UNIVERSITY OF GLASGOW

FACULTY OF LAW AND FINANCIAL STUDIES
DEPARTMENT OF PRIVATE LAW

EXCUSABLE NON-PERFORMANCE OF CONTRACT: INTERNATIONAL AND COMPARATIVE ASPECTS

THESIS SUBMITTED FOR THE DEGREE OF DOCTOR OF PHILOSOPHY (Ph. D.)

BY

PARVIZ SAVRAI

ProQuest LLC.
789 East Eisenhower Parkway
P.O. Box 1346
Ann Arbor, MI 48106 – 1346

ACKNOWLEDGEMENT

This thesis would never have been completed without the help and encouragement I received from many people over the years of this research.

I am deeply indebted to my supervisor, Joseph M. Thomson, Regius Professor of law, for his expert guidance, constructive comments and alacrity. He generously shared with me his valuable time, and his enthusiasm served as a major source of inspiration and stimulus. I am also grateful to Professor David G. Powles, Director of the Centre for Commercial Law, for his advice and suggestions which were helpful. Acknowledgement is also given to the Bureau of International Legal Services of Islamic Republic of Iran, in particular the head of the office, Professor G. Eftekhar Jahromi, for financial support during my research. Special thanks must be extended to the members of staff of the Faculty of Law and Financial Studies for the facilities and help given to me. I would like also to express my gratitude to the staff of Glasgow University Library, in particular Inter-Library Loans, for the courtesy and consideration with which they responded to my inquiries and placed the required materials at my disposal.

My gratitude and respect for my mother and father is abundant. I am indebted to each for their support and encouragement during my studies. Finally, I owe my greatest debt to my wife for her patience, understanding and encouragement.

Parviz Savrai

March 1994

ABSTRACT

The purpose of this thesis is to examine and analyse the application of excusable non-performance of contract through a comparison between the rules of the Common law, Civil law, international Conventions, and the standard form contracts on the subject. The approach is to consider and analyse the problem from an international as well as from a national perspective, *viz.*, the English, American, French, and German laws of contract. The main thrust of the thesis is that the problem of excusable non-performance viewed in doctrinal terms, presents extraordinary difficulties which have troubled legal scholars for many years. The emphasis is given to the potential ability of parties to regulate their own affairs by means of their contract. For this purpose, the study is aimed at examining drafting techniques and providing suggestions for the formulation of a *force majeure* clause in such a manner so as to introduce the clause as a means of contract security and a way of avoiding potential conflicts.

More specifically, the thesis is divided into four parts. Part one deals with excusable non-performance and conditions under which a contract is discharged. In this part, the concept of the excuse doctrines as well as the historical development of the doctrines will be examined, analysed and compared. Part two analyses the effects of total and partial excusable non-performance in which the important questions of rights and liabilities of contracting parties will be examined. Part three considers the problem and its confrontation at international level with regard to international Conventions, standard form contracts, and proposed theories. In part four, the thesis examines the role of *force majeure* clauses in the contracts. The thesis concludes with recommendations on how the problems of excusable non-performance can be eliminated by a well-drafted immunity clause.

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ABBREVIATIONS

(Excluding Recognised Law Reports)

Am. J. Comp. L.	The American journal of Comparative Law
Am. J. Int'l. L.	American Journal of International Law
Art.	Article
B.G.B.	Burgerliches Gesetzbuch (The German Civil Code of 1900)
B.G.H.	Federal Supreme Court
B.G.H.Z.	(Official Collection of Reports of Decisions of the Federal Supreme Court in Civil Matters)
B.U.L. Rev.	Boston University Law Review
Bull. Civ.	Bulletin Civil
Bus. Law.	The Business Lawyer
C. L. J.	Cambridge Law Journal
Cass. Civ.	Cassation Chambre Civile
Cass. Com.	Cassation Chambre Commerciale
Cass. Req.	Cassation Chambre des Requetes
Clunet	Journal du Droit International
Colum. J. Transnat'l. L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbial Law Review
Com. L.J.	Commercial Law Journal
Cons. d'Etat.	Conseil d'Etat
D.	Recueil Dalloz
D. P. C. I.	Droit et Pratique du Commerce Internationale
D.H.	Dalloz Hebdomadaire
D.P.	Dalloz Periodique
D.S.	Recueil Dalloz et Sirey (or Dalloz-Sirey)
De Paul Bus. L.J.	DePaul Business Law Journal
De Paul L. Rev.	DePaul Law Review
Duq. L. Rev.	Duquesne Law Review
EEC	European Economic Community
Ga. L. Rev.	Georgia Law Review
Gaz. Pal.	Gazette du Palais
Gaz. Trib.	Gazette des Tribunaux
Hamline L. Rev.	Hamline Law Review
Harv. L. Rev.	Harvard Law Review

Hasting Int'l.&Comp.L.Rev.	Hasting International and Comparative Law Review
Hasting L. J.	Hasting Law Journal
Hofstra L. Rev.	Hofstra Law Review
Hous. L. Rev.	Houston Law Review
How. L.J.	Howard Law Journal
ICC	International Chamber of Commerce
Illus.	Illustration
Ind. L. Rev.	Indiana Law Review
Int'l. & Comp. L.Q.	International & Comparative Law Quarterly
J. Bus. L.	The Journal of Business Law
J. Comp. Leg. Int'l. L.	Journal of Comparative Legislation and International Law
J. Int'l. Arb.	Journal of International Arbitration
J. Mar. L. & Com.	Journal of Maritime Law and Commerce
J.C.P.	Juris-Classeur Periodique
Jurid. Rev.	The Juridical Review
J.W.	Juristische Wochenschrift (Law Journal)
L. Q. Rev.	The Law Quarterly Review
Loy. U. Chi. L.J.	Loyola University Law Journal (Chicago ill.)
Mercer L. Rev.	Mercer Law Review
Mich. L. Rev.	Michigan Law Review
Mo. L. Rev.	Missouri Law Review
Mod. L. Rev.	The Modern Law Review
N / n	Numero
N.C.L. Rev.	North Carolina Law Review
N.J.W.	Neve Juristische Wochenschrift
N.Y.U. L. Rev.	New York University Law Review
New L.J.	New Law Journal
Notre Dame L. Rev.	Notre Dame Law Review
NW.U. L. Rev.	Northwestern University Law Review
Ohio St. L.J.	Ohio State Law Journal
Para.	Paragraph
R.G.	Reichsgericht (Imperial Supreme Court)
R.G.Z.	(Official Collection of Reports of Decisions of the former Supreme Court in Civil Matters)
Rocky Mtn. Min. L. Inst.	Rocky Mountain Mineral Law Institute
RT	Revue Trimestrielle de Driot Civil

Rutgers L. Rev.	Rutgers Law Review
S.	Sirey (or Recueil Sirey)
S.C.L. Rev.	South Carolina Law Review
Solic. J.	The Solicitors' Journal
St. John's L. Rev.	St. John's Law Review
St. Louis U.L.J.	Saint Louis University Law Journal
St. Mary's L.J.	St. Mary's Law Journal
Stan. Envtl. L.J.	Stanford Environmental Law Journal
Temp. L. Q.	Temple Law Quarterly
Temp. L. Rev.	Temple Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
U.C. Davis L. Rev.	U.C. Davis Law Review
U.C.C. L.J.	Uniform Commercial Code Law Journal
UCC	Uniform Commercial Code
UNCITRAL	United Nations Commission on International Trade Law
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
Willamette L. Rev.	Willamette Law Review
Yale L.J.	Yale Law Journal

INTRODUCTION:

Throughout history, contracting parties have grappled with the problem of non-performance of their contract caused by unexpected events. According to the principle of *pacta sunt servanda*, parties involved in contracts, both in national and international contexts, are bound to perform their obligations. However, in the course of performance of a contract or before that, supervening events may occur which prevent or, at least, make more difficult the achievement of the purpose that the parties had in mind. Thus, performance of contracts is subject to a variety of risks, including the vagaries of nature, both on the land and on sea, legal, political, social, industrial and technological change, economic upheavals or foreign currency exposure, and the impact of insolvency. Excuse may be justified in terms of the contract itself or justified by the provisions of national laws.

Generally, where the parties try to deal with such contingencies beforehand rather than leave the question open, there exists a relaxation in negotiations between the parties which blind their eyes to any downside risk in their bargain. In consequence, they deny themselves the chance to address those problems which are capable of identification with reasonable foresight, and to make provision in their contracts for the contingency of their occurrence. This failure to make adequate and satisfactory provision for supervening events which occur after a contract has been formed, is so widespread that a body of legal doctrines has grown up around it. These doctrines are described under different titles: frustration, impossibility, *force majeure*, impracticability, imprevision, wegfall der geschaftsgrundlage, excuse, relief, *etc.* The problem of excusable non-performance of contracts, viewed in doctrinal terms, presents extraordinary difficulty, uneasiness and has troubled legal scholars for many years. While these concepts share a common rationale, much confusion and perplexity has attended their application to international contracts due to differences in the notions, and variations in the approaches taken by different national laws in dealing with them. The words "frustration", "impossible", "outside control", "unforeseen", "unforeseeable" and "supervening" are imprecise, elastic and are subject to a variety of interpretations, not only among the various legal systems of the world, but even within a single jurisdiction.

While the problem of excusable non-performance is fairly general, the solutions provided by the various legal regimes are far from uniform. It will be seen that even in the Common law which is well known for its empirical approach, the problem is treated differently. With wide diverging views on the

subject it is extremely difficult to arrive at a definition of excusable non-performance which would be universally acceptable. Either it is too narrow and restrictive or too liberal if judged by any one standard. One of the greatest difficulties is that most countries have two different standards, one for impossibility and the other for imprevision, geschaftsgrundlage, *etc.* In this thesis, an attempt will be made to provide a brief analysis of the different concepts and how they have been dealt with in the past in different legal systems.

The present argument is that the above doctrines, notwithstanding certain comparative differences in scope and effect, are not entirely satisfactory. At international level, rules in most legal systems concerning exemption from the legal consequences of a failure to perform may lead to results which are incompatible with the circumstances and needs of international trade. Apart from the problems inherent in the evolutive character of the proper law, the parties to transnational commercial contracts may find out that the proper law may not always supply a precise and suitable answer to the problems that they may encounter as a consequence of supervening events interfering with the expected performance of the contract or rendering it impossible for the obligor to perform. This comparative law analysis will reveal that domestic rules are not always exempt from ambiguity. The parties to transnational contracts must be conscious that a stipulation of applicable law may not necessarily or always ensure the stability of their relationship. In view of the diversity of domestic rules, aggravated by the vagaries of case-law, the parties to transnational contracts should attempt to deal directly with the problem and to include in their contract an exemption clause defining exempting impediments and specifying the legal consequences of those impediments. *Force majeure* and hardship clauses can provide a more comprehensive and reliable form of protection. In this study, such clauses, particularly *force majeure* clauses, will not only be considered in conjunction with doctrines of excuse but also in isolation from them.

One of the basic impressions obtained from negotiation practice is that very often it is extremely difficult for a lawyer to have a legally satisfactory hardship, *force majeure* or special risks clause included in the text of the contract. A legal system which intervenes in the contractual regime and grants an excuse from performance on grounds of "impossibility", "frustration" or the "disappearance of the foundation of the contract" ignores the capacity of the parties to regulate their own affairs on the basis of mutual accord. It disregards the capacity of the parties to make their own bargains in the face of

impediments to performance. To grant a performance adjustment to parties where a contract provides for no excuse, is to displace the intention of the parties and to replace it with the intention of the court. Moreover, it is debatable, questionable, and even uncertain whether the law provides appropriate mechanisms to deal with the problem - the legal tools are suitable for a less dynamic world, possibly an abstract world which never existed.

The self-sufficiency of parties can be portrayed by a precise and comprehensive clause which specifies the limits of performance obligations. Parties can provide the circumstances in which excusable non-performance will be permitted. Parties can provide contractual provisions for changes in the price of the contract in the event of fluctuations. They can provide for an appropriate suspension of performance or termination of the contract. Accordingly, the contract can constitute the law of the parties. Consequently, this thesis contends that parties who assume obligations to perform in terms of their contract do so intentionally. The existence of an appropriate formula or machinery within the contract for gap-filling may often be crucial in saving the contract. In reinforcing this theme, the study identifies the parties' ability to foresee non-performance risks and burdens and to provide for them expressly in their contracts with an appropriate mechanism. Emphasis is given to their capacity to devise extensive contractual provisions.

The main thrust of this thesis is, therefore, to describe the potential ability of parties to regulate their own affairs by means of their contracts and the need to determine the ambit of the right of non-performance through contractual provisions rather than by superimposing an excuse into the contract by way of judicial construction. The self-reliance of the contracts illustrates the inappropriateness of imposing mandatory legal rules upon the parties.

The thesis therefore stresses that parties both at national and international levels through the use of comprehensive performance clauses in their contracts, are able to regulate a wide spectrum of events that affect their business ventures. Consequently, this thesis aims to show that parties involved in contracts should be excused where such an excuse is provided for in terms of their contract itself. In supporting this central theme, emphasis is placed upon the terms of the contract. Stress is given to the parties' potential ability to provide for a precise and comprehensive sequence of performance risks within detailed non-performance and performance adjustment clauses.
Thus, this thesis undertakes to contribute to the issue by discussing some specific problems concerning the *force majeure* contract provisions. For this

purpose, this thesis is aimed at examining drafting techniques and providing suggestions for the formulation of the clause and its elements in such a manner so as to introduce the clause as a means of contract security and also as a means of avoiding potential conflicts as well.

Parties to a contract, especially at international level, are inevitably aware of a number of undesirable consequences that may occur due to change or unexpected circumstances beyond their control. International confrontation, regional and global warfare with world consequences that effectively inhibit and sometimes even prevent the fulfilment of contracts may occur. However, none of these circumstances justifies that parties should automatically be entitled to a right of non-performance on the occurrence of a supervening event. None of these events should automatically confirm the parties' right of non-performance on the grounds that a severe disruption prevented his capacity to perform. They have every opportunity, given their detailed experience and knowledge, to deal directly with the problem and to specify in their contracts the type of situations which they are willing to consider as *force majeure* or hardship events and the consequences ascribed to such contingencies should they occur. Thus, it is the parties themselves who are bound to regulate performance risks in their contracts. It is they who, for reasons of cost and convenience, should provide under what circumstances the performance of their obligations should terminate or alter in nature.

However, as the governing law of the contract can be a legal system which has a different concept of excusable non-performance from that which a contracting party is aware, it is important to understand the application of different doctrines of excuse. Further, since the scope of transnational commercial transactions is wide, an effective analysis of the subject-matter must not only incorporate an international perspective but must also be sufficiently selective in providing a detailed examination of particular systems of law. Thus, in this regard, this thesis also seeks to present a comparative survey of excusable non-performance with particular emphasis on the evaluation of excuse doctrines. The emphasis is primarily on English, American, French, and German laws.

The above systems have been chosen for the following reasons: At first, these countries - which are usually the governing law of the majority of contracts - are leading systems and each of them has a distinctive historical, legal, political and economic structure and recognises different doctrines of excuse from each other. For example, whereas the German doctrine of

wegfall der geschaftsgrundlage is generally recognised as broad and flexible, the French doctrine of *force majeure* is generally recognised as strict and narrow. English law probably stands in the middle. Secondly, the analysis of these doctrines in different legal systems adds a sharper focus to the problems of excusable non-performance especially when the problem is considered at international level, since, where practical problems of international commercial law are concerned, a solution can only be found by a detailed comparative examination of the various national legal rules in question. It will become clear that even in a subject of strong international flavour such as the law of international sales (for example, Vienna Convention) those rules are greatly influenced by doctrinal concepts which may vary considerably in the various national systems of law. Indeed, any law of international trade of the future with synthetic non-national legal concepts is the product of such comparative law that may pave the way to the unification or harmonisation of the law of international trade. Thirdly, the above comparative analysis will show that irrespective of the varying degrees of contractual protection available under these doctrines, in practice relief by the operation of the law still falls short of the scope of protection afforded under *force majeure* or hardship clauses. Finally, international contracts usually set out the rights and duties of the parties in detail, in which case national law will be referred to only so as to fill any gaps left by the contract, or national law may make a clause in the contract involved. But recourse to national law remains inevitable. In other words, in the absence of any contractual clauses dealing with such questions, the parties will have recourse to the relevant rules laid down by the law applicable to the contract.

More specifically, this thesis consists of four parts: Part one deals with excusable non-performance and conditions under which a contract is excused. Chapter one is a short historical survey tracing the origin and early development of the problem of excusable non-performance. From this historical examination the origins of certain features of the modern doctrines emerge and are exposed to critical analysis. Chapter two evaluates the different laws governing non-performance. In chapter three all requisites which must be met to consider a contract excused will be fully discussed. The non-foreseeability of the frustrating events as a vital requirement to render a contract frustrated is explained in this chapter. In addition, to manifest the differences between discharge under breach of contract and under excuse doctrines, this chapter speaks of "non-fault of the party seeking relief" as another important requisite rendering a contract excused.

Part two deals with the most important part of the excuse doctrines, that is, the question of rights and liabilities of contracting parties under an excused contract. Furthermore, having regard to the significance of the distinction between "total and partial excusable non-performance" in determining the effect of excusable non-performance and the contracting parties' rights and liabilities, chapter four is devoted to the effects of total excusable non-performance and chapter five to the effects of partial excusable non-performance. Part three examines, analyses and evaluates the problem and its confrontation at international level with regard to international Conventions, standard form contracts and proposed theories of excusable non-performance.

All the above topics are dealt with by comparing the relevant rules and provisions of the following laws and international rules concerning non-performance: Common law, Civil law, the 1964 Hague Convention on Uniform Law for International Sale of Goods (ULIS), the 1980 Vienna Convention on Contracts for International Sale of Goods (CISG), the models contracts sponsored by the United Nations Commissions for Europe (ECE) and the International Chamber of Commerce (ICC) rules relating to international transactions and FIDIC's conditions for contract for work of civil engineering construction. The study also includes some discussion on other standard form contracts which are widely used in international transactions, the problems created by them in abuse of the freedom of contract and the means by which the victims of this exploitation are and can be further protected.

Finally, in part four, the closing chapter of this thesis, having regard to the close relationship between excuse doctrines and *force majeure* clauses, we examine the role of *force majeure* clauses in contracts and reveal the potential capacity of the parties to regulate their own affairs by means of contractual provisions. Further, the thesis suggests some important drafting techniques which can be employed in contracts both at national and international levels.

In conclusion, this proposition underlies the thesis: The need to have *force majeure* and hardship clauses in contracts and the need to have a precise and comprehensive formulation with regard to these clauses. Indeed, It is the purpose of this thesis to show that most, if not all, problems of excusable non-performance can and should adequately be solved by application of well established immunity clauses. Parties should rely more heavily upon the terms of the contract by drafting comprehensive *force majeure* and hardship clauses rather than general legal doctrines prevailing in

one country or another. Thus, the parties can make their own law and this need not necessarily be a system of national law.

In the end, it should be added that this thesis will use the words "excusable non-performance" "doctrines of excuse" to describe those situations in which the agreed performance has been prevented or has become onerous or can no longer accomplish its principal purpose.

PART ONE - EXCUSABLE NON-PERFORMANCE AND CONDITIONS UNDER WHICH A CONTRACT IS DISCHARGED

CHAPTER ONE:
SOME HISTORICAL ASPECTS OF EXCUSABLE NON-PERFORMANCE OF CONTRACT

For a better understanding of the nature of the problem of excusable non-performance and its application in different contracts both at domestic and international levels, and to find a satisfactory answer to the problem, it is at first essential to go into details and examine the history of the doctrine and its development in various legal systems. A brief account of historical development may provide a useful perspective and a deeper understanding of the parallel developments and scope of methods of excuse.

A. CIVIL LAW

1. HISTORICAL BACKGROUND PRIOR TO NINETEENTH CENTURY

The ancient maxim *pacta sunt servanda* required faithful performance of contractual obligations. According to the maxim, Roman law, at least as *jus strictum*, denied relief for excusable non-performance and did not recognise the doctrine. Consent was held to be an essential element of contract. Therefore, when the parties had entered into a contract, it followed logically that the obligation arising from it should be performed. However, along with this idea, there gradually grew up another theory, namely, that a person must not be held liable to do the impossible - *nemo tenetur ad impossibilia.* Supervening impossibility of performance (only absolute and objective impossibility) operated to extinguish an obligation.[1] While the texts do not give other instances of this rule than destruction of subject matter, Buckland concludes that the principle does not appear to be confined to this one case.[2] What is clear, however, is that Roman law at least recognised that impossibility of performance whether initial (*impossibilitas*) or supervening (*casus*), would absolve the obligor from his duty to perform.[3]

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[1]. R. W. Lee, The Elements of Roman Law, 4th ed. 1959, at 349-350; W. W . Buckland, Elementary Principles of the Roman Private Law, 1912, at 286, 287; W. W. Buckland, The Text-Book of Roman Law from Augustus to Justinian, 3rd ed. 1963, at 562.

[2]. *Loc. cit.* See also W. W. Buckland, *Casus* and Frustration in Roman Law and Common Law, 46 Harv. L. Rev. 1933, at 1281; G. Wassermann, 12 Revue du Barreau la Province Quebec, 1952, 366.

[3]. W. A. Ramsden, Some Historical Aspects of Supervening Impossibility of Performance of Contract, 38 Journal of Contemporary Roman-Dutch Law, 1975, 153.

The generic expressions used to denote the events which might be the cause of impossibility were *vis major* and *casus fortuitus.*[4] According to the above, in principle, if performance was *ab initio* physically or legally impossible the contract became void, and the party whose performance was made impossible, without any fault or fraud, was released from his obligation.[5] Thus, the Roman law of contract extinguished obligations of innocent parties where the thing was destroyed without the debtor's act or fault. It was applied in Roman times, for example, to save from liability a man who promised to deliver a slave by a certain day if the slave died before delivery.[6] This did not release the promisor if he was already in *mora*, or if it was imputable to him, for example due to his *culpa*; when he would be liable for *culpa.*[7] To sum up, it should be said that in ancient Roman law relief would be given provided that:
- The impossibility was not due to the fault of the party seeking relief;
- Performance must have been objectively, and not merely subjectively impossible.

Roman impossibility of performance as a means of exonerating an obligor for non-performance of his obligation has been incorporated into many systems of laws, for example German, French, *etc.*

However, through the development of *bona fide* institutions like the *exceptio dolis generalis*, relief would be given sporadically. This can be regarded as the origin of the *clausula rebus sic stantibus,*[8] the theory that every contract is subject to an implied or tacit condition under which contractual undertakings cease to be obligatory as soon as the facts out of which they arose have changed.[9] After many centuries, as a result of medieval canon law, *difficultas* became an excuse for non-performance: this doctrine released a debtor from performance of his obligation if it had become excessively difficult to do so. Thus, *rebus sic stantibus* was an ancient doctrine of canon law and applied by the ecclesiastical courts, who suspected usury whenever one party's bargain seemed too beneficial.[10] The canonists

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4. *Loc. cit.*

5. R. W. Lee, *op. cit.*; W. W. Buckland, (1912), *op. cit.*; W. W. Buckland, (1933), *op. cit.*; Bucland and McNair, Roman Law and Common Law, 1936, at 179-183.

6. Sohm, Institutes of Roman Law, 3d ed. 1907, 439, 440.

7. Buckland, A Manual of Roman Private Law, 2nd ed. 1981, at 342.

8. M. G. Rapsomanikis, Frustration of Contract in International Trade Law and Comparative Law, 18 Duq. L. Rev. 1980, 551, at 552.

9. R. B. Schlesinger, Comparative Law - Cases, Text and Materials, 2d ed. 1959, at 365, 366 (note).

disapproved any enrichment of one party at the expense of the other.[11] *Rebus sic stantibus* was considered as an implied term in contracts, by which the parties were obliged to keep their contractual promises only so long as the circumstances remained unchanged. This allowed a contract to be rescinded or modified when the contract was unprofitable. Its basis was what has become known in England as the theory of the implied term. In this regard, good faith was a vital element in the performance of the contracts and where, without the fault of the parties, a change of circumstances created hardship, the court was able to apply the doctrine. By the sixteenth century at the latest, this doctrine had been accepted by the secular Civil law.[12]

The approach taken by the natural law and by pre-19th-century jurists to the problems of impossibility and changed circumstances is to be found in their theory of contract.[13] According to the natural law jurists, contract was defined as a means of voluntarily assuming a legal obligation to transfer resources from one party to another. An illegal performance was not included among such resources; since there could be no legal obligation to perform, a party therefore could not intend to contract for an illegal performance. Moreover, one could not, properly speaking, intend to enter into a contract for a physically impossible performance, since a contract contemplated a transfer of resources between the parties and an impossible transfer would be no transfer at all. The same analysis was applied when there was excessive onerousness of performance. Thus, in this era, due to the natural law, three cases of relief, *viz.*, legal impossibility, physical impossibility and excessive onerousness of performance were recognised.[14] The doctrine of *clausula rebus sic stantibus* - the beginning of which date back to canonist authors and can be traced through the medieval period to Grotious and Pufondorf - became the prevailing medieval theory.[15] The doctrine not only made a great impression upon legal practice and theory but also was accepted in major

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[10]. Mejers, La Force Obligatoire des Contrats et ses Modifications dans les Droits Moderns, In Acts du Congres International de Droit Prive, 1950, at 99, 101. See also Keith S. Rossen, Law and Inflation, 1982, at 85.

[11]. Marcel Planiol, Georges Ripert, Traite Pratique de Droit Civil Francais, 2d ed., Vol. VI, Obligations, 1952, no. 391 ff. See also Joseph Dainow, Essays on the Civil Law of Obligations, 1969, at 153, 154.

[12]. See K. W. Ryan, An Introduction to the Civil Law, 1962, at 55.

[13]. A. T. Von Mehren and J. R. Gordley, The Civil Law System, 2d ed. 1977, at 1038.

[14]. *Loc. cit.*, at 1041-1043.

[15]. J. Meinecke, Frustration in West German Law of Contract, The Irish Jurist, 1978, at 83.

eighteenth century codifications.[16] Under the doctrine, it only remained to determine which changes of circumstances had sufficient significance to justify discharge from the obligation.

However, the doctrine was forgotten in Europe, particularly in Germany, during the nineteenth century.[17] In the face of the economic disequilibrium resulting from World War I, many European courts sought theoretical justification for excusing the party whose performance had become exceedingly burdensome. Thus, the doctrine was reclaimed and recycled under a variety of names. French jurists developed theori de l'mprevision and the Germans advanced the doctrine of wegfall der geschaftsgrundlage.

2. EXCUSABLE NON-PERFORMANCE AFTER THE NINETEENTH CENTURY

2.1. GERMANY

Medieval German law had adopted the doctrine of *rebus sic stantibus.* The doctrine was embodied in the legislation of the eighteenth century in the Bavarian Landrecht of 1756 and the Prussian Allegemienes Landrecht.[18] During the nineteenth century, the doctrine lost its currency in Germany and the BGB (German Civil Code) which came into force on 1 January 1900, generally did not recognise it.[19] However, the starting point in Germany was the concept of impossibility of performance, which was fundamental to the scheme of contractual liability expressed in BGB but which was not defined in it. Causes contributing to the demise of the doctrine of *clausula rebus sic stantibus* were: emerging ideas of economic liberty and the feeling that the doctrine posed a danger to commerce because of the insecurity of contract implied in its acceptance, the influence of the school of scientific positivism; and the advocacy by the historical school of classical concepts, particularly of Roman law, which did not recognise the doctrine.[20]

In 1852, the famous German jurist, Windsheid, presented a new doctrine under the title "voraussetzung" (presupposition theory)[21] in which he

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16. *Loc. cit.*

17. P. Hay, Frustration and its Solution in German Law, 10 Am. J. Comp. Law, 1961, at 345-346; 6 Planiol & Ripert, *op. cit.*, at 526-527.

18. P. Hay, *op. cit.*, at 358; H. Lesguillons, Frustration, *Force Majeure*, Imprevision, Wegfall der Geschaftsgrundlage, 5 Droit et Pratique du Commerce International, 1979, 505, at 527.

19. J. Meineck, *op. cit.* See also Dawson, Effects of Inflation on Private Contracts: Germany, 1914-1924, 33 Mich. L. Rev. 1934, at 176, n. 22.

20. P. Hay, *op. cit.*, at 345, 346; J. Meinecke, *op. cit.*, at 83, 84.

pleaded for the implication of a presupposition in every contract. According to this theory, "presupposition" is an "undeveloped condition" that the legal effect of the contract will remain in force as far as a certain situation exists. Thus, where the other party is in a position to conclude from the circumstances of a transaction that the presupposition forms an element of the other party's intention, the latter, according to Windschied, can refuse performance or recover any performance made by him if the presupposition is not complied with. However, this concept which is comparable to an implied condition was rejected by Windschied's contemporaries.[22] With the rejection of the *clausula* and the inadequacy of the traditional concept of impossibility in the light of extraordinary economic changes after World War I, the German courts developed two applications analogous to the theory of impossibility.[23] First, economic impossibility arising from a change in the contents of the obligation. This would apply when performance was delayed because of temporary impossibility. Reichsgericht applied this view to contracts of sale of raw materials which the war made it impossible or very difficult to import. In such cases, the vendor was excused if delivery after the end of the prolonged war would take place in economic conditions entirely different from those prevailing in peacetime when the contracts were originally made.[24]
Second, there was economic impossibility due to "unzumutbarkeit" (non imputability) which resulted when changes had occurred, following the conclusion of the contract, but before its performance, which altered the economic significance of the performance. Under the "unzumutbarkeit", the obligor would no longer be required to perform the original contract when such a claim imposed an unreasonably heavy burden. This view was applied in a case where the vendor of salmon was freed from his obligation because the war had destroyed the German market in such foreign wares, even although the vendor had previously, sporadically and exceptionally, found ways and means of obtaining some supplies.[25]

The above "economic impossibility" as the criterion of performance was a vague concept and difficult to apply. Finally, in 1918, the Supreme Court

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21. See E. J. Cohn, Frustration of Contract in German Law, 22 J. Comp. Leg. Int'l. L. 1946, 15, at 20; A. T. Von Mehren and J. R. Gordley, *op. cit.*, at 1044-1048.

22. *Loc. cit.*

23. P. Hay, *op. cit.*, at 359; J. Meineck, *op. cit.*, at 90.

24. RGZ 94, 68, 69. (Cited in K. Zweigert, H. Kotz, An Introduction to Comparative Law, 1977, at 191).

25. RG JW 1919, 499. (Cited in Zweigert, Kotz, *op. cit.*).

(Reichsgericht), for the first time basing itself on the "treu und glauben" (good faith) provisions of paragraphs 157 and 242 of the German Civil Code, declared that the plaintiff was not obliged to perform the contract when the value of what was to be performed in return had become inadequate because of the effects of war.[26] In another case,[27] in 1920, the court allowed a suit for the increase of the price in a contract which, because of extreme inflation, had now become excessively onerous. The court held that due to unzumutbarkeit, paragraphs 157 and 242 and economic impossibility (paragraph 325), the continued obligation to perform would place an unconscionable burden on the obligor: whereas these paragraphs justify termination of the contract, the court held that it must also be permissible to modify the contract, provided both parties desired its continuation and on condition that good faith and equity so require. In another case, the court released a lessor who had contracted to supply the lessee with steam in a situation in which the cost of providing the steam reached 10 times the amount of rent received by the lessor. The Supreme Court ordered the trial court to determine a reasonable price for the steam in the light of changed conditions.[28]

However, the difficulty in defining the theoretical basis for the concept of excusable non-performance and elaborating a uniform approach is illustrated by the fact that one year later the court held that relief from a contract was available when equivalence of performance had been disturbed to such an extent that the obligor would not receive an equivalent for his performance. Thus, notions of economic impossibility, the threatened economic ruin of obligor (amounting to unzumutbarkeit), and the theory of equivalence of performance existed side by side.[29]

In 1921, under the impact of the cases growing out of the currency inflation, Oertmann began to evolve the theory of the "wegfall der geschaftsgrundlage" (the collapse of the foundation of the contract).[30] This theory combined the previous approaches and defined frustration in terms of whether the change in circumstances affects the foundation of the contract, so that the consequences place an unconscionable burden on the obligor. According to the theory, a contract may lapse as a result of altered

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[26]. P. Hay, *op. cit.*; J. Meineck, *op. cit.*

[27]. Cited in P. Hay, *op. cit.*, at 359,360; J. Meineck, *op. cit.*, at 90-92

[28]. Judgment of September 21, 1920, 100 RGZ 129.

[29]. Dawson, *op. cit.*, at 181-189.

[30]. E. J. Cohn. *op. cit.*, at 20, 2; J. Meineck, *op. cit.*, at 92 *et seq.*

circumstances if the expectations, assumptions or suppositions entertained by the parties at the time of contracting are frustrated by subsequent events. Thus, an uncontrollable change in the circumstances surrounding the contract that leads to fundamental disequilibrium in the contract and puts an undue burden on the party who had not anticipated that risk in the contract, justifies an adaptation or termination of the contract.[31] This German version of changed circumstances was first applied by the German Supreme Court in 1923 in the aftermath of the first World War, when revolutionary events and hyper-inflation affected the German economy and disrupted the basis of many contracts. Although the German Supreme Court had no hesitation in rejecting Windschied's theory, because of the immediate post-war inflationary period, it subsequently accepted the theory of geschaftsgrundlage proposed by Oertmann.

With slight modifications, the above theory forms the basis of the present German doctrine of excusable non-performance and has mainly been derived from the case law.[32] Reichsgericht defined the doctrine of "geschaftsgrundlage" as follows: The geschaftsgrundlage is formed by the assumption made at the time of contracting by one party, the importance of which is known to the other party and which is not objected to by him, or by the common assumption of both parties, of the existence or the occurrence or non-occurrence of certain circumstances which have determined the intention to contract. Thus, upon a failure of that assumption, the obligation to perform in terms of the existing contract ceases. It is not, however, upon the basis of an implied term in the contract that the obligation to perform is excused. The principle applied is that it is contrary to good faith for a party to hold the other to performance when he is aware that the other party has contracted only on the basis of certain assumptions which have turned out to be incorrect. [33]

By the combined effect of the doctrines of geschaftsgrundlage, of economic impossibility, and the greatly extended scope of the application of paragraph 242 of the BGB, German courts began to adjudicate the mass of cases arising out of economic strain and war emergencies. However, the major criticism of Oertmann's doctrine is its inapplicability in cases where the subsequent alteration of circumstances could not be foreseen by the parties at

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31. N. Horn, H. Kotz and H. Leser, German Private and Commercial Law: An Introduction, 1982, at 141 *et seq.*

32. See P. Hay, *op. cit.*, at 361; J. Meineck, *op. cit.*, at 84.

33. RG 168, 126. (Cited in K. W. Ryan, *op. cit.*, at 59).

the time of contracting. Indeed, the parties when entering into the contract regard the continuance of the existing circumstances as self-evident and do not consciously form, much less express, any assumptions about the future course of events.[34]

To sum up, it should be said that in response to the dislocations caused by disastrous inflation following World War I, the German courts, relying on the good faith principle, first began to relax the strict rules of the doctrine of impossibility. They found in this general language adequate authority for holding that revision was appropriate when great inflation disrupted the foundation of the contracts rather than simply cancelling them. Finally, in the period after World War II, Court-imposed adjustment ceased to be an occasional remedy and became the standard and preferred solution.[35] What will be evident as the discussion proceeds is the wide divergence which has developed between German law on the one hand and Anglo-American and French law on the other hand. This divergence may be due to disasters encountered by Germany in the 1920's.

2.2. FRANCE

As pointed out above, owing to the prevalence of the economic and political theories of capitalism and liberalism and other factors, the *clausula rebus sic stantibus* started its decline towards the end of the eighteenth century. Since then, and for over a century, the theory was being replaced by *pacta sunt servanda* that is "contracts must be honoured": this has the implication that a contract must be performed regardless of any change in circumstances and regardless of cost, effort, or sacrifice to the obligor.[36] The doctrine was also rejected by the great French jurists of the seventeenth and eighteenth centuries. Neither Domat nor Pothier accepted the validity of an implied *clausula rebus sic stantibus* in contracts. Thus, it is no surprise to find French law at the time of codification omitting a general provision concerning the modification of contracts.[37] Indeed, French draftsmen felt no need to introduce the doctrine into the law since it had not really been part of their

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34. K. Zweigert, H. Kotz, *op. cit.*, at 193.

35. Dawson, Judicial Revision of Frustrated Contracts: Germany, 63 B. U. L. Rev. 1983, 1039, 1045-1051, 1075.

36. Pothier, Traite des Obligations, Partie III, Ch. 6, Art. 3, S. 668. See generally on the relation of Pothier's treatment of impossibility to that in Roman law, W. W. Buckland, *Casus* and Frustration in Roman Law and Common Law, *op. cit.*

37. See Joseph Dainow, *op. cit.*, at 154.

legal tradition. As we have seen, the position in Germany was completely different from that obtaining in France. The doctrine survived longer in Germany than in France.

However, the ancient Roman maxim with regard to impossibility of performance, and also the writings of Pothier on the subject, did create the basis of the French civil law on impossibility of performance as a means of excusing an obligation. The French jurist, Pothier,[38] writing in the eighteenth century, stated the rule to be as follows:

"The debtor corporis certi is free from his obligation when the thing has perished neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken upon himself the risk of the particular misfortune which has occurred."

From this foundation developed the modern French law of *force majeure.* According to Articles 1147 and 1148 of the Code Napoleon, there is no award of damages when performance is prevented by *cas fortuit* or *force majeure.* As expounded by traditional doctrine and applied by cautious jurisprudence, for a contract to be discharged, performance must be rendered absolutely impossible, not merely more onerous.[39] In the event of *force majeure*, the contract is treated as a nullity, *i.e.*, terminated, contrary to the German practice of adjustment.

After World War I, owing to circumstances incident to that war, especially the fall in the value of French currency, there was a tendency after 1914 to extend the notion of *force majeure.* From this there emerged in France a new doctrine, known as "theorie de l'imprevision" (lack of foresight or theory of unexpected circumstances).[40] According to the doctrine, the parties of a contract are relieved if the performance of their contract has subsequently become very onerous, by means of interpreting their wills and the *bona fides* Article 1134 of the French Civil Code. This theory was not included in the French codification of private law. However, undue burden on a party caused by an unforeseen and uncontrollable event was recognised as an excuse for non-performance in government contracts.[41] In the ***Gaz de Bordeaux*** case,[42] the Conseil d'Etat extended the theory of *force majeure* where performance

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38. Pothier, *op. cit.*

39. R. David, Frustration of Contract in French Law, 28 J. Comp. Leg. Int'l. L. 1946, at 11, 12.

40. Rene David, *op. cit.*, at 12.

41. *Loc. cit.*, at 13. See also Planiol and Ripert, Traite du Droit Civil Francais, 1952, 2em ed. Tome VI, Nos. 391-98.

42. March 30, 1916, S. 1916. 3. 17.

had merely become more onerous although not impossible. Consequently, the court was allowed to adapt or modify contractual obligations.
The civil courts were quite unmoved by such decisions of the Conseil d'Etat. Supervening events only justify rescission of the contract if the very strict conditions of *force majeure* are met. This remains the position in France to this day.[43]

B. COMMON LAW
1. ENGLAND

The traditional position of the English common law of contract, unlike the Roman law, was that the liability to perform a contract was generally absolute and that the promisor was liable for breach of contract even though the non-performance was not due to any fault on his side. The classic case illustrating the rule is the seventeenth century decision, ***Paradine v. Jane***,[44] here the plaintiff, the lessor, sued the defendant, the lessee, for unpaid rent. The defendant pleaded that he had been evicted by an enemy alien, such an event was beyond his control, and he was prevented from taking any profits from the land as he had intended when he had taken the lease. The defendant's plea was held to be insufficient. The court reasoned that since the defendant had not made his promise to pay the rent conditional on his ability peacefully to enjoy the land, he was bound to pay the rent even though he had been unable to use it. The court also added that the law will not protect a promisor beyond the contract and that since the defendant was to have the advantage of all profits accruing from the land, it was fair that he bore the risk of casual losses.[45] However, contrary to the above decision, on the Continent the courts applied at the same period a much more liberal rule. Indeed, the basic provision of *pacta sunt servanda* had been tempered by the doctrine of the *clausula rebus sic stantibus.*

But according to early English law, a clause listing circumstances under which performance was excused, or a *force majeure* clause, could alleviate the necessity of applying or developing the doctrine of impossibility. As a result, the doctrine of absolute contracts works well where it is usual to make

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43. See, *e.g.*, Civ. 6 June 1921. 1. 73; Civ. 15 Nov. 1933, Gaz Pal. 1934. 1. 68; Com. 18 Jan. 1950, D. 1950, 227.

44. *Paradine v. Jane* (1646) aleyn, 26; 82 Eng. Rep. 897 (K.B. 1647). This harsh rule applied in equity as well. See *Leeds v. Cheetham* (1827)1 Sim. 146, 150.

45. This exaltation of the principle of sanctity of contract was even applied to commercial contracts. See *Hills v. Sughrue* (1846) 15 M. & W. 253.

provision for the supervening event, or where the party could reasonably have been expected to make such provision. But in other cases, the doctrine is considered as an unsatisfactory way of dealing with situations occasioned by supervening events. The ***Paradine*** rule was an inflexible rule of contract enforcement, extremely literal in application, often resulting in harsh or absurd consequences. Looking only to the words that the parties had chosen was not an ideal approach. This was, perhaps, not the best way to effectuate what the parties intended. However, despite earlier cases that recognised excuses for non-performance,[46] for over two centuries after the above decision (from 1647 to 1863), the rule was more or less rigorously applied. This doctrine meant that many English contracts became verbose collections of exemption clauses. However, in the early part of the 19th century, it was recognised that some injustice occurred as a result of adherence to the principle.[47] Justice required that some exceptions be made to the rule. The first rupture of the doctrine was brought about by the case of ***Taylor v. Caldwell***[48] which established the excuse for physical impossibility of performance, as well as the "implied condition" theory. In this case, the owner of a music hall had agreed to rent the hall to the lessee to hold concerts. The hall was accidentally destroyed by fire before the concerts. The court hearing the case refused to apply the theory of the absolute contract and held that there was an implied condition precedent in the contract that the hall was in existence when the concerts were given; since that condition was discharged both the owner (from paying damages for non-performance of the rental contract) and the lessee (from paying the agreed rental) were excused performances. The claim failed, not because the owner of the hall was unable to perform the contract by reason of an event for which he was not responsible - as would have been the basis for the decision in Germany under paragraph 275 BGB - but because the contract of hire was construed to contain an "implied condition" that the parties shall be excused in cases where the performance becomes impossible from the perishing of the thing without default of the contractor. The court in the ***Paradine*** case[49] would not have been prepared to imply a

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46. See, *e.g.*, *Abbott of Westminister v. Clerke*, 73 Eng. Rep. 59 (K.B. 1536) (Illegality due to subsequent act of Parliament); *Hyde v. Dean & Canons of Windsor*, 78 Eng. Rep. 798 (K.B. 1597) (Death of party to personal service contract); and *Williams v. Lloyd*, 82 Eng. Rep. 95 (K.B. 1628) (Destruction of chattel that was specific subject matter of bailment contract).

47. See, *e.g.*, *Hadely v. Clarke* (1799) 8 T.R. 259; Blight v. Page (1801) 3 B. & P. 295 (n); *Hall v. Wright* (1859) E.B. & E. 446.

48. (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

condition and interpret the contract in the way that Blackburn J. did in the ***Taylor*** case.

Taylor v. Caldwell is interesting for civil lawyers because in order to find authority for his position, the judge had resort to the Digest and to Pothier.[50] Although the case may have been decided under the doctrine of impossibility, which was then already in existence,[51] it appears that the case created a new doctrine of frustration.[52] However, this celebrated case, which brought some degree of flexibility into an exceptionally rigid law, expanded the second of the exceptions of "absolute contract" into a general principle that destruction of specific subject-matter would excuse performance even though the contract contained no express provision to that effect. The great advance which the case represented was that a distinction between absolute contracts and contracts which were subject to such an implied condition was drawn. This case is the starting point for the further development of the doctrine of frustration, and its principle was soon applied in other cases,[53] and was also accepted by the legislature in relation to agreements for the sale of goods.[54] Although this case gave credence to impossibility of performance as a contractual defence, it limited its application to cases where the subject matter of the contract was destroyed, thereby rendering performance physically impossible. Despite its lengthy establishment period and late birth in 1863, the doctrine of excusable non-performance has grown quickly since ***Taylor***, but still has not reached full maturity.

However, the doctrine was developed by the courts in order to encompass not only the destruction of a "specific thing" but also the non-occurrence of certain events. Not long afterwards, this can be illustrated by three cases known as the Coronation cases, heard by the same court. In ***Krell v. Henry***,[55] one of the cases growing out of the cancellation of the Coronation

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[49]. *Paradine v. Jane*, (1964) aleyn, 26; 82 Eng. Rep. 897 (K.B. 1647).

[50]. 122 Eng. Rep. 309, 312-313 (Q.B. 1863).

[51].See for example, *Melville v. Dewolfe* (1855, Q.B.) 4E1 & B1. 844; *Hughes v. Wamsutta Mills* (1865, Mass.) II Allen, 201. See also Comment, Impossibility and the Doctrine of Frustration of the Commercial Object, Yale. L. J. 1924, 91, 92.

[52]. See generally, Anson, Law of Contract, 24th ed. 1975, at 477; Cheshire and Fifoot, Law of Contract, 7th ed. 1969, at 507.

[53]. See, *e.g.*, *Appleby v. Myers* (1867) L.R. 2 C.P. 651; *Howell v. Coupland* (1874) L. R. 9 Q.B. 462.

[54]. Section 7 of the Sale of Goods Act 1893.

[55]. [1903] 2 K.B. 740. See also *Chandler v. Webster* [1904] 1 K.B 493; *Herne Bay Steamboat Co. v. Hutton* [1903] 2K.B. 683. See also R. G. McElroy & G. Williams, The Coronation Cases (part 1 & 2), 4 M. L. Rev. 1941, at 241-260; 5 Mod. L. Rev. 1941, at 1-20.

of Edward VII, the lessee had hired a flat for reviewing the Coronation procession of the King. When the Coronation was cancelled due to the unexpected illness of the King, the tenant was discharged from his obligation to pay for the flat, because both parties were aware of the specific purpose for which the flat had been rented. Moreover, the other party's performance became valueless to him, although he was willing and able to perform.

In both ***Taylor***[56] and ***Krell***, the parties failed to foresee and provide for an event that prevented completion of their respective contracts. These cases have been allied under the topic of frustration, yet they differ in a decisive respect, *i.e.*, in the former the parties jointly suffered a loss; in the latter they did not. ***Krell v. Henry***,[57] which illustrates frustration of purpose, is more complex because it is less objectively determined. One can see that a building has burned; one can not determine so easily whether purpose, an intangible, has been so altered as to impair the essence of an agreement.

The rule of ***Taylor v. Caldwell***,[58] which was restricted to physical impossibility, was later extended to legal impossibility.[59] However the most important development of the doctrine of frustration grew out of the so called "true cases of frustration of the adventure". Most of the cases of this kind of frustration dealt with problems of delay in the performance of charterparties. One of the leading older cases which illustrates the point, is ***Jackson v. Union Marine Insurance Co. Ltd***.[60] A ship was chartered in November 1871, to proceed with all possible despatch, dangers and accidents of navigation excepted, from Liverpool to Newport and there to load a cargo of iron rails for carriage to San Francisco. She sailed on January 2, but on the 3rd ran aground, and it took six weeks to refloat her, and another six months to complete repair. On February 15, the charterers repudiated the contract. The question was whether the charterers were liable for not loading the ship, or whether the time likely to be required for repairs was so long as to excuse their failure to do so. This question was answered by the jury in the affirmative and the Court of Exchequer Chamber held that the charterparty ended upon

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[56]. *Taylor v. Caldwell* (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

[57]. [1903] 2 K.B. 740.

[58]. (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

[59]. See *Fibrosa Spolka Akcying v. Fairbrain Lawson Combe Barbour Ltd.* [1943] A.C. 32; *Metropolitan Water Board v. Dick, Kerr and Co.* [1988] A.C. 119; *Denny, Mott and Dickson Ltd. v. James B. Fraser and Co. Ltd.* [1944] A.C. 265.

[60]. L.R. 10 C.P. 125 (Ex. 1874).

the mishap. On this finding, it was held that the adventure contemplated by the parties was frustrated and the contract discharged. A voyage to San Francisco carried out after the repair of the ship would have been a totally different adventure from that originally envisaged. Thus, "the adventure", said Bramwell J., "was frustrated by perils of the sea, both parties were discharged, and a loading of cargo in August would have been a new adventure, a new agreement."[61]

The rule of "frustration of adventure" was further applied in ***Tamplin (F.A.) S. S. Co. v. Anglo Mexican Petroleum Products Co***.[62] In this case, Tamplin was chartered for five years. After the outbreak of World War I, the British government requisitioned the ship for service as a troopship. The ship owner claimed that the charterparty was frustrated in order to obtain a larger amount of compensation from the government. The House of Lords held that a 5 year charterparty which still had 3 years to run was not frustrated and the contract was still in effect.

It seems that although the different results in the above cases may be explained by the fact that in the latter the charterparty was substantially longer than the former, nevertheless, the different views held by the House of Lords can not be explained by any difference in their Lordships' opinions on the principles of law to be applied.[63] It is sufficient to note that these different views within the highest tribunal show that cases of frustration raise most difficult questions of fact as well as law. However, the ***Tamplin*** case introduced another theory under the title of "foundation of contract" analogous to the German doctrine of geschaftsgrundlage. Lord Loreburn in this case held: "No court has an absolving power, but it can infer from the nature of the contract and the surrounding circumstances that a condition which was not expressed was the foundation upon which the parties contracted."[64]

It can be said that theories of the "implied condition" and the "disappearance of the foundation of the contract" are only differently worded expressions of the same principle. Indeed, the doctrine of frustration rests upon the common

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61. *Loc. cit.*, at 148. See also J. Ramberg, Cancellation of Contracts of Affreightment, 1969, at 166, n. 17, indicating that this decision has been criticesed for misapplication of the doctrine; instead of the doctrine of frustration, the doctrine of failure of consideration should have been applied.

62. [1916] 2 A. C. 397. See also *Bank Line v. Capel (Arthur) and Co.* [1919] 1 A. C. 435.

63. [1916] 2 A.C. 397. Held by Lord Buckmaster L.C., Earl Loreburn, and Lord Parker of Waddington (Viscount Haldane and Lord Atkinson dissenting), that the interruption was not of such a character as that the Court ought to imply a condition that the parties should be excused from further performance of the contract, and that the requisition did not determine or suspend the contract.

64. *Loc. cit.*, at 404.

intentions of the parties of the contract and that it is simply the function of the courts to interpret the contract. However, in later years, this principle was challenged and the peak of the evolution was reached by the advance of Lord Wright's theory which was developed in the 1940s.[65] According to the theory, the courts were able to impose on the parties what they think "just and reasonable". The doctrine of frustration was really a device by which the courts reconciled the principle of sanctity of contract with special exceptions which justice demanded. According to the above, the doctrine had thus developed in a way that instead of interpreting the provisions of contract itself, it sought to base the excuse on extra contractual factors and considerations. There is an important criticism which can be made against the theory. Indeed, this approach is contrary to the principle that contracts should be construed by the courts rather than remade by them. However, in ***British Movietonews Ltd., v. London and Dist. Cinemas Ltd.***,[66] fearing that the principle of the sanctity of contracts was at risk, the House of Lords overturned a decision of the Court of Appeal which had adopted Lord Wright's theory. That is to say that the Court of Appeal had appeared to be willing to accept the theory of *clausula rebus sic stantibus* in the widest sense which was the direct antithesis of *pacta sunt servanda.* The facts of the case were as follows: the plaintiffs were film distributors and the defendants were owners of a chain of cinemas. In 1941 the plaintiffs contracted to supply the defendants with films. In 1943, at the height of the War, the parties entered into a supplementary agreement in which it was agreed that the producers should supply the cinemas with news reels on payment of a weekly sum as long as the Government Order controlling the supply of raw films was in force. After the War, the Order was retained by the Government for a different purpose, *viz.*, the restriction of imports of raw films from countries with hard currencies. In 1948, the defendants gave four weeks notice, in accordance with the original agreement, to terminate the contract. The plaintiffs refused to accept this notice as valid, and sued for breach of contract, the order still being in force. The question before the courts were whether the cinema owners were still bound by their war-time agreement. The Court of Appeal in a unanimous decision delivered by Denning L.J. answered this question in the negative. Adopting the theory of inherent jurisdiction, the court held that it had "a

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[65]. *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co.,* [1944] A.C. 265, 274-276; *Joseph Constantine S.S. Line v. Imperial Corp.*, [1942] A.C. 154, 182-187.

[66]. [1952] A.C. 166 (Heard in the Court of Appeal at [1951] 1 K.B. 190).

qualifying power" in the uncontemplated change of circumstances which had occurred by the retention of the Government Order in time of peace to do "what is just and reasonable" and ruled that the agreement of the parties had ceased to be binding. This radical test for frustration, under which the court has an absolving power and could impose a just and reasonable solution to the problem raised by the new circumstances,[67] was promptly repudiated on appeal by the House of Lords. The House held that a court had no power to qualify the literal words of the contract which referred to the particular statutory Order. Lord Simon said:

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to quality the terms of the contract, but because on its true construction it does not apply in that situation."[68]

Since the above case, there seems to have been some restrictions in the scope of the doctrine of frustration. Many factors account for this trend:[69]

- 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 the cases of frustration and cases where liability for breach of contract is strict;
- The tendency of businessmen to avoid operation of the doctrine of frustration by making their own express provisions for obstacles to performance.

However, five years after the above decision, a new doctrine of frustration was attempted in ***Davis Contractors Ltd. v. Fareham Urban District Council***,[70] and a new test was introduced. In this case, Lord Radcliffe held that:

"Frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in foedera veni* - it was not this that I promised to do."[71]

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67. [1951] 1 K.B. 190, 202.

68. [1952] A.C. 166, 185.

69. See G. H. Treitel, The Law of Contract, 1983, at 650.

70. [1956] A.C. 696.

This theory - change in the obligation or radically different performance - is the most acceptable of the conservative theories, and the one which had received the warmest commendation. The theory prevails in English law today, and has been approved by academic writers[72] and two House of Lords decisions, ***National Carriers Ltd. v. Panalpina (Northern) Ltd.***,[73] and ***The Nema***.[74]

However, although the doctrine of "radically different performance" prevails in English law, its theoretical basis has not been clarified and is still obscure. It seems that the application of doctrine of frustration is not easy in actual cases and the controversy as to the theoritical basis is well known.

As the above history shows, the early English law - contrary to French law by which impossibility was a ground of excuse - started with a harsh rule to the effect that impossibility could not excuse the contract. However, when English courts departed from that principle, English law continued its development while French law maintained the above principle and this position is continually emphasised by the Cour de Cassation.[75]

With regard to the effects of frustration of contract, it should be added that until 1943, there was only one form of judicial discharge. Declaration of frustration meant termination of the agreement, and no restitution was given for performance already rendered when the obligation to perform preceded the discharge. That was the case with regard to down payments: reliance expenses were also not recoverable.[76] However, in ***Fibrosa Spolka Akeyjna v. Fairbairn Lawson Combe Barbour, Ltd.***,[77] the House of Lords held that a buyer could recover an advance payment in quasi-contract, when the contract had been terminated by the war.[78] The court refused to allow the seller to keep any part of a down payment, even though he had incurred expenses. Furthermore, the court indicated that no quasi-contractual remedy would be available if a benefit, however small, had been conferred on the buyer. The decision in this case and a more general settlement of the matter, including apportionment of reliance expenses, was achieved by the Law Reform

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71. *Loc. cit.*, at 720.

72. *E.g.*, Cheshire and Fifoot, Law of Contract, 5th ed. 1960, at 469. See also Anson (1975), at 493.

73. [981] A.C. 675.

74. [1981] A.C. 239; Lloyd's Rep. 239 (H.L.).

75. *Infra*, pp. 83 *et seq.*

76. *Infra*, pp. 144 *et seq.*

77. [1943] A.C. 32; [1942] 2 All E. R. 122.

78. To this extent, the House of Lords overruled *Chandler v. Webster*, [1904] 1 K.B. 493.

(Frustrated Contracts) Act 1943, which affords a greater range of remedies when a contract is discharged. However, the 1943 Act has given rise to problems of interpretation. The lack of case law has also aggravated. ***British Petroleum Exploration v. Hunt***,[79] is the first and only authoritative interpretation of the 1943 Act. Mr. Justice Goff in this case made an important contribution to the understanding of the application of the Act particularly as no case had been previously reported on the topic since the Act became law. This case, and the above matters will be amplified in the next part of this thesis.[80]

2. SCOTLAND

Although nowadays in Scots law, frustration is accepted and understood in the same sense as in English law, its historical development is different from England.[81] Thus, the application of the doctrine in individual cases arises from the different legal background of Scots law.

Generally, Scots law has recognised the problems of impossibility of performance for a very long time. While Lord Cooper finds the origins at the beginning of 17th century,[82] it is believed that frustration can be traced back at least a century earlier to Balfour.[83] For this purpose, it is enough to say that Balfour reports the case of ***Abbot of Holyroodhouse v. Monypenny*** in 1549[84] in which it was held that tiends were not payable if corn was destroyed by uncontrollable force. In this era, factors such as hostility, water, force and violence which burnt, wasted or destroyed the rented lands, could discharge the tenants from their obligation to pay rent during the period of destruction.[85] According to this early history of Scots law relating to frustration, it can be said that the classic English case of ***Paradine v. Jane***[86] would have been decided differently in Scotland.

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79. [1981] 1 W.L.R. 236; [1982] 2 W. L. R. 253.

80. *Infra*, at 151 *et seq.*

81. Cooper, Frustration of Contract in Scots Law, 28 J. Comp. Leg. Int'l. L. 1946, pp. 1-5; W. W. McBryde, Frustration of Contract, Jurid. Rev. 1980, 1, 6, 7.

82. Cooper, *op. cit.*, at 6.

83. W. W. McBryde, *op. cit.*, at 6.

84. Balfour's Practicks, p. 146; M. 10142. See also *Abbot of Holyroodhouse v. Laird of Inverleith*, Balfour, *op. cit.*, M. 10142; *The Chapter of Glasgow v. Laird of Cessford*, Balfour, *op. cit.*, M. 10143.

85. Balfour, *op. cit.*, at 200. See also Anderson (1583) M. 10082 where storm was treated as frustration.

86. (1646) aleyn, 26; 82 Eng. Rep. 897 (K.B. 1647).

With the growth of the legal theory of frustration in the 17th century based on Roman law or its inspiration,[87] a mass of decisions accumulated dealing with problems of frustration by which a contract could be discharged by destruction of some specific thing essential to its performance. These decisions introduced a well-known technical term, *rei interitus* which is now the most obvious example of supervening impossibility.[88] By the 19th century, Scots law had collected a large number of opportunist doctrines which, as mentioned in above, was mainly based upon Roman law. Indeed, before the 20th century, the Scots law had amassed most of the raw materials which are required for the construction of a modern doctrine of frustration. However, there had not been enough attempt to rationalise the rules in a generalised theory and articulate them as principles of the law of contract.[89]

Scots law has always recognised that if a contract is frustrated, money paid is recoverable as paid for a consideration which has failed, on the principle of the *conditio causa data, causa non secuta*.[90] In 1923, the harsh rule of ***Chandler v. Webster***[91] was expressly repudiated by the House of Lords in ***Cantiere San Rocco v. Clyde Shipbuilding Co***.[92] In this case, restitution of the first instalment paid of the price of an engine was ordered on the ground of failure of consideration, subject to any counter-claim established for work done under the contract. It was held:

". . . 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 . . .".[93]

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*' . . .".[94]

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87. See Cooper, *op. cit.*, at 2.

88. See D. M. Walker, Principles of Scottish Private Law, 1988, Vol. II, at 135.

89. Cooper, *op. cit.*

90. *Cantiere San Rocco v. Clyde Shipbuilding Co.*, 1923, S.C. (H.L.) 105. On the early origin of the doctrine in Scots law, see Craig, Jus Feudale, III, v. 23.

91. [1904] 1 K.B. 493.

92. [1924] A. C. 226. See also *Watson v. Shankland* (1872) 10 M. 142; (1873) 11 M. (H.L.) 51. *Cf. Fibrosa v. Fairbairn* [1943] A.C. 32 and as to contracts governed by English law, Law Reform (Frustrated Contracts) Act 1943.

93. [1924] A.C. 226, at 234.

94. *Loc. cit.*, at 259.

