FRUSTRATION OF CONTRACT: COMPARATIVE LAW ASPECTS OF REMEDIES IN CASES OF SUPERVENING ILLEGALITY

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Government intervention in private commercial agreements has become a familiar post-war economic phenomenon. One prolific source of supervening events which disrupts contractual relationships during the course of performance has been the embargo on shipments to proscribed countries, coupled with imposition of export licensing requirements. Recently there have been brought into sharper focus certain interesting juridical by-products, stemming from the effects of such subsequent illegality, upon the rights and obligations of parties to sales contracts who claim discharge because they have been prevented from achieving the purposes for which each entered into the agreement.

In such situations, it matters little to what rubric the facts are assigned or which brocard is invoked—whether the applicable doctrine is claimed to be “discharge by frustration of purpose,” or whether appeal is made to “impossibility of performance by reason of supervening illegality,” or “failure of consideration.” Taxonomic efforts

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1 “Whether you call it impossibility of performance or frustration, the result is the same. In either event, the court will imply a condition excusing both parties from performance and the contract may be wholly dissolved or operation under the contract suspended, depending on the facts of the particular case....” MINTON, C.J., in Patch v. Solar Corp. 149 F. 2d 558, 559 (7th Cir. 1945); cert. denied, 326 U. S. 741, 66 S. Ct. 53; 90 L. Ed. 442, citing RESTATEMENT, CONTRACTS, § 288, “Frustration of the object or effect of the contract,” which reads:

“Where the assumed possibility of a desired object or effect to be attained by either party to a contract forms the basis on which both parties enter into it, and this object or effect is or surely will be frustrated, a promisor who is without fault in causing the frustration and who is harmed thereby, is discharged from the duty of performing his promise unless a contrary intention appears.”

See, also, Jackson & Co. v. Royal Norwegian Government, 177 F. 2d 694 (2d Cir. 1949); cert. denied, 339 U. S. 914 (1950), in which Judge CLARK stated: “Here the parties, the Court below and the State Court have framed the issue in terms of ‘frustration’ of a contract, but that, as Professor Corbin has said, may be ‘only perpetuating the use of a bad term to state the result!’ ... The performance itself has become impossible.”

Semantic wrangling over the precise substantive content of “frustration” once more confirms Kantorowicz’s gibe that “Rechtswissenschaft ist Wortwissenschaft.” Pound, Some Thoughts About Comparative Law, 1 Festschrift für Ernst Rabl 7 (Germany 1954).

McNAIR, LEGAL EFFECTS OF WAR, 151 (3d ed. Cambridge 1948) states: “... There can be no doubt that the balance of judicial authority is in favor of the implied terms
are of little use to courts confronted by the concrete task of equitably readjusting the relations of the parties where they have failed to provide their own method of rearranging their obligations upon the happening of an unforeseen event.

It is beyond the scope of this sketch to make any comparison between the theoretical foundations and present status of the doctrines of frustration and impossibility of performance in Anglo-American law and their juristic counterparts or analogues in civil law countries. These observations will be confined to a review of the remedial modalities of this problem found at present in some representative legal systems.\(^2\)

as the basis of the doctrine of frustration and history appears to be on that side. If you regard the doctrine as a development of the rule as to supervening impossibility . . . or if you prefer to trace a different and more distinctly mercantile pedigree of the doctrine, we suggest that you will be led to the same conclusion . . . .

In Swift Canadian Co. v. Banet, 224 F. 2d 36 (2d Cir. 1955), there was no mention of frustration by the Court or parties. A Canadian seller of pelts to an American buyer was prevented from delivering the balance of a shipment by reason of a regulation of the United States Bureau of Animal Industry stiffening import requirements. The contract, however, called for “F. O. B. Toronto” to Philadelphia via railroad, and stated that risk of loss and title passed to buyer when the product was loaded at seller’s plant. The buyer pleaded “excuse from performance” because of the governmental regulation. The Court construed “F. O. B. Toronto” as merely a shipping instruction which was complied with by seller when he notified buyer of readiness to place balance of pelts on car at Toronto; that the “rest of the world was free to the buyer as destination for the shipment,” despite the inability to ship into the United States; that the seller, having performed or indicated his readiness to perform by placing the goods on a car for shipment, was entitled to consider the contract breached upon refusal of buyer to accept delivery, and that the seller properly disposed of the goods to another buyer and could claim the difference in price as damages.

6 Corbin, Contracts, 254-256 (St. Paul 1950) warns against confusing, equating, or identifying “impossibility of performance of a promise” with “frustration of the purposes for which a contract was made,” a tendency which he claims is characteristic of English judges. Some American courts also continue to assert that the “essential element in every case involving frustration is impossibility of performance.” 119 Fifth Avenue Inc. v. Taiyo Trading Co., 73 N. Y. S. 2d 774 (1st Dep’t 1947), aff’d, 275 App. Div. 695, 87 N. Y. S. 2d 430 (1st Dep’t 1949). Others say the doctrine is akin to “impossibility of performance, though frustration is not a form of impossibility.” Lloyd v. Murphy, 25 Cal. 2d 48, 153 P. 2d 47 (1944).

Professor Patterson has suggested that the term “constructive condition” replace “implied condition,” since the latter has been used to designate the proposition that a promisor is excused by “impossibility of performance” as well as by “untoward frustration of his purpose.” “By assigning to both frustration of performance and frustration of purpose the logical form ‘constructive condition of frustration,’ we can indicate the common criteria of the facts which give rise to each.” Patterson, Constructive Conditions in Contracts, 42 Col. L. Rev. 903, 954 (1942).

2 The parent monographs on this subject—the series of sketches on frustration and its treatment in foreign legal systems, have been heavily relied upon for the framework of this article. See 28, 29 J. Comp. Leg. & Int’l. L. (3d Ser.) 1946, 1947. See, also, Gottschalk, Impossibility of Performance in Contract (London 1938), which con-
How and under what circumstances do courts in both common law and code jurisdictions, when handling cases of sales transactions, which have become aborted by supervening government decree, allocate the risks and split the losses among the parties? What is the nature and scope of judicial revision in applying remedies in cases where the transaction turned sour?

I. ANGLO-AMERICAN REMEDIES IN FRUSTRATED INTERNATIONAL SALES AGREEMENTS

Serving as a useful point of departure is the case of Amtorg Trading Corp. v. Miehle Printing Press and Mfg. Co.\(^3\)

This decision represents an interesting development of the remedy of restitution of installment payments in the context of a partly performed international sales transaction.

The Soviet trading agency in New York contracted for thirty printing presses for export to and use in Russia. Ten presses were accepted and paid for. A pre-payment of 25\% was made on the purchase price of the remaining twenty. Prior to delivery of the twenty presses, federal regulations were promulgated under which Amtorg was denied an export license.

Amtorg then rejected tender of the presses from the manufacturer. The manufacturer subsequently sold them to the United States Government at a price considerably above the contract price to Amtorg. The Court of Appeals held that Amtorg was a defaulting purchaser and was entitled under the New York Statute\(^4\) to restitution of its payments in excess of damage caused to the seller by the breach,


\(^4\) N. Y. Personal Property Law § 145(a).
but rejected its claim to recovery of the profits realized by the seller from the resale based on “frustration of the contract.”

This result exemplifies a tendency of some American Courts to mitigate the harshness of the general rule which refuses any relief to a defaulting vendee of personal property, by allowing recovery of his down payment (where the breach is unintended or insignificant) based on some equitable ground such as unjust enrichment, mutual recission, divisibility of contract, etc. See Note, Broudy, Sales—Right of Vendee to Recover Down Payment After Defaulting on Contract to Purchase Goods, 11 Wash. & Lee L. Rev. 269, 277 (1954). See, also, Note, St. Antoine, Restitution—Unjust Enrichment—Right of Defaulting Purchaser to Recover Part Payment, 52 Mich. L. Rev. 928 (1954).

For a discussion of the break the Court in the Amtorg case made from Erie v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1937), in refusing to follow New York State case law, which prior to the amendment of the N. Y. Personal Property Law, § 145(a), permitting defaulting buyers to obtain restitution of pre-payments in excess of the seller's damages, did not sanction such restitution, see Note, Perillo, Federal Practice—Diversity of Citizenship: Federal Court's Power to Disregard Old Decisions of Highest State Court, 39 Cornell L. Q. 736 (1954). It is the court's bold assertion that it would follow the amended Statute (and not the previous New York case law) as declaratory of the applicable New York law, which constitutes the major impact of the case. Though Amtorg was awarded its down payments in excess of damages to the seller, Clark, C. J., at 105, rejected its claim to recovery based on “frustration of contract,” since New York, as well as Federal case law, are identical on the point, viz: The risk of frustration (of his “ultimate” purpose) is in the circumstances of the buyer. And failure to obtain an export permit does not make performance impossible. 6 Corbin, Contracts, 354, 356 (St. Paul 1950). See, Gillespie v. Ormsby, 126 Cal. App. 2d, 272 P. 2d 949 (1954); Baetjer v. New England Alcohol Co., 319 Mass. 592, 66 N. E. 2d 798 (1946); Cooper v. Mundial Trading Co., 105 Misc. 378, 172 N. Y. S. 378 (1918). “Frustration” was rejected as a defense in the absence of an express provision that performance is conditional on obtaining an export permit and part payment was not recovered. Bardons & Oliver, Inc. v. Amtorg Trading Corp., 123 N. Y. S. 2d 633, aff'd, 301 N. Y. 622, 93 N. E. 915 (1948).

In McMaster & Co. v. McEwen & Co., [1921] Session Cases (H. L.) 24; 58 Scot. L. R. 70, after the making of a contract for the sale of jute f. o. b. Dundee, a valid order was issued by the Army Council prohibiting the export of jute except on permit, held, that the purchaser's failure to obtain a permit did not produce a frustration of contract; his right to export the goods derived from his ownership of the goods not from the contract. There would be no frustration unless it was shown that continued liberty to export was an implied term of the contract. In In re Arbitration between Anglo-Russian Merchant Traders and John Batt & Co., [1917] 2 K. B. 679, it was held that if a Government prohibition takes the form of making some act illegal unless a license to do it is obtained, it is the duty of the party whose act is thus made illegal without a license to bestir himself and apply for a license promptly; if he fails to do so, he cannot plead that the contract has been frustrated. See, also, J. W. Taylor & Co. v. Landover & Co., [1940] 4 All E. R. 335.

D. 86, it was held that a contract, valid prior to embargo, may not be terminated where the buyer can put goods into a warehouse in the country embargoing them.

An interesting problem arises in connection with the element of time as affecting the defense of frustration. In Amtorg, supra, there was no express provision in the contract making acceptance of delivery conditional on issuance to it by the United States Government of an export permit. Would Amtorg have been entitled to wait until the end of the "cold war," i.e., until the United States trading embargo on shipments to the U. S. S. R. had ceased and export permits once more issued?

In Straus v. Kazemakos, 100 Conn. 581, 124 A. 234 (1924), noted in 34 Yale L. J. 91 (1924), the parties agreed that performance should be postponed until the lifting of an embargo, but the buyer was held after eight months, the risk of depreciation of the subject matter (Russian rubles) being placed on him. Where sellers agree to supply buyers for export and an embargo supervenes, the contract may not be repudiated by the sellers in a suit for the value of the goods sold to buyers, when it appears that the embargo was lifted several weeks after its promulgation; sellers must wait a "reasonable" time before repudiation. Miller & Co. v. Taylor & Co., [1916] 4 K. B. D. 402.

For a discussion of cases where time is the central issue in applying the doctrine of frustration, see Bateson, Time as an Element of Frustration, The Business L. Rev. 173, 177 (July 1954).

