

**COMMON LAW DEVELOPMENT OF THE DOCTRINES OF  
IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION  
OF CONTRACTS AND THEIR USE AND APPLICATION IN  
LONG TERM CONCESSION CONTRACTS**

Common law development of the Doctrines of Impossibility of Performance and Frustration of  
Contracts and their use and application in long term concession contracts [1997] ICLR 298

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# COMMON LAW DEVELOPMENT OF THE DOCTRINES OF IMPOSSIBILITY OF PERFORMANCE AND FRUSTRATION OF CONTRACTS AND THEIR USE AND APPLICATION IN LONG-TERM CONCESSION CONTRACTS

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## 1. INTRODUCTION - THERE IS NOTHING NEW UNDER THE SUN

Long term concession contracts have existed at least since Roman times and doubtless long before that. The concept of a concession certainly predates the Magna Carta, which in a sense was about concessions (what God [or his representative the King] gives, he cannot capriciously take away) and predates the English notion of "common law". Herod may have been Governor of Judea, but he had only the right of usufruct, the right of peaceful use and possession, the right to rule the land and reap the fruits of its labours. This is the essence of the notion of a "concession". In the Middle Ages, there were German and Dutch concessions on the Thames river in London. The European colonialists have every reason to be ashamed of their history of exploiting large swatches of Africa and Asia, under the guise of concessions.

The legal characterisation of concessions has been a question in the domain of public international law, as Tore has rightly pointed out. Much of the law relating to the rights of governments to terminate concessions, and concessionaires to claim compensation, found in a highly developed way in civil administrative law systems, is also found in the realm of public international law, where the civil and common law systems meet, break bread together, and govern themselves by a systems of combined codified (treaty) and common (customary) law. Administrative contracts may in one sense be thought to be an entirely different civil law regime, but we share very common European roots, which are to this day expressed in a unified law before the International Court of Justice and in the United Nations generally.

A number of the cases of the Permanent Court of Justice and International Court of Justice reveal in some detail the scope, in relations between sovereign states, of the parties' rights under a concession. I will not review these, because they have been overtaken in many ways by the treaties to which Tore has referred, and others, such as the Multilateral Agreement on Investments which are coming into force.

The law in this area has historically witnessed a number of dynamic conflicts - one is that between the principle of *pacta sunt servanda* and the principle of *rebus sic stantibus*. Another is the battle between state rights and state responsibility, also referred to by Tore.

## **2. RISK ISSUES**

There are some considerations relating to the risk of default that are quite unique to BOT and concession contracts:-

### **Numbers**

The risks of default in a BOT contract must be greater than in an ordinary construction contract, simply because there is often a larger suite of contracts, including a "normal" construction contract, and there are more players involved.

### **Time - In the long run, we're all dead.**

The temporal element is also one of the distinguishing aspects of concessions. Adam Smith said "In the long run, we're all dead", but no one likes to admit it. A sale can take place in the twinkling of an eye, or modern, and risk is transferred forever thereby. With concessions, time drags on - the fruits of the opium war must one day come to an end, and the diamond cartels of Africa cannot last forever. The risks of significant change increases over time, because change is the one thing time assures. Nonetheless, we lawyers, like my namesake King Canute - still try to hold back the tide, or at least reign in/regulate the consequences of change.

For the parties to the construction contract, the long term is, in the absence of guarantees, shorter. Exactly how short it is depends on limitation/prescription periods in different jurisdictions.

### **Parties with special status**

There is certainly a large political element to any BOT contract, and responsibility for the various risks associated with this may well be a major problem. The risk of losing the service may be too great for the government to wish to bear it.

Those consequences naturally differ depending on whom is contracting with whom. BOT contracts exist entirely in the private sector, but often some sort of governmental body is involved. To the

extent that they are not the state, one problem, well rehearsed in various impossibility cases involving Eastern European state trading companies, comes to the fore - what happens if a superior state body, through some legitimate legislative act, makes it difficult or impossible for the inferior organisation to perform its obligations under contract? This question has been answered differently in different decades and in different circumstances.

Other thorny issues such as the scope of sovereign immunity and sovereign rights to assign benefits and burdens still need to be fully resolved.

### **Risk mixes**

In the construction contract, as opposed to the concession contract, things may be a little clearer. There is no administrative law in common law jurisdictions outside of the United States, so a separate regime is out of the question - issues are resolved in accordance with the parameters of normal (usually contract) law. Naturally one must distinguish contractor risks and owner/operator risks. Risk laden concepts include:

- State of the Art
- Fitness for Purpose
- Maintainability
- Reliability
- Serviceable life

Theories of risk allocation have been propounded for some time now. Risk is said to equal the probability of an event multiplied by its cost. There seem to be rather different schools of risk analysis amongst the Owners of the world, and the contractors. Wholesale risk dumping seems to take place as often as it is disparaged.