He also added that while the rule of ***Chandler v. Webster***,[95] may be the law of England and applies the maxim of "*potior est conditio possidentis*", this maxim is not part or ever was a part of the law of Scotland.[96]

However, the principles of frustration which are now used in Scots law harmonise in most essentials with those of England.[97] Like English law, if performance merely becomes more onerous, commercially impossible or unprofitable, the contract will not be frustrated.[98]

3. UNITED STATES OF AMERICA

It is, of course, well known that the general body of contract law of the United States was received as part of the legacy of the Common law bequeathed to Americans by the English. Thus, American courts tended to follow the doctrine of absolute liability that was articulated by the rule in ***Paradine v. Jane***[99] which was transplanted from England in the nineteenth century and was sanctioned by the American courts for a long time.[100] The equally harsh nature of the American doctrine of impossibility is illustrated by ***Stees v. Leonard***,[101] in which the defendant, a contractor, agreed to "build, erect and complete" a structure for the plaintiffs. The building was nearly completed when it collapsed as a result of a latent defect in the soil as opposed to the poor workmanship or materials of the defendant. The second attempt to build the structure was also unsuccessful, and for this reason the defendant abandoned the work and refused further performance. The court stated:

"No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from what he has expressly agreed to do so."[102]

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95. [1904] 1 K.B. 493.

96. [1924] A.C. at 260.

97. For physical destruction of subject matter, see *Leitch v. Edinburgh Ice Co.* (1900) 2 F. 904; *Tay Salmon Fisheries Co. Ltd. v. Speedie*, 1929, S.C. 593. For supervening illegality, see *Scott v. Desel*, 1923, S.C. (H.L.) 37; *James B. Fraser & Co. Ltd. v. Denny, Mott & Dickson Ltd.*, 1944 S.C.(H.L.) 35. For frustration, see *McMaster v. Cox, McEuen & Co.*, 1921, S.C. (H.L.) 24, 28.

98. See *Blacklock & Macarthur v. Kirk*, 1919, S.C. 57; *Duncan v. Terrel*, 1918, 2 S.L.T. 3; *Hong Kong etc., Dock Co. v. Netherton Shipping Co.*, 1909, S.C. 34.

99. (1646) aleyn, 26; 82 Eng. Rep. 897 (K.B. 1647).

100. G. Gilmore, The Death of Contract, 1974, 45-47. See also Thomas R. Hurst, Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks under UCC Section 2-615, 54 N. C. L. Rev. 1976, 545, 549; Comment, Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's perspective, 51 Temp. L. Q. 1978, 518.

101. 20 Minn. 494 (1874).

102. *Loc. cit.*, at 503.

According to the decision, the defendant was obliged to construct the structure completely regardless of the hardship or expense involved.[103]
The concept of absolute liability has also been applied to contracts other than construction agreements.[104] In all cases, where the defendant, agreed to build a structure or other specific performance without stipulating express exemption clauses, like *force majeure* or risk of loss, the courts assumed that the promisor made an unconditional promise to perform. However, as this rule produced harsh results and whereas performance of these kinds of contracts at times proved to be unduly burdensome and oppressive, by the end of nineteenth century,[105] American courts began eventually to recognise instances where parties should be excused performance.[106] At first, a majority of the American courts that considered the issue adhered, until recently, to the ***Taylor***[107] standard of impossibility. Justice Holmes expressed the nearly universal attitude in ***Day v. United States***,[108] when he commented that "one who makes a contract never can be absolutely certain that he will be able to perform it when the time comes, and the very essence of it is that he takes the risk within the limits of his undertaking."

The celebrated case of ***Butterfield v. Byron***[109] represents a counter point to the hard-line of the ***Paradine***[110] rule. In this case, Byron agreed to make, erect, and finish a three and one half storey frame hotel. Butterfield agreed to pay $8,500 for the structure. On May 25, 1889, a bolt of lightning struck the partially completed building, causing it to burn to the ground.

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[103]. *Loc. cit.*, at 507. See Also *School Dist. No. 1 v. Dauchy*, 25 Conn. 530, 535 (1857) (In which defendant agreed to complete a school house, but it was struck by lightning prior to completion. The contractor was not excused from doing what he had agreed to do so); *Adams v. Nicholas*, 36 Mass. (19 Pick), 275, 278 (1837); *School Trustees of Trenton v. Bennett*, 27 N.J.L. 513, 522 (1859).

[104]. See *The Hariman*, 76 U.S. 161, 175 (1869) (Where the court stated that a military blockade does not constitute a supervening event which renders performance of charterparty impossible); *Robinson v. Mississipi River Logging Co.*, 61 F. 893, 899-900 (C.C.N.D. Iowa E.D. 1894), *aff'd*, 69 F. 773, 789 (8th Cir. 1895); *Stottlemeyer v. Bobb*, 7 Mo.App. 578, (1879).

[105]. G. Gilmore, *op. cit.*, at 80-81. See generally 6 A. Corbin, Contracts, Sec. 1324 (1962); W. H. Page, The Development of the Doctrine of Impossibility of Performance, 18 Mich. L. Rev. 1920, 589, 592-594.

[106]. *Slater v. South Carolina Ry.*, 29 S.C. 96, 6 S.E. 936 (1888); *Buchanan v. Layne*, 95 Mo.App. 148, 154, 68 S.W. 952, 953 (1902); *Arming v. Steinway*, 35 Misc. 220, 222, 71 N.Y.S. 810, 811 (Sup.Ct. 1901) (In this case, the contract terminated upon an essential party's death); *Dixon v. Breon*, 22 Pa. Super. Ct. 340, 348 (1903).

[107]. *Taylor v. Caldwell* (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

[108]. 245 U.S. 159, 161 (1917).

[109]. 153 Mass. 517 (1890).

[110]. *Paradine v. Jane* (1646) aleyn, 26; 82 Eng. Rep. 897 (K.B. 1647).

Thereafter, no further work was done. Although Butterfield collected insurance to the tune of $6,914.08, he sued on the contract for breach. The court found in favour of Byron and argued that when the building is not wholly the responsibility of the builder - "as where repairs are to be made on the property of the other" - there is an implied term that the building shall continue in existence: "The destruction of it without the fault of either of the parties will excuse performance of the contract, and leave no right to recovery of damages in favour of either against the other."[111] The court stated that Butterfield could sue for payments already made to Byron, and that Byron could sue on implied *assumpsit* (for work done and materials supplied). To effect these findings, the verdict was set aside and Byron was given leave to file a declaration in set-off.

This case illustrates the more active role taken by American courts in impossibility cases near 1900.

As time went on, the door was opened to others. In due course, the courts excused acts which were not impossible, but greatly burdensome to perform. The expression "impracticability", introduced in this century, promoted the relaxation. In ***Mineral Park Land Co. v. Howard***,[112] a more liberal standard of excuse was adopted and for the first time the court excused performance on the basis of impracticability rather that impossibility. In this case, the defendants agreed to haul sand and gravel from the plaintiff's land which would be sufficient to construct a bridge. The defendants removed only part of the sand and gravel from the plaintiff's land and acquired the rest from elsewhere. The plaintiff sued the defendants to pay him the original contract price for the gravel purchased elsewhere. The defendants claimed excuse because the rest of the gravel and sand on the plaintiff's land was under water and the cost of removing it would have been ten to twelve times the contract price. In excusing the promisor's performance, the court found that the parties contemplated and assumed, as a basis of their agreement, that the land contained the requisite quantity of earth and gravel available for use, and that the removal of gravel located below the water level was not within the parties' contemplation. In this case, the court gave substantial weight to the ten to twelve fold cost increase attributable to this condition. An expense of ten to twelve times that stipulated in the contract is more than just a hardship; rather,

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111. *Loc. cit.*, at 518, 519.

112. 172 Cal. 289, 156 P. 458 (1916).

such a prohibitive cost is sufficient to excuse the promisor from liability for non-performance.

This case reveals a widening of the excuse doctrine. To the ***Stees***[113] court, impossible meant that a thing could not by any means be accomplished; to the ***Mineral Park***[114] court, it meant that performance would be difficult. The importance of this case as a leading pre-code case on commercial impracticability, lies in the expanded definition of impossibility to include impracticability due to the increased expenses of carrying out a contract, an expression which was later accepted by the Restatement of Contracts (First)[115] and was inserted into section 2-615 Uniform Commercial Code (UCC).[116] Until this decision, the court had never excused the promisor's performance for hardship alone or because a contract had become unprofitable. Even after the ***Mineral Park*** case, the case law often refrained from excusing performance on the basis of hardship alone.[117] The American common law, however, was unsatisfactory with regard to hardship cases. As the doctrine of impracticability developed, it became clear that mere additional expenses or even extreme expenses or losses of profits still did not entitle parties to relief.[118] Indeed, it offered no relief from burdensome contracts to businessmen who were not sufficiently well represented to ensure that exemption clauses were expressly agreed in their contracts. To correct this situation, Karl Llewellyn drafted section 87 of the Uniform Revised Sales Act, the forerunner to section 2-615 of the UCC. Llewellyn explained that the primary object of section 87 was to amalgamate and unify all the common law developments in this particular area under a universal criterion of excuse: unforeseen and supervening commercial impracticability.[119] The statutory language of section 87 of the Uniform Revised Sales Act and section 2-615 of UCC is similar.[120]

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113. *Stees v. Leonard*, 20 Minn. 494 (1874).

114. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916).

115. Sec. 454 (1932).

116. See generally J. D. Wladis, Impracticability as Risk Allocation: The effect of Changed Circumstances upon Contract Obligations for the Sale of Goods, 22 Ga. L. Rev. 1988, 503, 542.

117. See, *e.g.*, *Freidco v. Farmers Bank of Del.*, 529 F.Supp. 822 (D.Del. 1981).

118. See *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) ; *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P.2d 47 (1944) (Loss of profits did not excuse performance).

119. See Hawkland, *op. cit.*, at 77.

120. For a full explanation of the history behind the drafting of section 2-615 UCC, see generally J. D. Wladis, *op. cit.*, 506 *et seq.*

With regard to the "frustration of contract" or "frustration of purpose" doctrine, it should be said that although a few American courts[121] and the Restatement (First)[122] have recognised the doctrine as a means of discharging performance, as a practical matter, it has largely been rejected by most American courts. The most commonly cited modern American case involving aversion to accepting the frustration doctrine is ***Lloyd v. Murphy***.[123] In this case, the defendant had leased a location for five years for the sole purpose of conducting a new car dealership. Four months later, due to the outbreak of World War II, the Federal government prohibited the manufacture of any new cars. The lessor waived the restrictions on the use of the leased premises and on subletting or assigning the lease, but the defendant did not accept it and left the leasehold claiming that the purposes of the contract were frustrated by the Federal regulations. The court refused to invoke the doctrine of frustration on the basis that the Federal regulations were foreseeable and the frustration was less than total.[124]

From their common starting-point, American and English law have tended to move in somewhat different doctrinal directions. English law expanded the doctrine of implied conditions to include tacit assumptions with regard to the purpose of the contract. American courts, however, expanded the doctrine of implied conditions to include tacit assumptions regarding the kinds of circumstances which will excuse and not merely the kinds of circumstances which will not occur.

As a result of the rejection of the frustration doctrine by most American courts, if parties to a contract wanted to ensure that they would be discharged from their liabilities in the event of frustrating events, especially change of circumstances, they were obliged to use *force majeure* clauses or their own express contractual provisions for relief from performance. Parties of a

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121. See *e.g.*, *Garner v. Ellingson*, 18 Ariz.App. 181, 182-184, 501 P.2d 22, 24-25 (1972); *La Chambre Golf and County Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 425-426, 271 P. 476 (1928) (Where fire destroyed hotel, defendant - Hotel Co., was excused from its contract with Country Club providing its guest with use of the club's golf course); *20th Century Lites, Inc. v. Goodman*, 46 Cal.App.2d 938, 943-946, 149 P.2d 88, 93 (1944) (In this case, buyer of neon sign was relieved from making further payments on sign where government ordered indefinite blackout); *Johnson v. Atkins*, 53 Cal. App. 2d 430, 435, 127 P.2d 1027, 1029-1030 (1942).

122. Sec. 288.

123. 25 Cal.2d 48, 153 P.2d 47 (1944). See also *Pauley Petroleum Inc. v. United States*, 591 F.2d 1308 (Ct.Cl. 1979)

124. 25 Cal.2d at 53-58, 153 P.2d at 50-53.

contract who used *force majeure* clauses would get relief only if they stated the contingency precisely in their contract.[125]

In summary, the breakdown of absolute liability in the United States of America by the end of nineteenth century emerged through the use of various devices. At first, a distinction between subjective and objective impossibility was made, and this distinction was adopted in the First Restatement of Contracts. Secondly, some cases of discharging impossibility, similar to those of English law, were adopted. Thirdly, the concept of "impracticability" emerged and entitled the promisor to an excuse for non-performance. This term was widely used in the Uniform Commercial Code[126] and replaced the term "impossibility" in the Restatement of Contracts Second (1981).

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[125]. See W. D. Hawkland, The Energy Crisis and Section 2-615 of the Uniform Commercial Code, Com. L. J.1974, 76, 77; S. E. Wuorinen, Comment, North Indiana Public Service Company v. Carbon County Coal Company: Risk Assumption in Claims of Impossibility, Impracticability, and Frustration of Purpose, Ohio St. L. J. 1989, 163, 166.

[126]. Section 2-615.

CHAPTER TWO:
CRITICAL ASSESSMENT OF EXCUSE DOCTRINES IN DIFFERENT LEGAL SYSTEMS

As discussed above, most legal regimes take notice of problems of frustration and acknowledge the fact that supervening events beyond the control of the parties may be a cause of excuse for non-performance and make provision for the discharge of the contract. However, circumstances on which this defence is based, vary and contain different responses in various legal systems. Thus, the concept of excusable non-performance is different in each legal regime and the solutions provided by them for problems of frustration are far from uniform. Indeed, there exists no uniform set of rules regarding the issue in national legal systems nor in international practice. That is because of different academic concepts in various national laws of contract, in the sense that legal thinking regarding the concept of excusable non-performance varies from country to country. Effects of economic and political events of the first half of the twentieth century are other factors for such differences.

As will be seen, both the Common law and the Civil law have accepted excuse from performance in the event of impossibility, frustration, impracticability, *force majeure*, imprevision, wegfall der geschaftsgrundlage. As this thesis will explore, frustration is not equivalent to *force majeure* or wegfall der geschaftsgrundlage nor is *force majeure* the same as impracticability; even *force majeure* under Belgian law is not *force majeure* under French law. Thus, even within a single system, there are differences between the formulation of the law and its application.

However, the purpose of this chapter is to examine, analyse, criticise and compare the treatment given to excused non-performance in the law of contemporary legal systems.

A. COMMON LAW
1. ENGLAND
1.1. DOCTRINE OF FRUSTRATION OF CONTRACT AND THE JUDICIAL DEBATE CONCERNING THE THEORITICAL BASIS OF THE DOCTRINE

As discussed before,[127] the doctrine has been developed by the courts. Since the seventeenth century several theories have been evolved. Today,

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[127]. *Supra*, pp. 17-25.

the doctrine is not completely clear and despite the fact that it may be used to achieve justice in some cases, by and large the doctrine is not one that can be safely asserted by the parties. Confusion at a theoretical level[128] and difficulty in applying the doctrine in actual cases are important reasons for the confusion surrounding the doctrine. The "implied theory" which was introduced by the court in ***Taylor v. Caldwell***,[129] presumed that the parties had intended that a particular thing or state of thing would continue to exist. If they have done so, then a term to that effect will be implied, though it is not expressed in the contract.

The fallacy of the implied term theory can be exposed as follows: First, the difficulty of ascertaining the parties' intention and the latitude of judicial discretion may lead to uncertainty in the results reached by the courts. Thus, application of the doctrine involves judicial speculation to imply what the parties would have provided if they had anticipated the event. Indeed, the whole problem is left to the whim of the court without providing a standard affording even a minimal degree of certainty and predictability. Implication of fictitious conditions, where not based on a rule of law, seems to be incompatible with responsible administration of justice. The question is whether the court is better prepared to find out the true intentions of the parties? In no place in the history of contract law has this uncertainty been more conspicuous than in the disintegration of the doctrine of impossibility. Secondly, in borderline cases, it is possible that the application of the doctrine will lead to different conclusion on similar facts. Thirdly, the major criticism of the doctrine is its lack of a logical foundation.[130] Indeed, the theory is artificial and can be criticised for its ambiguity and fictitious nature,[131] since there would hardly be a indisputable common intention to terminate the contract upon the occurrence of the particular contingency in question. In this regard, Lord Denning has stated that: "the theory of an implied term has now been discarded by everyone, or nearly everyone, for the simple reason that it does not represent the truth."[132] Fourthly, the theory may refer to a term, which,

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[128]. See generally McNair, Frustration of Contract by War, 56 L. Q. Rev. 1940, 173; Treitel, The Law of Contract, 7th ed. pp. 712-716; Chitty on Contracts, 26th ed. Paras. 1634-1641.

[129]. (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

[130]. See, *e.g.*, *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) (Doctrine of implied conditions is "fictional" and "unrealistic").

[131]. *Cf.* Leon E. Trakman, Frustrated Contracts and Legal Fictions, 46 Mod. L. Rev. 1983, 39.

[132]. *The Eugenia*, [1964] 2 Q.B. 226, 238. See also Donald Harris, Contract and the doctrine of Frustration, 104 Solic. J. 1960, 966-968.

although the parties have not actually expressed it, the court implies in their contract by applying the reasonable man test. On the contrary, the parties may have actually foreseen the possibility of the event and considered it not to discharge the contract, but the court, by application of the theory, could nevertheless hold that the contract was frustrated by the event. Fifthly, if the doctrine of frustration depends on the implied term theory, the ordinary rules of admissibility of extrinsic evidence may apply.[133]

"Disappearance of the foundation of the contract", is the theory which was recognised in the Coronation cases discussed above.[134] Possibly in response to the fictional nature of the implied condition analysis, the courts developed the doctrine. The key point in this test is that every contract is built on a certain foundation, and when this disappears the contract is frustrated. The theory, however, seems open to serious criticisms. The test is so vague and speculative as to create a serious danger of confusion.[135] Moreover, in order to find out the foundation of the contract the court will probably refer to the nature of the contract and surrounding circumstances to infer whether in the contemplation of the parties, the continued existence of the conditions prevailing at the time of contracting was the foundation of their contract. In this regard, the test does not explain on what grounds the implication of any condition is permissible. Moreover, it fails to provide any justification for the propriety of the particular condition which can be implied.

"Just and reasonable solution", is the theory which was developed by Lord Wright.[136] According to this theory, the court has absolving power and may impose a just and reasonable solution to the problem raised by new circumstances. The doctrine seems identical with those legal systems, such as Germany,[137] which advocate the modification of contract on consideration of what is just and reasonable. Indeed, in this sense, the court is making a contract for the parties. However, there are inherent weaknesses in this theory and it is open to the objection that a judge may not revise the contract according to the intentions of the parties. Such a theory is too wide, gives too much power to the court to decide what is reasonable and just and ignores the

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133. D. Harris, *op. cit.*, at 968.

134. *Supra*, at 19 *et seq.*

135. *Cf.* McEllory & Williams, Impossibility of Performance, 1941, 61-63.

136. See *Denny, Mott & Dickson, Ltd. v. James B. Fraser & Co.* [1944] A.C. 265, 274-276; *Joseph Constantine S.S. Line v. Imperial Corp.* [1942] A.C. 154, 182-187.

137. *Infra*, at 97 *et seq.*

limited data for the court's decision: it suggests that attention should be focused on the harshness of enforcing the contract in the new circumstances.[138] The theory misconceives the significance of sanctity of contract. Moreover, it is contrary to English legal tradition which requires that policy should be skilfully deployed under the techniques of the law. The just and reasonable solution is not such a technique but the end purpose of the technique.[139]

Lord Radcliffe's theory of "change in the obligation" as a basis of frustration is probably the most acceptable theory which prevails in English law today.[140] According to Radcliffe's statement, in operating the theory, the courts should discover what was the original "obligation" and what would be the new "obligation". The next step is to compare the two obligations so as to see whether the new obligation is a "radical" or "fundamental" change from the original obligation.[141] In fact, the emphasis is on the fundamental difference between the obligation as originally agreed and the obligation that is now being required. The idea is that when a performance is still physically possible but, because of changed circumstances, becomes substantially different from what was reasonably expected, the contract is frustrated. Indeed, Lord Radcliffe's definition of frustration also includes contracts which are still executory but fundamentally different from the original one. According to this view, the doctrine now extends beyond the strict criteria of legal and physical impossibility to cases where a dramatically different situation has arisen. The question to be asked is just how radically the change in circumstances must be to frustrate the contract. The definition does not tell us what amounts to substantially different performance or what kinds of contingencies or events will cause performance to be substantially different. Indeed, the problem of the definition is related to how substantial the changed circumstances have to be so as to extinguish the contract. Moreover, this case also leaves aside the question of who decides what is "radically different". At one time, judges focused attention on what the parties wanted, implying what was not expressly provided for. However, today the courts just straightforwardly state that it is they who are applying their judicial judgment to

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138. See Donald Harris, *op. cit.*, at 968.

139. Fengming Liu, The Doctrine of Frustration: An Overview of English Law, 19 J. Mar. L. & Com. 1988, 261, at 270.

140. *Davis Contractors Ltd. v. Fareham U.D.C.*, [1956] A.C. 696, at 720.

141. *Davis Contractors Ltd. v. Fareham U.D.C.*, [1956] A.C. 696, at 720-721, 729.

decide what is "radically different" and to come to the conclusion, on all the circumstances of the case, including the contract terms and the event itself, whether it is fair and reasonable that the contract be excused on the ground of supervening event. This leads us to the point that frustration of contract is a matter of degree, whether or not the changed circumstances are fundamentally different.[142] Thus, the position is that each case of frustration has to be decided on its particular set of circumstances and a court should set a contract aside if after examining it in the light of all the circumstances the court reaches the conclusion that a reasonable man in the position of the judge would have considered the obligation to be fundamentally altered. In fact, the test for frustration is objective. It is a matter of positive judicial intervention, and not subjective inquiry into actual or presumed intentions of the parties,[143] as was suggested by the older theory of the implied term. Thus, it can be said that there is no uniform standard or unequivocal opinion which apply it to cases of frustration; it is a matter of degree and most of the time different opinions will emerge. As Lord Diplock has said: "Where questions of degree are involved, opinions may and often legitimately do differ."[144]

According to the above considerations, it is thus difficult for legal advisers, using the above formulation of the law, to advise clients as to what precisely would cause any particular contract to be frustrated or whether any particular sequence of circumstances has caused frustration.

1.2. FLAWS IN THE DOCTRINE OF FRUSTRATION

The doctrine of frustration has fundamental flaws and does nothing to clarify the law of excusable non-performance. One of the problems of the doctrine relates to the difficulty of applying the doctrine in actual cases. In this regard, the dividing line between repudiation and frustration is not always clear and the doctrine may frequently be confused with other doctrines that may also discharge one or both parties from their contractual obligations under different circumstances.[145] Take the famous case, ***Poussard v. Spiers***,[146] in which the defendant employed the plaintiff to sing in an opera.

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142. *The Nema*, [1981] 2 Lloyd's Rep. at 254.

143. *Davis Contractors Ltd. v. Farham U.D.C.*, [1956] A.C. 696, at 728. See also statement of Lord Summer in *Hirji Mulji v. Cheong Yue SS. Co.* [1926] A.C. 497, at 510.

144. See *The Nema*, [1981] 2 Lloyd's Rep. at 254.

145. See J. E. Stannard, Frustrating Delay, 46 Mod. L. Rev. 1983, 738, at 739-740.

146. (1876) 1 Q.B. 410.

Owing to illness she was unable to be present at the opening night or for the first week. When she recovered, the defendant, who had by now hired an understudy, refused to take her back. He was held to be justified in doing so, and therefore not liable in damages. The question arises whether this case should be classified as a case of repudiation or a case of frustration? If the case is considered as a case of breach, then the defendant has a choice whether or not to treat himself as excused. However, the plaintiff must pay damages and can not refuse to come back if her services are demanded after all. If we consider the case as frustration, the contract automatically comes to an end at some stage and both parties are excused.[147] If, however, the case is considered as some sort of non-performance which is neither breach nor frustration then the defendant is discharged in any case, whereas the plaintiff may not be excused depending on the length and nature of her illness. Now, of course, all this is academic, because the plaintiff's liability was not the question. However, this analysis shows that there must be something wrong with the doctrine which makes such a simple case so hard to classify.

Although there are differences between the doctrine of frustration and the doctrines of repudiation and fundamental breach, if a person examines the circumstances which would bring the doctrine of frustration into play (regardless of who brought it about) and the circumstances which would bring into play the doctrines of repudiation and fundamental breach, they seem to be exactly similar. Indeed, they are sufficiently similar that one could form a test that would cover all three doctrines. The problem can be illustrated by the ***Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha***.[148] In this case, Hong Kong Fir was chartered for a period of 24 months, from her delivery at Liverpool in February, 1957. Her engines at the time of delivery were in reasonably good condition, but because of their age, required careful attention. However, when delivered, her engine-room staff were too few and too incompetent to cope with her antiquated machinery. Consequently, there was, on the very first voyage, a succession of serious engine failures. On her voyage to Osaka she was delayed for 5 weeks owing to engine trouble and at Osaka, 15 more weeks were lost. Before the ship was again ready for sea, the charterers (defendants) repudiated the charter and the owner (plaintiff) claimed damages on the ground that the repudiation was wrongful.[149]

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147. For effects of frustration of contract, see *infra,* pp. 140 *et seq.*

148. (*The Hong Kong Fir*), [1962] 2 Q.B. 26, [1961] 2 Llolyd's Rep. 478, C.A.

149. (*The Hong Kong Fir*), [1961] 2 Lloyd's Rep. at 478-485.

In this case, the Court of Appeal considered whether delay by unseaworthiness amounted to a condition in order to entitle the aggrieved party to repudiate the contract, or whether it amounted to a warranty so as to entitle the aggrieved party to damages only. In determining this issue, the Court held that unseaworthiness did not *per se* amount to a breach of condition. It added that delay constituting a breach of condition had to be so great as to frustrate the commercial purpose of the charter. According to this case, the term "frustration" is being used in the context of breach of contract: indeed, frustration has become a blanket expression.

In this regard, Salmon J., In the court of first instance, held that the circumstances in which performance was demanded, with 17 months still to run, did not make it a thing radically different from that which was undertaken. That is to say the charterparty was not frustrated. The judge added that although the charterers may have been entitled to damages resulting from unseaworthiness, they had no right to repudiate the charterparty.[150]

On appeal, Mr. Roskill asked the following questions.

"Is the seaworthiness obligation in the charterparty a condition, the breach of which entitled the charterers in the circumstances to treat the contract as repudiated?"[151]

"Where in a breach of contract a party failed to perform it, by what standard did the ensuing delay fall to be measured for the purposes of determining whether an innocent party was entitled to treat the contract as repudiated?"

He argued that the case was not a frustration case at all, but one of breach of contract: thus "that delay must be so great as to frustrate the commercial purpose of the contract" was simply the wrong criterion to apply. The correct criterion should be "had a reasonable time elapsed or not, within which the party not in breach was entitled to say 'I regard this contract as at an end'? Mr. Roskill added that:

"It would be highly unjust that an innocent party should, before being allowed to treat a contract as at an end, have to wait as long as it would be necessary to wait, in order that the contract would be brought to an end by the operation of the doctrine of frustration."[152]

With regard to the first question, Diplock L.J., stated that the question was wrong, since "There are many contractual undertakings of a more complex character which can not be categorised as being conditions or warranties." He added that the old technicalities of the condition-warranty dichotomy are more

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150. *Loc. cit.*

151. [1961] 2 Lloyd's Rep. at 483.

152. *Loc. cit.*

than a century out of date. From Diplock L.J.s' point of view the problem should not be solved by debating whether the shipowner's express or implied obligation to tender a seaworthy ship is a "condition" or "warranty".[153] According to Diplock L.J., attention should be focused on the question whether the breach has frustrated the contract. Thus, the idea of frustrating breach was brought to the forefront of English law by the Court of Appeal. In this case, frustrating breach was defined as a breach having consequences which would attract the doctrine of frustration, had those consequences been extraneously induced.[154] Indeed, Diplock L.J., took the opportunity to review the cases on repudiation and frustration by delay and affirmed that these doctrines were two applications of the same principle. After reviewing the early cases, he stated:

"It was not . . . until ***Jackson v. Union Marine Insurance Co. Ltd.***,[155] that it was recognised that it was the happening of the event and not the fact that the event was the result of a breach by one party . . . that relieved the other party from further performance of his obligation."[156]

Diplock L.J.'s explanation is desirable in that it would reduce much of the confusion between the different doctrines. Unfortunately, it has still left untouched the much more difficult question: How is one to identify when a contract is frustrated? Moreover, because of the emphasis on the fact that the event requiring application of the different doctrines is the same, it may in fact lead to more confused use of the various doctrines being argued in a particular case and make it more complex to find out which doctrine was precisely relied upon by the court.[157]

It is interesting to note that a similar argument had been used in ***Universal Cargo Carriers Corp. v. Citati***,[158] a pre ***Hong Kong Fir***[159] decision: this case employed the standard of frustrating time in relation to a serious breach of a minor term. It established that a breach of contract which does not of itself (*i.e.*, by virtue of the term broken) entitle the innocent party to

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153. *Loc. cit.*, at 494.

154. By Diplock L.J. [1962] 2 Q.B. at 66; and by Upjohn L. J. at 64.

155. L.R. 10 C.P. 125 (Ex. 1874).

156. [1962] 2 Q.B. at 68.

157. F. Liu, The Doctrine of Frustration: An Overview of English Law, 19 J. Mar. L. & Com. 1988, 261, 281.

158. [1957] 2 Q.B. 401.

159. *Hong Kong Fir Shipping Co. v. Kawasaki Kisen Kaisha* [1962] 2 Q.B. 26; [1961] 2 Lloyd's Rep. 478, C.A.

end the contract must be such as, in effect, deprives him of his expected benefit. This was reaffirmed in the ***Hong Kong Fir*** case, in which the analogy with the doctrine of frustration is strongly drawn by Diplock L.J.
Again, in this case, Mr. Roskill had tendered the same argument. Referring to Devlin J.'s opinion in the ***Citati*** case, in which he had adopted the test of frustration, Sellers L.J. simply held that all the authorities were conclusive and consistent with Devlin J.'s holding.[160]

Another problem of the application of the doctrine of frustration relates to situations in which it works as a sword as well as a shield.[161] As we know, in the large majority of cases of frustration, the doctrine is used as defence or as an excuse for non-performance. However, it is possible to use the doctrine as a cause of action as well. In this situation, the doctrine may work as a shield and as a sword. Indeed, a party who has performed his obligations may argue that the contract has been frustrated so as to be remunerated not at the contract price, but on a *quantum meruit.* Take the well-known case of ***Davis Contractors Ltd. v. Fareham UDC***,[162] in which the builders in an attempt to recover a sum of money in excess of the contract price, argued that the contract had been brought to an end by frustration. However, they added that since they had performed the obligations arising under the contract, they should be remunerated not at the contract price but on a *quantum meruit* for the value of the work done. One fact made it specially difficult for the contractors to argue frustration. They had never stopped performing nor claimed that as of that time the contract was at an end. However, that such an argument could be put forward at all is surprising; what is similarly surprising is the failure of the analysis of the doctrine of frustration to distinguish between these cases and the more usual ones where frustration operates as a defence.
However, contrary to the above case, such a contention was successfully put forward in ***Societe Franco-Tunisienne d'Armement v. Sidermar SPA***,[163] one of the Suez Canal cases. There the court held that the voyage-charterparty was frustrated and imposed on the charterer an obligation to pay the ship owners a reasonable freight, *i.e.*, a *quantum meruit* as opposed to the contract price.

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160. *Hong Kong Fir* case, [1961] 2 Lloyd's Rep. at 480.

161. See J. E. Stannard, *op. cit.*, at 743, 744.

162. [1956] A.C. 656.

163. [1961] 2 Q.B. 278.

Such a claim in French law would be inconceivable, since this kind of contention clearly shows that there was no impossibility of performance of the contract. This suffices, of course, peremptorily to exclude *force majeure.*[164]

1.3. LIMITED SCOPE OF DOCTRINE OF FRUSTRATION AND THE PROBLEM OF HARDSHIP CASES

Another problem with the doctrine of frustration relates to hardship cases. The point is that the English courts have construed the concept of frustration quite narrowly and have refused to apply it in cases of mere hardship to one of the parties. For example, if a change in circumstances has rendered performance much more onerous or burdensome, the party seeking relief can not invoke the doctrine as a result of hardship *per se.*[165] For instance, in ***The Nema***,[166] Lord Diplock stressed:

". . . that the doctrine is not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargain."

In another case, Bailhache J. held:

"Nothing in my opinion, is more dangerous in commercial contracts than to allow an easy escape from obligations undertaken; and I desire to reiterate what the older judges have so often said, that the parties must be held strictly to their contracts; it is their own fault if they have not adequately protected themselves by suitable language."[167]

In construction contracts, it will be particularly difficult to rely on the doctrine and the contractor will not be excused because of difficulties with the soil, requiring additional foundations, or because it turns out he has underestimated the time needed to build according to the plan.[168] Additional expense is also not an event which will *per se* frustrate the contract. This is well illustrated in the Suez Canal cases where it was held that the only contracts in which performance could be excused were the ones which expressly provided that shipment was to be made *via* the canal.[169]

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164. *Infra*, pp. 82 *et seq.*

165. See, *e.g.*, *Brauer* case [1952] 2 All E.R. 497; *Albert D. Gaon and Co. v. Societe Interprofessionelle des Oleagineux Fluides Alimentaires* [1959] 3 W.L.R. 622.

166. [1981] 2 Lloyd's Rep. 239 at 254.

167. *Comptor Commercial v. Power* [1961] 1 K.B. 868, 878.

168. *Bottoms v. York Corporation* (1892), Hudson's B.C. 4th ed. Vol. 2, p. 8.

169. See *Tsakiroglou & Co. v. Noblee and Thorl GmbH* [1962] A.C. 93. See also Schlegel, Of Nuts, and Ships, and Sealing Wax, Suez and Frustrating Things - The Doctrine of Impossibility of Performance, 23 Rutchers L. Rev. 1969, at 429-438; Birmingham, A Second Look at the Suez Canal Cases: Excuse for Non-Performance of Contractual Obligations in the Light of Economic Theory, 20 Hasting L. J. 1969, at 1400-1406.

The approach in Scots law reveals the reluctance of the system to recognise economic impracticability as a cause of excusable non-performance as well. In ***Hong Kong and Whampoa Dock Co. Ltd. v. Netherton Shipping Co. Ltd.,***[170] the defenders who had contracted with the pursuers for the repair of their ship, discovered that it would be far more expensive than they had expected. Accordingly, they tried to cancel the contract arguing that performance was no longer "commercially possible". The court flatly rejected the argument holding that if performance becomes more onerous or commercially impossible the contract will not be frustrated.[171]

However, in an analysis of Scots law in respect of the above problem, McBryde has suggested that severe inflation may excuse the performance of the contract. He also purports to find a decision in Scots law to justify the conclusion that the total collapse of a currency may frustrate a contract.[172] Arguments of this kind tend to stress the broad, flexible and equitable nature of the doctrine in Scots law. However, for the present, none of the more recent decisions suggests that the Scottish courts are more willing than their English counterparts to accommodate commercial impossibility as a ground of excusable non-performance.[173]

What can be concluded from the above discussion is as follows:

(1) The parties to a contract are relieved of performance when without the default of either party, unforeseen events, occurring after the conclusion of contract, render the performance fundamentally different from that envisaged by the parties at the time of contracting;

(2) As a general rule, mere difficulty of performance or mere increase in the cost of performance do not excuse performance;

(3) In many cases, frustration of contract is a matter of degree.

The above discussion demonstrates the unwillingness of the modern courts to invoke the application of the doctrine of frustration when economic circumstances have changed. But in the world of today, there is a need for more flexibility, especially in international long-term contracts. However, the above approach also demonstrates the advantage which can be taken by

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170. 1909, S.C. 34, at 40, *per* Lord Pearson. See also *Davidson v. Macpherson* (1889) 30 S.L.R. 2. *Cf. British Movietonews Ltd. v. London and District Cinemas Ltd.* [1952] A.C. 166, at 185, *per* Viscount Simon; The Eugenia [1964] 2 Q.B.226.

171. 1909, S.C. 34, at 40, *per* Lord Pearson.

172. McBryde, Frustration of Contract, (1980), *op. cit.*, pp. 10-12.

173. *Cf.* A. D. M. Forte, Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom, Jurid. Rev., 1986, 1, 10-12.

inserting immunity clauses into contracts to cover such contingencies.[174] English courts recognise *force majeure* and hardship clauses in contracts.[175] The concept of hardship is very similar, if not identical, to that of frustration,[176] but there the similarity ends since the purpose of the hardship clause is primarily to adapt the contract to the exigencies of an event which may, otherwise, frustrate the contract.

In the light of the limitations inherent in the doctrine of frustration, it is submitted that parties would be well advised to incorporate *force majeure* or hardship clauses into their contracts. The purpose of such clauses is to permit the contracting parties to obtain these advantages by reliance on the provisions of the clauses. Such a clause, if clearly expressed, is valid and enforceable in English law. A comprehensive clause is potentially wider than the scope of frustration. However, a question which here arises is whether the presence of *force majeure* clause in the contract excludes the application of the doctrine of frustration.[177] It has been suggested that a *force majeure* clause will not necessarily prevent the application of the doctrine if an event comprehended within the clause nevertheless renders performance illegal or fundamentally alters the nature of the contractual obligations undertaken by the parties.[178] This was approved in ***The Super Servant Two***,[179] in which there was no suggestion that frustration could not be invoked on the ground that the contract contained *force majeure* clause *per se*. Rather, the position was that a clause may be relied upon as evidence that the parties have made express provision for the alleged frustrating event or, at least, that the event was one which was within their reasonable contemplation at the time of entry into the contract. However, the question here is that if the parties draw up a comprehensive *force majeure* clause, why should the courts not take them at their word and entirely refuse to apply the doctrine of frustration? When the parties both economically are strong enough to strike equal bargains why should they not be allowed to do so? This was the argument which was in fact

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174. See pp. 293 *et seq.*

175. See *Superior Overseas Development Corporation v. British Gas Coporation* [1982] 1 Lloyd's Rep. 262.

176. See Clive M. Schmitthoff, Hardship and Intervener Clauses, J. Bus. L. 1980, 82.

177. See Ewan McKendrick, *Force Majeure* Clauses: An Explanation, 4 Law for Business, 1992, 52-62.

178. See *F. A. Tamplin Steamship Co. v. Anglo-Mexican Petroleum Products Co. Ltd.* [1916] A.C. 397, at 406 (H.L.).

179. [1990] 1 Lloyd's Rep. 1.

put to Mocatta J., in the case of ***Bremer Handelsgesellschaft m.b.H. v. Vanden Avenne-Izegem P.V.B.A.***[180] Although there may be much to be said for this proposition as a matter of principle, and indeed, one commentator has stated "it is time to take up the suggestion of Mocatta J.",[181] it must be conceded that as a matter of authority the presence of the clause does not of itself exclude the application of the doctrine of frustration.

It is therefore extremely difficult, if not impossible, to draft a *force majeure* clause which excludes the doctrine of frustration completely, because even the widest drawn clauses may be held not to cover a particular, catastrophic event: further, a *force majeure* clause which makes provision for an extension of time may indicate to the court that the scope of the clause is confined to a temporary interruption in performance. On this basis, it should be noted that English courts interpret the *force majeure* clause very narrowly. A good example of this restrictive approach is provided by the case of ***Metropolitan Water Board v. Dick Kerr and Co. Ltd.***[182] Contractors agreed in July 1914, to construct a reservoir in six years. In the event of delays "however occasioned", they were to be given an extension of time. In 1916 the contractors were required by Government Order to stop the work and sell their plant. The contractors claimed that the contract had been frustrated. The Water Board argued that the contract had not been frustrated because the contract stated that, in event of delay "whatsoever and howsoever occasioned", the procedure was for the contractors to apply to the engineer for an extension of time. The House of Lords rejected the Water Board's argument and held that the contract was frustrated because the delay clause was intended to cover only temporary difficulties and not changes which "vitally and fundamentally [change the] conditions of the contract, and could not possibly have been in the contemplation of the parties to the contract when it was made."[183]

What is understood from the case is that where a *force majeure* clause provides for a specified event (*i.e.*, it is intended by the parties as a full and complete provision if the event occurs), this will normally preclude the court

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180. [1977] 1 Lloyd's Rep. 133, at 163. See also Ewan McKendrick, Frustration and *Force Majeure* - Their Relationship and a Comparative Assessment, (In *Force Majeure* and Frustration of Contract, Edited by Ewan McKendrick, 1991, at 27 *et seq.*).

181. Hedley, Carriage by Sea - Frustration and *Force Majeure*, 1990, 209, at 211.

182. [1918] A.C. 119.

183. See also *Fibrosa* case, [1943] A.C.32, especially the speech of Viscount Simon at p. 40 (A provision in the contract does not prevent frustration from application).

from holding that the contract is frustrated.[184] But, if on its true construction, the clause is found not to be intended to make full and complete provision for the situation created by the subsequent event, then it is still open to the court to find that the contract has been frustrated. As we have seen, in this case the court held that the provision was not intended to cover every effect of the event. Indeed, the provision was limited in extent. Thus, contracting parties would be well advised to include within their contract, not only a clearly drafted clause, but also a clause which specifically provides for the rights and duties of the parties in the event of frustration.[185]

If a *force majeure* clause does not of itself exclude the operation of the doctrine of frustration and if, as the law presently stands, it is subjected to a narrow interpretation, the question then arises whether any advantage can be taken by relying upon the *force majeure* clause. The answer to this question lies in the fact that the doctrine of frustration applies within very restricted confines and can not be invoked simply because contractual performance has become more onerous.[186] Moreover, as discussed above, the juridical basis of frustration has long been a source of debate. Although this debate does not have significant practical consequences, it does make it very difficult to predict when the courts will rely on the doctrine; if we are not sure of the basis of frustration we are unlikely to be able to predict with any degree of certainty the circumstances in which the courts will invoke the doctrine. Uncertainty is therefore inherent in the doctrine. This uncertainty and the flaws of the doctrine can be eliminated to a large extent by incorporation into a contract of a suitably drafted *force majeure* clause. The clause can specify the circumstances in which it is to apply and the role of the court is then reduced to the interpretation of the clause. By using such a clause in the contract, the parties can avoid the drastic consequences of frustration, by which the contract is automatically brought to an end.[187] By relying on these clauses, the parties can also escape the limitations imposed by the doctrine.

Another question which arises with regard to a *force majeure* clause is the applicability of the Unfair Contract Terms Act 1977.[188] Do these clauses

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184. See Benjamin's Sale of Goods, 4th ed. 1992, at 281.

185. For a detailed guidance, see the final chapter of this thesis.

186. See Ewan McKendrick, Frustration and *Force Majeure* - Their Relationship and a Comparative Assessment, *op. cit.*, 27-49.

187. *Infra,* pp. 142 *et seq.*

attract the test of reasonableness imposed by section 3 of the Act? Although it has been said that *force majeure* clauses are not exemption clauses,[189] it is difficult to draw any clear line of differentiation between the two types of clauses. On the one hand, the effect of *force majeure* clause may be analysed as relieving a contracting party of an obligation or liability to which he would otherwise be subject; if so, *force majeure* clauses would be subject to the Unfair Contract Terms Act 1977. On the other hand, it can be said that since *force majeure* clauses merely define the obligation assumed rather than excuse or limit the consequences of breach, they do not exclude or restrict liability; *viz.*, they do not operate to shield a promisor from liability for a breach of contract. If this analysis is accepted, *force majeure* clauses would not be subject to the statutory requirement of reasonableness under the Unfair Contract Terms Act 1977.[190]

However, even if the 1977 Act was applicable it is doubtful that a clause which merely permits one party to suspend, postpone or cancel performance upon the happening of events beyond his control would, in a commercial contract, be held to be unreasonable. Nevertheless, there may be circumstances where such a clause would be unreasonable, for example in an exclusive dealing agreement, when the seller was entitled to suspend delivery in such an event but the buyer was not entitled, during the period of suspension, to purchase supplies from elsewhere.[191] However, it should be relatively easy to satisfy the reasonableness test if the clause operates for the benefit of all the parties to the contract and is restricted to events beyond the control of any of them.

1.4. CRITICAL ANALYSIS OF SECTION 7 OF THE SALE OF GOODS ACT 1979

All cases of non-performance caused by events beyond the control of the parties, which occur after the formation of a contract, have to be resolved on the basis of the common law except those cases which fall within section 7

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188. It is submitted that the same issues arise in the context of the Scottish provisions of Unfair Contract Terms Act 1977.

189. *Fairclough, Dodd & Jones Ltd. v. J. H. Vantol Ltd.* [1957] 1 W.L.R. 136, 143; *Trade and Transport Inc. v. Iino Kaiun Kaisha Ltd.* [1973] 1 W.L.R. 210, 230-231; *The Super Servant Two* [1990] 1 Lloyd's Rep. 1, 7, 12.

190. See William Swadling, The Judicial Construction of *Force Majeure* Clauses, (In Ewan McKendrick, *Force Majeure* and Frustration of Contract, *op. cit.*, at 11-20).

191. See Benjamin's Sale of Goods, 4th ed. 1992, at 393; Chitty on Contracts, 26th ed., Vol. 1, at 633.

of the Sale of Goods Act 1979. In this regard, in addition to preserving the general rules of the common law (section 62(2)), including the rules as to frustration, the Act contains two provisions - sections 6 and 7 - which deal with specific goods which have perished. In theory, there is no reason why the general doctrine of frustration should not apply to the special case provided in section 7.

In practice, however, section 7 provides a statutory rule for one case of frustration, *viz*:

"Where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is thereby avoided."

The scope of the section is comparatively narrow. According to the section, an agreement to sell may be frustrated when the goods have perished provided neither the property nor the risk has passed to the buyer. The section only applies where there is an agreement to sell, and not a sale of the goods.[192] It does not have application where property has passed.[193] It is clear that cases involving frustration of a contract to sell generic goods do not fall within section 7. Moreover section 7 only applies when the goods have perished as opposed to suffering damage.[194] When section 7 does not apply, the general principles of the common law are still relevant and the doctrine of frustration may, therefore, operate to terminate the agreement to sell goods.[195]

Sections 6 and 7 of the Act deal with cases which apparently have much in common. In both cases the contract is for the sale of specific goods and the goods accidentally perish without any wrongful act on the part of the parties. However, there are the following differences between the two sections. Section 6 deals with a situation where the goods have already perished prior to the making of the contract[196] while section 7 is concerned with events occurring after the contract was made but before the passing of the risk from the seller to the buyer. Thus, section 6 deals with the case of common mistake and section 7, on the other hand, deals with the case of frustration. However, if section 6 applies, the contract is void: but if section 7

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192. Benjamin's Sale of Goods, 4th ed. 1992, at 269.

193. See *e.g., Horn v. Minister of Food*, [1948] 2 All E.Rep.1036.

194. See Benjamin's Sale of Goods, 1974, at Sec. 425, p. 423; P. S. Atiyah, The Sale of Goods, 7th ed. at 327.

195. See *Nickoll & Knight v. Ashton, Edrige & Co.* [1901] 2 K.B. 126 (Agreement to sell goods to be shipped by specified ship which was stranded before shipment).

196. In German law, this case is categorised as initial impossibility. See pp. 94, 95.

applies the contract is avoided or frustrated. Thus the effect is not the same. In both cases, the buyer can recover the purchase price or any part payment, while the seller is not entitled to retain or recover his expenses. As regards common mistake (section 6), this is in harmony with the general principles of law since the destruction of the subject matter is of fundamental importance;[197] as regards frustration (section 7), this is an exception from the rules laid down in the Law Reform (Frustrated Contracts) Act 1943.[198]

The effect of section 7 is quite clear. When it applies, it excuses the seller's obligation to deliver, and the buyer's obligation to pay the price. However, the scope of the operation of the section is not completely clear and may lead to different interpretations. For example, it is not clear whether the term "specific" should be interpreted as referring only to goods in existence at the time of making the contract. The question here is whether it also applies to cases such as ***Howell v. Coupland***?[199] Cases of this kind do not fit easily within the Act's definition of "specific goods", *viz* goods identified and agreed upon at the time the contract of sale was made (section 61(1)).

According to the section, in order to apply, the goods must have perished. It clearly covers the physical destruction of the goods. However, it has been suggested that the goods need not have been totally destroyed, provided that they have been so altered in nature by damage or deterioration that as a matter of business, they have become something other than that which was described in the contract.[200] It is, nevertheless, difficult to ascertain the degree of deterioration short of total destruction of the subject matter which will bring the section into operation. Moreover, the concept of the term "perishing" does not afford a reasonable solution to the problem of partial impossibility where a part of the subject matter is destroyed. If only part of the goods perish, does the section operate to frustrate the contract and discharge the seller? It seems that there is no difficulty if the seller's obligation with regard to goods which have been destroyed is severable:[201] the contract for the portion still in existence is enforceable and performance of the contract for

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197. See *Bell v. Lever Brothers Ltd.* [1932] A.C.161, 226 (*per* Lord Atkin).

198. *Infra*, at 163, 164.

199. An agreement to sell 200 tons of potatoes to be grown on a land. For complete discussion of the case, see, pp. 219-222.

200. Benjamin's Sale of Goods, (1992), at 269. See also John D. McCamus, The Doctrine of Frustration in the Law of Sales, Ontario Law Reform Commission, Research Paper No. II.7, 1974, at 47.

201. See J. D. McCamus, *op. cit.*

the purchase of the destroyed part will be excused. However, if the contract is indivisible, it seems that partial loss of the goods avoids the contract under section 7, and excuses the buyer's liability for the price.[202]

A different problem arises where the goods are no longer available to the seller, yet they have not "perished" in any physical sense; for example, cases such as theft or requisition of the goods by a government authority. There is judicial support for the proposition that goods which are irretrievably lost by theft, are deemed to have perished for the purposes of section 7.[203] Moreover, the section seems to apply where the goods deteriorate to such an extent as to be unsaleable under the contract description.[204] It may also cover a case where the goods are requisitioned by a government.[205]

Section 7 attracts another criticism by restricting its application to situations where risk has not passed to the buyer. Accordingly, when the seller passes the risk to the buyer before property has passed or before delivery of the goods to the buyer, the seller can not rely on the section.

There is an additional deficiency in the formulation of the section. The problem is that the word "fault" is defined in the Act as "a wrongful act or default".[206] The question arises whether the section disentitles a seller from relying on the section where the goods have perished as a result of his negligence. It appears that there is no authority in the law of sale of goods on the point. In the context of frustration generally, the point was expressly left open by the House of Lords in ***Joseph Constantine S. S. Line Ltd. v. Imperial Smelting***.[207]

By referring to a lack of fault of both parties, the section unnecessarily excludes from its application a case where the goods have perished as a result of the fault of the buyer.

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202. *Cf. Barrow Lane & Ballard Ltd. v. Phillip Phillips & Co. Ltd.*, [1929] 1 K.B. 574; P. S. Atiyah, The Sale of Goods, 1990, at 328. See also chapter five, pp. 223, 224.

203. That is what which was decided in *Barrow Lane & Ballard Ltd. v. Phillip Phillips & Co. Ltd.*, (*op. cit.*), where 700 bags of nuts in a warehouse - identified and agreed upon, and therefore specific - were sold. In fact at the time of contracting, 109 bags had been stolen, so that there were only 591 bags in the warehouse. The court held that the parcel of 700 bags had ceased to exist, and thus "perished", and that section 6 applied so that the contract was void.

204. See *Asfar & Company v. Blundell* [1896] 1 Q.B. 123 (Dates contaminated by sewage).

205. See *Re Shipton Anderson & Co.*, [1915] 3 K.B. 676.

206. Sec. 61 (1).

207. [1942] A.C. 154. For a detailed analysis of the problem, see cahpter 3, pp. 136, 137. However, for support for the view that negligence precludes application of the doctrine of frustration, see *Re Arthur's Estate* (1880), 14 Ch. D. 603; *Lebeaupin v. Richard Crispin & Co.*, [1920] 2 K.B. 714.

Finally, the limited scope of the section should be noted. The section does not cover quasi-specific goods, nor does it cover goods which have been ascertained after the conclusion of the contract. Why the section should draw this distinction is not clear.

It appears, however, that section 7 does not provide an absolute rule, but may be negatived or varied by express agreement, or by the course of dealings between the parties, or by such usage as binds both parties to the contract.[208]

Questions of frustration rarely arise in connection with the sale of unascertained goods. This is because in a sale of unascertained goods, the seller usually has to find the goods from any source.[209] If one source is not available then the seller must find another. In this regard, it has been held:
"a bare and unqualified contract for the sale of unascertained goods . . . will not be dissolved by the operation of the principle [of frustration], even though there has been so grave and unforeseen a change of circumstances as to render it impossible for the vendor to fulfil his bargain."[210]
Only if the seller and the buyer expressly or impliedly agree on the basis of a common assumption that the goods are to come from a particular source and no other, will frustration occur.[211]
However, it must not be supposed that a contract for unascertained goods can never be frustrated. There seems to be no reason why the doctrine of frustration should not apply. Even in contracts of this kind, a frustrating event may occur, such as the passing of legislation dealing with the goods in question (for example a prohibition on export from a country which is the only source of the goods, or the outbreak of war).[212]

2. UNITED STATES OF AMERICA

2.1. CONCEPTUAL PROBLEMS OF EXCUSABLE NON-PERFORMANCE

In the United States of America, excuse of non-performance still remains an unclear and unsettled doctrine. Moreover, the solutions advanced are not always consistent with the theories involved. The various terms

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208. Sale of Goods Act 1979, Sec. 55(1).

209. See Benjamin's Sale of Goods, 4th ed. (1992), at 272.

210. *Blackburn Bobbin Co. Ltd. v. T. W. Allen & Sons Ltd.* [1918] 1 K.B. 540, 550, *aff'd.* [1918] 2 K.B. 467.

211. See Benjamin's Sale of Goods, *op. cit.*

212. See, *e.g.*, *Re Badische Co. Ltd.* [1921] 2 Ch. 331. See also Benjamin's Sale of Goods, *op. cit.*

relating to excusable non-performance are often ambiguous, confusing, and even conflicting. Today the terms "impossibility", "impracticability" and "frustration" are used in sense of excuse from performance. While impossibility and impracticability are used interchangeably, they traditionally expressed distinct but related ideas. Generally, impossibility refers to a performance that could not be accomplished, whereas impracticability refers to performance that could be accomplished but only at an unreasonable or excessive cost. This concept, was expanded in comment 3 to section 2-615 of the UCC to "commercial impracticability," which is another undefined phrase. The comment, merely states that the term was chosen so as to call attention to the commercial character of the criterion.

Restatement (Second) of contracts substitutes the term "impracticability" for "impossibility". The term, "frustration", is reserved for a situation where performance is fully possible but the exchange has become undesirable. Indeed, frustration of contract is regarded as a change in circumstances that makes the performance virtually worthless.[213] In contrast to its treatment in the First Restatement, frustration is included within the chapter on impracticability. The doctrine has never acquired much precision or clarity of meaning in American law. For example, most of the time frustration has been used as a sort of loose synonym for what is called impossibility.[214] A finding that the promisor's performance has become impossible or that the frustrating event has destroyed the "foundation of the contract" establish the two most popular rationales. Sometimes these two concepts are inextricably bound together:

"where the performance depends upon the continued existence of a thing which is assumed as a basis of the agreement, the destruction of the thing by the enactment of a law terminates the obligation."[215]

Commentators have not agreed on the extent to which the doctrine of frustration is part of American law. In this regard, even if a limited form of the

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213. For the explanation of the above mentioned terms ("impracticability", "impossibility" and "frustration"), see D. L. Jacobs, Legal Realism of Legal Fiction? Impracticability under the Restatement (Second) of Contracts, 87 Com. L. J. 1982, 289-298; Comments, Contracts - Frustration of Purpose, *op. cit.*, at 98, 99; B. N. Henszey, UCC Section 2-615 - Does "Impracticable" Mean Impossible? 10 U.C.C. L.J.1977, at 109. See also *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916).

214. Marcaria J. Speziale, The Turn of the Twentieth Century As the Dawn of Contract "Interpretation": Reflections in Theories of Impossibility, 17 Duq. L. Rev. 1978-79, 555, at 580.

215. *Greil Bros. Co. v. Mabson*, 179 Ala. 444, 451, 60 So. 876, 878 (1912). See also T. Ward Chapman, Comments, Contracts, Frustration of Purpose, 59 Mich. L. Rev. 98, at 111.

doctrine is recognised, it has not received substantial acceptance in many states.[216]

As a result of these factors, it is extremely difficult to arrive at a definition of excusable non-performance in American law. In ***Housing Authority v. East Tennessee Light and Power Co.***,[217] the court stated that: "the conclusions reached in the decided cases are not harmonious, due, perhaps in part, to the multitude of circumstances or conditions under which the question was presented. It is impossible to state a general rule which will be applicable to all classes of cases."

Both American and English courts have therefore struggled over the centuries with the problem of excusable non-performance of contracts. This struggle, unfortunately, has not resulted in the development of a coherent positive theory consistent with the typical outcomes in the decided cases. The problem will be discussed in the context of both the American common law and the Uniform Commercial Code (UCC).

2.2. AMERICAN COMMON LAW

2.2.1. THE TRADITIONAL CATEGORIES OF EXCUSABLE NON-PERFORMANCE: FRUSTRATION OF CONTRACT AND IMPOSSIBILITY OF PERFORMANCE

Although the American courts have for the most part rejected the doctrine of frustration of purpose, there are cases which show that the doctrine has been accepted in, at least, some states.[218] The doctrine of frustration has been incorporated into both the first[219] and second[220] Restatements. Although the doctrine is not expressly recognised by section 2-615 of the UCC, there is a little doubt that it is applicable to contracts for the sale of goods.[221] The section is designed to apply in situations involving the

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216. See A. Anderson, Frustration of Contract - A Rejected Doctrine, 3 De Paul L. Rev. 1953, 1-22. *Compare* it with H. Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 Colum. L. Rev. 1958, 287, 309.

217. 183 Va. 64, 31 S.E.2d 273, 276 (1944).

218. See, *e.g.*, *West Los Angeless Inst. for Cancer Research v. Mayer*, 366 F.2d 220 (9th Cir. 1966), *cert. denied*, 385 U.S. 1010 (1967) (Seller of business to tax-exempt entity could rescind when "sale and leasback arrangement was frustrated by Revenue Ruling . . . while rejected the tax premises upon which the transaction was based"); *La Cumbre Golf Country Club v. Santa Barbara Hotel Co.*, 205 Cal. 422, 271 P. 476 (1928) (Hotel company was excused from paying flat fee for golf privileges for its guests when hotel burned down). See also Comments, Contracts - Frustration of Purpose, 59 Mich. L. Rev. 1960, 98; E. Allan Farnsworth, Contracts, 1982, at 689 *et seq.*

219. Section 288.

220. Section 265.

doctrine of commercial frustration as well. Comment 9 states that a buyer is discharged where the reasonable commercial understanding of the agreement is that the buyer agreed to purchase for a particular purpose and that purpose has been frustrated.

According to Restatement (Second), the party who claims that his purpose has been frustrated by a supervening event must meet four requirements:[222]

- The event must have "substantially frustrated his principal purpose".
- It must have been a "basic assumption on which the contract was made" that the event would not occur.
- The occurrence of event must not have been due to the fault of the party relying on frustration.
- The party seeking relief must not have assumed a greater obligation than the law imposes.[223]

The American cases dealing with frustration are very limited. Only a few judgments have accepted the doctrine. In fact, frustration has been invoked with even less success than impracticability.[224] In short, the U.S. courts have relied less on the doctrine of frustration than their English counterparts. A 1960 survey found only twenty-nine cases which reflected acceptance of the doctrine in America.[225] In general, these decisions and their justifying reasons have been similar to those of the English courts especially with regard to the fiction of the implied term.[226] Moreover, it should be added that although the American courts have for the most part rejected the English doctrine of frustration, they have, however, reached similar results by expanding the doctrine of implied conditions to include tacit assumptions

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221. Farnsworth, *op. cit.*, at 690; Note, Frustration as an Agricultural Buyer's Excuse under UCC Section 2-615, 11 University of California, Davis Law Review, 1978, 351. See also *Nora Springs Coal Co. v. Brandau*, 247 N.W.2d 744 (Iowa 1976) (*Dictum*: UCC 2-615 should be "equally applicable to buyers [since] the code expressly recognizes the doctrine of commercial frustration").

222. Restatement (Second), Sec. 265; Farnsworth, *op. cit.*

223. Restatement (Second), Sec. 265 expresses this by phrase "unless the language or the circumstances indicate the contrary."

224. See Birmingham, A Second Look at Suez Canal Cases: Excuse for Nonperformance of Contractual Obligations in the Light of Economic Theory, 20 Hastings L. J. 1393, 1394, 1969.

