common ground that the person invoking the circumstances should be accountable for them or it follows from the nature of the contract.
3. For the purpose of this article, a party to whom a contractual right or obligation has been transmitted, is treated as a contracting party."

In standard terms commonly used in construction contracts in The Netherlands, the Uniform Administrative Conditions (UAV) 1989, the frustration clause was drafted on the basis of this article of the Civil Code:

"UAV (Uniform Administrative Conditions), 1989 Clause 47. Cost-increasing Circumstances

1. For the purposes of this Clause, cost-increasing circumstances means circumstances or events the nature of which is such that when the Contract was made [172] the possibility of their occurrence needed not to have been anticipated, and which circumstances or events cannot be attributed to the Contractor, and cause a substantial increase in the cost of the Works.
2. If cost-increasing circumstances as defined in paragraph 1 do occur the Contractor shall be entitled to additional payment, in such manner as describedin the next paragraph and subject to the provisions of paragraph 4.
3. If the Contractor is of the opinion that cost-increasing circumstances have occurred he shall so notify the Employer in writing as soon as possible. Upon receipt of such notice the Employer shall within a reasonably short period of time consult with the Contractor about whether cost-increasing circumstances have indeed occurred, and if so to what extent the Contractor is to be fairly and reasonably compensated for the increase of cost.
4. Instead of agreeing to compensation as referred to in paragraph 3 the Employer may elect to limit, reduce, or terminate the work; in that event the sum required to be paid by the Employer shall be determined by principles of fairness and reasonableness.
5. If these UAV or the Contract contain special rules concerning cost-increasing or exceptional circumstances, this Clause shall not apply with respect to the cases provided for in such rules."

This approach to *force majeure* in French and Dutch law is in line with a number of articles in treaties, and codes of different nature, as will be demonstrated in the next paragraph. Thus, the involvement of the law, and the courts when approached by parties, is directed at *contingencies that were possibly foreseen, but, more importantly, were left unresolved by parties, that is, have not been the subject of a provision in their contract.*[28] Most contingencies constituting a *force majeure* situation, it is noted, in itself are perfectly foreseeable (war, oil crisis, devaluation of currency, etc.), which even more will be the case when considered in hindsight, traditionally the position when a *force majeure* clause comes up between parties. The well-known definition of a historian here comes to mind: a prophet turned backwards.

In my judgement, the English case of the *Eugenia*, with a well-known speech by Lord Denning, is the best illustration of this point of view, which, incidentally, is essential in trying to grasp the slippery contours of *force majeure* or frustration. In this case, parties had spent a couple of days negotiating by exchange of telex messages, while the vessel was waiting off the coast of Port Saïd, whether or not

[28] This approach is strongly advocated by John Bell, in *Contract Law Today. Anglo-French Comparisons* (Oxford, 1991), Donald Harris and Dennis Tallon, Eds., 216.

to sail through the Suez Canal, since at the time outbreak of war was in the air. They could however not reach a decision on the matter (the charterer being a Russian company, risking a single journey to Siberia if he took the wrong decision) and thereupon the vessel was sent through the Canal by the owner, and subsequently trapped, in the course of supervening events, that became known as the Suez Crisis. Foreseeable? By all means, but that fact will not stand in the way of a defence of frustration (which however was not awarded, on the facts of the case).[29] [173]

4. The fading relevance of "foreseeability" as a requirement of frustration in modern legislation

In the following, I will give a number of examples of the fall of foreseeability from the *tableau* of *force majeure* and frustration, setting the stage for the remaining criteria, and above all, thus making room for the allocation, or better even, imputation of risks to one of the parties, based on their original agreement and what is required by justice in the case. For that subject, see *infra*, paragraph 5, dealing with construction of contract.

The first example is the Unidroit Principles of International Commercial Contracts, Article 7.1.7:

> *"Unidroit Principles of International Commercial Contracts (1994) Article 7.1.7*
> Non performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.
>
> When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract.
>
> The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non receipt. (…)"[30]

This clause is almost identical to that contained in the "Principles of European Contract Law", drafted by the Lando Committee, Article 3.108. The same holds for Article 79 of the CISG (United Nations Convention on Contracts for the International Sale of Goods), which follows:

> *"Article 79 CISG, sections 1, 3 and 4 (1979)*
> 1. A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its

[29] *Ocean Tramp Tankers Corp. v. V/O Sovfracht* [1964] 1 *All ER* 161. The facts were, it was a time charter, the ship's cargo consisted of iron and steel goods, and a difference in sailing time for the whole venture from Genoa to Madras, via the Suez Canal versus via the Cape of Good Hope, was only 108 days, against 138 days.

[30] Compare for this article also: Joseph M. Perillo, "*Force Majeure* and Hardship under the Unidroit Principles of International Commercial Contracts" (1997) 5 *Tul Int'l & Comp L.*, 5.

consequences. …

3. The exemption provided by this article has effect for the period during which the impediment exists.
4. The party who fails to perform must give notice to the party of the impediment and its effect on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt."

