Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance; the Historical Origins and Development of an Autonomous Commercial Norm in the CISG

by

Peter J. Mazzacano*

* Adjunct Professor, Ph.D. (Cand.), Co-Coach of Vis Moot Team, Osgoode Hall Law School, Toronto, Canada.

Nordic Journal of Commercial Law
issue 2011#2

1 Introduction

This article considers the extent to which a problematic legal doctrine is an autonomous[1] international commercial norm, and capable of relative uniformity within the context of the 1980 *United Nations Convention on Contracts for the International Sale of Goods* ("CISG" or "Convention")[2] and its goal for a sales law that is transnational in design. This norm, is commonly known as *force majeure*, an Act of God, impossibility, frustration, the German *wegfall der geschaftsgrundlage*, the French *imprevision*, and the like, but embodied in CISG Article 79 under the neutral wording of "failure to perform…due to an impediment beyond his control" in CISG. A premise to be explored is that while phrase "failure to perform…due to an impediment beyond his control" in CISG Article 79 may have developed out of an amalgamation of similar national conceptions which, in turn, grew from the conflicting Roman maxims *pacta sunt servanda* and *rebus sic stantibus*, Article 79's excuse for non-performance ultimately stands alone as an autonomous international doctrine under the CISG in private international law. It belongs to a private legal order and is part of the non-state commercial lexicon of the new *lex mercatoria*.

This development plays a crucial role for uniformity in private international law generally, and specifically for international sales law. It supports the idea that in certain cases, particularly in international commercial transactions, individual domestic legal doctrines and norms—some of which evolved out of Roman maxims— can transcend state-based law-making, and may ultimately coalesce into autonomous international principles, regardless of their distinctive development by way of positive law in state-based jurisdictions.

Such a development also questions the role of the state in the creation of legal orders. This paper argues that this development of an autonomous legal principle—"failure to perform…due to an impediment beyond his control"—is part of the international commercial *lingua franca*. Further, this private law-making is also evidence of a growing autonomous global legal culture that is truly independent of any national sovereign. This development affects traditional (i.e. state-based) legal boundaries. The implications for transnational law and global governance is that, in the absence of a supranational legislator, the participants themselves, the international merchants and bankers, are needed—indeed, required—to determine their own legal norms.

[1] "Autonomous" comes from the Greek words *auto* meaning "independent" and *nomos* meaning "law". In this paper "autonomous" refers to a concept or action that is self-contained and undertaken or conducted without outside control—it exists and develops independently of the whole, and lives outside the environment of state-based law.

[2] *United Nations Convention on Contracts for the International Sale of Goods*, April 11, 1980, 1489 U.N.T.S. 3, 19 I.L.M. 671, hereinafter cited as the "CISG" or "Convention."

There is, thus, a greater role for industry practices, custom, and party autonomy in the modern globalized environment.

2 Roman Origins

The concept of a legal excuse for the non-performance of an obligation due to an unforeseen event did not fully develop until trade began to flourish in the medieval Mediterranean world. In many respects, it arose to meet the needs of a vibrant—and increasingly international—mercantile community. The principle was not explicitly recognized in the laws of ancient Rome.[3] The Roman Republic did not know the word *impossibilis*; the idea could be expressed, but only in Greek.[4] This is not surprising as early Roman law did not have a comprehensive body of contract law.[5] Rather, Roman law embodied various classifications of liability, but no comprehensive system of contractual responsibility.[6] In many respects the laws of Rome also failed to adequately address the needs of commerce. There was no separate court for the trial of mercantile disputes, and its commercial and maritime law was part of the general law.[7] In the early days of the Latin language there were no words to express sea terms, even though the commercial Sea Code of Rhodes, a Greek creation, came into existence in the second or third century B.C.E.[8] Even the term *contractus* retained a very restricted meaning, denoting lawful conduct that could give rise to liability.[9] Gaius does not even define the term in his commentaries.[10] It was far removed from the modern concept of "contract". Only certain types of transactions were recognized, leaving many types of agreements to exist without legal validity.

[3] J. Toshio Sawada, *Subsequent Conduct and Supervening Events* (Tokyo: University of Tokyo Press, 1968) at 114.

[4] W.W. Buckland, "*Casus* and Frustration in Roman and Common Law" (1932) 46 Harv. L. Rev. 1281 at 1281. See also D. 28.7.1.20. pr.

[5] Anthony Jeremy, "Pacta Sunt Servanda: The Influence of Canon Law Upon the Development of Contractual Obligations" (2000) 144 Law & Just. Christian L. Rev. 4 at 4.

[6] Malcolm P. Sharp, "Pacta Sunt Servanda" (1941) 41 Colum. L. Rev. 783 at 785.

[7] Frederick Rockwell Sanborn, *Origins of the Early English Maritime and Commercial Law* (New York: The Century Co., 1930) at 8. Here, Sanborn describes Roman law, by way of contrast to other legal systems, as being unitary and much more "abstract" and "sharply defined" in nature. He concurs with Francois Morel and Levin Goldschmidt that such a separate mercantile law would have been "contrary to the centralizing genius of the Roman law, and [...] contrary to their tradition of its unity". *Op. cit.* See also Francois *Morel, Les juridictions commerciales au moyen-âge: etude de droit compare* (Paris: Arthur Rousseau, 1897), and Levin Goldschmidt, *Handbuch des Handelsrechts*, vol. i (Stuttgart: F. Enke, 1891).

[8] *Ibid.* at 5 and 8.

[9] Coenraad Visser, "The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade" (1984) 101 S.A.L.J. 641 at 642.

[10] W.F. Harvey, *A Brief Digest of the Roman Law of Contracts* (Oxford: James Thornton, 1878) at 2.

In the classical period,[11] parol contracts did not create a binding legal obligation, and the term *nuda pacta* ("bare pacts") initially represented this array of unsanctioned agreements that were common, but not enforceable in law.[12] They were unenforceable for want of an action at law to make them binding, and were simply thought to be "natural obligations".[13]

Like much of Roman law, Gaius' discussion of the law of obligations is very narrow and focused. There was the verbal contract,[14] the *stipulatio*, which consisted of a formalistic series of questions and answers.[15] But this was valid only between Roman citizens, thereby excluding foreigners. Within the *stipulatio*, however, are the formative ideas that later evolved into more developed legal principles, such as *force majeure*, frustration, impossibility, hardship, and the CISG variant in Article 79. For example, in his title on invalid stipulations, Gaius tells us that

> "if any one stipulates for a thing which does not, or cannot exist, as for Stichus, who is dead, but whom he thought to be living, or for a Hippocentaur, which cannot exist, the stipulation is void".[16]

While the notions of impossibility and non-performance are evident here, absent are other fundamental ideas, such as a supervening event and unforeseeability. These are necessary in the doctrine of excuses for non-performance. Furthermore, there is also an absence of the concept of good faith, even though the idea of *ex fide bona* was a part of later Roman contract law involving sales, hires, and partnerships.

Like the Roman action of *bona fidei judicium*,[17] good faith is implicit in the doctrine of excuse for non-performance, as it requires the parties to do, not what has been exactly promised, but rather that which is fair and reasonable under the circumstances. Roman law rules of *ex fide bona* were initially concerned with jurisdictional matters, not those of an ethical nature or

[11] *Circa* 350 B.C.E.

[12] Jeremy, *supra* note 5 at 4-5.

[13] *Ibid*. at 6.

[14] While a written agreement was not necessary to make a *stipulatio* valid, often one was drawn up to record the transaction. See Thomas Collett Sandars, *The Institutes of Justinian* (Chicago: Callaghan & Co., 1876) at 427.

[15] Charles Sumner Lobingier, *The Evolution of Roman Law*, 2d ed. (n.p.: published by the author, 1923). In the *Institutes*, Gaius describes the *stipulatio* as follows: 'A verbal contract is formed by question and answer, thus: "Dost thou solemnly promise that a thing shall be conveyed to me"? "I do solemnly promise". "Wilt thou convey"? "I will convey". "Dost thou pledge thy credit"? "I pledge thy credit". "Dost thou bid me trust thee as guarantor"? "I bid thee trust me as guarantor". "Will thou perform"? "I will perform".' G. 3.92 (trans. Thomas C. Sandars).

[16] G. 3.97 (Title XIX. "De Inutilibus Stipulationibus").

[17] The action of *Bona Fidei Judicium* directed the judge of a dispute to found his judgment on the basis of good faith. In these cases the judge would order the defendant to render performance on the basis of good faith. In the action of *Bona Fidei Judicium*, the judge was thus given authority to introduce a good faith formula, and take into account informal agreements that would normally be unenforceable in law. See Jeremy, *supra* note 5 at 5.

moral responsibility.[18] Later, with the rise of commerce, and under the Christian influence of Justinian, the Canonists would imbue *ex fide bona* with the ideals of conscience and equity, and urge litigants to do what good faith and conscience required.[19] As Baldus de Ubaldis (1327-1400) noted, bare pacts among merchants became actionable at a very early stage, "since good faith is required in these contracts which are most frequently concluded, and in these respects a bare pact does not differ from a stipulation".[20] These became known as good faith agreements, and covered sales, hire, and partnerships. They allowed a judge to take into account implied terms, customs, and the unexpressed intent of the parties. In addition to the development of good faith, the concepts of a supervening event and unforeseeability would later evolve, as commerce expanded and legal rules adapted to more complex business transactions.

While some scholars have attempted to discern the predecessor of the doctrine of excuses for non-performance in Roman private law, there is little evidence to support this finding.[21] As noted above, its beginnings are fractured in a variety of undeveloped legal maxims and ancient legal rules. The underpinning idea can be traced back to the Code of Hammurabi (2250 B.C.E.). For example, it stated that

> "the hirer of an ox is bound to return it safe and undamaged but he is excused from his liability for its death in two cases: the first is in s. 244 where the ox is devoured by a lion 'in the open country'; the second is in s. 249 when a god has struck it".[22]

There are also references to legal excuses for non-performance in ancient Greek law, but these are only tenuous connections.[23] All that existed were certain formative ideas, and these would require considerable historical and legal development and articulation before crystallizing into modern concepts such as *force majeure*, impossibility, frustration, and Article 79's excuses for non-performance.

The closest ancient iteration containing certain aspects of the doctrine is evident in Gaius' discussion of cases in which a *stipulatio* would be deemed invalid. He stated:

> "[i]f any one stipulates for a thing sacred or religious, which he thought to be profane, or for a public thing appropriated to the perpetual use of the people, as a forum or

[18] *Ibid.* at 4.

[19] *Ibid.*

[20] Gloss ad D. 13.5.1.

[21] Sawada, *supra* note 3 at 114 fn. 30.

[22] G.R. Driver and John C. Miles, eds. & trans., *The Babylonian Laws* (Oxford: The Clarendon Press, 1952) at 438-440.

[23] *Ibid.* at 114.

> theatre, or for a free man, whom he thought to be a slave [...] the stipulation is at once void".[24]

These also included agreements, for example, imposing an impossible condition, such as a non-existent or unattainable object,[25] or a deceased[26] or insane[27] person. Also void were illegal pacts, or those between persons who had no legal capacity to form agreements.[28] Otherwise, obligations were to be strictly enforced, in a similar fashion to the much later doctrine of *pacta sunt servanda*. Over time even the *nuda pacta* became actionable, and was transformed into the *pacta vestita* ("clothed pacts").

Not surprisingly, contract law began its slow development with the expansion of the Roman merchant empire. While Rome expanded rapidly by conquest following the First Punic War,[29] and foreigners, lured by commercial opportunities, flocked to the urban centres, the *jus civile*, the primary body of law which applied only to Roman citizens, failed to address these new conditions.[30] Initially the *jus gentium*, which was considered to be a component of the *jus civile*, was limited to transactions between foreigners and Roman citizens.[31] Eventually, the *jus gentium* adapted and became the body of law that governed all commercial matters, covering both citizens and foreigners.

3 The Rise of Pacta Sunt Servanda

Even though the word *pactum* is one of the oldest words in the Latin language, the exact wording of the maxim *pacta sunt servanda* ("agreements must be honoured") was not common in the days of the Roman Empire.[32] However, the concept of the sanctity of contracts is universal: it is found in all legal systems, in all periods of history, in all cultures, and in all

[24] G. 3.97.

[25] "A condition is considered impossible of which nature forbids the accomplishment; as, if a person says, 'Do you promise if I touch the heavens with my finger'"? G. 3.98.

[26] G. 3.100.

[27] G. 3.106.

[28] G. 3.104, 109.

[29] From 264 to 241 B.C.E.

[30] Andrew Stephenson, *A History of Roman Law* (Boston: Little, Brown, & Co., 1912) at 197.

[31] Lobingier, *supra* note 15 at 213.

[32] Richard Hyland, "Pacta Sunt Servanda: A Meditation" (1994) 34 Va. J. Int'l Law 405 at 412.

religions.[33] For example, in 1292 B.C.E., a peace treaty was created between Ramses II and Hatushill III in which their respective gods were held to guarantee the sanctity of their agreement. Although the *pacta* maxim, which has since been elevated to a recognized legal principle, has its roots in Roman law, identical doctrines exist in Hindu, Buddhist, Muslim, Confucian, and in communist systems.[34]

It would appear that *pacta sunt servanda* has provided a standard of conduct for humanity from time immemorial. It is one of the world's most important legal norms, and it enjoys a very long tradition in all national legal systems. As an arbitral panel the held in *Liamco v. Libya*, "[t]he principle of the sanctity of contracts [...] has always constituted an integral part of most legal systems. These include those systems that are based [on] Roman law, the Napoleonic Code (e.g. article 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence 'Shari'a'".[35] The *pacta* principle reflects not only natural justice, but also an economic necessity: commerce would not be possible without reliable promises. As a basic and universal principle, it is today recognized in Article 1.3 of the UNIDROIT Principles,[36] and codified in international law in Article 26 (entitled "*Pacta sunt servanda*") of the *Vienna Convention on the Law of Treaties*.[37] Unquestionably, it is a paramount feature of contract law.

The *pacta* maxim was first used in a slightly altered form in 348 AD in a consilium by the Church involving a dispute between two bishops.[38] It read: [*p*]*acta quantumcunque nuda servanda sunt* ("pacts, however naked, must be kept").[39] The full phrase is not found in Justinian's *Digest*, even though an entire chapter is devoted to agreements, entitled *De pactis*.[40] In the *Decretals* of Gregory IX, issued in 1234, it is found again in a modified form as a sub-heading to a chapter on agreements.[41] The maxim as it is known today was likely first coined in the seventeenth century by the German jurist Samuel von Pufendorf (1632-1694).[42]

[33] W. Paul Gormley, "The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith" (1969) 14 St. Louis U. L.J. 367 at 373.

[34] *Ibid.* at 373-374.

[35] April 12, 1977, Y.B. Comm. Arb., (1981) 89 at 101.

[36] UNIDROIT, *UNIDROIT Principles of International Commercial Contracts 2004*, 2d ed. (Rome: UNIDROIT, 2004).

[37] 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980). The *Vienna Convention on the Law of Treaties* has been ratified by 111 states as of 16 June 2010.

[38] Hyland *supra* note 32 at 415-416.

[39] *Ibid.*

[40] *Ibid.* at 411-412.

[41] *Ibid.* at 415.

[42] *Ibid.* at 421-422.

4 Legal Abstraction and the Introduction of Rebus Sic Stantibus

Over the course of many centuries, excuses for non-performance did eventually develop into a recognized legal principle. This development was likely assisted by new scientific discoveries that forced academics to think in more abstract terms.[43] Without this level of abstraction, general legal principles would not evolve. Instead, what would follow would be a series of legal rules (i.e. maxims) and their exceptions, as typically found in Roman law.[44] In this way, excuses for non-performance evolved out of two conflicting Latin maxims: *pacta sunt servanda*[45] and *rebus sic stantibus* ("assuming things remain the same").[46]

Individually, neither maxim adequately addressed the situation where unforeseen supervening events made contractual performance impossible. *Pacta sunt servanda* would insist on performance in spite of the impossibility. Alternatively, reliance on *rebus sic stantibus* provided too much uncertainty in contractual relations. As a result of this inherent conflict, each maxim presented a different vision of contractual relations. As David Bederman stated: "[o]ne is harmonious, predictable, and stable; the other is dynamic, dangerous and uncertain".[47] This begs the question: how can a promise to perform a contractual obligation be reconciled with a fundamental change in circumstances? The development of the principle of an excuse for contractual non-performance, as in CISG Article 79, seeks to address this apparent contradiction. However, prior to the adoption of the CISG, it took a number of centuries to resolve the conflict between these two competing principles.