### **3. THE TRADITIONAL VIEW - THE CONTRACT IS THE LAW OF THE PARTIES - *PACTA SUNT SERVANDA* RULES - OK?**

The notion of post contract revision would seem to be anathema to the idea of conscious, carefully weighted pre-contractual splitting of the risk to the parties most able to bear it, and it is the case that the normal rule is that the some effort will be required to shift the contractual delineation of responsibility.

#### ***The victory of Pacta Sunt Servanda over Rebus sic stantibus***<sup>1</sup>

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<sup>1</sup> I am indebted for this catchy phrase to Saul Litvinoff, *Force majeure, failure of cause, and theorie de L'imprevision: Louisiana law and beyond* 46 Louisiana Law Review, 1985

The common law doctrines of impossibility of performance and frustration are strict. Perhaps the most important distinction in the common law world is between those jurisdictions, of which the United States is the most prominent, which have accepted the notion of impracticability of performance and those which stick more strictly to the more severe English doctrine of frustration as exemplified by the result in *Davis Contractors v Fareham UDC*<sup>2</sup>

In that case, a post-war labour shortage, which made it practically impossible to find sufficient tradesmen was held not to have the effect of frustrating the contract, even though performance was admittedly much more expensive and time-consuming than either party had foreseen at the time the contract was entered into. Lord Radcliffe said:-

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

There must be... such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."

In *National Carriers Ltd. v. Panalpina (Northern) Ltd.*<sup>3</sup> Lord Simon restated the test as follows:

*"Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances: in such case the law declares both parties to be discharged from further performance."*

The rather general nature of these statements belies the fact that the English courts have in fact been reluctant to apply the concept as broadly as these words might imply. The fact is that actual physical impossibility is the most likely event to result in a finding of frustration. So for example in the case of *Amalgamated Investment & Property Co. Ltd. v. John Walker & Son Ltd.*<sup>4</sup> it was held that an agreement for the sale of property for redevelopment was not frustrated despite the fact that

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<sup>2</sup> [1956] A.C. 696

<sup>3</sup> {1981} A.C. 675

<sup>4</sup> [1977] 1 W.L.R. 164.

the buildings on the land were listed (given a special protected status making it impossible to legally alter them) so that redevelopment became practically impossible and the value of the land plummeted.

The leading English expert on the topic, Professor Treitel, wrote:-

### ***Frustration***

*Under the doctrine of frustration a contract may be discharged if after its formation events occur making its performance impossible or illegal, and in certain analogous situations.*

[...]

*At one time most contractual duties were regarded as absolute, in the sense that supervening events provided no excuse for non-performance. In *Paradine v Jane* a tenant was sued for rent and pleaded that he had for about two years of his tenancy been dispossessed by act of the King's enemies. This plea was held bad. "When the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." This doctrine of absolute contracts works well enough (and continues to apply) where it would be reasonable, having regard to the nature of the contract or the circumstances in which it was made, to expect it to provide for the event. But where this is not the case, the doctrine is no longer regarded as a satisfactory way of allocating the loss that is occasioned by supervening events*

*Since that case, there seems to have been some narrowing in the scope of the doctrine of frustration. Many factors account for this trend: the reluctance of the courts to allow a party to rely on the doctrine as an excuse for escaping from a bad bargain; the difficulty of drawing the line between cases of frustration and cases where liability for breach of contract is strict; the tendency of business-men to "draft out" possible causes of frustration by making their own express provisions for obstacles to performance; and the practical difficulties to be discussed in the paragraph that follows. The trend is illustrated by the fact that the Second World War gave rise to few reported cases in which contracts were held to be frustrated otherwise than by supervening illegality.<sup>5</sup>*

The general American position is reflected in The Restatement 2nd, Section 261:-

### ***S261 Discharge by Supervening Impracticability***

*Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption*

*on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.<sup>6</sup>*

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<sup>5</sup> The Law of Contract by G.H. Treitel, Q.C., D.C.L., F.B.A. Ninth Edition London Sweet & Maxwell 1995

<sup>6</sup> Restatement (2nd) of Contracts 261-5 (1981)

The Comment goes on to elaborate that:

*This section states the general principle under which a party's duty may be so discharged. The following three sections deal with the three categories of cases where this general principle has traditionally been applied: supervening death or incapacity of a person necessary for performance (§ 262), supervening destruction of a specific thing necessary for performance (§ 263), and supervening prohibition or prevention by law.*

*Basic assumption. In order for a supervening event to discharge a duty under this Section, the non-occurrence of that event must have been a "basic assumption" on which both parties made the contract .... This is the criterion used by Uniform Commercial Code §2-615(a). Its application is simple enough in the cases of the death of a person or destruction of a specific thing necessary for performance. The continued existence of the person or thing (the non-occurrence of the death or destruction) is ordinarily a basic assumption on which the contract was made, so that death or destruction effects a discharge. Its application is also simple enough in the cases of market shifts or the financial inability of one of the parties. The continuation of existing market conditions and of the financial situation of the parties are ordinarily not such assumptions, so that mere market shifts or financial inability do not usually effect discharge under the rule stated in this Section. In borderline cases this criterion is sufficiently flexible to take account of factors that bear on a just allocation of risk. The fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption.*