As may be noted, essential is the existence of an "impediment" which is "beyond the control of a party", which "could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract". The Unidroit Principles contain a comparable regulation of [174] hardship clauses, in Article 6.2.2 (cited below, para. 6), where "hardship" is described as "the occurrence of events (which) fundamentally alters the equilibrium of the contract", events which "could not have been taken into account by the disadvantaged party at the time of the conclusion of the contract"; events that "are beyond the control of the disadvantaged party".

In American law, the Restatement of Contract (2nd), from 1979, and in accordance with the Uniform Commercial Code (§2-615), did not make use of the concept of "unforeseeability" in the section on impracticability either. In the "Comment" it is explicitly stated that the contingency causing frustration of contract need not have to have been foreseeable for the party in question. Compare the text of paragraph 261 and its comment:

> *"Restatement of Contract (2nd), 1979 § 261. Discharge by Supervening Impracticability*
> Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."

In the "Comment", the following is said:

> "This section states the general principle under which a party's duty may be so discharged. The following three sections deal with the three categories of cases where this general principle has traditionally been applied: supervening death or incapacity of a person necessary for performance (§ 262), supervening destruction of a specific thing necessary for performance (§ 263), and supervening prohibition or prevention by law.
>
> Basic assumption. In order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a 'basic assumption' on which both parties made the contract … This is the criterion used by Uniform Commercial Code § 2-615 (a). Its application is simple enough in the cases of the death of a person or destruction of a specific thing necessary for performance. The continued existence of the person or thing (the non-occurrence of the death of destruction) is ordinarily a basic assumption on which the contract was made, so that death or destruction effects a discharge. Its application is also simple enough in the bases of market shifts or the financial inability of one of the parties. The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section. In borderline cases this criterion is sufficiently flexible to take account of factors that bear on a just al-

> location of risk. The fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non occurrence was not a basic assumption.
>
> Impracticability. Events that come within the rule stated in this Section are generally due either to 'acts of God' or to acts of third parties. If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter and the situation will be governed by the rules stated in Chapter 10, without regard to this Section.
>
> As used here 'fault' may include not only 'wilful' wrongs, but such other types of conduct as that amounting to breach of contract or to negligence. Although the rule stated in this Section is sometimes phrased in terms of 'impossibility' it has long been recognised that it may operate to discharge a party's duty even though the event has not made performance absolutely impossible. This Section, therefore, uses 'impracticable'.
>
> Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw [175] materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section."

The American *Restatement* also contains a section on "frustration", which, again, does not require foreseeability, compare § 265:

> *"Restatement of Contracts (2nd) § 265. Discharge by Supervening Frustration*
> Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.
>
> *Comment:*
> 'Rationale. This Section deals with the problem that arises when a change in circumstances makes one party's performance virtually worthless to the other, frustrating his purpose in making the contract. It is distinct from the problem of impracticability dealt with in the four preceding sections because there is no impediment to performance by either party. Although there has been no true failure of performance in the sense required for the application of the rule stated in § 237, the impact on the party adversely affected will be similar. The rule stated in this Section sets out the requirements for the discharge of that party's duty. First, the purpose that is frustrated must have been a principal purpose of that party in making the contract. It is not enough that he had in mind some specific object without which he would not have made the contract. The object must be so completely the basis of the contract that, as both parties understand, without it the transaction would make little sense. Second, the frustration must be substantial. It is not enough that the transaction has become less profitable for the affected party or even that he will sustain a loss. The frustration must be so severe that it is not fairly to be regarded as within the risks that he assumed under the contract. Third, the non-occurrence of the frustrating event must have been a basic assumption on which the contract was made. This involves essentially the same sorts of determinations that are involved under the general rule on impracticability. See comments b and c to § 261. The foreseeability of the event is here, as it is there, a factor in that determination, but the mere fact that the event was foreseeable does not compel the conclusion that its non-occurrence was not such a basic assumption.'"

In the Uniform Commercial Code, enacted in all American States, this subject is

found in § 2-615, which, as said, inspired the drafters of the Restatement 2nd:

> *"Uniform Commercial Code § 2-615. Excuse by Failure of Presupposed Conditions*
> Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
> a. Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
> b. Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his [176] customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
> c. The seller must notify the buyer reasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer.[31]

A striking feature is, that this trend of leaving out the traditional requirement of foreseeability also is found in an increasing number of standard forms, when dealing with *force majeure* situations. An exception are the UNCITRAL and the EDF conditions, which explicitly carry the element of "foreseeability", and where only "unforeseeable events" are accepted for claims based on that article. This, however, is different in the case of the conditions of FIDIC (Red Book), ENAA and ICE, where it is of importance whether the occurrence is "within the control of the parties to allocate and address through the contract pricing mechanism".[32] The ENAA, EDF, UNCITRAL and Singapore conditions require the contingency to be "unavoidable", "notwithstanding reasonable care" or the "exercise of due diligence". The concept of "unavoidability" is contained in the concepts of "frustration of contract" and "impossibility of performance" in the ICE and old FIDIC

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[31] For a discussion of the concept of "impracticability" under American law, compare: G H Treitel, *Frustration and Force Majeure* (London, 1994), 238.