5 Medieval Origins of the Principle of Excuse for Non-Performance

The rigid position of *pacta sunt servanda* was based on ancient religious notions that developed long before the Roman Empire. The Chaldeans of Babylon, the ancient Greeks, Egyptians, and Chinese, all believed that the gods participated in the creation of a contract—and the divine

[43] *Ibid* at 419. Hyland uses the example of Galileo's discovery of the trajectory of a cannon shot. In finding that the cannon ball follows the outline of a parabola, he needed to separate the movement into its discrete parts. These distinctions are not empirically observable. Rather, they force men to think in abstract terms, and visualize each part of the movement of the cannon ball along the plane and its free fall. The same approach is used to develop legal maxims into more sophisticated general legal principles.

[44] *Ibid*.

[45] See Hyland, *ibid.* and Coenraad Visser, "The Principle Pacta Servanda Sunt in Roman and Roman-Dutch Law, with Specific Reference to Contracts in Restraint of Trade" (1984) 101 S.A.L.J. 641.

[46] Guenter Treitel, *Frustration and Force Majeure*, 2d ed. (London: Sweet & Maxwell, 2004) at 1.

[47] David J. Bederman, "The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations" (1988) 82 Am. J. Int'l L. 1 at 2.

became guarantors of the commitment.[48] In Islam, *pacta sunt servanda* also has a religious foundation, and Muslims are entreated to "abide by their stipulations".[49] The Koran, for example, states "[b]e true to the obligations which you have undertaken [...] Your obligations which you have taken in the sight of Allah [...] For Allah is your witness".[50] As guarantors of the contract, and under divine threat, the gods ensured that the parties would honour their agreements, regardless of subsequent unforeseen hardship or impossibility of performance. The violation of a promise, particularly an oath made under the gods, was a punishable spiritual offence.[51] In this way, contractual promises and performance became entwined with ancient religious practices and customs.[52]

Early Christianity had a great impact on ideals concerning the sanctity of contracts. In the late fourth century, St. Augustine (354-430) preached that individuals must always keep their word, even with enemies.[53] Thomas Aquinas echoed this view regarding the performance of contracts with foes. However, in words that foreshadow the modern principle of excuses for non-performance, Aquinas also said that if the circumstances that existed at the time of contract formation had radically changed, non-performance of the contract would be excusable.[54] This notion likely evolved from the philosophical writings of Cicero (106-43 BCE) and Seneca (4 BCE-65 CE) who acknowledged that promises and agreements could be adapted to unforeseen and extraordinary changes in circumstances.[55] Cicero used the example of a person who promised to store another's sword, but argued that he was not obliged to return the sword if the depositor had subsequently become insane.[56] Seneca devoted a chapter on the subject of exceptions to promises. His opening statement sets the framework: "When I promise to bestow a benefit, I promise it, unless something occurs which makes it my duty not to do so".[57] The Roman *praetor* also accepted this principle.[58] These views were helpful to those who admitted that there were exceptions to the sanctity of contracts. This idea was one of the formative components that later led to the development of the maxim of *clausa rebus sic stantibus*. This

[48] Hans Wehberg, "Pacta Sunt Servanda" (1959) 53 Am. J. Int'l L. 775 at 775.

[49] *Ibid*.

[50] Passage is quoted in Wehberg, *ibid*.

[51] Jeremy, *supra* note 5 at 8.

[52] *Ibid*.

[53] Wehberg, *supra* note 48 at 775-776.

[54] *Ibid.* at 777. Reference is to Aquinas' *Summa Theologica* at 2, 2, q. 140.

[55] Ingeborg Schwenzer, "Force Majeure and Hardship in International Sales Contracts" (2008) 39 V.U.W.L.R. 709 at 710 fn. 3.

[56] *De Officiis*, 1.10.31 and 3.25.94-95.

[57] *De Beneficiis*, 4.35.1.

[58] Schwenzer, *supra* note 55 at 710 fn. 3.

maxim found its way into Canon law in the fourteenth century as *rebus sic se habentibus*, and was first used as a principle in contract law in 1507.[59]

For the Canonist lawyers of the early medieval period, a violation of a promise became a sin, regardless of whether the promise had been made under the strict legal formalities of secular law. The Canonist Angelus Carletus put it in the following words: "The question is whether a man is bound by a naked pact. The answer is that he is so bound by Canon Law and in Conscience, under pain of mortal sin".[60] To break a promise was, in the eyes of the Canonists, perjury. In the eyes of God, even informal promises were to be as obligatory as those made under oath. The authority for this principle came from Jesus himself.[61] These religious notions eventually transformed the *nuda pacta* into the *pacta vestita*. From the belief that all agreements were binding, the Canonists imbued the doctrine of *pacta sunt servanda* with the Roman law notion of *ex fide bona*. In this way, the Canonists infused the *pacta sunt servanda* principle with duties of conscience and equity, and directed the individual to do what good faith and conscience required.[62] Through this development, parol contracts of merchants and *nuda pacta*, which would previously have created no enforceable legal relationships, came to be recognized as *bona fide negotia* or "good faith agreements".[63] This type of agreement bound merchants to perform not exactly what had been promised, but rather what might reasonably be expected under the circumstances. Conceptually, this laid the foundation to exceptions or legal excuses for the non-performance of contractual obligations.

The Canonists, in particular, Christopher St. Germain (1460–1540), had little difficulty in synthesizing these various—and sometimes conflicting—legal concepts. No doubt, scientific abstraction also played some role in the development of legal maxims into more elaborate legal principles. Echoing the words of Angelus Carletus (1411-1495) in his *Summa Angelica*, St. Germain tells us that binding promises must meet a number of criteria. These include, *inter alia*, that the promise is intentional, and that it may be disavowed if there is a material change in circumstances.[64] St. Germain's criterion sets the stage for *rebus sic stantibus*. The influence of the Canonists in the development of the law is clearly evident. The Canonists' proved decisive in developing the concept of *pacta sunt servanda*, even in the case of *nuda pacta*. This effect

[59] *Ibid.* at fn. 2 and fn. 3. Schwenzer notes that the phrase *rebus sic stantibus* was used by Jason de Mayno (1435-1519).

[60] Angelus Carletus, *Summa Angelica* quoted in Jeremy, *supra* note 5 at 8.

[61] "Again you have heard that it was said to men of old, 'You shall not swear falsely, but shall perform to the Lord what you have sworn'". *Matthew* 5:33 (Revised Standard).

[62] Jeremy, *supra* note 5 at 4.

[63] *Ibid.* at 5.

[64] Paul Vinogradoff, "Reason and Conscience in Sixteenth-Century Jurisprudence" (1908) 24 L.Q. Rev. 373 at 382. The passage from St. Germain is from his work *The Doctor and Student* circa 1530.

upon the nascent legal systems of Europe was to be significant.[65] In the West from the fifteenth century forward—roughly the era of Galileo (1564-1642)—contracts were to be honoured, unless there was no intent to attach legal significance to them, or unless a supervening material event discharged the parties' contractual obligations.

An additional influence on the conceptualization of contractual obligations in Europe was the adoption of *pacta sunt servanda* by the natural law lawyers and philosophers. One of the most prominent was Hugo Grotius (1583-1645). Writing an entire chapter on the subject of promises,[66] he viewed *bona fides* as being inextricably linked with *pacta sunt servanda*: "good faith [is] the foundation of justice [...] God Himself would act contrary to His nature if He did not make good on His promises. From this it follows that the obligation to perform promises arises from the nature of immutable justice".[67] Pufendorf followed Grotius' perspective in this regard and held that the sanctity of a promise was one of the inviolable rules of natural law.[68] A short time later, *pacta sunt servanda* was brought out in strong relief by Emer de Vattel (1714-1767). Although his primary concern was to apply the principle to the laws of nations, Vattel recognized its value in all contractual relationships. Phrasing it in very human terms, he noted that "[i]t is a settled point in natural law, that he who has made a promise to any one, has conferred upon him a real right to require the thing promised—and consequently, that the breach of a perfect promise is a violation of another person's right [...like] it would be to rob a man of his property".[69] In Vattel's view, *rebus sic stantibus* should only be used with the greatest of caution, and it was to play a subservient role to *pacta sunt servanda*.[70] It would be unjust to have to have a contracting party take advantage of *rebus sic stantibus* to release it from its contractual obligations: "we ought to be very cautious and moderate in the application of the present rule [*rebus sic stantibus*]: it would be a shameful perversion of it, to take advantage of

[65] According to Harold D. Hazeltine, "during the centuries when this long process (the growth of secular legal systems) of development was taking its course, the Canon Law, profoundly influenced by the renaissance of Roman law, had slowly taken its place as a world wide system of jurisprudence". See Hazeltine, "Roman and Canon Law in the Middle Ages" in J.R. Tanner, C.W. Previte-Orton, & Z.N. Brooke, eds., *The Cambridge Medieval History*, vol. 5 (New York: The MacMillan Co., 1926) at 749.

[66] Hugo Grotius, *De Jure Belli ac Pacis* (1625), trans. by Francis W. Kelsey (Buffalo: William S. Hein & Co. Inc., 1995) at 328 (corresponding to Book II, chap. XI, "On Promises").

[67] *Ibid*. at 330-331 (corresponding to Book II, chap. XI).

[68] Wehberg, *supra* note 48 at 779. Wehberg is referring to Pufendorf's *De jure naturae et gentium* (1672), Book II, chap. III, s. 23 and Book III, chaps. III, IV, ss. 1, 2 respectively.

[69] Emer de Vattel, *The Law of Nations* (1758), trans. by [anonymous] (Indianapolis: Liberty Fund, Inc. 2008) at 342 (corresponding to Book II, chap. XII, s. 163).

[70] *Ibid*. at 430 (corresponding to Book II, chap. XVII, s. 296).

every change that happens in the state of affairs, in order to disengage ourselves from our promises".[71]

All contracts are based on the idea that at the commencement of a contract, risks are allocated to each party. As such, these risks must not be later disturbed unilaterally by one of the parties, or revised by the courts. This is the foundation of the tenacious *pacta sunt servanda* principle. In contrast, *rebus sic stantibus* acts as a counter-principle to *pacta sunt servanda*. Without *pacta sunt servanda* there would have been little need for the development of an exception to it, hence, reliance on *rebus sic stantibus* became dependent on the existence of *pacta sunt servanda*. Indeed, the notion that *rebus sic stantibus* is a recognized legal doctrine has even been contested.[72] Some have viewed it as nothing more than a creation of political theory, born from the statecraft of Cicero and Machiavelli (1469-1527).[73] Regardless of its origins, as dubious as they may be, *rebus sic stantibus* has become a principle that is recognized today (albeit, in various guises) in every legal system.

As an exception to *pacta sunt servanda*, *rebus sic stantibus* developed in the late medieval period to incorporate the premise that contractual terms are not absolute, but relative. In this respect *rebus sic stantibus* set the basis for the establishment of the modern doctrine of excuse for non-performance. From this perspective was the notion that parties enter contracts with certain shared and implicit assumptions. However, a fundamental change in subsequent circumstances may destroy the basic assumptions upon which the contract was formed. The effect of this legal abstraction was to discharge a contract due to a supervening event that made performance excessively onerous or impossible. However, as an exception to contractual performance, the use of *rebus sic stantibus* was to be severely curtailed. From the outset, it was applied in a restrictive manner, not only in national courts, but also in arbitral practice. This approach continued into the modern era. Thus, by 1971 the sole arbitrator in ICC Case No. 1512 could state:

> The principle '*Rebus sic stantibus*' is universally considered as being of strict and narrow interpretation, as a dangerous exception to the principle of sanctity of contracts. Whatever opinion or interpretation lawyers of different countries may have about the 'concept' of changed circumstances as an excuse for non-performance, they will doubtless agree on the necessity to *limit* the application of the so-called 'doctrine *rebus sic stantibus*' (sometimes referred to as 'frustration', 'force majeure', '*imprevision*', and the like) to cases where *compelling reasons* justify it, having regard not only to the

[71] *Ibid.*

[72] Bederman, *supra* note 47 at 8. This criticism of *rebus sic stantibus* has come primarily from publicists in the field of international public law. They view it as an illegitimate child of international law, as it provides states with an excuse to renege on their treaty obligations.

[73] *Ibid.*

> fundamental character of the changes, but also to the particular type of the contract involved, to the requirements of fairness and equity and to all circumstances of the case.[74]

Consequently, while the principle of *rebus sic stantibus* and concept of changed circumstances were widely recognized by arbitral tribunals and the courts of most jurisdictions, in practice the requirements were rarely met.[75]

6 Origins of the Principle of Excuse for Non-Performance in Common Law

The dichotomy posed by the conflict between the sanctity of the contract or its discharge by supervening events has, over time, received divergent treatment by the civil and common law systems. While both legal systems acknowledged in varying degrees the doctrines of *pacta sunt servanda* and *rebus sic stantibus*, they emphasized certain aspects of each doctrine, and they did so at various historical periods. To say that one legal system embraced one doctrine over the other is to simplify the rather complex interaction each system had with these doctrines over the centuries.[76] Rather than focus on the broader principles of *pacta sunt servanda* or *rebus sic stantibus*, each legal system placed greater emphasis on the extent of the available remedies, as well as the culpability or degree of "fault" embedded in each doctrine.

The civil law tradition rejected the notion that a party could contract to do the impossible. This is stated in Justinian's Digest: *impossibilium nulla obligatio*.[77] Civil law remedies are concerned primarily with performance, not damages. From this it follows that a party cannot be forced to do the impossible, even if this was promised in contract. Conceptually in civilian legal systems, there can be no enforceability of an impossible obligation. In contrast, this concept was originally rejected in the common law tradition. It had little difficulty in holding such a party liable, at least in damages. While the obligation may be physically impossible to perform, it could be compensated for by way of a monetary judgment. Holt J.C. put it in the following terms in 1706: "when a man will for valuable consideration undertake to do an

[74] The arbitrator was Prof. Pierre Lalive. The case involved an Indian concrete company and a Pakistani bank. See Pieter Sanders, ed., "**Award of 1971 in Case No. 1512"** (1976) 1 Y.B. Com. Arb. 128 at 128-129 (italics are in the original).

[75] According to Christoph Brunner, *Force Majeure and Hardship under General Contract Principles* (The Netherlands: Wolters Kluwer, 2009) at 417.

[76] For example, Friedrich Kessler has noted that "[c]ivilians justify their system by reference to the maxim *pacta sunt servanda*".

[77] Dig. 50.17.185.

impossible thing, although it cannot be performed, yet he shall answer in damages".[78] Performance of an obligation may become physically impossible, but the payment of damages is always possible. In later common law jurisprudence, the common law came closer to acknowledging *rebus sic stantibus* as in the civil law approach. In one case it made the analogy with the civil law nullity of an impossible obligation, and ruled "the court does not compel a person to do what is impossible".[79] In such cases, the courts would not order specific performance, but such a refusal did not preclude the awarding of damages.

Unlike the initial common law approach, civil law could simultaneously acknowledge the existence of *pacta sunt servanda*, while stressing the importance and the flexibility provided in the principle of *rebus sic stantibus*. Of course, this would be tempered with the principle that no contract could be formed to do the impossible (*impossibilium nulla obligatio*).[80] In addition, the emphasis on *pacta sunt servanda* was treated in civil law as a self-evident legal norm, with ethical and moral characteristics, incorporating the notion of "fault". Not surprisingly, the Canonists believed all promises to be binding, including those that had not yet been accepted.[81] The moral imperatives of the Church were to be carried over into promissory obligations.

The prominence of *rebus sic stantibus* over *pacta sunt servanda* provided the civilian legal tradition with a differing view towards contractual obligations. Assuming events remained unchanged, this view incorporated the notion that a party would be liable for contractual non-performance, but only if it could be demonstrated that the party was somehow at fault.