*Impracticability. Events that come within the rule stated in this Section are generally due either to "acts of God" or to acts of third parties. If the event that prevents the obligor's performance is caused by the obligee, it will ordinarily amount to a breach by the latter and the situation will be governed by the rules stated in Chapter 10, without regard to this Section. [. ...].*

*As used here "fault" may include not only "wilful" wrongs, but such other types of conduct as that amounting to breach of contract or to negligence.*

*Although the rule stated in this Section is sometime phrased in terms of "impossibility", it has long been recognised that it may operate to discharge a party's duty even though the event has not made performance absolutely impossible. This Section, therefore, uses "impracticable".*

*Performance may be impracticable because extreme and unreasonable difficulty, expense, injury, or loss to one of the parties will be involved. A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply, or the like, which either causes a marked increase in cost or prevents performance altogether may bring the case within the rule stated in this Section.*

#### **FRUSTRATION OF PURPOSE, IMPRACTICABILITY AND ECONOMIC HARDSHIP**

Modern Common Law legal theory, especially in America has for some time accepted, at least in the abstract, the notion that bargains may change and be changed with time, but such revisionism, even if rooted in redolent Latin phrases and theories, such as "*rebus sic stantibus*"

has not been accepted universally or easily. American commentators have noted that the doctrine of impracticability has not taken such a firm root as, perhaps, some academics would prefer.<sup>7</sup>

The American case of *Alcoa* focused upon the differences in long term contracts and impracticability is a landmark case in this respect.<sup>8</sup> In that case, which was one of the energy crisis cases, the court intervened to re-establish a pricing mechanisms for smelting alumina which reduced, but did not eliminate, the loss *Alcoa* was suffering due to the increased cost of energy. Because of American developments of the concepts of frustration of purpose and impracticability, and openness to civil law notions such as economic hardship, American parties may very well receive, with a choice of an American governing law far more sympathetic treatment, on putting forward an allegation of frustration or impossibility of performance, than their brothers in England and other Common Law jurisdictions following the strict English lines.

Early in the twentieth century, in a famous coronation case, the English courts had excused a party even though it had been physically possible for the parties to be held to their bargain. The coronation was rescheduled, and the court held that the prospective lessor did not have to pay for the rent of a flat which would have had a good view over the procession. This case, *Krell v. Henry* had an effect on American theory in the field, but has had never actually resulted in England in the development of a viable thread of authority - or as a solid ground for relief from oppression. In England the doctrine *Krell v Henry* has not been accepted by or applied in subsequent cases.<sup>9</sup>

Waladis remarks that "the more things change, the more they remain the same and that despite the cataclysmic economic and political changes of the first half of the 20 Century and the fact that in England the prevailing view of the basis of the doctrine of frustration has moved from the "implied term" theory towards the "just solution" theory, English courts still grant a party the right to be excused from a contract essentially only upon facts that they would have granted an excuse at the end of the 19 Century.<sup>10</sup>

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<sup>7</sup> Litvinoff, *supra*, footnote 1, page 9

<sup>8</sup> Aluminium Company of America v Essex Group Inc. 499F. Supp. 53 (W.D. Pa 1980) [hereinafter ALCOA]

<sup>9</sup> *Common law and uncommon events: the development of the doctrine of impossibility of performance in English contract law* John D Waladis, Georgetown Law Journal Volume 75 page 1575 at 1621.

<sup>10</sup> Litvinoff comments: "*The Krell principle might never have been enunciated for all the change it has brought.*"

The result is an apparently ossified doctrine which could be argued to be one which does not meet the needs of business or simple logic. Courts have held that contracts to do the impossible will be enforceable, and if promisor breaches, damages are payable.<sup>11</sup>

### ***THE LOSS LIES WHERE IT FALLS***

Even if the contract is held to be terminated due to impossibility, the consequences may not be at all satisfactory, because under the common law, the loss lies where it falls, as at the date of termination. Legislation to partially cure this has been enacted both in the US and a number of common law jurisdictions. Treitel sets it out again:-

*From a practical point of view, the doctrine of frustration gives rise to two related difficulties. The first is that it may scarcely be more satisfactory to hold the contract is totally discharged than to hold that it remains in full force: often some compromise may be a more reasonable solution.*

*The second difficulty is that the allocation of risks produced at common law by the doctrine of frustration is not always entirely satisfactory. In a case like Taylor v. Caldwell it may be reasonable that neither party should be liable for loss of the benefit that the other expected to derive from the performance, so that the one should not recover his loss of anticipated profits, nor the other the payments promised to him. But it does not follow that loss suffered by one party as a result of acting in reliance on the contract should equally lie where it falls.*