[32] Compare Philip L Brunner, "*Force Majeure* under International Law and International Construction Contract Model Forms" [1995] *ICLR* 274, at p. 287, discussing *force majeure* in Article 66.1 FIDIC (Red Book, 4th ed.); Robert Knutson, "Developments of Impossibility of Performance" [1997] *ICLR* 298; Bruner, "*Force Majeure* and Unforeseen Ground Conditions in the New Milennium: Unifying Principles and 'Tales of Iron Wars'" [2000] *ICLR* 47 at 52 *et seq.*; Seppälä, *op. cit.* at 240 *et seq.* The *force majeure* clause in the new FIDIC Books (1999), Cl. 19, is discussed by Seppälä. The *force majeure* must "prevent" a party from performing "any of" its obligations, thereby expressly acknowledging the possibility of partial *force majeure*. The definition contains a non-exclusive list of possible *force majeure* events. When the contractor can invoke *force majeure*, he may claim an extension of time; additional costs are only provided in the case of war and related risks, under subclause 19-4. See for the FIDIC Silver Book, Jeffrey Delmon and John Scriven, "A Contractor's View of BOT Projects and the FIDIC Silver Book" [2001] *ICLR* 240 at 257. For the recent availability of insurance coverage for *force majeure* risks, see Smith, Wilson and Bundschuh, "Recent Developments in the insurability of *Force Majeure* and (not Completely) Unforeseen Condition Risks" [2001] *ICLR* 83 at 86.

conditions. Further reference is made to Philip Bruner's highly interesting 1995 article on the subject.[33]

5. Construction of contract, as the basis of force majeure. Solomon's ruling and other judgments

It has been observed before, that most theories on *force majeure* and frustration in the last resort depend on the construction of the contract. Treitel in his book on contract law even has a preference for "construction" as the governing theory of frustration (*op. tit.*, 1979, p. 683, the "most satisfactory explanation of the doctrine"). It is not hard to come to that conclusion when taking the implied term or the foundation of contract as [177] a basic element of frustration, but also those in favour of the "just solution" theory have stressed that construction of contract is at the bottom of it. Compare Lord Wright's statement, quoted by Treitel: "What happens is that the contract is held *on its true construction* not to apply at all from the time when frustrating circumstances supervene" (in *Denny, Mott & Dickson Ltd v. James B Fraser & Co Ltd*,[34] emphasis supplied).

Interestingly, also in the unhappy collision of Lord Denning with the House of Lords in the *British Movietonews* case of 1952[35] - in which the latter Court received wide support for its refusal to accept the view that a Court has the power to release parties from their obligations whenever it was just and reasonable to do so - Lord Simon in his rejection of the Denning line is more subtle than one would expect from an adherent of absolute contracts. Implicitly, one finds here the approach of construction of contract in good faith, in the end of the following quotation. It is not *in cauda venenum est*, this time *in cauda bona fides est:*

> "The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the contract, in the light of the circumstances, existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because *on its true construction it does not apply in that situation*" (emphasis supplied).[36]

In a more recent case, that of *National Carriers Ltd v. Panalpina (Northern) Ltd*, of 1981,[37] in Lord Simon's speech the normative element in construing the contract is hard to miss:

> "The appellants were undoubtedly put to considerable expense and inconvenience. But that is not enough. Whenever the performance of a contract is interrupted by a supervening event, the initial judgment is quantitative - what relation does the

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[33] "*Force Majeure* under International Law and International Construction Contract Model Forms" [1995] *ICLR* 274.
[34] [1944] AC 265.
[35] [1951] 1 KB 190; [1952] AC 166.
[36] [1952] AC 166 at 185, cited by Schmitthoff, 105.
[37] [1981] AC 675.

> likely period of interruption bear to the outstanding period for performance? This must ultimately be translated into qualitative terms: in the light of the quantitative computation and of all other relevant factors (from which I would not entirely exclude executed performance) would outstanding performance in accordance with the literal terms of the contract *differ so significantly from what the parties reasonably contemplated at the time of execution that it would be unjust to insist on compliance with those literal terms*?" (emphasis added).[38]

In Lord Roskill's speech, in the same case, another aspect is added, by accepting the "allocation of risk" as a central element. In the civil law tradition, such allocation is a question of law, not merely of fact, an imputation of an obligation to a certain party, which can only be based upon [178] the construction of the contract in good faith, that is, a normative construction of contract. In the following quotation, another element is also found, namely, the conclusion that the party in question had not provided for the contingency in the contract, which therefore leaves a gap in the contractual arrangement of parties, which may be filled, in the process of construing the contract. That theme was discussed above, in paragraph 4, where it was found to be the element replacing the traditional foreseeability test. Lord Roskill said:

> "… The doctrine has been described as a 'device' for doing justice between the parties when they themselves have failed either wholly or sufficiently to provide for the particular event or events which have happened. *The doctrine is principally concerned with the incidence of risk* - who must take the risk of the happening of a particular event especially when the parties have not made any or sufficient provision for the happening of that event? When the doctrine is successfully invoked it is because in the event which has happened *the law imposes a solution, casting the incidence of that risk on one party or the other as the circumstances of a particular case may require, having regard to the express provisions of the contract into which the parties have entered*. The doctrine is no arbitrary dispensing power to be exercised at the subjective whim of the judge by whom the issue has to be determined. Frustration if it occurs operates automatically. Its operation does not depend on the action or inaction of the parties" (emphasis supplied).[39]

It is interesting to place a quotation of an American author next to this text, where we find the same line of thought. Corbin, in his well-known treatise on contract law, gives the following, illuminating description of frustration in its essence:

> "In order to prevent the disappointment of expectations that the transaction aroused in one party, as the other party had reason to know, the courts find and enforce promises that were not put into words, by interpretation when they can and by implication and construction when they must. When unforeseen contingencies occur, *not provided for in the contract*, the courts require performance as men who deal fairly and in good faith with each other would perform without law suit. It is thus that unanticipated risks are fairly distributed and a party is prevented from making unreasonable gains at the expense of the other. This is not making a contract for the parties; it is declaring what the legal operation of their own contract shall be, in the view of the actual course of events in accordance with those business mores known as good faith and fair dealing" (emphasis added).[40]

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[38] *National Carriers*, at 707.

[39] *Idem*, at 712.

[40] Arthur L Corbin, *Corbin on Contracts* (1960) § 541, at 97, cited by Perillo, *op. cit.*, 12.

Again, we find as a determining factor for judicial involvement in the allocation of contractual risk in frustration cases, whether it can be established if the party concerned (or the parties in unison) has made a provision in the contract for the contingency that occurred. In the articles discussed above, of Unidroit and the Vienna Sales Convention (CISG), it was found that the central element is the fact whether the party confronted with an impediment beyond its control, could "reasonably be expected to *have taken the impediment into account* at the time of conclusion of the contract". The difficulty here is, that adherents of the traditional foreseeability test, will take this phrase as indicating the foreseeability aspect of a contingency. Thus, [179] explicitly, Perillo in his comment on the Unidroit article, referred to above, and the same can be said of other American authors, like Bruner.[41] The first writer, in a long tradition, accepts the following notion of unforeseeability as sound: "an event so unlikely to occur that reasonable parties see no need explicitly to allocate the risk of its occurrence, although the impact it might have had would be of such magnitude that the parties would have negotiated over it, had the event been more likely".[42]

Needless to say, that in that approach the allocation of risk element can easily be overlooked, and with it, the justification of judicial involvement in frustration cases, which in the normative construction of contract view is based on gap-filling. Progress in legal thinking can be hindered that way, keeping us in the sphere of the "implied term" discussion of the middle of the last century, and a factual approach to frustration.

As indicated earlier, the construction of contract view of frustration is gaining momentum among English authors; Beatson, for example, gives considerable attention to the construction element of frustration in his edition of Anson (at 517). In this context, it seems fitting to mention the recent development in English case law, in which the gap between construction of contract according to common law, and construction, continental style, is getting filled. Reference is made to the *Investors Compensation Scheme* (or *West Bromwich*) case of 1998, where the House of Lords is getting close to construction of contract in good faith.[43] This decision did not come alone; for instance, in 1974 Lord Reid stated that "the fact that a particular construction leads to a very unreasonable result must be a relevant consideration. The more unreasonable the result the more unlikely it is that parties

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[41] Compare Perillo, *op. cit.*, 17; Bruner, *op. cit.*, 2000, 101, and *passim.* Interestingly, the weakness of the foreseeability test is readily admitted by these authors. Perillo's remark in that respect is too nice to be left unquoted: "The question of foreseeability is a difficult one. Anyone who has read a bit of history or who has lived for three or more decades of the twentieth century can foresee, in a general way, the possibility of war, revolution, embargo, plague, terrorism, hyper-inflation and economic depression, among the other horrors that have inflicted the human race. If one reads science fiction, one learns of the possibility of new terrors that have not yet afflicted us, but involve possibilities that are not pure fantasy" (at 17).

[42] At 17; in a note reference is made tot Pietro Trimarchi, 11 *Int'l Rev L & Econ* 63 (1991).

[43] *Investors Compensation Scheme Ltd v. West Bromwich BS* [1998] 1 WLR 896, discussed by Sir Christopher Staughton (1999) 58 CLJ 303, who disapproves of modern trends in the construction of contract. The author dissented in the Appeal Court's decision in *Charter Reinsurance Co Ltd v. Fagan*, which was confirmed by the House of Lords, [1997] AC 313, another example of normative construction, disregarding the literal (or natural) meaning of a contract clause ("the sum actually paid").

can have intended it, and if they do intend it the more necessary it is that they should make that intention abundantly clear."[44] Lord Hoffmann in the *Investors Compensation Scheme* case gave a far-reaching opinion. Discussing Lord Wilberforce's view on interpretation of contracts, and the role of the surrounding circumstances in that respect, also known as "background" or "matrix", he said:

> "The background was famously referred to by Lord Wilberforce as 'the matrix of fact' but this phrase is, if anything, an understated description of what the background may [180] include. Subject to the requirement that it should have been reasonably available to the parties, and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man" (at 912).