225. Comments, Contract, Frustration of Purpose, *op. cit.*, 98, 106. On the basis of a 1953, Anderson concluded that the doctrine of frustration had not been accepted by any American courts of last resort. See Anderson, *op. cit.*

226. See Arthur L. Corbin, Frustration of Contract in U.S.A., J. Comp. Leg. Int'l. L. (Third Series), I, 1947, at 3. See also *Olson v. Carbonara*, 21, Ill..App.2d 69, 157 N.E.2d 273, at 275 (1959), leave to appeal denied 17 Ill.2d 147 (1959).

regarding the kinds of circumstances which will discharge a contract. In particular, they have often held that it was the implied intention of the parties that performance should be discharged when such performance became "impracticable" because of the extreme and unreasonable difficulty, expense, injury or loss involved. It can therefore be said that since the American courts have been prepared to apply the theory of implied conditions, there are in fact more exonerating circumstances in U.S. law than are covered by the English doctrine of frustration. Both the impossibility and frustration rationales are often explained in terms of an "implied condition". In ***Patch v. Solar Corp.***,[227] for example, the court stated:

"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 . . . ."[228]

Sometimes, however, a court states an "implied condition" in a manner which does not seem merely to be a way of stating the doctrines of impossibility or frustration. These varying uses of "implied condition" lead to the conclusion that there is a separate rationale for the doctrine of frustration which may be called the "implied condition" rationale. Indeed, one court has asserted that an alternative name for the doctrine of frustration itself is the "doctrine of implied condition."[229]

However, while the doctrines of impossibility of performance and frustration of purpose are similar, it should be emphasised that frustration is not a form of impossibility.[230] In American law, impossibility refers to factual situations where the contractual purpose becomes impossible to perform; frustration of purpose refers to the circumstances where the purpose for which a party entered into the contract has been frustrated due to a failure of consideration. Indeed, the doctrine refers to situations in which the contracted performance remains possible, but the original intentions of either the promisor or promisee will not be achieved by performance.[231]

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227. 149 F.2d 558 (7th Cir.), *cert, denied*, 326 U.S. 741 (1945).

228. 149 F.2d at 560.

229. *Wood v. Bartolino*, 48 N.M. 175, 146 P.2d 883 (1944).

230. Comments, Uniform Commercial Code Section 2-615: Commercial Impracticability from Buyer's Perspective, 51 Temp. L. Q. 1978, 518, at 528. See also *Crown Ice Mach. Leasing Co. v. Sam Senter Farms, Inc.*, 174 So.2d 614, 617 (Fla. 1965).

231. *Perry v. Champlain Oil Co.*, 101 N.H. 97, 98, 134 A.2d 65, 66 (1957). See also 6 A. Corbin, Contracts, Sec. 1325 at 338 (1962 and Supp. 1964); 6 S. Williston, *op. cit.*, Sec. 1935 (rev. ed. 1938); Restatement of Contracts, Sections 288, 454 (1932).

With regard to impracticability, as the court noted in ***Lloyd v. Murphy***,[232] there are significant conceptual differences between impracticability and frustration:

"Although the doctrine of frustration is akin to the doctrine of impossibility of performance . . . since both have developed from the commercial necessity of excusing performance in cases of extreme hardship, frustration is not a form of impossibility even under the modern definition of that term, which includes not only cases of physical impossibility but also cases of extreme impracticability of performance. Performance remains possible but the expected value of performance to the party seeking to be excused has been destroyed by the fortuitous event, which supervenes to cause an actual but not literal failure of consideration."

From a comparative point of view, it should be noted that the English judges, unlike their American counterparts, regard frustration as substantially identical with impossibility.[233] Indeed, the term "frustration" in England encompasses both frustration of purpose and impossibility of performance. While in American law, as discussed, the terms refer to two different situations. Thus the doctrine of frustration in English law is essentially similar to the United States doctrine of impossibility where it refers to impossibility of performance. Further, the terms such as "physical impossibility", "legal impossibility", "subjective and objective impossibility", "personal inability", "increased difficulty" and "frustration of object" are also found in American law.[234] Like English law, in order to be operative as an excuse of performance, frustration and impossibility must be determined objectively rather than subjectively.[235]

2.2.2. COMPLICATIONS IN THE DOCTRINE OF IMPRACTICABILITY

As discussed in the preceding chapter,[236] impracticability developed from the doctrine of impossibility. The concept of impracticability evolved to allow excuse when an event did not render performance impossible but,

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232. *Lloyd v. Murphy*, 25 Cal. 2d 48, 53, 153 P.2d 47, 50 (1944).

233. See john D. Calamari, The Law of Contracts, 1977, at 475 *et seq.*

234. See generally, 6 A. Corbin, *op. cit,*; 6 Williston, *op. cit.*; Restatement of Contracts, *op. cit.*

235. *Sachs v. Precision Prod. Co.*, 257 Or. 273, 476 P.2d 199 (1970); *Ballou v. Basic Constr. Co.*, 407 F.2d 1137 (4th Cir. 1969); *Williams v. Carter*, 129 Vt. 619, 285 A.2d 735 (1971); *White Lakes Shop. Ctr. v. Jefferson Standard Life Ins. Co.*, 208 Kan. 121, 490 P.2d 609 (1971). See also Restatement (First) of Contracts, Sec. 455.

236. *Supra*, pp. 27 *et seq.*

nevertheless, substantially different from that contemplated by the parties.[237] This development represents the most liberal extension of the American common law on excusable non-performance. A modern statement of the synthesis appears in a recent case:

"The doctrine of impossibility of performance has gradually been freed from the earlier fictional and unrealistic strictures of such tests as 'implied term' and parties' 'contemplation'. It is now recognized that a thing is impossible in legal contemplation where it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost."[238]

Some American courts define the term "impracticability" solely as increased cost.[239] However, it seems that an excessive cost increase may constitute but one example of impracticability.[240] The rationale for the doctrine is that the circumstances causing breach have made performance so vitally different from what was anticipated that the contract cannot reasonably be thought to govern.[241] However, the following cases indicate that the doctrine of impracticability has been translated into other concepts as well. In ***Asphalt International, Inc. v. Enterprise Shipping Corp.***,[242] for example, the defendant shipowner refused to repair a vessel chartered to the plaintiff after it had been severely damaged in a collision, notwithstanding the defendant's contractual duty to repair. The cost of repairing the vessel significantly exceeded the value of the ship. The plaintiff sued for loss of profits to be derived from the ship, claiming that the owner failed to repair the ship in accordance with the charterparty. The owner defended its failure to repair by claiming an excuse under section 2-615. Recognising that the section applied solely to the sale of goods, the court nevertheless applied its principles to discharge the defendant.[243] The court tried to determine whether, under the circumstances, performance would be "essentially different" from that for which the parties had contracted or whether the event altered the essential

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[237]. Note, UCC Section 2-615: Excusing the Impracticable, 60 B. U. L. Rev. 1980, 575, at 592.

[238]. *Transatlantic Fin. Corp. v. United States*, 363 F.2d 312, 313 (D.C.Cir. 1966 (Skelly Wright J.).

[239]. See also *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916).

[240]. Note, *op. cit.*, at 592, 593. See also *West L. A. Inst.*, 366 F.2d at 220; *Kinzer Constr. Co.*, 125 N.Y.S. 46 (Ct. Cl. 1910), *aff'd* 145 A.D. 41, 129 N.Y.S. 567 (1911).

[241]. Note, *op. cit.* See also *Eastern Air Lines, Inc. v. Mcdonnell Douglas Corp.*, 532 F.2d 957, 991 (5th Cir. 1976); *Standard Constr. Co. v. National Tea Co.*, 240 Minn. 422, 430-431, 62 N.W.2d 201, 206 (1953).

[242]. 667 F.2d 261 (2d Cir. 1981).

[243]. *Loc. cit.*, at 266.

nature of the contract.[244] In doing so, the court emphasised the change in the "essential nature" of the contractual performance rather than the magnitude of hardship to the parties. The court excused the owner because the subject matter of the contract had essentially been destroyed. The reasoning underlies the exceptions to the absolute performance rule of the early common law. However, "impracticability" is used instead of "impossibility" or "frustration".

In ***Waldinger Corp. v. GRS Group Engineers, Inc.***,[245] a subcontractor was sued by a contractor for breach of a contract to supply specially engineered equipment for use in a sewage treatment plant. The contract expressly listed several restrictive specifications for the equipment. The defendant supplied equipment that met the performance requirements issued by the federal law but which did not strictly comply with the engineering specifications listed in the contract. In defending the suit, the defendant raised the impracticability defence of section 2-615, arguing that it had relied on the government rules prohibiting the type of restrictive specifications found in the contract and claiming that if it had complied with the restrictive specifications, its machine would not have performed in accordance with the government rules.[246] The court accepted the defendant's argument and discharged its non-performance under the agreement. The court stated that the defendant's inability to supply a filter press that would both satisfy the plaintiff's mechanical specifications and perform as required by federal law was commercially impracticable.[247] In this case, the court discharged the subcontractor because federal law prevented performance in accordance with the terms of the agreement.

The above decisions are important because they show how the courts interpret the concept of impracticability in different ways. While the concept of impracticability may have been intended as a major improvement in terms of coverage, clarity and simplicity, its meaning and scope are not totally clear. On the one hand, some decisions reveal the similarity of the impossibility and impracticability concepts. These decisions bolster the argument that the two excuses are dealt with in the same way. On the other hand, other decisions define impracticability differently from impossibility, *i.e.*, exclusively in terms of increased costs.

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244. *Loc. cit.*

245. 775 F.2d 781 (7th Cir. 1985).

246. *Loc. cit.*, at 784-786.

247. *Loc. cit.*, at 789.

Both UCC Section 2-615 (for the sale of goods) and Restatement (Second) of Contracts[248] (for all other type of contracts) have adopted the new doctrine of impracticability[249] with the same formulations. In both, impracticability is not distinguished from impossibility. Instead, both authorities use only the term "impracticability".

According to Restatement (Second), death or incapacity of a person required for performance, destruction of subject matter, illegality, severe shortage of raw materials or supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply and severe cost increases (cost increase alone - wages, raw materials, or construction - if they fall outside the "normal range") are grounds for impracticability.[250] It should be noted that in the context of the new synthesis of "impracticability", the party seeking relief should also meet four requirements, *viz*:

- The event must have made performance "impracticable".
- It must have been a "basic assumption on which the contract was made" that the event would not occur.
- The occurrence of event must not have been due to the fault of the party relying on impracticability.
- The party seeking relief must not have assumed a greater obligation than the law imposes.

Although the doctrine of impracticability in the sense of excessive cost increase has been fully accepted by commentators,[251] the UCC[252] and the Restatement Second,[253] in practice most American courts are extremely reluctant to accept anything short of impossibility as discharging performance,[254] even though the standard is technically "impracticability".[255]

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248. Sec. 261.

249. The term "impossibility" used in the First Restatement. It has been said that this difference is merely in nomenclature, because the First Restatement defined "impossibility" as not only strict impossibility but impracticability because of extreme and unreasonable difficulty, expense, injury or loss involved. Indeed, the First Restatement equated extreme impracticability with impossibility. See First Restatement, Sec. 454 (1932) *accord H. B. Zachry Co. v. Travellers Indem. Co.*, 391 F.2d 43 (5th Cir. 1968); *City of Littleton v. Employers Firs Ins. Co.*, 169 Colo. 104, 453 P.2d 810 (1969).

250. Restatement (Second) of Contracts, Sections 261, comment c & d, 262, 263, 264. *Cf.* First Restatement.

251. See Comment, Impracticability as Excuse from Performance on Contracts for the Sale of Forest Timber, 20 Willmette L. Rev. 1984, 43, at 54.

252. Sec. 2-615.

253. Sections 261-272.

However, in ***Mineral Park Land Co. v. Howard***,[256] a leading pre-code case on commercial impracticability, the court held that the defendant was excused from performance because of excessive and unreasonable cost. In comparison with other cases, this decision constitutes an example of a liberal application of the doctrine and offers in theory at least, greater protection from supervening commercial hardship. But given that the doctrine has not been accepted by the majority of states, the place of the doctrine in American law remains unsettled.

From a comparative point of view, both American and English courts are reluctant to grant relief from contractual obligations because of commercial hardship *per se*.[257] Non-performance is not generally excused as a result of the increased cost of performance. Thus the best protection from supervening commercial hardship in contracts is that expressly contracted by parties themselves in their agreement. Although the American doctrine of impracticability theoretically at least is much wider than what is generally accepted in practice by the courts, it seems that the doctrine is accepted neither in theory nor in practice in English law. The vital difference is that the English doctrine of frustration is concerned with physical aspects of performance, for example, whether goods would be adversely affected if performance was carried out in the new situation or whether personal safety would jeopardised: whereas, the American commercial impracticability doctrine focuses on the commercial aspect of hardship to the parties. In ***Davis Contractors Ltd. v. Fareham U. D. C.***,[258] contractors agreed to build 78

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254. *Hudson v. D. & V. Mason Contractors, Inc.*, 252 A.2d 166 (Del.Super. 1969); *Columbus Railway, Power & Light Co. v. City of Columbus*, 249 U.S. 399, 39 S.Ct. 349, 63 L.Ed. 669 (1919); *International Paper Co. v. Rockefeller*, 161 App.Div. 180, 146 N.Y.S. 371 (3d Dep't 1914); *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974); *Maple Farms, Inc. v. City School District of City of Elmira*, 76 Misc.2d 1080, 352 N.Y.S.2d 784 (Sup.Ct.1974); *Portland Section of Council of Jewish Women v. Sisters of Charity of Providence in Oregon*, 513 P.2d 1183 (Or. 1973).
In above cases, the courts continued to hold firm against allowing sellers to be discharged because of inflationary rises in cost.

255. See *Wischhusen v. American Medicinal Spirits Co.*, 163 Md. 565, 163 A. 685 (1933); *Piaggio v. Somerville*, 119 Miss. 6, 80 So. 342 (1919); *Browne & Byran Lumber Co. v. Toney*, 188 Miss. 71, 194 So. 296 (1940).

256. 172 Cal. 289, 156 P. 458 (1916). See also *Swiss Oil Corp. v. Riggsby*, 252 Ky. 374, 67 S.W.2d 30 (1934); *Carroza v. Williams*, 190 Md. 143, 57 A.2d 782 (1948); *Brick Co. v. Pond*, 38 Oihio St. 65 (1882).

257. See also John J. Gorman, Notes - Commercial Hardship and Discharge of Contractual Obligations under American and British Law, 13 Vand. J. Transnat'l. L. 1980, 107-140.

258. [1956] A.C. 696.

houses for a local authority in eight months for £94,000. Because of labour shortages, the work took 22 months and cost the contractors £115,000. The contractors claimed that the contract had been frustrated, but the House of Lords rejected the claim. Lord Radcliffe said:
"It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for."[259]
A different result would obtain in any State which adopted the approach of the court in ***Mineral Park Land Co., v. Howard***.[260]

2.3. EXCUSE OF NON-PERFORMANCE UNDER UCC

The Uniform Commercial Code attempts to broaden the American common law on excuse for non-performance. In the area of contracts for the sale of goods, three sections of the UCC cover changes in circumstances. *Viz.*, sections 2-613, 2-614 and 2-615.

2.3.1. SECTION 2-613 OF UCC[261]

Section 2-613 of UCC codifies the generally accepted rule of casualty to specific goods. The section discharges the seller's duty of performance in certain cases involving the total or partial destruction of goods identified to the contract. This section contains provisions similar to section 7 of the British Sale of Goods Act 1979.[262] However, contrary to British law, the section applies whether the goods were already destroyed at the time of contracting without the knowledge of either party or whether they were destroyed subsequently, but before the risk of loss passed to the buyer.[263] Indeed, in

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259. *Loc. cit.*, at 729.

260. 172 Cal. 289, 156 P. 458 (1916).

261. The text of UCC Sec. 2-613 states: "Where the contract requires for its performance goods identified when the contract is made, and the goods suffer casualty without fault of either party before the risk of loss passes to the buyer, or in a proper case under a 'no arrival , no sale' term (section 2-324) then
(a) if the loss is total the contract is avoided; and
(b) if the loss is partial or the goods have so deteriorated as no longer to comform to the contract the buyer may nevertheless demand inspection and at his option either treat the contract as avoided or accept the goods with due allowance from the contract price for the deterioration or the deficiency in quantity but without further right against the seller."

262. *Supra*, pp. 47 *et seq.*

263. The UCC Commentary on Sec. 2-613, Comment 2.

section 2-613, sections 6 and 7 of the 1979 Act are merged into a single provision.

According to the section, as a general rule, there are three conditions for the seller's excuse of non-performance; *viz*:[264]

(a) the goods must be identified when the contract is made;

(b) the absence of fault on the part of either party.

(c) the risk of loss must not have passed to the buyer.

Most of the cases which have been decided under the section involve contracts for the sale of crops planted at the time of the contract which were later lost or damaged due to flood, disease or some other scourge. A contract for the sale of crops to be grown on designated land is covered by this section only if the crops have been planted and can thus be identified when the contract is concluded.[265] When the seller is a grower rather than a dealer, excuse has been granted when he has sold a particular crop which was to be grown on particular land. If the contract requires the grower to supply a particular crop to be planted on particular land and the crop is destroyed, impracticability would result since the seller is not obliged under the contract to acquire the crops from another source of supply.[266] Some courts have refused to discharge a farmer-grower when the contract did not expressly confine his obligation to crops from a particular source. A leading case is ***Bunge Corp. v. Recker***,[267] in which the contract identified the goods only by "kind and amount" and the seller apparently warranted delivery from crops grown within the "continental United States." It was held that there was no evidence that the goods to be sold were intended to be produced on identified land. The court concluded:

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[264]. See David C. Bugg, Crop Destruction and Forward Grain Contracts: Why Don't Sections 2-613 and 2-615 of the UCC Provide More Relief? 12 Hamline L. Rev. 1989, 669, at 671.

[265]. See John D. Wladis, Impracticability As Risk Allocation: The Effect of Changed Circumstances upon Contract Obligations for the Sale of Goods, 22 Ga. L. Rev. 1988, 503, at 533. According to section 2-501(1)(c), crops to be grown become identified to the contract when planted. The section provides: "(1) . . . Such identification can be made at any time and in any manner explicitly agreed to by the parties. In the absence of explicit agreement identifiction occurs (a) . . . (b) . . . (c) when the crops are planted or . . . ."

[266]. See *Paymaster Oil Mill Co. v. Mitchell*, 319 So.2d 652 (Miss. 1975) (Existing crops); *Dunavant Enterprises, Inc. v. Ford*, 294 So. 2d 788; *Campbell v. Hostetter Farms, Inc.*, 251 Pa. Super.Ct. 232, 380 A.2d 463 (1977). But see *Pearce-Young-Angel Co. v. Charles R. Allen*, Inc., 213 S.C. 578, 50 S.E.2d 698 (1948) (In this case, dealer excused when bad weather prevented seller from obtaining "Texas" blackeyed peas from a particular locality). See also Richard E. Speidel, Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management, S.C.L. Rev. 1980, 241, at 255, 256.

[267]. 519 F.2d 449 (8th Cir. 1975).

"[s]ince the beans were not identified other than by kind and amount, we agree with the trial judge that the destruction by weather did not constitute an act of God which would excuse performance . . . . Obviously the appellee could have fulfilled its contractual obligation by acquiring the beans from any place or source . . .".

If the crops were not identified at the time of contracting, *i.e.*, not planted, the excuse question is governed by section 2-615.[268] As we shall see, section 2-615 applies to a wide range of circumstances. This distinction could become important when pleading a lawsuit, but in either instance, if the crop fails for reasons beyond the seller's control, he is excused.

In addition to the identification requirement, the goods also must suffer casualty. It appears that this section is not limited to the "perishing" of the goods. "Perishing" of the goods is only one instance of the application of the broader concept of "suffer casualty". The term "suffer casualty" is not defined in the code, but would presumably include any damage to the goods. Thus the term "casualty" effects a further improvement by establishing that both destruction and deterioration of the goods is comprehended by the section.[269]

If the goods "perish" in the English sense, this would, no doubt, be a total loss within section 2-613 (a), leading to avoidance; but under paragraph (b) of the section, a partial loss would not automatically lead to avoidance. If the facts of ***Barrow, Lane and Ballard Ltd. v. Phillip Phillips & Co. Ltd.***[270] were to arise under section 2-613, it could be argued that the loss was total under paragraph (a) since the parcel of 700 bags had ceased to exist.

Section 2-613 makes it clear that in the case of a "no arrival, no sale" contract, "casualty" includes not only physical change in the goods but also delay in arrival or delivery.[271] The reason for this and for the specific reference to the "no arrival, no sale" term in the section is to allow the buyer the option of taking the goods under section 2-613 when they arrive late rather than voiding the contract for the delay and thus, perhaps, giving the seller a fortuitous profit.[272]

It can be argued that the casualty of specific goods is only one instance of the application of the broader rule codified in section 2-615. The question is

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268. See UCC Sec. 2-615, Comment 9; *Dunavant Enterprises, Inc. v. Ford*, 294 So.2d 788 (Miss. 1974) (Crops to be planted).

269. John D. Wladis, *op. cit.*, at 532, 533.

270. For the facts of the case, see pp. 223.

271. See UCC Sec. 2-613, Official Comment 3.

272. John D. Wladis, *op. cit.*, at 533.

whether any purpose is served by including a separate section such as 2-613. Two reasons may be given for providing such a provision. First, section 2-613 provides explicitly for the rights of a buyer in the event of seller's discharge, whereas there is doubt whether section 2-615 applies to buyers.[273] Secondly, even if section 2-615 applies to buyers, it may be useful to make it apparent that casualty to identified goods is unarguably "the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made" and consequently is covered by the more specific provision. But the danger inherent in providing a provision which covers only a narrow range of cases is that it creates unnecessary problems of definition.[274]

According to the section, the goods must suffer casualty without fault of either party and the risk of loss must not yet have passed to the buyer. If the risk of loss has passed to the buyer, the seller may not avoid the contract under the section and since the buyer has the risk of loss, he is presumably liable to the seller for the price. As the term "fault" is defined in the UCC,[275] it is clear that the negligence of either party prevents discharge. The section does continue to require that both parties be innocent of fault.

Section 2-613 seems to apply absolutely, regardless of the foreseeability of the casualty and regardless of any undertaking on the seller's part to assume liability for delivery in any event. In accord with the discussion of the relevance of the foresight criterion,[276] it appears that the operation of the section will be excluded when the casualty of the goods in question is sufficiently foreshadowed at the time of contracting. Further, excusable non-performance should also be negated where the seller assumes responsibility for the continued and faultless existence of the goods. In this regard, the court should be authorised to go beyond the terms of the contract and take into account trade customs and circumstances surrounding formation of the contract, including the foreseeability of the event by either party, in attempting to determine whether the seller had assumed the risk of such casualty.[277]

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273. See *infra*, pp. 79-82.

274. See also J. D. McCamus, *op. cit.*, at 75-78.

275. "Fault" includes negligence as well as willful misconduct. UCC, Sec. 2-163, comment 1. See also UCC, Sec. 1-201 (Definition of fault). In English law, this point was left open by the House of Lords, Joseph Constantine Steamship Line v. Imperial Smelting Corp. Ltd. [1942] A.C. 154; [1941] 2 All E.R. 165; see also pp. 136 *et seq.*

276. *Infra*, pp. 116 *et seq.*

277. *Cf.* Sec. 2-615, comment 8.

2.3.2 SECTION 2-614 OF UCC[278]

Section 2-614 of UCC deals with transportation and payment problems. Subsection 2-614(1) allows the seller to substitute a "commercially reasonable" means of delivery for the one agreed upon if it becomes unavailable or commercially impracticable. This rule is consistent with some American pre-code case law. In ***Meyer v. Sullivan***,[279] a contract called for delivery of wheat, "F.O.B. Kosmos Steamer at Seattle." The sellers duly engaged shipping space on that line. Due to the war conditions, the steamship line cancelled its shipping schedule. The plaintiffs (buyers) suggested they should take delivery of the goods at the shipper's dock, but the defendants would not agree. The court noted that the sellers' objection to such a commercially reasonable substitute performance was motivated by a desire to end the deal, because of a change in the market price of the goods sold.[280] The court did not discharge the sellers and held that they should have honoured the buyers' offer of substitute delivery arrangements. Further, performance of the essential part of the agreement, transfer of the goods to the buyer, was still possible through commercially practicable means, because the buyers were prepared to take delivery at the steamship line's warehouse dock. Under the current code, section 2-614(1) would have applied and the seller would have been obliged to perform the defendants' demand that the goods be delivered to the dock.

Section 2-614(2) is obviously a response to certain types of governmental regulation which is regarded as unfair. The provisions attempt to ensure the payment of a commercial equivalent and seem to be an equitable solution to a difficult problem. Thus, the buyer is permitted to modify

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278. The text of UCC Sec. 2-614 is:
"(1) Where without fault of either party the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, such substitute must be tendered and accepted.
(2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If delivery has already been taken, payment by the means or in the manner provided by the regulation discharges the buyer's obligation unless the regulation is discriminatory, oppressive or predatory."

279. 40 Cal.App. 723, 181 P. 847 (1919). See also Restatement of Contracts, Sec. 463, comment b, (1932) (Reference to performance being possible with only insubstantial variation).

280. 40 Cal.App. at 726, 181 P. at 848.

the means or manner of payment to any "commercially substantial equivalent" if the agreed means or manner fails because of government law or regulation.

The evident purpose of section 2-614 is to rescue a contract when basically full performance is possible in a commercially reasonable manner, although not by the precise means agreed by the parties. The result is desirable, since an increase in the market price may probably be the real reason for the seller's failure to deliver the goods. In such a situation, the seller presumably wants to claim that the contract is ended so that he can sell the goods for a higher price.

Although the section appears to be another provision dealing with particular excuse situations,[281] it is submitted that it is not really an excuse section at all, since it requires the party to render a commercially reasonable substitute performance where the agreed means of delivery or payment have failed.[282] Indeed, the premise of the section that a substitute performance must be rendered if the agreed performance fails, is limited to failures which are incidental to the main purpose of the contract. In other words, while the means of performance is frustrated, the essential part or purpose of the agreement is not. The distinction between the present section and sections 2-613 and 2-615 therefore lies in whether non-performance is concerned with an incidental part or goes to the very heart of the contract.[283]

The application of this difference between essential and incidental aspects of the contract is illustrated by two pre-code cases. In ***International Paper Co. v. Rockefeller***,[284] there was a contract to sell wood to be cut from a particular tract of land. When a fire destroyed the trees on that tract, the seller was held excused from his obligation to supply since performance was impossible. The fire had prevented performance of an essential part of the

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281. See George Wallach, The Excuse Defense in the Law of Contracts: Judicial Frustration of the UCC Attempt to Liberalize the Law of Commercial Impracticability, The Notre Dame Lawyer, 1979, 203, at 208.

282. See also John D. Wladis, Impracticability As Risk Allocation: The Effects of Changed Circumstances upon Contract Obligations for the Sale of Goods, 22 Georgia L. Rev. 1988, 503, at 532.

283. For example, the transfer of the goods to the buyer in return for payment of the price is the essential aspects of performance; other parts of the contract, such as method of delivery or payment, are undertaken to carry out this essential aspects and are thus incidental to it. If an incidental means of performance should become impracticable, yet the transfer of the goods and payment still be attainable through substitute means, then the section requires the substitute means to be tendered and accepted. (See Wladis, *op. cit.*, at 538-9).

284. 161 App.Div. 180, 146 N.Y.S. 371 (1914).

contract, the transfer of goods from the agreed source to the buyer.[285] If the current code had been in force, section 2-614 would not have applied. In ***Meyer v. Sulivan***,[286] the sellers were held not to be excused. The court found that the sellers should have honoured the buyers' offer of substitute delivery arrangements. Performance of the essential part of the contract, transfer of the goods to the buyer, was still possible through commercially practicable means.

In deciding what constitutes a commercially reasonable substitute, American courts look to the difference in cost and difficulty to the seller between the substitute performance and agreed performance, and the difference in the value to the buyer between the substitute performance and the agreed performance.[287] In ***Jon-T Farms, Inc. v. Goods Pasture, Inc.***,[288] the court noted that the statute does not allocate the added expenses that a substitute manner of delivery may entail, and concluded that the seller should bear the added expenses under section 2-614. In another case,[289] involving section 2-614(2), the parties were currency traders and the defendant had agreed to deliver Japanese yen to the plaintiff in the future. Following the devaluation of the U.S. dollar, the Japanese government imposed currency restrictions which prevented the defendant from delivering yen to the plaintiff in the United States. The defendant then offered a series of alternatives, none of which appealed to the plaintiff. The defendant then sold the yen held for the plaintiff, and credited the profits made by the plaintiff to his account in dollars. The court held that this was a commercially reasonable substitute for the failure to deliver yen to plaintiff.

What happens if an incidental part of an agreement fails and there is no commercially reasonable substitute available? According to the drafting history of sections 2-614 and 2-615 of the UCC, failures of incidental means of performance, such as the manner of delivery, can discharge the seller under section 2-615.[290] This is understood impliedly from the text of section 2-615,

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285. The official Comments to section 2-614 describe the interfering event as going "to the very heart of the contract." (UCC, Sec. 2-614, Official Comment 1).

286. 40 Cal.App. 723, 181 P. 847 (1919).

287. John D. Wladis, *op. cit.*, at 536. See also *Meyer v. Sullivan*, 40 Cal.App. 723, 726, 181 P. 847, 850 (1919).

288. 554 SW2d 743, at 751;21 U.C.C. Rep. Serv. 1309 (Tex.Civ.App. 1977). See also *Caruso-Rinella-Battaglia Co. v. Delano Crop. of America*, 25 Agric.Dec. 1028, 3 U.C.C. Rep. Serv. 863 (1966).

289. *United States Equities Co. v. First National City Bank* (52 App.Div.2d 154, 383 N.Y.S.2d 6 (1976).

since the section is explicitly made subject to section 2-614. That connection is needed only if failures of incidental means of performance described in section 2-614 can be the basis for excuse under section 2-615. This was the result under pre-code law where both buyer and seller knew when they contracted that the agreed means of transportation were the only means.[291]

Another question which arises is what happens if an essential purpose of the agreement fails - for example, unavailability of the specific goods or source of supply - but a commercially reasonable substitute for that part is available to be tendered? The answer is clearly negative, since neither section 2-613 nor 2-615 provide for substitute performance. Further, the explicit coverage of section 2-614 is only concerned with failure of transportation or payment facilities, and the Official Comments to that section carefully distinguish between essential and incidental failures and provide that the section applies only to the latter.[292] Finally, under pre-code law, in such a situation substituted performance was not required.[293]

2.3.3. SECTION 2-615 OF UCC[294]

The most important of the code's excuse provisions is section 2-615 under the title of "excuse by failure of presupposed conditions". Indeed, the main innovation of the commercial code was its definition of impossibility, as a result of which, it is now enough that performance of a contract has become "impracticable". As discussed before,[295] the Restatement (Second) adopted

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290. See Wladis, *Op. cit.*, at 540, 541.

291. Restatement of Contract, Sec. 460, illus. 9 (1932).

292. UCC, Sec. 2-614, Comment 1.

293. 6 A. Corbin on Contracts, (1962), Secs. 1337, 1339.

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

295. *Supra*, at 32.

this and made it applicable to other kinds of contracts. Despite this adoption, several differences remain between the UCC and Restatement (Second). Unlike the Restatement, the UCC does not use the term "impossibility". The code uses the term, "impracticability". Furthermore, the UCC abandons the distinction between impossibility and frustration, whereas the Restatement treats them in separate sections. The section in the UCC encompasses the entire field of excuse, including impossibility and frustration. Finally, the section allows more judicial discretion in determining excuse than the Restatement.[296] Both the Restatement and the UCC have adopted the same formulation of impracticability: and in both, impracticability is distinguished from impossibility.

According to section 2-615(a) of UCC, as a general rule, four conditions must be met if the promisor is to be discharged from performance of his obligations.[297] These conditions are as follows: First, performance must be impracticable. Secondly, performance must have been predicated on the non-occurrence of a contingency.[298] Thirdly, the party seeking relief should not be at fault.[299] Fourthly, the risk of the contingency must not have been assumed by either party nor must a greater obligation have been assumed.[300] Thus, if a party expressly undertakes to perform a contract, even though performance becomes impracticable, impracticability will not excuse him, and he will be liable for damages if he fails to perform.[301]

(I) PROBLEMS INDIGENOUS TO IMPRACTICABILITY

According to section 2-615, an event or a contingency must have made performance impracticable. The code omitted use of the term "impossibility", because it seems that in some situations non-performance should be excused

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296. See Hurst, Freedom of Contract in an unstable Economy: Judicial Reallocation of Contractual Risks under UCC Section 2-615, 54 N.C.L. Rev. 1976, 545, at 554.

297. See White and Summers, Uniform Commercial Code, 3d ed. 1988, 155 *et seq.*; Farnsworth, *op. cit.*, 670-671.

298. This will be discussed in chapter three pp. 116 *et seq.*

299. This will be discussed in chapter three, pp. 139, 140.

300. Norman Prance, Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability, 3 Hasting Int'l. & Comp. L. Rev. 1980, 435, at 440. See also *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976); *Iowa Electric Light & Power Co. v. Atlas Corp.*, 467 F.Supp. 129 (N.D.Iowa 1978); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429 (S.D.Fla. 1975).

301. *Gulf Oil Corp. v. Federal Power Commission*, 563 F.2d 588 (3d Cir. 1977); *Rowe v. Town of Peabody*, 207 Mass. 226, 93 N.E. 604 (1911).

even though it had not become significantly impossible. Indeed, the code does not require that a seller meet the earlier, stricter tests of impossibility or frustration.[302] Thus, the term "impracticability" indicates that something less than actual impossibility will suffice, *i.e.*, situations in which the cause of impossibility is not physical or legal but results from economic hardship. Even with this enlightenment, one is left with a rather vague idea of what impracticability implies. Further, as the courts applied the commercial impracticability standard infrequently and without enthusiasm, it is not clear whether the section was intended merely to codify the pre-existing common law of impossibility and frustration, or was intended to be a broad expansion of those doctrines to include impracticability as well. There are, however, indications that the provision in the code was intended to expand the circumscribed scope of impossibility at common law. Comment 3 emphasises the "commercial character" of the test in the code. The comment makes it clear that the term "impracticable" was chosen to stress and emphasise the drafters' intention that the courts should look to the commercial setting in which a problem arises rather than apply absolute (objective) notions of impossibility. This reading of comment 3 is supported by the terms of comment 4, which deals with cost increases as a basis for commercial impracticability. According to comment 4, what is implied in the section is that a seller will not be discharged if he encounters unanticipated difficulties or increased expenses, unless there were the results of an unforeseen contingency or a condition of severe economic hardship, which alters the nature of the performance. For example, a rise or a collapse in the market is not in itself a justification for applying impracticability, for that is exactly the type of business risk which business contracts made at fixed prices are intended to cover: but a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which either cause a marked increase in costs or prevent the seller from securing supplies necessary to his performance, falls within this section.

Because of the stress in the UCC on economic and commercial realities, impracticability denotes a situation in which excessive and unreasonable costs are encountered.[303]

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302. See *Crown Ice Mach. Leasing Co. v. Sam Senter Farms*, Inc., 174 So.2d 614 (Fla.Dist .Ct.App. 1965).

Karl Llewellyn was the principal draftsman of Article 2 of UCC.[304] His purpose in drafting the section appears in the official comments to the section.[305] The draftsman of the section clearly envisaged that the comments would be relevant to the proper interpretation of the section. It is just as clear that the comments advance a broad reading of the statute. The comments indicate that Llewellyn intended the impracticability defence in the code to be available in more situations than the common law impossibility doctrine would have allowed.

In spite of the intent of the draftsmen of the section to achieve innovation and liberalisation of the law, it can be argued that judiciary has failed to heed this tendency.[306] Indeed, as discussed above,[307] the courts have been extremely hesitant to excuse performance in any circumstances short of physical impossibility. They have shown little enthusiasm for equating economic hardship and impossibility. The courts have treated code impracticability to be very much like the common law doctrine of impossibility. This means that they have not attempted to arrive at an economically rational solution which is the aim of the statute in commercial impracticable situations. They have, in effect, frustrated the purpose of section 2-615(a), the drafters' intention, the language of the statute and its comments. In the following discussion, the case law reveals that this new terminology did not necessarily result in new thinking in the area.

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303. In *Transatlantic Financing Corp. v. United States* (363 F.2d 312, 315 (D.C.Cir. 1966)), the code was seemingly meant to replace the rigid "extreme and unreasonable" criterion with the more flexible criterion of commercial reasonableness. However, the court preceded this statement by quoting *Mineral Park* (172 Cal. 289, 156 P. 458 (1916)) to the effect that a "thing is impracticable when it can only be done at an excessive and unreasonable cost."

304. Norman, R. Prance, Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the UCC, 19 Ind. L. Rev.457 (1986), at 459, 462; Soia Mentschikoff, Highlights of the UCC, 27 Mod. L. Rev. 167, 1964.

305. The Official Comments to Article 2 are significant, if not authoritative relevance, because Llewellyn believed that a sound development of the law could only be achieved if there existed adequate commentary to guide a court's interpretation of the relevant statute. (Stephen G. York, Re: The Impracticability doctrine of the UCC, 29 Duq. L. Rev. 1991, 221, at 236).

306. See Wallash, The Excuse Defense in the Law of Contracts: Judicial Frustration of the UCC Attempt to Leberalise the Law of Commercial Impracticability. 55 Notre Dame L. Rev. 203, 1979; Paul Walter, Commercial Impracticability in Contracts, 61 St. John's L. Rev. 225, 1987, at 259; Stephen G. York, Re: The Impracticability Doctrine of the UCC, 29 Duq. L. Rev. 1991, 221, at 235; Comment, Contractual Flexibility in a Volatile Economy: Saving U.C.C. Section 2-615 from Common Law, 72 NW. U. L. Rev. 1978, 1032.

307. *Supra*, pp. 69 *et seq.*

In ***Maple Farms v. City School District of City of Elmira***,[308] for example, the plaintiff had agreed to supply milk to the defendant. Six months later, the price of raw milk had increased by 23 percent.[309] The substantial price increase in raw milk was occasioned by crop failures and the agreement between the United States and Russia to sell vast amounts of grain to Russia, which in turn created grain shortages in the United States. The plaintiff argued that its hardship would be compounded and its contemplated losses tripled because of similar fixed price contracts with other school districts. The court denied relief under section 2-615[310] and declared that where economic hardship alone is involved, performance will not be excused. As to what extent increased costs should be the basis for excusing performance, the court held that "there is no precise point, though such could conceivably be reached, at which an increase in price of raw goods above the norm would be so disproportionate to the risk assumed as to amount to 'impracticability' in a commercial sense."[311]

In ***Publicker Industries v. Union Carbide Corp.***,[312] a loss in excess of $5.8 million due to a 25 percent increase in the cost of ethylene did not render the contract "impracticable" within the meaning of section 2-615. The court rejected Union Carbide's impracticability defence, stating that it was not aware of any cases where something less than a 100% cost increase had been held to make a seller's performance impracticable. The court relied on the ***Transatlantic***[313] ***and Maple Farms***[314] decisions as precedents despite the fact that the price increases in those cases were on a much smaller scale.

The oil crisis had the further effect of precipitating a greater demand for nuclear energy. Even radical changes in the price of certain commodities, such as uranium or oil, have been held insufficient for performance to be discharged. In ***In re Westinghouse Electric Corp. Uranium Contracts***

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308. 76 Misc.2d 1080, 352 N.Y.S.2d 784 (Sup.Ct. 1974).

309. *Loc. cit.*, at 1081, 352 N.Y.S.2d at 786.

310. The court stated that the issues raised by the facts of this case were analogous to those of *Transatlantic* (*Transatlantic Fin. Corp. v. U.S.*, 363 F.2d 312 (D.C.Cir. 1966)), and thus it was persuaded to follow the decision. *op. cit.*, at 1084-85, 352 N.Y.S.2d at 789.

311. *Loc. cit.*, at 1085 and at 790.

312. 17 U.C.C. Rep. Serv. (Callaghan) 989 (E.D.Pa. 1975).

313. *Transatlantic Financing Corp. v. United States*, 363, F.2d 312 (D.C.Cir. 1966).

314. *Maple Farms, Inc. v. City School District of City of Elmira*, 76 Misc.2d 1080, 352 N.Y.S.2d 784 (Sup.Ct. 1974).

Litigation,[315] Westinghouse had begun to enter contracts to provide uranium to its utility customers. Subsequent developments in the energy field caused enormous price increases for uranium, resulting in Westinghouse's announcement that performance had become commercially impracticable under the Uniform Commercial Code and it could not honour its obligations under these contracts. Westinghouse asserted that contract performance could result in losses to it of $2.5 billion. The court lacked sympathy for Westinghouse's position and rejected its impracticability defence on the grounds that Westinghouse was largely responsible for position in which it found itself.

What can be concluded is that the current impracticability doctrine is in a state of confusion. Its application does not mirror commercial reality and it does not comport with the intent of those who drafted it. The judiciary has shut the door to further judicial interpretation and expansion. Case law on the doctrine of impracticability, decided since the enactment of the section, reveals an area of contract law wrought with inactivity and stagnation. Because of the approach of the courts, the reform effected by this change has not been dramatic. The test that the courts have developed can be criticised as both unrealistic and lacking a proper foundation in the intent of the draftsmen.

Another problem in the new "impracticability" principle relates to the meaning and scope of the term. The standard of commercial impracticability is not defined in the UCC. Indeed, while the section may have been intended as a major improvement in terms of coverage, clarity and simplicity in the law the meaning and scope of the concept are not totally clear. For the present, a number of important questions remain unresolved. The main question is what does it mean to say that the doing of something has become impracticable? What are the guidelines for determining the magnitude of price increases that is not foreseeable in a given situation? The code has not made clear or has not specified the percentage of increases in costs for applying the doctrine of impracticability. If an unexpected difference in cost allows the promisor to be excused from performing his promises, where is the line to be drawn? Of course, there are several cases interpreting the code but these do not solve the problem. While a 1000 per cent cost increase has been held

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315. 405 F.Supp. 316, 1975. (For analysis of the case, see James T. Otis, Robert A. Creamer and Paul K. Whitsitt, Commercial Impracticability in Mineral Transactions, Rocky MT. MIN. L. FDN. 1985, 7.1, 7.5 *et seq.*).

impracticable, increases of less than 100 per cent have not generally excused performance.[316] For example, in ***Transatlantic Financing v. United States***,[317] the Court held that a 14% cost increase resulting from the closure of the Suez canal did not render the contract "commercially impracticable" under the UCC, section 2-615, and suggested that the percentage increase in cost had to be significant.[318] In ***Publicker Industries v. Union Carbide Corp.***,[319] a 60 per cent cost increase did not amount to impracticability. In ***Mineral Park Land Co. v. Howard***,[320] where the actual cost of removing the gravel was ten to twelve times as much as the originally projected cost that difference was held to be sufficient to qualify for impracticability under American common law. The question remains whether eight times would be enough to qualify for impracticability? How about seven, six or five? Neither the ***Taylor*** case[321] nor the ***Mineral Park Land*** case provide detailed guidance to these issues. The more foreseeable the increased cost, the more extreme the increase a seller must show to warrant excuse. Cases interpreting the section have rarely excused an obligor on the ground of mere increase in expense. The courts have required performance to be rendered "economically unrealistic",[322] "economically senseless",[323] or "so excessive and

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316. See *Northern Corp. v. Chugach Elec. Ass'n.*, 518 P.2d 76, *modified* on other grounds, 523 P.2d 1243 (Alaska 1974). In addition to finding that the contract was actually impossible to perform, the court relied on Restatement of Contracts and stated that a ninety-three percent increase was sufficient to meet the requirement of commercial impracticability. However, it seems that the court was clearly swayed by the loss of lives (resulting from the contractually stipulated method of hauling rocks over the frozen lake) and the hazards involved.

317. 363 F.2d 312 (D.C.Cir. 1966).

318. *Loc. cit.*, at 319-320. It should be noted that although the court relied on UCC section 2-615, the UCC is not technically applicable, since the case involved in a contract for carriage, not for the sale of goods.

319. 17 UCC Rep. Serv. 989 [E.D.Pa. 1975]. See also *American Trading & Prod. Corp. v. Shell Int'l. Marine Ltd.*, 453 F.2d 939 (2d Cir. 1972) (In this case, the court held that a 30 percent increase in cost not sufficient for applying the doctrine of commercial impracticability); *United States v. Wegmatic Corp.*, 360 F.2d 674 (2d Cir. 1966) (In this case, one to one and half million dollars extra for redesign in 10 million dollar contract was not sufficient for excuse of non-performance); *Maple Farms, Inc. v. City School Dist.*, 76 Misc.2d 1080, 352 N.Y.S.2d 784 (Sup.Ct. Chemung County 1974) (In this case, the court found that a 23 percent increase in cost of raw milk did not justify for applying the doctrine, because there had been a 10 percent increase in the cost of raw milk one year before the contract was concluded). See also B. S. Conneely and E. P. Murphy, Sections 2-615 and 2-616 of the Uniform Commercial Code: Partial Solution to the Problem of Excuse, 5 Hofstra L. Rev. 1976, 167, at 186.

320. *Mineral Park Land Co. v. Howard*, 172 Cal. 289, 156 P. 458 (1916) (As discussed before, this case is the first United States case relating to excuse of non-performance on the grounds of commercial impracticability. *Supra*, pp. 29-30).

321. *Taylor v. Caldwell* (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

unreasonable that would result in grave injustice . . . [or be] specially severe and unreasonable."[324] Thus a moderate increase does not render the contract impracticable.[325] Suffice to say that relief has not generally been granted when prices escalate 100%[326] or indeed 400%.[327] However, it must be acknowledged that when costs increase 1,000%, excuse is probably available. Indeed, a ten or twelve-fold cost increase has been held sufficient for applying the doctrine of impracticability. The Restatement has adopted the reasoning of the courts and requires an "extreme and unreasonable" increase, illustrated by a 1,000% price rise.[328] But the range between 100% and 1,000% remains vague and unclear under the code. Even the "new spirit of commercial law", voiced in ***Aluminium Co. of America (ALCOA)***,[329] in which relief was granted from a 500% price increase, is unlikely to meet with the sympathy of those contemporary sellers who encounter great inflation every year.

The above discussion illustrates why parties should not rely solely upon section 2-615 and its doctrine of impracticability. Once again it is recommended that parties should draft contracts containing "escape" clauses such as *force majeure* and cost escalation clauses.[330]

In comparing American law with English law, it should be said that the situation under the English legal regime is, theoretically at least, less liberal. Under the English doctrine of frustration, it is not clear whether any cost

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322. *Natus Corp. v. United States*, 371 F.2d 450, 457 (Ct.Cl. 1967) (Promisor not entitled to relief merely because he can not sustain his anticipated profit again).

323. *Jennie - O - Foods, Inc. v. United States*, 580 F.2d 400, 409 (Ct.Cl. 1978).

324. *Gulf Oil Corp.v. FPC*, 563 F.2d 588, 599-600 (3d Cir. 1977), *cert. denied*, 434 U.S. 1062 (1978).

325. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283, 293 (7th Cir. 1974); *Peerless Cas Co. v. Weymouth Gardens*, 215 F.2d 362, 364 (1st Cir. 1954). See also F. D. Tannenbaum, Commercial Impracticability under the Uniform Commercial Code: Natural Gas Distributors' Vehicle for Excusing Long-Term Requirements Contracts? 20 Hous. L. Rev. 1983, 771, at 793.

326. See *Schafer v. Sunset Packing Co.*, 256 Or. 539, 541, 574 P.2d 529, 530 (1970) (133% increase). See also *Maple Farms, Inc. v. City School Dist.*, 76 Misc.2d 1080, 352 N.Y.S.2d 784 (Sup.Ct. 1974); *Publicker Indus., Inc. v. Union Carbide Corp.*, 17 UCC Rep. Serv. (Callaghan) 989 (E.D.Pa. 1975); *American Trading & Prod. Co. v. Shell Int'l. Marine Ltd.*, 453 F.2d 939 (2d Cir. 1972).

327. See *Eastern Air Lines Inc. v. Gulf Oil Corp.* 415 F.Supp. 429 (S.D.Fla. 1975).

328. Restatement (First) of Contracts (1932), Sec. 454, Sec. 460, illustration 2; Sec. 467, illustration 4. See also Restatement (Second) of Contracts, Chapter 11, Introductory Note (1981), and Sec. 261, comment d; *City of Vernon Hills v. City of Los Angeles*, 45 Cal.2d 710, 719, 290 P.2d 841, 846 (1955).

329. *Alumimum Co. of America v. Essex Group Inc.*, 499 F.Supp. 53 (W.D.Pa. 1980) (For analysis of this case, see *infra*, pp. 173 *et seq.*).

330. See T. Black, Sales Contracts and Impracticability in a Changing World, 13 St. Mary's L. J. 1981, 247, at 289.

increase can render the performance of contract radically different from that which was undertaken by the parties. Some English judges have said that an "astronomical" cost increase can be a ground for frustration of contract.[331] What is clear is that in America impracticability can be achieved before increases in costs become astronomical. Indeed, while American courts use a ten to twelve-fold cost increase for applying the doctrine of impracticability, the English courts give a hundred-fold increase as an example of an astronomical increase which would result in frustration of the contract. In ***Brauer & Co. Ltd. v. James Clark, Ltd.***,[332] a seller was held not to be excused when the grant of an export license was made subject to payment by him which would exceed what he was entitled to claim from the buyer, but it was suggested that it might have been otherwise if he had had to pay a hundred times as much.

Excuse of non-performance on the ground of commercial hardship requires factors beyond the commercial parameters of agreement which have caused the impracticability or frustration. Under both doctrines, an increase in cost is not *per se* enough for excuse of non-performance; accordingly, a rise or collapse in a market is not sufficient for relief. Each legal system contains basically the same requirements relating to excuse of performance. The main difference is related to UCC "impracticability" and English frustration of contract. Under the former, the performance is excused when such performance has become "impracticable", whereas under the latter, it is necessary to have "frustrating event". However, the concept of impracticability clearly offers a more liberal excuse than the concept of frustration.

(II) OTHER GAPS IN SECTION 2-615 OF UCC

Other gaps in section 2-615 are troubling. The wording of the section raises the following questions:

First, may the section be amended or supplanted? Secondly, does the section apply to buyers as well as sellers?

(a) MAY SECTION 2-615 BE AMENDED OR SUPPLANTED?

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331. See *Tsakiroglou & Co., Ltd. v. Noblee & Thorl Gmbh* [1961] 2 All E.R. 179, 186. See also *Brauer & Co., Ltd. v. James Clark, Ltd.*, [1952] All E.R. 497, 501 (C.A.); John J. Gorman, Notes, Commercial Hardship and the Discharge of Contractual Obligations under American and British Law, 13 Vand. J. Transnat'l L. 1980, 107, at 137-138.

332. [1952] 2 All E.R. 497, 500,501 (C.A.). See also *Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia)*, [1964] (C.A. 1963) 2 Q.B. 226 (45% increase in cost not enough for frustration); *Tsakiroglov & Co. v. Noblee Thorl G.M.b.H.* [1960] 2 Q.B. 318 *aff'd*, [1962] A.C. 93 (1961) (In this case, doubled cost not sufficient for excuse).

It is clear from the phrase in the section "except so far as a seller may have assumed a greater obligation", and from the Official Comment,[333] that the parties can contract for a stricter standard of performance than is contemplated by the section. The question which arises is whether the parties can contract for a lesser obligation. Indeed, this doubt is underscored by the sentence in Official Comment 8 to the section which provides:
". . . express agreement as to exemptions designed to enlarge upon or supplant the provisions of this section are to be read in the light of mercantile sense and reason, for this section itself sets up the commercial standard for normal and reasonable interpretation and provides a minimum beyond which agreement may not go. . . ".

There seems to be no sensible reason why such agreements should be generally prohibited. Indeed, expressly allowing for a greater consensual obligation should not implicitly foreclose the converse. The view that the section is not subject to amendment by the parties has been unenthusiastically received by those commentators who have addressed the subject. Hawkland, after reviewing the notes of Karl Llewellyn, has argued that the "legislative history" of the section and the Official Comments thereto indicate that the authors did not intend to prevent the parties to a contract from adopting a more relaxed standard either through the use of *force majeure* provisions or otherwise.[334] He has added that despite the "greater obligation" language, the intended power of contract was more consistent with the "unless otherwise agreed" language found throughout the code. He has suggested that the provisions of the section were designed to apply to those parties who had not made such specific provisions in their agreement. The section would apply particularly to the small businessmen who had not hired skilled legal advisors to assist in the drafting of exculpatory provisions.[335] Thus, the provisions of the section do not apply to contradict the express wishes of the parties or to impair their right to assume greater liability than that imposed by the code.

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333. Comment 8: "The provisions of this section are made subject to assumption of greater liability by agreement and such agreement is to be found not only in the expressed terms of the contract but in the circumstances surrounding the contracting, in trade usage and the like. . . ." Thus, it appears that the "greater obligation" can be based upon both explicit and "tacit" risk assumption whitin the code's expansive concept of agreement.

334. D. Hawkland, The Energy Crisis and the Section 2-615 of the Uniform Commercial Code, 79 Com. L.J. 75, 1974.

335. *Loc. cit.*, at 77, 79.

Support for Hawkland's view is implicit in the numerous cases[336] which have held that a party is excused performance pursuant to a "contingency" clause or similar clause in the contract. Section 2-202(3) states a recurring theme of the UCC, especially Article 2, that the effective provisions of the UCC "may be varied by agreement, except as otherwise provided in this Act and except that the obligations of good faith, diligence, reasonableness and care prescribed by this Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligations is to be measured if such standards are not manifestly unreasonable."

This very issue was presented in ***Eastern Airlines Inc., v. McDonnell Douglas Corp.***[337] If there was any uncertainty about the usefulness of *force majeure* and other exemption clauses, this case put that doubt to rest. In this case, McDonnell Douglas was sued by Eastern for damages caused by delay in the manufacture and delivery of commercial jets. The plaintiff recovered a large award of damages against McDonnell Douglas - an amount in excess of $24,000,000. The defence raised by the defendant was based upon the principles of UCC section 2-615 and a *force majeure* clause in the contract. The clause read that the seller would not be "deemed to be in default on account of delays in performance due to causes beyond seller's control and not occasioned by its fault or negligence, including but not limited to . . . any act of government, governmental priorities, allocation regulations or orders affecting material, equipment, facilities or completed aircraft."[338] The principal thrust of McDonnell's defence was that the delays had been caused by the government's informal methods of establishing an enforcing priority for its military equipment requirements during the conduct of the Vietnam War. The court held that a *force majeure* clause was not merely duplicative of UCC section 2-615 principles. After referring to the debate in the literature on

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336. That is, where such a clause gives the seller greater protection than would be available under the section, the courts' resort to this clause as determinative of the rights and obligations of the parties implies that the clause is enforceable and an appropriate source of the rules governing the parties' relationship. (For cases which either ascertain the paties' rights by reference to contractual stipulations or suggest that such stipulations would be appropriate, see, *e.g.*, *Eastern Air Lines v. McDonnell Douglas Corp.*, 532 F.2d 957 (5th Cir. 1976); *Intemar, Inc. v. Atlantic Richfield Co.*, 364 F.Supp. 82, 99 (E.D.Pa. 1973); *Mansfield Propane Gas Co. v. Folger Gas. Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974); *Heat Exchangers, Inc. v. Map Construction Corp.*, 34 Md.App. 679, 368 A.2d 1088 (1977).

337. 532 F.2d 957 (5th Cir. 1976). See also Squillante & Congalton, *Force Majeure*, 80 Com. L.J. 1975, 4, at 8-9.

338. 432 F.2d 957, at 963 n.6 (5th Cir. 1976).

whether the code permits parties to bargain for exemptions greater than those provided by UCC section 2-615,[339] the court held that they could so bargain. However, the court noted that it was constrained by the language in the comments[340] to hold that where the parties' intentions were unclear, it would limit the defence provided by a *force majeure* clause to the same kinds of defences which would have been provided by the application of UCC section 2-615. Applying that theory to the *force majeure* clause before it, the court concluded that, if the excusing event were specifically listed in the *force majeure* clause, the defence is not lost even if the event was foreseeable.

"When the promisor has anticipated a particular event by specially providing for it in a contract, he should be relieved of liability for the occurrence of such event regardless of whether it was foreseeable."[341]

In summary, the above case makes two important contributions towards the clarification of the confusion that existed with respect to the relationship of *force majeure* clauses to UCC section 2-615. The first is that section 2-615 has not eliminated the need for such clauses. Any doubt about the wisdom of using such clause is resolved on a reading of ***Eastern Air Lines, Inc., v. McDonnell Douglas Corp***.[342] Secondly, the case makes the forceful point that if a party provides specifically in an exemption clause for a certain event, a defence attributable to its occurrence will not be defeated by the foresight criteria. The specific provision allocates the risk of the occurrence to the other party.

(b) PROBLEM OF APPLICABILITY OR INAPPLICABILITY OF SECTION 2-615 OF UCC TO BUYERS

While the common law doctrines of impossibility and frustration make no apparent distinction between buyers and sellers, section 2-615, read literally, excuses only sellers from performance. No mention is made of buyers in section 2-615. By contrast, "Casualty to identified goods" (UCC section 2-613) and the "substitute performance" (UCC section 2-614) provisions establish defences that are expressly available to both sellers and buyers. This characteristic of section 2-615 has attracted considerable comment in the

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339. *Loc. cit.*, at 991, 998.

340. UCC, Sec. 2-615, Comment 8.

341. 432 F.2d 957, at 992 (5th Cir. 1976).

342. 532 F.2d 957 (5th Cir. 1976).

literature. The result is that the position of buyers is regulated by the common law doctrine of excuse, which is available to them as a supplementary principle of law or equity in accordance with section 1-103 of the code. That is the view of most commentators: they argue that there is little justification for the omission and that reliance should be placed on section 1-103 UCC to cure the omission.[343] While several commentators have acknowledged that the existing language of section 2-615 poses problems for the buyer, there is a divergence of opinion as to the extent to which section 2-615 precludes the buyer from its defence.[344]

Some courts, however, have determined that the section 2-615 does apply to buyers.[345] In ***Nora Springs Cooperative Co. v. Brandau***,[346] for example, the court was concerned with a series of contracts for the sale of corn. Although the plaintiff accepted some of defendant's deliveries, many tenders of delivery were refused on the ground that the plaintiff's grain conveyor was full and because of a shortage of railroad cars the plaintiff could

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[343]. See *e.g.*, Murray, Long-Term Supply Contracts: Foreseeing the Unforeseeable, 2 Eastern Mineral Law Institute, 1981, 2-1, at 2-10; J. White & R. Summers, Handbook of the Law under the UCC 128-129, 1980.

[344]. See J. Calamari & J Perillo, The Law of Contracts, 2d ed. 1977, at 506 (While the code is devoid of a provision which relieves the buyer from performance in the event of an unforeseen contingency and section 2-615 is strictly limited to the seller, buyer might resort to pre Code law via UCC Sec. 1-103); Duesenberg, Contract Impracticability: Courts Begin to Shape Section 2-615, 32 Bus. Law. 1976, at 1091 (While section 2-615 is limited to sellers, Official Comment 9 intimates that a buyer may fall within section 2-615's purview under certain circumstances. Also the buyer could possibly get into section 2-615 via UCC Section 1-103); Gilmore, The Assignee of Contract Rights and His Precarious Security, 74 Yale L.J. 1964, 217, 242 (Section 2-615 is only open to seller); Hurst, Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Rights under UCC Section 2-615, 54 N.C.L. Rev. 1976, 545, at 555 (Section 2-615 is limited to the seller); Sommer, Commercial Impracticability - an Overview, 13 Duq. L. Rev. 1975, 521, 542 (Official Comment 9 intimates that section 2-615 might apply to buyers); Spies, Article 2: Breach, Repudiation and Excuse, 30 Mo. L. Rev. 1965, 225, at 256 (While section 2-615 is silent with respect to the buyer, Official Comment 9 suggests that section 2-615 might be available to the buyer under the certain circumstances stated therein). See also Edmund M. Carney, The Nature and Extent of the Excuse Provided by a *Force Majeure* Event under a Coal Supply Agreement, 4 Eastern Minerla Law Institute, 1983, 11.1, at 11.14 - 11.20; Comments, Uniform Commercial Code Section 2-615: Commercial Impracticability from the Buyer's Perspective, 51 Temp. L. Q. 1978, 518.

[345]. See *e.g.*, *International Minerals & Chem. Corp. v. Llano*, Inc., 770 F.2d 879 (1985) (Reversing lower court determination that Sec. 2-615 does not apply to buyers), *cert. denied*, 475 U.S. 1015 (1986); *Lawrance v. Elmore Bean Warehouse*, Inc., 108 Idaho 892, 894, 702 P.2d 930, 932 (Idaho Ct.App. 1985)(Concluding that the section applies to buyers); *Wisconsin Knife Works v. National Metal Crafters*, 781 F.2d 1280 (7th Cir. 1986). The courts addressing this issue rely on comment 9, which states that in certain circumstances "the reason of the present section may well apply and entitle the buyer to the [excuse]." UCC Comment 9.