*A more general, but nevertheless limited, power of adjustment now exists by statute, but it does not cover all cases in which some form of apportionment would seem to be desirable.*

At common law, parties are only discharged from the obligation of future performance. Rights which have accrued before the occurrence of the frustrating event are still enforceable.<sup>12</sup> Treitel

explains that the common law rules can cause some problems:-

*At common law, rights not yet accrued at the time of frustration are unenforceable. If a builder agrees to build a house for £100,000 payable on completion he cannot recover the £100,000 if the contract is frustrated before completion. This rule is perfectly*

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<sup>11</sup> *Eurico SPA v. Phillipp Brothers* The Times, May 18, 1987 (Court of Appeal) So far as English law is concerned, Treitel illustrates this well:-(ii) *Building contracts. Under a building contract, the risk of the work is (unless otherwise agreed) on the builder until the agreed work is completed. Thus a contract to build a house or a factory would not be frustrated by destruction of the buildings before completion. On the other hand, where a builder agrees to do work on an existing building, e.g. to install new machinery in a factory, a distinction must be drawn. If, before the work is finished, the factory is destroyed, the contract is frustrated; but if only the machinery is destroyed there is no frustration and the builder will remain bound to complete the installation with out extra charge.*

(*Joseph Constantine* case [1942] A.C. 154, 187; cf. *The Super Servant Two* [1990] 1 Lloyd's Rep. 1, 18 ("further liability").)

*reasonable: it would be unjust to make the building-owner pay the full price for an unfinished house. But, further, at common law the builder could not recover anything at all for partial performance before frustration. He could not recover a quantum meruit as no agreement to pay a proportionate sum for doing part of the work could be implied in the teeth of an express agreement for payment on completion. Thus in Cutter v. Powell<sup>13</sup> a seaman whose wages were to become due on completion of a voyage died during it: his executrix recovered nothing for the services he had rendered. And in Appleby v. Myers<sup>14</sup> the plaintiffs agreed "to make and erect the whole of the machinery" in the defendant's factory "and to keep the whole in order for two years from the date of completion." After part of the machinery had been erected, an accidental fire destroyed the factory with such of the machinery as was already in it, and frustrated the contract. It was held that the plaintiffs could recover nothing for the machinery which they had erected. The general view is that this result is unsatisfactory and that the builder should get something for his work.*

### **THE RISK OF CHANGED CIRCUMSTANCES AND RECTIFYING THE CONTRACT**

It might have been thought that a judicial power to rectify contracts would be helpful in maintaining the economic balance of the contract. However, the scope of the judicial power to rectify is too narrow to afford parties much shelter. This is clearer again from the explanation given by Treitel:-

*Contracting parties may execute a document purporting to contain the terms previously agreed between them. If, as a result of a mistake, the document fails to contain all those terms, or contain different terms, the court may rectify it, that is, order its wording to be changed so as to bring it onto line with the earlier agreement; alternatively, the court may treat the document as having been so rectified without making a formal order for its rectification. Having been developed in equity, rectification is a discretionary remedy. It is available where there has been a mistake, not in the making, but in the recording, of a contract: "Courts of equity do not rectify contracts; they may and do rectify instruments." [footnotes omitted]<sup>15</sup>*

### **COLONIAL VARIATIONS**

It would be arrogant, and especially unacceptable from a Canadian, to discuss this topic as if there were only two common law countries. The framers of the Indian Contract Act, 1872 for example, were well aware of the shortcomings of the law as it then existed, and they improved upon it:

56. 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,

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<sup>13</sup> (1975) 6 T.R. 320.

<sup>14</sup> (1867) L.R. 2 C.P. 651.

<sup>15</sup>

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.

**[extract from commentary] Impossibility in general** - Nothing resembling this section has been found among the materials known to have been used by the framers of the Act. It varies the Common Law to a large extent, and moreover the Act lays down positive rules of law on questions which English and American Courts have of late more and more tended to regard as matters of construction depending on the true intention of the parties. It is not permissible to import the principles of English law *dehors* the statutory provisions, English cases have a persuasive value and are only helpful in showing how the English Courts have decided cases under similar circumstances.<sup>16</sup>

Similarly, in Australia the courts have shown a willingness, when circumstances required, to depart from the strict English orthodoxy. In the fascinating construction case of *Codelfa*<sup>17</sup> a construction contract was held to be frustrated even though no one particular "big bang" event suddenly made performance impossible. The Rail authority had represented to the contractors that the contractors would be able to work around the clock. Instead, third parties obtained injunctions preventing them from working between 10 pm and 6 am. The majority of the highest Australian court held that the contract had been frustrated somewhere along the way, and that the contractors were entitled to payment on a *quantum meruit*.

The judiciary or arbitrators deciding on the basis of a governing common law other than English law would be in a position of somewhat greater latitude, as the English cases might only have

persuasive authority, and in appropriate circumstances, might well choose to follow Australian, Indian, Malaysian, American or even Canadian precedents.