Nor may a buyer in England cancel a contract for sale of goods made subject to United States export license, where seller, an American company, was unable to get a license, but before the time of the first delivery under the installment arrangement, the restriction was removed. The buyer was under a duty to wait a "reasonable" time to see whether the seller could in fact get a license before repudiating the contract. The plea that the contract was "frustrated" because the seller could not immediately get his license was rejected. The goods sold were 600 lbs. of American saccharin. Mr. Justice Averx, at page 769, in stating this fact, observed: "... One would have thought that was enough to sweeten the whole world. ..." Baldwin & Co. v. Turner & Co., [1920] K. B. D. 36 T. L. R. 769.

Where sellers are obligated to obtain export licenses, and fail, their defense of frustration may likewise be rejected.

Despite a clause cancelling any unfulfilled part of the contract if export is prohibited, it was held that the seller is liable in damages to the buyer where the contract, made Sept. 20, 1951, called for shipment from an Italian port during October and November, 1951, and on October 20, 1951 (effective November 1, 1951), an Italian regulation called for export licenses. At the date of regulation, none of the goods had been exported. Seller failed to get a license and the court found that had the prohibition of export been instantaneous on October 20, the defense of frustration would have been effective. But, since the seller had ten days (October 20 to November 1) within which to exercise diligence in shipping and not done so, it could not rely on the cancellation clause and was not excused from performing. Smith & Co., Ltd. v. Lindsay, Ltd., [1953] 2 All E. R. 1064.

In Beves & Co. v. Farkas, 1 Lloyd's List L. R. 103 (Q. B. D. 1953), an English buyer purchased Austrian timber for delivery January to March 1951, from an Austrian seller, subject to an Austrian "compensation license" (enabling the Austrian exporter to sell at a "concessionary" price). These licenses were discontinued in January, 1951 and the seller informed the buyer of his inability to deliver, that delivery was made illegal and therefore it was impossible to perform the contract which seller claimed was frustrated. It developed that the seller could have, but did not, apply for an ordinary export license which would have permitted him to export the goods at a higher price. Taylor & Co. v. Landover & Co., [1940] 68 Lloyd's List L. R. 28. Further, that he had available outside Austria, other timber which would have been a good delivery under the contract; that instead of allocating such timber to the buyers, the seller sold it to others at the then current higher prices. The Court rejected the defense of "frustration" and ruled that the withdrawal of "compensation" licenses by the Austrian government did amount to prohibition of export; that non-delivery was
Inability of a buyer, under an international sales agreement for delivery within the United States, to obtain an export license because of a subsequent government embargo against his country, imposed after part performance of the contract, undoubtedly frustrates the buyer's "ultimate" purpose. Amarg's "ultimate" purpose was export to the U.S.S.R. But as far as it concerned the seller's liability, Amorg's "contractual" purpose was to buy and accept delivery in the United States. In the absence of an express provision in the contract that liability was conditional upon obtaining an export license, there was no basis for Amorg to assert "frustration of the purpose of the contract" to justify its claim of discharge. The "ultimate" purpose was frustrated, but not the "contractual" purpose. There was neither "impossibility of performance" nor "frustration of purpose of contract." The seller had delivered in part, prior to the government embargo, and was prepared to continue delivery in the United States. If the embargo had prohibited delivery by the seller to the buyer within the United States (thus nullifying the "contractual" purpose of Amorg) then its claim of discharge by frustration, produced by a supervening unforeseeable event, might conceivably have been held valid.

Such supervening events, when caused without fault of either party, frequently cause frustration of "contractual" purposes. Indeed, both may suffer losses or sacrifice anticipated profits. Who then must bear the loss? If a division of loss must be made, in what proportion?

not due to force majeure as seller could have obtained timber and delivered it to the buyers. The seller was held in breach of his contract: Discontinuance by the Austrian government of "compensation" licenses did not render performance impossible, but merely involved the seller in a loss on the deal, due to the rise in the market price of timber between the date when the contract was made and the date when it had to be performed. Said Mr. Justice Fielder, at page 113-114: "... It would be a strange thing if a seller could insist on the contract if the price fell, and could escape his own obligations if it rose. It would do away with the whole point of forward contracts altogether. ..." Further, that a seller can invoke frustration only where the parties clearly contemplated specific, ascertained goods in the country of origin as the goods to be exported. Where the timber, as here, was unascertained in Austria, and available outside Austria, the defense of frustration fails. Blackburn Bobbin Co., Ltd. v. T. W. Allen & Son, Ltd., [1918] 2 K. B. 467.

And where sellers of goods from Brazil, "subject to Brazilian export license," were notified by the Bank of Brazil, shortly after the date of the contract, that they could not obtain a license to ship goods to buyers, except at a higher price than contracted for, which would have compelled the sellers to pay a higher price to their Brazilian suppliers, there was no "prohibition of export" or embargo justifying repudiation of the contract or excusing performance. Brauer & Co., Ltd. v. James Clark, Ltd., [1952] 2 Lloyd's List L. R. 147.
What happens to part payments or payments on account of future deliveries?

Today in England, three centuries after the foundation case of *Paradine v. Jane*, the doctrine of frustration is more than ever the subject of heated controversy which rages over its theoretical and substantive basis. However, the Law Reform (Frustrated Contracts) Act, 1943, is not affected by this cleavage in English juristic thought.

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7 Law Reform Act, 6 & 7 Geo. VI, c. 40 (1943).
8 Gow, *Some Observations on Frustration*, 3 INT'L & COMP. L. Q. 291-318, Pt. II (1954), attacks the prevailing tendency in England expressed by the House of Lords, in *British Movietone News, Ltd. v. London and District Cinemas, Ltd.*, [1952] A. C. 166, to cling to the traditional theory of the "implied term" of the contract when applying the doctrine of frustration, to persist in claiming that Courts "have no absolving or qualifying power, cannot make contracts for the parties," and can merely "interpret" a contract when there is disagreement as to its effect.

-DENNING, L. J., in the Court of Appeals, [1951] 1 K. B. 190, in the Movietone case (which involved the effect of British war-time orders restricting the consumption of raw film stock upon a contract between an exhibitor and a supplier of news films) had bluntly rejected the traditional theory of the "implied term" and in his exposition of the basis of the frustration doctrine, followed Lord Wright's position that "the Court really exercises a qualifying power—a power to qualify the absolute or literal or wide terms of the contract—in order to do what is just and reasonable in the new situation"; that "the Court in the absence of express intention of the parties determines what is just." *Lord Wright, Local Essays and Addresses*, 258 (Cambridge 1939). In Constantine (Joseph) Steamship Line, Ltd. *v. Imperial Smelting Corp. Ltd.*, [1942] A. C. 154; *Denny Mott v. Dickson*, [1945] A. C. 265; Cricklewood Property and Investment Trust, Ltd. *v. Leightons Investment Trust, Ltd.*, [1945] A. C. 221, Lord Wright had "exposed the real basis of frustration as having nothing to do with implied condition, although this is the most frequent explanation given by the judges . . . frustration is a question of law for the judge upon the facts as found." Webber, *Frustration of Contract*, CURRENT LEG. PROB. 283 (1951), written, Gow points out, apparently before the House of Lords decision.

Gow concludes, after tracing the survival of the "implied term" approach to the persistence in British judicial thought-processes, of the obsolete "freedom of contract" notion, that "the theory of the 'implied term' is not adequate to the tasks which the ever-expanding problems of supervening impossibility thrust upon it . . ."; that " . . . the Law Reform (Frustrated Contracts) Act of 1943 resulted from a break-down of the theory of the implied term"; that "the Act relies for its administration on a very extensive third-party discretion, whether judicial or an arbitrator" and that the Act indeed "repudiates the theory of the implied term" (p. 315-316). For an earlier attack on the House of Lord's decision in the Movietone case, see, Grunfeld, *Traditionalism Ascendant*, 15 MOD. L. REV. 85-7 (Jan. 1952).

McNair, op. cit. supra note 2 at 143, lists five theories prevalent in England relating to frustration:

(a) the "implied term or classic approach;"
(b) disappearance of the basis of the contract—"non haec in foedera venit."
(c) Lord Wright's theory viz:—"That the parties not having dealt with the matter, the Courts must determine what is just, must find a reasonable solution for them, a theory which we suggest involves the importation of another implied term."

(Note: This might be described as the theory of the "implied delegation by the parties to the judge to exercise his discretion"—the parties, by failing to provide for the consequences of an unforeseen contingency, must be presumed to have given the Court power to devise the just remedy under the circumstances. Lord Wright
The function of that statute is "adjectival rather than substantive.

would strenuously deny that his approach, as described by McNair, merely substituted one "implied term" for another! The Court, says Lord Wright, imposes its own just and reasonable solution, it decides what is the true position of the parties, and its decision is as Lord Sumner said in Hirji Mulji v. Cheong Yue S. S. Co., Ltd., [1926] A. C. 497, at 510, "irrespective of the individuals concerned, their temperaments and failings, their interest and circumstances." Wright, LEGAL ESSAYS AND ADDRESSES, supra, at 258; and Denny Mott v. Dickson, supra, at 274-6).

(d) The theory of common mistake.

(e) The theory of supervening impossibility.

The "implied term" approach has evidently also been accepted by the Scandinavian legal systems. Zepos, Frustration of Contract in the Comparative Law and in the New Greek Civil Code of 1946, Art. 388, 11 MOD. L. REV. 36-46 (1948).

Corbin is definitely ranged on the "anti-implied term" side, and severely criticizes the reasoning of Viscount Simon in the British Movietone case, at 186, that in frustration cases, "... the question is really at bottom a question of construction." In 6 CORBIN, CONTRACTS, 23, 27, §§ 1331, 1353 (Supp., St. Paul 1954), it is stated: "the noble Lord fails in his attempt to show that the whole doctrine of frustration is solely a matter of interpretation. ... The proof, however, depends not upon 'words', but upon a clear analysis of the facts of the decided cases. The instant case before the House of Lords was not a case of 'impossibility' in any sense; nor does it appear that anyone's purposes were 'frustrated.' It is not a good case on which to base a full analysis of the subject."

9 McNair, The Law Reform (Frustrated Contracts) Act, 1943, 60 L. Q. REV. 160-174 (1944). At page 165, McNair states: "... At the outset let us note that the statute does not give the Court carte blanche to make whatever adjustment seems to be just and equitable, that is, to act ex aequo et bono; it states certain principles and imposes certain limits." Chandler v. Webster, [1904] 1 K. B. 493, one of the two principal "coronation cases," the other being Krell v. Henry, [1903] 2 K. B. 740 (C. A.), which previously determined the contrary, held that the hirer of space from which to view the coronation procession was required to pay the price despite the postponement of the procession following the King's illness. The House of Lords, in 1942, overruled Chandler v. Webster by their decision in Fibrosa Spolka Akcyjna v. Fairbairn, etc., [1943] A. C. 32, where a buyer, party to a frustrated contract, was allowed to recover from his seller, a pre-payment on the ground of failure of consideration. McNair, supra, p. 161, 162, further states: "... the justness of the effect of the [Fibrosa] decision was universally admitted, though there were some who questioned the wisdom of overruling a decision of the Court of Appeals which had formed part of our law for more than 40 years, and would have preferred the method of legislation. It was at once recognized that legislation had become necessary in order to permit a wider adjustment of the rights and liabilities of all the parties to a frustrated contract. ... The Law Reform (Frustrated Contracts) Act, 1943, was the result." The Act relates only to cases under English contracts which have become "impossible of performance" or been otherwise frustrated and the parties thereto have for that reason been discharged from the further performance of the contract. Generally, it permits (a) recovery of money paid, even though at the date of frustration, there has been no total failure of consideration; (b) it allows a party who has done something in performance of the contract prior to the frustrating event to claim compensation for any benefit conferred on the other. Certain contracts (charter-parties, insurance, sale of specific goods that have perished) are excluded from the Act. CHESHIRE AND FENTON, LAW OF CONTRACT, 430-432 (2d ed., London 1949). P. B. Mignault, writing in January, 1943, in 21 CAN. B. REV. 32, on The Frustration of Contracts, A Study in Comparative Law, commented on the Fibrosa case: "And the interest of the decision of the House of Lords is enhanced in that it has arrived at a solution which harmonizes with fundamental principles of jurisprudence laid down centuries ago in the Roman forum..." See, also, Falconbridge, Frustrated Contracts: The Need for Law Reform, 23 CAN. B. REV. 43-60 (1945).
It does not define the nature or the scope of frustration but regulates its consequences once it has happened. Though the Act does not define frustration, there is no reason why the law should not deal in the same manner with the consequences of the discharge of all three types of frustration with which it deals, viz: (a) by supervening impossibility (b) by change in vital circumstances (as in the "Coronation" cases) (c) by supervening illegality." Reversing the old rule that the "loss falls where it lies," and embodying the principle of restitution, Sec. 1, subsec. 2 of the Act grants a party the right to "recover all sums paid before the discharge of the contract and for the use of the other party, less any sums for expenses such as the Court determines are properly allowable to him." Subsection 3 embodies the principle of unjust enrichment, and permits a party to recover a "valuable benefit" received from him by the other party whether or not made before performance of the contract.