By contrast, the common law tradition, at least initially, rejected the civil law position, and held parties liable to their contracts even where performance had become impossible.[82] As Hannes Rosler has noted, "English law has never known the medieval *clausa* [*rebus sic stantibus*] doctrine".[83] *Pacta sunt servanda* was to dominate; *rebus sic stantibus* was to play a subservient role. The earliest recorded evidence of this principle is from an unnamed case in the Year Books.[84] Reported in 1366, the case involved a defendant who had agreed to maintain the buildings on a property that he had leased from the plaintiff.[85] The defendant was to return the buildings in the same condition as they had been in when they were initially leased. When the lease ended

[78] *Thornborow v. Whitacre* (1706), 92 E.R. 270, 2 Ld. Raym. 1164 at 1165.

[79] *Forrer v. Nash* (1865), 35 Beav. 167 at 171.

[80] *Ibid.* at 1-2.

[81] Hyland, *supra* note 43 at 418.

[82] *Ibid.* at 2.

[83] Hannes Rosler, "Hardship in German Codified Private Law – In Comparative Perspective to English, French and International Contract Law" (2007) 15 E.R.P.L. 483 at 497.

[84] [Anonymous] (1366), Y.B. Hil. 40 Edw. III, pl. 11, fol. 6.

[85] *Ibid.*

and one building was returned to the plaintiff in damaged condition, he sued for breach of contract. In defense, the defendant pleaded that the damage, a fallen wall, had been caused by a severe wind-storm. The plaintiff argued that this was still a breach of contract. The defendant responded that he was not obliged to repair damage caused by acts of God, which were beyond his control and unavoidable. The court ruled in favour of the plaintiff, upholding the *pacta sunt servanda* principle. Strictly speaking, while the storm was a supervening event, returning the property in its original condition was not something that was impossible. Rather, the promise was simply more onerous, but still capable of being performed, as the defendant could repair the damaged wall. Thus, the defendant was liable if he did not perform. The court stated that "a man is liable to do a thing which is capable of being done by a man, thus when he bound himself to the lessor to repair them, even though it was knocked down by the wind, or by other sudden events, yet you are capable of repairing them, and can do this".[86] If the defendant sought to avoid liability for damage caused by acts of God, he should have protected himself by expressly providing for such an exclusion at the time of contracting.

Later English cases also upheld the primacy of *pacta sunt servanda*. Many of these cases involved the carriage of goods by sea. In one case, the defendant promised to carry apples by a boat from Greenwich to London, but the vessel sank in a "great and violent tempest".[87] The defendant pleaded an act of God, but the court ruled, "it was holden to be no plea in discharge of the assumpsit, by which the [defendant] had subject himself to all adventures".[88] In a similar case a few years later, it was held that the defendant was still liable in damages under a contract of carriage, even though the boat was overturned "by the violence of wind and water".[89]

Although the law on impossibility of performance in England was still developing at this time, the initial emphasis was on a strict reading of *pacta sunt servanda*. This principle became enshrined in the English doctrine of absolute contacts in the 1647 case of *Paradine v. Jane*.[90] Frequently cited in later court decisions, and still regarded by some jurists as good law,[91] *Paradine* has come to stand for the common law principle that an impossible supervening event will not necessarily discharge a party from its contractual obligations. In doing so the case is an implicit rejection in English common law of the principle *rebus sics stantibus*.

[86] *Ibid*. Translation by John D. Wladis, "Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law" (1987) 75 Geo. L.J. 1575 at 1582 note 36.

[87] *Taylor's Case* (1583), 4 Leon 31, 74 E.R. 708.

[88] *Ibid.*

[89] *Tompson v. Miles* (1591), I Rolle's Abridgement, Condition G.9.

[90] Aleyn 26, 82 E.R. 897 (K.B.) [*Paradine*].

[91] Treitel, *supra* note 46 at 19.

The action in *Paradine* grew out of the English Civil War. According to the judgment, "Prince Rupert, an alien born, enemy to the King and his kingdom, had invaded the realm with a hostile army of men" and took possession of land owned by the plaintiff, Paradine.[92] At the time, the land was under lease to the defendant, Jane. The enemy army held the land for three years, and finally relinquished it in 1646. Paradine sued Jane for three years back rent, but Jane argued that he was not in possession during the period as the land was in enemy hands. As such the defendant was prevented from taking profits from the use of the land. In other words, Jane claimed to be without fault for his failure to pay the rent.

The court held that Jane was still liable for the rent. It ruled that "as the lessee is to have the advantage of casual profits, so he must run the hazard of casual losses".[93] Jane assumed the risk that he would make a profit (or loss) from the use of the land. The court made a crucial distinction between cases where "the party by his own contract creates a duty" and "where the law creates a duty".[94] It reasoned that the parties had committed themselves to the terms of the lease, and if they had wanted to provide for the avoidance of liability in certain situations, they could have done so by redefining the terms of the contract. When a party creates "a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract".[95] As the contract did not provide for any reallocation of the loss due to the foreign invasion, the loss remained where it fell. Thus, without a contractual excuse for non-performance, Jane had to follow his duty as a tenant and pay the rent. This was the case even though he was deprived of the property by an event for which neither he nor the property owner was responsible.

Paradine was followed in many later cases where it was similarly held that a tenant was not discharged for the payment of rent due to supervening events such as fire, flood, or enemy action.[96] Indeed, *pacta sunt servanda*, as enshrined in the English doctrine of absolute contracts triumphed for the next two centuries. Not only did the principle prevail, it came to stand for the proposition that physical impossibility would never excuse performance. Thus, in *Brown v. Royal Insurance Company* Lord Campbell, after paraphrasing the *Paradine* principle, declared, "the fact that performance has become impossible is no legal excuse for [non-performance]".[97]

[92] *Paradine*, *supra* note 90.

[93] *Ibid.* at para. 3.

[94] *Ibid.*

[95] *Ibid.*

[96] Treitel, *supra* note 46 at 23-26.

[97] (1859), 1 E1. & E1. 853, 120 E.R. 1131 (Q.B.).

The turning point for a strict reading of the *pacta sunt servanda* principle came in 1863 in the case of *Taylor v. Caldwell*.[98] While the case did not overturn the *pacta sunt servanda* principle in common law, it did introduce the notion that there can be mitigating factors to discharge an otherwise absolute contract. In the case, the defendant, Caldwell, contracted to permit Taylor the use of a music hall for four days in exchange for £100 per day. The contract stated that the hall must be fit for a concert but there was no express stipulation regarding disasters. The hall was destroyed by fire just before the first concert. As the concerts could not be performed at any other location, Taylor sued the music hall owner, Caldwell, for breach of contract for failing to rent the hall, and for his expenses that were incurred for advertising the concerts. There was no clause within the contract itself which allocated the risk to the underlying facilities, except for the phrase "God's will permitting" at the end of the contract.

In *Taylor v. Caldwell* Blackburn J. skilfully avoided a direct conflict with *Paradine*. He acknowledged the well-established precedent and stated, "[t]here seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible".[99] However, he dismissed Taylor's claim on the basis that "in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance".[100] Furthermore, the destruction of the hall excused not only the defendant from performance, but *also* the plaintiff: "both parties are excused, the plaintiffs from taking the [music hall] and paying the money, the defendants from performing their promise to give the use of the [music hall]".[101] It is significant that Blackburn J. noted that the destruction of the music hall was the fault of *neither* party, and that this fact rendered the performance of the contract by *either* party impossible. Such a ruling went beyond what was necessary to decide the case. Blackburn J. should have focused only on the liability of the defendant and the obligation to supply the music hall. However, he also excused the plaintiff from the obligation having to pay, even though the agreed payments were not impossible to make. The destruction of the subject matter in *Taylor*, and the associated discharge of the obligation to pay for the destroyed hall, thus, provided for an exception to the doctrine of *pacta sunt servanda* as enshrined in *Paradine*.

Over time, the exception, as initially formulated in *Taylor*, would be developed further and extended to recognition of *rebus sic stantibus* and the doctrine of discharge through frustration,

[98] 3 B. & S. 826, 122 E.R. 309 (Q.B.) [*Taylor*].

[99] *Ibid*.

[100] *Ibid*.

[101] *Ibid*.

impossibility, or hardship. Through this progression, by the early 1900s, the law came to recognize and address the problem of loss allocation that arises in situations where contractual performance becomes impossible because of a supervening event for which neither party is responsible.[102] The law did evolve to address this problem, particularly with a group of cases that arose when the coronation of King Edward VII was postponed due to illness.[103] It was in these coronation cases that the doctrine of frustration was recognized for the first time. Variants of the frustration, such as impossibility, hardship, and impracticability, also developed to address the realities of the modern world.

However, *pacta sunt servanda* never disappeared entirely from the legal landscape in the common law. The principle continues to exist primarily in cases that concern landlord and tenant law, as well as in other case law that follows the reasoning of *Paradine*, including those that concern antecedent impossibility.[104] While the common law has developed to recognize the doctrine of discharge (through frustration, impossibility, hardship, or impracticability) due to supervening events, in the interests of commercial certainty, the common law has come to attach greater importance to *pacta sunt servanda*. For this reason, in England the doctrine of discharge was severely restricted in scope after its initial development. The First World War did give rise to a number of cases that successfully relied upon the doctrine of discharge due to impossibility.[105] However, by the Second World War there were few reported cases of supervening impossibility.[106] Indeed, in the post-War era there was a distinct judicial reluctance to apply *rebus sic stantibus* to discharge a contract except in only the rarest of circumstances. As Guenter Treitel remarked, "this reluctance is primarily based on the importance now attached to the principle of sanctity of contract".[107] In this manner, excuses for non-performance of contractual obligations experienced a distinct evolution in the common law. This was to be different from the progression of excuses for non-performance as it evolved in civil law jurisdictions, and beyond, as incorporated in CISG Article 79 as an autonomous principle. But as in civil law, the common law developed an array of related doctrines and principles to deal with a fundamental change in circumstances.

[102] Wladis, *supra* note 86 at 1599.

[103] The cases are commonly known as the "Coronation Cases", and include *Chandler v. Webster*, [1904] 1 K.B. 493, *Clark v. Lindsay* (1903), 19 T.L.R. 202, *Griffith v. Brymer* (1903), 19 T.L.R. 434, and *Krell v. Henry*, [1903] 2 K.B. 740.

[104] Treitel, *supra* note 46 at 50-55. Treitel describes these as "historical survivals" and "survivals based on the reasoning of *Paradine v. Jane*".

[105] *Ibid*. at 57-58.

[106] *Ibid*. at 58.

[107] *Ibid*. at 59.

7 Frustration

The common law has developed the doctrine of frustration to deal with three types of cases that concern excuses for non-performance because of a fundamental change in circumstances: these are i) impossibility; ii) frustration of purpose; and, iii) temporary impossibility.[108] The first type of case is that where the frustrating event has rendered performance impossible.[109] In this respect, impossibility in the common law is a sub-set of the broader doctrine of frustration. In addition, the term "impossibility" must be differentiated from "frustration" even though these words are sometimes used interchangeably.[110] Indeed, as John McCamus has observed, "the doctrines of impossibility and frustration were received as and continue to be regarded as two separate doctrines".[111]

7.1 Impossibility

Frustration in the common law provides a party with an excuse for non-performance of a contract because that party's ability to perform has become severely compromised because of a supervening event. In many respects, it resembles the civilian doctrine of *force majeure*, but there are notable differences. While civil law never accepted that a party could contract to do the impossible, in the early stage of the development of the doctrine of frustration, the common law accepted that an impossibility was no excuse for failure to perform a contract.[112] As Treitel noted, generally, in most common law jurisdictions, there was no theory of impossibility.[113] Thus, as noted above, initially the common law adopted the strict doctrine of "absolute" contractual obligations. From this it followed that an impossibility to perform was generally not a legally recognized excuse.

Unlike the civil law, the common law was much more reluctant to allow for the termination of a contractual obligation because of a new, unanticipated event. However, there were some exceptions to the general rule of absolute contracts. The death of a promisor in a contract of personal service was one recognized exception; the other was the enactment of subsequent legislation that would make the performance illegal.[114] Apart from these narrow grounds, in

[108] John D. McCamus, *The Law of Contracts* (Toronto: Irwin Law, 2005) at 573.

[109] *Ibid*.

[110] See e.g. G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson/Carswell, 2006) at 576-577.

[111] McCamus, *supra* note 108 at 576-577.

[112] See e.g. *Paradine v. Jane*, *supra* note 90.

[113] Treitel, *supra* note 46 at 1-4, under the sub-heading "No Theory of Impossibility".

[114] McCamus, *supra* note 108 at 568.

the common law *pacta sunt servanda* was to prevail over a contractual impossibility. As Lord Buckmaster of the Privy Council stated in 1920, "no phrase [is] more frequently misused than the statement that impossibility of performance excuses breach of contract. Without further qualification such a statement is not accurate; and indeed if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule".[115]

Thus, in the common law where a party made an unqualified contractual promise, it had a *prima facie* duty to perform. If circumstances materially changed after contract formation, making performance impossible, the parties still remained bound to their obligations unless a term of discharge could be implied in the contract. More recently, Martin C.J. of Saskatchewan made this point when he stated, "[w]here a person by his own agreement creates a duty or charge upon himself, he is bound to carry it out notwithstanding that he is prevented from so doing by some accident or contingency which he ought to have provided against in his agreement".[116] The words of Martin C.J. echo those found in the seventeenth century judgment of *Paradine*: contractual performance was to be "absolute" to the extent that impossibility was not excusable, unless such a provision was provided for in the contract.

Over time, the common law became less strict in the application of the doctrine of absolute contractual obligations. The process of change began with Blackburn J.'s decision in *Taylor v. Cadwell*.[117] Blackburn J. did not directly contradict the precedent in *Paradine* in that impossibility could not apply to cases involving land, as the land could not be destroyed, and the remaining interests could survive.[118] However, the accidental destruction of a *building* by fire on property that was to be leased could discharge a contract. Blackburn J. made a similar ruling in *Appleby v. Myers*.[119] That case concerned a contract for the manufacture and installation of machinery for a factory, and maintenance of the machinery for two years. The contract was held to be discharged when the factory was destroyed by fire prior to the installation of the machinery. Blackburn J. also acknowledged the principle he laid down in *Taylor v. Cadwell*—that both parties were excused from their performance—but the plaintiffs could not recover for any work that had already been completed. The common law approach to frustration and discharge was that losses should lie where they fall at the time of the

[115] *Grant, Smith & Co. v. Seattle Const. & Dry Dock Co.*, [1920] A.C. 162 at 169 (U.K.).

[116] *McCuaig v. Kilbach*, [1954] 3 D.L.R. 117 at 119 (Sask. C.A.).

[117] *Supra*, note 98.

[118] Fridman, *supra* note 110 at 633.

[119] *Appleby v. Myers*, [1867] L.R. 2 C.P. 651.

frustrating event. This approach has also been adopted in Canada where two early Supreme Court decisions applied *Taylor v. Cadwell* and *Appleby v. Myers*.[120]

As G.H.L. Fridman noted, it was the decisions of Blackburn J. in the cases of *Taylor v. Cadwell* and *Appleby v. Myers* that were instrumental in facilitating the development of the modern doctrine of frustration in the common law.[121] According to Fridman, "[t]he courts were attempting to extricate themselves from the straightjacket of the absolute theory of contracts".[122] Treitel would appear to concur with this view by acknowledging that the judgment of Blackburn J. in *Taylor v. Cadwell* "formulated the doctrine of discharge in a way which facilitated its development and expansion".[123] However, in discussing the development of frustration, Treitel did so within the context of cases beginning with *Paradine* that remain historical "[s]urvivals of the doctrine of absolute contracts".[124] The common law, in developing the modern doctrine of frustration, never abandoned the *pacta* principle. As Lord Shaw stated, "frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject-matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole".[125]

What Lord Shaw was alluding to is the implied-term theory, which plays a part in the development of the doctrine of frustration in the common law. Indeed, it was Blackburn J. who, in his ruling in *Taylor*, articulated a concept that had been slowly evolving in English jurisprudence. This was the concept of an implied condition to a contract. Even though a contract might not expressly provide for discharge in the event of the destruction of a building by fire, according to Blackburn J., "a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance [...] [T]hat excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the particular person or chattel".[126] This was a logical step from the decision in *Paradine* which acknowledged the defense of an implied promise or a "legal incident", for example, "if a house be destroyed by a tempest".[127] By way of contrast, an express covenant to repair the same house would make a tenant liable even "though it be burnt by

[120] The cases were *Kerrigan v. Harrison* (1921), 62 S.C.R. 374 and *Canadian Government Merchant Marine Ltd. v. Canadian Trading Co.* (1922), 64 S.C.R. 106. See also Fridman, *supra*, note 110 at 636-637.