#### 4. FORCE MAJEURE CLAUSES - TALES OF THE ACTS OF PRINCES

The inherent judicial conservatism and slow pace of change has meant that the doctrines of impossibility of performance and frustration of the contract and how they developed in common law jurisdictions may well be thought to be inappropriate for long term complex contracts. The law is both confusing and inadequate<sup>18</sup>.

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<sup>16</sup> *Pollock and Mulla on Indian Contract and Specific Relief Acts, Bombay 1986*

<sup>17</sup> *Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales* (1982) 149 C.L.R. 337

<sup>18</sup> I have of course only been able to cover a selected number of aspects of the law here, and would encourage readers to purchase Treitel's book *Frustration and Force Majeure*

The Common Law doctrine of frustration of contracts and impossibility of performance and the use and effect of these doctrines in long term BOT type contracts has meant that contract drafts people have had to use the victorious principle of *pacta sunt servanda*, to circumvent the victory of *pacta sunt servanda* itself. Complex force majeure clause have become a staple of the international concession contracts. However, in some jurisdictions, for example Canada, I have seen BOT contracts which do not include any force majeure/frustration provisions.

It is sometimes said that there is no common law notion of *force majeure*. While it is true that there is no direct equivalent of Article 1147 of the Code Napoleon, there is of course some overlap of concepts, as the attached citation from Litvinoff<sup>19</sup> makes clear:

*After a contract is made, a party bound under that contract may run into obstacles that make his performance impossible. When such is the case, that party is not liable for any damages that may result from his failure to perform. That is the doctrine of force majeure which, with only slight departure from its French ancestor, article 1147 of the Code Napoleon, was received in Article 1933(2) of the Louisiana Civil Code of 1870. [footnotes omitted]. For that doctrine to prevail, however, performance by the obligor must be truly impossible. In the traditional approach of French and Louisiana courts, there is force majeure only when the performance of an obligation becomes absolutely impossible because of obstacles that the obligor could neither foresee nor resist. [footnotes omitted]. An obligor, in that conception must honour his signature or his word at any price. He is bound to employ all his efforts and resources, and even face the collapse of his business if necessary, in order to perform his obligation. His diligence, in other words, must be absolute and perfect, regardless of the magnitude of the increase in physical or financial effort that unforeseen events or changes in circumstances may require of him in order to perform, and also regardless of the collapse of his expectations when such events or changes, without making impossible the performance he promised, deprive him from obtaining the reasonable advantage in contemplation of which he bound himself to perform. [footnotes omitted]*

It is of course possible for the parties to vary, by their contract, the consequences of insuperable events making the performance of the contract impossible, and so force majeure clauses are drafted into the contract, or suite of contracts.

There are a number of issues in this area, and I will allude to some that I am aware of.

### **DEFINITIONS**

There are 2 basic approaches here - laundry lists and generic descriptions. Sometimes a combination might be used. FIDIC uses both in its clause relating to frustration and special risks - one might usefully compare the first and fourth edition versions of clauses 65 and 66

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<sup>19</sup> *supra* footnote 1, page 1

In both cases, the relationship of the clause to the governing law's principles of impossibility/frustration has to be considered - will the clause be effective, is there an overlap or a danger that an event which should bring an end to the contract is considered to be a frustrating event under the local law, but not in the contract. This latter problem is more likely in the laundry list approach. The problem with the generic description approach is that one is almost guaranteed an argument about whether certain circumstances constitute frustration. In one case I was involved in there was a clear case for arguing that a special risk had occurred, but not a frustrating event. The generic list can be combined with a laundry list which is inclusive, or exclusive (for example - strikes do not frustrate). Some precedents include both types of lists.

#### ***FLOW THROUGH OF LIABILITY***

It seems to me that ideally, where a suite of contracts is involved, such as one would have in our wastewater plant, there should be identical provisions for dealing with the consequences of a force majeure event. In this manner, no one will be left with an obligation to purchase, sell build or maintain, when the project itself has suffered a catastrophe. In practice, it seems this will not always be possible, especially where governments are involved. The provisions of the Channel Tunnel contracts may be instructive in this respect. I have seen both cases where the provisions for termination on specified events are quite different, and cases where no clauses are to be found in one of the contracts in the suite.

#### ***CONTROL OF THE CONSEQUENCES OF CHANGE***

The first edition of FIDIC has a frustration clause which is 3.5 lines in length. One of my precedents has force majeure provisions amounting to 29 pages. The definition of force majeure is 2.5 pages long. Other items covered include: notifications provisions - (ASAP - in any event within 48 hours, with a 7 days confirmatory notice). One might ask what the effect of giving notice in the 49th hour might be. Duty to mitigate - except where there is a political event; Delay caused by force majeure; and Restoration/compensation (which takes most of the 29 pages)

The manner in which your force majeure provisions may be handled will depend on a number of related questions related to which party should bear the risk of unforeseen events and how are adjustments made for those unforeseen circumstances. These questions go to the very heart of the allocation of risk in concession/BOT contracts and might include:-

- Do the parties share the economic burden of unforeseen circumstances or do they fall on one party or the other?

