Between Stability and Adaptability
The Hard Cases in Strategic Infrastructure Projects

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Strategic infrastructure projects are often the terrain upon which political ambition meets economic discipline; more than any other class of contract, they bring into sharp relief the tension between stability and adaptability: the contractor must be able to price, finance and resource a stable undertaking; the employer must remain free to adapt the project as circumstances change. Neither interest is absolute; each defeats the enterprise if pressed too far: a project can no more commence without stability than deliver without adaptability.

The contractual mechanisms through which the compromise operates — variation, omission, suspension, termination for convenience — all force the same question: how far the employer may depart from the original project and at what cost. Each carries an internal limit: a variation may alter the works but not replace the bargain; an omission may reduce scope but not destroy the assumptions upon which the work was priced; a suspension may postpone performance but not render the original allocation of risk unrecognisable. At some point lawful adaptation becomes transformation, the point being hardest to fix where change is cumulative: a succession of unobjectionable decisions gradually recasting the scope, sequence and economics of the project until the original bargain is discernible no longer.

Identifying that point is harder still because it is not determined by contract alone: the contractor must price not only the flexibility the contract confers upon the employer but also that reserved by the governing law itself; for the equilibrium between stability and adaptability is seldom fixed exclusively by the parties' bargain: the law keeps a finger on the scales. The point is especially apparent in the civilian tradition and Islamic jurisprudence, where doctrines of good faith, hardship and abuse of rights preserve a continuing public interest in contractual equilibrium, but it is not peculiar to them.

The orthodox account of how disputes over the point of inflection are resolved treats the tribunal's task as one of construction: the parties struck a bargain; the contract, read with the governing law, contains the equilibrium they selected; the tribunal identifies that equilibrium and applies it. The account is sound as far as it goes; but there are disputes in which each side's case is legally orthodox, commercially rational and genuinely persuasive; in which contract, legislation and authority can be read, without strain, to support either position; in which able lawyers, furnished with identical materials, reach opposite conclusions, with equal conviction. How much

adaptation did the parties contemplate; when does lawful change become transformation; what weight belongs to certainty and what to commercial reality; how far do mandatory norms qualify express terms — questions of this kind narrow the field of permissible answers without reducing it to one.[1]

If, then, the legal materials underdetermine outcome, the explanation must lie elsewhere. It lies in the adjudicator's sensibility: not the conscious pursuit of political or ideological ends, but the unstated assumptions, instincts and intellectual habits through which the function of contract and the office of law are understood. It is shaped by the accumulated intellectual, cultural, moral, institutional and social influences through which a lawyer acquires not merely the content of a legal system but the instincts by which it is interpreted and applied. Some are formed in traditions that treat autonomy as the pre-eminent organising principle of social life and contract as its principal instrument; others in traditions that subordinate private will to a wider conception of order, reciprocity and equilibrium. Neither disposition is superior; both produce great lawyers; but where the legal materials cease to compel, the difference becomes decisive.

The same sequence of events appears to one mind as the legitimate exercise of contractual flexibility, and to another as the gradual erosion of the bargain; the same mandatory rule presents to one as a necessary safeguard against disequilibrium, and to another as an exceptional derogation from autonomous choice. The materials remain constant; what changes is the valence accorded to the considerations competing within them: certainty and flexibility; autonomy and equilibrium; the bargain struck and the bargain experienced. The reasons given are sincere but incomplete: they explain why the chosen answer is permissible but not why it was chosen; the real explanation lies in assumptions so deeply embedded that the adjudicator rarely experiences them as assumptions at all.

The formal rules retain their office: they define the field beyond which no adjudicator may stray; but within these bounds, doctrine does not eliminate judgment: it does not dictate whether a particular bargain bends or holds. The equilibrium between stability and adaptability is settled not by the legal materials alone but by the adjudicator's cast of mind: the intellectual, cultural, moral and institutional experience of a lifetime, distilled into instinct. Law supplies the vocabulary; civilisation the idiom.

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[1] The possibility that legal materials may underdetermine outcome has long been recognised in jurisprudential scholarship and is assumed rather than defended here.