[346]. 247 N.W.2d 744 (Iowa 1976). See also *Northern Illinois Gas Co. v. Energy Coop., Inc.*, 461 N.E.2d 1049 (Ill.Int.App.Ct. 1984).

not ship the grain to resale purchasers. After several of these rejections, the defendant sold the undelivered corn elsewhere. The plaintiff sued the defendant for breach of contract on the basis that the contract remained in effect as their delay in accepting the deliveries was excused by temporary impossibility. The court held:

"[W]hile [UCC section 2-615] expressly mentions sellers, the explanations in comment 9 make it evident the provisions should be equally applicable to buyers."

This concession did not assist the buyer, however, for the court went on to hold that:

"[t]here was insufficient evidence to show circumstances constituting an impossibility sufficient to excuse the plaintiff's non acceptance of the grain."[347]

The court noted that impracticability had not been demonstrated because of conflicting evidence as to the existence of the railroad car shortage, and because the possibility of shipment by truck to resale purchasers was not shown to involve so great an additional cost as to constitute impracticability.

In a later case,[348] from Wyoming, a buyer of bull semen alleged excuse due to cancellation of orders from his customers. The trial court's summary judgement in favour of the buyer was reserved on appeal, but only after the appellate court had expressly applied section 2-615 to the circumstances.[349]

Although in some cases, the code has been extended to buyers, there are also cases which have not done so.[350] In ***Northern Indiana Public Service Co. v. Carbon County Coal Co***:,[351] the court expressed doubt whether the impracticability defence of the section applies to buyers.

It is the view of commentators,[352] that in the light of comment 9 to section 2-615,[353] the pre-code law of excuse and the historical development of

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347. *Loc. cit.*, at 748.

348. *Meuse-Rhine-Ijssel Cattle Breeders v. Y-Tex Corp.*, 590 P.2d 1308 (Wyo. 1979).

349. *Loc. cit.*, at 1309; *accord Hanock Paper Co. v. Champion Int'l. Corp.*, 424 F.Supp. 285, 290 (E.D.Pa. 1976) (Court presumed Sec. 2-615 applicable to buyer's claim of impracticability of performance but found rising market prices an insufficient excuse thereunder), *aff'd mem.*, 565 F.2d 151 (3d Cir. 1977).

350. See, *e.g.*, *R. C. Craig Ltd. v. Ships of the Sea*, Inc., 401 F.Supp. 1051, 1059 (S.D.Ga. 1975).

351. 799 F.2d 265 (7th Cir. 1986).

352. See also Norman R. Prance, Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability, *op. cit.*, at 444; T. Black, *op. cit.*, at 257.

353. UCC Sec. 2-615, Comment 9 provides in relevant part: ". . . Exemption of the buyer in the case of a 'requirements' contract is covered by the 'Output and Requirements' section [2-306] both as to assumption and allocation of the relevant risks. But when a contract by a manufacturer to buy fuel or raw material makes no specific reference to a particular venture and no such reference may be drawn

the section,[354] that the section should in fact be available to buyers as well as sellers. A more direct manner of bringing buyers into the statute is illustrated by the Mississippi version of section 2-615, which through its special amendment to the section, has extended the provisions to buyers.[355] Hopefully, all of the other states will follow Mississippi's lead and amend the section to include the buyer. This will make clear that the buyer's ability to raise the impracticability defence exists in the statutory codification of the UCC.

However, given the wide divergence of views on whether or not the section is applicable to buyers, rather than relying on the code, the parties should expressly agree that buyers are included or use a typical *force majeure* clause in which they can broaden or narrow the relief clause. From a buyer's perspective, express contractual coverage may be done by simply opening the *force majeure* clause as follows: "Neither party shall be liable for non-performance or delay in performance . . . ".

While a seller may reasonably agree with the above proposal, he may nonetheless insist that in no event should a *force majeure* clause excuse the buyer's obligation to pay. Thus, the seller may wish to provide: "Nothing herein contained shall relieve the buyer's obligation to pay in full for . . . ".

B. CIVIL LAW

1. FRANCE

The doctrine of frustration of contract which has been developed by the courts in England is unknown to the French legal system, but the purpose of such theory is served there by two other doctrines, *force majeure* and imprevision.

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from the circumstances, commercial understanding views it as a general deal in the general market and not conditioned on any assumption of the continuing operation of the buyer's plant. Even when notice is given by the buyer that the supplies are needed to fill a specific contract of a normal commercial kind, commercial understanding does not see such a supply contract as conditioned on the continuance of the buyer's further contract for outlet. On the other hand, where the buyer's contract is in reasonable commercial understanding conditioned on a definite and specific venture or assumption as, for instance, a war procurement subcontract known to be based on a prime contract which is subject to termination, or a supply contract for a particular construction venture, the reason of the present section may well apply and entitle the buyer to the exemption."

354. George Wallach, *op. cit.*, at 386.

355. MISS. CODE ANN. Sec. 75-2-615. (1972).

1.1. CRITICAL APPRAISAL OF THE FRENCH CONCEPT OF *FORCE MAJEURE*

As discussed before,[356] the concept of *force majeure* finds its origin in those continental legal regimes which were influenced by Roman law. According to the doctrine of *force majeure* or *cas fortuit*, [357] a contract will be rescinded when *force majeure* occurs. Under the doctrine, expressed in Articles 1147 and 1148 of the Code Napoleon, an obligor who fails to perform is liable for damages unless his performance has been prevented by an event not reasonably foreseeable by the parties at the time the contract was made. Although *force majeure* is not defined in the Code, Jean Carbonier describes it as follows:

"An event only constitutes a *force majeure*, if it presents the threefold quality of being: insurmountable, unforeseeable, and beyond the parties' control (external cause)".[358]

Thus, the prerequisites for relief are as follows:[359]

(I) The event must be of such a nature that its occurrence could not reasonably have been foreseen at the time the contract was made.

(II) The event must render performance absolutely impossible, not merely more onerous. Thus the fact that performance may be made considerably more onerous for one of the parties by governmental acts,[360] natural causes,[361] or human agencies[362] will generally not operate to excuse the party from the required performance. Furthermore, a serious economic crisis is not *per se* sufficient to excuse non-performance.

(III) The event must arise independently of the will of the party who relies upon it and not be in his control (no fault of the party seeking relief).

Force majeure may be physical, such as an act of God or loss of the contractual object or seizure in war. It may be legal,[363] as in the case of a fait

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356. *Supra*, at 16.

357. While there was a long debate concerning the utility of drawing distinction between "*force majeure*" and "*cas fortuit*", legal writers gave up trying to distinguish between them and the courts employ them indifferently. See J. Denson Smith, Impossibility of Performance As an Excuse in French Law: The Doctrine of *Force Majeure*, 45 Yale L. J. 1936, at 452; F. H. Lawson, A. E. Anton & L. Neville Brown, Amos and Walton's Introduction to French Law, 1963, at 214.

358. Les Obligations, 1985, at 290.

359. See R. David, *op. cit.*, at 11; J. Denson Smith, *op. cit.*, at 454.

360. *Hazard v. Leroy et Dubosca*, Nov. 18, 1852; *Devaux-Piketty v. Salmon et Forges et Acieries de la Marine*, Trib. Sein, Nov. 16. 1917, Gaz. Pal., Dec. 31, 1917.

361. *Brandicourt v. Martin*, Cour de Paris, Dec. 30, 1932, D.H. 1935. 169.

362. *Demanche v. Meyer*, Trib. Sein, Feb. 9, 1916, D. 1917 II. 6.

du prince - act of prince - that for instance prohibits exportation of the goods constituting the contractual object. Thus governmental acts and regulations by both national and local authorities,[364] actions by foreign powers such as governmental decrees and operations of war,[365] natural causes like flood,[366] drought,[367] an unusual freeze,[368] human agencies such as a strike[369] and riotous assembly,[370] are examples of *force majeure* in the French legal system.

The above requirements have been strictly enforced by the French civil courts and in the rare cases where relief has been granted, the contract has been treated as nullity. In a leading case, ***Canal de Craponne***,[371] a company had entered into a contract in 1560 to irrigate the defendant's orchards for a certain annual sum of money, which had become ridiculously low in the course of centuries. Although the Court of first instance and the Court of Appeal had held that it was appropriate to increase this sum, the Court of Cassation mercilessly quashed the decision and held that no factor of time or equity can authorise a court to revise the terms of the contract ("aucune consideration de temps ou d'equite ne peut artoriser le juge de modifier les conditions des parties"). The parties themselves must provide for the case of possible change of circumstances., since in no case are the courts authorised to take into account the change of circumstances so as to revise the contract and write a new contract for the parties, even though such revision would be consistent with equity. The Court argued that the rules set forth in Articles 1156-1164 of the French Civil Code on the interpretation of contracts do not go as far as to allow a court to read an implied *rebus sic stantibus* in every

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363. L. M. Drachsler, Frustration of Contract: Comparative Law Aspects of Remedies in Cases of Supervening Illegality, 50 New York Law Forum, 1957, at 64; M. D. Aubrey, *op. cit.*, at 1174.

364. See *Elgnozi Aboab v. Epoux Treille*, Cass. Civ., Dec. 8, 1926, S. 1927 I. 44; *Remy v. Besson*, Cour de Paris, Jan. 11, 1928, S. 1930 II. 1.

365. *Tabet v. Pernot*, Trib. Montbeliard, Oct. 28, 1898, D. 1900 II. 405; *Devaux-Piketty v. Salmon et Forges et Acieries de la Marine*, Cour de Paris, Gaz. Pal. Dec. 31, 1917.

366. *Chemin de Fer de Midi v. Cenac*, Cour de Pau, Dec. 15, 1909, S. 1910 II. 13.

367. *Credit Foncier v. Bollok*, Cass. Civ. Jan. 30, 1923, D. 1924 I. 148.

368. *Societe Thai-Thong et Cie v. Chemin de l'Indo-Chine*, Cass. Req., Feb. 19, 1924.

369. *Comp.des Messageries Maritimes*, Cons. d'Etat, Jan. 29, 1909 D. 1910 III. 89.

370. *Cremieux et Cie v. Cippiotti*, Trib. Sein, Jan. 20, 1915, S. 1916 II. 52.

371. Cass. Civ. 6 Mars 1876, D.P. 1876. 1. 193. See also Cass. Civ. 6 Juin 1921, D. 1921. 173; Cass. Civ. 18 Octobre 1926, D. 1927. 1. 101; Cass. Civ. 15 Novembre 1933, S. 1934. 1. 13.

contract and in any rate the principle of good faith provided in article 1134 does not empower the court to remake a contract.

This strict position which represents a policy of security for commercial transactions is, in spite of all the criticism to which it has been subject, still the position of the French courts. The Cour de Cassation reaffirmed its rigorous position in cases arising from the economic crisis following World War I.[372] The majority of the French writers,[373] with the possible exception of Ripert,[374] seem to agree with the Cour de Cassation that the courts should not be allowed to revise the contracts unless the case falls precisely within the classic definition of *force majeure*. It should be noted that the reluctance to modify contracts is consistent with the general philosophy of the French Civil Code that only absolute impossibility of performance excuses performance. Colin and Capitan vigorously emphasise the necessity to maintain the stability of contracts as the basis of confidence and security in commercial relations. They believe that revision of contract, even under exceptional circumstances, would ultimately result in the destruction of certainty in commerce.[375] This justification appears to be hardly convincing in the light of the fact that the more flexible approach of the German courts has not led to any of those harmful consequences. Moreover, if modification of contract is not allowed in exceptional cases, the obligor will suffer considerable prejudice and the other party will obtain an unjust profit from a contract that was not motivated by speculation.[376]

However, it should be added that there are some exceptions to the narrow concept of *force majeure.* These include the situation where performance, while not strictly impossible would endanger the life of a party.[377] The early case of ***Aquado C. de Bearn et Consorts***[378] provides another example of such an exception. In this case, land was leased on the

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372. Cass. Civ. Aug. 4, 1915, 1916 D.P. 1. 22.

373. See, *e.g.*, Josserand, Le Contrat Dirige, D. 1933, Chr. 89; Capitant, Le Regime de la Violation des Contrats, D. 1934, Chr. 1; Azard, L'instabilite Monetaire et la Notion d'Equivalence dans les Contrats, J.C.P. 1953. 1. 1092.

374. Ripert, La Regle Morale dans les Obligations Civiles, 3d ed. 1935, 139 *et seq.* See also M. Planiol and G. Ripert, (1952), *op. cit.*, No. 391 *et seq.*, specially Nos. 395-398.

375. Colin and Capitant, 2 Cours Elementaire de Droit Civil Francais, 1948, No. 130.

376. See Ripert, *op. cit.*

377. See J. Denson, *op. cit.*, at 456, 457.

378. Cour de Paris, May 1, 1875, (1875) II D. 204; *Esteve C. Dubois et Lacoste*, Trib. Toulouse, June 1, 1915, (1916) II D.112.8. See also Michael D. Aubrey, *op. cit.*, at1175, 1176.

understanding that it was to be used for hunting. A government decree forbade hunting in the area. The court held that this entitled the lessee to a reduction in the rent payable. This liberal view is much nearer to the English doctrine of frustration and is based on the same principle as the English "Coronation cases",[379] namely, the disappearance of the common aim of the parties.

Moreover, the French Civil Code contains certain provisions which allow some measure of judicial intervention in contractual performance. For example, Article 1244 authorises the courts to grant a delay in performance and Article 1769 allows abatement of rent to farmers.[380] A series of laws enacted after World Wars I and II, such as Loi Faillot of 1918, allows relaxation of the strict rules of the Code with regard to performance.[381] It thus appears that while judicial revision of contracts has been admitted in exceptional cases, the Cour de Cassation refuses to extend the concept of *force majeure*.

French law, therefore, exhibits a quite divergent approach from the English doctrine of frustration. It is clear that the concept of *force majeure* is too narrow to cover the needs of today's contracts. For example, if circumstances arise after the conclusion of a contract and upset the purpose or jeopardise the economic significance of the contract, will *force majeure* be operative? Of course, the answer will be negative. Therefore, it is not surprising that a legal advisor would hesitate to choose French law as the law applicable to an international contract when, given the current political and economic difficulties, it is impossible under French law to adapt the contract to circumstances which may arise during the performance of a long term contract. As will be discussed later,[382] inflexible rules such as these discourage commercial bodies from contracting industrial, commercial or financial business on an international scale.

French courts have retained the traditional notion of *force majeure* and relief has rarely been granted. No doctrine of change of circumstances or economic impossibility or disappearance of the foundation of the contract or frustration of purpose has been admitted by the civil courts, even in the aftermath of two

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379. *Supra*, pp. 19, 20.

380. See also Arts. 960, 1889.

381. For the other rules see *supra*, pp. 191, 192.

382. *Infra*, pp. 178 *et seq.*

catastrophic wars. The impossibility must be absolute. In one case,[383] a party agreed to erect a hydroelectric station on a river and to supply electricity to the other party, in return for that other party's giving up his rights over the river. A subsequent law prohibited the construction of such stations except under government authority. The Cour de Cassation held that this did not amount to *force majeure*, and that the prospective builder was therefore liable in damages for non-performance, since it had not been alleged that the law *per se* had proved an insurmountable obstacle to performance; the government might have allowed the station to be constructed, if it had been asked.
In another case,[384] where contractors had agreed to carry out works at certain docks, a collective agreement reached shortly after the conclusion of the contract resulted in the payment of increased wages to the workmen. The Cour de Cassation held that this did not constitute *force majeure*, because it merely rendered the performance of the contract more onerous and did not make it impossible. These cases illustrate that subsequent changes of events which make the performance more difficult, onerous or expensive do not constitute *force majeure*, any more than they would constitute frustration under English law.[385]

However, Article 1148, in recognising that a contract can be excused due to *force majeure,* is not mandatory law. This is because the rules concerning *force majeure* are not imperative or "d'ordre public".[386] Parties are free to make their own provisions with regard to supervening events. Thus a contractual *force majeure* clause is valid[387] and the parties can stipulate what is to happen if a particular event occurs. The effect of such clauses will, of course, depend on the type of contract and the language of the clause.[388] It should be noted that in French law, like English law, the courts will construe such clauses in a strict manner. Thus, parties would be well advised to ensure

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383. Cass. Req. 27. 12. 1937., S. 1938. I. 52.

384. Cass. Civ. 17. 11. 1925, D.H. 1926. 35; Gaz. Pal. 1926. I. 68.

385. *Compare* Davis Contractors Ltd. v. Fareham U. D. C. [1956] A.C. 696.

386. See Jean Raduant, Du *Cas Fortuit* et de la *Force Majeure*, 1920, at 126. See also H. Lesguillons, Frustration, *Force Majeure*, Imprevision, Wegfall der Geschaftsgrundlage, Droit et Pratique du Commerce International, 1979, 507, at 518

387. See Mazeaux, Responsibilite, 1970, at 742.

388. See final chapter of this thesis, *supra*, at pp. 301-304.

that not only is the clause clearly drafted but also that it regulates precisely the consequences of the supervening event.[389]

The French concept of *force majeure* has been adopted in the codes of other countries, but the meaning of the term may vary, depending upon the system of law applied. Parties to international contracts should therefore be very careful to know exactly what is meant by the term in the law which governs the contract in question. For example, with minor reservations, the French and Belgian concepts of *force majeure* are the same. However, French *force majeure* must be unforeseeable, unavoidable and beyond a party's control, whereas Belgian courts do not require proof that the event was exterior to the parties.[390] As we have seen, although French and Belgian laws are the most exacting, some delicate differences can be found. In Swiss law, the criteria are also similar to those of France and Belgium. But Swiss law distinguishes *force majeure* from *cas fortuit*, the latter being a particular method of proving the absence of fault whereas *force majeure* is defined by writers in a manner similar to the French and Belgian definition.[391] As discussed above,[392] nowadays in France, *force majeure* is not distinguished from *cas fortuit.* Accordingly, although most jurisdiction with civil codes use the term *force majeure*, the definition and the consequences are not always the same, and even in these jurisdictions it is better to use a clause of the type which is suggested in the final chapter of this thesis.

In comparing the *force majeure* with the English doctrine of frustration, it should be said that the two principles are different ways of looking at the same problem. But while they overlap to some extent, they are by no means identical. At least partially, there is a limited parallel depending on the facts between frustration and *force majeure.* The doctrine of frustration does not apply where a party's intentional action caused the event. Apparently, in *force majeure*, the event must also arise independently of the will, or the fault of the obligor. Another common point between the two doctrines is that the events are outside the control of the parties are usually unforeseen by them at the date of conclusion of contract and arise subsequently to the date when the contract came into existence. Both doctrines will not be operative merely because the contract becomes more onerous. Neither the doctrine of

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389. For detailed guidance on this point see the final chapter of this thesis.

390. H. Lesguillon, *op. cit.*, at 519, 520.

391. *Loc. cit.*, at 519.

392. *Supra*, note 357.

frustration nor that of *force majeure* would seem to apply to the sale of substitutable things.

Apart from common points between the doctrines of frustration and *force majeure*, it should be noted that the differences between the doctrines are more important than their similarities. A contract is frustrated under English law, when the performance of such contract has become physically or legally impossible, and also where the contract by reason of circumstances which have arisen since its inception has lost its identity. Indeed, to apply frustration, the event must be deemed absolutely to negate the common intention of the parties and have been unforeseen by the parties in their contractual stipulations. However, to apply *force majeure*, the question is whether an event prevented performance. Therefore, in *force majeure,* the fact that a party's performance has become impossible is the key; whereas in frustration, the key is whether or not the realisation of the common intent of the parties has become impossible. Thus, the definitional scope of the French doctrine of *force majeure,* in which only physical and legal impossibility is admitted, is narrower than that of frustration in English law (which itself is markedly more restrictive than its counterpart in German law).[393] The doctrine of frustration admits not only physical and legal impossibility, but also those events which make the performance radically different from that which the parties intended to be undertaken: whereas in France, *force majeure* can not be invoked while literal performance remains possible.[394] Accordingly, the absolute impossibility required under the French concept of *force majeure* is more strict and more narrowly construed than under the common law, and substantially more so than that under the UCC.

Unlike the doctrine of frustration, *force majeure* plays a role in the law of delict. According to French law, a person is liable independently of any fault, if some damage has been caused by a thing which is under his control or custody. The only way to excuse himself from his liability is to prove that the damage was due to an external cause (cause etrangere), *i.e.*, an event of *force majeure* or the victim's own fault. A very large number of cases are dealt with on this basis, particularly in road accidents. That is why *force majeure* is often invoked in delict, which may surprise a common or Scots lawyer.

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393. See, *e.g.*, Cass. Civ. 4. 8. 1915, S. 1916. 1. 17.

394. Paris, 9. 6. 1961, D. 1962. 297.

The term, *force majeure,* is not truly known to the common law. However, the term has been used as a clause in contracts.[395] Section 2-613 of the Uniform Commercial Code is a statutory enactment of the principle of *force majeure.*[396] *Force majeure* has not been defined by English courts. Accordingly, parties who incorporate it into common law contracts without any formal definition in the contract, do so at their peril. In ***British Electrical etc., Industries v. Patley Pressings Ltd.***,[397] a contract was made subject to various *force majeure* conditions. The court found that, the particular phrase was so ambiguous as to be incapable of any precise meaning. Because of this obscurity, the court reasoned that the parties had no intention to be bound and therefore no agreement was made between the parties with the consequence that no contract was created.

1.2. ANALYSIS OF FRENCH CONCEPT OF IMPREVISION

Another theory in French law allowing discharge is that of imprevision. This can be translated as the doctrine of unpredictable circumstances.[398] The doctrine is based on the combination of Article 1134 of the Civil Code, which stipulates good faith in performance of contracts, Article 1135 of the Civil Code which requires reasonable compliance with contracts, and the doctrine of *rebus sic stantibus.* This doctrine is only applied in administrative contracts. However, it is applicable not only when the contract is silent on the point but even if the contract stipulates that the doctrine is not to apply. A decision of the Conseil d'Etat,[399] openly admitted the imprevision theory, thus paving the way for the large discretionary powers which the French administrative tribunals still enjoy today.[400] Indeed, the theory is designated not to alleviate the individual hardship of the parties but to ensure the general public interest. Under the doctrine, if because of unforeseen circumstances, the performance becomes exceedingly more onerous for the obligor, the courts may vary the contents of the contract in the light of unexpected and far-reaching changes. In other words, if the economic equilibrium of the contract is seriously affected

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395. See *infra*, pp. 392 *et seq.*

396. Squillante, *Force Majeure*, Com. L. J. 1975, at 4.

397. [1953] 1 W.L.R. 280; [1953] 1 All E.R. 94.

398. R. David, English Law and French Law, a Comparison in Substance, 1980, at 121.

399. 30 Mars 1916, D. 1916. 3. 25; S. 1916. 3. 17.

400. See Conseil d'Etat, 27 Mars 1926, D. 1927. 3. 17; Conseil d'Etat, 9 Decembre 1932, D. 1933. 1. 17; S. 1933. 3. 9.

by an unforeseen change of circumstances, the doctrine applies to enable an equitable adjustment of the parties' rights and duties. The goal of this adjustment of obligations is to return to the "base essentiele" or equilibrium of interest, which existed at the time of contracting, and which has been disturbed by the occurrence of the unpredictable events. Three conditions must be met if the obligor is to be excused under the doctrine. These conditions are as follows:[401]

- The event must be unforeseeable, for example, increased salaries or prices of raw materials which the parties could not reasonably foresee when concluding their contract.
- The unforeseen event must basically change the economic balance of the contract, *i.e.*, the loss must be essentially greater than that originally accepted.
- The event or difficulty must not be created by the fault or negligence of the party relying on the imprevision.

It should be added that the administrative courts have applied the doctrine of imprevision in many cases in order to adapt contracts which have become extremely burdensome. In the leading case, ***Compagnie General d'Eclairage de Bordeaux c. Ville de Bordeaux*** (or ***Gaz de Bordeaux*** case),[402] the Conseil d'Etat allowed the adaptation of a contract which had become extremely burdensome owing to an unexpected change in circumstances. In this case, the price of coal, and consequently the liabilities of the company, were considerably increased as a result of war. The company asked for modification of the contract. This was rejected by the Conseil de Prefecture of the department of Gironde. On appeal to the Conseil d'Etat, the decision was quashed. The Conseil d'Etat recognised that a new situation had arisen which was completely outside the expectations of the parties and which absolutely upset the economics of the contract. Adjustment was regarded as a suitable remedy because it was in the interests of the public that they should have access to public utilities. The case was returned to the Conseil de Prefecture in order to adjust the terms in the event that the parties could not agree themselves. This case paved the way for the large discretionary powers to adjust contracts that the French administrative courts still enjoy today.[403]

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401. See H. Lesguillons, *op. cit.*, at 443.

402. Conseil d'Etat, March 30, 1916, S. 1916. 3. 17; 1916 D. III. 25.

403. See Conseil d'Etat 27 Mars 1926, D. 1927. 3. 17; Conseil d'Etat 9 Decembre 1932, D. 1933. 1. 17; S. 1933. 3. 9.

What is interesting to a British lawyer is the court's decision that failing some voluntary settlement by the parties, the court could adapt the contract to provide a fair price.

It should be acknowledged that the doctrine corresponds very closely to hardship clauses which are used in international contracts. When unexpected circumstances cause a fundamental alteration of the economic basis of a contract, the situation is covered by a hardship clause. The clause has been defined as follows:

"Hardship clause is one which allows for review of the contract, in the event of changed circumstances fundamentally altering the initial balance of the parties' obligations."[404]

Thus the hardship clause can be considered as an agreed adjustment of the contract.

Imprevision, however, is limited to long-term contracts where the party has undertaken to perform over a period of many years.[405] Thus the concept of imprevision is very important in long-term international transactions where French is the applicable law. If the applicable law does not accept imprevision, hardship clauses will be important. On the other hand, when imprevision is recognised by the governing law, the purpose of a hardship clause is only to adapt a legal concept which is *prima facie* applicable. In that case, the clause is only used in so far as the provisions of the doctrine are too restrictive or too inflexible. Parties may wish to substitute their own procedure for adaptation other than that required by the applicable law and, in particular, may seek to avoid the jurisdiction of the courts.[406] When drafting a hardship clause, the parties should be very careful if the governing law is French. They should provide either for a clear method of calculating the changes in price or for the appointment of a third party with the specific mandate of adjusting the price in the case of changed circumstances. Otherwise, the hardship clause may be held void., since under Articles 1591 and 1592 of the Civil Code, the price must be fixed by the consent of both contracting parties, or by a third person, but never unilaterally by one of the parties. In this regard, Article 1129 requires that any obligation must have as its object a specified thing. The Cour de Cassation appears to hold that prices which are not precisely and objectively fixed render a contract void.[407]

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404. M. Fontain, Hardship Clauses, Droit Pratique Commerce International, 1976, 51, at 54.

405. Leo. M. Drachsler, *op. cit.*, at 67.

406. See Fontaine, Hardship Clauses, D.P.C.I. 1976, 51.

The common link between the doctrines of imprevision and *force majeure* is the occurrence of unforeseeable and unavoidable events. The difference between them is that, in contrast to *force majeure*, for the purpose of imprevision the performance of the contractual obligations need only become excessively onerous - not necessarily impossible. The main elements are that the occurrence is unforeseeable and makes performance of the contract grossly inequitable. Thus imprevision is a more flexible concept than *force majeure* in the sense that *force majeure* totally prevents the performance of contract, whereas, imprevision does not do so, but merely upsets the economics of the contract. This flexible and liberal excuse of performance has, however, never been admitted by the civil and commercial courts in France. Indeed, attempts to expand the doctrine to private contracts have been regularly frustrated by the Cour de Cassation which has been inclined to release the obligor only if performance of the contract is literally impossible. Rene David points out the reasons as follows:[408]

- The doctrine of *rebus sic stantibus* is a common doctrine in public law but not private law and clauses of *rebus sic stantibus* are commonly specified in French private contracts.
- Many commercial contracts give arbitrators the power to act as amiable compositeurs, in the sense that they will be authorised to disregard the rules of French law.
- There are number of regulations providing for variation of contracts in specific cases, for example, laws regulating the variation of wage scales and collective contracts. These numerous laws allow the revision, or cancellation of various classes of contracts. Thus, to some extent, the harsh effects of the denial of the doctrine are alleviated in the civil and commercial courts by the above mentioned factors.

Although imprevision is not applied in French civil contracts, the doctrine seems to be gaining acceptance in other countries.[409]

In comparing imprevision with frustration, it appears that they are different from each other. Frustration is more rigid than imprevision. While the

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407. See A. H. Puelinckx, *op. cit.*, at 59.

408. David, Frustration of Contract in French Law, *op. cit.*, at 13, 14.

409. See Drachsler, *op. cit.*, at 79; Azevedo, Frustration of Contract in Latin-American Law and Particularly in Brazil, J. Comp. Leg. & Int'l. L. 1947, 3d Series, at 15-19; Couture, Frustration of Contract in Uruguayan Law, J. Comp. Leg. & Int'l. L. 1946-1947, 3d Series, 13-15; Horacio, A. Grigera Naon, Adaptation and Renegotiation of Contracts: An Argentine Substantive and Private International Law Outlook (In Adaptation and Renegotiation of Contracts in International Trade and Finance, Edited by N. Horn, 1985, at 58).

English doctrine of frustration recognises the termination of the contract, the doctrine of imprevision on the contrary is founded upon the continuation of the contract. 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 by the parties;[410] further, Article 1134 of the Civil Code requires *bona fide* performance of all contracts. Thus, it can be said that in this aspect, imprevision has its closest parallel to the English doctrine of frustration. Another similarity between the two doctrines lies in the circumstances which give rise to their application. Imprevision depends upon the existence of unforeseen circumstances which result in "bouleversement de l'economie du contrat", a phrase which is very close to Lord Wright's "frustration of the commercial purpose."[411] However, an interesting comparison of the differences of interpretation between frustration, imprevision, and wegfall der geschaftsgrundlage can be made in the context of the ***Suez Canal*** cases in 1962. In these cases,[412] several ships were chartered at the moment the Canal was closed. Therefore they had to travel around the Cape of Good Hope. Although the contracts basically lost their economic balance, the House of Lords ruled against the frustration of the contract.[413] In only one case was performance excused, since the contract had expressly provided for a route through the Suez Canal.[414]
If the above cases had been considered by a French court the judge would probably have regarded this situation not to be *force majeure* but imprevision, and a German judge would, of course, have ruled in favour of the adjustment of the contracts.

2. GERMANY

Like other legal systems, German contract law is based on the principle of sanctity of contract. Under German law, the rule of *pacta sunt servanda* is certainly no longer adhered to in its strictest sense. The German approach to the problem of excuse of non-performance is fairly flexible as it has developed

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410. Leo M. Drachsler, *op. cit.*, at 67.

411. See *Joseph Constantine S.S. Line v. Imperial Corp.* [1942] A.C. 154, at 182.

412. See, *e.g.*, *Societe Franco Tunisienne d'Armement v. Sidermar S. P. A.* [1961] 2 Q.B. 278; [1960] 2 All E.R. 529; *Carapanayoti & Co. Ltd., v. E. T. Green Ltd.* [1959] 1 Q.B. 131.

413. *Tsagkiroglou & Co. Ltd. v. Noblee and Thorl G.m.b.H.* [1960] 2 All E.R. 160, 169-172 (*per* Lord Herman L.J.), *affirmed* [1962] A.C. 93.

414. *Albert D. Gaon & Co. v. Societe Interprofessionnelle des Oleagineux Fluided Alimentaires* [1960] 2 Q.B. 334, *affimed* [1960] 2 Q.B. 348 C.A.

a more liberal concept of impossibility. The situations in which relief from contractual performance is granted are impossibility and wegfall der geschaftsgrundlage.

2.1. IMPOSSIBILITY

The concept of *force majeure* finds no specific counterpart in the German law contract. However, the principle that no one can validly undertake to do the impossible - *impossibilium nulla est obligatio* - has had a paramount significance.[415] Like the French Code Civil, the Burgerliches Gesetzbuch (BGB) does not define impossibility. While the scope of the doctrine has been set forth by the courts and jurists, nevertheless several paragraphs of the BGB are related to impossibility.[416] Paragraph 306 refers to initial impossibility which makes the performance of contract impossible for both parties, for example, a contract for delivery of a picture which has been destroyed by fire before the formation of the contract is null and void.[417] A party would only be liable to pay damages if he had knowledge of the impossibility when it would be a breach of good faith. The damages would be those necessary to replace the negative interests.[418] It should be noted that according to German law, the distinction between subjective impossibility (Unvermogen) and objective impossibility (Unmoglichkeit) becomes relevant in case of initial impossibility; only objectively ascertained initial impossibility makes the contract null and void.[419] Nevertheless, a person who has given a generic promise may be subjected to a more stringent liability with regard to supervening impossibility, since his promise under the circumstances may be considered to contain a guarantee that the contract can be performed.[420] In cases where the initial

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[415]. Ramberg, *op. cit.*, at 141.

[416]. B.G.B. Paragraphs 275, 279-280, 306-308, 319-325.

[417]. See N. Horn, H. Kotz & H. L. Leser, German Private and Commercial Law: An Introduction, 1982, at 96.

[418]. According to paragraph 307 BGB under the title of 'negative interest': "If a person in concluding a contract the performance of which is impossible, knew or should have known that it was impossible, he is obliged to make compensation for any damage which the other party has sustained by relying upon the validity of the contract; not, however, beyond the value of the interest which the other party had in the validity of the contract. The duty to make compensation does not arise if the other party knew or should have known of the impossibility."

[419]. B.G.B. paragraph 306. See also J. Ramberg, *op. cit.*, at 143.

[420]. B.G.B. paragraph 279; Ramberg, *op. cit.*, at 143, 144.

impossibility is subjective, the non-performing party will be liable for damages in every case, regardless of fault.[421]

It should be said that the scope of the doctrine of impossibility in German law is much wider than its common law counterparts. In this regard, initial impossibility in German civil law is an example of the classic doctrine of mistake in common law. For example, if the delivery of the specific thing before the conclusion of the contract was physically or legally impossible, the contract will be null because of impossibility of performance under German law and will be void under the doctrine of mistake at common law. However, according to German law, the relevant time for the determination of initial impossibility, is the time when the contract is made. Hence, it may depend on minutes or seconds whether initial impossibility or subsequent impossibility is the relevant principle. In initial impossibility, the performance of contract must be physically or legally impossible.[422]

Another paragraph relating to impossibility is paragraph 275. This is concerned with subsequent impossibility without fault. When this arises, the primary claim for specific performance is extinguished. In other words, the paragraph relieves a debtor from his obligation to perform if performance becomes impossible, (for example, the destruction of the subject matter) provided the promisor has not assumed responsibility for the circumstances which made the performance impossible. Responsibility is defined in terms of good faith[423] and lack of bad intention or negligence.[424] However, if the impossibility is in respect of a generic obligation (gattungschuld), the debtor is still obliged to carry out the contract or be responsible for non-performance under paragraph 279, even if he is not at fault. Conversely, if specific goods (stuckschuld) are physically destroyed and can not be replaced, the contract becomes impossible and consequently void (paragraph 306). If the performance of the contract remains physically possible but involves disproportionate cost or effort, in that case the courts may consider that the impossibility criterion is satisfied.[425] Extension of the concept of impossibility

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421. Para. 280. Initial impossibility also occurs when the contract is impossible to perform at the time of the agreement by the particular debtor, it does not matter that third paties could perform (Para. 275 II). See also J. Barrigan Marcantonio, Unifying the Law of Impossibility, 8 Hasting Int'l. & Comp. L. Rev. 1984, at 54.

422. N. Horn, H. Kotz, and H. G. Leser, *op. cit.*, at 96; Ramberg, *op. cit.*, at 142.

423. B.G.B. Para. 242.

424. B.G.B. Para. 276. See also Michael D. Aubrey, *op. cit.*, at 1177.

425. See Nigel G. Foster, German Law & Legal System, 1993, at 4.2.

was made in the course of the World War I. The sharp rise in prices and the shortage of supplies due to the war probably persuaded the courts to accept the idea that economic impossibility should be equated with physical and legal impossibility as a form of objective impossibility. A debtor was therefore released if performance would result in his economic ruin. The test of impossibility of performance is also satisfied, if contractual performance is contrary to statutory prohibition; in these circumstances the contract is void (paragraph 309).

According to paragraph 323 BGB, both parties are discharged from contractual obligations if neither of them is responsible for the supervening impossibility; if one party is responsible for non-performance due to impossibility the other may demand damages, rescission or counter-performance depending on whose performance has been rendered impossible.[426] It should be noted that for cases of subsequent impossibility, contrary to initial impossibility, the distinction between subjective and objective is no longer material: both will be treated similarly.[427]

In considering the German approach to impossibility, it should be added that under paragraph 275 BGB, a party's performance is excused where it becomes impossible because of an event subsequent to the contract to perform and for which the party is not responsible. What is understood is that BGB does not require the event to be unforeseeable - only that it renders performance impossible. Like other systems, the impossibility may be physical, actual or legal, but it is judged with more flexibility than the unavoidable requirement of French law.[428] This flexibility can be seen in other aspects, for example, where the party had to make sacrifices or efforts disproportionate to the performance originally contemplated; German courts admit these as impossibility cases. Because of this flexibility in the concept of impossibility, the courts have been able also to use paragraph 275 BGB as a common basis for *force majeure* and unforeseeable difficulties.[429] Accordingly, the rationale of paragraph 275 is either a modification of performance or impossibility of performance. We can therefore say that impossibility in German law does not have the same absolute nature as unavoidability in French law. However, the different types and degrees of impossibility in

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426. M. D. Aubrey, *op. cit.* See also paragraphs 324, 325.

427. J. B. Marcantonio, *op. cit.* See also B.G.B. paragraph 275 (2).

428. H. Lesguillons, *op. cit.*, at 523.

429. *Loc. cit.*

German law make it a complex matter. Indeed, the categories of impossibility of performance such as objective, subjective, initial, subsequent, legal, physical, permanent and temporary impossibility are artificial and unrealistic. The underlying doctrine of paragraph 242 BGB, "treu und glauben" (good faith), is itself wide enough to cover any type of impossibility, without the need for specific reference to the categories of impossibility embodied in paragraphs 275, 280, 306 and 323 BGB. Indeed, modern German law favours a limited application of the doctrine and suggests other means for solving the problem.

2.2. WEGFALL DER GESCHAFTSGRUNDLAGE

As discussed before,[430] German courts have developed a general doctrine of relief under the title of wegfall der geschaftsgrundlage (collapse of the foundation of the contract)[431]. German case law defines "geschaftsgrundlage" as follows:

"The common representation of both contracting parties at the time of signing of the contract, or representation of one party which have been perceived and implicitly accepted by the other party with regard to the existence or future occurrence of circumstances upon which the intention for contracting of both parties is based."[432]

In this theory, all elements of a contract (tatbestand) are generally relevant for the determination of the basis of the contract.[433] The absence of the foundation of the contract is a basis for relief, provided continued insistence on the obligor's performance would be against good faith. To require performance which would ruin the debtor economically, or would require undue sacrifices on his part (opfergrenze), or would basically disturb the equivalence of performance, is considered against good faith.[434] According to

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430. *Supra*, pp. 13-15

431. The doctrine has been translated as failure of the basis of the contract or disappearance of the contract. See P. Hay, *op. cit.*, at 365 *et seq.*; K. Zweigert & H. Kotz, An Introduction to Comparative Law, 1977, Vol. II, 192 *et seq.*; Ralp, A. Newman, Equity and Law: A Comparative Study, 1961, at 195.

432. Wolfgang Peter, Arbitration and Renegotiation of International Investment Agreements, 1986, at 118-119. Professor Oetermann has defined it as follows: "Basis of the transaction is an assumption made by one party that has become obvious to the other during the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence of circumstances forming the basis of the contractual intention. Alternatively, contractual basis is the common assumption on the part of the respective parties of such circumstances." (M. D. Aubrey, *op. cit.*, at 1179).

433. P. Hay, *op. cit.*, at 368.

434. *Loc.cit.* See also E. J. Cohn, Frustration of Contract in German Law, *op. cit.*, at 22.

the doctrine, a party ceases to be bound by his promise if the basis of the contract has been destroyed. Relief may take the form of adjustment rather than termination. Thus, if the material circumstances surrounding performance are so changed as to result in the alteration of the economic essence of the agreement, the doctrine will be applicable in the form of adaptation or termination of the contract.[435]

The authority of applying the doctrine is the principle of good faith which recognises that performance of a contract which leads to fundamental disequilibrium can no longer be insisted upon when, as a result of a complete change in conditions, the performance has become completely different from that originally expected. Indeed, the requirements of the principle which are expressed in paragraphs 242, 133 and 157 BGB are the basis for applying the doctrine of wegfall der geschafsgrundlage. For example, in the presence of profound economic disturbances, it is contrary to good faith for the creditor to insist that the contract be performed as originally anticipated.

The conditions under which the doctrine is applied can be summarised as follows:[436]

- Certain fundamental circumstances that are not terms of the contract but are not merely motives for entering into the contract, have been made basic to the contract either by both parties or by one party to the knowledge of the other;
- There has been a profound change in these circumstances leading to a fundamental disequilibrium of contract - being against the requirements of good faith - by unforeseeable and unavoidable events.

The courts, relying on good faith, have applied the doctrine to a variety of situations and events, including political developments, changes in legislation, denial of permission for a contract by authorities and frustration of purpose.[437] The reduced purchasing power of money or inflation does not in itself justify applying the doctrine; that said, in rare and very exceptional cases substantial inflation has been a ground for adaptation.[438] It must be added that the doctrine has been held to apply where a party, in performing his

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435. P. Hay, *op. cit.*; N. Horn, H. Kotz & H. G. Leser, *op. cit.*, at 141 *et seq.*

436. O. Lando, Renegotiation and Revision of International Contracts, German Yearbook of International Law, 1980, 35, at 49; Cartwright, The Law of Obligation in England and Germany, 13 Int'l. & Comp. L. Q. 1964, at 1316, 1335; Wolfgang Peter, *op. cit.*, at 119.

437. N. Horn, Changes in Circumstances and the Revision of Contracts in Some European Laws and International Law, (In Adaptation and Renegotiation of Contracts in International Trade and Finance, Edited by N. Horn,1985, at 19).

438. Wolfgang Peter, *op. cit.*, at 119; N. Horn, *op. cit.*, at 19, 20.

obligation, encounters difficulties so great that he can not in fairness be expected to overcome them. For example, if repurchasing a stock of products - which has been completely destroyed by fire - is extraordinary difficult and expensive, the seller will be freed from his obligation to supply.[439] Generally, the German courts have been much more flexible in using this doctrine than the courts in other countries. It is difficult to discover how much more expensive performance has to become for the doctrine to apply. Originally German courts insisted upon at least an 80% decrease in the value of the monetary performance; this was gradually reduced to two-thirds, one-half, and then to one third.[440] Subsequent decisions have held that the disproportion between claim and performance justifying an increase in value need not to be strictly defined or expressed in monetary terms. In later decisions adopted by the Reichsgericht, the view is expressed that under special circumstances, an increase in value could be justified where the decrease in the value of performance was only moderate. Increasingly, general principles of good faith and fair weighing of the demands of the parties in the particular case, have been relied upon rather than the above mentioned criteria. Each decision attempts to provide a solution that is the most just and fair in the circumstances.[441]

However, the weakness of the doctrine is that the assumption of the parties may not be clear and yet relief is granted. Its vagueness can be considered to be unconductive to legal certainty and thus endangers the security of commerce. The doctrine describes a situation that is not properly met by other juridical conceptions and lacks a comprehensive formula. Thus, it can be applied in a large variety of situations, including those which do not really warrant adaptation. This is very close to the "qualifying power" to which Denning L.J. referred in the ***British Movietonenews*** case.[442] The doctrine fails to explain why, in the absence of any supporting rule of law or express provision in the contract, the occurrence of such contemplated facts may be held to create an obligation for the continued existence of the contract. It also fails to explain why every minor disturbance of the basis of contract results in

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439. S. P. de Cruz, A Comparative Survey of the Doctrine of Frustration, Legal Issues of European Integration, 1982, at 54.

440. See Keith S. Rossen, *op. cit.*, at 94.

441. See *G. Co. v. J. G. R. & S. Co.*, 147 RGZ, 286 (Reichsgericht, 1935) (Cited in A. Von Mehren, *op. cit.*, at 751).

442. [1950] 2 All Eng.Rep. 390, at 395; [1951] 1 K.B. 190, at 200; [1952] A.C. 166, 171.

the ineffectiveness of express contractual provisions.[443] The disadvantage of this theory is also clear in the sense that parties do not know what attitude the court will take. Therefore, it is not desirable for parties to international commercial transactions, where there may be enough uncertainty in any case. Furthermore, as the doctrine has the potential to be interpreted in a large variety of situations, including those which do not really qualify for adaptation, the principle of *pacta sunt servanda* may be easily jeopardised by arbitrary application of the doctrine. The doctrine diverts attention from the fact that the judges are basically involved in an analysis of allocation of risk between the parties. Moreover, the fundamental principle underlying the doctrine is that of good faith. Good faith in German law is something more than the *bona fides* of Roman law, bonne foi of French law, or good faith in Anglo-American legal systems. It takes into account an ethical notion of mutual confidence and the relationship of the parties.[444] The point is expressly noted in ***G. Co. J. G. R. & S. Co.***,[445] where a claim was allowed in the case of unforeseen circumstances in the value of the English pound and the American dollar. In this case, the parties to a contract of sale had relied on the stability of the English pound as a gold currency and had set the sale price in pounds sterling. After England suddenly left the gold standard, the Reichsgericht allowed the injured party (seller) to demand payment of compensation for the loss due to devaluation. The court pointed that:

"However, though the shaking of the basis of the transaction (Geschaftsgrundlage) is the legal conception fundamental to the action for equalization, in connection therewith the principles, as to the fair evaluation of the justified demands of both parties, of the action in equalization, developed by the Reichsgericht and derived from paragraph 242 of the Civil Code, are also to be applied. In connection with the application of these principles, all circumstances of the case that, under the fundamental principle of good faith in commerce, could come into consideration to determine a just equalization between the two performances, must be carefully cleared up, tested, and taken into consideration. "[446]

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443. See H. Smit, Frustration of Contract: A Comparative Attempt at Consolidation, 58 Colum. L. Rev. 1958, 287, at 290.

444. See Deschenaux, La Revision des Contracts en Droit Suisse, 30 J. Comp. Leg. Int'l. L. 1948, 15, at 59.

445. 2 April 1935, 147 ERG (Z) 286. (Cited in Arthur Taylor Von Mehren, The Civil Law systems, Cases and Materials for the Comparative Study of Law, 1957, at 751-754).

446. *Loc. cit.*, at 753.

In the celebrated case of ***ST. v. R.***,[447] again the central principle underlying frustration was held to be good faith. In this case, the Reichsgericht gave a strong impetus to the movement for a general revalorization of money obligations. In this case, the mortgagee of real estate refused to cancel the mortgage unless repaid a sum equivalent in value to the money loaned in 1913. The court relied on paragraph 242 BGB to make the owner of the mortgaged property pay the mortgagee a supplementary sum over and above the nominal value of the mortgage so as to alleviate the very marked devaluation of paper money in Germany.

For the following reasons the Reichsgericht's decision is unconvincing:[448] At first, the court dismissed legal tender legislation, the initial obstacle to revalorization, on the dubious ground that at the time of the enactment of the legal tender statute, the legislature had assumed there would be no paper money inflation and that the value of paper money would remain equal. Secondly, central to this decision is paragraph 242 BGB which requires that obligations be performed in good faith, taking ordinary commercial practice into consideration. However, it was hardly ordinary commercial practice for the debtors to revalorize their debts voluntarily.[449] Thirdly, the court decision is open to criticism with regard to its obscurity about how revalorization was to be achieved. Indeed, the court expressly refused to set out a general standard or guideline for revalorization. Instead, it ordered the lower court to balance an array of equities on a case by case basis.

The decision received both high approval and severe criticism for undertaking to revalorize contractual obligations. Dawson has acclaimed the decision "a landmark in German legal history and a fitting climax to the magnificent work of the Reichsgericht in guiding a great nation through its darkest hours."[450] Nussbaum, on the other hand, characterised it as "one of thoroughgoing judicial aberration and confusion."[451] While the political situation in Germany was clearly chaotic during revalorization nevertheless, it is submitted that the courts should not have intervened without legislation; but given that the

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447. 107 RGZ, 78, 1923. (Cited in A. Von Mehren, *op. cit.*, at 743-746.)

448. See Keith S. Rosenn, *op. cit.*, at 91.

449. *Op. cit.*

450. Dawson, Effects of Inflation on Private Contracts: Germany, 1914-1924, 33 Mich. L. Rev. 1934, 171, at 205.

451. A. Nussbaum, Money in the Law National and International, (Rev. ed. 1950), at 210.

legislature was no better equipped to cope with the situation, the courts had little choice but to intervene to ameliorate the nation's economic chaos.[452]

What can be concluded from the above discussion is that economic factors such as inflation, devaluation, price rises, and even increase in the cost of living[453] can be grounds of excusable non-performance leading to termination or adjustment of contract.

It should be noted that the application of the doctrine of geschaftsgrundlage can be expressly excluded by the parties.[454]

It is obvious that the German approach is entirely different from the other doctrines we have discussed. There is a very important and basic difference between the Common law, French law and the law of Germany: The French and Common law (United States and England) operate the doctrine of excuse of non-performance on the basis of unforeseeability, whereas German law operates on the basis of good faith. It is not, however, upon the basis of an implied term in the contract that the performance is excused. The principle applied is that it is contrary to good faith for a party to hold the other to performance of his contract when he is aware that the other has entered into the contract only on the basis of certain suppositions which have turned out to be incorrect. In addition, the German doctrine of collapse of foundation of contract affords relief in a great number of cases on the basis of good faith. Despite the presence of good faith provisions in Article 1134 of the Civil Code, French civil courts have chosen to apply the traditional view of contract that a contract is the immutable law between the parties. The doctrine of geschaftsgrundlage strongly resembles *rebus sic stantibus*; indeed, a number of German courts and commentators have equated the two doctrines.[455] It also resembles the French theory of imprevision in the following common points: (a) there must be an unforeseeable change of circumstances; (b) the change must be actually exceptional, exceeding the normal risk assumed by the parties; (c) the change must render performance of the contract seriously burdensome; and (d) the change must occur without the fault of the party seeking relief.

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452. See also Kieth S. Rossen, *op. cit.*, at 93.

453. See, *e.g.*, *Sp. Co. v. F. Co.*, 1920, 100 RGZ, 129; *B. V. F.* 1920, 99 RGZ, 258; *Marseiwerke v. H.* 1921, 103 RGZ, 177. (Cited in A. Von Mehren, *op. cit.*, at 732-740).

454. See Wolfgang Peter, *op. cit.*, at 118.

455. See Cohn, Frustration of Contract in German Law, *op, cit.*, 15, 18.

In comparison with German law, the doctrine of frustration is given a relatively narrow interpretation by the English courts. Indeed, the courts have not yet been prepared to hold that hardship situations *per se* can frustrate the contract. More precisely, the courts still cleave to the nominalist rule that a pound is a pound, whatever its international value.[456] Consider, for example, ***Anderson v. Equitable L. Assur. Soc.***,[457] where the equitable claim for relief could not have been clearer. In this case, an Englishman living in Russia had purchased a life insurance policy from the German branch of an American insurance company. The death benefit was fixed at 60,000 German marks, payable in London. However, when the insured died in 1922, the insurance company paid his widow what was then the equivalent of 60,000 paper marks. As English law was the applicable law, the court reluctantly held that the widow was legally entitled to nothing more, though some judges expressed the hope that the insurance company would voluntarily pay something to the beneficiary out of considerations of justice and equity. As we see, the result in this case was very harsh. If this case had been considered by a German court it would probably have been decided differently. American courts, like English courts, have taken a similar approach with respect to debts expressed in collapsed currencies.[458] Thus Anglo-American courts have been much more uncomfortable than German civil law courts with regard to modification of contracts. Indeed, they have been much slower than Civil law countries in developing excuse doctrines.

In the end of this chapter, we can conclude that neither the German nor the French nor the common law have yet achieved the proper solution for the problem of supervening events and the balance between private and social interests. *Force majeure* is very strict in the matter of changed circumstances, whereas German wegfall der geschafsgrudlage probably stands at the other extreme, with the common law systems somewhere in the middle. Parties who wish to escape from problems associated with the application of excuse doctrines should therefore plan their avoidance by drafting *force majeure* clause or hardship clauses in their contracts, rather than relying on the general principles of the applicable law.

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456. See A. D. M. Forte, Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular reference to the United Kingdom, The Juridical Law, 1986, 10, 12.

457. [1926] 134 L.T. 557, 42 T.L.R. 302.

458. See, *e.g.*, *Tillman v. Russo Asiatic Bank*, 51 F.2d 1023 (2d Cir. 1931), *cert. denied*, 285 U.S. 539; *Tillman v. National City Bank*, 118 F.2d 631 (2d Cir. 1941), *cert. denied*, 314 U.S. 650 (1941).

CHAPTER THREE:

CONDITIONS UNDER WHICH A CONTRACT IS CONSIDERED EXCUSED

I. NON-FORESEEABILITY

The state of confusion which is a feature of most issues in the law of excusable non-performance intensifies when we consider the question of the relevance, if any, of the fact that one or both parties have foreseen, or ought reasonably to have foreseen, the occurrence of the supervening event. The view could be taken that the parties should be obliged to carry out the contract in cases where the intervening events were, or ought to have been, foreseen. Foresight or foreseeability may thus play a pre-eminent role in limiting the scope of the doctrine of excusable non-performance. It is frequently asserted that a party may not be excused from performance if the supervening event preventing performance was foreseeable at the time of contracting. However, this statement is far too general to represent the truth. Although there is judicial support for this contention, this is not always the case. Statements stressing that the event must be "unexpected", "unforeseeable", "unforeseen", or "could not have been anticipated" are undoubtedly explained by the fact that the promisor in such cases has not been able to consider the possibility of such events interfering with his performance. If they still happen, his promise may be considered excused. On the other hand, if, at the time of contracting, he was in position to evaluate the risk of the occurrence of the event, *prima facie* he should be held to his promise. In such a case, the promisor could have protected himself by a provision in the contract and the fact that he did not, constitutes ample evidence that he was prepared to assume the risk himself. If a contingency is foreseen or foreseeable, the obligor is free not to enter the transaction; if however, he chooses to do so, he undertakes an absolute duty to perform and should be considered to have assumed the risk of the contingency arising.

Generally, escape doctrines deal in one way or another with excuse for non-performance when there is an unforeseeable or unforeseen contingency. It can therefore be said that the non-foreseeability of a contingency, which could not reasonably be expected to have been taken into account at the time of the conclusion of contract, is one of the most important pre-conditions of excusable non-performance in most legal systems.

Before analysing this important issue in detail, let us see what is the literal meaning of the word foreseeable. In Webster's Third New International Dictionary, "to foresee", means "to see (as a future occurrence or

development) as certain or unavoidable" beforehand.[459] The compound form, used as an adjective, adds the suffix "-able" and thus modifies the meaning by adding "such as may reasonably be anticipated; lying within the range for which forecasts are possible . . .". "Foresee" and "foreseen" thus denote that which is or should be expected, that which is reasonably possible. Unforeseen means "not foreseen" or "unexpected". Unforeseeable, however, is defined much more restrictively and means "inapplicable of being foreseen, foretold, or anticipated".[460] Therefore, while "foresee" suggests what is or should have been seen, "foreseeable" limits the situation to that which could have been seen. Black's Law Dictionary,[461] in defining the word "foreseeability" says that foreseeability is "the ability to see or know in advance, hence, the reasonable anticipation that harm or injury is a likely result of acts or omissions".

These concepts are much more complex and controversial in practice especially in Common law systems. Parties to a contract should be relieved from liability if performance is prevented by circumstances which are beyond their control and which were unforeseen or unforeseeable. However, in Common law, particularly English law, unlike French law, the question of the foresight test and its role in frustration of contract is not clear. In this regard, there are some important differences between these two legal regimes. Let us examine the issue in detail in each legal system.

A. CIVIL LAW

1. FRANCE

According to the French concepts of *force majeure*[462] and imprevision,[463] the contingency or the changed circumstances must be unforeseeable (imprevisibilite)[464] or beyond what could reasonably be

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459. 890, 1971.

460. *Loc. cit.*

461. 5th ed. at 584.

462. Weil Alex et Francois Terre, Droit Civil, Les Obligations, Dalloz, 1980, pp. 476, 477; Marty Gabriel et Raynaud Pierre, Droit Civil, Les Obligations, Tome II, Sirey, 1962, p. 530, Sec. 486; F. Chabas, *Force Majeure*, Encyclopedia Dalloz, (Repertoir de Driot Civil), vol. 4, n. 8.

463. Closset, Note in D. 1927, III. 17; G. Marty et P. Raynaud, *op. cit.*, at 208. See also arthur Taylor Von Mehren, The Civil Law System (Cases and Materials for the Comparative Study of Law), 1957, at 712.

464. See Cass. Req. 15 June 1911, D. 1912, I. 181, *affirming* C.A. Alger, 30 May 1910 (Which held that en matiere de paiement, la maladie ne peut etre un cas de *force majeure*; qu'elle peut et doit etre prevue et ne saurait etre consideree comme un de ces evenements qui echappent a toute prevision). See also C.A. Lyon, 28 May 1951, D. 1951, 478.

foreseen by a diligent person (reasonable man) at the time of the formation of the contract. Indeed, if the event was foreseen at the time of contracting, the *force majeure* can not be invoked., since the obligor could foresee the contingency and could have refused to make the contract.[465] By entering such a contract, he is at fault or he has accepted to bear the risk due to such a contingency.[466] In ***Ste Bata v. Farge***,[467] B leased premises on March 18th 1936, in order to carry on a business selling shoes. On May 24th 1936, he was notified that he was in default in continuing to sell shoes as a result of a law passed on March 22nd 1936 to the effect that; "during two years no new shops are allowed to be open, without an authorisation of the ministry of commerce". B argued that, given the law was passed after the conclusion of the contract, it was not possible for him to continue his activity as it was intended. He stated that the contract should be terminated because of an event of *force majeure, viz.*, the passing of that law. The court rejected the argument and held that B must perform the contract by paying the rent; since the subsequent law, which prevented B from carrying on the business, was foreseeable at the time of contracting. It had been proved that B foresaw the passing of the law and deliberately concluded the contract before it came into force.

In ***Maiano v. Simard***,[468] an Italian entered into a contract to construct a number of houses for Simard. Five months later and before the houses were completed, he was exiled from France. The court decided that Maiano was liable to pay damages since his expulsion was foreseeable in the light of the international situation which prevailed at the time of contracting.

Administrative delay in granting a building permit has been held to be a foreseeable contingency.[469] On the other hand, an order to evacuate in 1940 which caused an owner of a garage to leave behind the plaintiff's car was held to be unforeseeable.[470] Delaying a ship for hygienic inspection has been held

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[465]. J. Carbonier, Driot Civil, 4/ Les Obligations, 6eme, Press Universite France 1969, p. 243; Alex Weill, *op. cit*; Alex Weill and Francois Terre, *op. cit.*, at 476.

[466]. H. L. & J. Mazeaud, Traite Theorique et Pratique de la Resposibilite Civil delictuelle et Contractuell, Tome II, Sixieme edition, Montchrestien, Paris, 1970, n. 1575, p. 689. See also C.A. Lyon, 22 June 1944, Gaz. Pal. 1944, II, 162.

[467]. Caen. Oct. 11th. 1937. Gaz. Pal. 1937. 2. 797.

[468]. Bordeaux, Nov. 26th. 1940, Gaz. Pal. 1941. 1. 29.

[469]. Cass. Com. 26. 10. 1954, D. 1955. 213.

[470]. Cass. Civ. 22. 12. 1954, D. 1955. 252. See also Barry Nicholas, The French Law of Contract, 1992, at 203.

to be foreseeable because it could have been foreseen at the time of contracting.[471]

A *force majeure* was held to be inapplicable to a strike in a coal mine because strikes were known to be a very common contingency in the coal mining industry.[472] However, it has been accepted in principle, that a strike by the debtor's workers may, in extreme cases, constitute *force majeure*, provided that the event was genuinely unforeseeable and irresistible.[473] In ***Bouvier v. E. D. F.***,[474] E entered into a contract with B for the supply of electricity. Approximately one year later after the conclusion of the contract, all the employees of E went on a strike. B sued E for damages arising from the interruption of the supply of electricity. The tribunal stated that the strike was in fact irresistible, since it was a general strike, and covered the whole territory of France. However, the court held that E was not excused because the strike was not unforeseeable. This was due to the fact that before the strike, there had been some dissatisfaction amongst E's employees and that the negotiations between the representatives of both the employer and the employees had been negative.