- Should the risk of changes in price or the demand for the product or service be shared between the contractor and the owner?
- How much risk should the concessionaire be forced to take and how much risk should the public sponsor absorb?
- How do these questions relate to the termination provisions?
- Are liquidated damages enough?

## 5. PROSPECTS - THE ONLY CONSTANT IS CHANGE

Given the state of demand for infrastructural works around the world, innovative methods of finance will grow in importance and public-private partnerships will continue to thrive. The need to intelligently regulate change will mean that force majeure and termination provisions will have to be carefully considered. The need for back to back or complimentary provisions will be important.

The choice of governing law might be critical. Revision of concessions as a result of changes to the economic circumstances of the parties will continue to be governed mainly by national principles and the prospects for revision will in most cases depend upon the laws of the jurisdiction chosen as the substantive law of the contract. *Pacta sunt servanda* is the most common "common law" attitude, but there are significant differences in approach between jurisdictions. An alternative which is sometimes chosen is to apply "common principles of law" of 2 states.

In cases where hybrid systems of law are chosen, (and concessions should continue to figure prominently here), or *lex mercatoria* is applied either by choice or application of conflicts rules, or the doctrine of *trunc commun* is applied, imaginative counsel will be in a position to at least argue that the risk allocation should be changed as a result of changed circumstances. The first approach should however be contractual, because the consequences of having to rely on the common law may be unpalatable.

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**End of text**

## **Appendix**

# **TREATY**

**between the United Kingdom of Great Britain and  
Northern Ireland and the French Republic**

**concerning the Construction and Operation  
by Private Concessionaires of a  
Channel Fixed Link**

**with**

**Exchanges of Notes**

### **ARTICLE 6 Exceptional Circumstances**

- (1) In the event of any exceptional circumstances, such as natural disasters, acts of terrorism or armed conflict, or the threat thereof, each Government, after consultation with the other if circumstances permit, may take measures derogating from its obligations under this Treaty, its supplementary Protocols and arrangements, or the Concession.
- (2) Such measures may include closure of the Fixed Link, but shall be limited to the extent required by the exigencies of the situation and shall be notified immediately to the other Government and, as appropriate, to the Concessionaires.

### **ARTICLE 14 Modification of Concession**

- (1) When the term of the Concession ends, no compensation of whatever kind shall be due to the Concessionaires except as expressly provided in the Concession.
- (2) The two States undertake not to interrupt or terminate the construction or operation of the Fixed Link by the Concessionaires throughout the term of the Concession save on the grounds of national defence, or in the case of a failure by the Concessionaires to satisfy or comply with the terms of, and as provided in, the Concession or under the powers referred to in Article 6. Any breach by a State of this obligation would give the Concessionaires a right to compensation in accordance with the provisions of the Concession and consistent with international law.
- (3) If a State interrupts or terminates the construction or operation of the Fixed Link by the Concessionaires on grounds of national defence, the Concessionaires shall be eligible for compensation as provided under the law of the State concerned. In those cases where both States are liable under this provision and where the Concessionaires make a claim for compensation against both States, they may notice receive from each State more than half the amount of compensation payable in accordance with the law of that State.

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- (4) Each State shall bear the cost of the payment of any compensation to the Concessionaires in proportion to its responsibility, if any, in accordance with international law.

**ARTICLE 16**  
**Compensation between States**

In the event of either State unilaterally interrupting or terminating the construction or operation of the Fixed Link by the Concessionaires the term of the Concession, the other State shall be entitled to compensation. Such compensation shall be limited to the actual and direct loss suffered by that other State and shall exclude any indirect loss or damage; in particular it shall exclude any loss of taxation or other benefits derived from the establishment or operation of the Fixed Link. No compensation shall be payable in respect of an interruption or termination of the construction or operation of the Fixed Link on grounds of national defence where it serves the defence interests of both States.

**ARTICLE 17**  
**Rights of Governments on Termination of Concession**

Where the concession terminates, whether by effluxion of time or prematurely for whatever reason, the rights enjoyed by the Concessionaires in that part of the structure, land and fixed installations of the Fixed Link within the jurisdiction of each State will revert to that State. Other property relating to the Fixed Link should become the joint property of the two States under the conditions provided for in the Concession. If the two Governments decide to continue to operate the Fixed Link together, they will do so on the basis of equality of rights and obligations, including the upkeep of the structure and installations of the Fixed Link.