[121] Fridman, *supra*, note 110 at 633.

[122] *Ibid.*

[123] Treitel, *supra* note 46 at 55.

[124] *Ibid.* at 50 (sub-heading).

[125] *Lord Strathcona Steamship Co. v. Dominion Coal Co.*, [1926] A.C. 108 at 114 (U.K.).

[126] *Taylor*, *supra*, note 98 at 839.

[127] *Paradine*, *supra* note 90.

lightning".[128] In this way, Blackburn J. viewed the contract in *Taylor* as being subject to an implied condition that the owner be excused if the subject matter of the contract was destroyed: "looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall [...] that being essential to their performance".[129] With the subject matter of the contract destroyed, it seemed reasonable to excuse the parties from performance. This solution, to Blackburn J., must have been the presumed intent of the parties.

Thus developed the theory that performance might be dependent upon certain promises, but these same promises, in turn, might be dependent upon the performance of some other condition.[130] As a result, it could be implied into a contract, even where it was not made explicit that a promise depended on the occurrence of a certain event, that this was intended, based on the reasonable person standard. Hence, contracts could be subject to either a condition precedent or a condition subsequent. If the implied term where a condition precedent, it would not be a case of impossibility or frustration, but rather one from the older law that was based on dependency of performance (i.e. fulfillment of conditions precedent). Alternatively, it was now recognized as an implied contractual term that performance could be dependent upon a condition subsequent, i.e, a supervening event. As such, the contract could be deemed "frustrated" and excused based on impossibility of performance.

The concept of implied conditions became the basis for the English doctrine of frustration until the House of Lords rejected it in a decision in 1981.[131] The *Law Reform (Frustrated Contracts Act) 1943*[132] enshrined many of the legal consequences of frustration, but its primary aim was to prevent unjust enrichment.[133] The Act otherwise did little to change the common law in this regard, and it did not enshrine the concept of implied intent in contract interpretation.[134] In addition, many types of contracts fell outside its scope.[135] The problem with the implied intent theory was that the inquiry into intent did not concern the *actual* intent of the parties, but the *presumed* intent of them acting as reasonable persons. Where the subject matter of the contract was destroyed, who can say with certainty that the parties would not have wanted to adapt or continue with the contract? As Lord Radcliffe was to later note, "there is

[128] *Ibid.*

[129] *Taylor*, *supra*, note 98 at 839.

[130] Fridman, *supra* note 110 at 633-634.

[131] Brunner, *supra* note 75 at 89. The decision was in *National Carriers Ltd. v. Panalpina (Northern) Ltd.*, [1981] A.C. 675 [*National Carriers*].

[132] 6 & 7 Geo. 6, c. 40 (U.K.).

[133] Brunner, *supra* note 75 at 90-91.

[134] *Ibid.*

[135] *Ibid.*

something of a logical difficulty in seeing how the parties could even impliedly have provided for something which *ex hypothesi* they neither expected nor foresaw".[136]

The inadequacy of implying contractual terms had been noted in earlier jurisprudence. In particular, a 1916 case involved the requisition of a ship from a charter party for the purpose of carrying troops during World War I.[137] The owners claimed that the charter party had been discharged by the requisition. The charterers, who wished to continue with the contract, claimed that the government's intervention was not sufficient to frustrate the contract. There, in using an implied-term approach to reconstruct the intent of the parties, a majority of the court ruled that no term could be implied in the charter party to excuse performance. Thus, the contract had not been frustrated. In a dissenting opinion, and without referencing the intent of the parties or an implied contractual term, Viscount Haldane noted that the charter party could be dissolved on the basis that "[a]lthough the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence, itself, may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation".[138]

The problem with the implied term theory was that it left it to the courts to determine the true intent of the parties. The courts were forced to attempt to determine whether a supervening event had had such a negative effect on the contract that it would be unfair to hold parties to their bargain, in the absence of fault and of any assumption of the risk by either party. This left unanswered the question of what was the foundation of the contract, or what was fundamental to it, or what was the adventure or purpose of the contract. As Lord Hailsham L.C. remarked when the House of Lords rejected the implied term theory, "[t]he weakness [...] of the implied term theory is that it raises once more the spectral figure of the officious bystander intruding on the parties at the moment of agreement".[139] The theory preferred by Lord Hailsham L.C. and later courts was based on the construction of the contract. Such a theory sought to discern the true meaning of the contract.

7.2 Frustration of Purpose

"Frustration of purpose" is the second type of case that falls under the doctrine of frustration. This type of case has broadened the notion of impossibility in English law. In many respects,

[136] *Davis Contractors Ltd. v. Fareham Urban District Council*, [1956] A.C. 696 at 728 [*Davis Contractors*].

[137] *Tamplin Steamship Co. v. Anglo Mexican S.S. Co.*, [1916] 2 A.C. 397 (H.L.) [*Tamplin Steamship Co.*].

[138] *Ibid.* at 406-407.

[139] *National Carriers*, *supra* note 131 at para. 13.

cases of frustration of purpose seek to reconstruct the fundamental basis or foundation of the contract. The implied intent of the parties is not the focus; rather, the court attempts to uncover, or "reconstruct" the true meaning of the contract.

The common law concept of frustration of purpose appears to have originated with the early case of *Jackson v. Union Marine Insurance Co. Ltd.*[140]—at least that was the view of Diplock L.J.[141] In *Jackson*, a ship, which was to be chartered, ran aground without the fault of either contractual party. This caused several months' delay in the availability of the vessel. The court ruled that this event discharged the charter party. The ship could have been sent later, but by the time it would have been ready, the original purpose of the charter could not have been fulfilled. On this basis the case was decided, even though there was no physical impossibility or true frustration. Instead, there was "practical" frustration, or frustration of purpose. Giving credit to Bramwell B. in this case, Diplock L.J. noted that "it was recognized that it was the happening of the event and not the fact that the event was the result of a breach by one party of his contractual obligations that relieved the other party from performance of his obligations".[142]

Following *Jackson*, English courts treated cases of this type as "frustrating" the contract, even though the contract could be performed at some point in the future. The rationale for extending the scope of frustration was the notion that the commercial purpose of the original contract had been frustrated. To continue with performance would be to bind the parties to a new arrangement, under new circumstances. This would be a radically different agreement than was originally agreed to. As Lord Radcliffe put it: "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*. It was not this that I promised to do".[143]

[140] (1874), L.R. 10 C.P. 125 [*Jackson*]. According to Bramwell B. at 147: 'There are the cases which hold that, where the shipowner has not merely broken his contract, but has so broken it that the condition precedent is not performed, the charterer is discharged. Why? Not merely because the contract is broken. If it is not a condition precedent, what matters it whether it is unperformed with or without excuse? Not arriving with due diligence or at a day named is the subject of a cross-action only. But not arriving in time for the voyage contemplated, but at such a time that it is frustrated is not only a breach of contract, but discharges the charterer. And so it should though he has such an excuse that no action lies.'

[141] In *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd.*, [1962] 2 Q.B. 26 at 68-69 [*Hong Kong Fir*].

[142] Ibid.

[143] Davis Contractors, supra note 136 at 729.

The historical impetus for the expansion of the principle of frustration in the common law came from a series of cases[144] that occurred as a result of the postponement of the coronation procession of King Edward VII due to his illness. It appeared that the similar problems presented in these cases could not be easily resolved under the rigid common law rule of impossibility. As impossibility was never at issue, the courts felt compelled to expand the principle frustration to incorporate situations where the purpose of the contract failed or was defeated through a subsequent event that was not the fault of either party. In what became known as the coronation cases,[145] they represented an innovative approach to frustration, and marked a clear departure from earlier decisions.

The facts in these cases had a common element. Numerous contracts had been made in anticipation of the coronation, such as the rental of rooms, the rental of seats in stands, etc. When the coronation had to be postponed, performance of these contracts did not become impossible. The leased rooms and seats could still be occupied on the contracted dates, but this would have been a superfluous exercise.

The leading case was *Krell v. Henry*.[146] The defendant, Henry, had agreed to hire from the plaintiff some rooms to watch the coronation procession on 26 and 27 June, 1902. He paid £25 as a deposit and was to pay the balance of £50 on 24 June. When the King became ill and the coronation procession was postponed, Henry refused to pay the balance, and the plaintiff brought a claim for the outstanding amount due. Henry also counterclaimed to recover the £25 deposit he had paid. At trial, the court held that there was an implied term in the contract that the procession should take place. Accordingly, Darling J. gave judgment for the defendant on both the claim and the counterclaim. Krell appealed, but the Court of Appeal dismissed the appeal, holding that the purpose of the contract had been frustrated. The court noted that the agreement made no reference to the coronation. However, the plaintiff was aware of the purpose for renting the rooms. In the court's view, the postponement of the coronation destroyed the value of the contract for the defendant. Referencing the *Taylor* case, Vaughan Williams L.J. stated that the *Taylor* rule had been expanded to include those "cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance".[147] In his view, the novel point in this case was whether the court should

[144] Chandler v. Webster, [1904] 1 K.B. 493; Clark v. Lindsay (1903), 19 T.L.R. 202; Griffith v. Brymer (1903), 19 T.L.R. 434; Herne Bay Steamboat Co. v. Hutton, [1903] 2 K.B. 68 [Herne Bay]; Krell v. Henry, [1903] 2 K.B. 740 [Krell].

[145] Krell, ibid.

[146] Ibid.

[147] *Ibid.* at 748.

consider circumstances that went beyond the terms in the contract in applying the rule that was established in *Taylor*. He answered in the affirmative:

> you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited.[148]

Although it was not stated in the court's decision, such an approach would also honour the *pacta* principle. It was not that the contract became impossible to perform; the payment of money for the rent of a room is rarely an impossibility. Rather, where the occurrence of an event becomes the basis of a contract—even though it may not be explicitly mentioned in the agreement—the parties may be discharged from their obligation if the event does not occur. It is not an impossibility that has prevented performance, but instead it is the failure of the purpose of the contract that has rendered performance superfluous. In this way, *Krell* established a doctrine related to, but independent of, impossibility. As McCamus stated, "[b]y eliminating references to impossibility of performance and by formulating the rule in terms of a cessation or non-existence of a 'state of things' going to the root of the contract, the *Krell* decision cast the rule in broad enough form to embrace all of the impossibility cases" as well as cases like *Krell* "in which no question of impossibility arises".[149]

The *Krell* decision has been subject to some criticism for its theoretical ability to allow a party to be excused from a bad bargain as a result of an unfortunate subsequent event.[150] As Thomas Roberts stated, "[t]o accept *Krell* as a general precedent allowing frustration of purpose to be a valid ground for cancellation would however introduce into the law a principle at odds with the principle sanctity of contract".[151] However, the potential for the expansion of the doctrine of frustration of purpose has not been realized. As Lord Wright remarked of the *Krell* decision, it "is certainly not one to be extended".[152] Indeed, *Krell* has been narrowly distinguished from

[148] *Ibid.* at 749.

[149] McCamus, *supra* note 108 at 576.

[150] See e.g. Treitel, *supra* note 46 at 320-321; McCamus, *supra* note 108 at 577; and Fridman, *supra* note 110 at 635.

[151] Thomas Roberts, "Commercial Impossibility and Frustration of Purpose: A Critical Analysis" (2003) 16 Can. J.L. & Juris. 129 at para. 30.

[152] *Martime National Fish Ltd. v. Ocean Trawlers*, [1935] A.C. 524 at 529.

similar cases. In another of the coronation cases, *Herne Bay*,[153] decided in the same year as *Krell* by the same panel of judges, the defendant's contract to hire a boat to watch the King at a naval review was not discharged from the agreement by the cancellation of the coronation.

Herne Bay begs the question: why was a contract to rent a room for viewing the coronation wholly frustrated by the cancellation of the coronation, but a contract to hire a boat to watch the naval review was not frustrated? Even though the naval review was part of the coronation activities, Vaughan Williams L.J. felt that the object of the voyage was not limited to the naval review, but also extended to "taking them round the fleet".[154] The fleet was still in place, and so the tour could still proceed in spite of the cancellation of the naval review. As Treitel has noted, the *Herne Bay* case demonstrates a common feature of the cases on frustration of purpose, in that it shows that the approach of the common law to partial frustration of purpose diverges from the method that has been adopted to cases of partial impossibility.[155] "In cases of partial impossibility", he stated, "a contract can be discharged if its *main* purpose can no longer be achieved; but in cases of frustration of purpose the courts have applied the more rigorous test of asking whether *any* part of the contractual purpose [...] could still be achieved: if so, [the courts] have refused to apply the doctrine of discharge".[156]

The Court of Appeal in both cases also considered the "common purpose" of the parties, and made a noteworthy distinction. In *Krell*, the "common purpose" was for the rooms to be used for the viewing of the procession and this purpose was frustrated when the coronation was postponed. There was no such common purpose in *Herne Bay*. Romer L.J. considered that, the "statement of the objects of the hirer of the ship would not [. . .] justify him in saying that the owner of the ship had those objects just as much in view as the hirer himself".[157] This meant that, although the postponement had frustrated the defendant's purpose in entering into the contract to hire the ship, it had not the frustrated plaintiff's purpose, which was presumably to provide a ship for a tour of the fleet. Wherever appropriate, the *pacta* principle would be upheld, and to defeat it would require a frustrating event for *both* parties. Treitel put it in the following terms: "This emphasis on the requirement that the purpose of *both* parties must be frustrated is found also in other English and American cases. It means that the supervening event must prevent one party from supplying, and the other from obtaining, what the former had contracted to provide and the latter to acquire under the contract".[158] Thus, the court was

[153] *Herne Bay, supra* note 144.

[154] *Ibid.* at 683.

[155] Treitel, *supra* note 46 at 324.

[156] *Ibid.* Emphasis in the original.

[157] *Herne Bay, supra* note 144 at 684.

[158] Treitel, *supra* note 46 at 324-325. Emphasis in the original.

unwilling to allow the doctrine of frustration to be used by the defendant to escape from a bad commercial bargain.

The doctrine of frustration of purpose has also been recognized in Canadian law.[159] However, even though the doctrine was considered to be innovative, it appears that the doctrine has had little practical effect on the courts in common law jurisdictions.[160] Some scholars have seen its development as arising from a unique set of events.[161] It has also played a relatively insignificant role in the subsequent development of the law of impossibility, at least in England.[162] This is likely due to the preference in the common law to place *pacta sunt servanda* ahead of the competing principle of *rebus sic stantibus*.

7.3 Temporary Impossibility

As frustration can occur without the fault of either party, the courts have been able to fashion rules to excuse the parties from their contractual obligation as long as the impossibility continues. A problem arises, however, when the impossibility ceases and one party then insists on performance. In such cases, it must be determined whether the party should then perform, or whether the prolonged delay caused by the temporary impossibility should excuse performance entirely. In this respect, the term "temporary impossibility" must be distinguished from "partial impossibility". The latter term is often used to designate a situation in which some part, but not all of the promised performance becomes legally impossible, while "temporary impossibility" refers to a delay in performance resulting from some operative facts of impossibility.

The origin of the principle of temporary impossibility can be traced to Roman law. The *perpetuatio obligationis* excused the delay in performance in those situations where the obligation had become temporarily impossible to perform.[163] Most importantly, it did not terminate the obligation to perform, but only suspended it.[164] When the temporary impossibility ceased to operate, performance was expected, or could be demanded. The same rule applies today in the common law: a temporary impossibility may have other legal effects, but it does not discharge a

[159] McCamus, *supra* note 108 at 577.

[160] *Ibid.*

[161] See e.g. John D. Wladis, "Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law" (1987) 75 Geo. L.J. 1575 at 1608-1622.