A strike is therefore not in itself a case of *force majeure*. It has to be unforeseeable and irresistible.[475] Both of these two conditions have to be met. They are not alternative but cumulative. For example, failure of telephone communications has been held to be unforeseeable but not irresistible, since other means of communication could have been used.[476]

Another example of foreseeability of the event relates to an impossibility the danger of which can be foreseen. For example, there is normally no *force majeure* when fog causes a road accident, since the peril can be foreseen and precautions may be taken.[477] It has been said that war,

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471. See *Comp. descompt de Paris v. Hambro*, Cour de Paris, April 25, 1863, D. 1863. I. 80; *Ouest v. Loutrel*, Cass. Civ. Feb. 17, 1874, D. 1874. I. 302.

472. *Decroix v. Taffin-Ledieu*, Trib. Hazebrouck, Jan. 18, 1890, D. 1891. III. 24.

473. Cass. Civ. 7. 3. 1966 and Cass. Com. 28. 2. 1966, JCP 1966. II. 14878 (In both cases, nevertheless, the plea failed). A tendency is discernible in French Jurisprudence to hold that *force majeure* can be pleaded when the strike has been precipitated by governmental action (for example, a freeze on wages) and is therefore beyond the control of the employer. See Cass. Civ. 21. 11. 1967, JCP 1968. II. 15462, RT (1968), 733; Lyon 14. 6. 1980, JCP 1980. II. 19411. See also Barry Nicholas, The French Law of Contract, 1992, at 204.

474. April 29th. 1963. D. 1963. 673.

475. See also Mazeaud, Responsibilite, 1970, *op. cit.*, at p. 710.

476. Paris, 30. 6. 1958, D. 1958. 578.

477. Civ. 14. 12. 1956. JCP 1975. II. 9737.

invasion, death, floods, armed robbery, lightning and the enactment of a prohibitory law are unforeseeable events within the meaning of *force majeure.*[478]

Accordingly, foreseeability plays a central role in questions of *force majeure.* A significant point which should be noted in French law is that the foreseeability should be considered *in abstracto*, "bon pere de famille".[479] The test of foreseeability is the abstract one of the reasonable man. It is thus clear that the criterion is not the subjective view of the particular obligor.[480] It is not a question whether the obligor has or has not foreseen the contingency, but rather whether he should have foreseen the event. The test is that of a reasonable man in the same position as the obligor. If for example, the party seeking relief was a businessman, then the question is whether a reasonable businessman in his position would have foreseen the contingency. Should the answer be positive, then the party seeking relief is deemed to have foreseen the contingency. However, the obligor will not be excused by arguing he, personally, could foresee less than the reasonable or ordinary man in his situation. Unforeseeability is determined objectively, not subjectively. For *force majeure* to arise, the contingency must be such that it could not have been foreseen by a reasonable man in the position of the party seeking relief.[481] Appreciating that unforeseeability is objectively ascertained, Article 1150 of French Civil Code provides:

"When the non-performance of the obligation is not due to the dol of the debtor, he is liable only for such damage as was foreseen or as one could have foreseen at the time of contract."

The Article speaks of damage which one could have foreseen not which he could have foreseen.[482] Thus, the criterion used for foreseeability is again objective not subjective. Nevertheless, the French courts sometimes have taken into account the ability and capability of the non-performing party to foresee the contingency.[483]

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478. Comments (by M. Hunley), Supervening Impossibility as a Discharge of an Obligation, *op. cit.*, at 66; Gabriel Marty et Pierre Raynaud, *op. cit.*, at 530, 531.

479. Mazeaud Henry et Leon, Mazeaud Jean, Lecon de Droit Civil, Tome II, Cinquieme edition, pp. 584,585; Mazeaud, lecon de Driot, 1985, p. 663; G. Marty et P. Raynaud, *op. cit.*, p. 530; G. Viney, Les Obligations - La Responsibilite - Conditions en Traite de Droit Civil, (Ed. J. Ghestin), vol. 4, Librairie General de Droit et de Jurisprudence, 1982, n. 399.

480. H. L. et J. Mazeaud, (Cinquieme ed.), *op. cit.*, p. 585.

481. See *Veuve Joly v. Grimault*, June 29. 1966. D. 1966. 645.

482. See also Barry Nicholas, French Law of Contract, 1982, at 225, 226.

483. Chabas, *op. cit.*, n. 22-23.

The issue of foreseeability therefore plays a dual role in the context of *force majeure*. First, it is a basic factor in establishing a defence based upon *force majeure*. Second, the fact that the contingency is foreseeable necessarily infers that the promisor intended to assume the risk by entering such contract.

As will be discussed later,[484] the French reasonable man standard is open to criticism. The objective standard may penalise a party who in fact subjectively fails to foresee an event which is objectively foreseeable. In other words, while a court may deem a contingency foreseeable, it does not mean that the party actually contemplated it. The deficiency of the test lies in its unrealistic overestimation of the foreknowledge of the party.

2. GERMANY

In German law, the issue of unforeseeability of the contingency is not as rigid as it is in France. According to paragraph 275 of BGB, a debtor is relieved from his obligation to perform if performance becomes impossible. The conclusion is that, contrary to French law, the BGB does not require the contingency to be unforeseeable - only that it results in impossibility of performance.[485] However, the issue in the context of the doctrine of wegfall der geschaftsgrundlage (collapse of the foundation of the contract) is a little different. Although unforeseeability is one of the preconditions of the doctrine,[486] German courts have been much more flexible than the French.[487] For example, in a sale contract, the seller was obliged to produce a number of specific drilling machines for the buyer. The place of delivery was East Germany. The seller knew that because of their specifications the drilling machines could only be sold in that country. However, after the contract was concluded, the Berlin Blockade prevented delivery of drills to East Germany. Although the blockade was in operation at the time the contract was made, the BGH (Federal Supreme Court) held that:
"both parties based their contract on the assumption that despite the blockade, already existing at the contract's conclusion, the delivery would be possible in the foreseeable future."[488]

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484. *Infra*, pp. 111, 123 *et seq.*

485. Henry Lesguillons, *op. cit.*, at 523.

486. Peter Wolfgang, *op. cit.*, at 120.

487. M. Joachim, *op. cit.*, at 105.

488. BGH MDR 1953, 282 (Cited in M. Joachim, *op. cit.*).

The buyer was therefore relieved from the obligation to accept and pay for the goods, but as the contract had to be modified to the new situation, good faith demanded that he must pay one-quarter of the total agreed sum. The court indicated that the loss resulting from non-performance should fall on both parties. This would go some way to compensate the plaintiff for the expenditures incurred in beginning to perform the contract.[489] This decision is open to criticism, since a purchaser who buys on his own account in the hope of gaining from a resale, must bear the risk of such a resale becoming impossible. This risk typically rests on him, and if he wants the vendor to share it, he should expressly so provide in the contract.

As this case illustrates, with regard to the foresight test, there is an important judicial difference between French and German law. *Force majeure* and imprevision operate on the basis of unforeseeability which is one of the essential conditions of the doctrines. In the German doctrines of impossibility of performance and wegfall der geschaftsgrundlage, foreseeability is not a precondition in the former and is not rigidly applied in the latter. It can be said that this difference arises for the different principles which underlie the two regimes of excusable non-performance, *i.e.*, French law operates on the basis of unforeseeability, while German law operates on the basis of good faith.[490]

B. COMMON LAW

1. ENGLAND

In contrast to French law, the question of foresight and its role in frustration of contract is not clear in English law. The issue remains controversial among both judges and commentators.[491] The problem is that while some believe that unforeseeability is a precondition, others do not. The English cases seem to demonstrate considerable inconsistency with regard to the question of foreseeability, while the French jurisprudence acknowledges that only contingencies which are not foreseeable may free a contracting party from performance.

According to Treitel's thesis on foresight, the parties to a contract are free expressly to allocate the risk of contingencies. If they do not, it may be clear from the nature of transaction that they intended the risk of

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[489]. *Loc. cit.* See also K. Zweigert, H. Kotz. *op. cit.*, at 195.

[490]. See M. D. Aubrey, Frustration Reconsidered - Some Comparative Aspects, 12 Int'l. & Comp. L.Q. 1963, 1165, at 1180.

[491]. See G. H. Treitel, (1983), *op. cit.*, at 675-682., and Glifford G. Hall, Frustration and the Question of Foresight, 4 Leg. Stud. 1984, pp. 300 *et seq*; Chitty on Contracts, *op. cit.*, at 1646-1647.

contingencies occurring to lie where it falls.[492] A contract may not be frustrated if the parties precisely stipulated for an event which has occurred. However, a contract should not be frustrated by a contingency which was foreseeable or which should have been foreseen by the parties.,[493] since in these circumstances, it is said that the parties have consciously accepted the risk and therefore intended the loss to lie where it falls.[494] Although there are some cases which support Trietel's views, there are other cases which are to the contrary. Let us examine the problem case by case.

In ***Walton Harvey Ltd. v. Walker and Homfrays Ltd.***,[495] the defendants granted the plaintiffs the right to display an advertisement on defendant's hotel. Within the period of the contract, the local authority, under statutory powers, compulsory acquired the hotel and demolished it. It was held that the contract was not frustrated, because the defendants knew that there was a risk of this happening and could have provided against it, but did not do so.[496] Where by reason of special knowledge, one of the parties of transaction foresees the potentiality of the contingency and keeps it secret from the other party, there is considerable support[497] for the view that as a matter of "elementary justice",[498] he should not be excused. In effect, he has misled the promisee. In the absence of such conduct, however, it is more doubtful whether the same result should be obtained. In deciding whether or not the parties were excused from performance, Williams L.J., asked himself the following question:

"Was the event which prevented the performance of the contract of such a character that it can not reasonably be said to have been in the contemplation of the parties at the date of contract."[499]

This element of foreseeability was again emphasised in the ***Davis Contractors Ltd. v. Fareham Urban District Council***.[500] There a building contractor claimed frustration of contract on the basis that uncontemplated

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492. G. H. Treitel, *op. cit.*, at 676.

493. *Loc. cit.*, at 679.

494. *Loc. cit.*

495. [1931] 1 Ch. 274.

496. *Loc. cit.*, at 282.

497. G. H. Treitel, *op. cit.*, at 679; Chitty on Contracts, *op. cit.*, at 1027. See also Halsbury's Laws of England, 4th ed. vol. 9, London, 1974, at 321, Para. 456.

498. McElroy and Williams, Impossibility of Performance, 1941, at 244.

499. *Krell v. Henry*, [1903] 2 K.B. 740 (C.A.), at 752.

500. [1956] A.C. 696, at 731.

circumstances such as shortage of labour and bad weather had resulted in the work taking twenty two months instead of the eight months as originally expected. One of the reasons Lord Radcliffe gave for refusing to find that the contract was frustrated was the fact that the delay was not due to circumstances which the parties could not reasonably have contemplated. He said:

". . . the cause of the delay was not any state of things which the parties could not reasonably be thought to have foreseen. On the contrary, the possibility of enough labour and materials not being available was before their eyes and could have been the subject of special contractual stipulation."[501]

In another case, ***Baily v. Decrespigney***,[502] it was said:

"Where the event is of such a character that it can not reasonably be in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens."

Finally, in ***Interadex v. Leisure***,[503] sellers wanted to be excused on the basis of frustration of contract on account of a delay caused by a failure in their source of supply. This claim was rejected as follows:

"The events were not sufficient to warrant any finding of frustration. There was the breakdown of machinery at the factory. There was difficulty in getting raw materials down by rail. Such events are commonplace in the world of affairs. If a party desires to avoid such consequences, he must insert a stipulation to excuse him. He can not avoid them by a plea of frustration."[504]

As these cases show a plea of frustration is rejected if the contingencies are as the result of foreseeable or commonplace events.

Accordingly, as these cases illustrate[505] (and Treitel's thesis[506]) a contract is not frustrated by foreseen or foreseeable contingencies. The test used in deciding whether or not the contingency is unforeseeable is the objective reasonable man test, *viz.*, "the event must be one which any person of

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501. *Loc. cit.*, at 731.

502. (1869) L.R. 4 Q.B. 180, at 185.

503. [1978] 2 Lloyd's Rep. 509.

504. *Loc. cit.*, *per* Lord Denning M.R. at 514.

505. See also *Tamplin (F.A.) S.S. Co. v. Anglo Mexican Petroleum Products Co.* [1916] 2 A.C. 397, 426; *Chandler v. Webster* [1904] 1 K.B. 493, *per* Romer L. J. at 501; *Bank Line v. Capel (Arthur) and Co. op. cit*; *Re Badische Co. Ltd.* [1921] 2 Ch. 331, 379; *Cricklewood Property and Investment Trust Ltd. v. Leighton's Invest. Trust Ltd. op. cit.*, at 228, *per* Viscount Simon; *Denmark Productions Ltd. v. Boscobel Productions Ltd.* [1969] 1 Q.B. 699, at 725, *per* Salmon L. J. See also the comments of Lord Brandon in The *Hannah Blumenthal* [1983] 1 Lloyd's Rep. 103, at 112; *F. C. Sphepherd and Co. Ltd. v. Jerrom* [1986] 3 All E.R. 589 (C.A.), at 595, Para. b.

506. G. H. Treitel, *op. cit.*, at 679.

ordinary intelligence would regard as likely to occur."[507] Another conclusion which can be inferred from this discussion, is that in a such case, like French courts' practice, if the event is foreseeable the party can not claim frustration because he is deemed to have taken the risk of its occurrence.[508]

However, in contrast there are cases where foreseen or foreseeable contingencies have nevertheless frustrated the contracts. For example, in ***Palmco Shipping Inc. v. Continental Ore Corp.***,[509] it was said:
"It is not necessary in English law for an event to be unexpected for it to frustrate a contract."
This idea is evident in earlier cases such as ***Bank Line v. Capel & Co.***[510] and ***Tatem Ltd. v. Gamboa***.[511] Both cases concerned war-time time charter parties prevented from being performed during a certain periods as a result of war. In the latter case, during the Spanish civil war, the defendant chartered a vessel for the evacuation of civilians for the month of July. On July 14, the ship was captured by the nationalists who kept her until September 7. The ship owners who had been paid the hire for July in advance, claimed further hire for the period running from August 1 to September 11. In this case, although the risk of capture was known to the parties of contract, nevertheless, it was held that the charterparty was frustrated. Goddard J. said:
"If the true foundation of the doctrine [of frustration] is that once the subject-matter of the contract is destroyed, or the existence of a certain state of facts has come to an end, the contract is at an end, that result follows whether or not the event causing it was contemplated by the parties."[512]
In another case, the ***Eugenia***,[513] Lord Denning M.R. in a well known *dictum*, rejected the argument that frustration can be excluded on the basis that the event is foreseeable. He said:

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507. *Loc. cit.*, at 680.

508. *Loc. cit.*, at 679.

509. [1970] 2 Ll.'s L.R. 21, at 31 (*per* Mocatta J).

510. [1919] A.C. 435, at 455, 456, (H.L.), *per* Lord Summer.

511. [1939] 1K.B. 132; [1938] 3 All E.R. 135. See also *Geaning and Chapman Ltd. v. Woodman, Matthews and Co.* [1952] 2 T.L.R. 409, at 412, 413, C.A. *obiter per* Somervell L.J. ("Frustration may apply although the event which frustrated [the contract] is an event which both parties may have realised might happen."); *Societe Franco-Tunisienne D'Armement v. Sidemar S.P.A.* [1961] 2 Q.B. 278; [1960] 3 All E.R. 797 ("the possibility, appreciated by both parties at the time of making their contract, that a certain event may occur, is one of the surrounding circumstances to be taken into account in construing the contract, and will, of course, have greater or less weight according to the degree of probability or improbability and the facts of the case." [1960] 1 Lloyd's Rep. 594, Q.B.).

512. [1939] 1 K.B. 132 at 138.

513. [1964] 2 Q.B. 266, at 239. See also *Nile Co. v. Bennet* [1986] 1 Lloyd's Rep. 555.

"It has often been said that the doctrine of frustration only applies where the new situation is 'unforeseen' or 'unexpected' or 'uncontemplated' as if that were an essential feature. But it is not so. The only thing that is essential is that [the parties] should have made no provision for it in their contract."

From the viewpoint of French law, where it is frequently asserted that the contingency must be "unforeseeable", the former group of cases are not surprising. However, in the latter decisions, the only relevance of foreseeability is that the parties might have been expected to have provided for a foreseen contingency in their contract.[514]

Some authors also do not consider unforeseeable events to be a basic condition of frustration. McNair states that foreseeability is completely immaterial. It does not matter whether or not the frustrating event was foreseen by the parties to contract. In McNair's opinion the precondition for frustration, is that the event and its effects are such that performance under the contract becomes a thing totally different from that originally contemplated and the parties did not provide that they would be bound by their contract, notwithstanding the occurrence of that contingency.[515] Schmitthoff believes that while the factor of unforeseeability of the contingency is relevant for the ascertainment of the common intention of the parties, in many systems, including English law, it is no longer the decisive test.[516]

In this respect, English law to the extent that foreseeability of the event does not exclude frustration, is similar to the German doctrine of impossibility which does not require foreseeability as a precondition.

Given the state of the authorities, it is not clear whether or not foreseeability precludes the operation of the doctrine of frustration. Treitel's thesis has been criticised[517] on the basis that if a party foresees a contingency as a possibility but does not make provision in the contract, he should not be able to justify what would otherwise be a breach of contract by reference to the doctrine of frustration. That is why it is suggested that foreseeability should be included within the notion of self-induced frustration.[518] Consequently, if the parties have entered into a contract where a contingency

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514. See also *B. P. Exploration (Libya) Ltd. v. Hunt* [1979] 1 W.L.R. 783. In this case, Goff J. said that the mere fact that frustration was a foreseeable probability at the time of formation of contract must not of itself exclude an award of restitution (*Loc. cit.* at 830).

515. Arnold D. McNair, Frustration of Contract by War, L. Q. Rev. 1940, 173, at 178. See also McElroy and Williams, *op. cit.*, at 246.

516. Helsinki Discussions, *op. cit.*, at 151.

517. Glifford G. Hall, *op. cit.*

518. *Loc. cit.*, at 304 *et seq.*

is foreseeable, they themselves are responsible for the failure expressly to stipulate what should happen to their contractual relationship should the event occur. It was their choice to take the risk of frustration of their contract. In other words, the parties must take the consequences if the foreseen contingency occurs.[519]

To sum up, it can not be said with assurance whether in English law foreseeability of the contingency, does or does not exclude frustration. Indeed, it is beyond question that the present state of the doctrine is unsatisfactory. The doctrine of frustration has often been interpreted by the courts in different ways. This may possibly be explained by the tendency of the English courts to refrain from general statements and to apply the doctrine of frustration to the particular facts of each case; in contrast the French courts are more inclined to comment upon the general prerequisites required to bring the remedies excusing from performance into operation. This being so, it is not surprising that foreseeability in English law may, or may not, become relevant. Because of this uncertainty, parties should not rely on the general principles of the English doctrine of frustration, particularly in transnational commercial transactions: instead, they should expressly deal with the issue in their contract.

2. UNITED STATES OF AMERICA

Generally, American courts take the view that a party who foresees the occurrence of a contingency will be deemed to bear the responsibility of such an occurrence. However, it should be noted that the issue is not always a conclusive factor. Indeed, considerable confusion exists among the commentators and also among the courts. Some authorities state that the test should be "unforeseeable" (objective test), others maintain that the test must be "unforeseen" (subjective test), and finally other approaches have been considered.

According to the Restatement of Contracts (First), the promisor will not be excused unless the court decides that the promisor had no reason to anticipate the occurrence.[520] The Restatement stresses the importance of

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[519]. *Loc. cit.*

[520]. Sec. 457. After finding the contingency foreseeable, the courts often held that the doctrine of impossibility was inapplicable. See *Glens Falls Indemnity Co. v. Perscallo*, 96 Cal.App.2d 799, 216 P.2d 567 (1950); *Shore Inv. Co. v. Hotel Trinidad, Inc.*, 158 Fla. 682, 29 So.2d 696 (1947); *Carlson v. Sheehan*, 157 Cal. 692, 109 Pac. 29 (1910) (In this case, foreseeability was deemed as a factor probative of assumption of the risk of impossibility). However, it should be also noted that in a few other courts, the factor of foreseeability was deemed probative of non-assumption of risk. See, *e.g.*,

foreseeability as precondition of excusable non-performance. Thus, a contracting party can not invoke contingencies which he "knows or had reason to know"[521] or had "reason to anticipate"[522] at the time of the formation of the contract.[523]

On the other hand, both UCC[524] and Restatement of Contracts (Second)[525] allow discharge of performance when performance has become impracticable because of the occurrence of an event, the non occurrence of which was a basic assumption upon which the contract was made. By adopting the "basic assumption" criterion, the Restatement of Contract (Second) follows, to some extent, the analysis of the UCC. The Restatement (Second) specifies that in determining whether the non-occurrence of a particular event was or was not a basic assumption of the contract involves a judgment as to which party assumed the risk of its occurrence. For example, in a contract for constructing and delivery of goods at a fixed price, the seller assumes the risk of increased costs within the normal range. If, nevertheless, a catastrophe results in an abrupt ten-fold increase in the cost to the seller, in that case, it may be held that the seller did not assume the risk by concluding that the non-occurrence of the contingency was a "basic assumption" on which the contract was made.[526]

The commentary to the UCC provides for non-performance in the event of unforeseen supervening circumstances not within the contemplation of the parties.[527] The First Restatement was concerned with whether or not the obligor had reason to see the occurrence of the event. The question in UCC is whether or not he foresaw the risk of the contingency and actually assumed the risk that it might occur. It can be said that the Restatement (First) used the standard of foreseeability to be found in the law of tort, *i.e.*, that of the reasonable man who in the circumstances of the party would have anticipated

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Johnson v. Atkins, 53 Cal.App.2d 430, 127 P.2d 1027 (1942); *Fratelli Pantanella v. International Commercial Corp.*, 89 N.Y.S.2d 736 (Sup.Ct. 1949). See also Note, the Fetish Impossibility in the Law of Contracts, *op. cit.*, at 98.

521. Restatement of Contracts, (1932) Secs. 456, 465.

522. *Loc. cit.* Sec. 457.

523. See also Corbin on Contracts, *op. cit.*, Secs. 1333, 1354.

524. Sec. 2-615.

525. (1981), Sec. 261.

526. Farnsworth, *op. cit.*, at 683; Restatement (Second), chapter 11, introductory note.

527. See UCC Sec. 2-615, comment 1:". . .unforeseen supervening circumstances not within the contemplation of the parties." See also comment 4 referring to ". . . unforeseen shutdown of major sources of supply or the like. . .".

the supervening event. On the other hand, UCC regards the issue as whether the parties in fact knew of the contingency but did not provide for its occurrence in their contract. This explains why the UCC suggests that the supervening event must be "unforeseen" as opposed to unforeseeable.

The Restatement (Second) emphasises the requirement that the non-occurrence of the supervening event must be a "basic assumption" of the parties to the contract and concludes that "[t]he fact that the event was foreseeable, or even foreseen, does not necessarily compel a conclusion that its non-occurrence was not a basic assumption."[528] The Restatement (Second) argues that the foresight test is only one of the factors to be considered in determining whether the defence of impracticability is available. Thus, according to the Restatement (Second), in a complicated contract failure to deal with an improbable or insignificant contingency, even though foreseen, should not be deemed to amount to an assumption of the risk.[529] Indeed, the Restatement (Second) suggests that the parties did not assume the risk of all foreseeable or foreseen events: rather, the foresight criterion is simply a factor which can be used to determine the basic assumptions of the parties. In this regard, it had been stated that the party seeking relief should be free to make clear why there was no provision in the contract covering the contingency, for example, that the other party was the dominant economic party and therefore forced him to sign a standard form contract.[530]

To summarise, in contrast to the objective test in the First Restatement, the language of comments 1 and 4 of UCC section 2-615 which use the word "unforeseen", represents a shift from the objective test of what might "reasonably have been intended by the parties", to an apparently subjective test. The Code's shift, theoretically at least, results in the abandonment of the fiction of the reasonable man. The concept of reasonable foresight gives way to a new behavioural analysis with the inquiry being focused on what the parties actually contemplated. On the other hand, the UCC regards the foresight (subjective) test as a precondition, the Restatement (Second) regards foreseeability (objective or subjective) as only a factor in determining the parties' basic assumptions.

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528. Sec. 261, comment b. See also Sec. 265, comment a.

529. See also *L. N. Jackson & Co. v. Royal Norwegian Gov't.*, 177 F.2d 694 (2d Cir. 1949), *certiorari denied* 339 U.S. 914, 70 S.Ct. 574, 94 L.Ed. 1340 (1950).

530. See John D. Calamari, and Joseph M. Perillo, The Law of Contracts, 3rd ed., 1987, at 571.

Notwithstanding its language, the UCC's subjective search for actual foresight has not in fact displaced the centrality of objective foreseeability in U.S. law. In both Common law and UCC issues, most American courts have maintained that where an event was found to be foreseeable or should have been contemplated by the parties, relief should be denied unless the party seeking relief had provided for the contingency in his contract.[531] Otherwise, the risk of the occurrence of the contingency falls on that party.[532] The theory behind the foreseeability test is that if the contingency was foreseeable and the party seeking relief made no provision for it in his transaction then he is deemed to have assumed the risk of its occurrence.[533] In the pre-code case, ***Lloyd v. Murphy***,[534] Justice Trynor makes the classic statement of the foreseeability rule:

"If [the contingency] was foreseeable there should have been provision for it in the contract, and the absence of such a provision gives rise to the inference that the risk was assumed."[535]

That is, of course, what French law also emphasises.

In ***Westinghouse I***,[536] and ***Westinghouse II***,[537] Judge Merhige argued that the question whether or not the non-occurrence of a particular contingency was a basic assumption of the parties was to be answered not upon a factual finding of what the parties assumed but upon a judicial determination of

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[531]. *Neal-Cooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974) (Government regulation foreseeable to refuse relief); *Mishara Const. Co. v. Transit-Mixed Concrete Corp.*, 365 Mass. 122, 310 N.E.2d 363 (1974); *Valero Transmission Co. v. Mitchell Energy Corp.* 743 S.W.2d 658, 663 (Tex.App. 1987), citing *Gulf Oil Corp. v. Federal Energy Regulatory Commission*, 706 F.2d 444 (3d Cir. 1983), *cert denied*, 464 U.S. 1038 (1984).

[532]. See S. E. Wourinen, Case Comment, *Northern Indiana Public Service Company v. Carbon County Coal Company*: Risk Assumption in Claims of Impossibility, Impracticability, and Frustration of Purpose, 50 Ohio L. J. 1989, 162, at 173. See also *Eastern Airlines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 441-42 (S.D.Fla. 1975); *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721, 725-28 (Mo.App., W.D.), *cert. denied*, 444 U.S. 865 (1979).

[533]. *Foster v. Atlantic Ref. Co.*, 329 F.2d 485, 489 (5th Cir. 1964); *City of Minneapolis v. Republic Creosoting Co.*, 161 Minn. 178, 189, 201 N.W. 414, 419 (1924); *Nebaco, Inc. v. Riverview Reality Co.*, 87 Nev. 55, 482 P.2d 305 (1971); *Glenn R. Sewell Sheet Metal, Inc. v. Loverde*, 70 Cal.2d 666, 451 P.2d 721, 75 Cal. Rptr. 889 (1969) (Military action was discussed at the time of contracting, therefore, the contingency was foreseeable). See also Comments, Contractual Flexibility in a Volatile Economy: Saving UCC Section 2-615 from the Common Law, 72 N.W. Uni. L. Rev. 1978, 1032, at 1038.

[534]. 25 Cal. 2d 48, 153 P.2d 47 (1944).

[535]. 25 Cal. 2d at 54, 153 P.2d at 50. For the discussion of Justice Trynor's style concerning the issue, see S. McCaulay, Justice Trynor and the Law of Contracts, 13 Stanford L. Rev. 1961, 812, 833-838.

[536]. 517 F.Supp. 440.

[537]. 597 F.Supp. 1456.

whether the event was "foreseeable". The issue, then, is not whether the event was foreseen, but whether it might reasonably have been foreseen under the circumstances. This insistence on the mechanism of objective foreseeability as the indicator of a presumed intent can be seen as a conscious refusal to adopt the specific language of the Uniform Commercial Code. The judge stated that:

"[W]here the contingency may reasonably be said to have been foreseeable, courts have generally taken the view that the promisor should not be released from his obligation. This rule is based on the notion that where the parties can reasonably anticipate events that may affect performance, the prudent course is to provide for such eventualities in their contract."[538]

Unanticipated expenses, even approaching $100 million, can not obviate the foreseeability problem because a reasonable person would take care to "recognise and appreciate" the potential events that might affect the contract.[539]

In ***Eastern Air Lines Inc. v. Gulf Oil Corp.***,[540] Gulf sought to avoid a long-term contract under which it was to supply jet fuel to Eastern Airlines Inc. Gulf's commercial impracticability defence was based on the intervening 1973 OPEC oil embargo, the energy crisis and unexpected Federal price controls. In Eastern Airline's action for specific performance of the contract, the United States District Court for the Southern District of Florida rejected the excuse of impracticability raised by Gulf Oil. In applying the foreseeability test, the court stated:[541]

"Even if Gulf has established great hardship under UCC Sec. 2-615 which it has not, Gulf would not prevail because the events associated with the so-called energy crisis were reasonably foreseeable at the time the contract was executed. . . the foreseeability rule would defeat Gulf's claim."

In another case, ***United States v. Wegematic Corporation***,[542] Wegematic had promised to sell the government a computer for $231,800, but later broke its promise and claimed technical difficulties which it would take at least $1,000,000 to correct. The court stated that the possible inability to develop

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538. 517 F.Supp. at 454.

539. *Westinghouse II*, 597 F.Supp. at 1477-78. For analysis of these cases see Sheldon W. Halpern, Application of the Doctrine of Commercial Impracticability: Searching for "the Wisdom of Solomon", 135 U. Pa. L. Rev. 1987, 1123, at 1148-1153.

540. 415 F.Supp. 429, 438, 441 (S.D.Fla. 1975).

541. *Loc. cit.*, at 441-442.

542. 360 F.2d 674 (2d Cir. 1966).

the technology had been foreseeable and that the plaintiff had assumed that risk.

The significance of "foreseeability test" must not be exaggerated, because it is not always a conclusive factor. Indeed, some authorities argue that the rule should be abandoned or at least modified.[543] An even more liberal view has been adopted by a few courts. The contention is that foreseeability is of no importance when it is clear that the parties did not intend that the risk of the occurrence should be assumed by the party seeking relief. ***West Los Angeles Institute for Cancer Research v. Mayer***[544] is a leading case which helps to clarify the point being made. In this case, the defendant contracted to sell certain real property to the plaintiff and to lease it back. As the plaintiff was a tax-exempt charitable institution, the parties believed that certain very substantial tax benefits would accrue to the defendant. From the evidence, it is clear that the plaintiff knew that the defendant would not have contracted but for the prospective tax advantages and that the transaction was premised upon these advantages being obtained. The government issued a revenue ruling disallowing the kinds of tax advantages foreseen by the parties. The defendant refused to perform and argued that the contract was frustrated. The court accepted that the prospective tax advantage formed the basis upon which both parties had contracted. However, the plaintiff argued that defendant could not rely upon frustration because it was foreseeable that the government might disapprove of such contract. Despite this, the court decided that the defence was available because it was evident that the parties intended that neither party should assume this risk.

In ***Transatlantic Fin. Corp. v. United States,***[545] the court was careful to note that the fact that a particular occurrence was foreseeable did not necessarily indicate how the risk of that occurrence had been allocated. The same position has been taken by the Restatement (Second) of Contracts.[546] The court stated:

"foreseeability or even recognition of a risk does not necessarily prove its allocation . . . . Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they can not agree,

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543. *E.g.*, see *Jackson v. Royal Norwegian Gonv't.* 177 F.2d 694 (2d Cir. 1949), *Cert. denied* 339 US 914, 70 S.Ct. 574, 94 L.E. 1340 (1950).

544. 366 F.2d 220 (9th Cir. 1966), *certiorari denied* 385 U.S. 1010, 87 S.Ct. 718, 17 L.Ed.2d 548 (1967). See also *Edward Maurer Co. v. Tubeless Tire Co.*, 285 F. 713 (6th Cir. 1922).

545. 363 F.2d 312, 318 (D.C. Cir. 1966).

546. Restatement 2d, Chapter 11, Introductory note; Sec. 261, Comments b and c.

often simply because they are too busy. Moreover, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs."[547]

The American cases demonstrate considerable inconsistency with regard to the question of foresight test. While most cases generally acknowledge that only contingencies which were not foreseeable may free a contracting party from his promise, a few cases use other approaches.

It should be noted that the words "foreseeability" or "foreseeable" do not appear within the text of section 2-615 of the UCC. However, comments 1 and 4 to the section employ the terms "unforeseen circumstances" and "unforeseen contingency" respectively. It has been argued that by using the term "unforeseen", the UCC draws distinction between "unforeseen contingency" and "unforeseeable contingency". The "foreseen standard" of the UCC is therefore a subjective test, referring to the actual intent of the parties, *i.e.*, whether they actually foresaw the contingency. The phrase in comment 1, ". . . not within the contemplation of the parties", confirms the subjective approach of the UCC. On the other hand, the "foreseeable standard" refers to an objective test. An event is foreseeable if it is likely to have been foreseen by a reasonable person. Here, the question is whether the ordinary prudent person, in the position of the promisor, could reasonably have been expected to foresee the contingency. A subjective test, of course, imposes a less rigid requirements on the parties. Indeed, the concept of subjective "unforeseen contingencies" broadens the scope of excuse; whereas, the objective test may hold the seller to supervening events of which he is not aware.[548] As the objective foreseeability test is based on flawed and imperfect assumptions about how the reallocation of risks must be done, it is the present writer's submission that the concept of "unforeseen" is preferable to the concept of "unforeseeability". The language of section 2-615 UCC does not require the application of the objective foreseeability criterion as the term "foreseeability" does not appear in either the text or comments to the section.

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547. This view is expressly adopted in *Opera Co. of Boston v. Trap Found. for Performing Arts*, 817 F.2d 1094 (4th Cir. 1987) and another well known impracticability case, *Aluminum Co. of Am. v. Essex Group, Inc.*, 499 F.Supp. 53, 76 (1980) ("foreseeability or even recognition of a risk does not necessarily prove its allocation." As we see *Alcoa* case rejects the strict approach of the foreseeability factor and adopts the view that foreseeability alone does not preclude relief.).

548. See P. Walter, Commercial Impracticability in Contracts, 61 St. Jonh's L. Rev. 1987, 225, at 236, 237; N. Prance, Commercial Impracticability: A Textual and Economic Analysis of Section 2-615 of the Uniform Commercial Code, 19 Ind. L. Rev. 1986, 457, at 486, 487; Richard E. Speidel, Excusable Non-Performance in Sales Contracts: Some Thoughts about Risk Management, 32 S. C. L. Rev. 1980, 241, at 261.

Moreover, there is judicial support for the use of the "unforeseen" test. In ***Security Sewage Equipment Co. v. McFerren***,[549] the court held a contractor to be in breach when the contractor did not fix a sewer system in a residential development. As the contractor had not been able to get the necessary government permit, it was held that only a contingency which was "unforeseen and unusual" would excuse the non-performance of the contract. The court stated that the contractor, "by the nature of its business, possessed superior knowledge of the requirements of the Department of Health."[550] Accordingly, the occurrence was not "unforeseen".

2.1. CRITICISM OF THE FORESEEABILITY TEST

Although most American courts use the "foreseeability test" in interpretation of section 2-615 of UCC and some commentators[551] support it, many scholars have criticised this tendency.[552] Some argue that while the foreseeability test may have probative weight with respect to risk assumption, it should not be determinative.[553]

It can be argued that, in theory at least, every contingency is possible and foreseeable;[554] no event in the world is an unforeseeable contingency because every event in the world is foreseeable.[555] Accordingly, impossibility should never excuse performance.[556] For example, there is always some possibility that a fire will destroy the source of supply, that a key person in the

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549. Ohio St.2d 251, 237 N.E.2d 898 (1968). *Cf. Eastern Airlines v. McDonnel Douglas Corp.*,532 F.2d 957 (5th Cir. 1976).

550. Ohio St.2d 251, at 256, 237 N.E.2d at 900 and 901.

551. For example, see Benjamin N. Henszey, UCC Section 2-615 - Does "Impracticable" Means Impossible? 10 U.C.C. L. J. 1977, 107, at 111-114.

552. See Farnsworth, Diputes over Ommission in Contracts, 68 Colum. L. Rev. 1968, 860, 879-880, 885-887; Hurst, Freedom of Contracts in an Unstable Economy: Judicial Reallacation of Contractual Risks under UCC Section 2-615, *op. cit.*, at 567-570; Aubrey, *op. cit.*, at 1184-1186; Macaulay, Justice Trynor and the Law of Contracts, *op. cit.* at 833-838; Smit, Frustration of Contract: A Comparative Attempt at Consolidation, *op. cit.*; Note, Fetish of Impossibility of Performance, *op. cit.*, at 98, n. 23.

553. Hurst, *op. cit.*, at 567-575; Note, The Doctrine of Impossibility of Performance and the Foreseeability Test, *op. cit.*, at 584-585; Note, Sections 2-615 and 2-616 of the Uniform Commercial Code: Partial Solutions to the Problem of Excuse, 5 Hofstra L. Rev. 1976, 167, at 186.

554. Marvin O. Young, Construction and Enforcement of Long-Term Coal Supply Agreements - Coping with Conditions Arising from Foreseeable and Unforeseeable Events - *Force Majeure* and Gross Inequities Clauses, Rocly Mtn. Min. L. Inst. 1981, 127 at 139; Paul L. Joskow, Commercial Impossibility, the Uranium Market and the *Westinghouse* Case, The Journal of Legal Studies, at 158

555. Norman R. Prance, *op. cit.*, at 487.

556. Stephen J. Siriani, *op. cit.*, at 58.

contract will die, that there will be war, embargo or acts of God - like flood, typhoon, earthquake. This argument can be criticised on the ground that it is unrealistic to believe that the reasonable man, let alone the actual parties to the contract, can foresee all events. The parties are not prophets! Further, what is important is that which was actually foreseeable or foreseen; not what is possible to occur. We are concerned with foreseen or foreseeable events not possible events. Moreover, since the promisor has to prove that the supervening event which rendered performance impossible or impracticable was unforeseeable, he is faced with the difficulty of having to prove a negative. This has been said to be another reason for rejecting the foresight test.[557] However, this argument does not appear to be rational because while proving a negative is difficult, it is not impossible, though, the burden of proof may be heavy. The result is that the courts may rarely find the event unforeseeable.

It is the present writer's submission that the "foresight" test should continue to be a precondition of excusable non-performance but that a subjective criterion should be used. The objective "foreseeability" test has been rejected for the following reasons:

The foreseeability test is based upon the fiction of the reasonable man's standards. This penalises a party who actually fails to contemplate the objectively foreseeable event. Although such a standard has been important in the law of negligence, in the context of frustration a court may deem a contingency foreseeable when the parties did not in fact contemplate it or intend to allocate the risk of its occurrence. A contingency may be unforeseen by the parties but at the same time be a logical possibility which is foreseeable by the reasonable man. In ***Bende & Sons, Inc. v. Crown Recreation, Inc.***,[558] a defendant-seller alleged that a train derailment made impracticable the defendant's performance. The court decided that the seller had not established the defence because "the derailment was not unforeseeable." In this respect the court stated, "Although it did not appear that Bende [the plaintiff] and Kiffe [the defendant] ever contemplated a train derailment . . . common sense dictates that they could easily have foreseen such an occurrence."[559] Thus, although the parties did not in fact expect a train

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557. Comments, Contractual Flexibility in a Volatile Economy: Saving UCC Section 2-615 from the Common Law, *op. cit.*, at 1042; Stewart Macaulay, *op. cit.*, at 835,836; Thomas Hurst, *op. cit.*, at 568.

558. 548 F.Supp. 1018 (1982).

559. 548 F.Supp. at 1022.

derailment to occur and the event was therefore unforeseen by them, the court deemed that event was foreseeable since the train derailment was a logical possibility. This case shows that the test based on the fiction of foreseeability is artificial: it lacks a realistic foundation and can be a troublesome barrier to relief.

Because of these difficulties, some commentators have proposed other tests for the interpretation of section 2-615 of UCC. It has been recommended that the courts should place emphasis on the words of the section, rather than to substitute the test of foreseeability. Impracticability by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, is not the same as impracticability by the occurrence of an unforeseen or unforeseeable contingency. A contingency can be foreseen or foreseeable and yet the parties may contract on the assumption that it will not occur. The "unforeseen" and "unforeseeable" tests can therefore be jettisoned.[560]

While rejecting the notion of foreseeability, Prance argues that the courts must at least use the subjective "foreseen" language of Official Comments of the section 2-615 of UCC in place of the objective "foreseeable" test which is not stipulated in the language of the section or its comments. He maintains that the courts must consider the language of the contract and any other relevant evidence in order to discover the parties' intentions: If, however, the contract is silent, then the court may refer to the section free of any concepts of foreseeability.[561]

Another approach is to concentrate on the assumption of risk.[562] The purpose of this approach is to discover whether the parties actually intended at the time of formation of contract that the seller should assume the risk of the occurrence of the event which he later claims should discharge his performance. In this approach where the intentions of the parties regarding risk allocation concerning a particular contingency can not be found from the contract[563] or parole evidence, the courts must rely upon what Coon has

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560. Rodman Elfin, The Future Use of Unconscionability and Impracticability as Contract Doctrines, 40 Mercer L. Rev. 1989, 937, 953-956.

561. Norman R. Prance, *op. cit.*, at 486-487.

562. See Comments, Contractual Flexibility in a Volatile Economy: Saving UCC Section 2-615 from the Common Law, *op. cit.*, at 1050-1053.

563. See *Gulf Oil Corp. v. Fedeal Power Commission*, 563 F.2d 588 (3d Cir. 1977) (Applying the assumption of risk, the court held that "by warranting, rather that merely promising, the availability of sufficient quantities of gas, Gulf assumed for itself the entire risk that future conditions would raise the cost of gas"), *op. cit.*, at 599.

called the "uses of doubt and reason".[564] Here the court exercises its discretion and settles the case in the light of commercial and equitable criteria. In this regard, the purpose, nature, history and the circumstances surrounding the contract are factors which can be used to determine the parties' intentions concerning the allocation of risk.[565] If parole evidence is not available, Childres' "status"[566] approach may be helpful. According to this thesis, if the bargaining powers of the parties are not equal in power or knowledge - for example, the weaker party was not able to protect himself with an excuse clause - the loss should be allocated in a way which will avoid the stronger party from taking advantage of this situation.

Carrol and Edwards[567] advocate the "commercial foresight test". Under this criterion, which is a modified objective test, the courts are allowed to consider some subjective factors. The test urges the court to consider all the circumstances of the contract to discover what a business man might have contemplated beyond the occurrence of the contingency. The question becomes whether or not the obligor should have contemplated the contingency in the light of the commercial circumstances of the contract. Of course, the courts must also see whether or not good faith has been exercised by the party seeking excuse. Finally, it must, of course, be decided whether or not the contingency rendered performance impracticable within the commercial setting of the contract. Here, the question is whether or not the contingency rendered performance impracticable, in the light of both the individual contract and the broader commercial circumstances of the transaction.

Brown has argued[568] that the court's initial inquiry should be whether the contingency was contemplated by the parties at the time of contracting. The court must try to determine whether the party seeking discharge was

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564. Coons, Approaches to Court Imposed Compromise - The Uses of Doubts and Reasons, 58 NW. U. L. Rev. 1964, 750.

565. Comments, *op. cit.*, at 1052.

566. According to this thesis, three categories of contracts with regard to the expertise and bargaining power of the parties can be classified as follows: 1. Formal contracts, contracts where the parties are equal in expertise and bargaining power; 2. Informal contracts, contracts between parties who have equal bargaining power, but without expertise; 3. Adhision contracts, contracts where the parties are not equal. See Childres and Spitz, Status in the Law of Contract, 47 N.Y.U. L. Rev. 1971, 1.

567. Note (Dan L. Caroll and Mark C. Edwards), Labor Strife and UCC Section 2-615: On Strike and You're out? U. C. Davis L. Rev. 1981, 669, at 684-686.

568. Charles G. Brown, The Doctrine of Impossibility of Performance and Foreseeability Test, 6 Loy. U. Chi. L. J. 1975, 575, at 585-593.

aware of the possibility of the event. This determination can be made from the terms of the transaction and the surrounding circumstances. Negotiations before the conclusion of the contract may reveal the parties' awareness. Consideration of the provisions in similar contract which the party seeking relief has entered will also be useful. The nature and source of the contingency and its remoteness to the subject matter, may be an indication of whether it was the type of risk of which a businessman would generally be aware. In the end, after deciding whether the contingency was foreseen, it must then be determined whether the promisor should be held to have assumed the risk. In this regard, the first stage is to attempt to discover the intentions of the parties. If their intentions can not be determined - because the parties have failed to express their intentions - the court should consider the following factors: the nature, purpose and the terms of the contract, the commercial sense of requiring performance, bargaining positions of the parties and the ability of the individual party to insure against the disabling event or to bear or distribute the loss. In the end, if the court still can not decide who should bear the risk, it should refer to the foreseeability test and its own sense of justice. For Brown foreseeability is neither the decisive factor nor totally irrelevant; it is to be considered together with other factors.

The present writer agrees with Brown's contention that the court's initial inquiry should be whether the party was actually aware of the contingency. But the remaining criteria can not be accepted. It is irrational to say that a party who has in fact foreseen the contingency, might not have assumed the risk of its occurrence. If the contingency is foreseen by the obligor, he can either refuse to contract or alternatively make express provision in the contract. If he does not do so, it follows that he has consciously entered into the contract on the basis that he has assumed the risk.

The present writer offers as a criterion of foresight the "concrete-abstract foresight test". This is a modified objective test. At first, a subjective criterion is used. If it is found that a promisor in fact foresaw the risk of the occurrence of the event, relief will be denied. Such a finding may be based on the promisor's express assumption of the risk, on circumstances surrounding the making of the contract, or on the presumption that certain risks normally are assumed by the promisor unless shifted by express contractual term. It is of course unlikely that it would always be possible directly, or even circumstantially, to demonstrate the actual intent of the contracting parties where the contract is silent. Accordingly, if after considering these subjective factors, the court can not discover whether the contingency was foreseen by

the obligor (concrete foresight), then it can use the objective foreseeability test, *i.e.*, the foresight of the reasonable man, the "bon pere de famille" of French law. This suggested test will be discussed in detail in the final chapter of this thesis.[569]

II. NO FAULT OF THE PARTY SEEKING RELIEF

The word "fault" is derived from the French word "faut", which originated from the Latin verb *fallere,* which expresses the notion of failing in some way.[570] In this context, the word "fault" has the same meaning as default. When a person fails to perform his promise or fails to perform it adequately, he is said to be in default.[571] In law the word has a wider meaning and includes negligence, an error or defect of conduct, any deviation from prudence, duty, or any shortcoming, or neglect of care or performance resulting from inattention, incapacity, or perversity; a wrong tendency, course or act; bad faith or mismanagement; neglect of duty.[572] In section 62 of the Sale of Goods Act 1893[573] "fault" means "wrongful act or default". In the Law Reform (Contributory Negligence) Act 1945, "fault" is defined as follows: "negligence, breach of statutory duty or other act or omission which gives rise to a liability in tort or would, apart from this Act, gives rise to the defence of contributory negligence."

In Civil law systems, "fault" is either an action with intent to cause damage or is an error of conduct that a reasonable man (bon pere de famille) would not have committed if placed in same situation as the author of damage.[574] The word covers both intentional *i.e.*, deliberate wrongdoing and negligence.[575] The first is the state of mind of a person who consciously and

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569. *Infra*, pp. 323 *et seq.*

570. F. H. Lawson, Sellected Essays, Vol. II, (North-Holland Pub. Co. Amestrad, New York - Oxford), 1977, at 348.

571. *Loc. cit.*

572. See *Continental Ins. Co. v. Sabine Towing Co., C.C.A.Tex.*, 117 F.2d 694, 697; UCC Sec. 1-201 (16) (Wrongful act, omission or breach).

573. See now section 61 of the Sale of Goods Act 1979.

574. Jean-Gabriel Castel, The Civil Law System of the Province of Quebec, Butterworth, 1962, at 402, 403.

575. G. H. Treitel, Remedies for Breach of Contract, a Comparative Account, Clarendon Press, Oxford, 1988, at 342; E. J. Cohn, Manual of German Law, vol. I, 1968, at 118; B. J. Markesinis, a Comparative Introduction to the German Law of Tort, Clarendon Press, Oxford, 1986, at 45; International Encyclopedia of Comparative Law, chapter I, vol. II (A General View of Contract), at 84. See also Para. 276 BGB which lays down that the debtor is always responsible for deliberate or careless misbehaviour.

willingly pursues a particular wrongful result,[576] while the latter is the conduct of a person who fails to observe the standard of ordinary care[577] (failure to use reasonable care).

Generally, excuse doctrines do not apply where the occurrence of the contingency is due to the fault of the party seeking relief.[578] Indeed, the essential condition before vitiating factors such as frustration of contract, *force majeure*, wegfall der geschaftsgrundlage, imprevision and impracticability, apply, is that the contingency is not attributable to the fault of the party. Each legal system has its own variations on this condition.

A. CIVIL LAW

Following Roman law, in Civil law systems contractual liability depends on fault.[579] In French law, *force majeure* does not exist whenever the party seeking relief is at fault. Indeed, absence of fault ("absence de faut" or "san la faut de debiteur") is a basic condition for release.[580] If there is personal responsibility, *i.e.*, negligence, the obligor is held liable for non-performance. No fault of the party seeking relief denotes that the event was beyond the obligor's control, exteriorite.[581] The doctrine of *force majeure* can not be invoked in a contract of personal services if the illness was caused by the obligor's conduct, for example, addiction to alcohol.[582] A strike does not constitute *force majeure* if workers go on strike for their justified demands;[583] but, a strike which is traceable to national labour unrest can be beyond the

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576. B. S. Markesinis, *op. cit.* See also German Civil Code Paras. 276, 280, 285.

577. *Loc. cit.*; BGB Para. 276.

578. See Para. 323 BGB; Art. 1148 French and Belgian Civil Code; Art. 1933(3) of Louisiana Civil Code; Art. 17(24) Civil Code of Quebec. See also Treitel, The Law of Contract, (1983), *op. cit.*, at 683-685; Restatement of Contract (First), Sec. 457; Restatement (Second), Secs. 261, 265.

579. See B. Nicholas, (1982), *op. cit.*, at 48; K. W. Ryan, An Introduction to the Civil Law, 1962, at 56; Lawson, *op. cit.*, at 359.

580. H. L. and Jean Mazeaud, Traite Theorique et Pratique de la Responsibilite Civil Delictuelle and Contractuelle, Tome II, sixieme ed. Montchrestien, 1970, p. 679, n. 1565; Jean Carbonier, Droit Civil, 4 Les Obligations, 1956, at 243; A. Colin and H. Capitan, Traite de Droit Civil, Tome II, 1959, p. 573, n. 851; H. L. and J. Mazeaud, Lecon de Driot Civil, cinquieme ed. p. 585, n. 575. See also Andre Tunc, *Force Majeure* et Absence de Faut en Matiere Contractuelle, 43 Revue Trimestrielle Civil, 1945, at 235 *et seq.* See also Arts. 1302/1, 1881, 1882 French Civil Code.

581. Tunc, *Force Majeure* et Absence de faut, *op. cit.*; Jean Carbonier, Les Obligations, 1985, at 291; Mazeard, Lecon de Droit, *op. cit.*

582. Mazeaud, (1970), *op. cit.*, at 712, n. 1588. See also Paris, 7 Jan. 1910, D. 1910. 2. 292 (Serious toothache requiring surgery was regarded as an excuse for a writer's failure to deliver the manuscript of a play on time).

583. C.A. Poitiers, 12 January 1903, D. P. 1903, 2, 389.

employer's control.[584] The requirement of no fault of the party seeking relief is illustrated in the following case.[585] A buyer bought a certain amount of rice from the seller. In order to guarantee the payment, the buyer agreed to furnish the seller with a confirmed letter of credit. However, the buyer did not succeed in obtaining authorisation from the committee of control of capital export which was necessary in order to open the credit. The buyer declared that this refusal frustrated performance. The seller instituted legal proceeding against the buyer for damages and interest. The court held that non-performance can only be excused as a result of a contingency in which the buyer played no part.

Thus *force majeure* excludes fault because the result can not be imputed to the promisor: but it is also correct to say that fault excludes *force majeure.*[586]

It should be noted that where damage arises because of *force majeure* and also the fault of the party, the legal solution is less clear cut. Some cases have allowed partial release of the obligor. For example, in the ***Affaire Lamoriciere***,[587] natural contingencies and the fault of the defendant had both contributed to the accident. The court held that the defendant's liability fell to be reduced proportionately to his share of responsibility for the accident. In another case,[588] a contrary decision was reached. In this case, some goods were taken in a railway station by the enemy but the goods were only at the station because of delay on the part of the railway company. In these circumstances, the company was refused release: it was the company's fault which smoothed the path for robbery.

It must be acknowledged that today the second approach seems to be accepted in French law, *i.e.*, the obligor will not be excused if the non-performance is due to his fault as well as *force majeure.*[589]

Under Article 1147 of the Civil Code, the obligor is liable for non-performance or delay in performing his contractual obligation unless he shows

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584. Alex Weill, Obligations, (1980), at 460.

585. *Freres Kahn v. Societe Frnaco-Belge D'extreme-Orient*, Cass. req., January 4, 1927, Gaz. Pal. 1927. I. 587.

586. Jean Carbonier, (1956), *op. cit.*, at 243.

587. Civ. Sec. Com.(or Cass Com.) 19. 6. 1951, D. 1951, 717; Cass Civ. 10 March 1948, Bull. 1948, n. 83, p. 254. See also Amos and Walton's Introduction to French Law, 3rd ed. (by F. H. Lawson, A. E. Anton and L. Neville Brown), Oxford, 1967, at 186.

588. J. Carbonier, (1959), *op. cit.*, at 244.

589. H. L. & J. Mazeaud, (1970), *op. cit.*, at 734 *et seq.*, n. 1611 et *seq.*

that non-performance was caused by an external cause which can not be imputed to him. As we have seen, implicit in this Article is the idea of fault. Consequently, French jurisprudence has identified two essential characters for *force majeure*: unforeseeability and irresistibility.[590] Another important point is that the obligor must negative fault by proving that non-performance is attributable to a cause which was unforeseeable, irresistible and out of his control.[591] It should be noted that we are concerned both with "obligation de resultat" (obligation of result) and "obligation de monyens" (obligation of means).[592] In an obligation de resultat the obligor has to prove the cause etrangere. But in an obligation de moyens the obligor does not have to prove the externality of the event.[593] His failure to take care is the basis of a claim for non-performance. But since he need only exercise the diligence of a bon pere de famille; the burden of proof lies on the obligee to show that such diligence has not been exercised and that the event which has made performance impossible would not have arisen if such care had been taken, *i.e.*, that the obligor was at fault. In an obligation de resultat, the creditor has only to show that the contract has not been performed and it is then for the obligor to prove a cause etrangere.[594]

German law also bases liability on the principle of fault (verschldensprinzp) or responsibility.[595] A party will be liable for all intentional and negligent acts.[596] Thus supervening impossibility is considered to be a

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590. Mazeaud, Lecon de Droit, (cinquieme ed.), *op. cit.*,at 584, n. 575.

591. Boris Stark, Droit Civil, Obligations, Librairies technique, 1972, at 616, n. 2081. See also Henry Depage, Traite Elementaire de Droit Civil Belge, Tome 2 (3eme ed. Bruxelle), 1964, at 602.

592. In French law, two types of contract are identified. In one (obligation de moyens), the obligor is obliged to do no more than exercise the care of bon pere de famille (reasonable care). His obligation is to take the measures which a reasonable man would take to achieve the purpose of the contract. Indeed, in this type of contract, the promisor agrees to use his best efforts or to act as a prudent administrator. Contractual fault is the failure to comply with the standard of bon pere de famille. In the second type of contract (obligation de resultat), the promisor's obligation is not just to exercise due diligence, but to achieve the result which he has promised. In this type of contract, non-performance may be excused only by supervening impossibility. (See Barry Nicholas, French Law of Contract, (1982), *op. cit.*, at 49).

593. Boris Stark, *op. cit.*, at 617, n. 2082.

594. See B. Nicholas, *op. cit.*, at 48 *et seq.*

595. E. J. Cohn, Frustration of Contract in German Law, *op. cit.*, at 15; Kojo Yelpaala, Mauro Rubino-Sammartano and Denis Compbell, Drafting and Enforcing Contracts in Civil and Common Law Jurisprudence, Kluwer, 1973, at 98.

596. G. H. Treitel, Remedies for Breach of Contract, a Comparative Account, *op. cit.*, at 342; E. J. Cohn, Manual of German Law, *op. cit.*, at 118; B. J. Markesinis, *op. cit.*, at 45. See also J. Barrigan Marcantanio, Unifying the Law of Impossibility, 8 Hasting Int'l. and Comp. L. Rev. 1984, 41, at 53.

breach of contract rendering the obligor liable in damages if he is responsible for it.[597] In that case, the other party can not claim specific performance, but other remedies such as damages and termination of the contract are available.[598] According to German law, where the contingency is beyond the obligor's control, it is said that he is not at fault.[599] For example, a seller is discharged from his liability where the impossibility of delivering the goods was not caused by his fault.[600] However, where generic goods are promised to be delivered, according to paragraph 279 of the BGB, there will be no relief if the goods are unavailable anywhere in the world, notwithstanding the lack of *culpa* of the obligor.[601] This is, of course, an example of strict liability.

Apart from BGB paragraph 275 which relieves a debtor from his obligation if performance becomes impossible due to circumstances for which he is not responsible, there are three other situations where impossibility is relevant.[602] First, the impossibility may be in consequence of a circumstance for which neither party is responsible; in that case, BGB paragraph 323 provides that both parties are discharged and according to the rule of unjust enrichment any performance already rendered must be restored. In the second, if the creditor is responsible for the impossibility, the debtor is relieved and retains the right to demand the counter performance (BGB paragraph 324). In the third, if the debtor is responsible for the impossibility, the creditor has the right to choose between a claim for damages or termination of the contract (BGB paragraph 325).

As discussed above, the debtor is only responsible for circumstances caused by his wilful default or negligence. However, in case of a dispute, like French law in obligations de resultat, the burden of proving that the impossibility is not due to his fault rests upon the debtor.[603]

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597. See BGB Paras. 276 *et seq.* and Para. 323.

598. Treitel, *op. cit.*, at 36.

599. See Horn, Kotz ans Leser, German Private and Commercial Law: An Introduction, *op. cit.*, at 93 *et seq.*

600. Konard Zweigert, Aspects of German Law of Sale, Int'l. and Comp. L. Q. (Special publication, No. 9, symposium on some comparative aspects of the law relating to the sale of goods), 1964, at 6.

601. *Loc. cit.* See also Ernest J. Schuster, The Principle of German Civil Law, Oxford, 1907, at 168.

602. G. H. Treitel, *op. cit.*, at 341-342; Aubrey, *op. cit.*, at 1177; E. J. Cohn, (1968), *op. cit.*, at 121; K. Zweigert and H. Kotz, *op. cit.*, at 162 *et seq.*

603. BGB Para. 282. See also Ernest J. Schuster, *op. cit.*, at 168; E. J. Cohn, (1968), *op. cit.*, at 120; K. Zweigert and H. Kotz, *op. cit.*, at 162.

B. ANGLO-AMERICAN LAW

While Civil law systems base contractual liability on fault, in Anglo-American law, generally, there is no place for fault in contractual liability. In the Common law contractual obligations have been traditionally thought to be absolute. Where the Civil law expresses the issue in terms of rules, the Common law resorts to the construction of the contract.[604] While in French law, a contracting party is liable for fault, his English counterpart is usually liable for breach of an implied term to use due care.[605] When a contract is not performed, a French court will ask the basic question: Is non-performance due to the obligor's fault? At Common law, the court will construe the contract and ask whether the contract can be performed; if not, the court will then ask whether there is a legal excuse for non-performance.[606]

Nonetheless, under both English[607] and Scots[608] laws, the frustrating event must arise without the fault of the party seeking relief (or the fault of those for whom he is responsible). It is a basic condition that the frustrating event must not arise from the act or election of the party. For example, if a foreign government enters into a contract of sale, then imposes prohibition, the government can not rely on the prohibition as a ground of excuse.[609] A

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[604]. *E.g.*, in *Taylor v. Caldwell* (1863) 3 B. & S. 826, despite the parties' failure to insert an appropriate term in their contract, they were discharged from liability on the basis of presumed intention. While in French law, *force majeure* has nothing to do with intention and its rational is absence of fault.

[605]. B. Nicholas, French Law of Contract, *op. cit.*, at 30, 31, 48, 49; Lawson, *op. cit.*, at 359; G. H. Treitel, (1988), *op. cit.*, at 346.