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**THE CHANNEL  
FIXED LINK**

*Dated as of 14th March, 1986*

**The Secretary of State for Transport**

**and Le Ministre de L'Urbanisme,  
du Logement et des Transports**

**and**

**The Channel Tunnel Group Limited**

**and France-Manche S.A.**

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**CONCESSION AGREEMENT**

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**Clause 24: Exceptional Circumstances and Force Majeure**

24.1 None of the parties to this Agreement shall be liable for any failure or delay in complying with any obligation under this Agreement to the extent that such failure or delay has been caused directly by Exceptional Circumstances or by any other event or circumstance presenting the characteristics of force majeure such as:

- war (whether declared or undeclared);
- invasion, armed conflict or act of foreign enemy;
- riot, insurrection, act of terrorism, sabotage, criminal damage or the threat of such acts;
- nuclear explosion, radioactive or chemical contamination or ionising radiation;
- any effect of the natural elements including geological conditions which it was not possible to foresee and to resist;
- strike of an exceptional importance;
- behaviour of one party causing serious and certain damage to another party;

to the intent that in particular, but without limitation, the time allowed for the performance of the obligations referred to in Clause 10 shall be extended accordingly.

24.2 Any party claiming that it has been prevented from fulfilling any of its obligations under this Agreement by reason of an Exceptional Circumstance or any other event or circumstance referred to in Clause 24.1 will notify all other parties immediately in writing, stating the basis of the claim.

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- 24.3 Any party wishing to dispute the validity of a claim which has been notified under this Clause will give written notice of dispute to the party making the claim within 28 days of the date of the notice of claim stating the grounds on which such claim is disputed.
- 24.4 If neither the notice of claim nor the notice of dispute has been withdrawn within 28 days of the date of the notice of the dispute, the matter shall be submitted to arbitration in accordance with the provisions of Clause 40.
- 24.5 If the notice of claim is not contested or if the notice of dispute is withdrawn within 28 days, all parties shall be deemed to have accepted the validity of the claim.
- 24.6 A party shall not be entitled to rely upon Clause 24.1 where that party by act or omission has seriously aggravated the relevant Exceptional Circumstances or other event or circumstances referred to in Clause 24.1.
- 24.7 The giving of notice invoking Clause 24.1 shall not release the party giving the notice from the requirement to take all reasonable steps to mitigate the consequences of the relevant Exceptional Circumstances or other event or circumstance referred to in Clause 24.1.
- 24.8 Except as specifically provided to the contrary, no party shall be relieved of its obligations under this Agreement by reason of impossibility of performance or any circumstances whatsoever outside its control.

**Clause 25: Interruption of Construction or Operation by order of the Principals**

- 25.1 The Principals undertake not to interrupt the construction or operation of the Fixed Link by the Concessionaires save on grounds of National Defence or in the case of a failure by the Concessionaires to satisfy or comply with the terms of, and as provided in, this Agreement or under the powers referred to in Article 6 of the Treaty. Nevertheless the Concessionaires shall, if so required by the Principals or either of them for any reason, interrupt such construction or operation, either in whole or in part. No such interruption shall be of a duration or extent greater than is necessary having regard to the circumstances giving rise to the requirement therefor.
- 25.2 In the case of any interruption on the grounds of Exceptional Circumstances or other event or circumstance referred to in Clause 24.1 or a failure by the Concessionaires to satisfy or comply with the terms of this Agreement, the Concessionaires will not be entitled to any compensation.
- 25.3 In the case of any interruption necessitated by reasons National Defence, the Concessionaires will be eligible for compensation in accordance with the provisions of Article 15(3) of the Treaty.
- 25.4 Any interruption by the Principals otherwise than as referred to in Clauses 25.2 or 25.3 shall entitle the Concessionaires to compensation in accordance with the principles set out in Clause 38.2 except that no compensation shall be payable in respect of the first hour of any such interruption, up to a maximum of 12 hours in any calendar year.

**CHANNEL FIXED LINK**

**CONDITIONS OF CONTRACTS**

**THE CHANNEL TUNNEL GROUP LIMITED  
FRANCE MANCHE S.A.**

**and**

**G.I.E. TRANSMANCHE CONSTRUCTION  
in joint venture with  
TRANSLINK**

***[The standard FIDIC Clause]*Work to be in accordance with Contract**

- 13.1 Unless it is legally or physically impossible, the Contractor shall execute and complete the Works and remedy any defects therein in strict accordance with the Contract to the satisfaction of the Engineer. The Contractor shall comply with and adhere strictly to the Engineer's instructions on any matter, whether mentioned in the Contract or not, touching or concerning the Works. The Contractor shall take instructions only from the Engineer (or his delegate).

***[Channel Tunnel Main Conditions of Contract]*Employer's Instructions**

- 13.(1) The Contractor shall design, supply, install, construct, complete, test, commission and maintain the Works to the satisfaction of the Employer and in strict accordance with the Contract and shall comply with and adhere strictly to the Employer's instructions and directions on any matter whether mentioned in the Contract or not, touching or concerning the Works.