This aspect of frustration was mentioned, not just for the appeal it has for me, having written a PhD thesis on "Normative interpretation of contract", in Arcadian times, it also serves well to make a few other points. When parties, or even courts, are called to find a solution for a *force majeure* situation, which is an obstacle to performance from a commercial point of view, a reasonable approach would be first to establish the original position taken in the contract, as a starting point. The American author Richard Speidel in the 1980s had made a scheme, which in my opinion still has not lost its value, whereby an offer from the party seeking adaptation of the contract, could be evaluated:

1. "distinguish between changes in production costs the risks of which were assumed and those that were not;
2. establish with reasonable certainty the increased production costs, the risks of which were not assumed, that were caused or will be incurred by the unanticipated change;
4. submit a proposed adjustment adhering to a standard of reasonableness."[45]

In regard to the standard of reasonableness, Speidel suggested to take into account the nature of the transaction, commercial practices and prior courses of dealing. An example given by him is the "equitable adjustment" of government contracts. The standard proposed is, "that the disadvantaged party should be paid the actual, additional costs of production plus the percentage of profit that would have been made under the original contract". Thus, reasonableness proves not to be so vague as some opponents of the just solution suggest. In case opportunism, bad-faith advantage-taking is on the agenda of one of the parties, one could consider the assistance of a third party intervener or referee.[46]

This approach definitely is more sophisticated than a Solomon's ruling of dividing the loss between parties on a 50-50 basis, as was advocated in post-war Germany by some authors (Kegel) and recently brought up again (Bydlinski). Its main disadvantage is, that the original risk allocation of parties is left out. In my

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[44] In *Wickman Machine Tools Sales Ltd v. L Schuler AG* [1974] AC 235, at 251; however, compare also Lord Mustill's speech in the *Investors Compensation Scheme* case.

[45] Richard E Speidel "Court Imposed Price Adjustments under Long-term Supply Contracts", 76 *Northwestern Univ Law Rev*, 369 at 410. Compare also: Richard M Buxbaum, "Modification of Contracts: American Legal Developments", in N Horn, Ed., *Adaptation and Renegotiation of Contracts* (1985), 31.

[46] See for that subject: Horn and Glossner in *Adaptation and Renegotiation of Contracts*, 173 *et seq*., 191 *et seq.*

view, after deduction of that "historic" risk portion, a 50-50 division of additional loss would be an option in certain cases, while in other cases the attribution of the total extra loss to the employer, carrying the general risk of the project (e.g. a government party) could also be followed. In Dutch arbitration in building cases and court decisions in other commercial disputes, examples of such approaches are found.

Some authors are in favour of putting up a threshold of a 50% increase of costs, when relief may be sought from the courts. In German practice in [181] construction cases, however, a rise in costs of 10% may be adequate for adaptation of the contract, as is reported by Korbion. In my research on Dutch arbitration in construction cases, I found that in a *force majeure* setting, accepted by the tribunal, even a cost increase of 10-15%, and a percentage of 5% of the contract sum, may give ground for relief to the contractor.[47]

The assistance of courts in finding a solution for frustrated contracts is still a highly disputed issue. An interesting variation to the theme, is a court order "to go hence and settle". Some of the Westinghouse cases in the 1970s and 1980s are of interest in this respect. In the supply of "yellow cake" to utility companies around the world, Westinghouse had calculated it would suffer a loss of over US $ 2.6 billion, and it sought adaptation of contracts, which led to litigation in 17 cases.

In *Florida Power & Light Co v. Westinghouse Electric Corp*, the court ruled that it "intended to meet and confer with counsel, in an effort to assist them in reaching agreement".[48] The court order to parties to try to reach settlement was given "in view of the fact that the interests of both parties and the public would be best served by an expeditious and final resolution of this matter". In another case, *re Westinghouse Electric Corp Uranium Contracts Litigation*, the court went a step further, appointing a "settlement master" on the basis of Federal Rule of Civil Procedure 53.[49] The judge was of the opinion that at issue were "business problems, and should be settled as business problems by businessmen, as I have been urging from the very first". Parties were made aware of "the Court's availability, willingness, and eagerness to participate, even more fully than I have already, in the settlement negotiations for those parties who deem it appropriate that I do so", expressing the court's expectation that parties "would enter into serious and intense negotiations, and continue the ones that you have already commenced".