[162] *Ibid.* at 1608-1622.

[163] W.A. Ramsden, "Temporary Supervening Impossibility of Performance" (1977) 94 S. African L.J. 162 at 162.

[164] Dig. 46.3.98.8.

contract.[165] In this respect, temporary impossibility is not firmly rooted in the principle of frustration. However, there is one exception. Contracts will be discharged in cases of temporary impossibility only where it is deemed that time is of the essence.[166] In such cases, the practical effect is to treat the contract as though it were wholly frustrated. This approach is similar to that found in German and Swiss law, which is to treat a temporary impossibility as a permanent impossibility.[167]

Problems of temporary impossibility seemed to arise most frequently in maritime cases. These situations typically involved either a charterer or the shipowner who sought a discharge from its obligation under the charter party agreement due to an unforeseen delay. For this reason, the term "frustration of the adventure" has often been used by the courts to refer to cases where delayed performance had rendered the charter of no value to one of the parties. An example of such a case is *Geipel v. Smith* where the defendant shipowner had contracted to ship coal from Newcastle to Hamburg, "restraint of princes" excepted.[168] Before performance was effected, war broke out and Hamburg was blockaded. The court held that the blockade was likely to continue for some time, and the contract was not merely suspended, but dissolved. The court made the additional point that the contractual provision relating to the "restraint of princes" was a requirement to have performance made within a reasonable time.

In a similar case, *Jackson*,[169] a ship was chartered from Liverpool to Newport (U.K.) to load rails for shipping to San Francisco. It ran aground on its way to Newport. In this case, it was the ship-owner who wished to enforce the contract against the charter party. The court decided that the contract was frustrated. In the court's view, the delay in repairs meant that it would be unreasonable to require the charterers (the owners of the rails) to supply the cargo to the ship owner. The delay, although excusable, was held to so diminish the value of performance that the charterer was entitled to repudiate the agreement.

The principle of temporary impossibility has extended to a series of cases involving prolonged delay. During World War I, for example, the principle became firmly established.[170] In one wartime case, *Tamplin Steamship Co.*,[171] the House of Lords went as far as to suggest that cases of prolonged delay were part of a line of jurisprudence established in *Taylor*[172] and *Krell*.[173]

[165] Treitel, *supra* note 46 at 233.

[166] *Ibid.* at 233-235.

[167] Brunner, *supra* note 75 at 251.

[168] (1872), L.R. 7 Q.B. 404.

[169] *Supra*, note 140.

[170] McCamus, *supra* note 108 at 578-579.

[171] *Supra*, note 137.

[172] *Supra*, note 98.

However, although there may be some justification for speaking of a general doctrine of frustration that could incorporate impossibility, frustration of purpose, and temporary impossibility, this merger of these separate distinctions has not occurred—at least not in the common law.[174] As will be illustrated below, this contrasts with CISG Article 79, which embraces the vagaries of frustration as found in the common law.

8 Hardship and Impracticability

The early common law of England rejected any notion of hardship that did not amount to an impossibility. The principle of frustration was not applied to cases of *rebus sic stantibus* where unforeseen circumstances had rendered performance extremely onerous. Treitel, for example, concluded that the "English cases do not provide a single clear illustration of discharge on such grounds [of hardship or "pure" impracticability] alone".[175] The House of Lords has denied relief on the grounds of hardship or impracticability in a number of cases. As Lord Loreburn stated in one case: "the argument that a man can be excused from performance of his contract when it becomes 'commercially' impossible [...] seems to me a dangerous contention which ought not to be admitted unless the parties have plainly contracted to that effect".[176]

Similar judicial hostility in England to hardship and impracticability appeared in a number of other cases involving contractual performance difficulties due to World War I. In one case, for example, the contract was not discharged even though it was "practically impossible for the vendor to deliver".[177] McCardie J. elaborated and expressed the view that it could not be "said that grave difficulty on the part of the vendor in procuring the contract articles will excuse him from the performance of his bargain".[178] This is representative of the common law's preference towards *pacta sunt servanda*, and the subservient—or almost irrelevant—role played by *rebus sic stantibus*. This is in general contrast to the treatment of hardship in civil law jurisdictions, which have been much more receptive to cases of changed circumstances that result in situations of hardship and impracticability.[179]

[173] *Supra*, note 144.

[174] McCamus, *supra* note 108 at 579.

[175] Treitel, *supra* note 46 at 283.

[176] *Tenants (Lancashire) Ltd. v. C.S. Wilson & Co. Ltd.*, [1917] A.C. 495 at 510.

[177] *Blackburn Bobbin Co. Ltd. v. T.W. Allen & Co.*, [1918] 2 K.B. 540 at 551, aff'd [1918] 2 K.B. 467.

[178] *Ibid.* at 545.

[179] See *infra*, section *D. b. Imprevision, Wegfall der Geschaftsgrundlage, Changed Circumstances and other Hardship Principles*.

Not surprisingly, therefore, other English cases have demonstrated the hostile judicial attitude towards hardship and impracticability, even during times of war. This relatively rigid position may represent the fact that common law countries did not experience the same degree of war-time devastation as did the civil law countries of continental Europe. Thus, English courts have held that an unanticipated 88 percent increase in the cost of goods to be supplied,[180] or a rise in the price of raw materials to manufacture paper,[181] or in freight costs of the seller that made the transaction unprofitable, are not grounds to discharge a contract.[182] Similarly, in *Greenway Brothers Ltd. v. S.F. Jones & Co.* the defendant, who had contracted to sell zinc ingots, was not excused even though, due to the outbreak of war, the defendant could obtain the metal alloy only at an "abnormal price".[183]

The English common law hostility to the principle of hardship and impracticability also extended to events that arose during World War II. The leading case concerned the contract for the supply of newsreels to cinemas during the war.[184] After the end of the war, the cinema owners argued that the contract had been discharged by the end of the war. The Court of Appeal agreed that this "uncontemplated turn of events" had released the parties from the contract,[185] but the House of Lords reversed the decision.[186] Lord Simon remarked that "parties to an executor 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 of itself affect the bargain they have made".[187]

Later cases would follow this line of reasoning. For example, Lord Radcliffe would note that "it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play",[188] and Lord Simonds would assert without any qualification that "an increase of expense is not a ground for frustration".[189] These judicial statements support the English common law view that to discharge a contract on the basis of hardship or impracticability would introduce too much uncertainty in contractual relationships. English law has, thus,

[180] *S. Instone & Co. Ltd. v. Speeding Marshall & Co. Ltd.* (1916), 33 T.L.R. 202.

[181] *E. Hulton & Co. Ltd. v. Chadwick Taylor & Co. Ltd.* (1916), 33 T.L.R. 202.

[182] *Blythe & Co. v. Richards, Turpin & Co. Ltd.* (1916), 85 L.J.K.B. 1425.

[183] *Greenway Brothers Ltd. v. S.F. Jones & Co.* (1915) 32 T.L.R. 184.

[184] *British Movietonenews Ltd. v. London and District Cinemas*, [1952] A.C. 166 [H.L.] [*British Movietonenews*].

[185] [1951] 1 K.B. 190 at 201.

[186] *Supra*, note 184.

[187] *Ibid.* at 185.

[188] *Davis Contractors*, *supra* note 136at 729.

[189] *Tsakiroglou & Co. Ltd. v. Noble Thorl GmbH,* [1962] A.C. 93 at 115.

placed greater emphasis on certainty and *pacta sunt servanda*, even though the result has occasionally been harsh on one of the parties. As Treitel has stated, after surveying English jurisprudence in this area of law: “[o]ne can conclude that no English decision supports a general rule of discharge by impracticability and the number of dicta of high authority appear to emphatically to reject such a rule”.[190]

With the notable exception of the United States, most common law jurisdictions have followed the English approach toward hardship and impracticability, and do not explicitly recognize the doctrine.[191] Even in the United States, where impracticability is recognized under the Uniform Commercial Code,[192] as well as under the Restatement (Second) of Contracts at s. 261,[193] the courts have applied it in a very restrictive manner.[194] This strict approach has even led certain scholars to question whether a difference exists between American and English law of contractual discharge by “impracticability”.[195] Indeed, it has been observed that the US doctrine of impracticability is nothing more than a corollary of the English doctrine of frustration of purpose.[196] Such a view supports the proposition that while US law may explicitly

[190] Treitel, *supra* note 46 at 290-291.

[191] See e.g. Brunner, *supra* note 75 at 418: “A comparative law analysis shows that hardship is not universally, but widely recognized as a ground for exemption. This is especially true for civil law systems”.

[192] Under the heading “Excuse by Failure of Presupposed Conditions”, the Uniform Commercial Code [UCC] s. 2-615 states in part: ‘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.’ Although this provision refers explicitly to sellers, it has also been deemed to be applicable to buyers. This is through UCC s. 1-103 which preserves common law principles unless they are displaced by specific provisions of the UCC. Because impracticability is a common law defense, UCC s. 1-103 permits a buyer to also assert the defense of impracticability even though this is not explicitly provided for under s. 2-615.

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

[194] See e.g. Brunner, *supra* note 75 at 408. According to Brunner, “[i]n applying the impracticability test, American courts have adopted a restrictive attitude”. See also Treitel, *supra* note 46 at 280: “in all these cases is therefore a strong indication of the restrictive attitude of the American courts towards impracticability as a ground of discharge”.

[195] Treitel, *supra* note 46 at 289, where he states: “The preceding discussion shows that it is hard to formulate the exact difference between English and American law on discharge by ‘impracticability’”.

[196] See e.g. David R. Rivkin, “Lex Mercatoria and Force Majeure,” in Emmanuel Gaillard (ed.),

Transnational Rules in International Commercial Arbitration (Paris: ICC Publ. No. 480, 4, 1993) 161 at 167 who puts it in the reverse: “Frustration of purpose is the converse of impracticability”. See also Treitel, *supra* note 46 at 419:

recognize impracticability, it still retains the relatively rigid common law approach to contractual discharge due to supervening events.

Section 2-615 of the UCC, entitled "Excuse by Failure of Presupposed Conditions", explicitly adopts the doctrine of impracticability in circumstances where supervening events affect a seller's performance.[197] It can also be extended to buyers through s. 1-103.[198] It provides that a seller's failure to perform a contract, either in whole or in part, is not a breach of contract "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".[199]

The American principle of impracticability incorporates of the notion that the object of a contract could not be accomplished without commercially unacceptable costs and time input far beyond that contemplated in the contract. In this respect, it can be narrowly distinguished from frustration of purpose. While both principles fall short of cases of pure physical impossibility, frustration of purpose typically involves a party in which the performance received (or expected) has substantially decreased in value. With impracticability, the cost of performance for one party has increased so dramatically, that the original obligation has become economically unviable.

The American doctrine of impracticability appears to have originated in the case of *Mineral Park Land Co. v. Howard*,[200] which relied in part on dictum in the English case of *Moss v. Smith*.[201] *Mineral Park* involved a contract where the defendants agreed to take all of the gravel required for a nearby construction project from the plaintiff's land. The plaintiff was to be paid 5¢ per cubic yard. Only about half of the gravel was taken, which was the only part that was above water level. No greater quantity could have been taken by ordinary means, except at "a prohibitive cost" of ten to twelve times the typical cost of such an extraction.[202] On this basis, the plaintiff's claim was rejected. In his decision, Sloss J. noted that "[a] thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost".[203]

"English law acknowledges frustration of purpose as a ground of discharge, which may be considered as the mirror-image of [the American doctrine of] impracticability".

[197] *Supra* note 192.

[198] *Ibid*.

[199] *Ibid*.

[200] 172 Cal. 289 (1916) [*Mineral Park*]. Sloss's J. quote came from *Beach on Contracts* at 459.

[201] (1850), 137 E.R. 827, 9 C.B. 94.

[202] *Ibid*.

[203] *Ibid*.

It may appear paradoxical that English law, which first recognized the doctrine of frustration of purpose, as discussed in the coronation cases, above, has been reluctant to recognize its mirror-image, the doctrine of impracticability. However, it must also be recalled that English jurisprudence has not expanded the doctrine of frustration of purpose since the coronation cases. Similarly, American jurisprudence has applied the doctrine of impracticability in a number of cases, but such an application has been very restrictive.[204] From this conceptual perspective, the difference between the two doctrines is not particularly striking.

In addition, American law has made a distinction between those cases where performance of a contract has become merely more onerous for one of the parties, and where performance becomes excessively more onerous. It is only in the latter case where the doctrine of impracticability may apply. The official commentary on UCC s. 2-615 makes this point in terms of increased costs: "Increased cost alone does not excuse performance".[205] Although the term "impracticable" suggests that far less is required than "impossibility" to release an aggrieved party from its contractual obligations, the requisite threshold remains quite high in the US. The Restatement (Second) of Contracts provides a number of examples of cases in which impracticability might apply, such as the loss or destruction of property necessary to perform the contract.[206] However, the list is not intended to be exclusive.

The required threshold whereby performance must become excessively more onerous to constitute impracticability is set considerably high. In one case, a US District Court summarized American jurisprudence on this point: "[the court] is not aware of any cases where something less than a 100% cost increase has been held to make a seller's performance 'impracticable'".[207] As this statement suggests, in practice, US courts have interpreted rules regarding impracticability very strictly. New York courts, for example, have excused contractual obligations for impracticability "only in extreme circumstances".[208] Financial difficulty or economic hardship "even to the extent of insolvency or bankruptcy" is generally not enough to render a contract impracticable.[209] In other American jurisdictions, courts have similarly held that even long-term contracts will not be excused as impracticable if they become more

[204] See *supra* note 194.

[205] American Law Institute & National Conference of Commissioners on Uniform State Laws, Official Comment Number 4 to U.C.C. s. 2-615. The full passage reads: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance. Neither is a rise or a collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover".

[206] Restatement (Second) of Contracts ss. 262-265 (1981).

[207] *Publicker Industries v. Union Carbide Corp.*, 17 U.C.C. Rep. Serv. 989 at 992 (E.D. Pa. 1975).

[208] *Kel Kim Corp. v. Central Markets Inc.*, 519 N.Y.S.2d 384 at 385 (N.Y. 1987).

[209] *406 East 61st Garage Inc. v. Savoy Fifth Avenue Corp.*, 23 N.Y.2d 275 at 281 (N.Y. 1968).

economically burdensome than anticipated.[210] Thus, it appears evident that US courts will rarely excuse performance because of mere financial hardship.

James White and Robert Summers have also undertaken a comprehensive review of the UCC, and have similarly concluded that "American courts have generally rejected the sellers' arguments under section 2-615".[211] They continue by adding that where sellers have sought to use the impracticability defense, "[t]he courts have…favored buyers".[212] Thus, even though the doctrine of impracticability has been elevated in American law to black letter status, its importance appears to be significantly reduced, and it would seem that a change in this perspective should not be expected anytime soon. As White and Summers have opined, "[b]y and large, American courts have been unreceptive to such claims [of impracticability] and we expect them to continue that hostility".[213]

Nicholas Weiskopf has reached a similar conclusion on this topic. Based on his survey of American jurisprudence on impracticability, "the inescapable conclusion is that the courts typically do not permit purchasers of goods and services to escape contractual liability because of supervening frustration of [the] bargaining objective [i.e., impracticability]."[214] He further notes that American courts, while formally recognizing the doctrine, do little more than "pay lip service to its viability, and then virtually refuse to apply it".[215] Based on this treatment, one must question whether American jurists take the doctrine of impracticability seriously, or view it as an interloper. Courts there typically voice doctrinal acceptance to the doctrine, but then deny the defense on the grounds of foreseeability, contributory fault, or based on partial impracticability.[216]

Notwithstanding the codification of impracticability in the UCC, the apparent American aversion to hardship and the doctrine of impracticability is consistent with the general common law attitude towards *pacta sunt servanda* and *rebus sic stantibus*. While civil law jurisdictions have maintained an affinity for *rebus sic stantibus*, the common law has emphasized the primacy of *pacta sunt servanda*. The reason for this difference in the approach in the civil law and common law towards hardship, impracticability, and *force majeure* (and its variants) can be traced to

[210] *Valero Transmission C. v. Mitchell Energy Corp*., 743 S.W.2d 658 at 663 (Tex. App. 1988).