In the United States, as Professor Anderson has pointed out, the doctrine of frustration has become a juristic orphan. While not flatly rejected it has received only occasional tangential mention by the courts, or else has been studiously ignored in concrete application.10

It is curious that over 70 years before the Frustrated Contract Act, § 56, IX Indian Contract Act (1872) had already provided: "An agreement to do an act impossible in itself is void. A contract to do an act which after the contract is made becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. Where one person has promised to do something which he knew or with reasonable diligence might have known and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise." Khaitan, An Examination of the Indian Law Relating to Impossibility of Performance of Contracts, 6 INDIAN L. REV. 145-188 (1952). The origin of this section is believed to be English and not attributable to indigenous Mohammedan or Hindu laws according to Khaitan. Evidently the section was inserted in the last-minute revision of the draft as indicated by the speech of Sir James Fitz James Stephens, when introducing the bill in council on April 9, 1872. See, POLLOCK AND MULLA'S, COMMENTARY ON THE INDIAN CONTRACT ACT, 306 (7th ed. by Sir M. Gwyer, London 1944); RANKIN, BACKGROUND TO INDIAN LAW, c. VII, § 1 (Cambridge [Eng.], 1946).

In Kesari v. Gov. General in Council, [1949] 1 L. R. 718 (Nagpur Court), the Court stated that "the doctrine of frustration had been traced to a treatise on 'The law of Nature and Nations,' and that it is a principle so inherently just and reasonable as inevitably to find a place in any civilized system of law." See, also, Ram Kishan, Effect of Frustration, 1 VYAVAHAR NIRNAYA 92 (March 1952) (Law Union, Faculty of Law, University of Delhi, India).

10 In Petaccia v. Gallian, 16 N. J. Sup. 427, 84 A. 2d 748 (1951) (a case in which the frustration concept might have been applied), the issue revolved around a purchase of the never-produced "Tucker" car, conditioned on the prior purchase of accessories. The Court reversed a judgment for the plaintiff in the amount of the price of the accessories (which he had in reality paid as a "deposit" on account of the price
In 1922, Conlen hopefully described the doctrine in the United States as "still a growing one and perhaps not yet fully recognized in the courts of first instance in this country."\(^{11}\)

In 1932, Rothschild concluded: "... Quite true, is it therefore that the law of implied condition or of frustration is but in a process of transition. At this moment, for commercial transactions contemplating goods to be created in the future, it is well-nigh a phrase rather than a fact. . . ."\(^{12}\)

Anderson, in 1954,\(^ {13}\) after making an exhaustive review of the

the notion of frustration is the Court's concluding comment at page 750. Though the plaintiff had not asserted restitution on the basis of frustration nor mentioned the latter, but claimed fraud as the ground for demanding return of his deposit, the Court stated: "We repeat that there is no evidence of fraud on the part of the defendants. We have no reason to suppose that they foresaw that the Tucker would never actually be brought into production and put on the market. It may be that the plaintiff will be able to amend his complaint so as to show a cause of action, consonant with the facts. Both parties probably entered into the contract for accessories in implicit confidence that Tuckers would soon be available. If they had not so believed, they would not have made the contract. Counsel for plaintiff may well consider whether the doctrine of frustration is followed in New Jersey and whether it gives his client a cause of action. See, Restatement, Contracts, §§ 288, 468 (1932); Williston, Contracts, § 1954 (New York 1936-1938); and Perlee v. Jeffcott, 89 N. J. L. 34, 97 A. 789 (Sup. Ct. 1916), judgment reversed.

But Dawson, viewing the confusion and lack of unifying principle in the mass of American restitution cases, observes that nevertheless, the courts have "... responded remarkably well. Specific solutions in restitution cases are still on the whole ingenious and sensible. It is only when one tries to string them together, that one becomes confused. . . ." Dawson, Unjust Enrichment 112 (Boston 1951).

Sec. 468 of the Restatement of Contracts 884 (1932), Rights of Restitution, reads:

"(1) Except where a contract clearly provides otherwise, a party thereto who has rendered part performance for which there is no defined return performance fixed by the contract, and who is discharged from the duty of further performance by impossibility of rendering it, can get judgment for the value of the part performance rendered, unless it can be and is returned to him in specie within a reasonable time.

"(2) Except where a contract clearly provides otherwise, a party thereto who has rendered performance for which the other party is excused by impossibility from rendering the agreed exchange, can get judgment for the value of what he has rendered, less the value of what he has received, unless what he has rendered can be and is returned to him in specie within a reasonable time.

"(3) The value of performance within the meaning of Subsections (1, 2) is the benefit derived from the performance in advancing the object of the contract, not exceeding, however, a ratable portion of the contract price."

It should be noted that the Restatement of Restitution (1937) "deals with situations in which one person is accountable to another on the ground that otherwise he would unjustly benefit or the other would unjustly suffer loss. . . . The subject includes the rules usually classified under the heading of quasi-contracts . . ." (General Scope Note, p. 1).\(^ {11}\)

Conlen, The Doctrine of Frustration as Applied to Contracts, 70 U. Pa. L. Rev. 87-95 (1922).

Rothschild, note 2 supra, at 356.

Anderson, Frustration of Contract—A Rejected Doctrine, 3 De Paul L. Rev. 1-22 (1953). "... At the time when the Restatement was being written, the case
American cases stated that: "... acceptance still has not occurred: during the entire 50 years of its history it is believed no American court of last resort has based its decision, in litigation involving a contract, expressly on the doctrine of frustration or on Sec. 288 of the Restatement of Contracts. ..." Like many other concepts, not fully understood, yet emanating some indefinable merit (perhaps because of its British-maritime origins?), which somehow it would be unworthy of the courts wholly to ignore, "frustration" wanders in the outer doctrinal darkness of the American Common law of contracts, in a sort of juridical purgatory, neither wholly dead, nor yet fully alive.

It is submitted that the important question is not, what have been the vicissitudes of "frustration-in-the-abstract", but (to adopt an excellent phrase of Professor Anderson's), how have courts molded remedies when confronted with the great variety of "frustration-in-fact" situations, where the "shattering of hopes and plans by subsequent events" (especially unforeseen government intervention) call for the liquidation on a just and equitable basis of mutual obligations whose performances have been halted in mid-stream? It is difficult to share Professor Anderson's gloom over the failure of the "frustration" concept to "catch on" with American courts. Is it cause for dismay if, by and large, satisfactory results in the "frustration-type" cases are reached without resort to the doctrine as such (as seems to be indicated by his survey)? Do concepts of contract law, especially in the

law did not justify the recognition of the doctrine as a part of the American common law, but those responsible for the Restatement nevertheless included it as Sec. 288. ..."

In his zeal for generalization, the writer evidently had forgotten his citation on page 11, of Osius v. Barton, 109 Fla. 556, 147 So. 862 (1933) as the "... only case in history in which an American court of last resort has rested its decision expressly on the doctrine of frustration or Section 288"—refusal of the Court to enjoin a commercial use of land deeded originally with a restriction to single family dwellings, where the character of the neighborhood had changed. Two random usages of the word "frustrate" are distinguished by Anderson, apart from the doctrine of frustration of contract: (a) Contracts are sometimes spoken of as "frustrated" when what actually has occurred is that performance has become impossible—two mutually opposed concepts; where the defense of frustration is interposed, performance is possible, but the exchange has become undesirable, as in the "Coronation cases." (b) "Frustration of voyage" in admiralty cases which are too remote from the common law doctrine of frustration to be considered as properly a part of its study.

As to England, however, McNair, LEGAL EFFECTS OF WAR, 135 (Cambridge 1948) states that the common law as to supervening difficulty and impossibility (Paradine v. Jane and its descendants) as one great source of the doctrine of frustration, and the commercial doctrine of the "frustration of wartime adventure" merged and coalesced during World War I, when Lord Loreburn in Tamplin S. S. Co. v. Anglo-Mexican Petroleum Products Co., [1916] 2 A. C. 404, asserted that the principles in the latter cases are the same as in others.

14 Anderson, supra, at 2.
severely practical area of performance and discharge call for sanctification per se? It may well be the vague contours of "frustration" (unaided in the United States by a "Frustrated Contracts" statute, or unclarified by Sec. 288 of the Contracts Restatement) which have persuaded American courts to look elsewhere for guidance.

II. CIVIL LAW REMEDIES IN FRUSTRATED INTERNATIONAL SALES AGREEMENTS

There is, of course, wide variance among remedies afforded by various legal systems in cases of sales contracts aborted by supervening illegality. All proceed from a common substantive basis—recognition of the inequity which would result unless restitution or discharge were accorded to a buyer innocent of true default, prohibited from performing or unable to obtain performance because of some legal inhibition upon him or the seller. "So there is now a general uniformity in basic principle between civil law and common law on frustration of contract. The fundamental approach of each has become similar to that of classical Roman law."15 From the comparative law point of

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15 For the Roman law origins of unjust enrichment see: Baxter, Unjust Enrichment in the Canadian Common Law and in Quebec Law: Frustration of Contract, 32 CAN. B. REV. 855-857 (1954). See, also, BUCKLAND AND McNAB, ROMAN LAW AND COMMON LAW, 240 (2d ed. by Lawson, Cambridge [Eng.] 1952). At page 873, Baxter states: "... But with the two systems side by side in Canada (i.e., common law provinces and code in Quebec) and a single supreme court, there seems to be a special opportunity to obtain the best from each in the development of a branch of law related to unjust enrichment. ... It would be no sign of weakness for one system to imitate or borrow from the other. ..." This calls to mind a fascinating talk by Judge Jerome Frank of the United States Court of Appeals, before a joint meeting of the American Foreign Law Association and the Association of the Bar of the City of New York, at the House of the Association, on February 17, 1955, on the influence of the civil law upon the common law, in which he concluded that while juridical symbiosis of the various legal systems may be instructive and useful to both, juridical "miscegenation" or absorption of civil law concepts is undesirable because of their "indigestibility" in common-law jurisdictions. This would not seem to have been the case in Puerto Rico, Philippines, Louisiana, or Canada. In these areas, both systems have for considerable periods influenced and cross-fertilized each other without producing "discomfort" or "cross-sterilization." It seems a truism that the major western legal systems of today are eclectic products. A prime objective of comparative law should be not merely a sterile academic pursuit and depiction of parallelisms or diversities among the systems, but a conscious effort, in the interest of unification to urge adoption or adaptation of whatever desirable non-indigenous concepts or procedures have been under study, keeping in mind the limitations of the legal and social milieu proposed as-host. See, GUTTERIDGE, COMPARATIVE LAW, 9 (2d ed., Brooklyn 1949). On the dynamic process of amalgamation of civil law and common-law elements in the Philippines and Louisiana, see, SCHLESINGER, COMPARATIVE LAW CASES AND MATERIALS, 152-168 (Cambridge 1950). See, also, Ramos, Interaction of Civil Law and Anglo-American Law in the Legal Method in Puerto Rico, 23 TULANE L. REV. 1 (1948).
view, we find divergences only as to the extent of judicial discretion in revision of the contract and fixing an appropriate remedy. These range from the common law doctrine that the judge cannot "remake" a contract or "absolve" the parties (although determining damages for any breach), to the sweeping judicial revisionary power granted by Article 388 of the Greek Civil Code to a judge in cases of supervening impossibility, not only to decree partial or total discharge of the contract, but also to make alterations and even a total change in the conditions under which the obligations arising from a contract are to be carried out.