Since the enactment of Uniform Commercial Code, Section 2-615, "commercial impracticability", for decades that article designed by Llewellyn, remained unused by the courts; its application was rejected in a few dozen reported cases. The ALCOA case, *Aluminum Co of America v. Essex Group Inc*, of 1980, caused great concern among lawyers and academics, with its "equitable reformation", as "essential to avoid injustice". However, it was outside the scope of the UCC.[50] In

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[47] For this matter, and the foregoing, reference is made to my 1998 study for the Dutch Construction Law Association, Ch. 4, referred to in n. 4. The awards are based on Clause 47 UAV, cited *supra*.

[48] 517 F Supp. 440 (ED Va 1981), Merhige, J, discussed by Robert W Reeder, "Court-imposed Modifications: Supplementing the All-or-Nothing Approach to Discharge Cases", *Ohio State Law J*, 1079 at 1086 (1983). This decision was partly overruled by the Court of Appeals in 1987, see *infra*.

[49] No 235 (ED Va 27 October 1978), discussed by Speidel, 413, and by Michael N Zundel, "Equitable Reformation of Long-Term Contracts – The 'New Spirit' of ALCOA", *Utah Law Rev* (1982) 985 at 992.

[50] 499 F Supp 53 (WD Pa 1980), discussed by Speidel, 377, 412, 416, 422; Zundel, 993.

this case the court gave the following reasons for the position it took, in permitting adaptation of contract:

> "The Court gladly concedes that the parties might today evolve a better working arrangement by negotiation than the Court can impose. But they have not done so, and a rule that the Court may not act would have the perverse effect of discouraging the parties [182] from resolving this dispute of future disputes on their own. Only a rule which permits judicial action will provoke a desirable practical incentive for businessmen to negotiate their own resolution to problems which arise in the life of long term contracts."

The court made an effort, which was highly criticised, to prevent "a general disruption of commercial life by inflation", and tried to warrant "the future of a commercially important device - the long-term contract".

The case of *Florida Power & Light Co v. Westinghouse* (1981) was in 1987 partly quashed in appeal, surprisingly, which made it the first adaptation of a long-term contract under the UCC rule of Section 2-615 UCC, "commercial impracticability".[51] The Court of Appeals ruled in favour of Westinghouse, taking into consideration that the utility company could spread the increase of cost over the consumers, which had enjoyed an advantage of over US $ 2 billion of the production of nuclear energy in the past, which was set against Westinghouse current loss of US $ 80 million, due to stricter federal legislation on disposal of nuclear waste.

The involvement of the courts in reaching an acceptable solution between parties confronted with frustration of contract surprisingly also is found in Europe. A landmark case is the decision of the Cour d'Appel of Paris in *Electricité de France (EDF) v. Shell Française*, of 1976.[52] It concerned a long-term contract of oil supply, caught by the Kippur war of 1973, which led to a steep increase of production costs for Shell, who sought adaptation of the contract. The Court ruled:

> "Considérant que par leur attitude commune, les contractants démontrent que, loin de vouloir rendre leurs accords caducs, ils entendent seulement les adapter aux circonstances nouvelles; qu'il leur appartient done, pour le calcul du prix et de ses variations, de substituer à une référence disparue ou devenue inapplicable, une formule qui assure d'EDF, pour chaque catégorie de fuel, un prix d'achat réduit en rapport avec l'importance exceptionnelle des fournitures en quantité comme en durée et la mission de service public de cet organisme, tout en laissant au raffineur une marge bénéficiaire suffisante; qu'il convient, avant dire droit au fond, de renvoyer les parties, selon leur engagement, à conclure un accord sur ce point, sous l'égide d'un observateur; que c'est seulement en cas d'échec de cette négociation et en connaissance des solutions proposées que la Cour dira si la formule qui pourrait éventuellement convener sur le plan financier modifie les donées des contrats en cours et interdit par conséquent au juge de l'imposer, ou bien si clle se borne, comme l'ont voulu les parties, et sans altérer l'économie des contrats, à adapter le prix aux fluctuations du marchs et peut donc être substituée d'office."

The Appeal Court appointed an "observateur" to assist parties in finding a solu-

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[51] US Courts of Appeals, 4th Circuit, 12 August 1987, 826 F 2d 239 (4th Cir 1987); see, in particular, 279 *et seq.*

[52] l. re Ch. A, 28 September 1976, *Juris-classeur Périodique, La Semaine Juridique* (1978), 18 810, note Jean Robert; discussed by Jean-Louis Delvolvé, "The French Law of 'Imprévision' in International Contracts", *The International Contract* (1981), 3 at 8.

tion. If they would fail, an interesting proposal is made by the Court, based on objective standards, including a margin of profit for Shell. Since the doctrine of *imprévision* is not available to a civil court, the Appeal Court found a creative way to adapt the contract, by way of reasonable construction of an [183] existing, improperly devised indexation clause (which, incidentally, also inspired the American court in the *ALCOA* case[53]).