[606]. See Joseph Dainow, Essays on Civil Law of Obligations, Louisiana State University Press, 1969, at 152.

[607]. See *Maritime National Fish Ltd. v. Ocean Trawlers* [1935] A.C. 524 (Approved by H.L. in *Joseph Constantin SS. Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154.); *Denmark Productions Ltd. v. Boscobel Productions Ltd.* [1969] 1 Q.B. 699, at 725, 736, 737, [1968] 3 All E.R. 513, at 523, 533, C.A.; *Bank Line Ltd. v. Acapel and Co.* [1919] A.C. 435, 452: "Reliance can not be placed on self-induced frustration." (*per* Lord Summer); *Ocean Tramp Tankers Corp. v. V/O Sovfracht* (The *Eugenia*) [1946] 2 Q.B. 226, 237; *National Carriers Ltd. v.Panaplina (Northern) Ltd.* [1981] A.C. 675, 700; *Metrens v. Home Freeholds Co. Ltd.* [1921] 2 K.B. 526, at 535. See also Section 7 of the Sale of Goods Act.

[608]. See *Duncan v. Arbroath* (1668) Mor. 10075; founded on in *Jacksons (Edinburgh) Ltd. v. Contractors John Brown Ltd.*, 1965 S.L.T. 37; *James B. Fraser and Co. Ltd. v. Denny, Mott and Dickson Ltd.* , 1944 S.C. (H.L.) 35, at 41; *Cantiere San Rocco v. Clyde Shipbuilding ans Engineering Co.*, 1923, S.C. (H.L.) 105, at 111.

[609]. *Prodexport v. E. D. and F. Man Ltd.* [1973] 1 All E.R. 355. *Cf. Rolimpex* case, [1979] A.C. 351; [1978] 1 All E.R. 81 (In this case, Rolimpex was treated separately from the Polish government of Poland, therefore, was not prevented relying on the prohibition as a ground of frustration event.) (For detailed discussion of this case, see final chapter, pp. 338-341).

party who intentionally induces illness in order to escape from an engagement, can not rely on the illness as a ground for frustration.[610]

The leading case on this point is ***Maritime National Fish Ltd. v. Ocean Trawlers.***[611] The appellants chartered a trawler from the respondents. The trawler was fitted with an otter trawl. Both parties knew at the time of contracting that it was illegal to use a trawl without a license from the Minister of Fisheries. The appellants were operating four otter trawlers besides the respondents' trawler. However, in reply to their application for five licences, they were informed that only three licenses would be granted and were required to choose three trawlers. The appellants named three trawlers other than the respondents. They later claimed that they were not bound by the charterparty as it had been frustrated by the Minister's refusal of a license. The Judicial Committee of the Privy Council held that the charterparty was not frustrated, since the charterers were at fault, *i.e.*, they had by their own election prevented the trawler in question from being used as an otter trawler.

This decision[612] should, perhaps, have been distinguished from the later case of ***J. Lauritzen AS v. Wijsmuller BV (The "Super Servant Two").***[613] The defendants agreed to transport the plaintiff's drilling-rig from a Japanese shipyard to a location off Rotterdam, using, at their option, their Super Servant one (SS1) or Super Servant two (SS2) (both of which were adapted for this type of duty). The defendants also entered into contracts with other persons which required the use of SS1. They therefore allocated SS2 to the performance of the contract with plaintiffs. However, before the time of performance, SS2 sank. The plaintiffs were not able to carry out the contract by using SS1, because it had been allocated elsewhere and was unavailable. The defendants claimed frustration. The court rejected the claim, holding that the fact that the defendants had a choice as to the allocation of SS1 was sufficient to break the chain of causation and make this a case of self-induced frustration.

These two above mentioned cases emphasise the election of the defendants as proof of self-induced frustration. However, some important facts should be taken into account. In the ***Maritime National Fish*** case,[614] two of the three

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610. G.H. Treitel, Remedies for Breach of Contract, *op. cit.*, at 35.

611. [1935] A.C. 524. (Approved by H.L. in *Joseph Constantine SS. Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154).

612. *Maritime National Fish Ltd. v. Ocean Trawlers* [1935] A.C. 524.

613. [1990] 1 Lloyd's Rep. 1.

trawlers to which the licences were applied were owned by the defendants. Besides, before the conclusion of the contract the parties knew that only three licences would be granted. They had therefore a true option to decide which trawler should be allocated a licence. In ***J. Lauritzen AS v. Wijsmuller BV.***,[615] on the other hand, at the time the SS2 sank, the defendants had no other option as to the allocation of SS1. If they had employed the remaining vessel for that specific contract, then the other users could have claimed breach of contract. It was simply not possible to allocate a ship to carry out all the concluded contracts. Accordingly, it is submitted that ***Maritime National Fish*** could have been distinguished and the court should have found the contract frustrated. This case shows how even modern courts are reluctant to use the doctrine of frustration except in exceptional cases, whereas the commercial world of today needs more flexibility in transactions, especially at international level. That is why this thesis emphasises that the parties to such contracts, instead of relying on general principles of domestic laws, should insert a *force majeure* clause or any other appropriate clauses in their contracts expressly to regulate the effects of contingencies arising.

It should be added that in English law, if a breach or an act of a party is one of the factors among others which causes the frustrating event, the application of the doctrine of frustration is precluded. ***The Eugenia***[616] provides an illustration. In this case, a charterer, who was in breach of a contractual clause forbidding him from bringing a ship into a war zone without the owner's consent, could not rely on the doctrine when the ship was trapped in the war zone: his breach of contract had caused the frustrating event.

The English law therefore differ from those French cases in which *force majeure* could be relied on even though the obligor was partially at fault.[617]

If an employee is imprisoned for a criminal offence, what will happen to his contract of employment? There are some cases which support the idea that the contract is frustrated.[618] However, as Treitel rightly points out that this solution is contrary to the principle that frustration must not be self-induced;

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614. [1935] A.C. 524.

615. [1990] 1 Lloyd's Rep. 1.

616. [1964] 2 Q.B. 226. See also *Monarch SS. Co. v. A/B Karlshamns Oljefabriker* [1949] A.C. 196; *Cf.* The Sky [1981] 2 Lloyd's Rep. 95, 98. (In this case, the position is different where the breach has no casual connection with the frustrating event).
However, the solution is the same where the frustration results from the breach of both parties. See *Hannah Blumenthal* [1983] 1 All E.R. 34.

617. *Supra*, at 130, note 587.

618. *Hare v. Murphy Bros.* [1974] I.C.R. 603; *Harrington v. Kent C. C.* [1980] I. R. L. R. 353.

the better solution is that such an event does not frustrate the contract and gives the employer the right lawfully to terminate the contract.[619]

What kind of act or omission by the party seeking excuse will disentitle him to invoke frustration? There is no doubt that there is no frustration where the event has been brought about by a deliberate act.[620] The problem is that it is not yet sufficiently clear what degree of fault will suffice.[621] In particular, it is not clear whether negligence will constitute fault. The problem was discussed by the House of Lords in ***Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.***[622] In this case, there had been an explosion on board a vessel which had been chartered to carry a cargo from Australia to Europe (the cause of explosion was never ascertained). The explosion caused such extensive damage to the ship which *prima facie* frustrated the contract. The respondents alleged that the appellants had first to establish that the explosion occurred without their fault before they could rely on the doctrine of frustration and avoid liability for breach of contract. The House of Lords held that the sole question was one of burden of proof. Their unanimous decision was that the burden of proving that the event which causes frustration was due to the act or default of a party, lies on the party alleging it to be so. Since the respondents had failed to satisfy the court on this point, the contract was discharged.

In this case the House did not decide whether mere negligence of the party would suffice.[623] However, there are *dicta*[624] indicating that frustration may still be invoked where frustration is caused by negligence. Nevertheless, there exists contrary views which suggest that generally a negligent act will exclude the doctrine.[625]

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619. Treitel, The Law of Contract, *op. cit.*, at 682. See also *Norris v. Southampton C. C.* [1982] I. C. R. 177.

620. See *Maritime National Fishs v. Ocean Trawler* [1935] A.C. 524. In *Taylor v. Caldwell* (1863) 3 B. & S. 826, Lord Sterndale M.R. observed: "I do not think any authority has gone so far as to decide that if the defendant had burned down the music hall himself, he would have been entitled to say the subject matter was gone and the contract was frustrated.".

621. See *Paal Wilson and Co. A/S v. Partenreederei Hannah Blumenthal* [1983] 1 A.C. 854, at 909.

622. [1942] A.C. 154; [1941] 2 All E.R. 165.

623. However, in a Scottish case a contract was held to be frustrated although the cause of frustration was due to the negligence of the party founding on it. (*London and Edinburgh Shipping Co. v. The Admiralty*, 1920, S.C. 309).

624. See *Joseph Constantine Steamship Line, Ltd. v. Imperial Smelting Corporation, Ltd.* [1942] A.C. 154. See at p. 166 (Viscount Simon L.C.); at p. 179 (Lord Russel); at p. 195 (Lord Wright); at p. 205 (Lord Porter).

There is therefore no clear authority in English law on the scope of fault for this purpose of the doctrine of frustration.[626] Because of the state of the authorities, McBryde takes the view that reference to the concept of fault is misleading. Instead, he emphasises the "beyond the control" test which he believes gives a more accurate picture of the circumstances in which frustration arises.[627]

"The frustrating event is something altogether outside the control of the parties - a war, a famine, a flood or some event of that sort - so that if the parties had thought to provide for it they would at once have agreed that on its happening the contract comes to an end."[628]

Fault differs from the "beyond the control" test. Fault in a wide sense includes intentional and negligent acts, whereas the "beyond the control" criterion is a standard applying irrespective of intention or negligence. For example, if the performance of the contract is prevented by a strike of the employees of one of the contracting party whether or not frustration could operate might depend on whether the "fault" or the "beyond the control" test was used. A strike may not be caused by the "fault" of anyone, but it could be within the control of the employer to end the strike. However, the certainty of the "beyond the control" test must not be overestimated. It is not always within the control of employers to end strikes. However, the test is undoubtedly useful. The present writer therefore suggests as one of the preconditions of excusable non-performance is that the event must be "beyond the control and not caused by the fault of the party seeking relief".[629]

From a comparative point of view, we can conclude here that while the French concept of *force majeure* excludes negligence, in English law it is not authoritatively settled whether frustration is excluded by a party's negligent act. In French law, the obligor who claims to be released must himself prove *force majeure*, whereas in English law, the burden of proof does not rest on party claiming frustration but the party who denies it.[630] However, the English

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625. See Treitel, *op. cit.*, at 683; P. S. Atiyah, An Introduction to the Law of Contract, 3rd ed. oxford, Clarendon press, 1981, at 206; Christine Mogride, Frustration, Employment Contracts and Statutory Rights, New L. J. 1982, 795, at 796-797.

626. See Ewan McKendrick, Frustration and *Force Majeure* - Their Relationship and a Comparative Assessment (in *Force Majeure* and Frustration of Contract, Edited By Mckendrick), *op. cit.*, at 45; J. P. Swanton, The Concept of Self-induced Frustration, 2 Journal of Contract Law, 1990, 206, at 216-217.

627. W. W. McBryde, The Law of Contract in Scotland, Edinburgh, 1987, at 354.

628. *Denmark Productions Ltd. v. Boscobel Productions Ltd.* [1969] 1 Q.B. 699, at 736 (*per* Harman L. J.).

629. See *Infra*, pp. 319 *et seq.*

rule is open to objection, for example, in the ***Joseph Constantine*** case, the charterer is much less likely than the owners to be able to prove how the explosion occurred.[631]

Under American common law[632] and the Uniform Commercial Code, a party can not rely on the doctrine of excuse where the supervening event is caused by his own fault. Unlike sections 2-613 and 2-614 UCC which start with expressions of the requirement that neither party be at fault, the text of section 2-615 is totally silent on the fault issue. However, implicit in section 2-615(a),[633] comment 5[634] to the section, opinions of legal writers[635] and explicit in the language of cases,[636] it is now beyond challenge that fault is a basic element of section 2-615. The issue of fault is well illustrated in the leading case, ***Canadian Industrial Alcohol Co. v. Dunbar Molasses Co***.[637] The defendant, a middle man, agreed to sell to the plaintiff approximately 1,500,000 gallons of molasses from certain refinery. Because the output of the refinery fell below its capacity, the defendant was only able to deliver just 344,083 gallons. The plaintiff brought a suit for damages. The defendant pleaded the defence of impossibility as a result of the reduced production at the refinery. The court did not accept the defendant's defence, since he had not even bothered to obtain a contract from the refinery to meet his obligations

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630. *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154, 179, [1941] 2 All E.R. 165, H.L. (If for example a party of contract proves contingency which *prima facie* would frustrate contract the burden of proving that frustration was self-induced lies upon the other party).

631. See Treitel, *op. cit.*, at 684.

632. Restatemet (First) of Contracts, Sec. 459; Restatement (Second) of Contrats, Sec. 261; Williston on Contracts, Sec. 1950; 6 A. Corbin, Contracts, Sec. 1329 (1962).

633. See James J. White and Robert S. Summers, Uniform Commercial Code, 2d ed. 1980, at 128.

634. "There is no excuse under this section, however, unless the seller has employed all due measures to assure himself that his source will not fail".

635. For example see, E. Allan Farnsworth, *op. cit.*, at 678, note 8; Brian S. Conneely and Edmond P. Murphy, Section 2-615 of the UCC: Partial Solutions to the Problems of Excuse, 5 Hofstra L. Rev. 1976, 167, at 181; Comment (Henry Chajet), Contractual Excuse Based on a Failure of Presupposed Conditions, 14 Duq. L. Rev. 1976, 235, at 244; Fredric D. Tannenbaum, Commercial Impracticability Under the UCC: Natural Gas Distributors' Vihicle for Excusing Long-Term Requirements Contracts, 20 Hous. L. Rev. 1983, 771, at 796; George Wallach, The Excuse Defense in the Law of Contracts: Judicial Frustration of the UCC Attempt to Leberalize the law of Commercial Impracticability, 55 Notre Dame Lawyer, 1979, 293.

636. For example see *Iowa Electric Light and Power Co. v. Atlas Corp.* 467 F.Supp. 129 (N.D.Iowa, 1978) (In this case, the court stated: "There is no doubt that many of those costs were not foreseen or considered likely to occur or to be substantial. But Atlas has failed to bear its burden on the counter claim to prove whcih and how much of the increases were reasonably unforeseen and not, in part, a function of its own actions.", *op. cit.*, at 132-133).

637. 258 N.Y. 194, 179 N.E. 383 (1932).

to the plaintiff. Indeed, the defendant was guilty of contributory fault in failing to do so.

It should be noted that fault can take many forms. In ***Jennie-o Foods***,[638] the fault consisted in a supplier's failure to seek alternative sources of supply. In ***Gulf Oil Corp. v. Federal Power Commission***,[639] the fault involved Gulf's overestimate of natural gas reserves that were in a natural gas field.

In American law, like German and French laws, but contrary to English law where the issue is not settled, fault includes negligence and is not restricted to wilful misconduct.[640] Contributory fault includes any type of action or inaction or voluntary acts or omissions which disable the seller from performing the contract.[641] Thus, a court will not discharge a seller who is unable to deliver the goods because they have been destroyed due to his negligence.[642] This principle also prevents the promisor from relying on the doctrine of excuse where he has wilfully disabled himself in order not to render personal services that he has promised.[643] It should also be added that the wilful commission of a crime by the obligor which leads to his imprisonment will prevent him relying on doctrine of excuse in a contract requiring him to render personal services.[644] Contributory fault can take other forms. For example, in ***Washington Manufacturing Co. v. Midland Lumber Co.***,[645] the defendant who had failed to supply a specified quantity of lumber, claimed excuse of performance. The court said that the seller had failed to

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638. *Jennie-o Foods Inc. v. United States*, 580 F.2d 400 (Ct.Cl. 1978).

639. 563 F.2d 588 (3d Cir. 1977). See also *Lowenschuss v. Kane*, 520 F.2d 255 (2d Cir. 1975); *Nealcooper Grain Co. v. Texas Gulf Sulphur Co.*, 508 F.2d 283 (7th Cir. 1974); *City of Albertville, Ala. v. United States Fidelity & Guar. Co.*, 272 F.2d 594 (5th Cir. 1960); *Chemerton Corp. v. McLouth Steel Corp.*, 381 F.Supp. 245 (N.D.Ill. 1974); *Heat Exchangers, Inc. v. Map. Constr. Corp.*, 3 Md.App. 679, 368 A.2d 1088 (1977).

640. The Restatement (Second) has a broad definition of fault to include not only wilful wrong but such other types of conduct as that amounting to breach of contract or to negligence (See Sec. 261, Comment d); UCC, Sec. 2-613 and comment 1 ("Fault is intended to include negligence and not only merely wilful wrong").

641. Comment, (by Henry Chajet), *op. cit.*, at 244. See also *United Societies Committee v. Madison Square Gardens Corp.* 59 N.Y.S.2d 475 (1946); McNally v. Moser 122 A.2d 555 (1956).

642. Farnsworth, *op. cit.*, at 684. See also *Blount-Midyette and Co. v. Aeroglide Corp.* 254 N.C. 484, 119 S.E.2d 225 (1961).

643. Farnsworth, *op. cit.*; Restatement (First) of Contracts, Sec. 495; Williston on Contracts, *op. cit.*, Sec. 1959.

644. Treitel, Remedies for Breach of Contract, a Comparative Account, *op. cit.*, at 35.

645. 113 Wash. 593, 194 P. 777 (1921).

employ "diligence and good faith in endeavouring to obtain . . . a release . . . from the lumber embargo".[646] This could have been done by simply applying for a release. The seller's inaction *i.e.*, his failure to act in a commercially reasonable manner by applying for release amounted to contributory fault of the part of the seller which prevented him from relying on doctrine of excuse. That is why comment 5 emphasises that a seller must apply "all due measures to assure himself that his source will not fail."

An important point must be added. Under American law - like French law and German law - the burden of proof rests on the party relying on the doctrine of excuse. Thus, in ***Iowa Blount-Midyette and Co. v. Aeroglide Corp.,***[647] a contractor who had exclusive control of grain elevator which he was repairing, had the burden of showing that the fire was not his fault before he could rely on the doctrine. In another case,[648] the Supreme Court held that: ". . . It was incumbent upon the defendant (seller) to prove the damage occurred without his fault if he wished to have the benefit of the damage limitation provision in section 2-613 of UCC."[649]

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646. *Loc. cit.*, at 596, 194 P. at 778.

647. 254 N.C. 484, 119 S.E.2d 22d (1961). See also *Iowa Electric Light and Power Co. v. Atlas Corp.* 464 F.Supp. 129 (N.D.Iowa 1978).

648. *Carlson v. Nelson*, 285 N.W.2d 505 (Neb. 1979).

649. *Loc. cit.*, at 510.

PART TWO - THE EFFECTS OF EXCUSABLE NON-PERFORMANCE

It remains to be seen what are the consequences for the parties when the performance of contract has been excused. What are the parties' positions, their rights, their duties, and in particular what is the solution when the contract has only been temporarily or partially frustrated *i.e.* when there has been part performance. Courts faced with an excuse claim, may respond in variety of ways to these problems. The court could *inter alia*:

(a) Enforce the contract through an order of specific performance or award full contractual damages;

(b) Discharge the party seeking relief and award no damages;

(c) Grant relief coupled with restitution or adjustment of parties' relations;

(d) Suspend the performance of the contract;

(e) Try to induce a settlement by encouraging the parties to re-negotiate the terms of their own agreement;

(f) Reformulate the contract to allow performance to continue in a modified manner.

Traditionally, the courts of different legal systems under discussion usually solve the problem in one of two ways *viz.*, enforce the original contract or discharge the burdened party. The reasoning behind this all-or-nothing approach is that since there is no fault on either side, the loss must lie where it falls.

Once a contract is discharged by reason of frustration, an important question is the extent to which the court is empowered to adjust the parties' relations. In this respect, other questions need to be answered. The problem is how the courts should deal with the losses suffered by the parties. There are basically four kinds of losses which need to be considered. First, expectation interests, which include loss of profit claims; second, reliance interest, or direct and indirect expenditures incurred in performance of the contract; third, the value of the subject matter of the contract which has been destroyed; and fourth, advance payments.

The last approach, reformation of the contract by court, has enjoyed little judicial acceptance. In this respect, the following questions should be answered: -

(a) What would be the likely effect of judicial power to rewrite contract terms upon the reliability and utility of the law of contract?

(b) When and how can a judge reconcile the divergent interests of the parties and devise terms to govern their future relations?

(c) Why is a judge in a better position to revise the contract than the parties themselves?

(c) From what source does a judge derive the power to rewrite a new contract?

These problems are, of course, answered in different ways in different legal systems. In order to study and analyse the issues in detail, the Common law and Civil law approaches will be analysed, compared and criticised. In addition, a clear distinction will be drawn between "total" and "partial" frustration, since they appear to be governed by two completely different sets of rules.

CHAPTER FOUR
EFFECTS OF TOTAL EXCUSABLE NON-PERFORMANCE
A. COMMON LAW
1. ENGLAND

In English and Scots law, the effects of frustration are as follows:[1]

1. Frustration terminates the contract from the date of the frustrating event; thus, performance of a frustrated contract is excused as to the future. In other words, the contract is not rendered void *ab initio*, but is avoided *de futuro* from the date when frustration occurs.

2. Frustration is automatic irrespective of the parties' choice, election or wishes. A frustrating event does not require notice of cancellation to terminate the contract.

The principle in English law that frustration is automatic has raised problems with respect to arbitration clauses. In ***Hirji Mulji v. Cheong Yue***,[2] the Privy Council held that as frustration terminated the contract, the arbitration clause could not be invoked to resolve the parties' differences. This decision is not acceptable. The effect of frustration is merely to excuse performance of the contract in the future,[3] and therefore an arbitration clause remains valid to determine disputes between the parties. Secondly, such a result negates the very purpose of arbitration which is to avoid judicial

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[1]. The *Joseph Constantine* case [1942] A.C. 154 at 187; *Fibrosa case*, [1943] A.C. 32 at 50, 70; *Fraser and Co. Ltd. v. Denny, Mott and Dickson Ltd*; 1944 S.C. (H.L.) 35 at p. 41; *Hirji Mulji v. Cheong Yue SS Co. Ltd.* [1926] A.C. 497; *Denny, Mott and Dickson v. James B. Fraser* [1944] A.C. 265; *National carriers Ltd. v. Panalpina (Northern) Ltd.* [1981] A.C. 675, 712; *Heyman v. Darwins Ltd.* [1942] A.C. 356, at 365, [1942] 1All E.R. 337 at 343, H.L., *obiter per* Viscount Simon L.C.; *Blakely v. Muller and Co.* [1903] 2 K.B. 760n; *Chandler v. Webster* [1904] 1 K.B. 493, C.A.

[2]. *Supra* note 1.

[3]. See also *Heyman v. Darwins* [1942]A.C. 365 at p. 400 *per* Lord Porter.

proceeding. That is probably why, it is now accepted that an arbitration clause may remain in force to solve matters up to the date of frustration or the issues arising from effects of frustration.[4]

The "automatic frustration" rule can be the source of other problems. For example, it does not work for temporary frustration. Indeed, if the contingency is only temporary - for example, in the case of a servant who falls ill - it may excuse delay but may not relieve the party's performance in the future.[5] Moreover, it is often a difficult question to decide whether a transaction has been frustrated by a contingency which causes delay in performing the contract. In ***Pioneer Shipping Ltd. v. B. T. P. Tioxide Ltd. (The Nema)***,[6] Lord Roskill said:

"it is often necessary to wait upon events in order to see whether the delay already suffered and the prospects of further delay from that cause, will make any ultimate performance of the relevant contractual obligations radically different . . . from that which was undertaken by the contract. But, as has often been said, businessmen must not be required to await events too long. They are entitled to know where they stand. Whether or not the delay is such as to bring about frustration must be a question to be determined by an informed judgment based upon all the evidence of what has occurred and what is likely thereafter to occur. . . ".[7]

Therefore does "automatic frustration" apply in cases of frustrating delay? Another problem which arises is that it prevents the parties from solving their problems through negotiation and arbitration. That is also illustrated by ***Hirji Mulji v. Cheong Yue SS Co.***,[8] where, as we have seen, the Privy Council wrongly held that since the contract was frustrated, the arbitration clause had come to an end.

1.1. EFFECTS OF FRUSTRATION OF CONTRACT PRIOR TO THE 1943 ACT

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4. *Heyman v. Darwins Ltd.* [1942] A. c. 356, [1942] 1All E. R. 337,H.L.; *Kruse v. Questier and Co. Ltd.* [1953] 1Q. B. 669, [1953] 1All E.R. 954; *Government of Gilbraltar v. Kenney* [1956] 2Q.B. 410; *Pioneer Shipping Ltd. v. B. T. P. Tioxide Ltd.* [1983] A. C. 724 at 742-44, 752-54; *Scott and Sons Ltd. v. Del Sel*, 1923 S. C.(H.L.) 37.

5. See *e. g., Marshal v. Harland and Wolf Ltd.* [1972] 1 W.L.R. 899 (Contract for employment). Thus temporary illness on the part of an employer will not necessarily discharge a contract of employment although it temporarily excuses the employee's nonperformance. See *Storey v. Fulham Steelworks co.* (1907) 24 T.L.R. 89, C.A.

6. [1982] A.C. 724, 752.

7. See also *Anglo-Northern Trading Ltd., v. Jones* [1917] 2 K. B. 78,85; *Denny Mott and Dickson v. Fraser* [1944] A.C. 265, 278. One must wait a reasonable time to see likely results: The *Wenjiang* (N0.2) [1983] 1 Lloyd's Rep. 400.

8. *Supra* note 1.

In English law, the consequence of frustration was that the "loss lay where it fell". The leading case was ***Chandler v. Webster***,[9] in which it was held that the plaintiff not only was not entitled to recover down payments made before frustration, but also was still bound to pay an additional sum which he had contracted to pay before the frustrating event occurred. The result would have been less harsh had the rule of ***Paradine v. Jane***[10] been applied. The plaintiff would at least have been entitled to the value of the defendant's performance, whatever that might have been construed to be. This rule seems to have been a unique development of English law. It does not appear in the Civil law.[11] Scots law rejected the rule which was only considered workable "among tricksters, gamblers and thieves".[12] Accordingly, down payment under Scots law was recoverable on the basis of *condictio causa data causa non secuta*.[13] The rule in ***Chandler*** case[14] has been generally rejected in the United States,[15] although the approach has been reflected in a few scattered decisions.[16]

The harshness and hardship caused by this principle was recognised by the House of Lords in ***Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd.***[17] In this case, the House overruled ***Chandler***[18] and allowed a buyer to recover a pre-payment from his seller on the basis of a total failure of consideration. The ***Fibrosa*** case was the first step towards developing adjustment rules but the solution remained open to criticism. Because money could only be recovered where the failure of consideration was total. This was considered to be an imperfect solution in that there could be no recovery if the consideration had only partially failed. Moreover, only money could be recovered. Some of the Law Lords recognised the

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9. [1904] 1 K.B. 493; See also *Appleby v. Myers* [1926] A.C. 497 at p. 505.

10. (1646) aleyn 26; 82 Eng. Rep. 898 (K.B. 1647).

11. The Roman Antecedents of the Civil law were thoroughly discussed in the *Cantiere* case, below.

12. *Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co. Ltd.* [1924] A.C. 226 at p. 259.

13. *Watson v. Shankland* (1872) 10 M. 142; (1873) 11M. (H.L.) 51; *Davis and Primose v. Clyde Shipping Co.*, 1917, 1 S.L.T. 297. *Cantiere San Rocco v. Clyde Shipping Co.*, 1923 S. C. (H.L.) 105.

14. [1904] 1 K.B. 493.

15. See 6 Williston on Contracts, Sec. 1972 (1938); Restatement (First) of Contracts, Sec. 468.

16. See, *e. g.*, *Pabst Brewing Co. v. Howard*, (Mo.App. 1919) 211 S.W. 720; *Cowley v. N.P.R. Co.*, 68 Wash. 558, 123 P. 998 (1912); *Seigel, Cooper and Co. v. Eaton & Prince Co.*, 165 ill. 550, 40 N.E. 449 (1897), *dictum*.

17. [1943] A.C. 32.

18. [1904] 1 K.B. 493.

harshness of the rule.[19] They indicated that legislation was appropriate to make provisions for apportioning loss.[20]

In response, Parliament acted swiftly by passing the Law Reform (Frustrated Contracts) Act 1943.[21] The Act made important changes in the common law relating to the consequences of frustration. It extended the scope of the ***Fibrosa*** case[22] by covering the situation where a seller had made partial performance before frustration. In such a case, the Act provides that the seller has a quasi-contractual remedy for the value of the partial performance. If one party has conferred a benefit on another party before frustration, the Act permits recovery of the value of the benefit. Another effect of the Act is that it permits the courts, "having regard to all of the circumstances of the case", to make a limited equitable apportionment of losses following frustration. It has been claimed that the philosophy behind the Act, particularly sections 1(2) and (3), is to prevent unjust enrichment of either party to the contract at the other's expense.[23] While it has been said that this is simply a statutory formulation of a basic principle of the English law of restitution,[24] commentators have suggested that the Act is designed to provide more flexible machinery for the adjustment of loss than at common law.[25] Moreover, in the Court of Appeal, Lawton L.J. has stated that the Court obtained "no help from the use of words which are not in the Statute".[26] Accordingly there is a fundamental problem in that the purpose of the 1943 Act is not readily apparent.

1.2. SECTION 1(1) OF THE 1943 ACT

Section 1(1) provides:

"Where a contract is governed by English law has 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,

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19. *Fibrosa Spolka Akcyina v. Fairbairn Lawson Combe Barbour Ltd.* [1943] 32, at 49.

20. *Loc. cit.* at 49-50 (Viscount Simon), 54 (Lord Atkin), 63,72 (Lord Wright), 78 (Lord Porter).

21. 6 & 7 Geo. 6, C. 40.

22. [1943] A.C. 32.

23. *British Petroleum Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1979] 1 W.L.R. 783, 799, (by Robert Goff J).

24. *Ibid.*

25. See A. M. Hay Croft & D. M. Waksman, "Restitution & Frustration, J. Bus. L. (1984), 207, 225.

26. [1982] 1 All E.R. 925, 983. In *Orakpo v. Manson Investments* [1978] A.C. 95, at p. 104c. Lord Diplok stated that there is "no general doctrine of unjust enrichment recognised in English law".

the following provisions of this section shall subject to the provisions of section two of this Act, have effect in relation thereto."

The section sets out the circumstances under which the Act applies, namely, where the contract is governed by English law. The Act is therefore dealing with a provision relating to the conflicts of law. Moreover, the Act does not specify what principles will be applied by English courts to a contract the proper law of which is not English, for example French law.[27] The American Restatement of the Conflict of Laws,[28] states that the law to be applied in the situation dealt with by the 1943 Act is the law of place where the benefit is conferred, or where the enrichment takes place. This is the rule which is preferred by conflicts lawyers.[29]

The Act does not define frustration. However, it is generally accepted that it applies to supervening illegality.[30] It is clear, however, that the Act does not apply to initial impossibility or where the contract is discharged by breach. Furthermore, the Act does not specify when a contract is frustrated. Nevertheless, the common law gives the answer. Generally, a contract is frustrated at the time of frustrating event., since the operation of frustration does not depend on a party's act or election.[31] However, where the essence of the contract is the occurrence of a future event, such as Edward VII's Coronation, and this occasion is cancelled, frustration occurs on the announcement of the cancellation.[32]

An important question to be asked is whether the Act applies to a contract which includes a *force majeure* clause? This will depend on how the *force majeure* clause is drafted. If the clause specifies the consequences of the *force majeure*, the Act will not be applicable. But if the clause is silent, the Act will be operative.[33]

Of course, it should be emphasised that it is the present writer's thesis that - given the deficiencies of domestic laws on frustration - parties to

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27. Glanville L. Williams, "The Law Reform (Frustrated Contracts) Act, 1943", London, 1944, Stevens & Sons, p. 19.

28. Sects. 452, 453.

29. Gutteridge & Lipstein, 7 Camb. L. J. 80.

30. McNair, (1944), 60 L. Q. Rev. 160, 162,163; Goff and Jones, The Law of Restitution, 3rd ed., at 486.

31. See also *Joseph Constantine SS Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A. C. 154, at 163, [1941] 2 All E. R. 165, at 171, H.L. (*per* Viscount Simon LC.).

32. See *Krell v. Henry* [1903] 2 K. B. 740, C. A.

33. See section 2(3) of the 1943 Act. See also *infra*, pp. 160, 161.

transnational commercial transactions should draft comprehensive *force majeure* clauses.

1.3. SECTION 1(2) OF THE 1943 ACT (RECOVERY OF MONEY)

Section 1(2) provides:

"All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as 'the time of discharge') shall, in the case of sums so paid, be recoverable from him as money received by him for the use of the party by whom the sums were paid, and, in the case of sums so payable, cease to be payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred."

The above section has two main elements. The first is that there is no requirement of a total failure of consideration. It means that sums paid are recoverable in cases of partial failure of consideration. Thus it reverses the decision in ***Whincup v. Hughes***[34] where it was held that no part of premium paid for an apprenticeship could be recovered when the master (watch maker) died during the currency of the apprenticeship. The second element of the section is the proviso which allows the recipient of the advance payment to set off against it such expenses incurred for the purpose of performance before the frustration, as the court thinks just.[35] However, court's discretion to decide whether to allow any retention or deduction of an advance payment is limited to expenses before the time of frustration. Moreover, the payee can not recover more than the value of the prepayment.

This section, especially the proviso, gives rise to some problems of interpretation. The lack of case law also aggravates the issue. The effect of the section may result in the payer being able to withdraw from an unprofitable transaction, since the down payment is recoverable, regardless of the consideration which would have been received if the transaction had been performed.[36]

A further point is that the section does not provide for recovery of payments made after the time of frustration;[37] for example, if it has been paid

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34. (1871) L. R. 6 C. P. 78.

35. *B. P. Exploration Co. Ltd v. Hunt* [1979] 1 W.L.R. 783, at p. 800.

36. *Loc. cit.*

in ignorance of the facts which frustrated the contract, or in ignorance that known facts have operated to frustrate the contract.

Another criticism is that expenses[38] which can be offset are restricted to those expenses which have been incurred "in, or for the purpose of, the performance of the contract." Accordingly, expenses incurred in reliance on the contract but not for the performance of the contract - such as pre contractual expenditure or incidental reliance - may not be taken into account.[39] Moreover, the Act does not even protect a seller who incurs performance expenditure unless he has demanded a down payment from the buyer.

No provision is made in the section for an increase in the sum recoverable by the plaintiff, or the amount of expenses to be allowed to the defendant, to take into account the time value of money.[40] This means that although money - or expenses incurred - has been paid a long time before the date of discharge, nevertheless, the sum recoverable can be no greater than the sum actually paid even though the defendant may have had the use and profit from the money during that period. However, under the Law Reform (Miscellaneous Provisions) Act 1934 section 3(1), the court has power to award interest on the principal sums from the date of the accrual of the cause of action.[41]

The most important deficiency of the section is that it does not make clear the basis under which the court is to calculate the amount of expenditure which a payee is entitled to retain for his expenses. There is as yet no authority on the assessment of the amount. The question is how much is the payee entitled to retain? Does it mean that the payee is entitled to retain all of it? Half of it, some other portion of it, or none of it? The view of the English Law Revision Committee[42] that the payee should be able to retain the complete amount of expenses was approved by Robert Goff J. in ***B.P. v.***

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37. While both the New South Wales Frustrated Contracts Act 1978 Sec. 5(4) and the South Australia Frustrated Contracts Act 1988, Sec. 7(6) bring the issue within the control of the Act post-frustration performance.

38. According to the Act, expenses include a reasonable sum for overhead expenses and for work or services personally performed (Sec. 4).

39. "Emphasis on performance appears to eliminate from consideration such incidental reliance expenses unless they are subsumed by the 'all circumstances' terminology." Philip D. Weiss, Apportioning Loss after Discharge of a Burdensome Contract: A Statutory Solution, 69 Yale L.J. 1960, 1055, at 1073.

40. *B. P. Exploration v. Hunt* [1981] 1 W L.R. 232, 244, C.A.

41. Goff & Jones, "The Law of Restitution", 3rd ed. London, 1986, at p. 489.

42. Seventh Interim Report (1939), Cmnd, 6009.

Hunt (No. 2)[43] which he justified on the basis of change of position; regarding the proviso as a statutory recognition of the doctrine.

In respect of prepayments, the English Law Revision Committee came to the conclusion that "it is reasonable to assume that in stipulating for prepayment the payee intended to protect himself against loss under the contract."[44]

This assumption can be criticised. If the purpose of the down payment is to compensate the payee for bearing the risk, then clearly he is entitled to keep the down payment - it is an insurance premium. But this is not always the case and the down payment may be completely unrelated to that purpose. In other words, it is actually difficult to understand why the fact that there is an advance payment should not have purposes apart from insurance. The purpose of the down payment may be to finance the purchase of supplies by the contractor or to improve the payee's financial situation in order to begin the job or to protect him against the risk of the payer's breach or insolvency or even against loss of profit. There are therefore a number of plausible reasons for down payments that are unrelated to the provision of insurance in the event of an occurrence which may prevent the completion of performance of the contract. The treatment of the proviso as a statutory recognition of the defence of change of position is also difficult to accept, since the English common law has not yet recognised the existence of such defence.[45]

Glanville Williams has argued that natural justice decrees that the distribution of loss should be equal.[46] This approach has been adopted by the British Columbia Frustrated Contracts Act 1974, section 5(3) and New South Wales Frustrated Contracts Act 1978, section 12(2). The problem of this approach is that the equal division of loss is not always appropriate[47] and it ignores the court's discretion in exercising its power to apportion the down payment which the payee can retain.

It has been supported by McKendrick that the onus of proof with regard to the proviso rests on the defendant.[48] He argues that if the payee

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43. [1979] 1 W.L.R. 783, at p. 800 (f).

44. Seventh Interim Report (1939), Cmnd, 6009.

45. See for *e. g.*, *Barclays Bank v. Simms* [1980] Q. B. 677. See also A. M. Haycroft and D. M. Waksman, Frustration and Restitution, J. Bus. L.1984, 207, at 215.

46. Glanville L. Williams, The Law Reform (Frustrated Contracts) Act, 1943, London, 1944, at 35, 36.

47. See New South Wales Act, Sec. 15.

fails to discharge the onus, for example, where his expenditure resulted in a product which could be used in the performance of another contract[49] then any loss lies on him. Where he satisfies the onus, he should be entitled to recover any loss incurred for the performance of the contract. The shortcoming of this view is, however, that it merely shifts the loss from one party to the other, and ignores the court's discretion.

Because of these difficulties of interpretation it is contended by the present writer that at the end of the day, it will be left to the court's sense of justice whether to order a retention or payment of expenses or split the loss and to quantify the amount involved. A party who has made or agreed to make prepayments may only recover or retain such sums as the court considers just in the light of the expenses incurred by the other party and all the circumstances of the case. In exercising this discretion, the courts will be influenced by the degree to which the expenses have no practical use or advantage as a result of the frustrating event. For example, if machinery made for a buyer can easily be sold to another, in that case the loss lies on payee. It should not be forgotten that the word "just" in the proviso should play an important role when the courts exercise their discretion. The courts have the responsibility to achieve justice between the parties leading to a "no winner" and "no loser" situation, *i.e.*, to act *ex aequo et bono.* Suppose that one party has received 2000 pounds as a prepayment and has incurred expenses of exactly that amount. Both parties are faultless and equally relieved of performance of their contractual rights and duties. Here it seems most equitable that the court in exercising of its power under section 1(2) should divide the loss equally between them instead of merely shifting it from one party to the other. However, there can be situations where equal division of loss will not be equitable and just. For example, where the party incurs unusually high incidental reliance losses,[50] to make the other party share the loss will not be just, as it may force him to spend more than he would have spent if the contract had not been discharged.

In other jurisdictions like New South Wales legislation, provides for equal division of loss.[51] Nevertheless, even here the legislation recognises

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48. See Ewan McKendrick, "*Force Majeure* and Frustration of Contract", Lloyd's of London Press Ltd. 1991, at p. 61.

49. In this regard see *Davis and Pimose Ltd. v. Clyde Shipping and Engineering Co. Ltd.* 1917, 1 S.L.T. 297.

50. If incidental reliance expense is regarded as an expense made "in, or for the purpose of, the performance."

51. Act 1978, Sec. 12 (2)(b)(ii).

that equal division is not always necessarily appropriate in all circumstances.[52]

It should always be remembered that the 1943 Act does not give the court carte blanche to make whatever adjustment seems just and equitable. The court's discretion is limited to expenses incurred before the date of frustration and to the value of prepayment.

1.4. SECTION 1(3) OF THE 1943 ACT (PAYMENT FOR VALUABLE BENEFIT OBTAINED)

Section 1(3) provides that:

"Where any party to the contract has, by reason of anything done by any other party thereto in, or for the purpose of, the performance of the contract, obtained a valuable benefit (other than a payment of money to which the last foregoing subsection applies) before the time of discharge, there shall be recoverable from him by the said other party such sum (if any), not exceeding the value of the said benefit to the party obtaining it, as the court considers just, having regard to all the circumstances of the case and, in particular-

(a) the amount of any expenses incurred before the time of discharge by the benefited party in, or for the purpose of, the performance of the contract, including any sums paid or payable by him to any other party in pursuance of the contract and retained or recoverable by that party under the last foregoing subsection, and

(b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract."

As discussed above, a party who has incurred expenses can not recover under section 1(2) if no down payment was paid or was payable prior to the time of frustration. However, a claim may be made under section 1(3) against a party who has obtained a valuable benefit at the cost of the other party. Section 1(2) is restricted to payments of money, but section 1(3) is not so restricted. Accordingly, section 1(3) extends to all cases where a party by partial performance of the contract has conferred a valuable benefit on the other party. Thus section 1(3) reverses the common law principle laid down in ***Cutter v. Powell***,[53] that nothing could be recovered under the doctrine of *quantum meruit* for services performed.

That said, section 1(3) is the most complicated and troublesome section in the Act. According to Robert Goff J., it must be applied in two distinct stages.[54] First, the benefit should be identified and valued. Secondly,

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52. *Loc. cit.*, Sec. (15).

53. (1795) 6 Term Report, 320.

the court has to consider the award of a just sum which is no greater than the value of the benefit. The section was applied in ***B.P. (Exploration) Libya Ltd. v. Hunt***.[55] This case is the first authoritative interpretation of the Act. The case arose from an agreement between British Petroleum (B.P.) and Mr. Hunt. In 1957, the Libyan government granted Mr. Hunt an oil concession. As he did not have the experience and equipment to explore and develop the concession himself, in 1960 he entered into a joint venture with B.P., a "farm in" agreement which was governed by English law. Under the agreement, B.P. agreed to finance its development in return for a 50 per cent interest in the concession plus three eighths of Hunt's share (called the "reimbursement oil") until B.P. had recovered an agreed sum (calculated by reference to B.P.'s expenditures). A large oil field was discovered and oil began to follow from it in 1967. In 1971 the contract between B.P. and Mr. Hunt was frustrated when the Libyan government expropriated B.P.'s interest (*i.e.*, half-share of the concession). At the time of the expropriation of the B.P.'s interest in December 1971, B.P. had received some but not all of the reimbursement oil to which they were entitled. Mr. Hunt's half-share or interest was also expropriated in 1973. However, Mr. Hunt had obtained 74 million barrels of oil from this concession during that period. Both B.P. and Mr. Hunt received some compensation from the Libyan government. But since B.P. had not been completely reimbursed for its endeavours on behalf of Mr. Hunt, they alleged that the "farm in" agreement was frustrated and that they were entitled to a just sum under section 1(3) of the Act. This claim was allowed by Robert Goff J. and affirmed by the Court of Appeal and the House of Lords subject to relatively minor modification.[56]

1.4.1. IDENTIFICATION OF THE DEFENDANT'S BENEFIT

The problem is that the Act does not define "benefit"; it can therefore be defined narrowly or broadly, depending on the view of the court. It is not clear whether the word means "actual" or "constructive" benefit. For example, if as in ***Appleby v. Myers***,[57] the work is completely destroyed before any real benefit is conferred; can there be a claim for partial performance of contract under section 1(3)? There are at least two possibilities:

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54. *B. P. v. Hunt* [1979] 1 W.L.R. 783, 810 (This approach appears to have been impliedly accepted by the Court of Appeal [1981] 1 W.L.R. 232, 237).

55. [1979] 1 W.L.R. 783; *affirmed* [1981] 1 W.L.R. 236, [1982] 1 W.L.R. 235.

56. [1981] 1 W. L. R. 236, 240; [1982] 2 W. L. R. 253, 258.

57. (1867), L.R. 2 C.P. 651.

(a) The benefit is identified as the services themselves rendered by the plaintiff.
(b) The benefit is regarded as the end product of the services.
Glanville Williams believes that the words "valuable benefit" should be interpreted so as to include any performance received by the other party, whether or not he derives any sensible advantage from it.[58]
However, in ***B.P. v. Hunt***, Robert Goff J. held that "benefit" within the meaning of section 1(3) should be identified, not as the performance rendered by the party, but as the end product of the services.[59] This definition of benefit can not be comprehensive. There are some cases when the services are not intended to have an end product, for example, transportation of goods. Moreover, an end product may have no objective value, for example, decorating a room - which is already in good decorative order - to appeal to the defendant's own execrable taste. The benefit of prospecting for minerals is not the discovery of the mineral but the knowledge of whether or not the mineral exists and the consequent enhancement of the value of the land.[60] In the above examples, the benefit is presumably valued by reference to the value of the services performed by the plaintiff. That is why the learned judge did not fully rule out the possibility of the services themselves constituting a benefit.[61] Robert Goff J. gave two reasons for his interpretation - *viz.*, that "benefit" means the end product of services. First, section 1(3) distinguishes between the plaintiff's performance and the defendant's benefit. Secondly, paragraph (b) of section 1(3) clearly relates to the product of the plaintiff's performance,[62] since it requires the court to have regard to the effect on the benefit of the circumstances giving rise to frustration. According to the learned judge's interpretation, the result in ***Appleby v. Myers***[63] would be unaffected by section 1(3). This means that in the case where the end product of the services is destroyed by the frustrating event, the provider of the services can not recover under the Act, since there is no benefit to be valued. In other words, although it might be thought just to award a sum

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58. *Loc. cit.* at pp. 48-51. *Contrast Parsons Bros. Ltd. v. Shea* (1965), 53 D.L.R. (2d) 86 (Stove partially installed at height summer: actual benefit required).

59. [1979] 1 W.L.R. 783, 802.

60. See Francis Rose, Restitution after Frustration, New Law Journal, 1981, 955, at 956.

61. [1979] 1 W.L.R. 783, 803.

62. *Loc. cit.* at 801 F.

63. (1867) L.R. 2 C.P. 651.

assessed on a *quantum meruit* basis, the effect of section 1(3)(b) - according to Robert Goff J.'s interpretation - will be to reduce the award to nil.

However, it should be noted that, Robert Goff J. was concerned that the Act had failed to provide that the labour itself might be considered to be a benefit.[64] Although his interpretation may be correct, the section could be interpreted as being applicable where a valuable benefit was obtained before the time of frustration even although it no longer existed after the frustrating event. If this were so, the court would have to look at the facts as they were before frustration occurred and not after. This view is supported by the structure of the section. The section is introduced by the words "such sum as the court thinks just having regard to all the circumstances of the case and in particular (a) . . . (b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract". When a valuable benefit has been obtained, the court has power to make an award and section 1(3)(b) is the guideline for the exercise of the court's power or discretion to award a just sum.[65] Moreover, the phrase "the value . . . to the party obtaining it" indicates the time when the services were performed, not when they are received. In addition, the verb "has...obtained" a benefit can be used to indicate a performance which has been done in the past, *i.e.*, before the frustrating event. Accordingly, the Act appears to provide that attention should be focused on the performance rather than the receipt of performance.

These two different interpretations are sustainable. However, it is the present writer's view that the performance of services should be valued even if there is no end-product. This interpretation - contrary to Robert Goff J.'s construction which creates an undesirable result - gives rise to equity, fairness and justice, because the court, in making an award, will be able to take into account the benefit which has been destroyed and, if appropriate, to split the loss in such proportions as it thinks just. The British Columbia Frustrated Contracts Act 1974, for example, provides that a benefit is "something done in the fulfilment of contractual obligations whether or not the person for whose benefit it was done received the benefit";[66] and such loss can be split equally.[67] If interpreted in this way, section1(3) of the 1943 Act

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64. *B. P. v. Hunt* [1979] 1 W.L.R. at 802 E, F, 803 D.

65. See Treitel, (1983), *op. cit.* at p. 689.

66. Sec. 5(4).

67. Sec. 5(3). A similar provision is to be found in New South Wales Frustrated Contracts Act 1978, Sec. 12(2)(b)(ii).

gives the court more flexible discretion. Even so, if a judge comes to the conclusion that no benefit had been obtained before frustration, he has no discretion to award anything. For example, if a person orders goods from a manufacturer and does not receive any benefits, the manufacturer can not claim under the section that he has bought raw materials and started to produce the goods.[68]

1.4.2. VALUATION OF THE BENEFIT

After identification of the benefit, the next step, according to Robert Goff J. is that the court must assess the value of the benefit to the defendant. This assessment fixes the maximum amount the plaintiff can recover. Since the benefit may be identified as the end product of the service, again some problems will be encountered.

At first, as Robert Goff J. recognised: "a small service may confer an enormous benefit and conversely, a very substantial service may confer only a very small benefit".[69] For example, some very simple prospecting may discover a large deposit of valuable minerals. *Vice versa*, decorating rooms which are in good decorative order in accordance with the defendant's execrable taste may involve work costing substantial sum which is, objectively speaking, of little or no value. But if the services are taken into account as a benefit, the problem will be avoided because in that case, the court will simply concentrate on the objective value of the services which may be assessed on a *quantum meruit* basis. Under the British Columbia Frustrated Contracts Act 1974, receipt of benefit of partial performance is required to be demonstrated: the plaintiff can base his claim upon reasonable expenditure incurred in performing the contract.[70]

Recognising the consequences of his interpretation, the learned judge stated that "the work must be treated as a benefit to the defendant since he requested it and valued it as such".[71] But if the judge was prepared to adopt this approach in this case, why did he not consider it to be of general application?

The second question to be asked is when the benefit should be valued? For example, building work or the transfer of goods may increase or

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68. In this regard, see Treitel, *op. cit.*, At p. 690. See also New Wales Frustrated Contracts, 1978, under which equal division is not approriate in all cases.

69. *B.P. v. Hunt (No.2)*[1979] 1 W.L.R. 783, at 803A.

70. Sec. 7(a). It should be added that loss of profit will not be taken into account. Sec. 8(a).

71. *B.P. v. Hunt (No.2)* [1979] 1 W.L.R. 783, at 803C.

decrease in value between the time of supply and frustrating event. In this regard, Robert Goff J. held that the benefit is to be valued at the time of frustration. He argued that section 1(3)(b) places the risk of depreciation or destruction by frustrating event upon the plaintiff.[72] Indeed, the section expressly requires the court to take into account the effect of frustration upon the value of the benefit.

However, if services are identified as benefit, there will not be such a problem, since a reasonable remuneration for the services rendered at the time of performance will be awarded. As we have argued, the subsection can be read as referring to a benefit being obtained before the date of frustration, and, accordingly that is the time at which the benefit should be valued.

Robert Goff J.'s approach opens further arguments. Suppose goods are supplied and sold long before the date of frustration. Does the learned judge's approach require that an allowance should be made for the time value of money obtained by the disposal of the goods so that a true valuation of the benefit can be obtained at the date of frustration? It is clear that to make allowance for the time value of money - which the defendant may have obtained by selling the benefit before the date of frustration - would lead to a more just result. Nevertheless, Robert Goff J. did not take this view: instead he argued that the defendant does not necessarily benefit from having the money over a period of time. Further, if this allowance is to be made then a comparable allowance should be made in respect of expenses incurred by the defendant.[73]

One further problem is that section 1(3)(a) requires the court to have regard to the amount of any expenditure incurred before the time of frustration by the benefited party. The question is whether this should be deducted from the value of the benefit or the award of the just sum? For example, if the defendant's benefit is valued at 200 pounds, a just sum assessed at 150 pounds, and the defendant's expenses are 100 pounds, how much will be the final award? 100 pounds or 50 pounds? Robert Goff J.'s opinion is that it should be deducted from the value of the benefit on the ground that the allowance for expenses is a statutory recognition of the change of position defence.[74] However, it seems that the wording of the

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[72]. *Loc. cit.* at 803F.

[73]. *Loc. cit.* at 804. It should be added that the judge awarded interest from the time of frustration under the Law Reform (Miscellaneous Provisions) Act 1934.

[74]. *Loc. cit.*,at 804E.

section 1(3)(a) provides that expenses are to be deducted from the just sum, not from the value of the benefit.

Robert Goff J. in this case states that if the benefit is identified with the end product which has been obtained partly by the efforts of both the plaintiff and the defendant, then the court has to do its best to apportion the benefit and decide what proportion is attributable to the work done by plaintiff. That proportion will then constitute the relevant benefit for the purposes of section 1(3) of the Act.

1.4.3. ASSESSMENT OF THE JUST SUM

According to Robert Goff J. the final stage is the assessment of the just sum. The Act itself gives no indication of the way in which the just sum is to be assessed. However, as discussed above, Robrt Goff J. explained that the principle at issue in assessment of the just sum is "the prevention of unjust enrichment of either party to the contract at the other's expense".[75] The Court of Appeal, however stated that "we got no help from the use of words which are not in the statute."[76] and held that "what is just is what the trial judge thinks just". The Court of Appeal added that an appeal court was not entitled to interfere with the assessment of the just sum by the trial judge "unless it is so plainly wrong that it can not be just".[77] The Court of Appeal also recognised that the just sum might legitimately be assessed in a number of different ways.[78] However, the methods of assessment were not considered. The problem is that it is very difficult to predict what a court will award as a just sum if the assessment is left to the virtual untrammelled discretion of the trial judge.[79] On the other hand, Lawton L.J.'s statement that "what is just is what the trial judge thinks is just"[80] does allow the necessary flexibility to reach a fair result. The court will therefore look at the facts as they were before frustration and will assess the value of the services. Moreover, section 1(3)(a) and (b) provide guidelines for the exercise of court's discretion in assessing a just sum.

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75. [1979] 1 W.L.R. 783, 799.

76. [1981] 1 W.L.R. 232, 243; [1982] 1 All E.L. 925, 983.

77. *B.P.* [1982] 1 All E.R. 925, 980.

78. *Loc. cit.*

79. Ewan McKendrick, *op. cit.*, at 67.

80. [1981] 1 W.L.R. 232, 243; [1982] 1 All E.R. 925, 983.

1.5. APPLICATION OF ROBERT GOFF J.'S PRINCIPLES IN THE *B.P.* CASE

Robert Goff J. applied the above principles as follows:
First he identified the benefit, the enhancement of the value of Mr. Hunt's share in the concession resulting from B.P.'s work. The benefit was not the day - to - day work done by B.P. in prospecting for oil, but was the end - product of that work. However, that benefit was reduced to take account of the expropriation, *i.e.* by the effect of the circumstances giving rise to frustration of the contract. Accordingly, the enhancement was limited to the benefit of the oil (net amount of oil) Hunt received before and after his contract with B.P. had become frustrated plus the compensation paid to him by Libyan government. This total was then divided by two, to reflect the fact that Hunt already owned half of the concession, so that the enhancement in value was only 50 per cent attributable to B.P. The resulting figure was $ U.S. 85m.[81] Ignoring the time value of money made a difference of some $ U.S. 5.4m.

In calculating the "just sum", however, the judge adopted the criterion which he had rejected in valuing the benefit, *viz.*, the cost to B.P. of their work to the extent that it was done for Mr. Hunt, plus the contribution in cash and oil received by him, minus the reimbursement oil already received by B.P. On this basis the just sum was some $34.67m.[82]

It is submitted that the calculation of the valuable benefit merely acted as an irrelevant ceiling, and the just sum was basically the value of the services rendered to Hunt and the goods supplied to him by B.P. less the reimbursement.

1.6. SOME COMPARATIVE ASPECTS OF ENGLISH AND SCOTS LAW

In the ***Cantiere San Rocco v. Clyde Shipbuilding and Engineering Co. Ltd.***,[83] Scots law arrived at a similar result as that obtained by English law in the ***Fibrosa*** case.[84] In ***Cantiere***, Lord Shaw stated that the case would

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81. [1982] 1 All E.R. 925, 952e-953e.

82. [1981] 1 W.L.R. 236, 241; this contrasts with the figure of some $35.40m. in [1979] 1 W.L.R. 783, 827. The difference is not explained and may be due to the adoption of different currency conversion factors at first instance and in the Court of Appeal. (Treitel, The Law of Contract, 1983, at 689).

83. 1923, S.L.T. 624. See *supra* pp.256,257.

84. [1943] A.C. 32.

be a "typical case of restitution under the Roman law and one for application of the maxim, '*causa data causa non secuta*'. . . ".[85]

There is also a possibility in Scots law that after frustration a party might be remunerated on the basis of *quantum meriut* for work done.[86] However, it should be noted that, although Lord Cooper opined that the Scots courts have all the requisite powers for making adjustment,[87] there is doubt about the extent of the doctrine.[88] The basis of the doubt is to be found in the judgment of the Lord President (Inglis) in ***Watson v. Shankland***.[89] He stated: "there is no rule of the Civil law . . . as adopted into all modern municipal codes and systems, better understood than this - that if money is advanced by one party to a mutual contract, on the condition and stipulation that something shall be afterwards paid or performed by the other party, and the latter party fails in performing his part of the contract, the former is entitled to repayment of his advance, on the ground of failure of consideration. If a person contracts to build me a house, and stipulates that I shall advance him a certain portion of the price before he begins to bring his materials to the ground, or to perform any part of the work, the money so advanced may certainly be recovered if he never performs any part, or any available part of his contract. No doubt, if he performs a part and then fails in completing the contract, I shall be bound in equity to allow him credit to the extent to which I am *lucratus* by his materials and labour, but no further; and if I am not *lucratus* at all, I shall be entitled to repetition of the whole advance, however great his expenditure and consequent loss may have been."

The *dictum* of the Lord President in ***Watson v. Shankland*** has been tacitly approved by the House of Lords.,[90] and was followed in ***Davis & Primose Ltd. v. Clyde Shipbuilding & Engineering Co. Ltd. and others***.[91]

In spite of this authority, the view has been taken that the payee can claim an adjustment for the expenses he has incurred. In the ***Fibrosa*** case,[92] Lord Atkin stated, albeit *obiter*, that under Scots law the recovery of the whole of the down payment is not allowed if the payee claims an adjustment for the expenses he has incurred. In ***Cantiere San Rocco***,[93] there was no express holding on this point, but the House of Lords impliedly approved the

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85. *Cantiere San Rocco v. Clyde Shipbuilding*, [1924] A.C. 226, at 259.

86. *Head Wrightson Aluminium Ltd. v. Aberdeen Harbour Comms.*, 1958, S.L.T. (Notes).

87. Cooper, Selected Papers 1922-1954 (1957), p. 124, 125.

88. See *Fibrosa* case, [1943] A.C. 32, at 54 *per* Lord Atkin; T. M. Cooper, *op. cit.*, at 128.

89. (1871) 10 M. 142 at 152; on appeal (1873) 11 M. (H.L.) 51.

90. (1873) 11 M. (H.L.) 51.

91. 1917, 1 S.L.T. 297.

92. [1943] A.C. 32 at 54.

93. [1924] A.C. 226.

interlocutor of the Lord Ordinary (Lord Hunter) who believed that such an adjustment could be made. Moreover, in ***Penny v. Clyde Shipbuilding and Engineering Co***;[94] a counter claim for the payee's expenses was allowed.

Given the state of authorities, Lord Cooper's statement[95] that the Scottish courts have all powers provided in the English Law Reform (Frustrated Contracts) Act 1943 is open to doubt. For the time being, Scots law is much more susceptible of criticism than the present English law.[96] In other words, although difficulties remain in English law, it now possesses much greater clarity than Scots law on the point.

1.7. SUPPLEMENTARY PROVISIONS OF THE 1943 ACT

1.7.1. SECTION 2(3), CONTRACTUAL PROVISION TO THE CONTRARY

Section 2 (3) of the 1943 Act provides:
"Where any contract to which this Act applies contains any provisions which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or would but for the said provision operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the provision and shall only give effect to the foregoing section of this Act to such extent, if any, as appears to the court to be consistent with the said provision."

According to section 2(3) of the Act, parties can by express provision in the contract regulate the consequences of frustration and exclude the provisions of the Act.[97] Accordingly, relief under the 1943 Act will be influenced by the parties' own allocation of risk. For example, if a plaintiff - whether expressly or by necessary implication[98] - takes the risk of non-payment in the event of frustration, the court should make no award under subsection 1(3).[99] Thus section 2(3), gives contracting parties the opportunity to eliminate the problems of subsections 1(2) and 1(3), if they agree on some

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94. 1920, 1 S.L.T. 264.