In those "prohibition of export cases" where performance never occurred, the problem of remedy remains relatively simple (whether or not the Court recognizes frustration resulting from supervening illegality as a defense), and the decisions in the United States and England are fairly uniform. I have, however, selected for comparative review the handling of those other situations where "complications" have set in, and where the courts must resort to restitutionary remedies to "unwind the contract." What are the consequences, where part payments had been made by the purchaser, where the seller has incurred manufacturing and shipping expense, etc.? When parties have received uncompensated benefits at each other's expense, we reach the area where the doctrines of unjust enrichment and restitution come into play.16

The evolution of the doctrine of frustration of contract due to supervening impossibility is marked by a steady attempt of courts in common law as well as code jurisdictions to reconcile the principles of pacta sunt servanda with clausula rebus sic stantibus. The catastrophic impact of the First World War on domestic commercial and international transactions exposed the injustice of a strict application of pacta sunt servanda. In the following review, the attempt is made to bring together for comparative purposes, the present positions of com-

16 Baxter, id. at 873, states: "... Where, without fault of the parties, it becomes impossible to complete a contract which has been partly performed, this would seem an appropriate situation in which to apply a principle of unjust enrichment to prevent a party gaining an unfair advantage by reason of the unexpected obstacle to completion. ... The common law jurisdictions have arrived more or less at this position (with the help of statutory changes) but the process has been slow. ..." For a comparative treatment of the doctrine of unjust enrichment, see: Ernst von Caemmerer, Bereicherung und unerlaubte Handlung, 1 Festschrift für Ernst Rabel, 333-401 (Germany 1954), and Dawson, Unjust Enrichment, note 10 supra, at 112, et seq. on the chaotic state of the American law of restitution.
mon law and code systems on the remedial facets of cases centered around supervening illegality.\textsuperscript{17}

A. SCOTS LAW

In 1923 the harsh rule of Chandler \textit{v.} Webster (one of the "Coronation cases") was expressly repudiated in Cantiere San Rocco \textit{v.} Clyde Shipbuilding Co.\textsuperscript{18} The House of Lords held, in determining the "Coronation cases" that a first installment payment on a frustrated contract could not be recovered. This holding was not binding in Scotland.

Delivery of marine engines purchased by an Austrian company from a Scottish company (payment in five installments of which the

\textsuperscript{17} Zepos, in \textit{Frustration of Contract in Comparative Law and in the New Greek Civil Code of 1946}, (Art. 388), 11 Mod. L. Rev. 36-46 (1948), summarizing at p. 45, claims that the general frustration clause contained in Art. 388 "gives a solution to all the problems arising from the frustration of a contract which have the subject of analysis and criticism both in the English and continental legal systems. The framers of this article evidently attempted to formulate a synthesis of the theory of "l'imprévision" and "Unzutnutbarkeit der Leistung," so as to simplify the problem of non-performance and impossibility of performance, by abolishing the German distinctions between "original," "supervening," "objective," and "subjective" impossibility, and making any culpable violation of a promisor's action able for damages, thus abandoning the "dangerous rule" of "impossibilium nulla est obligatio." The gist of Art. 388 (states Zepos, page 43), is that in cases of a supervening change in the circumstances under which a contract was made where these circumstances constitute the basis and foundation of the contract, the court may decree the entire or partial discharge of the contract, if in its opinion the performance of the contract should not be claimed. Where there has been a discharge of all obligations, parties are required to return all they have received, according to the provisions relating to unjustifiable enrichment. The key, however, to the effectiveness of this article is the judge, who according to Zepos (page 44), "is not an automaton in the application of a concrete legal system, but also collaborates with the legislator and contributes to his task. He is a real interpreter of the system of law who has not only to fill the 'gaps' in the given legal system, but who is also able to make alterations and even a total change in the conditions under which the obligations arising from a contract are to be carried out." This conception is close to the Swiss principle in Art. 1 (2) (3) of the Swiss Civil Code, granting power to the judge in default of positive rules or customs to decide "as if he had himself to act as legislator."

A proposed article (No. 1150) for the 1928 Hungarian Civil Code; Articles 1467-69 of the recent Italian Civil Code; Art. 269 of the Polish Civil Code and Art. 147 of the Egyptian Civil Code invite comparison with Art. 388 of the Greek Civil Code, in that they approximate its provisions on judicial discretion and discharge of contracts under "excessively onerous or unforeseeable conditions. See the companion articles by Meijers and da Fonseca, \textit{La force obligatoire des Contrats et ses Modifications dans les Droits Modernes}, 1951 Int'l Institute for the Unification of Private Law, 99-129. Professor Meijers leans toward restraint of judicial discretion and contends that if parties are to be permitted too many excuses for discharge, "... s'ils peuvent demander trop facilement au juge la resiliation a la modification d'un contrat, ce sera la fin de la confiance reciproque, base de tous les rapports juridiques entre les hommes."

\textsuperscript{18} Cantiere San Rocco \textit{v.} Clyde Shipbuilding, [1924] A. C. 226.
first was paid) was frustrated by the outbreak of World War I. The seller did nothing except make plans and order material. Restitution of the first payment was ordered on the ground of failure of consideration, subject to any counter-claim established for work done under the contract. The Earl of Birkenhead stated that: "... in order to formulate the rule applicable to this case, it is necessary to consider first the Roman law as a source of Scottish law, and secondly the Scottish authorities which show how far the Roman law applicable to this topic has been received and applied in the law of Scotland. . . ." Lord Shaw stated that the case would be a "typical case of restitution under the Roman law and one for the application of the maxim, 'causa data causa non secuta' . . .," and further, while the unjust rule of Chandler v. Webster that nothing can be done to adjust the rights of the parties where an advance payment has been made and the performance, which was the consideration for the payment, became impossible, may be the law of England and applies the maxim of "potior est conditio possidentis"—a maxim "which works well enough among tricksters, gamblers and thieves" . . . "this is not part or ever was any part of the law of Scotland."$

In the Scottish doctrine of frustration, the concepts of restitution and of the courts' ample powers to create remedies for equitable readjustment of the parties' relationships (rather than the question of whether or not the parties' obligations have been dissolved) receive the central emphasis. Scots law eschews philosophic speculation on the problems of "implied term". Scottish courts have all the requisite powers (even without statutory authority such as for example granted to them under the War Damage to Land [Scotland] Act, 1939) to mold the necessary remedies. This act aided to work justice between parties whose contract had been aborted by supervening illegality after part payments or part performance.

Restitution as the substitute obligation for the original but extinguished contract obligation, has been the basis of the Scottish doctrine of frustration since the 17th century.

Recently, however, it has been pointed out that if certain dicta

19 Id. at 234.
20 Id. at 259.
21 Id. at 260.
22 War Damage to Land Act, 2 & 3 Geo. VI, c. 80 (1939).
23 The traditional Scottish position is forcefully stated by Lord Cooper in Doctrine of Frustration in Scots Law, 28 J. Comp. Lex. & Int’l L. (3d Ser.) Parts 3 and
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in the now famous "British Movietone" case were followed closely in Scotland, the traditional approach—"equitable adjustment by judicial decree when one party to a transaction has been enriched unintentionally at the expense of the other"—would be overridden. It is possible that English influence and the suggestion that questions of frustration are of 'general jurisprudence,' may supersede the older tradition of Scottish law.

B. FRENCH LAW: 1. "FORCE MAJERE" AND "L'IMPRÉVISON"

The defense of impossibility of performance is treated under the doctrine of "force majeure." Impossibility must be absolute (by

4, 1-5 (1946). Comment on the more recent position is made by Professor T. B. Smith, in English Influence on the Law of Scotland, 3 Am. J. Comp. L., 522-542 at 540.


25 It is interesting that despite the civilian derivation of the law of South Africa, the early cases there involving impossibility of performance relied on the English doctrine of frustration, and it was not until 1919 in Peters, Hamman & Co. v. Kokstad Municipality, [1919] A. D. 427 that the civil law doctrine of impossibility was applied.

In Bayley v. Harwood, (3) S. A. 239 (T) (1953). See ANNUAL SURVEY OF SOUTH AFRICAN LAW 88 (1953), the defense of frustration was rejected by the Court which held that that doctrine did not form part of South African law. Proof of absolute—not partial impossibility, is necessary in order to sustain a defense that a contract has been discharged by impossibility of performance, Weinberg v. Weinberg Bros. (Pty) Ltd, (3) S. A. 266 (C) (1951). See ANNUAL SURVEY OF SOUTH AFRICAN LAW, 83 (1951). For an historical review, see Lee, Frustration of Contract in the Union of South Africa, 28 J. Comp. Lex. & Int'l L. 5 (Pts. 3 & 4) (3d Series 1946).

26 Code Civil, Arts. 1147, 1148. Under the French Doctrine of "force majeure" as the basis for pleading excuse for performance, the general rule is that the discharge on that ground will not be recognized unless the occasion thereof made performance absolutely impossible, and the event must have occurred independently of the party pleading for discharge, must not have been under his later control or have been of such a character that its occurrence could not have been reasonably foreseen at the time the agreement was entered into. (Code Civil 1148). "Fait du Prince" is the French generic expression designating "among other acts" governmental intervention (for example "menace de réquisition") prohibiting performance of a contract of sale for export, "L'autorité publique peut requisitionner ou bloquer des produits qui devait être livrés ou exportés... interdire certains commerces ou certains lieux de destination..." Dalloz, Force Majeure, 2 NOUVEAU REPÈRE DE DROIT 595 (Paris 1948). Thus a seller who cannot make delivery of goods on a contract for export because of governmental suppression of export licenses after the contract was made is exonerated of liability on the ground, that this "fait du commerce" constitutes "force majeure" (1 REVUE TRIMESTRIELLE DE DR. COMM. 128 (1948)—(Req. 27 January 1947, IV J. C. P. 55)). French courts during the First World War began to embody within the concept "force majeure," cases where no absolute impossibility occurred, but merely facts constituting extreme hardship and under conditions which the original basis of the contract was destroyed and the parties must have intended it to be dissolved in view of their contracting with reference to a specific state of facts which was radically changed by events beyond their control. This position was defended by writers putting forward the theory of "L'imprévision" or the release of a debtor by reason of occurrences which could not have been foreseen. J. Denson Smith, Impossibility of
reason of the later occurrence of an event unforeseeable at the time of execution) of which there are two categories: (1) "Legal" impossibility—i.e., supervening illegality by reason of a law or decree inhibiting performance (the "prohibition of export" cases in England and the United States, where frustration is set up as a defense, would fall into this category). (2) "Physical" impossibility; destruction of goods, Act of God, seizure in war, etc. In all other cases, where the "fault" of the promisor is in issue (the Roman law principle "culpa" being the basis for determining in cases of non-performance, whether the promisor was liable or not for damages), sanctity of contract, *pacta sunt servanda*, has been strictly adhered to.