**Security and Protection /Environment/Terrorism**

**Risk in the Works**

- 20.(1) From the Commencement Date until the date stated in the Certificate of Completion for the whole of the Works pursuant to Clause 48(7) the Contractor shall take full responsibility for the care of the Works. In case any damage, loss or injury shall happen to the Works, or to any part thereof, from any cause whatsoever, (save and except the expected risks as defined in Clause (20(2))), while the Contractor shall be responsible for the care thereof the Contractor shall repair and make good the same, so that at

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completion the Permanent Works shall be in good order and condition and in conformity in every respect with the requirements of the Contract and the Employer's instructions.

**Excepted Risks**

- (2) The "excepted risks" are war, hostilities, (whether war be declared or not), invasion, act of foreign enemies, rebellion, revolution, insurrection or military or usurped power, civil war, or unless solely restricted to employees of the Contractor or of his sub-contractors and arising from the conduct of the Works, riot, commotion or disorder, or use or occupation by the Employer of any part or the Permanent Works, or ionising radiations or contamination by radio-activity from any nuclear fuel or from any nuclear waste from the combustion of nuclear fuel, radio-active toxic explosive, or other hazardous properties of any explosive, nuclear assembly or nuclear component thereof, pressure waves caused by aircraft or other serial devices travelling at sonic or supersonic speeds or such operation of the forces of nature in respect of which insurance cover cannot reasonably or economically obtained, all of which are herein collectively referred to as "the excepted risks".

**Frustration**

**Payment in Event of Frustration**

If a war, or other circumstances which have been unforeseeable, irresistible, insuperable and beyond the control of either of the parties arises after the Contract is made so that either party is prevented from fulfilling his contractual obligations, or under the law governing the Contract, the parties are released from further performance, then the sum payable by the Employer to the Contractor in respect of the work executed shall be the same as that which would have been payable under Clause 65(8) if the Contract had been terminated under the provisions of Clause 65.

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**Other Rights of Termination**  
**Concession**

- 71.(1) Notwithstanding anything in the Contract contained, the Employer may, by giving 14 days written notice to the Contractor, terminate the Contract if the Concession is terminated or otherwise repudiated for any reason by either or both of the French and British Governments.

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**FIDIC 1ST AND SECOND EDITIONS**

**Clause 65 SPECIAL RISKS**

Notwithstanding anything in the Contract contained.

(1) The Contractor shall be under no liability whatsoever whether by way of indemnity or otherwise for or in respect of destruction of or damage to the Works (save to work condemned under the provisions of Clause 39 hereof prior to the occurrence of any special risk hereinafter mentioned) or Temporary Works or to property whether of the Employer or third parties or for or in respect of injury or loss of life which is the consequence whether direct or indirect of war hostilities (whether war be declared or not) invasion act of foreign enemies rebellion revolution insurrection or military or usurped power civil war or (otherwise than among the Contractor's own employees) riot commotion or disorder (hereinafter comprehensively referred to as "the said special risks") and the Employer shall indemnify and save harmless the Contractor against and from the same and against and from all claims demands proceedings damages costs charges and expenses whatsoever arising thereout or in connection therewith and shall compensate the Contractor for any loss of or damage to property of the Contractor used or intended to be used for the purposes of the Works (including property in transit to the Site) and occasioned either directly or indirectly by said special risks.

**Clause 66 FRUSTRATION**

In the event of the Contract being frustrated whether by war or otherwise howsoever the sum payable by the Employer to the Contractor in respect of the work executed shall be the same as that which would have been payable under Clause 65 hereof if the Contract had been terminated under the provisions of Clause 65 hereof.

**FIDIC 4TH EDITION WITH 1992 AMENDMENTS**

**Special Risks**

**65.1 1 No Liability for Special Risks**

The Contractor shall be under no liability whatsoever in consequence of any of the special risks referred to in Sub-Clause 65.2, whether by way of indemnity or otherwise, for or in respect of:

- (a) destruction of or damage to the Works, save to work condemned under the provisions of Clause 39 prior to the occurrence of any of the said special risks,
- (b) destruction of or damage to property, whether of the Employer or third parties, or

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- (c) injury or loss of life.

**65.2 1 Special Risks**

The special risks are:

- (a) the risks defined under paragraphs (a), (c), (d) and (e) of Sub-Clause 20.4, and
- (b) the risks defined under paragraph (b) of Sub-Clause 20.4 insofar as these relate to the country in which the Works are to be executed.

**Release from Performance**

**66.1 1 Payment in Event of Release from Performance**

If any circumstances outside the control of both parties arises after the issue of the Letter of Acceptance which renders it impossible or unlawful for either or both parties to fulfil his or their contractual obligations, or under the law governing the Contract the parties are released from further performance, then the parties shall be discharged from the Contract, except as to their rights under this Clause and Clause 67 and without prejudice to the rights of either party in respect of any antecedent breach of the Contract, and the sum payable by the Employer to the Contractor in respect of the work executed shall be the same as that which would have been payable under Clause 65 if the Contract had been terminated under the provisions of Clause 65.