95. 28 J.Comp.Legi. and Int'l L. (1946), 12.

96. See also Alexander A. M. Irvine, The Consequences of Frustration of Contract in Scots and English Law, 1962, The Scots Law Times, 165, at 168.

97. This rule also applies to the common law action for the recovery of down payments created by the *Fibrosa* case. Thus the money may be paid out - and out, with the intention that the payee shall keep it in any event. (*Fibrosa* case, [1943] A.C. 32, at 43, 77.).

98. For example, the plaintiff may, by insuring against the consequences of frustrating event, agree to bear the risk of its occurrence.

99. *B.P. Exploration Co. (Libya) Ltd. v. Hunt (No. 2)* [1983] 2 A.C. 352, 372 (Upholding the courts below: [1979] 1 W.L.R. 783, 807, 829-833; and [1981] 1 W.L.R. 232, 241 (C.A.).

different solution to the problems arising on the occurrence of a frustrating event.

In the ***B.P.*** case, Mr. Hunt argued that under the terms of the contract, B.P. took the risk of the exploration not proving commercially viable: only if enough oil was produced from the field, was B.P. to be reimbursed. He added that the clause 6[100] of the agreement was one intended to have effect even in the event of frustration and so took priority, by virtue of section 2(3), over the statutory scheme for relief.

On its true construction, the clause was held not to exclude the Act, because it was not intended to deal with the risk of expropriation. That is why the House of Lords rejected the claim and held that there was nothing in the terms of the contract, or in the circumstances surrounding the making of it, to indicate expressly or by necessary implication, that the parties when they made their contract, had in contemplation the risks, such as the expropriation of the concession in whole or in part; or, that having had such risks in contemplation, they included in the contract any provision which, expressly or impliedly, was to take effect in the event of such risks materialising.[101]

Some important points about section 2(3) should be noted. Simply to exclude the Act by contractual provision is unwise: the parties to the contract - especially parties to transnational commercial transactions - must also provide for the consequences of frustration. Otherwise, the courts will refer to the common law rules with all their imperfections.

Secondly, according to Robert Goff J. the mere fact that the contract which is frustrated is an entire contract, for example, if a clause provides that payment is not due until the work is complete, is not enough for the court to infer that the clause precludes an award under section 1(3).[102] Only if, upon the true construction of the contract a seller, for example, has agreed to receive no payment in the event which occurred will the fact that the contract is entire have the effect of precluding an award under the Act.[103]

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100. Clause 6 of the letter agreement: "It is specifically understood and agreed that Mr. Hunt shall have no personal liability to repay the sums required in the operating agreement and this letter agreement to be advanced by B.P. for Mr. Hunt's account or paid to Mr. Hunt, but B.P.'s right to recover any such sums which B.P. is required to pay or advanced for Mr. Hunt's account; shall be limited to recovery solely out of three - eights of Mr. Hunt's half of the production, and in the manner specified under Sec. 9 of the operating agreement, if as and when produced saved and delivered at the Libyan sea terminal."

101. [1983] 2 A.C. 352, 372.

102. [1979] 1 W.L.R. 783, at 807.

103. [1979] 1 W.L.R. 783, at 806, 807.

1.7.2. EFFECT OF PRIOR BREACH

In the ***B.P.*** case, Mr. Hunt claimed that before the frustrating event B.P. committed certain breaches of contract in developing the field: as a consequence he argued that the company was barred from claiming a just sum. Robert Goff J. rejected the submission on the facts and stated that such a breach does not affect the right of a party to repayment under section 1(2), nor the award of a just sum under section 1(3). However, the defendant may raise his accrued right to damages, and this may be the subject of a set-off or counterclaim in the proceedings in which the claim is made.[104]

Robert Goff J.'s approach is right with regard to cases of prior non-repudiatory breach. But this is not always the case. For example, if a party commits a repudiatory breach which the other party accepts, then the Act does not apply. For according to wording of section 1(1) the contract must be ". . . impossible of performance or otherwise frustrated and the parties thereto have for that reason been discharged from . . . further performance". Accordingly, where a contract is discharged as a result of a repudiating breach and not from any impossibility of performance or frustration, the Act does not apply.

1.8. CONTRACTS EXCLUDED FROM THE 1943 ACT

Section 2(5) sets out certain types of contract to which the 1943 Act does not apply. These contracts are as follows:

1.8.1. VOYAGE CHARTERPARTIES AND OTHER CONTRACTS FOR THE CARRIAGE OF GOODS BY SEA[105]

A contract for the carriage of goods by sea or any charterparty are not covered by the Act, other than a time charterparty or a charterparty by way of demise. Accordingly, the freight payable or paid in advance remains payable in the event of frustration (for example, loss of vessel and cargo)[106] unless the contract provides to the contrary.[107]

In carriage of goods by sea, the ship owner can not recover freight pro rata,[108] if a vessel can not complete a voyage because of events outside his

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104. [1979] 1 W.L.R. 783, 808.

105. Sec. 2 (5) (a).

106. See *Byrne v. Schiller* (1871) L.R. 6 EX. 319.

107. *The Olivia* [1972] 1 Lloyd's Rep. 458.

108. *St. Enoch Shipping Co. Ltd. v. Phosphate Mining Co.* [1916] 2 K. B. 625.

control. The rule of ***Chandler v. Webster***[109] - though criticised - has been preserved by the 1943 Act. Glanville Williiams states that the philosophy behind the exclusive is that commercial practice has developed well-known rules for insurance against the risks inherent in these contracts.[110]

In the Scottish legal system, any advance payment of freight made by a charterer to a ship owner is recoverable if, for example the ship and the cargo were lost. In ***William Watson and Co. v. Robert Shankland***,[111] Lord President (Inglis) criticised English law in this respect as not being in accordance with sound legal principle.

1.8.2. CONTRACT OF INSURANCE[112]

Under an insurance policy, once the risk has started to run the whole of the premium for that risk is treated as having been earned by insurer. Thus there can be no apportionment of premiums. The philosophy behind this is that " the contract is for the entire risk and no part of the consideration can be returned. "[113]

1.8.3. CERTAIN CONTRACTS FOR THE SALE OF GOODS[114]

The Act does not apply to any contract to which section 7 of the Sale of Goods Act 1979 applies, or to "any other contract for the sale or for the sale and delivery, of specific goods, where the contract is frustrated by reason of the fact that the goods have perished." As was discussed,[115] under section 7 of the Sale of Goods Act 1979, an agreement to sell specific goods is avoided if the goods perish without any fault on the seller or buyer before the risk has passed to the buyer. The 1943 Act does apply *inter alia* to all contracts for the sale of unascertained goods and to contracts for the sale of specific goods which are frustrated by events other than the perishing of goods, for example, by subsequent illegality of the contract.

Where section 7 applies, its effect is that the contract comes to an end discharging both parties from performance of future obligations. However,

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109. [1904] 1 K.B. 493.

110. Glanville Williams, Law Reform, *op. cit.*, at p. 74.

111. (1872) 10 M. 142, at 153.

112. Sec. 2 (5) (b).

113. *Tyrie v. Fletcher* (1777) 2 Cowp. 666, 668. See also *Bermon v. Woodbridge* (1781) 2 Doug. 781.

114. Sec. 2 (5) (c).

115. See *supra*, pp. 47-51.

the section is not concerned with the consequential positions of the parties. This means that the section does not provide for apportionment of the loss and the seller is not allowed to retain or recover any sum in respect of expenses incurred by him before the date of frustration in, or for the purpose of, the performance of the contract. Accordingly, in such a case, the ordinary common law rules of frustration apply.[116]

It should be noted that the difference between the common law rules and 1943 Act is related to cases where there has been a down payment and part delivery. If the buyer has already paid the price in advance but does not get the goods, at common law he can recover what he has paid on the ground of total failure of consideration.[117] If the Act was applicable, the same result would be achieved. In other words, there is no difference in that situation. This was the position even before the ***Fibrosa*** case[118] since the rule in ***Chandler v. Webster*** did not apply in this situation.[119] The difference is, of course, that where section 7 applies, the seller is prevented from setting off under the 1943 Act any expenses which he may have incurred before the time of discharge, for example putting the goods into a deliverable state.

Part delivery followed by frustration can be illustrated in two ways. If a buyer, after having paid in advance, gets only part of the goods agreed to be sold and the remainder subsequently perishes, then according to the common law rules, since consideration has only partially failed, he can not recover what he has paid. Moreover, he is not entitled to rely on the 1943 Act. However, it has been argued that he may be able to recover back a proportionate part of the prepayment, if the risk in respect of those goods was on the seller at the time of perishing.[120] This view produces a much more just allocation of the loss.

Secondly, where only a part of the goods has been delivered to the buyer, and the seller has not been paid anything, if the remaining goods perish, he can not rely on 1943 Act if there has been a valuable benefit conferred on the buyer. He may be able to recover under common law if a new contract can be implied from the buyer's keeping the goods after frustration.[121] However, it is difficult to imply such a contract if the buyer no

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116. See *supra* pp. 144, 145.

117. *Rugg v. Minett* (1809) 11 East 210; *Logan v. Mesurier* (1847) 6 Moo. P. C. 116.

118. [1943] A.C. 32; [1942] 2 All E.R. 122.

119. [1904] 1 K.B. 493.

120. See Atiyah, The Sale of Goods, 1985, at 336; Benjamin, *op. cit*, para. 422.

121. Treitel, *op. cit.*, at 693.

longer has the goods for example, because he had used them up or sold them before frustration.

In entire contracts, if one party has partly performed his contract, but as a result of frustration he is not able to complete performance, in that case, even though some benefit has been received by the other party, he is not entitled to any part of the agreed price.[122] It has been argued that acceptance of this general common law rule in the contract of sale is difficult and the buyer should not be able to retain the goods without paying for the part retained. Accordingly, he should be held liable *quantum meruit* upon a new implied contract.[123]

There are two further issues. First, it is difficult to understand why section 7 agreement to sell should be excluded from the operation of 1943 Act. Nor is there any reason why sales of specific goods should be distinguished from sales of unascertained goods. The statutory provisions of the 1943 Act for apportionment of loss should have been applicable when a contract has been frustrated because specific goods have perished. It has been argued[124] that the case of frustration by the perishing of goods is peculiar to the law of sale, that especial rules applicable to the perishing of specific goods have been long established and are well understood by the commercial community so that there is no point in disturbing them. The fallacy underlying this argument is that if this is correct in relation to the perishing of specific goods, why does the argument not apply in other cases of frustration, for example the requisitioning of goods, or supervening illegality. In addition, if we accept the above argument, all sorts of contracts of sale of goods should have been excluded from the 1943 Act. Because every contract of sale has its own applicable especial rules which are understood by the commercial community. Accordingly, it is the present writer's view that the existence of section 2(5)(c), is completely unjustifiable and should be repealed in the interests of justice.

2. UNITED STATES OF AMERICA

2.1. EFFECTS OF IMPRACTICABILITY AND FRUSTRATION

The usual effect of escape doctrines under American law is excuse from further performance.[125] Although discharge of obligations is the proper

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122. *Cutter v. Powell* (1795) 6 TR 320; *Appleby v. Myres* (1867) LR 2 CP 65.

123. See *Sumpter v. Hedges* [1898] 1 Q. B. 673.

124. Chalmer's Sale of Goods Act 1979, 8th ed. (by Michael Mark and Jonathan Mance), 1981, Butterworth and Co. at 19.

remedy in many cases,[126] it will cause injustice in some cases. That is what happened in ***20th Century Lites v. Goodman***[127] in which the court automatically applied the rules by simply discharging the contract and leaving the parties without fair restitution. In this case, because of war regulations prohibiting lightning at night, the lease of a neon sign was terminated. The court, contrary to the lessor's argument that the prohibition had since been repealed and the lease should only be suspended, discharged all obligations without considering the lessor's manufacturing and installation costs.

In the American legal system, unlike English law, "automatic discharge" is not always the case. In the American cases sometimes either party[128] or one party[129] is entitled to put an end to the contract after performance has become impossible. On the other hand, some courts adopt the English position that impossibility or impracticability puts an end to the contract automatically. That is what happened in the ***Isle of Mull***[130] where a ship under charter was requisitioned by the British government. The plaintiff insisted that the charter contract remained in force so that he could recover the higher rate of hire paid by the government. The district court held that the contract remained in force and the plaintiff was entitled to recover the amount paid by the British government in excess of the charter price.[131] However, this decision was reversed by the fourth circuit, which held that there was a frustration discharging both parties and that the owner was therefore no longer bound by the contract.[132] As this case shows, "automatic frustration" may provide the opportunity for a party who has in no way been disadvantaged by the delay, to rely on frustration as an excuse to evade performance of an obligation.

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125. See *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891) (In this case the contractor was excused from oblgation to build a house where the house destroyed by fire after partial performance.); see also Restatement (First) of Contracts Para.457; Restatement (Second) of Contracts, Paras. 261, 265. *Cf.* U.C.C. Sec. 2-615.

126. See *e.g. Ask Mr. Foster Travel Service v. Tauck Tours*, 181 Misc. 91, 43 N.Y.S.2d 674 (Sup. Ct. 1943).

127. 64 Cal. App.2d 938, 149 P.2d 88 (1944). *Cf. Kaiser v. Zeigler*, 115 Misc. 281, 18 N.Y.Supp. 638 (App.T. 1921).

128. For example U.C.C. Sec. 2-509 and Sec. 2-613.

129. In this regard, see Palmer, Mistake and Unjust Enrichment, 1962, at 62-63.

130. 278 F. 131 (4th Cir. 1921). See also *The Frankmere*, 262 F. 819, *aff'd.* 278 F. 139 (C.C.A. 4), *cert. den.* 257 U.S. 662; *Allanwilde Transp. Corp. v. Vacuum Oil Co.*, 248 U.S. 377, 386, 39 S.Ct. 147, 63 L.Ed. 312, 3 A.L.R. 15 and annotation, 8 Brit. Rul. Cas. 507 *et seq.*

131. 257 F. 798 (D. Md. 1919).

132. 278 F. at 135.

To what extent are the American courts empowered to adjust the parties relations after frustration? It should be said that under both American and English laws, expectation interests have never been protected, nor has their loss ever been shared.[133]

The treatment of down payments in American law is relatively clear. Most courts of American states[134] have rejected the rule of ***Chandler v. Webster***.[135] Accordingly, a down payment is recoverable when the contract is excused. Nevertheless, the ***Chandler*** rule has been applied in a few American courts.[136] It should be added that, contrary to the Law Reform (Frustrated Contracts) Act 1943, advance freight is recoverable if the property is destroyed in transit.[137]

In a contract for personal services, failure to render performance, because of impossibility or frustration, entitles the employer to be reimbursed for any advance payment.[138] However, if there is partial performance, the advance payment will usually be reimbursed after deducting the value of the services rendered.[139]

what is the approach in the UCC? Is the buyer entitled to recover any down payment which has been made? The non-code American common law

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133. *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891). See also Comment, 46 Mich. L. Rev. (1948), 401, 412; Comment, Apportioning Loss After Discharge of a Burdonsome Contract: a Statutory Solution, 69 Yale L. Rev. 1960, 1054, 1059.

134. See for example the following cases: *Hooe v. O'callaghan*, 10 Cal.App. 567, 103 P. 175 (1909); *Ogren v. Inner Harbor Land Co.*, 83 Cal.App. 197, 256 P. 607 (1927); *Waldheim v. Englewood Heights Estates*, 115 N.J.L. 220, 179 A. 19 (1935); *Jordan v. McCammon*, 56 Ohio St. 790, 49 N.E.IIII (1897), *revising McCammon v. Peck*, 9 Ohio C.C. 589 (1895); *Cowley v. N.P.R. Co.*, 68 Wash. 558, 123 P. 998 (1912); *Keeling v. Schastey and Vollmer*, 18 Cal.App. 764, 766, 124 Pac. 445, 446 (Dist.Ct.App. 1912); *Butterfield v. Byron*, 153 Mass. 517, 522, 27 N.E. 667, 668 (1891); *Coehran v. Forbes*, 257 Mass. 135, 153 N.E. 566 (1926); *Panto v. Kentucky Distilleries and Warehouse Co.*, 215 App.Div. 511, 214 N.Y.S. 19 (1926); *Kirtley v. Perham*, 176 Cal. 333, 168 Pac. 351 (1917); *Bowser v. Chalifour*, 334 Mass. 348, 352-53, 135 N.E.2d 643, 645 (1956); *Tenner v. Retlaw Div. Corp.*, 163 Misc. 248, 295 N.Y.Supp. 31 (Sup.Ct. 1936); *Stone and Gambrell v. Wait and Company*, 88 Ala. 599 (1889); *Hudson v. Hudson*, 87 Ca. 678 (1891). See also Restatement (First), Para. 468; 6 Williston on Contracts, Sec.1972 (1932); Corbin on Contracts, Sec. 1368.

135. [1904] 1 K.B. 493.

136. See *e.g. Huyett and Smith Co., v. Edison Co.*, 167 ill. 233, 241, 47 N.E. 384, 387 (1897) (alterntive holding); *Seigel v. Eaton and Prince Co.*, 165 ill. 550, 557-58, 46 N.E. 449, 451 (1897) (*dictum*). *Cf. Pabst Brewing Co. v. Howard*, 211 S.W. 720 (Mo.Ct.App. 1919).

137. *Briggs v. Vanderbilt*, (N.Y.S.Ct. 1855) 19 Barb. 222; *Reina V. Cross*, Cal. 29 (1856); *Lawson v. Worms*, 6 Cal. 366 (1856).

138. See *e. g. Bucklin v. Morton*, 105 Misc. 46, 172 N.Y.S. 344 (1918).

139. *Moore v. Robinson*, 92 ill. 491 (1879); *Callahan v. Shotwell*, 60 Mo. 398 (1875); *Bucklin v. Morton*, 105 Misc. 46, 172 N.Y.S. 344 (1918).

allows recovery and there is no contrary provision in the code preventing the application of this rule to the sale of goods.

It should be added that where the risk of a contingency is impliedly or expressly assumed by the party seeking restitution of his down payment, the claim might be denied. This is what happened in ***Shelton v. Tuttle Motore Co.***[140] Shortly before the involvement of the United States in the Second World War, a buyer made an advance payment on the purchase of a car. It was expressly provided in the contract that the seller would not be liable for any delay or failure in making delivery through any cause whatsoever. Because of government regulations, the plaintiff was not able to obtain delivery and claimed restitution of his down payment which was denied on the ground that the parties "contracted against the very contingency which has arisen."

This case can be criticised on the ground that the court did not give the correct interpretation to the provision in the contract, *viz.*, that the buyer had taken the risk of failure of delivery because of war. Indeed, it can be argued that the provision merely excluded the liability of the seller to pay damages in the event of failure to deliver. Principles of unjust enrichment and the seller obtaining the price without providing consideration are other factors for doubting the decision.

The American courts have generally taken the view that when performance of the contract is excused, the excused party is entitled to restitution of any benefit that he has conferred.[141] Each party must pay for benefits received from the essential reliance expenditure of the other. Moreover, few American courts have followed the former English rule,[142] under which a person who has partly performed his contract to make repairs and additions to an existing building can get no compensation for his work, if the additions and the building are destroyed prior to his work being completed.

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140. 223 N.C. 63, 25 S.E.2d 451 (1943).

141. *Buccini v. Parterno Const. Co.* 253 N.Y. 256, 170 N.E. 910 (1930); In *re Will-Low Cafeterias*, 111 F.2d 429 (2d Cir. 1940). See also 6 Corbin, Contracts, *op. cit.*, Sections 1367-72; 6 Williston, Contracts, Sec. 1977 (rev. ed. 1938).

142. *Enoch Shipping Co. v. Phosphate Mining Co.*, [1916] 2 K.B. 624; *Appleby v. Myers*, L.R. 2C.P.651 (1867); *Cutter v. Powell*, 6 T.R. 320 (1975) (Illustrating former English law). See also *Brumby v. Smith*, 3 Ala. 123 (1841); *Huyett and Smith Mfg. Co. v. Chicago Edison Co.* 47 N.E. 384, 167 ill. 233 (1897); *Krause v. Board of Trustees,* 70 N.E. 264, 162 Ind. 278 (1903); *Garrety v. Brazell*, 34 Iowa 100 (1871); *Taulbee v. McCarty*, 137 S.W. 1045, 144 Ky. 199 (1911) (Illustrating American law).

Like English law, any benefit accruing from incidental reliance expenditure may not be compensatable.[143]

In defining benefit, there is confusion among the American courts. The overwhelming majority of cases define it as acts and services (labour) which are part of a promised performance (regardless of whether the promisee gains anything from the transaction) or materials incorporated in a building (even though the building is destroyed by a catastrophe).[144] A few courts reject this definition and instead define it as a net gain having pecuniary advantage for the defendant.[145] For example, in ***Automobile Insurance Co. v. Mode Family Laundries***,[146] recovery of the value of storing furs - which were destroyed by fire - was denied on the ground that the services did not have pecuniary value to the defendant, because the goods had been destroyed. Here as we have seen, the definition of benefit is the same as that of Robert Goff J. in the ***B.P.*** case.[147]

The benefit is generally measured in terms of what it would have cost the owner to obtain or buy similar services and materials.[148] In other words, the criterion when valuing the services rendered, is the value of the services at market rates.[149] However, sometimes the benefit is measured by referring to the contract rate.[150]

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143. See Woodward, Quasi Contracts, Sec. 49 (1913). *Cf. United States v. Pacific R.R.*, 120 U.S. 227, 239-40 (1887); *Davidson v. Weschesters Gas Light Co.*, 99 N.Y. 558, 566-67, 2 N.E. 892, 895 (1885).

144. *Whelan v. Ansonia Clock Co.*, 97 N.Y. 293 (1884); *Anderson v. Shattuck*, 76 N.H. 240, 81 Atl. 781 (1911); *F.M. Gabler Inc. v. Evans Labs., Inc.*, 129 Misc. 911, 913, 223 N.Y.Supp. 408, 410 (Sup.Ct. 1927).

145. *Independant Elec. Lightining Corp. v. Broodsky and Co.*, 118 Misc. 561, 194 N.Y.Supp. 1 (Sup.Ct. 1922); *Ryan and Associates v. Century Brewing Ass'n*, 185 Wash. 600, 55 P.2d 1053 (1936). *Cf. Caroll v. Bowersock*, 100 Kan, 270, 164 Pac. 143 (1917).

146. 133 Conn. 433, 52 A.2d 137, 170 A.L.R. 975 (1947). *Cf. Glough Stilwell Meat Co.*, 112 Mo.App. 117 (1905) (On similar facts recovery of the value of services was upheld). See also *Buccini v. Paterno Const. Co.*, 253 N.Y. 256, 170 N.E. 910 (1930).

147. [1979] 1 W.L.R. 783, 802.

148. *Carrol v. Bowersock*, 100 Kan. 270, 164 P. 134 (1917); *Young v. City of Chicopee*, 186 Mass. 518, 72 N.E. 63 (1904).

149. See *Buccini v. Paterno Const. Co.* 170 N.E. 910, 253 N.Y. 256 (1930) (Judgment for reasonable value of the service perfomed). See also *West v. Peoples First Nat. Bank and Trust Co.*, 106 A.2d 427, 378 Pa. 275 (1954); *Dryer v. Lewis*, 57 Ala. 551 (1877); *Ryan v. Dayton*, 25 Conn. 188 (1856); *Coe v. Smith*, 4 Ind. 79 (1853); *Nesbitt v. Miller*, 188 N.E. 702, 98 Ind.App. 195 (1943); *Harrison v. Harrison*, 100 N.W. 344, 124 Iowa 525 (1904); *Stanley v. Kimbal*, 118 A. 636, 80 N.H. 431 (1922); *Mendenhall v. Davis*, 100 P. 336, 52 Wash. 169 (1909).

150. *Butterfield v. Byron*, 153 Mass. 517, 27 N.E. 667 (1891) (Builder "entitled to be compensated at the contract price for all he did before the fire."). *Cf. Anderson v. Shattuck* 81 A. 781, 76 N.H. 240 (1911); *Dame v. Wood*, 70 A. 1081, 1082, 75 N.H. 38, 39; *Weis v. Devlin*, 67 Tex. 507 (1887).

The overwhelming majority of American courts have based recovery on the principle of unjust enrichment.[151] The question to be asked is whether there is another basis for recovery under which reliance interests can be protected. Either party or both may have incurred expenditure in reliance on the contract, for example, if materials which have been bought for performance of contract but not yet worked into the building are destroyed along with the building.

In English law, reliance losses are deductible from a restitution award. In other words, the plaintiff may recover expenses incurred "in, or for the purpose of, the performance of the contract", to the extent that the court considers that to be just.[152] In American law, generally, the courts do not allow the plaintiff to offset such expenses against the restitution claim.[153] However, a few courts have rejected unjust enrichment as the sole basis of restitution and have allowed recovery for reliance expenditure. For example, in ***Angus v. Scully***,[154] the plaintiff had contracted to move the defendant's house. The house burned before the completion of the move, but the plaintiff was allowed to recover for work done. In ***Albre Marble and Tile Co. v. John Bowen Co.***,[155] the plaintiff recovered the fair value of work and labour in preparing "samples, shop drawings, tests and affidavits" for tiles and marble to be put in a hospital, even though none of this work was incorporated into the hospital. In this case, indeed, the court expressly permitted recovery of those losses despite an absence of unjust enrichment. However, the court, based its protection of the reliance interest partly on the peculiar facts of the case. First, the impossibility had been brought about by the acts of the

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151. See *Taulbee v. McCarty*, 144 Ky. 199, 201, 137 S.W. 1045 (1911); *Mathews Const. Co. v. Bradly*, 104 N.J.L. 438, at 442, 140 A. 433 at 435 (1917); *Carrol v. Bowerstock*, 100 Kan. 270, 276, 164 P. 143, 145 (1917); *Ontario Deciduous Fruit-Packing Co.*,134 Cal. 21, 66 P. 28 (1901); *Buccini v. Paterno Const. Co.*, 253 N.Y. 256, 170 N.E. 910 (1930); *Stratford, Inc.v. Seattle Brewing and Malting Co.*, 94 Wash. 125, 162 P. 31 (1916); *Krause v. Board of Trustees*, 162 Ind. 278, 70 N.E. 264 (1904); *Von Waldheim v. Englewood Heights Estates, Inc.*, 115 N.J.L. 220, 179 A. 19 (Ct.Err.&App. 1935). See also Restatement of Contracts, (First), Sec. 468, Comment d. (1932).

152. Law Reform (Frustrated Contracts) Act 1943, 6 & 7 Geo. 6, C. 40, Sec.1(2).

153. See *e. g.*, *Carrol v. Bowersock*, 100 Kan. 270, 164 P. 134 (1917) (No recovery for temporary devices employed to give form to the structure which was to be produced.); *Young v. Chicopee*, 186 Mass. 518, 72 N.E. 63 (1904) (No recovery for lumber near bridge that had not been wrought into the bridge at the time of the fire); *Wallace Studios v. Brochstein's Inc.*, 297 S.W.2d 218 (Tex.Civ.App. 1956). *Cf. The Isle of Mull*, 278 F. 131 (7th Cir.), *cert.denied*, 257 U.S. 662 (1921); *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 467 F.Supp. 129 (N.D.Iowa 1978), *rev'd* on the other grounds, 603 F.2d 1301.

154. 176 Mass. 357, 57 N.E. 674 (1900).

155. 338 Mass. 394, 155 N.E.2d 437 (1959), *aff'd* on rehearing, 343 Mass. 777, 179 N.E.2d 321 (1962).

defendant. Secondly, the defendant had insisted that the work to be performed. ***Northern Corp. v. Chugach Electric Association***,[156] is another case justifying recovery based on reliance interests, rather than recovery being limited to benefits conferred. In this case, the plaintiff lost his equipment because of the defendant's insistence that a method of hauling rock across a frozen lake was feasible. The plaintiff was allowed to recover the losses incurred on reliance upon the theory of implied warranty of the method of performance.

In addition, the Restatement (Second) of Contracts[157] also supports protection of the reliance interest by stating a rule that gives a court power, when the contracts fail, to "grant relief on such terms as justice requires, including protection of parties' reliance interests."

In the light of these developments, some writers' argue[158] that the former emphasis on applying the theory of unjust enrichment has waned. This means that these developments contain the seeds from which the policy of dividing losses between the parties could evolve. That is what happened in ***Northern Corp. v. Chugach Electric Association*** in which the result was a division of reliance losses.[159] Dividing losses between the parties in appropriate cases, promotes justice and fairness.

Unfortunately, the issue has not been clarified in UCC. Confused areas of American common law could have been eliminated if the code had provided the solution of the problem. This means that it might have served as a model in other cases. However, the seller who has made partial performance in terms of having shipped some of the goods to the buyer, is entitled to the contract price of the goods accepted.[160] When the seller incurs expenses prior to impracticability, for example in reliance on the contract, while the code does not deal with the matter, a solution can be found in section 1-103 UCC which admits the application of supplementary principles of the common law.

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156. 518 P.2d 76 (Alaska), *modified* on rehearing, 523 P.2d 1243 (Alaska)1974, *aff'd*, 562 P.2d 1053 (Alaska) (1977). For similar decision, see *Bibb v. Mitchell*, 165 Okla. 61, 65, 24 P.2d 997, 1001 (1933).

157. Sec. 272 (2).

158. *E.g.*, see Fuller and Perdue, The reliance Interest in Contract Damages, 46 Yale L.J., (1937), 373, at 380; Perillo, Restitution in the Second Restatement of Contracts, 81 Colum.L.Rev., (1981), 37, 39. See also Perrilo, Restitution in Contractual Text, 73 Colum.L.Rev., (1973), at 1221.

159. 523 P.2d. 1243, 1246-47, *aff'd*, 562 P.2d 1053.

160. U.C.C. Sec. 2-607 (1).

2.2. MODIFICATION OF CONTRACT AS ANOTHER EFFECT OF THE ESCAPE DOCTRINE IN LONG-TERM CONTRACTS

As discussed above, the remedy usually invoked under the escape doctrines is discharge of performance, sometimes coupled with restitution. The question arises whether there is a more flexible remedy than discharge of the contract? In other words, can we go one step further by ordering reformation of the contract to be accomplished by court order so that the expectations of the parties can be protected.

This issue is very important in long-term contracts. A number of distinctive features of long-term contractual relationships suggest that discharge should be avoided.[161] To understand the problem, long-term contractual relations should be analysed. The main question is what is a long-term contract? Permanent lease arrangement,[162] 16[163] or 20[164] year old contracts can generally be considered long-term contracts. But are five, six or x years contracts, also long term? For example, was the five year contract in ***Scullin Steel Co. v. PACCAAR, Inc.***,[165] on which the parties had made substantial reliance, a long-term contract? It seems that these kinds of contracts are also long-term, because they are more complex than the "one shot" sale contract. It is clear that the longer the term of the contract, the more likely it is that unforeseeable contingencies will intervene. Thus, the extended duration of long-term contract is much riskier than a short-term contract.[166] Moreover, neither party, nor even skilled parties, will be able at the time of contracting, to predict and allocate all the potential risks that might develop during the life of the agreement. Furthermore, long-term contracts are inherently incomplete in their coverage, evolving obligations as they progress.

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161. See generally McNeil, Contracts: Adjustment of Long-Term Economic Relations under Classical, Neoclassical and Relational Contract Law, 72 Northwestern University Law Review, 1978, 854; Michael N. Zundel, Equitable Reformation of Long-Term Contracts - The "New Spirit" of *ALCOA*, Utah Law Review, 1982, 985. See also Leon E. Trakman, Winner Take Some: Loss Sharing and Commercial Impracticability, 69 Minnesota Law Review, 1985, 471.

162. *McGinnis v. Cayton*, 312 S.E.2d at 767.

163. *Aluminum Co. of America v. Essex Group, Inc.* 499 F.Supp. 53 (W.D.Pa. 1980).

164. *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265 at 267 (7th Cir. 1986).

165. 708 S.W.2d 756, 758-60 (Mo.Ct.App. 1986).

166. See *e.g.*, *Iowa Elec. Light and Power Co. v. Atlas Corp.*, 467 F.Supp. 129, 140 (N.D.Iowa 1978) (Price of uranium rose approximately 58% over life of 4 year contrac causing supplier loss of $ 3,097,312). See also Wall St.J. Nov.10, 1972 at 28, Col.1 (Describing Westinghouse's potential liability of over 2 billion dollers on uranium contract, where price rose from $ 9.50 a pound in 1975, to $ 40 a pound in 1977).

Long-term contracts may also produce very complex reliance issue so that continued performance is much more preferable than discharge. For example, in the ***Alcoa case***, in order to perform its part of the contract, Essex entered into a separate long-term agreement to obtain a supply of aluminium.[167] Moreover, most long-term agreements involve public interest; accordingly, the public will benefit if the performance of the contract is continued.[168] Finally, if litigation leading to discharge is avoided, the broader relationship between the contracting parties and the various third parties with whom they are associated will not be affected by termination. Thus the features of long-term agreements may exacerbate the problems linked with discharge cases. Accordingly, the exact formalism of the all-or-nothing approach should be avoided.

The reasons why courts usually refuse to revise contracts are that the parties are reasonably able to foresee the occurrence of the contingency at the time the contract was concluded or, at least, they are able to avoid its effects by taking precautions in the agreement. But in long-term contract, even skilled parties are not able to foresee and allocate all of the potential risks that might develop during the period of the contract. It seems that the most important factor which prevents the courts reforming contracts is that they do not want to break the habit of the traditional solution, *viz.*, the all-or-nothing approach. Moreover, reforming the contracts presupposes fair, equitable and acceptable standards. This is a task that the judges do not want to be the first to attempt.

In summary, the approach of American cases to the problem is as follows:

1. a few courts have discussed the matter without accepting it;[169]
2. reformation of contracts in American law has been limited to contracts where it can be proved by clear evidence that the contract warrants such reformation;[170]

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[167]. *Alcoa* case, 499 Supp. 53, 82 (W.D.Pa. 1980) (Brief of defendant Essex Group, Inc., at 30, *Alcoa* case). See also *Florida Power and Light Co. v. Westinghouse Elec. Corp.*, 517 F.Supp. 440, 444-46 (E.D.Va. 1981).

[168]. See *e.g.*, *Missouri Pub. Serv. Co. v. Peabody Coal Co.*, 583 S.W.2d 721.

[169]. See *e.g.*, *McLouth Steel Corp. v. Jewell Coal and Coke Co.*, 570 F.2d 594, 610 (6th Cir. 1978), *cert. denied*, 439 U.S. 801 (1978); *Iowa Elec. Light and Power Co. v. Atlas Corp.*, 467 F.Supp. 129, 135-36, 138-40 (N.D.Iowa 1978), *rev'd* on other grounds, 603 F.2d 1301 (8th Cir. 1979) *cert. denied*, 445 U.S. 911 (1980); *Eastern Air Lines, Inc. v. Gulf Oil Corp.*, 415 F.Supp. 429, 432 n.2 (S.D.Fla. 1975); *Publicker Indus. Inc. v. Union Carbide Corp.*, 17 UCC Rep.Serv. (callaghan) 989. 990 (E.D.Pa. 1975).

3. the ***Alcoa case*** is the only case that the court has revised the price of the contract and anticipated further performance.

2.2.1. *ALCOA* CASE

The traditional "all-or-nothing" approach was abandoned by the Federal District Court for the Western District of Pennsylvania, when the court rewrote the price escalation formula in a long-term contract in ***Aluminium Co. of America v. Essex Group, Inc.***,[171] ***ALCOA***. In this case, Judge Teitelbaum attempted to fashion a new expansive approach to the doctrine of excuse in the form of modification of the contract.

In 1967, Aluminium Company of America (ALCOA) and Essex entered into a twenty-year contract.[172] The contract provided that Essex would deliver alumina to ALCOA. ALCOA would convert the alumina to molten aluminium and sell it to Essex for later fabrication.[173] In order to adjust for changes, the contract contained a price escalation clause in respect of the set price of aluminium sold to Essex. This clause contained three variable factors: a construction cost index, ALCOA's average hourly labour cost, and the wholesale price index for industrial commodities.[174]

Approximately eight years after the parties signed the contract, because of the Arab oil embargo and the subsequent energy crisis, ALCOA's costs increased far beyond what the escalation clause compensated. Indeed, ALCOA's non labour costs increased by five hundred percent, while the index increased only one hundred percent. This discrepancy left ALCOA with an estimated sixty million dollars loss on the contract. ALCOA sued Essex, seeking reformation of the price under the doctrines of mutual mistake of fact, unconscionability, frustration of purpose, and commercial impracticability.[175]

As the ***ALCOA*** demonstrates, the case is an example in which a price formula apparently failed to achieve the parties' goal of limiting their risks. Under the "all-or-nothing" approach, the court could have had either excused ALCOA from further performance or imposed specific performance. However,

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170. See *e. g., Day v. Fireman's Friend Ins. Co.*, 67 F. 2d 257, 258 (5th Cir. 1933) (Reformation of insurance contract to include mortgage clause). *Cf. Oliver-Mercer Elec. Coop. v. Fisher*, 146 N.W.2d 346, 355 (N.D. 1966).

171. F.Supp. 53 (W.D.Pa. 1980).

172. *Loc. cit.*, at 57.

173. *Loc. cit.*, at 56-57.

174. *Loc. cit.*, at 58.

175. *Loc. cit.*, at 59.

Judge Teitelbaum rejected the traditional alternatives of enforcement of the contract or discharge and instead, chose a third alternative and rewrote the price escalation clause to permit ALCOA a profit. In this regard, the court stated:

"A remedy modifying the price term of the contract in the light of circumstances which upset the price formula will better serve the purposes and expectations of the parties than any other remedy. Such a remedy is essential to avoid injustice in this case."[176]

The court decided that discharge would be unfair to Essex and would deprive it of the assured long-term aluminium supply for which it had bargained. Besides, this remedy would grant ALCOA a windfall gain in the current aluminium market.[177] The court first concluded that there was a mutual mistake at the time of contracting in that the parties had anticipated that the escalation clause would adequately adjust for future changes in energy costs.[178]

In analysing ALCOA's alternative theories - impracticability and frustration of purpose - the court found that the unforeseeable dramatic increase in cost had in the circumstances made performance impracticable in a commercial sense.[179] The court therefore granted ALCOA "some relief". But the relief awarded was equitable reformation rather than discharge. In applying the doctrine of frustration of purpose, the court added that one of ALCOA's principal aims was to make a profit and avoid loss and those purposes had been frustrated.[180] The court also cited the Restatement (Second)[181] of Contracts to support its argument and in conclusion linked its use of equitable reformation to "gap filling" under UCC when the parties have omitted a necessary clause from their agreement.[182]

Although the ***ALCOA*** decision was appealed, the parties renegotiated their contract and settled before any judgment.[183]

Judge Teitelbaum's methodology has been criticised by some commentators. Dawson[184] condemned the decision and described it as

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176. *ALCOA* case, 499 F.Supp. 53, 79 (W.D.Pa. 1980).

177. *Loc. cit.*, at 79-80.

178. *Loc.cit.*,at 63.

179. *Loc. cit.*, at 76.

180. *Loc. cit.*, at 76-77.

181. *Loc. cit.*, at 79 n.21 (Citing Restatement (Second) of Contracts Sec. 296 (2)) (Unofficial version), which became Sec. 272 (2) of final version).

182. 499 F.Supp. at 91 (Citing UCC sections 2-204, -305, -308, -310 (1972).

183. Stewart McCaulay, An Empirical View of Contract,Wisconcin L. Rev., (1985), 465, at 476.

"grotesque", "a lonely monument on a bleak land scape" and "the frustrated venture of a single trial judge whose fancy was unusually free."

Siriani[185] said, "If other courts adopt the ***ALCOA*** test, contracts - especially long-term ones - will become markedly less secure and there will be little basis upon which parties might ascertain in advance which contracts are vulnerable to reformation or avoidance."

It seems that Judge Teitelbaum's mistake was that he blurred the difference between the doctrines of mistake, frustration and impracticability. Mutual mistake is only applicable if the parties are mistaken as to the existing facts,[186] while the doctrines of frustration of purpose and impracticability relate to future contingencies. Thus, the ***ALCOA*** court eliminated these distinctions and its analysis of mistake might be a threat to the stability of contract.

The ***ALCOA*** decision is the only American case which is authority for court-imposed modification. It should be noted that the ***ALCOA*** decision has had little impact on judicial thought in other American cases.[187] However, there are *dicta* in some cases which have approved the new approach and have indicated that the judges are prepared to reform a contract in an appropriate case.[188]

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184. Dawson, Judicial Revision of Frustrated Contracts: The United States, 64 B.U.L. Rev., (1984), 1, at 26, 35.

185. Siriani, The Developing Law of Contractual Impracticability and Impossibility: Part 1, 14 U.C.C.L.J. (1981), 30, at 35.

186. See *e.g., Raphael v. Both Memorial Hosp.*, 67 A.D.2d 702, 412 N.Y.S.2d 409, 411 (App.Div. 1979) (Denying plaintiff's request to cancel settlement agreement, because of agreement's adverse effect on another action on grounds that mistake did not concern a fact existing at the time the contract was entered); *Turderville v. Upper Valley Farms, Inc.*, 616 S.W.2d 677, 678 (Tex.Civ.App. 1981) (Requirement of mutual mistake that the parties believe " in the present existence of a thing . . . that does not exist " satisfied by mistakes concerning ownership of land). *Cf. Shear v. National Rifle Ass'n*, 606 F.2d 1251 (D.C.Cir. 1979); *Japhe v. A-T-O Inc.*, 481 F.2d 366, 370 (5th Cir. 1973); *Leasco Corp. v. Taussing*, 473 F.2d 777, 781 (2d Cir. 1972); *Moffat Tunnel Improvement Dist. v. Denver and S.L.Ry.* 45 F.2d 715 (10th Cir. 1930).

187. See *e. g., Printing Indus. Ass'n. v. Graphic Arts International Union, Local No. 546*, 628 F.Supp. 1103 (N.D.Ohio 1985); *Wooldridge v. E. Exxon Corp.*, 39 Conn.Supp. 190, 473 A.2d 1254 (Conn.Super.Ct. 1984); *Friedco, Ltd., v. Farmers' Bank*, 529 F.Supp. 822 (D.Del. 1981); *Louisiana Power and Light v. Allegheny Ludlum Indus.*, 517 F.Supp. 1319 (E.D.La. 1981); *Wabash, Inc. v. Avnet, Inc.*, 516 F.Supp. 995 (N.D.ill. 1981).

188. See *Gerard v. Almouli*, 746 F.2d 936, 939-40 (2d Cir. 1984); *Friedco, Ltd. v. Farmers Bank*, 529 F.Supp. 822, 830n.9 (D.Del. 1981); *Florida Power and Light Co. v. Westinghouse Elec. Corp.*, 517 F.Supp. 440, 458 (E.D.Va. 1981); *Iowa Elec. Light and Power Co. v. Atlas Corp.*, 467 F.Supp. 129, 135-36 (N.D.Iowa 1978), *rev'd*, 603 F.2d 1301 (8th Cir. 1979), *cert. denied*, 445 U.S. 911 (1980); *McGinnis v. Cayton*, 312 S.E.2d 765, 779-81 (W.Va. 1984).

Although there are many criticisms against this remedy, it is thought that advantages can be gained through the use of modification of contract in frustration situations especially in long-term agreements.

2.2.2. ARGUMENTS AGAINST COURT-IMPOSED MODIFICATION

The competence of courts to reform the parties' agreement invokes the following questions and criticisms:

1. Freedom to contract and sanctity of contracts (*pacta sunt servanda*) are the two fundamental corner stones of the law of contracts in both the Civil and the Common law systems. Accordingly, parties to a contract should be able to rely upon their contract. In this regard, Siriani argues that if the ALCOA's test is used in other contracts, the stability of contracts will be in danger[189] and the impact of it will produce uncertainty between the parties. Suppose a supplier promises to carry out a carefully planned agreement. At the conclusion of the contract, he assumes the risk of onerous circumstances. The later adjustment of the contract will produce uncertainty and deter planning.[190]

2. The ***ALCOA*** decision is contrary to the maxim that the courts will not make a new contract for the parties. It has often been emphasised that the courts will neither consider hardship situations nor modify contracts.[191] The court in ***ALCOA*** remade the contract and substituted its own pricing basis. Critics argue that the ***ALCOA*** case will restrict the parties' autonomy and they will not be able to rely on the terms of the contract that they themselves have created. Dawson[192] questions the existence of such a judicial power so to act. He questions how the parties can be compelled to accept new terms that are manufactured by a court.

3. Such judicial determinations cost money and time and a court can rarely make a better agreement for the parties than they could make for themselves.[193] Moreover, it is doubtful whether the court is capable of

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189. Siriani, *op. cit.*, at 35, 55. *Cf.* H. Deschenaux, La Revision des Contrats par le Juge, Revue de Droit Suiss, (1942), 509, at 518. See also Art. 1134 French Civil Code.

190. See *e. g., Wabash, Inc. v. Avnet, Inc.*, 516 F.Supp. 995, 999 n.5 (N.D.ill. 1981); *Printing Indus. Ass'n v. Int'l Printing and Graphic Communications Union. Local No. 546*, 584 F.Supp. 990, 998 (N.D.Ohio 1984).

191. See *e. g., Cameron-Hawn Reality Co.v. City of Albany*, 207 N.Y. 377, 381-82, 101 N.E. 162, 163 (1913). See also *supra* pp. 42-44, and 71-73.

192. Dawson, *op. cit.*, at 27-31.

193. *Loc. cit.*, at 36.

managing the mass of evidence and proof necessary for making an appropriate reformation. Such a modification requires the courts to make difficult and complex decisions. A court may also find itself responsible for the supervision and perhaps readjustment of the agreement throughout the contract term.

In addition, courts do not have sufficient guidance on the appropriate terms of modification, and in any event, judges are personally ill-equipped to modify complex commercial contracts.[194] The impact of such an approach would be haphazard and would deter planning.[195]

2.2.3. ARGUMENTS IN FAVOUR OF COURT-IMPOSED MODIFICATION

The present writer has defended the reformation of long-term contracts. However, modification should be admitted only, if at all, when some important conditions are met.

Modification of long-term contract can be properly imposed if it will help to stabilise contractual relationships. These contracts are inherently incomplete in their coverage and most evolve a series of obligations during the life of the contract. Accordingly, we can say that inherent in these contracts are a series of gaps which create uncertainty. This is magnified by paying attention to the situation where the contract also produces very complex and specialised reliance. For example, one of the parties may depend on the contract to finance the acquisition or development of coal reserves intended to be used to supply the other party. The increased incentive to keep performing the contract by modification is aptly illustrated by the fact that Essex built a processing plant adjacent to ALCOA's refinery.[196] Accordingly, the possibility of an unforeseen or unforeseeable contingency causing the contract to be discharged deters the parties from entering into long-term contracts by which the public might benefit. Furthermore, as the parties are aware that any litigation for excuse of performance may result in a court-imposed modification, they will try to solve their problems through negotiation.

It should also be noted that in American law, the maxim that the courts will not make a contract for the parties, has lost most of its force. In other

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194. *Loc. cit.*,at 17-18, 36-37.

195. *Loc. cit.*, at 31.

196. Initially, to perform its part of the agreement, Essex entered into a separate long-term agreement to obtain a supply of aluminum. (*ALCOA* case, 499 F.Supp. 53, 82 (W.D.Pa. 1980).

words, a court can often imply reasonable terms into a contract when the parties have failed to provide an express term. In this regard, Justice Holmes, the father of classical contract,[197] states that a court may imply a condition for a variety of reasons: "You always can imply a condition in contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusion."[198]

But will parties be prepared to adjust voluntarily after the initial breakdown? Dawson concedes that parties are unlikely to do so. The German experience indicates that many parties lacked incentive to renegotiate during an inflationary period.[199] Accordingly, the threat of a court-imposed adjustment may serve to encourage the parties to negotiate a solution.

Dawson argues that judges lack the parties' expertise in relation to the subject matter of the contract and their experience in bargaining contractual terms. He adds that problems such as risk allocation, understanding and applying complex accounting data and foreseeing future contingencies are complex matters unsuitable for judges. The present writer thinks that this argument is unconvincing. Complex matters are not unique to long-term agreements; they arise in short term contracts as well. Moreover, judges can refer to expert witnesses for advice.

Court-imposed modification also decreases the likelihood of litigation. Where there has been a frustrating event, the advantaged party does not have any option but to litigate in order to be excused further performance. Accordingly, security of long-term agreements will be increased.

The all-or-nothing approach in long-term contracts is conducive of other problems such as unexpected gains and losses, a lack of trust in good faith negotiation and a situation when the buyer usually wins. In ***Missouri Public Service Co. v. Peabody Coal Co.***,[200] the issue was whether a ten year contract, which included an index to adjust for inflation, should be

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197. G. Gilmore, The Death of Contract, (1974) 5-55.

198. Oliver Wendell Holms, The Path of the Law, 10 Harv. L. Rev., (1897), 457,466; *Hawkins v. Graham*, 146 Mass. 284, at 287-88, 21 N.E. 312, at 313 (1889). *Cf. Parv. Prod. Co. v. I. Rokeach and Sons, Inc.*, 124 F.2d 147, 149 (2d Cir. 1941); 18 S. Williston, A Treatise on the Law of Contracts, Sec. 1937, at 33 (3rd ed. 1978).

199. Dawson, *op. cit.*, at 29-30.

200. 583, S.W.2d 721 (Mo.Ct.App.), *cert, denied*, 444 U.S. 865 (1979).

discharged. Because of the failure of the index - resulting from a change in economic conditions precipitated by the Arab oil embargo - Peabody was left with an unexpected 3.4 million dollars loss on the contract.[201] The Missouri Appeals court found that Peabody should have foreseen the embargo and its consequences for coal prices[202] and left the loss where it fell. But if, contrary to court's decision, the embargo was not foreseeable,[203] it is clear that such an imposition was unfair and inequitable.[204]

If economic analysis[205] is applied in cases of impracticability, the seller will always lose the litigation, since the seller is in the better position to insure against possible contingencies. Moreover, as discussed before, interpretation of commercial impracticability by the courts is usually in favour of buyers.[206]

To place all the accidental loss on one party is very harsh in long-term contracts. When a contract is modified, neither party wins or loses as the loss will not fall entirely on one party. As we have seen in the ***ALCOA*** case, the loss was equitably split between the parties. Reformation is consonant with the principle that no one should knowingly cause harm to another without justification.[207] The imposition of the entire loss on one party may undermine long-term relationships and may result in devastating economic effects for a large innocent group of independent suppliers and consumers. Reformation on the other hand may help both the parties to the contract and also persons indirectly affected, such as employees, subcontractors and agents. Thus, reformation operates to fill gaps in long-term commercial transactions and also provides a flexible process for the settlement of disputes. In other words, it may reflect what the parties would have agreed at the time of contracting if they had foreseen the problem of changed circumstances.

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201. *Loc. cit.*

202. *Loc. cit.*

203. Some commentators have questioned the court's analysis of foreseeability. For example, see Macaulay, Justice Traynor and the Law of Contracts, 13 Stan. L. Rev., 812, 835 (1961); Note, The UCC Section 2-615: Sharp Inflationary Increase in Cost as Excuse From Performance of Contract, 50 Notre Dame Law, (1974), 297, 304-306; Comment, Contractual Flexibility in a Volatile Economy: Saving UCC Section 2-615 From the Common Law, 72 NW. U. L. Rev., (1978), 1032, 1042.

204. *Cf. Iowa Elec. Light and Power Co., v. Atlas Corp.*, 467 F. Supp. 129 (N.D.Iowa, 1978), *rev'd* on other grounds, 603 F.2d 1301 (8th Cir. 1979).

205. Posner and Rosenfield, Impossibility and Related Doctrines in Contract Law: an Ecocomic Analysis, 6 J. Leg. Stud., (1977), 90-91.

206. For example , see *Iowa Elec. Light Power Co. v. Atlas Corp.*, 467 F.Supp. 129 (N.D. Iowa, 1978) *rev'd* on the other grounds, 603 F.2d 1301 (8th Cir. 1979). See also pp. 69 *et seq.*

207. Hillman, An Analysis of the Cessation of Contractual Relations, 68 Cornell L. Rev., (1983), 617, at 619.

Court-imposed modification should be regarded as another aspect of the development of the current law of excuse. In other words, the court should not be limited to an all-or-nothing approach. If this were the case, the court would be able to prevent a party from being released from a disadvantageous contract since there is another option, *i.e.*, modification which could be used to internalise some of the loss.

Finally, in the remedy of reformation, the judges have the benefit of hindsight to provide accurate information. This information helps the judges to modify the contract in a fair and equitable manner. For these reasons, it is thought that the all-or-nothing approach should be reappraised. In conclusion, it is submitted that:

(1) The remedy of modification should be available in extremely serious situations which arise in long-term agreements especially those concerned with international commerce where, for example, there are wide variations in foreign exchanges rates and the prices of many basic commodities such as oil and uranium.

(2) The events that bring about the change of circumstances and call for the application of modification, must be so extraordinary that they are not capable of being foreseen by the party and would not have been foreseeable by the reasonable man.

(3) As a general rule, a change of circumstances, even when fundamental, will not be relevant if the contract is speculative, for then the parties are deemed to have assumed the risk of such change of circumstances.

(4) Reasonable hardships or difficulties will not be taken into account; modification will only be appropriate if a party suffers considerable prejudice. In other words, the economic balance between the parties' respective performances must be drastically altered because of the increased onerosity of performance for one of the parties.

(5) The effects of the change of circumstances must be of such significance that the promisor would not have entered the contract had those changes been foreseeable.

(6) The party seeking modification must prove that because of the change of circumstances, the other party will obtain an unjust profit from the performance of the contract.

(7) Finally, long-term contracts can be terminated if the there is reasonable cause to believe that the basis of the contractual purpose is no longer existent.

2.3. UCC TREATMENT OF MODIFICATION

Authority for judicial modification can be found in comment 6 to section 2-615 UCC. The comment states that:
"In situations in which neither sense nor justice is served by either answer when the issue is posed in flat terms of 'excuse' or no 'excuse', adjustment under the various provisions of this Article is necessary, especially the sections on good faith, on insecurity and assurance and on the reading of all provisions in the light of their purposes, and the general policy of this Act to use equitable principles in furtherance of commercial standards and good faith."[208]

It is clear from the comment that sometimes the appropriate solution is adjustment of contract price rather than excuse or no excuse. The comment suggests that the court may fix a fair price where performance has become impracticable. The flexible nature of the comment permits remedies to be fashioned. This proposition is supported by the reference in the comment to section to the provisions on good faith when "neither sense nor justice is served" by a mechanical application of excuse or no excuse.

It should be noted that the comment gives little concrete guidance to judges who encounter the problem. In other words, it is not clear how the judges are to modify the contract. What does the concept of "good faith" cover? What is the relationship between the application of good faith and the assertion of a claim of impracticability? How should the "purposes and general policy" of the UCC be interpreted in relation to the contract?

The Restatement (Second) of Contracts has adopted a provision analogous to comment 6 to UCC section 2-615 which is not particularly helpful. The Restatement provides only skeletal guidance to a judge attempting to reach a modification of contract. Section 272(2) of the Restatement (Second) of Contracts provides that when the traditional approach "will not avoid injustice" in discharge cases, the court may grant relief "on such terms as justice requires."

Two cases have addressed the issue of good faith. In ***Missouri Public Service Co. v. Peabody Coal Co.***,[209] the defendant informed its buyers that because of production cost increases it would not perform the contracts. Many of its customers acceded to an increase in price, but the Missouri Public Service Company refused to do so and sought specific performance. In his argument the defendant alleged that the plaintiff had

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[208]. U.C.C. Sec. 2-615, Comment 6 (1978).

[209]. 583 S.W.2d 721 (Mo. 1979). The second case considering the problem was *Louisiana Power and Light Co. v. Allegheny Ludlum Industries*, 517 F.Supp. 1319 (E.D.La. 1981).

acted in bad faith by refusing to accede to price modifications. The court rejected this argument, reasoning that:
"where an enforceable, unattained contract exists, refusing modification of price and seeking specific performance of valid covenants does not constitute bad faith or breach of contract. . . ".[210]

This case illustrates how the American courts are not willing to apply comment 6. However, whether or not the courts accept the remedy of modification, what is important is that both UCC and Restatement (Second) of Contracts as well as ***ALCOA*** decision constitute the first steps away from the "all or nothing" approach of the current discharge doctrine.

Although comment 6 and section 272 (2) of Restatement (Second) are not generally accepted by American courts, they are technically available if a court is confronted with a case in which neither discharge nor specific performance seems just. No such alternative can be found in current English law.

B. CIVIL LAW

1. FRANCE

1.1. EFFECTS OF *FORCE MAJEURE*

In principle, by the occurrence of *force majeure* - both in unilateral[211] and synallagmatic[212] contracts - the debtor is totally exonerated from his obligation to perform and is discharged from his liability to pay damages for such non-performance.[213] If the contract is unilateral, there is no problem., since in such case, there is only one obligation on the part of the debtor. For example, in a contract of loan, if the thing borrowed is destroyed by *force majeure*, the debtor is released.[214] However, if the contract is synallagmatic and the debtor is released because of *force majeure*, does it mean that the creditor is also released? Article 1148 of French Civil Code only refers to debtor, and a literal interpretation of the Article would appear to limit the effect of *force majeure* to the debtor alone.

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210. *Missouri Public Service Co. v. Peabody Coal Co.*, 583 S.W.2d. 721, at 725.

211. See Art. 1929 French Civil Code (Contract of Bailment [depot]).

212. Art. 1147 French Civil Code. See also Art. 1302 (Loss of the thing because of *force majuere*); Art. 1722 (destruction of thing rented); Art. 1795 (Death of the worker, architect or entrepreneur). See also Arts. 1741, 1788, 1790 and 1767.

213. Art. 1148. See also Civ., 14 Janv. 1941, D.A.1941. 66.

214. See generally chapter 1, Sec. 2, Arts. 1880 *et seq.*

Planiol maintains that since the obligations are conditional upon each other, neither party intends to bind himself to a contract without receiving counter performance: in which case, both should be discharged.[215]

Other jurists find a solution in the theory of risk (theorie de risques). They argue that the risk of the *force majeure* event lies on the debtor of the obligation which has become impossible. Accordingly, he can not seek the creditor's performance because it is terminated by *force majeure.*[216] Murray relies on the notion of equivalence of the parties' obligations. He asserts that it is of the nature of a reciprocal contract that each party considers his performance as an equivalent for the counter-performance of the other: equivalence is nothing more than equivalence of values between reciprocal exchange.[217]

It seems that the most logical basis for excusing the counter-performance is the failure of the cause of the obligation. In Civil law, contrary to English law, "no consideration" is needed to make an obligation enforceable, but a cause must be found at the root of every obligation so as to make it binding. In effect, in bilateral contracts, the obligation of one party acts as cause for the obligation of the other. That cause is the motive, reason, or purpose for which the party undertakes the obligation.[218] If by reason of *force majeure,* the desired execution of one party becomes impossible, the other party is likewise released from his obligation to perform, since the obligation to perform disappears with the destruction of its cause. Capitant contends that Planiol's theory that the two obligations are conditional upon each other is merely the application of cause by a different name.[219] It should be added that while the French Code does not expressly recognise this doctrine as a general principle, there are various particular applications of it in many Articles of the Code.[220] If we regard *force majeure* as being related to theorie de la cause, the effect is that the doctrine

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215. 2 Planiol, Traite Elementaire de Droit Civil (1932), n. 1337, at 501.

216. See *e. g.*, H. Mazeaud, J. Mazeaud and Francois Chabas, Lecon de Droit, Tome II, premiere volume, Obligations, Theorie General, Montchrestien, 1991, pp. 663, 116 *et seq*; Jean Raduant, *Force Majuere*, Dalloz, Repertoir de Driot Civil, Tome II, 833, at 837 (1952). See also Arts. 1722, 1741, and 1867.

217. Murray, Notion D'equivalence, 1920, at 31.

218. Capitant, De la Cause des Obligations (3 ed. 1927), nos. 7, 133, 138, pp. 30, 290, 301; Planiol et Repert, Traite Pratique de Droit Civil Francais, vi (1930), n. 411. p. 576; Colin et Capitant, Cours Elementaire de Droit Civil Francais II (6 ed. 1931) at 299.