The economic chaos during and following World War I gave rise to the "théorie de l'imprévision" to justify extension of the scope of "force majeure" to include cases where no absolute impossibility existed, but performance would have been far more burdensome than could have been foreseen at the time the contract was entered into. The rationale of "imprévision" is based on the importation of the now discredited international law principle of "*clausula rebus sic stantibus*" (the claim that non-performance of a treaty is justifiable because of material and unexpected change of circumstances) into the area of private commercial contracts. Since, in French law, a contract must be interpreted according to the parties' intention, the implied condition, "*rebus sic stantibus*" must be read into all contracts as having been agreed to by the parties; and further that Art. 1134 of the Civil Code requires performance *bona fide* of all contracts.


"... Cette alternative entre la force majeure et l'imprévision ne se rencontre pas seulement en droit administratif. En droit international public, la théorie de la force majeure appliquée aux traités devient la théorie de la clause *rebus sic stantibus* et la théorie de l'imprévision, celle de la révision des traités. ..."

29 This echoes the current controversy in England over the "implied term" as the basis of frustration (see note 8 *supra*), arising from the British Movietone case. For the reasoning justifying the need in French law of an "implied term" approach
"Imprévision" is thus the closest parallel to the English doctrine of frustration.

The theory of "imprévision" is not accepted by the Cour de Cassation or the civil or commercial courts, due to their insistence on pacta sunt servanda, and strict interpretation of force majeure. This results in the famous cleavage relating to "imprévision." Contrary to the Court de Cassation, the Conseil d'Etat (not bound by the Code Civil) and the "Tribunaux Administratix" to accept and have applied this theory in a number of cases. The French "droit administratif," which is motivated chiefly by the "public interest and welfare," governs between the State and/or a public body and an individual. "Imprévision," however, is limited to long-term contract situations where, performance has become unduly burdensome under unforeseen conditions. A party may then ask for relief and the agency in question will be required to modify the arrangements or pay an indemnity to enable the individual to profitably continue performance. Strained economic conditions in World War I gave birth to the well-known "Loi Failliot" in 1918, a statute which permitted revision of the pre-1914 contracts. There has been legislation since, permitting revision or cancellation of various types of contracts such as landlord and tenant, sales of business concerns ("fonds du commerce") and favoring victims of Nazi racial discrimination.

David believes resort to the theory of "imprévision" may well decline in all cases, both in civil and commercial courts, as well as those governed by the "droit administratif," because of the increasing French practice of inserting clauses permitting revision under changed conditions (thus spelling out rebus sic stantibus), instead of leaving it to implication, as well as the use of arbitration clauses under which arbitrators are given power to act as "compositeurs amiables." These may determine disputes not strictly according to French law, but ac-

("clause accessoire à l'accord principal et ordinairement tacite et conditionnelle") in order to give a logical basis to the discharge of obligation in "force majeure" cases, see Wigney, Responsibilité Contractuelle et force majeure, 34 Revue Trimestrielle de Droit Civil 20 (1935). For the thesis that "force majeure" in the French law of contracts and "absence de faute" are interdependent and correlative concepts, see A. Tunc, Force majeure et absence de faute en matière contractuelle, 43 Revue Trimestrielle de Droit Civil 235-237 (1945). For a brief survey of the development of the principle of unjust enrichment in French law and the action for restitution under Arts. 1376 and 1377 of the Code Civil, as applications of that principle, see Amos & Walton, Introduction to French Law, 204-210 (London 1935).

30 David, note 27 supra at 13.
31 Id. at 14.
cording to their own conception of natural justice, in the light of the changed conditions in question. Their awards are final and non-appealable.

2. The Law of April 23, 1949

An important statutory extension of judicial discretion in the area of unforeseen commercial difficulties precipitated by World War II, was made in the law of 23 April, 1949. This law permits French judges to declare the cancellation, with certain exceptions, of contracts entered into before September 2, 1949 relating to delivery of goods, manufactured products or commodities, work contracts, etc. Request for such cancellation must have been made by either one of the parties prior to July 1, 1949 or for those outside of France, before June 1, 1950. Failing a compromise or settlement, a party could demand a cancellation; the judge could pronounce such a cancellation with or without granting damages, if such party established that due to war conditions or unusual economic conditions he had to increase his costs or expenses, or that losses would have been caused him far beyond what it would have been reasonable to expect or to foresee at the time the contract was made. Contracts made between September 1, 1939 and the date of liberation were also cancellable in the same way, if the demanding party proved that at the time for performance the changed economic conditions resulting from the war had made it impossible for him to perform, without having to incur such entirely new costs as would have prejudiced him to such a degree that performance could not take place without completely upsetting or drastically changing the contract. The law applied retroactively to pending cases involving contracts not yet performed. Some question was raised as to the long delay in passing this legislation (almost

32 "Loi No. 49-547 du 22 Avril 1949 permettant la résiliation de certains marchés et contrats" GAZETTE DU PALAIS 1949 (1 er sem.) 462. For an elaborate analysis of the impact of this law on French commercial contracts generally, a comparison of the law with its earlier counterpart, the "Loi Faillot" of 1918 and consequential modifications of the "théorie de l'imprévision," see Peytel, La théorie de l'imprévision et les contrats commerciaux" (1 er. sem. 1949), "Doctrine" 56-62 (Paris 1949). See, also, Toujas, "La résiliation de certains marchés et contrats" (Commentaire de la loi du 22 Avril, 1949) Semaine Juridique, 1949, "Doctrine", 774 (Paris). A note to the law following its reprint in Recueil Dalloz 1949, 241, states: "... Cette loi est fondée sur la théorie de l'imprévision. Le principe n'en est pas nouveau. Lorsque la guerre de 1914-1918, un texte analogue Loi Faillot du Janv. 1918 (D. P. 1918.4.261) avait été voté; mais les contrats commerciaux en avait seul le bénéfice." See, also, DALLEZ, NOUVEAU REPÉRE DU DROIT 100, "Résiliation des contrats" (Paris 1952).

33 Peytel, note 32 supra at 56.
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five years after the liberation) whereas the "Loi Failliot," prepared in 1916, was passed during the War, in January 1918.

Thus "disruption of the economy" due to war conditions is conceived in French law to be a catastrophe, general collapse justifying national intervention in the form of a sweeping grant of judicial power, contrasted with the specific and narrow supervening illegality produced by a governmental prohibition of exports. This power enables the judge literally to make or unmake contracts, as well as in his unfettered discretion, to refuse or to grant damages, exercising what in Anglo-Saxon jurisprudence is called "equitable powers."34

From the point of view of the present French economic order ("économie dirigée") the doctrine of "l'imprévision" would seem to afford the basis, in those cases arising under the "loi administratif," for an allocation or a division of losses between the public agency and its opponent, which resulted from an unforeseen extreme rise in prices or some major economic convulsion ("Bouleversement de l'économie") occurring during the course of performance; thus the relative economic position of the parties ("l'équilibre financier du contrat") may be maintained. While both "l'imprévision" and the theory of "fait du prince" tend to the same result (maintenance of the original contractual and economic relationship freely entered into into between the parties), it is important to distinguish between the two theories. From the juridical view, the theory of "fait du prince" envisages a direct, governmental intervention during performance which disrupts the contractual relationship. This may have an important bearing on the judge's determination as to which party assumed the risk and how damages should be distributed.38 In either case, basically, the French

34 Id. at 81.
35 Peytel, id. at 61, describes the jurisprudence that grew out of the "Loi Failliot" as representing "avant tout, une loi d'équité" which merely effectuated the legislative intention to prevent the ruin of one party and the benefiting and enrichment of the other as a result of nation-wide economic conditions after a war affecting all persons.

In Belgium a law comparable to the Loi Faillot was enacted on October 11, 1919, modified July 23, 1924 and another on June 20, 1930, for discharge of long-term leases executed before December 31, 1923.

36 French commentators seem divided on the question as to whether the 1949 law applies to "contrats administratifs"—see Louis de Soto, La loi du Avril 22, 1949, est-elle applicable aux contrats administratif? SEMAINE JURIDIQUE, "Doctrine" 809 (Paris 1949), where it is asserted that procedural provisions of the law prove that it was written "l'esprit civil" and not "administratif" thus excluding its application to the latter category of cases. For a discussion of the impact of the doctrine of "l'imprévision," during a period of "l'économie libérale" as compared to the present French "économie dirigée," see Jean de Soto, Imprévision et économie Dirigée, SEMAINE JURIDIQUE, Doctrine 817 (Paris 1950).
judge would seem to have the power to choose between cancellation of the contract or its continuance in effect, subject to such modifications as may seem to him equitable.  

C. GERMAN LAW

GERMANY perhaps more than any western European nation, during the period between 1914 and the present, has been subjected to the economic convulsions of war, currency inflation and revaluation, rendering the certainty and dependability of commercial contract performance in constant doubt. Impossibility of performance and frustration were ever present risks in industrial and commercial life. It may not be too wide of the mark to characterize German attempts, in many areas of the law, to handle the vast problem of frustration and contract disruption as the frank adoption of administrative or quasi-administrative techniques, in the form of greatly enlarged powers of the judges to “remake” rather than to dissolve or grant recission of contracts, and a movement away from the conventional judicial enforcement of contractual rights.

1. “FORTFALL DER GESCHÄFTSGRUNDLAGE”
   (LAPSE OF THE BASIS OF CONTRACTS)

Cohen has sketched the evolution of the German concept of impossibility (“unmöglichkeit”):

(a) from its adoption in Sec. 306 of the B. G. B. of the Roman principle of “Impossibilium non est obligatio” (initial impossibility);

(b) its elaboration in Sec. 275, 276, 279, 280, 281, 282, 307, 308, 323 and 324 of B. G. B.;

37 M. Planiol, et G. Ripert, Tome IV, 6 “TRAITE PRATIQUE DE DROIT CIVIL FRANÇAIS, Sec. III, Par. 538 (Paris 1952). At p. 537, it is noted that certain civil codes other than the French (viz. Polish Code of Obligations 1934, art. 269; Italian Civil Code 1942, arts. 1467-1469 and Egyptian Civil Code (1949), art. 147(2)) grant judges the power to modify or cancel contracts when performance has been disrupted by drastic economic changes. See also, 2 De La Moraudiere, COURS ÉLÉMENTAIRE DE DROIT CIVIL FRANÇAIS, 94 (10th ed., France 1948).


39 See the summary in Gottschalk, IMPOSSIBILITY OF PERFORMANCE IN CONTRACT, 128-135 (London 1938), introduced by the comment; “The German law on this subject is stated incoherently in three different parts of the German Civil Code. Its statement is therefore difficult.” Closely related, he points out, (at 132-133) are the rules as to the passing of the risk in German Contract Law. (§§ 243, 446, 447, 536, 615, 616, 644, 645, 651).

40 E. Wolf has recently criticized as superfluous and misleading and has urged the elimination of the conceptual differentiations or antinomies set forth in the BGB re-
(c) the revival by Windscheid in 1852 of “clausula rebus sic stantibus” in the form of the notion of “requirement” (“Voraussetzung”), i.e., an “undeveloped condition” of a contract, contrasted with an express condition (and entitling a party to repudiate the contract or demand return of any performance made by him if the “requirements” were not complied with);

(d) the modification of the “clausula” in 1921 by Oertmann (under the impact of the cases growing out of the currency inflation) in the form of “the contractual basis” concept (“geschäftsgrundlage”), i.e., an assumption by one or both parties of the continued existence from the inception of the contract, of circumstances which form the basis of the contractual relationship. This led to the use in a variety of cases of the defense styled “lapse of the basis of contracts” (“Fortfall der Geschäftsgrundlage”) entitling each party to rescind the contract (“Rücktritt”), according to the provisions of the Civil Code;

(e) the inadequacy of the traditional concept of impossibility in the light of extraordinary economic changes after World War I, resulting in attempts by German courts to adopt “economic impossibility” (a vague concept, difficult to apply) as the criterion for performance;

(f) the abandonment of “impossibility” and increasing resort to the famous Sec. 242 of the Civil Code (“Treu und Glauben”)—the requirement of good faith in the performance of contracts—as the basis for applying “Fortfall der Geschäftsgrundlage,” i.e., holding it to be, in the presence of profound economic disturbances, a

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41 §§ 346-361.