[211] James J. White & Robert S. Summers, *Uniform Commercial Code* (4th ed.) (St. Paul, MN: West Publishing Co., 1995) at 129.

[212] *Ibid*. at 130.

[213] *Ibid.*

[214] Nicholas R. Weiskopf, "Frustration of Contractual Purpose—Doctrine or Myth?" (1996) 70 St. John's L. Rev. 239 at 242.

[215] *Ibid.*

[216] *Ibid*. at 261-262.

fundament differences in each legal system. The concept of *force majeure* was imported from the Code of Napoleon when the common law courts began dealing with commercial disputes that arose under merchant law. While the *force majeure* concept had its origins in the Roman law, the common law was less-influenced by this ancient legal tradition. The civilians followed the Roman rule *impossibilium nulla obligation est*—that no person can be obliged to perform the impossible. To the common law jurists, however, this did not mean that a contract, which became impossible to perform, was necessarily void. In this respect, the concept of *force majeure* was not embedded in the common law; rather, *force majeure* was viewed as an interloper, imported into the common law through its appearance in clauses in the contracts of commercial parties. Rather than being a universally applicable concept as in civilian jurisprudence, a *force majeure* clause in the common law tradition became a purely contractual right. The foreign nature of these clauses, in part, may explain the difficulty that common law jurisdictions have had when dealing with concepts such as hardship, impracticability, frustration, and *force majeure*. Fundamentally, the common law tradition is an adversarial system in which the courts' function is to assign liability between the two adversarial parties on the basis of either tort or contract principles. In this tradition, *pacta sunt servanda* is paramount, and liability is imposed where a party to a contract fails to perform its contractual obligations.

Although it is often equated to the common law doctrine of contractual frustration, *force majeure* is different, and it has been applied much more broadly and flexibly than has its approximate common law counterparts of frustration or impracticability. A late nineteenth-century English case illustrates this point. In *Jacobs v. Credit Lyonnaise* the defendant shipper claimed *force majeure* after it failed to deliver a number of remaining shipments of esparto due to a war that had broken out in Algeria.[217] Under French law, which prevailed in Algeria at that time, the defendant argued that it would not have been liable due to"the insurrection in Algeria and the military operations connected with it [which] had rendered the performance of the contract impossible; and that by the French Civil Code, which prevails throughout Algeria, *force majeure* is an excuse for non-performance".[218] The court found that while French law may have given relief under *force majeure*, English law applied in this case, and there was no equivalent common law principle, including frustration, that could relieve the defendant of liability. While the intervening war had disrupted performance, it did not destroy the "subject-matter" of the contract or the underlying rational for the bargain as was required for relief under the doctrine of frustration.[219] As the court explained, "one of the incidents which the English law attaches to a contract is that [...] a person who expressly contracts absolutely to do a

[217] (1884) 12 Q.B.D. 589 (C.A.).

[218] *Ibid.* at 599.

[219] *Ibid.* at 600.

thing not naturally impossible is not excused for non-performance because of being prevented by *vis major*."[220]

The differences between the civil law and common law become more clear when *force majeure* is contrasted with the common law doctrine of frustration. *Force majeure* and the doctrine of frustration are similar in that they deal with unforeseen supervening events that are beyond the control of parties to an agreement. Frustration requires that the entire subject matter or underlying rationale for the contract be entirely destroyed. It normally operates to relieve parties permanently from all of their contractual obligations, including those to perform and to pay, and essentially leaves the pieces of a contract to fall where they may. Courts are not able to revise the terms of the contract to achieve a fair or equitable remedy. By contrast *force majeure* permits greater flexibility. The unforeseen events giving rise to relief can be broader, and the entire rationale or subject matter of the contract need not be destroyed in order for *force majeure* to operate. Civilian courts typically have greater latitude to revise, or "re-write" contractual terms to account for the unforeseen event. *Force majeure* may also be temporary, allowing the parties to suspend their contract temporarily, and then to reinstate it once the event passes or is remedied. This is in contrast to the doctrine of frustration, which is a blunt instrument that permanently ends all contractual obligations.

The most significant difference between civil law's *force majeure* and the concepts of hardship, impracticability, frustration, is that these latter principles are antithetical to common law principles and ideals. With the use of these defences for non-performance, parties avoid contractual obligations and fault or liability is ascribed to neither party to the contract, but rather to a cause deemed to be beyond the control of both parties. Given the great divergence between common law values and the concepts of hardship, impracticability, frustration, and civil law's *force majeure*, it is not surprising that common law courts have repeatedly shown great reticence in giving effect to these principles.

9 Origins of the Principle of Excuse for Non-Performance in Civil Law

9.1 An Exception to the Rule of *pacta sunt servanda*

The principle of an excuse for contractual non-performance developed along different lines in civil law jurisdictions. Even though civilian jurists utilized many of the same philosophers who had enunciated the notion of *pacta sunt servanda*, they emphasized not the rule *per se*, but rather the exceptions to the rule. Thomas Aquinas, for example, had noted that individuals must always keep their word, even with enemies. However, he also stated that an individual's

[220] *Ibid.* at 603. The term *vis major* is from Latin, meaning "superior force".

promise may be excused "if circumstances have changed with regard to persons and the business at hand".[221] Niccolo Machiavelli went much further, eschewing the *pacta sunt servanda* principle: "experience shows that princes who have achieved great things are those who have given their word lightly".[222] Ever-changing circumstances were to be used to the advantage of the prince: "a prudent ruler cannot, and must not, honour his word if it places him at a disadvantage and when reasons for which he had given his promise no longer exist".[223] Jean Bodin (1530–1596), who opposed Machiavelli's views on power politics, was also able to formulate the exception to the rule that a prince must honour his word, for instance "in cases where what you have promised is by nature unfair or cannot be performed".[224]

In the seventeenth century, the principle of *pacta sunt servanda* was also attacked by two prominent political philosophers, Thomas Hobbes (1588-1679) and Benedict de Spinoza (1632-1677). This attack was within the context of political arguments for the supremacy of state sovereignty, yet there was little difficulty in transforming the principle of *rebus sic stantibus* to contractual relations between individuals rather than applying it to relations between states. While Hobbes acknowledged the importance of the sanctity of contracts ("[f]or performance is the natural end of obligation"), he also stressed the idea that the sovereign had almost unlimited power, and was "bound to himself only".[225] However, agreements need not be kept if they might cause a person harm or threaten the security of the state.[226] Spinoza similarly claimed that "no holder of State power can adhere to the sanctity of contracts to the detriment of his own country, without committing a crime".[227] It was also during Spinoza's time that *rebus sic stantibus* came to be regarded in certain European jurisdictions as an implicit condition in contracts, allowing parties freedom to adjust their agreements due to a change in circumstances.[228]

During the seventeenth century, the attack on the principle of *pacta sunt servanda* assisted in the growth and development of *rebus sic stantibus*.[229] Perhaps this was influenced by the philosophers of the era and the rise of the Age of Reason. Seventeenth century Europe

[221] Quoted in Bederman, *supra* note 47 at 8 fn. 22.

[222] Niccolo Machiavelli, *The Prince*, trans. by George Bull (London: The Folio Society, 2006) at 93.

[223] *Ibid.* at 94.

[224] Quoted in Wehberg, *supra* note 48 at 778

[225] Thomas Hobbes, *Leviathan* (Markham: Penguin Books, 1982) at 198, 313.

[226] *Ibid.* at 215.

[227] Quoted in Wehberg, *supra* note 48 at 778. The passage is from Spinoza's *Tractatus Theologico-Politicus*.

[228] Bederman, *supra* note 47 at 8 fn. 24.

[229] Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (New York, Oxford University Press Inc., 1996) at 581.

witnessed the culmination of the slow process of detachment of philosophy from theology, and reason was seen as the primary source for legitimacy and authority. In Europe there began critical questioning of traditional institutions, customs, and morals, and a strong belief in rationality. This new perspective assisted in the growth of *rebus sic stantibus* as a rational counter-balance to the *pacta* principle.

It appears that part of the attractiveness of *rebus sic stantibus* was due to efforts to address the devastation caused by numerous wars in Europe. The *rebus* principle was also popular with the natural law theorists, particularly as it applied to public international law.[230] It flourished on the continent for about 200 years. However, in the area of private law, *rebus sic stantibus* began to lose its credibility as a legitimate legal principle.[231] By the nineteenth century most jurists were hostile to it, and the principle seemed to have disappeared. However, it is more accurate to term the disappearance as a transformation. While the term *rebus sic stantibus* may have fallen out of favour, the concept that it represented (i.e. changed circumstances) continued to develop. In this respect, the *rebus* principle only temporarily lost its attraction. As one legal commentator noted, the *rebus* principle, having been thrown out the door, found its way back in through the window.[232]

As already noted, the civil law system rejected the notion that a party could contract to do the impossible (*impossibilium nulla obligation*), even if this was promised in a contract. In addition, the focus of civil law remedies is on performance, not damages. As such, in civil law jurisdictions the obligor is released from its contractual performance obligations if the impossibility was not foreseen at the time of contracting, and if the impossibility arose after the contract was formed. Alternatively, some civil law jurisdictions allow the courts to modify contracts in cases of unforeseen supervening events.[233] To revise contracts is to interfere with party autonomy, and such an approach would be an anathema in common law systems. Furthermore, with some exceptions, civil law jurisdictions are traditionally based on the fault principle.[234] Breach of contract presupposes fault on the part of the non-performing party. In common law, a contract is similar to a guarantee: if a party breaches any of its obligations under the contract, the aggrieved party is entitled to damages, regardless of the fault of the non-performing party. From a conceptual perspective, the civil law and common law systems, thus, have opposing approaches to the principle of strict liability for breach of contract.

[230] *Ibid*.

[231] *Ibid*.

[232] The remark is attributed to Bernhard Windscheid (1817-1892), a German jurist. See *ibid*.

[233] See e.g. Rosler, *supra* note 83 at 485. Rosler notes that German courts now prefer "judicial adaptation" of the contract over discharging the contract. Note also that the French principle of *imprévision* allows a contract to be modified in case of a change of circumstances. See Schwenzer, *supra* note 55 at 710.

[234] Brunner, *supra* note 75 at 69.

In civil law, *pacta sunt servanda* is still, of course, an important principle. However, in comparative terms, continental legal systems have placed greater emphasis on the role of *rebus sic stantibus*, even though it is dependent on the *pacta* principle. For this reason, national laws in civilian law jurisdictions have developed an array of doctrines and principles to deal with a fundamental change in circumstances. All of these doctrines and principles differ to some extent from CISG Article 79. In these national laws, the phrase *rebus sic stantibus* is rarely used, but other terminology has developed in its place. Although the wording has been altered, the concept of changed circumstances has remained intact. This is evident in a comparative overview of excuses for non-performance in a number of continental legal systems.

9.2 Force Majeure

There are numerous words and terms in national legal systems to describe supervening events that make contractual performance impossible or excessively more onerous. Some of these terms are used interchangeably, but this is incorrect: such imprecision masks the subtle legal complexity behind these words. Thus, even though the term "frustration" more accurately describes the common law recognition of an excuse for non-performance, courts in Canada have occasionally imported the term *force majeure* into the nation's legal vocabulary. Dickson J. of the Supreme Court of Canada, for example, noted in a leading case on the subject that "[a]n Act of God clause or *force majeure* clause [...] generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight and skill".[235]

The term *force majeure* originated in one of the oldest codifications that still exists today: the French Civil Code of 1804.[236] It is defined in Articles 1147 and 1148 of the Civil Code.[237] It

[235] *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, [1976] 1 S.C.R. 580 at 583.

[236] C.c.F. (1804-1807); Reinhard Zimmermann, "The Civil Law in European Codes" in Hector MacQueen, Antoni Vaquer, & Santiago Espiau Espiau, eds., *Regional Private Laws and Codification in Europe* (New York: Cambridge University Press, 2003) at 19. Zimmermann notes that the French Civil Code was based on the Prussian Code of 1794. The other oldest, current codification is the Austrian General Civil Code of 1811, which was also based on the Prussian Code.

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

Article 1148: "No damages arise when, as a result of *force majeure* or of a fortuitous event, the obligor was prevented from giving or doing that for which he had obligated himself, or did what was forbidden to him". Translation by Rivkin, *supra* note 196 at 174.

generally describes circumstances outside one's control.[238] Literally, *force majeure* (or its Latin equivalent, *vis major*) means "superior force", but the French term is often used in a generic manner in many jurisdictions, including those of the common law, to characterize a wide range supervening events. For example, even the International Chamber of Commerce promotes its own model "Force Majeure" clause which parties to international contracts may incorporate into their contracts.[239] The UNIDROIT Principles similarly devotes an entire article to "Force Majeure".[240] The article also closely mirrors the language found in CISG Article 79.[241] In this respect, the term *force majeure* has been assimilated into the English language and is often used to express an extraordinary event or circumstance beyond the control of contracting parties. This may include such events a war, strike, riot, fire, storm or any "act of God". However, strictly speaking, by way of contrast, legislation in common law jurisdictions rarely use the term *force majeure*. Instead, terms such as "frustration", "impracticability", "impossibility", or "hardship" are used in its place.

In the private, commercial law of France, however, the principle of *force majeure* exhibits the approach developed out of the remnants of Roman law, which focuses on the relative fault of the party in breach.[242] It applies to two types of cases: i) *legal* impossibility, and ii) *physical* impossibility.[243] Legal impossibility can arise from a supervening change in the law or a governmental decree that make it illegal for a party to perform a contractual obligation. A physical impossibility is deemed to be an "Act of God" or some other event (e.g. destruction of the goods) that makes performance of the contract materially impossible.

[238] The *Shorter Oxford English Dictionary*, 6th ed., defines "*force majeure*" as an "[i]rresistible force, overwhelming power".

[239] International Chamber of Commerce, *ICC Force Majeure Clause 2003*; *ICC Hardship Clause 2003* (Paris: International Chamber of Commerce, 2003).

[240] UNIDROIT Principles, *supra* note 36 at Article 7.1.7 (*Force majeure*).

[241] *Ibid.* Article 7.1.7 states: '(1) 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. (2) 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. (3) 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 nonreceipt. (4) Nothing in this article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.'

[242] Rivkin, *supra* note 196 at 173.

[243] Rene David, "Frustration of Contract in French Law" (1946) 28 J. Comp. Legis. & Int'l L. 3d ser. 11 at 12.

As noted above, as a general principle, *force majeure* deals with cases involving legal or physical impossibility of performance, even though the term "impossibility" is not used in the Code.[244] As it is commonly understood, and as embodied in Articles 1147 and 1148 of the Civil Code, *force majeure* is an event that is beyond a party's control, making performance of a contract impossible. A party in default is not liable in damages only if the non-performance is a "result from an outside cause which cannot be imputed to him".[245] Belgian, Dutch, and Luxembourgian law mirror the French approach.[246] While Articles 1147 and 1148 appear to be indistinguishable to the concept of strict liability as found in the common law, the Civil Code from its origins never adhered to the rigidity that was found in the English case of *Paradine*. Instead, French law, and other continental legal systems, utilized interpretive techniques to bring liability based on fault closer to the common law concept of strict liability. For example, French law focuses on the substance of a party's performance obligation. In doing so, it makes a distinction between "result-based" obligations (*obligations de resultat*) and obligations of "best efforts" or conduct-oriented obligations (*obligations de moyens*).[247] In the case of an *obligations de moyens* the plaintiff must prove that the defendant did not act as a prudent, average person when undertaking his/her obligations.[248] With an *obligations de resultat* the plaintiff need only demonstrate that the result that the defendant undertook to provide had not been accomplished.[249]

Swiss law takes a similar approach, and makes a distinction between non-performance and fault.[250] As with the French Civil Code, this technique brings liability based on fault closer to the concept of strict liability. In Switzerland, a party is at fault for non-performance if it can be proven that the obligor failed to use its diligence to fulfil its contractual obligations, regardless of whether this was intentional or done through negligence.[251] However, in the case of a "best efforts" obligation, the distinction between non-performance and fault becomes irrelevant. Recently, the Swiss Federal Tribunal has focused on the requirement of non-performance, rather than on the requirement of fault.[252] Regarding the obligation to achieve a "specific result", in theory, Swiss law maintains the distinction between non-performance and fault. But

[244] James Gordley and Arthur Taylor von Mehren, *An Introduction to the Comparative Study of Private Law* (New York: Cambridge University Press, 2006) at 499.