6. Hardship clauses, an instrument to cope with frustration of contract

Hardship clauses, developed in the 1970s for the offshore industry, hit by the oil crisis, presently figure commonly in long-term contracts, including building contracts. The English term is now widely accepted, also in French and German legal practice; furthermore, it also goes under the the name of: "clause d'adaptation", "clause de sauvegarde", and "Anpassungsklausel". Despite its popularity, it is somewhat hard to find uniformity in these clauses, at least in the 50-odd clauses I have studied. However, a common characteristic is the obligation to renegotiate in case of hardship.[54]

Given the uncertainty regarding judicial adaptation of contract in frustration cases in many jurisdictions, self-help of the parties in drafting their own hardship clauses can be seen as a long-term investment in their contractual relationship.[55]

The continental "father" of the hardship clause, Bruno Oppetit, once gave the following definition of the clause:

> "La clause de 'hardship' peut se définir comme celle aux termes de laquelle les parties pourront demander un réamenagement du contrat qui les lie si un changement intervenu dans les données initiates au regard desquelles elles s'etaient engagées vient à modifier l'équilibre de ce contrat au point de faire subir à l'une d'elles une

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[53] 499 F Supp 53 (WD Pa 1980).

[54] See for the basics of this subject: Bruno Oppetit, "L'adaptation des contrats internationaux aux changements de circonstances: la clause de 'hardship'", *Journal de droit international* (1974), 79; M Fontaine, "Le cause de Hardship. Aménagement conventionel de l'imprévision dans les contrats internationaux à long terme (travaux du groupe de travail 'Contrats internationaux'), *Droit et Pratique de Commerce International* (1976), 7; Clive M Schmitthoff, "Hardship and Intervener Clauses" (1980) *Journal of Business Law*, 82: Ole Lando, "Renegotiation and Revisions of International Contracts: An Issue in the North-South Dialogue", *German Yearbook of International Law* (1980), 37; Norbert Horn, "Neuverhandlungspflicht", *Archiv. f. civ. Praxis* (1981), 55: Régis Fabre, "Les clause d'adaptation dans les contrats", *Revue Trim. de droit civil* (1982), 1; Ernst Steindorff, "Vorvertrag zur Vertragsänderung. Ein Beitrag zur Leistungsvorbehalten und Anpassungsklauseln", *Betriebsberater* (1983), 1127: Jan Paulsson, "L'adaptation du contrat", *Revue de l'arbitrage* (1984), 249. Compare for: "government take clause", "first refusal clause", "client le plus favorisé", "de hausser et de baisse": Oppetit, 796, and for German law: Jürgen F. Baur, *Vertragliche Anpassungsreglungen. Dargestellt am Beispiel langfristiger Energielieferungsverträge* (1983), Heidelberg.

[55] Compare for the international contracts: M Burkhardt, "Vertragsanpassung bei veränderten Umständen in der Praxis des schweizerischen Privatrechts-Vertragsgestaltung", *Scheidsgerichtpraxis und Praxis des Bundesgerichts* (thesis St Gallen, 1996), 85 *et seq.*; and also "The drafting of *force majeure* clauses", by M Furmston and A Berg, in: E McKendrick, Ed., *Force Majeure* and Frustration of Contract (2nd ed., London, 1995), 57 *et seq.*

rigueur ('hardship') injuste" (*op. cit.*, p. 797).

As one may observe, a remarkable element is the lack of a requirement of foreseeability. In two other, classic, hardship clauses of the 1970s, we find the more traditional and the modern wording of the clause:

> "In the event that during the period of this agreement, the general situation and/or the data on which this agreement is based are substantially changed so that either party [184] suffers severe and unforeseeable hardship, they shall consult and show mutual understanding with a view to making such adjustments as would appear to be necessary and such revisions as would be justified by circumstances which could not reasonably be foreseen, as of the date on which this agreement was entered into, in order to restore the equitable character of this agreement" (*Occidental - SCAP contract*).

> "Substantial hardship shall mean if at any time or from time to time during the term of this agreement without default of the party concerned there is the occurrence of an intervening event or change of circumstances beyond said party's control when acting as a reasonable and prudent operator such that the consequences and effects of which are fundamentally different from what was contemplated by the parties at the time of entering into this agreement (such as, without limitation, the economic consequences and effects of a novel economically available source of energy), which consequences and effects place said party in the situation that then and for the foreseeable future all annual costs (including, without limitation, depreciation and interest) associated with or related to the processed gas which is the subject of this agreement exceed the annual proceeds derived from the sale of said gas" (*Ekofisk contract*).

In the first clause, open wording is used, describing the "equitable character" of the contract. In the second clause, a more objective standard is sought, indicating when the economic balance of the contract is disturbed. Fontaine, who studied this subject in its early developments, has found some dozens of variations to the theme; he only found one somewhat objective standard, which still is rather vague: "de façon à replacer les parties dans une position d'équilibre comparable à celle qui existait au moment de la conclusion du present contrat."[56]

The ICC standard forms (Paris, 1985) contain a feature which by now will have become familiar: no requirement of foreseeability is used. In its comment, it is stated: "the event which gives rise to hardship must be one which was not contemplated when the parties made their contract, but it need not be one which the parties could not have taken into account." At its core is the following clause, as a "drafting suggestion":

> *"ICC Hardship clause, 1985*
> 1. Should the occurrence of events not contemplated by the parties fundamentally alter the equilibrium of the present contract, thereby placing an excessive burden on one of the parties in the performance of its obligations, that party may proceed as follows:
> 2. The party shall make a request for revision within a reasonable time from the

[56] See also my Report, IACL Conference Sydney-Melbourne 1986, "Contractual Revision of Contracts in Dutch Law", in Gerver, Hondius and Steenhoff, Eds., *Netherlands Reports* (Asser Institute, 1986), p. 75, at p. 89 v., and my essay in *The Long-term Contract* (Heidelberg, 1987), p. 413.

moment it becomes aware of the event and of its effect on the economy of the contract. The request shall indicate the grounds on which it is based.