42 § 242 BGB reads: “The debtor is bound to effect performance according to the requirements of good faith, common habits being duly taken into consideration.” Corollary to § 242, in the matter of interpretation of contracts are §§ 133 and 157. Section 133 reads: “In the interpretation of a declaration of intention, the true intention of the parties is to be sought without regard to the literal meaning of the expression.” Section 157 reads: “Contracts should be interpreted according to the requirements of good faith, ordinary usage being taken into consideration.”
breach of good faith for any creditor to insist that the contract be upheld in its original form, since it would call for sacrifices by a debtor beyond the requirements of good faith ("opfergrenze") and was not to be expected ("unzumutbar"). Thus by the combined effect of the doctrines of Geschäftsgrundlage, of economic impossibility, and the greatly extended scope of application of Sec. 242, described as the Civil Code counterpart of equity's power to mold suitable remedies, German courts began to adjudicate the mass of cases arising out of economic strain and war emergencies;

(g) the perversion of the doctrine of "Geschäftsgrundlage" during the Nazi regime as a means of dissolving contracts, pension agreements, etc.;

(h) as a supplement to the doctrine of "Geschäftsgrundlage," and as an administrative measure to handle the mass litigation which threatened the enactment on November 30, 1939, of the Decree on Judicial Assistance in respect of contracts ("Vertragshilfeverordnung"). Under an administrative procedure, judges of the Amstgerät (local courts) were empowered in certain classes of cases to amend contracts by granting time for performance and permitting installment payments.

Following the surrender on May 8, 1945, cases involving impossibility of performance due to war conditions or prohibition by Nazi decrees, began to accumulate. A major economic chapter in post-

43 1 Manual of German Law, General Introduction, Civil and Commercial Law, par. 194(d), 61 (London 1950).
44 Id. at 195(d), 62.
45 See note 38 supra at 24. Writing in 1946, Cohn, after noting the inadequacy of the decree on Judicial Assistance to deal with the total collapse of Germany at the war's end, despite extension of that decree to the United States Zone and makeshift decisions and decrees in other occupied zones, stated: "... the present situation will undoubtedly require more far-reaching measures than have been devised in the past. There is little doubt that the courts will have to be given wider powers than they ever had before. Only this can enable them to deal with a situation that is, it seems, without precedent in the legal history of Europe." A useful comparative survey of public international law aspects of war-disrupted or frustrated private contracts between enemy nationals, with brief observations on judicial remedies in England, France and the United States is found in Aubin, Die Öffentliche rechtliche Einwirkung des Krieges auf privat Vorkriegsverträge mit Feindbeziehung, 18 Zeitschrift für ausländisches und internationales Privatrecht, 922-973 (1953).
46 A review of the jurisprudence on "Unmöglichkeit" during the period between May 8, 1945 and March 1947, is found in Haun, Die Behandlung von Forderungen und Schulden aus der Zeit vor dem 8-5-45 (March 1947) reviewed in 1 Neue Juris. Woch., 221 (1947-1948). Haun supports the doctrine of direct judicial intervention and modification of contractual relationships as the basis for the successful handling of frustrated contract cases.
World War II history was opened by the enactment of the 1948 currency reform. West Germany began her rapid return to industrial production and to the world market. Increasing volume of international transactions revived interest in the problem of the protection of rights of German sellers.

2. **THE LAW OF MARCH 26, 1952: "VERTRAGSHILFE" (JUDICIAL ASSISTANCE)**

The continuing problem of cases involving "fortfall der geschäftsgrundlage," especially those in which payment in pre-1948 Reichsmarks was called for, produced the most important enactment since the 1939 Judicial Assistance decree. This law of March 26, 1952—"Gesetz über die richterliche Vertragshilfe (Vertragshilfegesetz)," repealed and modified the pre-existing legislation in this field. Only pre-conversion date contracts i.e., entered into before June 21, 1948 (when the German currency reform was instituted) are affected by this law, whether or not the medium of payment was Reichsmarks or other currency. The judge on the application of the debtor (who must establish that he attempted first to settle his obligation with his creditor), is granted power to extend or suspend the times of pay-

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47 For a comparison of German, English, French and American concepts and statutory provisions protecting sellers by granting them rights to retain possession and to reserve title to goods sold and delivered in installments in cases of defaulted payments (important to German sellers in foreign trade where the governing law problem of "lex rei sitae" arises) see, Schenk, *Zur frage der sicherung des Verkaufers bei Export-und-Import geschäften* (insbesondere der Eigentumsvorbehalt) 3 NEUE JURIS. WOCHEN. 248 (1950).

48 BGB, Part I, 198.

49 Evidently there was considerable opposition to this law on the ground that the whole concept and the implementing administrative machinery of "Vertragshilfe" judicial (contract) "assistance" or "alleviation", was alien to German laws and institutions, and should be wholly abandoned. The proponents of this legislation acclaimed its utilization, indeed urged an enlargement of the previous law. See Schubart, *Das neue Vertragshilfegesetz*, 5 NEUE JURIS. WOCHEN. 445-447 (1952), summarizing the main provisions of the 1952 legislation. Criticism of the working of the law, in so far as it affects mortgage claims is found in Loschhorn, *Die behandlung der hypothekenforderungen in Vertragshilfegesetz*, 1952, 5 NEUE JURIS. WOCHEN. 1362 (1952). For comment on the growing case law on "Vertragshilfegesetz, 1952," see Vahlen, *Vertragshilfegesetz Kommentar* v. E. Saage, 1952, (reviewed in 5 NEUE JURIS. WOCHEN. 1366 (1952). Also, Beck, *Vertragshilfegesetz, Kurskommentar* v. Duden u. Roswedder, 6 NEUE JURIS. WOCHEN. 174 (Germany, 1953), in which, among other arguments in support of the law, the point is made that it is not, as its opponents have claimed, an indirect insolvency or bankruptcy procedure. For the impact of the law respectively upon German war-time procurement contracts and credits, see Hauer, *Die Abwicklung der Waren- und-Geldkredite aus der Kriegszeit*, 6 NEUE JURIS. WOCHEN. 321 (1953), and Coing, *Planwirtschaftliche Verträge insbesondere Rüstungskredite in Vertragshilfeverfahren*, 6 NEUE JURIS. WOCHEN. 1326 (1953).
ment or reduce the requirements for performance in certain classes of cases (including contracts for installment deliveries) when it appears that the times for performance or full performance, if insisted on, would not result in an equitable balancing of interests between the parties.

Jurisdiction of the Judge ("Vertragshilferichter") under the 1952 law extends presumably only to cases in which both parties are German nationals. What of those numerous situations where one of the parties to a contract for delivery of goods in installments (disrupted or frustrated due to the outbreak of war) was German and the other non-German? The London Agreement of February 1953, arranging for the settlement of pre-war German external private debts, is silent on the important question as to whether or not pre-war contracts for delivery of goods or for services are to be considered discharged or continued in effect. This gap has raised questions of some difficulty for German debtors as to reimbursement of sums paid by way of down payments, installments or part payments in such contracts. In the absence of a specific provision, it would seem that such issue as continuation or discharge of these contracts would be determined under private international law rules of the forum fixing the governing law. Under German law, prepayment cases52 grow-


52 Erler, see note 51 supra at 10, cites (a) as the British concepts applicable in the solution of these cases, the doctrines of implied condition ("Stillschweigende freizeichnung") and essential frustration—i.e., resulting from supervening impossibility or illegality ("nachfolgender unmöglichkeit oder ungesetzlichkeit") and the extinction of the contract at the outbreak of the war;

(b) for the American principles applicable (which Erler claims resemble those announced by German courts in comparable cases during World War I and II, p. 10, n. 15), the case of Neumond v. Farmers Feed Co., 244 N. Y. 202, 155 N. E. 100 (1926), where the Court of Appeals held that a contract between a German company and an American company made before the war, but left uncompleted and executory due to its outbreak, was terminated and payments owing the German plaintiff would not be required because mutual obligations had not been fulfilled, "when the essential purpose of the parties would be thwarted by delay or the business efficacy or value of their bargain materially impaired." (Leeman, J. at p. 206). It is interesting that though the Neumond case did not mention "frustration," it has been cited as based on that doctrine in Pacific Trading Co. v. Mouton Rice Milling Co., 184 F. 2d 141, at 148 (8th Cir. 1950);

(c) as to French doctrine, Erler claims that it tends to great conservatism in
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...ing out of incompleteness delivery situations would be governed by Secs. 323 and 818(3) of the German Civil Code. Sec. 323 applies to “reciprocal” contracts (“gegenseitige verträge”) where, in the intention of the parties, the performance of each party constitutes the equivalent of the other party’s performance and should performance become impossible and neither party is responsible for the impossibility, both parties are discharged. However, if the counter-performance has already been made, it can be reclaimed under Sec. 323(3), in accordance with the rules of unjust enrichment.

3. THE LONDON AGREEMENT OF FEBRUARY 1953 AND “VERTRAGSHILFE”

Of particular importance in cases where the pre-payments were made to German sellers of goods on installment deliveries under pre-war contracts, would be Sec. 818(3) which provides that “the obligation to return or to make good the value is excluded where the recipient is no longer benefited.” It is interesting to note further that the London Agreement provides that the dispute as to the existence or amounts of any claims decreeing dissolution of contracts, though there is a similarity, he believes, between “l'imprivision” (”Nichtvoranssehbarkeit”) and the German doctrine of “Wegfall der Geschäftsgrundlage.” See, also, Larenz, Geschäftsgrundlage und Vertrageserfüllung, reviewed in 6 NEue Juris. Wochen. 654 (1953), and Larenz, Zum Wegfall der Geschäftsgrundlage, 5 Neue Juris. Wochen. 561 (1952).

53 Annex IV, Art. 27 of the London Agreement (p. 446, BGB, 1953, Part II, p. 446), relating to “claims arising out of prepayments for supplies of goods and services,” urges settlement of such claims but in default thereof calls for payments either in installments or in full. Whether or not in circumstances of supervening impossibility or illegality such prepayments as a matter of law should be made, can of course be determined only by applying the substantive law of the forum on this subject. Erler, see note 51 supra at 12.

54 MANUAL OF GERMAN LAW, note 43, supra at 72, § 215.

55 Id. at 77, § 225(a).


Where the seller of machines in what later became the Russian zone, received in January 1943 from the West Zone buyer, 22,000 marks, the full purchase price, and later, due to war restrictions was unable to deliver the machines and in October 1943, returned only 16,000 marks to the buyer, who claimed the balance of 6,000 marks the OLG Braunschweig held valid the claim of unjust enrichment, and rejected seller's defense that under § 818(3) BGB, he was no longer enriched due to the seizure of his plant by the Russians, because, as the court held, prior to the seizure in May 1945, the defendant had had the use and benefit of that balance of 6,000 marks for other purposes of his business than that of manufacturing machines for plaintiff (which was never done). Also, § 242 BGB was rejected as a defense. (OLG Braunschweig, #100. 1. Zivilgericht-6-1-48. I U 130/47). 2 MONATSCHRIFT FUR DEUTSCHES RECHT 256 (1948).

shall be decided by a court of law or a court of arbitration agreed upon by the parties "which is competent in view of the legal relationship between the parties." Further, the "Hardship clause" grants relief to a debtor "whose financial position has been affected by war or other extraordinary conditions to such an extent that the debtor cannot be expected to settle his obligations in accordance with the conditions and within the time limits laid down in this settlement proposal." This would seem to be an express recognition and adoption of the "Opfergrenze-unzumutbarkeit" doctrine implicit in Sec. 242 of the German Civil Code ("Treu und Glauben") that a debtor cannot be expected to make the sacrifices otherwise called for, where insistence by the creditor would be outside the boundaries of good faith.