[245] C. civ. Article 1147.

[246] Brunner, *supra* note 75 at 67.

[247] *Ibid.*

[248] *Ibid.*

[249] *Ibid.*

[250] *Ibid.* at 68.

[251] *Ibid.*

[252] *Ibid.*

in practical terms, if the plaintiff succeeds in proving the non-performance of a specific obligation, the defendant may only succeed if it can prove that it was not at fault due to a *force majeure* event. In this respect, it has been said that "fault is to a large degree merely the other side of the coin of non-performance".[253] In either case, as in French law, the non-performing party is excused if *force majeure* is found. So although the concept of *force majeure* appears different, and narrower than the common law concept of frustration, in actual cases, on similar facts, the same result may be reached.

In traditional Islamic law there is no legal doctrine that might be considered analogous to *force majeure*.[254] In certain contracts, however, certain rules have been identified by Muslim jurists that bear some resemblance to *force majeure*. These include the concepts of *Amer min Allah* ("Act of God") and *Afah Samawiyyah* ("calamity"), both of which render performance impossible.[255]

Until the revision of the German Civil Code, the Bürgerliches Gesetzbuch (BGB), in 2002, that country followed the Roman law rule by making a distinction between initial and subsequent liability. Under the substantially amended BGB, it now makes no difference when the impossibility occurred. Retained from the past, however, is the principle that liability for an impossible performance depended on whether a party was responsible for the fact that performance had became impossible.[256] In such cases, that party was liable. According to s. 276, a party is "responsible" for "wilful default and negligence".[257] While the BGB incorporates the concept of *force majeure* and changed circumstances (i.e. *rebus sic stantibus*), these both fall under the German principle of *wegfall der geschaftsgrundlage*.[258] It states: "[i]f circumstances upon which a contract was based have materially changed after conclusion of the contract and if the parties would not have concluded the contract or would have done so upon different terms if they had foreseen that change [...]".[259] As noted, in cases of non-performance under *wegfall der geschaftsgrundlage*, the role of fault plays a key role in determining whether a claim for damages can be excluded due to a party's non-performance.[260] However, the amended BGB now also allows for instances where fault is not to be used as a "guiding principle".[261] Thus, in addition

[253] *Ibid*.

[254] Adnan Amkhan, "Force Majeure and Impossibility of Performance in Arab Contract Law" (1991) 6 Arab L.Q. 297 at 298.

[255] *Ibid*. at 298-299.

[256] BGB s. 276.

[257] *Ibid*.

[258] BGB s. 313(1).

[259] *Ibid*. Translation by Brunner, *supra* note 75 at fn. 1969.

[260] BGB s. 280(1).

[261] Brunner, *supra* note 75 at 39.

to an at-fault principle, the BGB incorporates the principle of liability without fault in certain circumstances. This stricter type of liability may apply where the obligor has assumed a guarantee, or assumed the acquisition risk to procure a certain item. These amendments to the BGB allow for greater flexibility for considering the scope of fault and liability in cases of impossibility and changed circumstances. However, with this flexibility comes, at least in theory, the possibility of greater uncertainty in the law.

In France and many other continental legal systems, *force majeure* includes such events as a natural catastrophe, a strike, war, or a sovereign decree. More specifically, there are three characteristics of *force majeure* as recognized in the Civil Code. The first is the existence of an "outside cause" that cannot be imputed to the obligor. This must be an external event that occurred beyond the obligor's sphere of control. Secondly, *force majeure* event must have been "unforeseeable" at the time of the execution of the contract. In making this determination, all circumstances surrounding the event must be considered. In addition, while the test is a subjective one, it does include what a "prudent" (*en bon père de famille*, literally, a good father of a family) or "average man" should have foreseen.[262] Finally, the requirement of "irresistibility" constitutes the third characteristic of the *force majeure* principle. In other words, the event must have raised an insurmountable obstacle to the performance of the obligation. This is an event against which there is no defense, even if the party had foreseen the event. It leaves the obligor powerless. As already noted, civil law accepts that no one can be obliged to perform what is impossible. In this respect, the "irresistibility" characteristic of *force majeure* also incorporates the notion of *rebus sic stantibus*. This recognizes that the parties would not have contracted the same way if they had reasonably considered how events might otherwise develop.

As under CISG Article 79, in French law, where *force majeure* is found, the obligor is not liable for damages. In most cases of *force majeure*, French courts will discharge *both* parties from the obligation.[263] But in contrast to the CISG, where an event of *force majeure* prevents performance of an obligation only partially, cancellation of the contract may be denied, but a corresponding diminution in the counter-performance of the obligee may instead be permitted.[264]

[262] Rivkin, *supra* note 196 at 175.

[263] Michael D. Aubrey, "Frustration Reconsidered–Some Comparative Aspects" (1963) 12 Int'l & Comp. L.Q. 1165 at 1176.

[264] Rivkin, *supra* note 196 at 177.

9.3 Imprevision, Wegfall der Geschaftsgrundlage, Changed Circumstances and other Hardship Principles

Imprevision, *wegfall der geschaftsgrundlage*, and *rebus sic stantibus*, *inter alia*, are all recognized hardship principles found in various civil law countries. Each one of these principles recognizes an impediment to performance that consists of a fundamental change of circumstances that does not amount to a physical impossibility. In these situations, impossibility principles, such as *force majeure*, cannot apply since there is no contractual obligation that cannot be performed, but rather one where the promisor's performance, though not impossible, has become excessively onerous. The basis for this approach is that in many business and legal circles a strict interpretation of the *pacta sunt servanda* rule was thought to be too severe, especially in contracts of a lengthy duration. In this respect, a hardship principle may be considered as a subset of the *force majeure* excuse. Considering this specific group of hardship cases under force majeure, there exist more flexible legal rules and consequences than those found under *force majeure* and frustration.

A variation of *force majeure* exists separately in the laws of France, and it fundamentally relies on the principle of *rebus sic stantibus*.[265] In contracts with the French government, it is an implied term of such transactions that the continuation of the obligation is subject to the continued existence of fundamental facts or circumstances. This is the basis of the French principle of *imprevision*, which is a principle of changed circumstances (i.e. *rebus sic stantibus*). While French administrative courts will accept the defence of *imprevision* in contract cases involving private parties and the government, the civil courts have thus far refused to recognize this defence when applied to private contracts.[266] As Rene David stated many years ago, "[t]he doctrine of *imprevision* has never been admitted by the hierarchy of civil and commercial courts", as they favour exclusively the concept of *force majeure*.[267] However, this situation may be changing, as civil courts there have become increasingly more receptive to the concept in private law matters.[268] Until *imprevision* is fully accepted in all of France's courts, the stricter defence of *force majeure* must be used in its place.

Conceptually, *imprevision* is closer to the common and civil law principle of hardship. It appears to have developed out of the Civil Code's requirement of good faith, as well as the obligation it places on parties to reasonably comply with contractual obligations, while recognizing the doctrine of *rebus sic stantibus*.[269] In addition, until 1914 the doctrine of *force*

[265] *Ibid.* at 174.

[266] Gordley and von Mehren, *supra* note 244 at 524.

[267] David, *supra* note 243 at 13.

[268] Brunner, *supra* note 75 at 404-405.

[269] C. civ. Articles 1134 and 1135. See also Aubrey, *supra* note 263 at 1175-1177.

majeure was the only defence available to a party to discharge a contract in the event of new circumstances. The advent of World War I, and the outbreak of war again in 1939, forced the courts in France, and elsewhere on the continent, to expand the *force majeure* concept to discharge certain contracts.[270] The new doctrine became known as the *theorie de l' imprevision*. It encompassed cases where there was no impossibility of performance, but rather where performance had become much more onerous since the time of contracting. As part of this new doctrine, *rebus sic stantibus* was considered to be an implied or tacit condition stipulated by the parties to all contracts. In this respect, *rebus sic stantibus* was viewed as an intention of all contractual parties, regardless of whether or not this was expressed in the contract itself. In this way, *imprevision* could exist in harmony with the will theories of contracts, which became popular with jurists in the nineteenth century.[271] As Windscheid noted, the continuation of certain circumstances could simply evidence an "undeveloped condition" of the contract, the "undeveloped condition" being something that was not willed by the parties.[272]

In addition, the unforeseen economic hardship must be severe, such as the devaluation of the French currency after World War I, which resulted in a fundamentally different obligation for the plaintiff.[273] The Conseil d'Etat has explained the term in the following manner:

> [a]n "unforeseen contingency" may be defined as a situation in which the balance of a contract is upset as a result of an event of a general character, which is either political or most often economic, which is, in any case, independent of the intention of the parties, and which was unforeseeable at the signing of the contract, and which, without making performance by the administration's opposite contracting party impossible, makes the carrying out of his obligation intolerably onerous.[274]

Imprevision is limited to contracts for future and/or continuous performance, and results in the discharge of the promisor's contractual obligations. However, it can be distinguished from the English principle of frustration. With frustration a contract comes to an end because it becomes something beyond what the parties had contemplated; it is beyond the will of the

[270] David, *supra* note 243 at 12.

[271] Gordley and von Mehren, *supra* note 244 at 504.

[272] *Ibid*.

[273] *Compagnie Generale d'Eclairage de Bordeaux c. Ville de Bordeaux, Conseil d'Etat*, March 30, 1916, (1916) III D. 25; (1916) III S. 17.

[274] Quote is from, and translated by, Rivkin, *supra* note 196 at 178.

parties.[275] With *imprevision*, the contract may also be discharged, but this interpretation is based on the will of the parties to the contract.[276]

For centuries, under the concept of *rebus sic stantibus*, many civil law jurisdictions accepted the principle of changed circumstances. It is not surprising, therefore, to find that many continental legal systems have statutes that recognize the concept of hardship. Among them are Germany, The Netherlands, Italy, Greece, Portugal, and the Scandinavian countries.[277] In Italy, for example, the German principle of *wegfall der geschaftsgrundlage* was adopted in Article 1467 of the Italian Civil Code, which concerns cases of *eccessiva onerosita sopravenuta*.[278]

In other civil law jurisdictions, hardship is recognized in case law only. These countries include Switzerland, Austria, and Spain.[279] In addition, the modern civil codes in many Arab countries have imported the concept of *rebus sic stantibus* from continental Europe, and recognize cases of hardship through that principle.[280]

The hardship principle attempts to determine which party should bear the risk of changed circumstances, and to what extent. In civilian jurisdictions this issue is typically determined by weighing the importance of *pacta sunt servanda* against the principle of good faith in contractual performance. While the *pacta* principle demands performance (assuming that physical performance of the obligations is possible), this must be balanced against the counter-principle of good faith. A violation of good faith would likely occur if a party demanded performance of a contract according to its original terms even though this performance had become excessively burdensome for the obligor. Such a demand might even be deemed an abuse of right.[281] This assumes, of course, that the risk of changed circumstances was not assumed by the aggrieved party. It is also worth noting that, with the exception of the American UCC,[282] the common

[275] David, *supra* note 243 at 12-13.

[276] *Ibid*.

[277] Schwenzer, *supra* note 55 at 711. Schwenzer provides the following examples at fn. 10: Germany: BGB s. 313 (*Störung der Geschäftsgrundlage*); Netherlands: Dutch Civil Code (BW) Art. 6:258; Italy: CC, Art. 1467 (*eccessiva onerosità sopravvenuta*); Greece: Greek Civil Code, Art. 388; Portugal: Portuguese Civil Code, Art. 437; Austria: Austrian BGB ss. 936, 1052, and 1170a.

[278] C.Cit. Art. 1467.

[279] Brunner, *supra* note 75 at 403. However, Schwenzer, *supra* note 55, notes that the Austrian BGB recognizes hardship through analogy in ss. 936, 1052, and 1170a.

[280] Brunner, *supra* note 75 at 404.

[281] *Ibid*. at 394.

[282] The key good faith provision of the UCC is s. 1-203, which states: "Every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement." The good faith obligation applies to all duties imposed by the UCC, as well as all contracts subject to the UCC. However, the good faith obligation does not appear to extend to the process of contract negotiation and formation.

law has been hostile to recognizing good faith. This may help to explain why civilian legal systems have generally been more receptive than the common law to the concept of *rebus sic stantibus*.

By way of contrast, English law rejects not only good faith in law, but also any notion of relief for changed circumstances that do not amount to an impossibility. Furthermore, the term "hardship" is more of a factual description than it is a recognized legal concept.[283] As noted above, most common law jurisdictions follow the English approach. A notable exception is the United States, but even in that case, American courts have taken a rigid stance towards hardship and impracticability. While the UCC recognizes impracticability, US courts have tended to follow the rigid *pacta sunt servanda* rule in the common law, and have generally rejected the defence of changed circumstances. Such an approach appears to be at odds with the promulgation of the UCC in 1953, and its adoption of the doctrine of impracticability in s. 2-615.[284] The Restatement (Second) of the Law of Contracts reiterates this position,[285] but courts there still appear to follow the traditional common law approach, favouring *pacta sunt servanda* and eschewing *rebus sic stantibus*.

10 CISG Article 79 and Hardship

CISG Article 79 provides a bridge between the extremes found in certain civil and common law jurisdictions. The term "hardship" and *force majeure* are not mentioned in the CISG. However, while Article 79 does not explicitly recognize hardship, a compelling case can be made for the proposition that Article 79 does, indeed, cover cases of hardship. The basis for a hardship defence exists even though Article 79 relieves a party from paying damages *only* if the breach of contract was due to an impediment beyond its control. During the CISG negotiations in Vienna, the idea that Article 79 would cover cases of changed circumstances, i.e. hardship, thus recognizing the principle of *rebus sic stantibus*, was a highly contentious issue. A proposal made by the Norwegian delegation sought to release a party from its obligation if, after the temporary impediment had passed, there had been a radical change of circumstances.[286] The issue was

[283] Schwenzer, *supra* note 55 at 711.

[284] See UCC s. 2-615, *supra* note 192.

[285] American Law Institute, *Restatement of the Law Second, Contracts, Vol. 2* (St. Paul, MN: American Law Institute Publishers, 1981) at s. 261. Under the heading "Discharge by Supervening Impracticability" s. 261 states: "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 circumstances indicate the contrary".

[286] United Nations, *United Nations Conference on Contracts for the International Sales of Goods, Vienna, 10 March-11 April 1980, Official Records*, UN Doc. A/CONF.97/19 (New York: UN, 1991) at 381-382. The Norwegian delegation proposed that the draft of the Convention should be revised to allow a party that fails to perform a

debated, and it was noted by both the Swedish and French delegates that the Norwegian proposal "was something very different from *force majeure* and much closer to the *theorie de l'imprevision* in French law or the doctrine of frustration in Anglo-Saxon law".[287] There was only limited support for the idea that hardship be explicitly recognized in Article 79, thus, the Norwegian proposal was rejected.

However, the concept of hardship has been acknowledged as falling under Article 79 by many courts, tribunals, and scholars.[288] There can be no gap in the CISG regarding a party's invocation of economic impossibility and the adaptation of the contract to changed circumstances and hardship. This outcome is due to the quest for uniformity of international sales law, i.e. the CISG, across national borders. To hold that hardship is not covered under Article 79 would be to allow courts and tribunals to invoke national concepts, such as *imprevision*, *wegfall der geschaftsgrundlage*, frustration, *rebus sic stantibus*, etc., resulting diverging interpretations of the CISG. Such a result would undermine the purposes of the CISG to create a uniform sales law that is able to transcend national borders.

A recent statutory acknowledgement of hardship can be found in Germany. The *Statute on the Modernisation of the Law of Obligations* in 2001 finally codified the right to have a contract adapted to a fundamental change in circumstances (i.e. *rebus sic stantibus*) in section 313 of the BGB.[289] This section of the BGB is all-encompassing, and it covers not only cases of hardship, where an unforeseen change in circumstances has made contractual performance excessively more onerous for a party, as well as traditional *force majeure*-type cases of impossibility. In this respect BGB section 313 is extremely comprehensive in scope, and is, arguably, analogous to CISG Article 79 in that it embraces a wide range of events that amount to a fundamental alteration of the equilibrium of a contract.