3. The parties shall then consult one another with a view to revising the contract on an equitable basis, in order to ensure that neither party suffers excessive prejudice.
4. The request for revision does not of itself suspend performance of the contract."[57]

Also in this field, the Unidroit Principles are informative, being a melting pot of what is found in European jurisdictions on the matter. The following clauses were drafted: [185]

"Unidroit Principles. Section 2: Hardship Article 6.2.1 (Contract to be observed)
Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

Article 6.2.2 (Definition of hardship)
There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives had diminished, and

a. the events occur or become known to the disadvantaged party after the conclusion of the contract;
b. the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
c. the events are beyond the control of the disadvantaged party; and
d. the risk of the events was not assumed by the disadvantaged party.

Article 6.2.3 (Effects of hardship)

1. In case of hardship the disadvantaged party is entitled to request renegotiations. The request shall be made without undue delay and shall indicate the grounds on which it is based.
2. The request for renegotiation does not in itself entitle the disadvantaged party to withhold performance.
3. Upon failure to reach agreement within a reasonable time either party may resort to the court.
4. If the court finds hardship it may, if reasonable,
   a. terminate the contract at a date and on terms to be fixed; or
   b. adapt the contract with a view to restoring its equilibrium."

The Principles of European Contract Law, of the Lando Committee, are in conformity with the above draft-rules, with the exeption of the last sub-section, which is quoted here:

"Article 2.117, sub 3 PECL
3. If the parties fail to reach agreement within a reasonable period, the court may:
   a. terminate the contract at a date and on terms to be determined by the court; or
   b. adapt the contract in order to distribute between the parties in a just and equitable manner the losses and gains resulting from the change of circum-

[57] *Force Majeure and Hardship* (ICC Brochure, 1985), p. 18. The draft Brochure is of 1978, and was discussed by Lando, p. 53, giving alternative rules.

stances; and

c. in either case, award damages for the loss suffered through the other party refusing to negotiate or breaking off negotiations in bad faith."

7. Concluding remarks

We have come to an end of our *tour d'horizon* in the land of *force majeure* and frustration. Hopefully, the impressions of our journey may give some inspiration in looking at the state of the law, as we find it in our own practice.

By tradition, in this stage of the excursion, your guide has some general remarks in the sphere of armchair philosophy. The first remark would be, that as always, the paradox is, that comparison of law gives a better insight in one's own law, which the comparatist thought he knew best at the outset, than in the foreign legal system that was the subject of study. In the approach [186] followed in this article, however, I hope that the back-and-forth switching between common law and civil law solutions to *force majeure* and frustration problems in contract law, may help to distinguish developments, in each jurisdiction, that perhaps are overlooked in its early, if not infancy, stage. Thus, these developments may be taken more seriously than would have been the case if only the local traditions and folk-lore was followed.

I have suggested that the foreseeability test in *force majeure* and frustration cases has run its course, and in legal doctrine, case law and legislation, gradually is being replaced, both in civil law and in common law, by risk allocation, in a setting of normative construction of contract. On both sides of the legal divide, this may come as a shock. Of course it is; it really is a change of the guards, however, without obligatory pomp and circumstance (the law is a republic, nowadays).

As all changes, it is both a revolution, and a natural process; being amongst lawyers, that must be self-evident, especially the last part. Therefore, it is not alleged that foreseeability has no longer to play any role whatsoever in frustration land, but its future contribution will be modest. Incidentally, that is not an uncommon feature in the development of the law; the intention of parties may also have been derived of its nineteenth century splendour, for some time now, it still is a factor to reckon with in construing contracts.

This leads me to a final remark, giving praise to the old regime of foreseeability, which was not so bad after all. A Dutch contractor once told me a story that nicely illustrates this. His company was tendering for a motorway construction project in Poland. The subcontractor hired for building the toll machines was an Italian company. Why? Italian car drivers have a world reputation in manipulating toll machines, and it could be expected that all tricks existing, would be matched by the Italian subcontractor, thus obtaining a system, fitting Eastern European conditions.[58] I understand it worked out quite well. A little foresight in contracting does help, after all.

[58] Compare the problems with the Budapest-Vienna motorway, where Hungarians would not pay toll fees, with disastrous consequences for the BOT project, discussed by Miklos Bauer [1997] *ICLR* 253.