Article 11 of the London Agreement provides equitable relief in the light of the debtor's "special circumstances" and "in accordance with the concessions which the debtor has been or may be granted by a German creditor on similar grounds under the legislation for the relief of debtors ("Vertragshilferecht"). Where there is a disagreement, "a competent German court shall make a decision." Creditors are given the right to appeal, or after an unfavorable court decision, to resort to the Court of Arbitration set up by Annex IV, Art. 17.60

4. "VERTRAGSHILFE" AND JUDICIAL REVISION

In all of this development, fundamental issues of judicial process and decision are at stake.60

The enlarged statutory role of the German judge in reconstituting or readjusting contract relationships following economic catastrophe has not been accepted without considerable opposition and alarm among German jurists for the integrity of the postulate "pacta sunt servanda." There is evidence, however, of a determination to confine

60 For an essay of extraordinary penetration and concision on this fluid and complex problem, see von Mehren, The Judicial Process in the United States and Germany—A Comparative Analysis, in Band I of Festschrift für Ernst Rabel—RECHTSVERGLEICHUNG UND INTERNATIONALES PRIVATRECHT, 68-98 (Tübingen 1934). While emphasizing that the extremely involved nature of the problem precludes any sweeping generalizations, von Mehren suggests that the tendency towards judicial law-making seems much less marked in Germany at the present time than in the United States.
61 For a vigorous attack on the abuses of German judicial assistance under the aegis of the pre-war and post-war "Vertragshilfe" legislation as constituting (in Roscoe Pound's phrase, "socialization of private law"), see Neumayer, Die Richterliche Abänderung Notleidender Geldverbindlichkeiten (Vertragshilfe) und ihre Kritik, 4 MONATSCHRIFT FÜR DEUTSCHES RECHT, 652-655 (1950). Also Sieg, Korrektur von Rechtsgeschäften durch den Prozessrichter, 4 NEUE JURIS. WOCHE. 507 (1951).
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"judicial assistance" strictly to cases of "Wegfall der geschäftslage" (disappearance of the basis for the business relationship) and to resist the application of Sec. 242 of the Civil Code as a justification for judicial revision of contracts contrary to the express intention of the parties.62

Proponents of the "Vertragshilfegesetz" of 1952 would doubtless argue that in the presence of economic ruin, insistence on a strict application of "pacta sunt servanda" is unrealistic and inhuman. Professor Corbin has made the pungent observation: "‘FIAT JUSTITIA RUAT COELUM’—a phrase impressive mainly because of its being in Latin and not understandable. When the skies begin to fall, Justice removes the blindfold from her eyes and tilts the scales."63 It will be interesting to see whether the opponents of Vertragshilfe, during the present cycle of West Germany’s economic prosperity will be able to persuade German courts once more to return the blindfold.

D. SWISS LAW

The right of the judge to intervene and revise a private contract is recognized in principle under Swiss law.64 The basis of this power is Article 2 of the Swiss Civil Code which governs the case of a palpable abuse of a right. Demand for performance is held to be such an abuse if, because of a drastic change in the economic situation, not foreseeable at the date of the execution of a contract, insistence on performance would mean unjust enrichment of the creditor at the expense of the debtor.65 The concept of unjust enrichment and its remedial

62 See the decision of the Bundes Gerichte Hof of April 22, 1953—II Z R 143/52 (Hamm), reported in 6 NEUE JURIS. WOCHE 937-938 (1953), in which the court held that while a judge may, in the absence of an express provision in a contract which has been fully executed, supply and put into effect the necessary term, he may not on the basis of § 242 BGB (“Treu und glauhen”) do so, if the actual result will produce such a modification of the other terms of the contract as would call for action by the parties wholly contrary to their expressed intentions.

63 Professor Corbin’s 80th Birthday, 71 L. Q. REV. 203 (1955).

64 SIMONTUS, QUELQUES REMARQUES SUR LA CAUSE DES OBLIGATIONS EN DROIT SUISSE, Études de droit civil à la mémoire de Henry Captiant 175 (Paris, 1939), referred to in Gow, supra, note 8 at 316-318. There is of course the famous Art. 1(2)(3) of the Swiss Civil Code which states that “where no provision is applicable, the judge shall decide according to the existing customary law, and in default thereof, according to the rules which he would lay down if he had himself to act as legislator. Herein he must be guided by approved legal doctrine and case law.” This “freie richterliche ermessung” (free judicial discretion) is exercised in cases involving determination of quantum and distribution of damages and especially in unjust enrichment cases. (Arts. 62-67 of The Swiss Federal Code of Obligations). See Guiz, DAS SCHWEIZERISCHE OBLIGATIONSRECHT, 72, 166 (Germany 1948).

65 Swiss Civil Code, Art. 2(2) at 1. “The law does not sanction the evident abuse of a man’s rights.” (English version by Ivy Williams, Oxford 1925.)
correlative, restitution, are implemented in Articles 62-67 of the Swiss Law of obligations and in other articles dealing with impossibility of performance.\footnote{66} Supervening illegality, as in other jurisdictions, is a complete defense to an action for breach of an installment sale contract. Impossibility of performance resulting from such illegality discharges the obligor or debtor under Art. 119(1)—“An obligation is discharged to the extent of its becoming impossible by circumstances for which the debtor cannot be made responsible.”

Illustrating the application of Art. 119, in the context of an international sale contract (though the element of restitution was lacking) is an interesting case decided by the “Graubünden Kantonsgericht”:\footnote{67} B ordered 150 bales of textiles from an Italian firm for delivery, from January 13 through March 20, 1941. January 14, B sold the goods to M. H. Pursuant to the delivery schedule, B received 36 bales from the Italian seller, which he then turned over to M. H. February 21, 1941, the Italian finance ministry prohibited the export of these textiles without a license. Due to excessive delay (imposed on the Italian manufacturer by his government) in procuring an export license, defendant B was unable to meet the delivery schedule (delivery of the balance of 114 bales to M. H. at the Swiss-Italian border by March 20, 1941). The court held that the impossibility of performance of the Italian seller was likewise the impossibility of performance of B, vis-à-vis his buyer M. H. This “Ausfuhrverbot” (prohibition against export) was the basis for the defense of impossibility due to supervening illegality (“rechtliche Unmöglicheit der Erfüllung”). Further, the court held that the defense of impossibility was strengthened by evidence that B had made efforts but had failed to buy goods within Switzerland to replace those not delivered, at

\footnote{66} {Art. 119 (Impossibility of performance), Art. 20 (Void contracts) and Art. 21 (Unconscionable contracts) pp. 85 and 18 respectively in Wettstein, The Swiss Federal Code of Obligations (Zurich 1928); Arts. 62-67 incl. Id. at 47-51, cover obligations resulting from unjustifiable enrichment (“Enrichissement ilégitime,” “ungerechtfertigter Bereicherung”). For an authoritative treatment of these important articles see, Gub, see note 64 supra at 36, 48-49, 162-169, 178, 224. The role of the judge in handling private contract litigation affected by Swiss war-time price regulations in the light of Art. 20(1) of the Federal Code of Obligations (Contracts void because they contain impossible, illegal or contra bonos mores provisions) is discussed in Stahel, Der Einfluss der Verletzung Kriegswirtschaftlicher Vorschriften auf die zivilrechtliche Gültigkeit der Verträge, 40 Schweizerische Juristenzeitung, 213-219 (July 15, 1944), and Leuman, Privatrechtliche Sanktionen des Kriegswirtschaftsrechts, 39 Schweizerische Juristenzeitung, 237-242 (Feb. 15, 1943).

\footnote{67} {June 20, 1947, Granbünden K. G.; reported in 47 Schweizerische Juristenzeitung, 79-80 (1951).}
prices no higher than those fixed in his Italian contract. This was an "objektive unmöglichkeit der Erfüllung," for which B, in view of the unforeseeability of the issuance of the Italian decree, and despite his efforts at replacement of the goods, was not responsible. B was therefore discharged of liability under Art. 119(1).

E. LATIN-AMERICAN LAW

Latin-American jurisprudence generally has been influenced by the French theory of "l'imprévision". While the cases evidently are scanty, civil and commercial code provisions in such countries as Uruguay, Argentina and Mexico, for example, when read together, have produced a moderation or attenuation of the strict rule of "pacta sunt servanda". These codes cover situations where unforeseeable large-scale economic disaster, or supervening illegality in the form of governmental decrees have made performance impossible, or where insistence on strict performance could result in unjust enrichment of the creditor or financial ruin of the debtor. The trend seems also to be in the direction of enlarging the judge's power to intervene in

68 Couture, Frustration of Contract in Uruguayan Law, 28-29 J. Comp. Leg. & Int'l L. 13-15 (3d Series, 1946-1947). Azevedo, Frustration of Contract in Latin-American Law and Particularly in Brazil, 28-29 J. Comp. Leg. & Int'l L. 15-19 (3d Series, 1947). Impossibility, force majeure, good faith between contracting parties, interpretation in doubtful cases in a debtor's favor, and other meliorating provisions are found, for example, in Arts. 1271, 1283, 1291, 1293, 1304 and 1549 of the Uruguayan Civil Code, and Art. 1009 of the Commercial Code. Arts. 1828, 1293 and 2111 of the Mexican Civil Code govern impossibility and Arts. 1882-1895 lay down rules on unjust enrichment. In Argentina, Arts. 513, 514 and 819 of the Civil Code relieve debtors or obligors of liability on the occurrence of fortuitous events or those caused by force majeure. Art. 514 reads: "A fortuitous event (force majeure) is one which could not have been foreseen or which having been foreseen, could not have been avoided." Force majeure was rejected as a defense in an action for breach of contract made in February 1942 to sell iron (the seller having purchased it in the United States which was then at war). War, the court held, is not of itself a fortuitous event or force majeure, except when, as a result thereof, it is materially impossible to fulfill the obligation, which was not the case here since the country of origin of the iron was not mentioned as a condition in the contract. Jose Ferrarini v. Porto y Cia, J. A. 1949, 9 (Sept. 30; 1948).

69 Fonseca, note 17 supra, concludes his analysis of "La force obligatoire des contrats" at 127: "La tendance du droit moderne n'est plus le maintien rigide de la force obligatoire des contrats . . ." and cites Arts. 1467-1469 of the Italian Civil Code as models for legislation in other countries.

Art. 1467 reads: "Contracts calling for mutual performance—In contracts of continuous or periodic performance or of delayed performance, if the performance of one of the parties has become excessively onerous due to the occurrence of extraordinary unforeseeable events, the party which owes such performance can demand the cancellation of the contract with the effects established by Article 1458. The cancellation cannot be demanded if the supervening burdensome factor falls within the normal
appropriate cases of supervening impossibility, so as to restore the economic balance between the parties. Differences of opinion as to the extent and scope of the judge’s revisionary powers exist among Latin-American students of the problem.\(^7^0\) The cleavage (in Brazil) parallels the lines of division on the continent.\(^7^1\)

risk of the contract. The party against whom the cancellation is demanded can avoid it by offering to modify the conditions of the contract in an equitable manner."