Although *force majeure* is dealt with under Articles 1147 and 1148 of the French Civil Code, and *imprevision* is accepted only in administrative contracts with the state—which is effectively a rejection of *imprevision* in the private law of France—there is no other legal principle in that country that could be deemed a "hardship" provision. Conceivably, under Article 1137, non-

permanent exemption to the extent that, after the impediment is removed, the circumstances are so radically changed that it would be manifestly unreasonable to hold that party liable.

[287] *Ibid.* at 381. Quote is from the French delegate, Mr. Plantard.

[288] See CISG-AC Opinion No. 7, *Exemption of Liability for Damages under Article 79 of the CISG*, Rapporteur: Alejandro M. Garro, Columbia University School of Law, New York, N.Y. at para. 3. Adopted by the CISG-Advisory Council, 12 October 2007 [CISG-AC Opinion No. 7]; Georg Gruber and Hans Stoll, "Article 79" in Peter Schlechtriem and Ingeborg Schwenzer, eds., *Commentary on the UN Convention on the International Sale of Goods (CISG)*, 2d ed. (New York: Oxford University Press, 2005) at 810-811 [Schlechtriem &Schwenzer]; Niklas Lindstrom, "Changed Circumstances and Hardship in the International Sale of Goods" (2006) 1 Nordic J. Com. L. 1 at 23-24 online: <http://www.njcl.utu.fi/1_2006/commentary1.pdf>; Brunner, *supra* note 75 at 218.

[289] Schwenzer, *supra* note 55 at 711.

performance might be excused if there was a *cause estrange*, or an utter accident (*cas fortuity*) under Article 1721. However, compared to other civil law jurisdictions, French law has not been favourable to the concept of hardship.[290] Where it might be recognized in France, a party would most likely use the defence of *imprevision*, which shares many of the same attributes as hardship.

It is also important to note that while civil law emphasized *rebus sic stantibus*, the common law initially focused on the primacy of *pacta sunt servanda*. In conjunction with the *rebus* principle, civilian legal systems focused on the degree of fault of the non-performing party. Breach of contract, thus, presupposed fault on the non-performing party. Of course there were some exceptions, but civilian legal systems would then attempt to determine the *degree* of fault of the non-performing party. Conceptually, this is at odds with the approach taken by the common law. With its closer affiliation with the *pacta* principle, the common law utilized a stricter and more rigid approach. It treated every contract as a guarantee, as in strict contractual liability. A party that breached its obligation under a contract entitled the aggrieved party to claim damages, regardless of fault on the non-performing party. Typical of this perspective is the comment of Lord Edmund-Davies: it is "axiomatic that, in relation to claims for damages for breach of contract, it is, in general, immaterial why the defendant failed to fulfil his obligations, and certainly no defence to plead that he had done his best".[291] From these two divergent approaches, each legal system developed unique methods to excuse contractual non-performance in cases of supervening events. Although there were some exceptions and concessions in each legal system, each began from a different vantage point. Of utmost significance is how CISG Article 79, as an autonomous principle of an excuse for non-performance, has been able to bridge this common law-civil law divide.

11 CISG Article 79 as an Autonomous Legal Principle

One of the unique aspects of CISG Article 79 is its aspiration to bridge the differences between the civilian principles of hardship and *force majeure* with the common law's limited recognition of impracticability, frustration, and impossibility. Like many provisions within the CISG, Article 79 represented a compromise between civil law and common law conceptions of excuses for non-performance due to an unforeseen supervening event. However, it is more than just a compromise provision; it is a self-contained, independent, concept that must be read and interpreted without reference to domestic legal principles. In this fashion, Article 79 is deemed to be "autonomous".

[290] *Ibid.* at 710.

[291] *Raineri v. Miles*, [1981] 1 A.C. 1050 at 1086 (U.K.).

As noted above, civilian legal systems generally recognized the Roman rule *impossibilium nulla obligation*. Thus, parties were readily excused from the performance of their contractual obligations if such performance had subsequently become impossible. This principle was codified in the laws of most civilian jurisdictions in the form of *force majeure*-type provisions. Indeed, the principle was later extended to include not only cases of physical impossibility, but also those of hardship—cases which fell far short of impossibility. In determining whether a party might be released from its contractual obligations, the extent of that party's "fault" was also, taken into consideration. Strict contractual liability was eschewed by the civilians. In this manner, the civilian jurisdictions emphasized *rebus sic stantibus*, and were more empathetic where circumstances had changed and performance had become more onerous for one of the parties.

By contrast, the common law never adopted the *impossibilium nulla obligation* rule from Roman law. A party could, therefore, be found contractually liable even though a supervening event had occurred without his or her fault, and had made performance physically impossible. In the common law, liability for breach of contract was often strict: a party would be held liable in damages even if, without fault, he or she contracted to do something that had subsequently become impossible to perform. An absence of fault was not enough to discharge a contractual obligation. Contractual promises were seen as guarantees. Such an approach towards commitments accounted for the primacy of *pacta sunt servanda* in the common law. This helps to explain the absence of *force majeure*-type legislation in the early common law. Recall that issues of *force majeure* entered common law courts because the parties had borrowed the concept from civil law, and incorporated *force majeure* clauses into their contracts. Otherwise, *force majeure* was viewed as an interloper in English law.

The CISG can be regarded as one of the most successful international attempts in commercial law to harmonize divergent legal concepts and principles from various national laws and legal systems. The provisions within the CISG seek to eliminate the technical differences and peculiarities that are frequently encountered when comparing national laws and different legal systems. As Ulrich Magnus stated, "[t]he CISG provides a basic set of rules which has resulted from an intensive comparison of legal systems and politically supported compromises between these legal systems".[292] The CISG achieves this by avoiding references to abstract legal concepts or principles that are peculiar to domestic laws. Instead, it uses an autonomous approach by using neutral language in describing specific circumstances, and then elaborating on the content of the rule without reference to national legal concepts. Article 79 is included in Section IV of Part III of the Convention under the heading "Exemptions". The drafters of the CISG chose the broad term "Exemptions", rather than something more specific, in order to avoid any association with a national legal system. Thus, Article 79 does not refer to *force*

[292] Ulrich Magnus, "General Principles of UN-Sales Law" (1997) 3 Int'l Trade & Bus. L. Ann. 33 at s. 6(b).

majeure, impossibility, frustration, hardship, impracticability or other related terms that have their origin in specific legal systems. Rather, in plain, generic language it expresses a situation, as in, for example, Article 79(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 consequences".[293]

As Andersen has noted, Article 79 is an excellent example of "terminological neutrality".[294] The concept of "an impediment" beyond a party's control that would excuse liability for failure to perform "would usually be deemed *force majeure*, *wegfall*, *hardship*, *impossibility*, or *frustration* in traditional legal terminology in numerous legal systems; but the drafters of the CISG sought to avoid such familiar terms, in the hope that Article 79 would establish its own autonomous definition of impediments beyond a party's control".[295]

One salient feature of CISG Article 79 is that the concept of an excuse for non-performance is unitary in scope.[296] It is unitary in that Article 79 encompasses a breach of any obligation under the contract. More importantly, it unifies the range of concepts that would be considered as legal excuses to non-performance. Specifically, the phrase "failure to perform any of his obligations [...] due to an impediment beyond his control" is extremely broad in scope, and it covers a litany of related principles that are found in a variety of national laws and legal systems. The non-performance referred to under Article 79 covers *any* failure to perform, for *any* cause whatsoever, including, for example, delay, the obligation to pay money, or the delivery of non-conforming or defective goods.[297] The scope of Article 79 thus includes not only typical *force majeure*-type events, or impossibility, but also related, narrower legal principles that are recognized in specific jurisdictions, such as frustration, hardship, *imprevision*, *wegfall der geschaftsgrundlage*, and impracticability, to name a few. In other words, conceptually, the impediments leading to a legal excuse for non-performance embrace a wide range of possibilities. The excuses available under Article 79 may be applicable to all types of non-performance. The range can be thought of as a spectrum of unforeseen supervening events,

[293] CISG Article 79(1).

[294] Camilla Baasch Andersen, *Uniform Application of the International Sales Law. Understanding Uniformity, the Global Jurisconsultorium and Examination and Notification Provisions* (The Netherlands: Kluwer Law International, 2007) at 94.

[295] *Ibid*. Emphasis in the original.

[296] Brunner, *supra* note 75 at 57-61, 75-77.

[297] Sonja A. Kruisinga, *(Non-)conformity in the 1980 UN Convention on Contracts for the International Sale of Goods: A Uniform Concept?* (Antwerp: Intersentia, 2004) at 130. See also Brunner, *supra* note 75 at 111. *Cf.* Harry M. Flechtner, "Article 79 of the United Nations Convention on Contracts for the International Sale of Goods (CISG) as Rorschach Test: The Homeward Trend and Exemption for Delivering Non-Conforming Goods" (2007) 19 Pace Int'l L. Rev. 29.

covering the most extreme cases at one end, such as physical impossibility because of the destruction of the subject-matter, to less-severe events, such as an unforeseen rise in prices, leading to hardship or something onerous to a party, at the opposite end. Article 79 can, thus, be successfully invoked in any case where the non-performance is due to a partial, permanent, or temporary impediment that occurred after contract formation.

CISG Article 79 is also unitary in scope in that it reconciles the differing civil law and common law positions regarding fault. In many civil law jurisdictions, the principle of a breach of contract presupposes fault on the part of the non-performing party.[298] This approach is due to the Roman law influence, where an obligor was absolved of liability if the obstacle to performance occurred without his/her fault.[299] The existence of various grades of culpa also accounts for the attempts in civil law to discern the subjective requirements for breach of contract, and to analyze, refine, and categorize the various degrees of fault.[300] For example, Friedrich Mommsen, writing in the nineteenth century, considered the concept of impossibility of performance within the context of breach of contract.[301] He applied and categorized impossibility into a wide-range of situations, such as initial and supervening, natural and legal, absolute and relative, objective and subjective, permanent and temporary, complete and partial, and apparent and "real" impossibility. The emphasis on *rebus sic stantibus* in civil law, with its allowance for changed circumstances, also reinforced this approach.[302]

This is conceptually at odds with the traditional common law principle of strict liability for breach of contract. In the English common law, a party's obligation and liability to perform did not depend on fault. In accordance with *pacta sunt servanda*, all contractual promises were thought of as guarantees. Exemptions for liability had to be incorporated into the contract, otherwise a party could be held liable even when a supervening event had made performance impossible. Over time, the common law softened its rigid approach towards the *pacta* principle, and recognized the doctrine of frustration in the case of *Taylor* in 1863.[303] Further developments in the common law occurred to mitigate the harsh consequences of the law's recognition of absolute contracts and insistence on literal performance. Nevertheless, these advancements failed to bridge fully the gap between the civil and common laws' divergent approaches to excuses for non-performance.

[298] Brunner, *supra* note 75 at 65-68.

[299] Zimmermann, *supra* note 229 at 808.

[300] *Ibid.*

[301] Friedrich Mommsen's publication was entitled *Die Unmoglichkeit der Leistung in ihrem Einfluss auf obligatorische Verhaltnisse* (1853). See Zimmermann, *ibid.* at 809-810.

[302] *Ibid.*

[303] *Supra* note 98.

As noted above, in Article 79's attempt to bridge the civil-common law divide it provides a principle of non-performance that fuses together the civil and common laws' distinctive approaches to this legal rule. It relies neither on the civil law's concept of presumed fault, nor on the common law's concept of strict liability.[304] However, it does not abandon the concept of fault altogether. Indeed, "fault" is still relevant, but it is not a question of law; it has been relegated to an interpretation of the facts. Utilizing generic language, Article 79 thus uses the objective test of an "impediment beyond the control" of a party. By doing so, it is implicit that such non-performance does not require fault on the part of the party in breach, nor does there need to be an absence of fault. In other words, an absence of fault is not a relevant consideration for an invocation of Article 79, but the existence of fault leading to the impediment would exclude an application of Article 79. With fault, the impediment would not be beyond the control of the non-performing party, or the impediment would have been reasonably foreseeable or avoidable.

The legislative history of the CISG further supports the view that Article 79 was not designed to rely on presumed fault as found in the civil law, nor on the common law's principle of strict liability. Instead, Article 79 was designed as a compromise to bridge these two legal conceptions—and in doing so it has become an autonomous provision. In an early draft of this article from 1976, it provided that a party that failed to perform its obligations would not be liable in damages if the failure was due to an impediment that occurred without fault.[305] In this early draft, therefore, fault was presumed, as in the civil law. The following year, in revising the grounds for exemption, this provision was changed.[306] The requirement, that the party be without fault to be held not liable in damages, was dropped. The "fault" or "no-fault" requirement was replaced by a new, more objective test, as incorporated in Article 79: an "impediment beyond the control" of the party.[307]

In this manner, CISG Article 79 has connected the two conceptual approaches to fault as found in the civil and common law. The focus is not on "fault" or "no-fault", but is shifted to something more neutral and objective: the conception of "impediment" and the equally official French *empechement*. While the difference between "fault" or "no-fault" and an exemption from non-performance for an "impediment beyond the control" of a party may appear to be slight, this unitary formulation of an important legal concept is of utmost significance. As Andersen has commented, the attempt "to separate the language of the CISG from all other existing terminology demonstrates a good guideline for the uniformity of the CISG, as intended by the drafters: namely the quest for the development of autonomous terms–the

[304] Brunner, *supra* note 75 at 69.

[305] The counterpart to CISG Article 79 was Article 50 in the 1976 Geneva Draft. See Brunner, *ibid*. at 69.

[306] The revised article was Article 51 from the Vienna Draft, 1977. See Brunner, *ibid*. at 69-70.

[307] CISG Article 79(1). See also Brunner, *ibid*.

drafters aimed for a uniform language [...] to be understood universally the same, with no taint from domestic law".[308]

Even if the lofty goal of uniform and autonomous terminology is realized, it is necessary to look at whether there is uniformity in the application of the CISG among national courts and arbitral tribunals. This requires, for example, that Article 79 be applied in similar ways across various jurisdictions. As Hans Stoll and Georg Gruber have stated,

> Article 79 is the result of a difficult compromise between the advocates of an absolute guarantee [i.e. *pacta sunt servanda*] that the contract will be performed, in accordance with the Anglo-American model, and the proponents of the principle of fault, characteristic for most of the continental European legal systems. The compromise must not be weakened by recourse to principles of liability under national law when interpreting Article 79; the provision's independent character must be observed.[309]

John O. Honnold has similarly admonished courts, tribunals, and legal practitioners to "purge [their] minds of presuppositions derived from domestic traditions and, with innocent eyes, read the language of Article 79 in the light of the practices and needs of international trade."[310] In other words, in the developing body of international cases, there should be no evidence of interpretive flexibility or divergence in its adaptation to the various national legal systems that have considered Article 79.

With the use of standardized contract clauses, self-governing contracts, trade term usages, recourse to commercial arbitration, and use of autonomous principles and rules, as in CISG Article 79, international merchants have introduced their own self-governing regulatory regime into the global legal order. This operates as an addendum of national law. Indeed, as this paper has argued, this is representative of the new law merchant or *lex mercatoria*, which is simply de-nationalized law, or non-state law.[311] The past dissatisfaction with, and inadequacy of, national legal regimes and related doctrines and rules, has led to a renaissance of a new *lex mercatoria*. In the process, the modern effort to create a uniform transnational commercial law has been re-created. And Article 79, the roots of which can be traced back to ancient times, is a living example of this new legal order.

[308] Andersen, *supra* note 294 at 38-39.

[309] Stoll and Gruber, "Article 79" in Schlechtriem & Schwenzer, *supra* note 288 at 807.

[310] John O. Honnold, *Uniform Law for International Sales under the 1980 United Nations Convention*, 4th ed., Harry Flechtner, ed., (The Netherlands: Kluwer Law International, 2009) at 615 [Honnold & Flechtner].

[311] See e.g. Barton S. Selden, "*Lex Mercatoria* in European and U.S. Trade Practice: Time to Take a Closer Look" (1995) 2 Ann. Surv. Int'l & Comp. L. 111.