Art. 1468: “Contract with obligations on the part of only one party—In the hypothesis assumed in the preceding article, if there is concerned a contract in which only one of the parties has assumed obligations, such party can request a reduction of his performance or a modification of the terms of performance, sufficient to make it equitable again.”

Art. 1469: “Aleatory contract—The provisions of the preceding articles do not apply to contracts which are aleatory in their nature, or by the intent of the parties.”

\(^7^0\) Azevedo, note 68 supra, at 18-19, makes a strong plea for judicial intervention in Brazil in cases of supervening impossibility to round out the acceptance by the courts of that country of the theory of “imprévision,” and cites a proposal in 1941 of the Committee to revise the Brazilian Civil Code (not yet enacted by the Brazilian Parliament) to include an explicit delegation of such power to judges at the debtor’s or obligor’s request, in cases of exceptional and unforeseeable difficulties in performance which might result in excessive loss to him, to modify the terms.

\(^7^1\) Fonseca, see note 68 supra at 123, while citing a number of cases of the Brazilian courts, which pursuant to special decrees, have recognized and applied the theory of “imprévision,” contends that under the Civil Code alone, the “revisionist” point of view could not easily be put into effect in Brazil, because of various severe restrictions on the judge’s powers to delay payments of a debtor, to change the price, or in other ways, modify the terms of a contract, and citing Arts. 1214, 1246 and 1433 as illustrations of inhibitions on judicial discretion, Brazilian special decree legislation since 1933, Fonseca points out has exhibited a tendency contrary to the Code, i.e., to regulate prices, rents, loan rates, agricultural obligations and profits, in the public interest, and to prevent “labus de droit.” Following the lead of the “anti-revisionist” Ripert, Fonseca warns against the undue extension of judicial discretion (despite the need for preserving the principle of unjust enrichment), as a threat to the integrity of private contracts and as a means of undermining the basic concept of good faith in contractual relationships. It is significant that Art. 5 of the Brazilian decree law of September 4, 1942 (“Introduction to the Brazilian Code”) expressly requires judges in applying the laws, “to keep in mind their social purposes and the exigencies of the public interest.”

In Puerto Rico (despite earlier rejection of “imprévision” as a means of solving the problem of a contract interrupted or made impossible of performance by unforeseeable occurrences or conditions) recent decisions in that jurisdiction decreeing restitution in such cases, as well as Spanish and Puerto Rican commentators, seem to favor adoption of the doctrine. The confusion has been pointed out in the Puerto Rican decisions, as to the inaccurate and interchangeable use of “imprévision” and “el caso fortuito” (Act of God). This is illustrated in the recent decision in Lopez v. Carolina, 75 Dec. P. R. 479 (1953); liability of a municipality building an aqueduct, to a contractor who had dug two wells needed for it, but who had failed to obtain certificates of potability of the water from the pertinent government agencies. The commentator notes the favorable attitude of the Supreme Court of Puerto Rico in the Lopez case, which in applying the doctrine of restitution, buttressed by Arts. 1210, 1227, 1235 of the Civil Code of Puerto Rico governing performance of contracts, leaves the door open to the eventual incorporation of “imprévision” into Puerto Rican jurisprudence. Calderon, Jr., La imprévision, el caso fortuito y el caso Rodríguez Lopez v. Municipio de Carolina, 24 Revista Jurídica de la Universidad de Puerto Rico 171-179 (1954).
III. CONCLUSION

Cases involving breaches of international sales contracts brought about by supervening illegality (government decree, "fait du prince") offer a peculiarly inviting opportunity for application of the comparative method to a sharply limited field. The parties may be nationals of two or more countries with differing bodies of contract or commercial laws, yet disruption of performance, suspension of deliveries, incompleted or prohibited payments, or other factors, present basically the same practical, as well as juridical, problems for solution in each legal system. Thus, sellers and buyers in foreign commerce constitute a unity, as well as a potential diversity, of economic interest upon which certain universally recognized, but variously applied judicial concepts are brought to bear.

In this sketch of restricted scope, the attempt has been made to identify, not so much the common substantive elements, as the remedial elements of various legal systems when handling the problem of frustrated contracts. This essay was undertaken in the more modest spirit of the comparative method, in Arminjon's phrase, as a "discipline auxiliaire," in the hope that it would serve as a spur for a more penetrating study of the deeply interrelated problems of freedom of contract in the sphere of international transactions and legislative and judicial revisionism—"le dirigisme contractuel."

Within the narrow factual context there are presented partly performed international sales contracts frustrated by government decree—we find observance in all legal systems of the underlying principle of impossibility of performance—"impossibilium nulla obligatio." Starting with antithetical premises as to when impossibility or illegality may be accepted as a defense, both common law and civil law systems reach virtually the same results in the cases by applying the

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72 GUTTERIDGE, COMPARATIVE LAW, 32-34 (2d ed., Cambridge 1949). The writer has been guided by Rabel's admonition, "... Again, comparative work on concrete legal problems (as contrasted with methodology or legal philosophy) has often failed when extended to abstract theories. For quite a time, our task will be enormous, even if restricted to rules and facts. One of the first lessons a comparative student is likely to learn, is how much more readily judicial decisions on analogous case situations can be compared than statutes and doctrines. ..." Rabel, The Hague Conference on the Unification of Sales Law, 1 Am. J. Comp. L. 58 at 67 (1952).

73 ARMINTON, NOLFE AND WOLFE, 1 TRAITÉ DE DROIT COMPARE 22 (France, 1950).

74 This phrase is attributed to Josserand by Fonseca, see note 17 supra, at 115.

motion of “frustration” (as in England, but sparsely employed in the United States) “imprévision” or “Unzumutbarkeit.” Further, the principles of unjust enrichment and restitution are actively applied in both systems when working out readjusted contractual relationships and obligations in the form of redistributed risks. Nevertheless, a major divergence has developed in the area of the nature and scope of judicial revision of frustrated contracts. Far-reaching economic disasters flowing from the two World Wars have produced a drastic enlargement of judicial power in code countries. The judicial process in those countries, under the strain of post-war economic reconstruction, is employed as an instrument of public policy in the quasi-administrative readjustment of private contract obligations whose performance had become legally impossible or economically ruinous. Judges, under such recently enacted statutes, or amended civil codes, are empowered to handle war-generated currency-inflation litigation, arising from incompleting contracts for sales of goods, much as an international commercial arbitrator acting under a mandate to make a complete readjustment of all the rights and obligations of the parties.

The concept of unjust enrichment is strongly defended (p. 65) by LORD DENNIN in his little book, The CHANGING LAW (London 1953), as a powerful means to break down “the straight jackets of contract and tort” into which the courts have been forced to fit all remedies. But there is still doubt whether unjust enrichment as yet forms a part of the common law of England. Reading v. A. F., [1951] A. C. 507 at 513. Corbin states: “... When an actually unforeseen event had caused a promised performance to be impossible or has increased or decreased its cost or value and the risks involved cannot be shown by a process of factual 'interpretation' to have been allocated by the parties themselves, the Court must determine their allocation in accordance with the opinions of men in general as evidenced by business practice and social mores. Such a judicial allocation is always a subdivision of risks. As nearly as may be feasible, the parties are restored to the status quo ante. The judicial remedy is restitution, not enforcement. . . .”

The courts of today—the successors of the Chancellors of yesterday—have full power to fashion their judgments and decrees as the justice of the time requires.” Corbin, Frustration of Contract in the United States of America, 28-29 J. Comp. Leg. & Int'l L., Parts III-IV, 1-8 (3d Series, 1946-1947). In a footnote (19), Professor Corbin adds: “It did not require a Frustration of Contracts Act to confer this power upon the Courts. . . .”

For an acute analysis of the contrasted roles of the Anglo-American and French judges in the application of State-interventionist public policy in the field of private contract, see LLOYD, PUBLIC POLICY, A COMPARATIVE STUDY IN ENGLISH AND FRENCH LAW, 2, 3, 7, 121, 122 (London 1953).

In England Lord Wright and Lord Denning are proponents of the frank recognition of judicial law-making. In the preface of his book The CHANGING LAW, see note 75 supra at vii, LORD DENNIN states: “In theory, the judges do not make law, they only expound it. But as no one knows what the law is until the judges expound it, it follows that they make it.” At p. 45: “... The truth is that they (the judges) do every day make law, though it is almost heresy to say so.” But the debate still rages in England: Lord Simonds, in Major v. Newport Corp., [1952] A. C. 189 at 191,
In common law jurisdictions, though despite its reality, the principle of judicial legislation (exercised in practical effect to "remake" contracts for the parties) is still piously denied. The courts by implementing the doctrines of unjust enrichment and restitution, have nevertheless reached similar equitable results where problems of part payments or incompletely delivered deliveries were presented. In the United States, "frustration" has been given halting recognition and is simply merged with "impossibility of performance", or applied in the disguised form of "failure of consideration." On the international level, a synthesis of the various conceptions in common law and code systems relating to the bases for recognizing an obligor's defense of frustration by unforeseeable events as an excuse for non-performance is found in Art. 77 of the "Revised Draft of a Uniform Law on International Sales of Goods." Intention of the par-

denounced Lord Denning's position in that case when it was in the Court of Appeal, that "courts must fill in the gaps in statutes," as "a naked usurpation of the legislative function under the thin disguise of interpretation."

Denning, see note 76, supra at 60, notes the growing tendency of the English courts not only to set aside contracts for mistake, but also to "review the whole transaction and determine the rights of the parties as practical justice seem to demand." McElroy and Williams have suggested that "failure of consideration" offers the best approach to the solution of supervening impossibility and until the "coronation cases" the English courts were in the process of "developing the principle." Gow, see note 8 supra at 302, 303.

In New York, it has been held that supervening acts of government which render "performance impossible," excuse the seller from performance as a matter of law (Matter of Kramer & Uchitelle, Inc., 288 N. Y. 467 (1942), but in General Aniline & Film Corp. v. Bayer, 64 N. Y. S. 2d 492, aff'd, 305 N. Y. 479 (1953), the lower court mentioned frustration by supervening acts of the sovereign "as one of the elements in its decision on the sufficiency of a complaint, but the Court of Appeals treated that defense simply as "impossibility of performance").


81 INT'L INST. FOR THE UNIF. OF PRIVATE LAW, "Unidroit" 32 (Rome, Ed. 1951). Section II reads: "Where one of the parties has not performed one of his obligations, he shall not be liable for such nonperformance, if he can prove that it was due to an impediment, which according to the intention of the parties, at the time of the conclusion of the contract, he was bound to contemplate, or to avoid or to overcome. In the absence of an intention of the parties, regard shall be had to the intention which is usual when similar parties are placed in an identical situation. When the impediment is such as to cause a temporary exemption, such exemption shall be deemed permanent where an account of the delay in performance, its subsequent execution will be so radically transformed as to have become the performance of an obligation other than that contemplated by the contract. The exemption set out in this article on behalf of one of the parties does not deprive the other party of his right to avoid the contract or claim or a reduction of price where this law entitles him to avail himself of either of these rights." The restitution principle is recognized in Art. 81 (Effects of Avoidance): "The avoidance of the contract releases both parties from their obligations arising from it, subject to any damages which may be due. Where either party has performed his part of the contract either wholly or partially, such party
ties is considered decisive, but where no agreement is indicated, the problem is reduced to one of interpretation according to techniques developed in common law countries. The Report on the Draft (in commenting on the difficulty of reconciling opinions on the problem of steep increase in price levels, following unforeseeable change of circumstances) states: "... But on closer study, these differences arise from the way of looking at the extent of the typical risks which sellers adopt. The formula of Art. 77 leaves all these notions intact but reminds the judges that they must apportion to each party his share of the risk by interpreting their empirical intention and not by applying diverse doctrines of a dogmatic nature. Perhaps once this common basis has been recognized, the decisions will become integrated to some extent."