219. Capitant, *op. cit.*, n. 138 at 301.

220. See *e. g.*, Arts. 1722, 1741, 1788, 1790, 1867.

necessarily entails the nullity of obligations without the need for recourse to a court to rescind the contract.[221]

When the question comes before the courts, they usually apply Article 1184, French Civil Code.[222] This Article gives the party to whom execution is due a right to demand specific performance or resolution with damages. In other words, it is concerned with the judicial rescission of the contract when non-performance is due to the fault of the debtor: no mention is made of the case where non-performance is due to excusable impossibility. Nevertheless, in a recent case,[223] the Cour de Cassation has reaffirmed that Article 1184 has general application and is relevant both in a case where non-performance is imputable to the debtor and in a case of *force majeure.* The leading case, ***Ceccaldi v. Albertini***,[224] justifies the application of Article 1184 in a case of *force majeure* in terms of cause. The court stated that Article 1184 does not distinguish between causes of non-performance and does not prevent cancellation upon the ground of *force majeure* when one party has failed to perform his obligation. In effect:

"in a synallagmatic contract, the obligation of one party has a cause, the obligation of the other, and *vice versa*, such that if one is not fulfilled, the obligation of the other becomes without cause."[225]

The approach of the Cour de Cassation can be criticised. First, on a literal interpretation of the language used in Article 1184, its application is limited to those situations where rescission is sought because of non-performance arising from the fault of the defendant. The words, "does not perform" in the Article lend weight to this argument. Moreover, the Article allows "dommage-interets" (damages) to be awarded but, as we have seen, damages should be irrelevant in cases of impossibility of performance. Secondly, the decisions of the Cour de Cassation unreasonably combine actions for rescission and actions for nullity of contract. The Article provides for resolution of the contract by the court, yet, according to the doctrine of cause, the contract is terminated automatically without the need for intervention by a judge.

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221. See *e. g.*, Arts. 1108 and 1131 . For a case of absence of cause, see Cass. Civ. 17. 12. 1959, D. 1960. 294.

222. *Ceccaldi v. Albertini*, Cass. Civ., April 14, 1891, D. 1891, I. 329, S. 1894. I. 391; *Cerfschmer v. Delobel*, Cass. Civ., Aug. 3, 1875, D. 1875 I. 409; *Fornier v. Gros, Cass. Civ.*, May 5, 1920, S. 1921 I. 298. See also, 6 Dec. 1909, D.P. 1910. 1. 281; 5 Mai 1920, D.P.1926. 1. 37.

223. March 12th. 1985, Bull. Civ. 1. n: 94. p. 87.

224. Cass. Civ., April 14, 1891, D. 1891. 1. 329; S. 1894. 1. 391.

225. S. 1944. 1. 99.

In English law, a frustrating event automatically brings the obligation to perform the contract to an end: in *force majeure*, the court acting under Article 1184 grants rescission of the contract. Under English and French law, both parties are discharged from further performance. The point to be made is that in English law the fact that both parties are discharged has long been settled by authority: whereas in French law this has been inferred from the Article, for the reasons discussed above . The ultimate result is therefore the same.

1.1.1. SCOPE OF RESTITUTION AFTER OCCURRENCE OF *FORCE MAJEURE*

A consequence of Article 1184 is that a decree of rescission operates retrospectively to annul the contract with the result that each party is bound to return to the other what he has received. Thus, restitution, in kind or in money, must be made of benefits received by each party.[226] If restitution can not be made, when, for example, a thing has been consumed or services rendered, then compensation may have to be paid. In ***Anglo-American Telegraph Co. v. Compagnie Francaise de Paris a New York***,[227] the two companies entered into a long-term contract in 1880. In 1887, the French company refused to keep performing the contract and, indeed, was forbidden to carry out the contract by Ministerial letter of 21 May 1891. The Anglo-American company sued the French company and claimed the return of certain monies paid to the defendant since 1880 and damages. The Paris Cour d'Appel held that during the years 1880-86, the contract was being properly carried out and the plaintiff was entitled to nothing. During the years, 1887-91, the French company was in breach and the court awarded an account of sums due. Finally, from 21 May 1891 to the expiry of the contract, the Ministerial letter was found to be *force majeure* and no damages were awarded in respect of that period.

The current English approach concerning the down payments is more or less the same as in France. According to the doctrine of cause, when the performance of one of the parties becomes excused due to *force majeure*, the performance of the other party is also excused. Both parties are then treated as if they had never entered the contract. Thus, money paid, for example, to secure the performance of the contract or paid to get the counterpart, is recoverable.

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226. Cass. Civ. 4. 5. 1898, S. 1898. 1. 281; D. 1898.1. 457.

227. *Loc. cit.*

As to the question whether or not a party can claim remuneration for partial performance, the solution given by French law, under Articles 1787-1790 of the Civil Code, is that a person whose work is destroyed before delivery by *force majeure* can not claim any remuneration.[228] Similarly if materials are supplied for installation in a building and these materials - whether or not installed in the building - are destroyed by *force majeure* before delivery, then, again, the party who supplied the materials can not ask for remuneration.[229] This result is radically different from that which would have been reached under the 1943 Act if as discussed above, the materials installed in the building were treated as a benefit.[230] However, the French argue that under the maxim of *res perit dominio*, the risk of destruction of the materials lies on the owner.[231]

The question of reliance expenditure incurred by one party in preparing to carry out the contract has not been discussed at length in French law. The problem is resolved under the theory of "le risque contractuel". It appears that one of the parties must bear the whole risk.[232] For the reasons already discussed,[233] this solution is not fair and in this respect French law requires amendment. The best solution is to impose the loss between the two innocent parties equally.

It has to be added that in the French legal system, the courts are not willing to reform the contracts in changed circumstances. The "all-or-nothing" approach is the only solution. In this regard, English courts are more flexible than their French counterparts.

It has been argued[234] that in a case of *force majeure*, the excused party is obliged, under the principle of good faith,[235] to inform the other party of the situation in order to prevent him incurring extra costs. Failure to do so will result in the excused party being liable in damages.[236] In English law, the party whose performance becomes impossible is under no duty to inform the

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228. *Cf. Appleby v. Myers* (1867) L.R. 2 C.P. 651.

229. *Cf.* Weil, 1971, *op. cit.*, at 519.

230. See generally pp. 152 *et seq.*

231. Weil, *op. cit.*, at 522-23; Mazeaud, L. Lecons, Tome. 3, Vol. 2, Principaux Contrats, 1968, at 544.

232. See P. B. Mignault, La Frutration d'un Contrat, La Revue de Barreau, 387, 1942, at 402.

233. See generally pp. 152 *et seq.*

234. *E.g.*, see Fiat, at 18.

235. Art. 1134 French Civil Code.

236. Fiat, *op. cit.*, at 20.

other party of the situation., since frustration causes the cessation of the obligation to perform the contract *ipso facto.*

1.1.2. EXCEPTIONS TO THE GENERAL RULE

The general rule that a contract is totally discharged because of f*orce majeure*, has the following exceptions: -

1. Contractual[237] and legal[238] risks;
2. If the debtor has been in mis en demeur; this means that if he delays in delivering a specific thing - which is the subject of the obligation - and the thing is destroyed by *force majeure,* he will be responsible for such destruction;[239]
3. Partial exoneration where the damage has two distinct causes, *viz.*, *force majeure* and fault of the defendant. In this case, partial exoneration might be admitted by French jurisprudence;[240]
4. Partial impossibility, which will be discussed later;[241]
5. Temporary impossibility. Although this is not to be found in the French Civil Code, in a case of temporary impossibility the courts do not permit total exoneration but suspend the contract,[242] until the obstacle has disappeared.[243] Although this is also the case in American law,[244] in English law the delay in performance is simply excused with the consequence that the non-performing party will not be liable in damages for delay.[245] Nevertheless, he is bound to perform his obligation in the future. If time appears to be of the essence of the contract, in that case temporary non-performance will justify the other party in rescinding the contract.[246] But what

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237. See Arts. 1772,1773, and 1811.

238. Arts. 1881 and 1882.

239. Arts. 1302 and 1929. See also Req. 4 Juill. 1882, D. P. 82. 1. 353; Req. 19 Nov. 1872, D. P. 73. 1. 215; 20 Mai 1874, D. P. 76. 1. 35; Civ. 7 Avr. 1945, 385.

240. See *Transport Maritime de l'Etat v. Brosset etc.*, Civ. Com. june 19th. 1951 (2 arrets), D. 1951. 1717. However, recent cases indicate that this tendency has been abandoned., see Mazeaud, Responsibilite, *op. cit.*, at 737.

241. *Infra*, pp. 234 *et. seq.*

242. Cass. Civ. 15 Feb. 1888, D. 1888, I, 203; Cass. Req. 15 Nov. 1921, D. 1922, v, 14,; Req. Oct. 24th. 1922. D. 1924. 1. 8. C. Cass.

243. *Dame Saurin v. Dame Bonnafous*, Civ. 1ere. Feb. 24th. 1981. D. 1982. 479.

244. *Village of Minneota v. Fair Banks, Morse and Co.*, 226 Minn. 1, 31 N.W.2d 920 (1948); *Autry v. Republic Prods.*, 30 Cal.2d 144, 180 P.2d 888 (1947). See also Patterson, Temporary Impossibility of performance of Contract, 47 Va. L. Rev. 1961; Restatement of Contracts (Second), Sec. 269.

245. *Supra*, at 43. For Frustrating Delay, see J. E. Stannard, 46 Mod. L. Rev., 1983, 738.

if time is not of the essence of the contract but the party seeking relief will be prejudiced by the delay? In French law, the judge has to ascertain what the parties' intentions were at the time of the formation of the contract. What is important is that the performance of the contract after delay should not be useless[247] and still conform to the intentions of both parties.[248] In English law, the criterion is that the contract is discharged if the delayed performance frustrates the contract.[249] This means that the claimant has to prove that the delay will cause such a change of circumstances that performance will be a thing radically different from that which was undertaken by the contract.

It should be added that advance payments are recoverable if the payer does not receive an equivalent during the period of suspension.[250] French jurisprudence does not admit any modification in the contract after performance has become possible.[251]

Suspension is automatic and does not require a court order. For example, where an employment contract is suspended, the employer will not pay the employee and the employee will not work for the employer: This arises automatically.[252]

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246. In French law, see *e. g., Bour v. Hertz et coquelin*, Trib. Sein, Dec. 14, 1916, Gaz. Trib. 1916 II. 4; *Levy v. Despretz*, Cass. Civ., June 3, 1929, S. 1929 I. 365; *Jonat v. Societe du Jardin d'Acclimation*, Cass. Civ., June 10, 1929, S. 1929 I. 267. In English law see *Parkin v. Thorold* (1852) 16 Beav. 59; *United Scientific Holdings v. Burnley B.C.* [1977] 2 W.L.R. 806. In American law see *Allanwilde Transport Co. v. Vacuum Oil Co.*, 284 U.S. 377, 39 S.Ct.147, 63 L.Ed. 312, 3 A.L.R. 15; *Leopold v. Salkey*, 89 ill. 412, 31 Am. Rep. 93; *Hong v. Independant School Dist.*, 181 Minn. 309, 232 N.W. 329, 72 A.L.R. 280; *Horwitz v. United States*, 267 U.S. 458, 45 S.Ct. 344, 69 L.Ed. 736.

247. *Devaux, Pichetty v. Salmon et Forges et Acieries de la marine*, Trib. Sein, March 16, 1917, Gaz. Pal. Dec. 31, 1917. (If in sale contract, price of a commodity fluctuates greately, in that case, suspension might not be allowed).

248. Cass. Req. 28 November 1934, S. 1935, I. 105; See also Weil, 1971, *op. cit.*, at 441. *Cf. Rungeard etc. v. Giallard.* Ch. des Requetes, Feb. 13th. 1872 D. 1871. 2. 177 (The court should examine whether or not the time limit in contract is essential, since further performance after the time limit will be useless).

249. *Hong Kong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.* [1962] 2 Q.B. 26; *Price v. Milner* [1968] E.G.D. 234; *Wrong Lai Ching v. Chinachem* (1979) 13 Build.L.Rev. 86; *Marshall v. Harland and Wolff* [1972] I.C.R. 101; *Kidston v. Monceau Ironworks* (1902) 7 Com. Cas. 82; The *Hannah Blumenthal* [1983] 1 Lloyd's Rep. 103.

250. See *Bassot v. Basset*, Cour de Paris, Oct. 19, 1916, Gaz. Trib. 1916 II. 530.

251. Fiat, *op. cit.*, at 142 and cases cited.

252. See Raduant, *op. cit.*, at 274. In American law, see *Patch v. Solar Corp.*, 149 F.2d 558 (7th Cir.), *cert. denied* 326 U.S. 741, 66 S.Ct. 53, 90 L.Ed. 442 (1945) (Patent licence could not be utilized during wartime; frustration is not total, since usable after end of war; duty to pay royalty suspended).

1.1.3. SPECIAL SOLUTION IN CONTRACTS INVOLVING THE TRANSFER OF OWNERSHIP OF A SPECIAL THING - ARTICLE 1138

According to Article 1138 of French Civil Code, in a contract of sale of a specific thing, as soon as the contract is formed, the buyer bears the risk of the destruction of the thing as a result of *force majeure*, even if it has not been delivered to him.[253] This rule is not mandatory. Accordingly the parties are allowed to stipulate in their contract that the seller will be liable until the thing is delivered. Moreover, the seller will bear the risk, even though ownership has passed to the buyer, if the buyer has given notice to the seller to deliver. On notification, the risk of any damage or destruction by *force majeure* falls upon the seller. These rules also apply to other contracts, such as a contract of loan for use[254] (pret a usage), and contract of hire of work and skill[255] (louge de service). Thus, for example, in a contract of hire of work, the owner of the thing upon which work or service is being carried out, for example, repair of a machine, is not obliged to pay for that work or service unless he has benefited from the work done.[256]

1.2. EFFECTS OF IMPREVISION

As we have seen,[257] the theory of imprevision has not been accepted in civil or commercial case law. In applying the theory, the Tribunaux Administratifs of France, especially the Conseil d'Etat, generally take the following steps: First, the parties are invited by the judge to renegotiate in good faith so as to agree to certain conditions.[258] Secondly, if amicable adjustment by the parties fails, the court may grant what is called an "indemnite d'imprevision" which in fact would most probably cover at least part of the increased cost of the claimant's performance.[259] In measuring indemnite, the courts take into account all the circumstances, such as the economic situation of the claimant, profits and advantages expected.

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253. Weil, 1971, at 522-523.

254. Art. 1877 of French Civil Code.

255. Arts. 1788-90 of French Civil Code.

256. Art. 1790. *Cf. Appleby v. Meyers* (1867) L.R. 2 C.P. 651.

257. *Supra* pp. 15-17.

258. *Compagni General d'Eclairage de Bordeaux v. Vill de Bordeaux*, Conseil d'Etat, March 30, 1916, D. 1916. 3. 25; S. 1916. 3. 17.

259. *Loc. cit.* See also Conseil e'Etat, 27 Mars 1926, D. 1927. 3. 17; Conseil d'Etat 9 Decembre 1932, D. 1933. 1. 17; S. 1933. 3. 9.

However, in practice the administration bears most of the actual losses (from 80 to 90 per cent).

It is believed that the court should not fix the terms of the contract for future,[260] as it is only the parties who can adjust the contract and it is not open to the court to do so.[261] However, it is rather difficult to avoid this, because future losses and gains should also be taken into account in order to determine how the losses should be equitably shared.[262]

In summary, if the parties are not able to agree between themselves on the special conditions in which the plaintiff will be able to continue to perform the contract, the judge, taking all the facts into account, will have to determine the amount of indemnity so as to enable the plaintiff to perform his obligation under the contract with a reasonable margin of profit in the new circumstances which have arisen.[263] In the leading case, ***Gaz de Bordeaux***,[264] the plaintiff suffered considerable loss as a result of the rise in coal prices. The Conseil d'Etat came to the conclusion that without an adjustment, the plaintiff would face financial ruin. Accordingly, it decided that the administration had to share with the plaintiff the additional burden by granting an adequate indemnity.

It should be noted that the remedy in this case was granted where the change of circumstances was merely temporary. If the situation becomes permanent, imprevision becomes *force majeure* and the court may grant recession of the contract. For example, ***Cie. des Tramways de Cherbourg***[265] involved a tramcar concession. Because of high rates, the company lost its customers. On the verge of bankruptcy, the company petitioned for financial assistance from the Administration. The petition was rejected by the administration and this decision was affirmed by the lower administrative court. However, the Conseil d'Etat held:
"The new situation thus created constitutes a case of *force majeure* and authorises either party, in the absence of a mutually satisfactory agreement, to claim for termination of the contract with compensation if due, taking into consideration the provision of the contract as well as all circumstances."

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260. 6 Planiol and Ripert, Traite Pratique de Droit Civil (2nd ed. 1952), Sec. 398, p. 538.

261. M. Walline, Droit Administratif , (9eme ed., Edition Sirey, 1963), p. 734.

262. Closset, Note, in D. 1927. III. 17.

263. See Conseil d'Etat, 30 Mars 1916, D. 1916. 3. 25.

264. *op. cit.*

265. Cons. d'Etat. Decembre 9, 1932, S. 1933. 3. 9., 1933 D. III. 17.

1.3. SPECIAL SITUATIONS ON THE MODIFICATION OF THE CONTRACTS IN CIVIL LAW

The rigor of French civil jurisprudence resulted in intervention by the legislature. A series of laws were enacted after the First World War. As a result, performance of certain contracts which had become so burdensome for the obligor that he would become totally ruined, were not to be upheld. The most celebrated law, Loi Faillot[266] allowed the debtor to demand the resolution of a contract entered into before the war. The judge was not authorised to revise the contract, but he might upon the request of one of the parties, order the suspension of the contract, with or without indemnity.[267] Similar laws were enacted after the Second World War. The law of 22 April 1949, allowed judges to declare the cancellation of such contracts. The legislature then took further steps and authorised the courts to modify the contract where the performance of the contract had become burdensome. This was particularly marked in the case of apartment and farm leases.[268] More recently, the law of 18 April 1946 (Art. 3) and the law of 25 August 1948 again authorised the judges to modify certain leases.

2. GERMANY

2.1. EFFECTS OF IMPOSSIBILITY OF PERFORMANCE

In cases of initial impossibility, the contract is void[269] and the obligor is released from his obligation. However, this rule is not *jus cogens.* For example, in the sale of a non-existing right, the contract is not void and the seller is responsible for any damage unless the right is the one the creation of which is impossible.[270]

According to paragraph 275 of the BGB which relates to contracts in general, the promisor becomes free of his obligation as a result of impossibility of performance occurring after the conclusion of the contract. The BGB also contains a special provision on leases that permits the scaling down of rent when the asset leased becomes unfit for the purpose of the

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266. Loi du 21 Janvier 1918. The most important of these laws are: Loi du 6 Juillet 1925; Loi du 9 Juin 1927; Loi du 21 Juillet 1927; Loi du 29 Juin 1935; Loi du 18 Avril 1966; Loi du 25 Aout 1948; Loi du 25 Mars 1949; Loi du 22 Avril 1949; Loi du 2 Aout 1949; Loi du 24 Mai 1951; Loi du 22 Juillet 1952; Loi du 9 Avril 1953.

267. Cass. Req., 26 Dec. 1927, Gaz. Palais, 28 Feb.

268. Law of 6 July 1925; Law of 9 June 1927; law of April 1933; Law of 12 July 1933.

269. Para. 306 B.G.B.

270. R.G.Z. (Official collection: Entscheidungen des Reichsgericht in Zivilsachen, Vol. 90, p. 240.) (Cited in Gottchalk, p. 129).

lease.[271] Paragraph 275(1) BGB deals with objective impossibility, while paragraph 275(2) BGB deals with subjective impossibility. However, paragraph 279 BGB makes a significant exception to the principle in paragraph 275(2). Under paragraph 279, if an object that the promisor has undertaken to deliver is defined generically, he is responsible for his subjective impossibility to deliver although no fault is imputable to him, provided delivery of a thing of that genus is objectively possible.[272]

In reciprocal contracts, where the performance becomes impossible for one party, neither he nor his partner remains responsible.[273] In other words, this means that in this situation, impossibility cancels the contract and releases both parties from performance. In German law recession operates to bring the parties back to the status quo; while in English law, frustration merely frees them from future performance.[274]

Restitution in German law rests upon the doctrine of unjust enrichment.[275] According to paragraph 812 BGB, a person who acquires something without legal ground, through the performance of another or otherwise at his expense, is obliged to return it to him. Thus, any down payments, benefits conferred and partial performance may be subject to restitution.

While there is doubt whether unjust enrichment is completely recognised in English law,[276] the doctrine is very important in German law. As we have seen, the doctrine is not as well developed in France, because, unlike the BGB, no Articles in the Code expressly[277] establish the doctrine of unjust enrichment: and in so far as it is applicable in French law, this has been through jurisprudence.[278]

The doctrine of unjust enrichment is, however, open to criticism. It only applies if a benefit is obtained to which the acquirer had no legal right. In excusable non-performance, it is presupposed that the contract expressly

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271. Para. 537 B.G.B.

272. *B. v. Bremer Rolandmuehle* (Reichsgericht, Second Civil Senate), 23 Feb. 1904, 57 ERGZ 116. (Cited in Von Mehren and Gorderly, *op. cit.*, p. 1067).

273. Para. 323 B.G.B.

274. *Supra* pp. 142-143.

275. See Paras. 812-822 B.G.B.

276. See A. M. Haycroft and D. M. Waksman, *op. cit.*, at 208.

277. Art. 1377 refers to payment by mistake; Art. 1376 refers to money or property received without consideration, and Art. 1379 refers to the obligation to restore specific property in kind.

278. Req. 15 June 1892, D. 1892. 1. 596, S. 1893. 1. 281. (In this case, the Cour de Cassation laid down the rule that a person may not enrich himself unduly at another's expense).

gives the party benefited a legal right to performance. Furthermore, the doctrine does not consider any minor benefit to be unjust enrichment and it is therefore difficult to determine when a benefit qualifies as unjust.[279]

Under paragraph 818 BGB, a party is not required to return benefits received when he is no longer enriched thereby. Thus, reliance expenditures incurred in preparation of the performance, will not be recoverable. This means in effect that apportionment for the reliance can not be sought.

In sale, the risk of accidental destruction or deterioration passes to the buyer on the delivery of the thing sold. Contrary to French Law, the risk is not transferred to the buyer on the conclusion of the contract and rests with the seller.[280]

2.2. EFFECTS OF WEGFALL DER GESCHAFTSGRUNDLAGE

In Germany, there has been more judicial involvement with the problem of changed circumstances than in the other countries studied. It is now well established that the courts, as a result of unexpected changed circumstances, may either terminate the contract or modify the terms of the contract by substituting new terms for those agreed by parties. In German law, adjustment is preferred to termination of the contract.

Within the scope of this research, it is, however, impossible to analyse the abundant case law and only one of the most important decisions of the Bundesgerichtshof (German high court) will be discussed.

2.2.1. THE *VOLKSWAGEN* CASE[281]

In this case, the plaintiffs (two buyers) had ordered Volkswagen cars very shortly prior to the war. They had also made payments on the cars. When the war occurred, the defendant's factory was promptly taken over by Hitler's government for war production and was then heavily bombed, with the destruction estimated at 65 percent. The money paid by the plaintiffs and other buyers was confiscated by the Russians when they reached Berlin. After the war, the defendant started producing cars. The plaintiffs sued the defendant for delivery of the automobiles they had ordered. The German intermediate court of appeal dismissed the action, declaring that the foundation of the contracts had been destroyed. The court argued that the

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279. H. Smit, *op. cit.*, at 292.

280. Para. 446 B.G.B.

281. 1952 JZ 145 (BGH Oct. 23, 1951) (Cited in Dawson, Judicial Revision of Frustrated Contracts: Germany, 6 B. Uni. L. Rev., 1983, 1039, at 1083-1088).

sale price had risen from the agreed price of 990 marks to 4400 marks and it would be wrong to order the defendant to deliver a car at the original price. Moreover, the court said it did not have the power to bind both parties to new terms.

The Bundesgerichtshof disagreed holding that the collapse of the foundation of a contract does not necessarily lead to termination of the contract:

"In law one must start from the premise that the contracts are to be performed. The courts by virtue of [paragraph] 242 are authorised when the foundations of a transaction have been destroyed to intervene in a contract relation and extensively reshape it. The duties expressed in the contract can in such a case be very considerably changed to the extent this is needed in order to ensure that performance will serve those interests of both parties that deserve to be considered."

The Bundesgerichtshof added that the lower court had apparently been under the misconception that it must be able by its decree to alter the obligations of the other 336,000 buyers who had made their own separate contracts and were not parties to the action. While this was clearly impossible, it was not necessary. The contracts of the other buyers were relevant only for deciding what performance could fairly be demanded by these two plaintiffs from the defendant. It was for this reason that it was important to know how many other buyers had asserted claims under their contracts, how many were able to make the payments that were still due from them and how many did not want cars after all and merely their money back. With such claims for restitution, there would be the question whether they should be awarded the full amount paid or whether like other debts that had been incurred before 1948, it must be cut down to one-tenth of the original amount. The lower court had also to ascertain whether the defendant had used the money paid by the buyers to acquire other assets or profits. In order to determine what price the plaintiffs would be required to pay, the trial court would need to discover the actual cost of production of a Volkswagen car (in this regard, the parties has made contradictory assertions) and the present rate of production at the defendant's plant. Moreover, it was important that the defendant's plant be ordered to produce the maximum number of cars, since the trial court must set a deadline for the performance of the pre-war contracts so as to ensure that their performance would not be prolonged far into the distant future.

As this case shows, there were huge and unmanageable tasks to be taken by the lower court. The trial judge was ordered to find out what had happened to 336,000 buyers who had bought cars thirteen years before

during which death and migration of Germans occurred on an enormous scale. The trial judge had to find out the defendant's current production costs, profits and financial situation. The trial judge was also ordered to consider whether the defendant should be given credit for any of the highly variable overhead costs it had incurred before, during and after the war and how much credit the buyers - who had to wait so long for their cars - should receive for the payments made before the war.

It is clear that in doing so the trial judge will encounter a lot of inaccessible facts and complex matters. Why then should the courts be given such authority? The present writer has argued that the remedy of modification can only be accepted in respect of revision of long-term contracts and even then only applied within a framework of limitations and conditions.[282] He would certainly not allow the remedy in respect of the contracts in the Volkswagen case. Moreover, in cases such as Volkswagen, the question arises whether the judge is capable of managing the mass of evidence necessary for adjustment. What is the procedure to obtain the data required by the court to achieve a desirable result? Finally, what are the advantages of Volkswagen decision for future contracts? It is submitted that the approach in the Volkswagen case is unnecessary, of little utility, far from the main task of a court and, more importantly, is open to subjective manipulation. Finally it results in uncertainty as parties can not know what attitude a court will take in similar cases.

2.2.2. FORMS OF MODIFICATION

As we have seen, the consequence of the collapse of the basis of contract is usually adaptation of contract. This may take the following various forms:

It may be in the form of a limitation of demand or delay in the performance of the contract.[283] The adjustment may result in an increase of performance so as to provide an equivalent for benefits already received.[284] In a long-term rental contract, for example, the plaintiff was bound to supply the defendant with steam at a fix price for heating purposes. The change in the value of money (because of the inflation of the early 1920s) rendered the rent a ridiculously inappropriate consideration for the value of the steam that

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282. *Supra*, p. 181.

283. BGH. Monatsschrift Fur Deutsches Recht 1953, 282; NJW 1958, 758. (Cited in Hay, *op. cit.*, at 36).

284. BGH. Der Betrieb 1985, 1325 (Cited in Hay, *op. cit.*).

had to be supplied. The judgement of Reichsgericht (1920) raised the price for the steam above what had been agreed in the contract since, otherwise, the situation would have been intolerable for the plaintiff and would have been against the principles of good faith and equity.[285]

Another form of modification may lead to a reduction in the obligation of the contacting party. For example, in one case, which involved a usufructuary lease of property for the purposes of construction, a subsequent regulation prohibited construction on that property. The lessee demanded a reduction of the rent and argued that he considered that the basis of the lease was that the land could be used for the erection of a building. Although the lessor stressed that the lessee had given up his plan to build, the court decided that the lessee was to be granted a reduction in the rent, since it would violate the principle of good faith expressed in paragraph 242 BGB, if no reduction was made.[286]

Sharing either the loss or the profit resulting from the contract[287] or an internal change in the terms of performance are other illustrations of adjustment of contracts. In one case,[288] two heirs of a family who owned a farm, gave their right of inheritance to another heir. He was expected to continue running the farm as a family concern. Because of his sudden death, his son sold the farm for DM1,000,000. One of the heirs demanded an increase in compensation, commensurate with this development. The BGH decided in her favour. The court held that a compensation arrangement would have to be found, to which reasonable parties would have agreed if they had contemplated at the time of contracting that the farm would be sold out of the family.

Other appropriate modification might be also required by the courts depending on particular facts and circumstances involved, for example, a requirement to produce alternating electric current might be substituted for an obligation to supply direct current.[289]

Termination of contract may be allowed if adaptation is not possible or can not reasonably be required.[290] According to unjust enrichment theory,[291]

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285. RGZ, Vol. 100, at 129, 139. (Cited in Cohn, J. Comp. Leg. and Int'l. L., 1946, *op. cit.*, at 19).

286. BGH NJW 58, 758. (Cited in Meinecke, *op. cit.*, at 109).

287. Joachim Meinecke, *op. cit.*

288. *Cf.* BGH LM no.40 on Para. 242; BGHZ 40, 334 (338) (Cited in Meinecke, *op. cit.*).

289. BGH NJW 1954, 1323. (Cited in Hay, *op. cit.*, at 364).

290. BGH (1959) JZ 482. (Cited in Rainer Geiger, The Unilateral Change of Economic Development Agreements, 23 Int'l. and Comp. L. Q., 1974, 73, at 95).

each party must return to the other whatever he received in return for any obligations not performed. If restitution is not possible the party who has been unjustly enriched must pay compensation.

Before discussing other matters, the question arises whether contract modification can take the form of substituting a completely different physical subject matter for that promised but which can no longer be delivered. The answer is in the affirmative! However, the German courts rarely do so. In one case, a plaintiff contracted with a builder for the erection of a house on a tract of farm land leased by the plaintiff. The local housing officer refused a permit to erect a house on the land. The plaintiff claimed impossibility of performance and sought the return of his down payment. The defendant did not accept the plaintiff's claim, arguing that there was other land some distance away owned by a third party who was willing to lease it to the plaintiff at the same rent. Moreover, a building permit could be secured for a building on the new land which had the same features, such as fresh air and a good view, as the land the plaintiff had originally wanted. The German high court (Bundesgerichtshof) held that if the defendant proved these facts, the trial court would be required to accept his offer and the contract as thus revised would be enforced.[292]

It should be noted that like French imprevision, in the case of a transaction with speculative elements,[293] or where the risk was foreseeable to the party and he could have protected himself by an appropriate clause,[294] the German courts will not accept modification.

Unlike English law, supervening events in Germany do not automatically lead to termination of the contract. The reason is that the policy of German courts is, under the principle of contractual loyalty and commercial security, to maintain the contractual relationship as far as possible. The result is that the courts are willing not only to supplement, but also to change, the contractual terms[295] so as to allow modification according to standards of

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291. Paras. 812-822 B.G.B.

292. 1966 JZ 409 (BGH 1966). A different decision was held in 1972, JZ 120 (OLG Karlsruhe 1971), which involved a conract to deliver over a period of ten years a large quantity of coal (936,000 tons) to be produced in three designated mines in Ruhr. When the three mines were permanently closed because of their high production costs, the seller offered but was not allowed to deliver coal of the same quality produced at other mines. In *dicta*, the court added that similarly the buyer if he had desired it, could not have demanded coal from other mines.(Cited in Dawson, at 1089).

293. Bundesgerichtshof, Der Betriebsberater (1964), p. 1397. (Cited in Wolfgang, *op. cit.*).

294. BGHZE, p. 293, at 295. (Cited in Wolfgang, *op. cit.*).

295. *Cf. Volkswagen* decision of the BGH (1952) NJW, 137

good faith. As with imprevision,[296] the parties are initially encouraged to attempt to renegotiate an adaptation in good faith.[297]

In Anglo-American and French law, the courts generally deny adjustment and in an appropriate case merely discharge the parties from liability to perform the contract. In German law, however, the courts are willing not only to supplement, but also to change express contractual terms[298] to permit a modification according to the presumed intent of the parties or to objective standards of fair dealing and good faith. Thus, a variety of options are available due to completely open nature of the doctrine of wegfall der geschaftsgrundlage. German law leaves the determination of supervening events as well as its effects to the courts. While in English law, the 1943 Act limits itself to the effects of frustration and, as discussed before,[299] it does not define a frustrating event; this is done by the courts.

In conclusion, it can be said that neither Civil law nor Common law have as yet achieved a comprehensive and acceptable solution to the problems we have been discussing. The Common law approach to frustration is too rigid, while the approach in German law is too liberal in that it gives a blanket power to the courts to revise a contract even if the changed circumstances are not very harmful and the contractual balance between the parties is not basically disrupted. Surprisingly, contractual revision has also been granted in the form of substituting a totally different subject matter for that promised! The German approach is therefore seriously open to subjective manipulation, which raises undesirable hopes for possible modification and reduces the stability and security of any agreement - especially in transnational commercial transactions. Accordingly, the present writer contends that the best way in order to avoid the defects in the domestic laws, is for the parties to protect themselves by a well-drafted *force majeure* clause. How easy is this solution? How should we draft a comprehensive *force majeure* clause? These are important issues which are discussed in final chapter of this thesis.

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296. Conseil d'Etat, March 30. 1916. S. 1916. 3. 17.

297. Lesguillons, *op. cit.*, at 532.

298. See *Volkswagen* case, at 194-196.

299. *Supra*, p. 146.

CHAPTER FIVE:
EFFECTS OF PARTIAL EXCUSABLE NON-PERFORMANCE

As will be discussed, partial excuse of non-performance does not ordinarily bring the contract to end. Generally, if the part of the obligor's performance that is excused is so minor that it is still practicable for him to render substantial performance, he is expected to perform the obligation which remains possible. The problem which is likely to arise is to determine what alteration is to be made in the other party's obligation to render counter performance? What proportion of the original consideration is the discharged party still entitled to receive? If a person is under two or more contractual obligations and due to an intervening event, can not perform them completely, what is he to do? To what extent is the seller relieved from liability to any particular buyer? Let us examine these issues from a comparative point of view.

A. COMMON LAW SYSTEMS
1. UNITED STATES OF AMERICA
1.1. PARTIAL IMPRACTICABILITY

In a case of partial impracticability, under American law, if a party is still able to render substantial performance, it is his duty to do so.[300] Moreover, if the other party is willing to accept less than substantial performance, the obligor is required to perform unless the partial impracticability renders the remainder of the performance more burdensome. In that case, the entire performance is discharged. If the obligor does all that is practicable, he may have a claim for excuse and restitution.[301]

For example, suppose A contracts to construct a restaurant for B for $100,000. The plan of the restaurant includes numerous lighted signs including one next to the street. Before performance of the contract, a local authority forbids the installation of such a sign. in these circumstances, performance of the entire contract is not excused since what is substantial is the construction of the restaurant. A's failure to install the sign next to the street would not be material. However, B will be under a duty to pay the agreed consideration subject to a claim for restitution based on A's failure to install the sign for which he has been paid.[302]

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[300]. Restatement (Second) of Contract, Sec. 270, Comment b.

[301]. *Loc. cit.*, Comment a.

[302]. *Loc. cit.*, Sec. 272.

It should be noted that partial excuse of non-performance, does not always preclude a total discharge of the contract. In ***Edward Maurer Co. v. Tubeless Tire Co.***,[303] the plaintiff agreed to sell certain tonnages of rubber to be delivered in monthly instalments between May and December. The agreement contained *force majeure* clause that discharged liability for non-performance caused by government regulations. Shortly after the conclusion of the contract, the government issued regulations concerning the distribution of rubber and as a result the buyer qualified for only 180 pounds of rubber per month. No deliveries were made in June, July and August. In September, however, the seller delivered a quantity equal to a monthly instalment under the agreement. The buyer rejected delivery. When the war was over and the regulations had been lifted, the seller again tendered delivery and the buyer again refused to accept. The market price of rubber had fallen considerably, and the seller sold it at much less than the agreed price. He sued the buyer for the difference between that price and the contract price. The court held that:

"The applicable law seems to be well settled. If performance is made impossible by a subsequent valid act of law or governmental authority, both parties are discharged. If a contract is made subject in its entirety to a condition, and that condition happens, the rule is that both parties are discharged, and not that performance is suspended until the condition is overcome."[304]

The sixth circuit[305] affirmed this decision arguing that it had been the parties' intention that in the event of government regulation, the performance of the contract would be excused, not merely suspended.

In another case,[306] it was expressly agreed in a lease that the only business to be carried on in the premises was a saloon. During the term of the lease, the sale of alcoholic beverages became illegal. Although the premises could be used for other purposes, the court held that frustration was "nearly total". In other words where the principal use is completely frustrated, the frustration of the contract as a whole will be "nearly total". Conversely, where

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303. 272 F. 990 (N.D.Ohio 1921), *aff'd*, 285 F. 713 (6th Cir. 1922).

304. 272 F. at 993.

305. 285 F. 713 (6th Cir. 1922). See also *Dant and Russell v. Grays Harbor Exportation Co.*, 26 F.Supp. 784 (W.D.Wash.), *aff'd*, 106 F.2d 911 (9th Cir. 1939); *Autry v. Republic Prod.*, 30 Cal.2d 144, 180 P.2d 888 (1947); *Monite Waterproof Gulf Co. v. Sawyer-Cleator Lumber Co.*, 234 Minn. 89, 48 N.W.2d 333 (1951); *Village of Minneota v. Fair Banks, Morse and Co.*, 226 Minn. 1, 31 N.W.2d 920 (1948); *Kunglig Jarnvagsstyrelsen v. National City Bank*, 20 F.2d 307 (2d Cir. 1927).

306. *Doherty v. Monro Eckstien Co.* 198 App.Div. 708, 191 N.Y.S. 59 (1st Dept. 1921).

the principal use is not completely frustrated, the frustration will be merely "partial" and the defence of excuse of performance will not be available. Thus, in American law, the doctrines of frustration and impossibility will not apply unless the escape doctrines are "total or nearly total".[307]

When there is commercially reasonable substitute partial excuse will not lead to total excuse of performance. In ***Myer v. Sullivan***,[308] the sellers sold a quantity of wheat "f.o.b. Kosmos Steamer at Seattle". The outbreak of war resulted in Kosmos line ships being unavailable at Seattle; however, delivery at that line's loading dock remained possible. The sellers' duty to deliver was not excused., since a dock substitute was available at no additional expense. In another case,[309] the seller's obligation was not affected under a contract to deliver milk at the buyer's address when quarantine restrictions made delivery there illegal. The court argued that "it does not follow that the contract could not be performed substantially if not literally."

Where the obligor's non-performance is material, it will lead to total excuse. Nevertheless, where the parties have exchanged promises the contract may be salvaged instead of being discharged. In effect, this can prevent the obligee from being relieved of his duties and the consequent discharge of the obligor's obligations. Such an agreement will also bar any claim for restitution in respect of the obligor's non-performance.[310] For example, if the excused party is assured by the other party that he will perform completely within a reasonable time, the excused party ought to perform what he can. Apportionment will be unnecessary since the other party is willing to render his own performance in full and has accepted the situation.[311] Thus - in order to be entitled to partial performance - the party whose performance is not discharged must be ready and willing to perform in full. If the contract is divisible, what will be the solution? When the excused party has rendered partial performance, the agreed exchange will be the relevant proportion of the total performance promised. Otherwise, the excused party will be unjustly enriched at the expense of the other party. In ***Mullen v. Wafer***,[312] the court

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307. *Lloyd v. Murphy*, 25 Cal.2d 48, 153 P. 2d 47, 1944.

308. 40 Cal.App. 723, 181 P. 847 (1919); U.C.C., Sec. 2-614, Comment 1.

309. *Whitman v. Anglum*, 92 Conn. 392, 103 A. 114 (1918).

310. Restatement of Contracts (Second), Sec. 270, Comment c.

311. Restatement, *op. cit.*, Sec. 270 (b) and illustration 4, the facts of which are suggested by *Van Dusen Aircraft Supplies of New England v. Massachusetts Port Auth.* 361 Mass. 131, 279 N.E.2d 717 (1972).

found the contract divisible, the return performance was therefore apportioned and the excused party recovered accordingly. In this case, the seller of an accounting business died before he had performed his obligation to assist the buyer for two years; the court held that:
"the contract is severable and can be apportioned [so that] the sale of the physical assets for the separate contract price of $4,682.20 is enforceable."[313]
A fortiori, the same is true where the excused party has partially performed the contract.

1.2. PRORATING IN AMERICAN COMMON LAW

According to section 2-615(b) of the UCC, when the impracticability affects only part of a seller's capacity to perform, he must allocate production and deliveries among his buyers in a "fair and reasonable" way. It seems that the subsection continues the general trend of American common law on this matter. Although commercial impracticability as a ground of discharge originated in the code, the duty to allocate is a feature of pre-code law. An examination of the related cases shows that sellers were expected to allocate in impracticable situations. In the earliest case, ***Oakman v. Boyce***,[314] a contract was concluded for delivery of 5000 tons of coal. Under the provisions of the contract and by trade usage, it was provided that delivery would take place from time to time at the buyer's request during the shipping season, which lasted to the end of the year. The seller shipped only a part of the agreed amount. The court accepted that he was discharged from his obligation to make subsequent deliveries, since the civil war prevented part shipment of the coal. In recognising the reasonableness of pro rata allocation, the court held that when civil war prevented part shipment of coal, the seller could satisfy the obligation by delivering a pro rata share of the total sales. The court permitted non-contract customers, to whom the seller was accustomed to deliver coal, to share in the pro rata distribution scheme. The court explicitly rejected the contention that one particular buyer should have priority and should receive one hundred per cent of his deliveries before other buyers had received any of their deliveries. A buyer who had a contract should not stand on any better footing than a customary spot buyer.

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312. 252 Ark. 541, 480 S.W.2d 332 (1972). See also *Kowal v. Sportswear by Revere*, 351 Mass. 541, 222 N.E.2d 778 (1967) (In this case again the contract was held divisible and the employer was held liable for commission on orders placed by salesman before his death); *Gile v. Johnstown Lumber Co.*, 151 Pa. 534, 25 A. 120 (1892) (It was held that lumber company was liable for logs driven to destination before Great Johnstown flood.).

313. *Mullen v. Wafer*, 480 S.W.2d, 332, at 334.

314. 100 Mass. 477 (1868).

In ***Jessup and Moore Paper Co. v. Piper***,[315] the proration doctrine was applied when there was a shortage of coal cars. Judge McPherson stated that:

"It is at that point that we approach the question of fact that is to be submitted for your determination - that is, the allegation upon the part of the defendants that they did not have sufficient cars to enable them to fulfil their contracts, and therefore that they did the next best thing; that is to say, they apportioned their cars among all their customers, giving to each one his due and ratable share. If the facts were as averred by the defendants, I think that would be a fair, a reasonable, and proper thing to do. I do not think the defendants could be called upon to carry out one contract in full at the expense of all the other contracts for which they were equally bound, but that if there was a genuine scarcity of cars, so that it was impossible for them, for example, to carry out more than twenty-five per cent of each contract I think that would be perfectly fair and proper and lawful to do, under such a contract as lies before us."[316]

However, the court opined that the seller could not enter new contracts after the shortage had arisen. It is not clear whether non-contract customers were allowed to share in the pro rata distribution scheme. It would appear that regular customers could be included in allocation scheme, while new buyers could not. Likewise, in ***Acme Manufacturing v. Arminius Chemical Co.***,[317] when performance of all related contracts became impossible, the court applied the proration doctrine. Nevertheless, the court found that the seller in this case had diverted its sulphur supply to higher-priced non-contract users. The court held that the seller should not add new purchasers at the time when the price of sulphur had radically increased.

In some other cases, the allocation is restricted to contract customers. In ***Haley v. Van Lierop***,[318] the pro rata doctrine was applied to the sale of flowers. In this case, partial performance was discharged when the gladiola crop failed and the seller had to make a just and equitable pro rata distribution among existing contracting customers.[319]

It will therefore be clear from these American pre-code cases that at common law, allocation in the form of pro rata distribution has been

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315. 133 F. 108 (C.C.E.D.Pa. 1902).

316. F. 108, 110 (C.C.E.D.Pa. 1902).

317. 264 F. 27 (4th Cir. 1920). See also *Davidson Chemical Co. v. Baugh Chemical Co.* 133 Md. 203, 104 A. 404 (1918).

318. 64 F.Supp. 114, 117 (W.D.Mich.). See also *Diamond Alkali v. Henderson Coal Co.*, 278 Pa. 232, 235, 134 A. 387, 388 (1926) (It was held that the seller must allocate product fairly among contract customers).

319. 64 F.Supp. at 116.

recognised for more than one hundred years,[320] but that the courts are divided on whether or not to include customers who are not under existing contracts in the allocation scheme.

Let us now examine the point and related matters in the Uniform Commercial Code.

1.3. PRORATING IN THE UNIFORM COMMERCIAL CODE

Under section 2-615(b)[321] of the UCC, when full performance becomes impracticable, the seller must offer partial performance and develop a fair and reasonable allocation plan. He must give notification of the delay and of the estimated quota that will be made available to the buyer.[322] Failure to give notice prevents the seller from claiming excuse.[323] Section 2-615(b) and comment 11[324] to the section, specify that the seller must consider all buyers,

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320. For example see *McKeefrey v. Connellsville Coke and Iron, Co.*, 56 F. 212, 217 (3d Cir. 1893) (Prorating based on contract orders equitable apportionment); *Consolidation Coal Co. v. Peninsular Portland Cement Co.*, 272 F. 625, 630-31 (6th Cir. 1921) (In this case, the court, like the most of the courts, enforced ratable distribution as a trade custom. The court held that custom to apportion available coal cars was a proper consideration in determining breach); *Corona Coal Co. v. Robert P. Hyams Coal Co.*, 9 F.2d 361, 362 (5th Cir. 1952) (In this case, the court held that custom of proration during coal car shortage was factor in determining breach); *Garfield and Proctor Coal Co. v. Pennsylvania Coal and Coke Co.*, 199 Mass. 22, 82 N.E. 1020 (1908) (One who had bought another's mine could not prorate to the old customers of that mine); *Adsmen Lumber Co. v. Stanton*, 132 Kan. 91, 294 P. 853 (1931) (Proration was applied in sale of cement); *Country of Yuba v. Mattoon*, 16 Cal.App.2d 456, 325 P.2d 162 (1958) (The court required to prorate crop among lessors when crop limited by government orders); *Akins v. Riverbank Canning Co.*, 80 Cal.App.2d 868, 183 P.2d 86 (1947); *Renny-Davis Mercantile Co. v. Shawano Canning Co.*, 11 Kan. 68, 206 P. 337 (1922). See also Restatement of Contracts (First), Sec. 464 (1).

321. The text of UCC Sec. 2-615(b) is:
"(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable."

322. The text of UCC Sec. 2-615(c) is:
"(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available for the buyer."

323. U.C.C. Sec. 2-615(a).

324. Comment 11 reads: "An excused seller must fulfill his contract to the extent which the supervening contingency permits, and if the situation is such that his customers are generally affected he must take account of all in supplying one. Subsections (a) and (b), therefore, explicitly permit in any proration a fair and reasonable attention to the needs of regular customers who are probably relying on spot orders for supplies. Customers at different stages of the manufacturing process may be fairly treated by including the seller's manufacturing requirements. A fortiori, the seller may also take account of contracts later in date than the one in question. The fact that such spot orders may be closed at an advanced price causes no difficulty, since any allocation which exceeds normal past requirements will not be reasonable. However, good faith requires, when prices have advanced, that the seller exercise real care in making his allocation, and in case of doubt his contract customers should be favoured and supplies prorated evenly among them regardless of price. Save for the extra

including contract customers and regular non-contract customers. It is implicit in the comment that the seller may not add new customers, although no such prohibition is expressly stated. The inclusion of regular customers not then under the contract, is at the seller's option. Moreover, the seller is advised that in a case of doubt, contract customers should be favoured and the goods prorated evenly among them regardless of price. Accordingly, the seller is prohibited from favouring one buyer over another if one or more buyers offer a higher price. *A fortiori*, a large allocation to a spot customer who is not under contract but who is prepared to offer a higher price than contract customers will not fall within the framework of a "fair and reasonable" allocation. This means that the seller is not permitted to make a profit by selling the scarce goods at the higher rates, thus reducing the share which must be allocated to lower-priced contracts. To do so would be contrary to the general doctrine of good faith in the performance of the contracts.[325] In ***L. R. Foy Const. Co., Inc. v. South Dakota State Cement Plant Commission***,[326] the defendant - seller, a state cement plant, after pleading to serve the needs of local customers first, knowingly oversold its cement production capacity; the defendant misrepresented to the local customers that it was allocating the cement fairly while it was in fact giving preferential treatment to new out-of-state customers. The court held that the contract was breached because the seller had not been acting in good faith.

A seller may treat himself as a customer and include himself in the general pro rata allocation. It seems that inclusion of the seller in an allocation plan originated in the code.[327] Nevertheless, again under the doctrine of good faith, the seller may not deviate too far from the allocation scheme in order to increase his quota.

The subsection therefore affirms the proration method as the basic allocation scheme. But it does not always require it to be strictly pro rata because an allocation system needs only to be "fair and reasonable". In effect, if one of the buyers will suffer particularly great injury or loss, the seller is authorised, in order to achieve a "fair and reasonable" allocation, to allocate a greater than pro rata share to that buyer. Thus, the code does not rule out

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care thus required by changes in the market, this section seeks to leave every reasonable business leeway to the seller."

325. U.C.C. Sec. 1-203.

326. 3UCC Rep. Serv.2d 630; 399 N.W.2d 340 (S.D. 1987).

327. See *Haley v. Van Lierop*, 64 F.Supp. 114, 116 (W.D.Mich.) (Seller not justified in allocating to its partners or employees), *aff'd*, 153 F.2d 212 (6th Cir. 1945) (*per curiam*).

substantial deviations from a pro rata scheme in appropriate cases. This is perhaps the most important difference between the provisions of the code and the pre-code law. To sum up, it should be said that none of the post-code cases add much to the pre-code authorities as they merely continue the policy set out in the earlier case law. Every one of the cases recognises some form of proration, but several of them recognise that there may be certain priority rules,[328] *viz.*, the basis of the allocation in good faith requirement as opposed to past order quantities. Another important conclusion is that if the seller has not any contracts with any of the buyers but was simply a routine supplier to them then the provisions of section 2-615 (b) will not apply.

From a drafting point of view, it should be noted that in order for there to be an exception from the rule of allocation provided in the subsection, the contract must specifically contain an affirmative provision that the seller will perform even though events which would allow allocation might occur.[329]

If a seller claims the allocation is fair, but the buyer disagrees, where does the burden of proof lie? In ***Chemerton Corp. v. McLouth Steel Corp.***,[330] the court held that where a seller's performance of a contract became impracticable, in part because of explosions in one of its compressors, the burden was on the seller to prove the fairness of the allocation between the plaintiff and its other customer.

Under section 2-15 UCC, the seller must notify the buyer seasonably that there will be a delay or non-delivery and, when allocation is required, give him details of the estimated quota being made available to the buyer. The consequence of failure to notify is well illustrated by ***Bunge Corp. v. Miller***.[331] Here the court held that a failure to give prompt notice prevented the party asserting excuse from relying on the defence. This view is also supported by the language of the section, which uses the word "must" in referring to notice and allocation requirements. The choice of the word "must" suggests that

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328. See *McKeefrey v. Connellsville Coke and Iron co.*, 56 F. 212 (3rd Cir. 1983) (In this case the court held that blast furnaces could have first priority). The *Atlantic Richfield* cases recognise and approve the appropriateness of deviation from pro rata in certain customers, as when the allocatee is not in operation during the historic allocation period. *Intermar, Inc., v. Atlantic Richfield Co.*, 364 F.Supp. 82 (E.D.Pa. 1973); *Terry v. Atlantic Richfield Co.*, 72 Cal.App.2d 962, 140 Cal.Rptr. 510, 22 U.C.C.Rep. 669 (1977).

329. *Mansfield Propane Gas Co., Inc. v. Folger Gas Co.*, 14 U.C.C. Rep. 953; 231 Ga. 868, 204 S.E.2d 625 (1974).

330. 15 U.C.C. Rep. 383; 381 F.Supp. 245 (DCND ill. 1974), *aff'd* on other grounds 17 U.C.C. Rep. 772; 522 F.2d 469 (C.A. 7th, 1975).

331. 381 F.Supp. 176 (W.D.Tenn. 1974).

satisfaction of these requirements is a condition precedent to a successful claim of excuse.[332]

However, the question arises in what situations will the seller's notification be regarded as seasonable? It seems that if the seller notifies within a reasonable time, it can be said that he acted seasonably. The reasonable time for taking any action depends on the nature, purpose and circumstances of the action.[333] It is a question of fact whether or not there is seasonable notice. In ***Selland Pontiac - GMC, Inc. v. King***,[334] the seller became aware of its supplier's receivership on July 8, informed the buyer on August 12, and thereafter kept the buyer advised of the situation. Although the seller did not ultimately advise the buyer of non-delivery, nevertheless the seller's notification constituted seasonable notice of both delay and non-delivery.

According to section 2-615(c), a seller who is not able to fill all its orders must seasonably notify its customers both of its need to allocate and of the amount each will receive. If the seller is not able to provide the notice of amount immediately, does it follow that the seller's notification is unseasonable? In interpreting the subsection, it is submitted that the courts must be flexible. In ***Cliffstar Corp. v. Riverbend Products, Inc.***,[335] for example, the seller notified the buyer in September that a crop shortage was forcing it to re-evaluate all contracts; the seller remained in regular contact with buyer thereafter, but did not inform the buyer until November of the amount it would receive. The court did not take the view that the defendant's notification was unreasonable.

Does the notice have to be in writing? Consider the following case.[336] A seller agreed to grow and deliver 250,000 pounds of sunflower to a buyer. The contract expressly discharged the seller's performance due to acts of God, as long as the seller notified the buyer by certified mail within 10 days of any such event. Instead of mailing a written notice of the effect of a drought on his

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[332]. See George Wallach, The Excuse Defense in the Law of Contracts: Judicial Frustration of the UCC Attempt to Liberalize the Law of Commercial Impracticability, 55 Notre Dame Lawyer, 1979, 203, at 225.

[333]. *Cf. Alimenta (U.S.A.), Inc. v. Cargill, Inc.*, 7 U.C.C. Rep. Serv.2d 1100; 86 F.2d 650 (CA 11, 1988).

[334]. 1 U.C.C. Rep. Serv.2d 463; 384 N.W.2d 490 (Minn.App. 1986).

[335]. 13 U.C.C. Rep. Serv.2d 392; 750 F.Supp. 81 (WD NY 1990).

[336]. *Red River Commodities, Inc. v. Eidsness*, 13 U.C.C. Rep. Serv.2d 1076; 459 N.W.2d 805 (ND 1990).

harvest, the seller orally notified the buyer's agent of the effect of the drought. Subsequently, he delivered only 75,000 pounds of sunflower. Although the buyer had actual knowledge of the reduced harvest through a report from his agent, it sued, claiming that as it had not received notice by certified mail, the defendant was not discharged from performance. The trial court decided in favour of the plaintiff, excluding evidence relating to the buyer's actual knowledge of the reduced harvest. This decision is open to criticism. First, by delivering all the sunflowers that he had produced, the seller fulfilled his contract insofar as the contingency permitted. Secondly, the plaintiff actually and seasonably was informed that the deliveries would be reduced. Thus, the buyer was not harmed or prejudiced by the lack of certified mail notice. The trial court went wrong by not considering the evidence of actual knowledge of the reduced crop as communicated through the agent. Moreover, according to section 1-201(25) UCC, a person has "notice" of a fact when he has "actual knowledge" of it. Thirdly, although the parties' contract expressly provided that the seller should send a notice in writing by certified mail, the seller's failure to do so was not material, because the buyer had actual knowledge of the event. For these reasons, the present writer approves the approach of the Appeal Court which reversed the decision and remanded the case back for a determination of whether the buyer had actual knowledge.

Section 2-615(b) does not apply to the termination of a contract by either party. However, it covers the situation where it has become impracticable for a seller to perform during the existence of his contract. This means that the section can be used as a defence by a seller who was unable to deliver due to unforeseen contingencies and as a result is sued by the buyer for breach of contract.[337] When a buyer receives the notification of allocation, if he is dissatisfied with the seller's allocation he should give timely notice of that fact to the seller. He may by giving written notification to the seller, modify the contract by agreeing to take the quota allocated by the seller. He may also terminate the contract or permit to lapse by inaction or silence.[338] In other words, the code does not require a buyer to take the allocated goods: the buyer has the choice to terminate the contract or accept the share. Since the seller's tender of partial non-performance may be justified

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337. *American Oil Co., v. Columbia Oil Co.*, 22 U.C.C. Rep. 440; 88 Wash.App. 835, 567 P.2d 637 (1077).

338. U.C.C. Sec. 2-616. Under Sec. 2-613(b), if the loss of identified goods is partial, buyer has option either to treat the contract avoided or to accept partial performance with due allowance from the contract.

as an excuse for his partial non-performance, when the buyer accepts the share, he must be careful not to waive his rights against the seller by acknowledging the seller's right of excuse. The buyer when accepting the quota, is entitled to reserve the right to claim for a fair and reasonable allocation or seek damages for breach on the basis of unfair or unreasonable allocation. However, it should be noted that only contract customers have this right.[339]

The code does not suggest how the seller is to allocate the goods among his customers; it simply requires that the allocation must be "fair and reasonable". What then is a "fair and reasonable" allocation and how is it to be achieved? In ***Terry v. Atlantic Richfield Co.***,[340] the plaintiff (a gas station operator), challenged the Atlantic Riechfield Co. allocation scheme, claiming that it was not getting a fair share of the seller's available gasoline supply. The court held:

"The statutory demand for a fair and reasonable allocation of short supplies denotes a collective quality characterizing the supplier's treatment of his customers as a group. An individualised approach, geared solely to the needs of particular customers, may provide adequacy to some, insufficiency to others. A fair and reasonable allocation distributes benefit and hardship equably . . . . Plaintiffs' demand for treatment shaped to their unique circumstances runs counter to statutory insistence upon collective fairness . . . . The fact that some other formula might have increased plaintiffs' allocation does not require rejection of the formula actually adopted."[341]

In ***Roth Steel Product v. Sharon Steel Corp.***,[342] the seller was not able to make timely steel deliveries to buyer in accordance with the contract. Since the seller diverted production to a wholly owned subsidiary and failed to prove that this subsidiary fell within the scope of permissible customers, the court held that the seller had not allocated its production and deliveries in a fair and reasonable manner.

In another case,[343] the buyer, in a breach of contract action, sought summary judgement claiming that seller had failed to allocate equally. The plaintiff maintained that while some customers received 85% or more of their

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339. *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 458-59 (9th Cir. 1979) (In this case the court held that customer not under contract can not allege unfair allocation under Sec. 2-615 (b)).

340. 72 Cal.App.3d 962, 140 Cal.Rptr. 510 (1977).

341. *Loc. cit.*, at 968-69, 140 Cal.Rptr. at 513.

342. 35 U.C.C. Rep. 1435; 705 F.2d 134 (CA, 1983).

343. *Cliffstar Corp. v. Riverbend Products, Inc.*, 13 U.C.C. Rep. Serv.2d 392; 750 F.Supp. 81 (WD NY 1990).

orders, he had received only 31% of the tomato paste he had ordered. The court held that section 2-615(b) does not require equal allocation, but only a "reasonable" allocation: since reasonableness is a question of fact, this issue had to be decided by a jury. Therefore, the plaintiff was not entitled to summary judgement.

If the allocation is unfair, the seller will be liable in damages for breach of that portion of the contract which has not been performed. The measure of damages will be the difference between what the buyer should have received under a "fair and reasonable" allocation and the quota actually received.[344] For example, in ***Ranney-Davis Merc. Co. v. Shawano Canning Co.***,[345] the court decided that the buyer was entitled to the difference between the share received and a fair and reasonable allocation. However, it should be noted that specific performance should also be allowed to the buyer, if seller is able to perform.[346]

1.3.1. CRITICISMS OF THE UCC APPROACH OF PRORATING

There are some points in section 2-615(b) and its comment 11, that are vague and unclear. The vagueness of the law, combined with the complexity of the facts which can arise means that even eminent lawyers and judges will make mistakes. For example, the code states that the allocation must be made in a "fair and reasonable" manner. But it does not specify in detail the way in which such an allocation should be made. Detailed guidelines are required. In a number of cases, the fairness and reasonableness of allocation plans adopted by the seller, have been challenged by buyers.[347] Perhaps this is because the current provisions are so vague. Moreover, the courts have not established any guidelines for meeting the "fair and reasonable" standard. The "fair and reasonable" criterion gives judges great discretion. Thus parties

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344. *Cf. Consolidation Coal Co. v. Peninsular Portland Cement Co.*, 272 F. 625, 630 (6th Cir. 1921); *Haley v. Van Lierop*, 64 F.Supp.114, 117 (W.D.Mich.), *aff'd*, 153 F.2d 212 (6th Cir. 1945).

345. 111 Kan. 68, 71-72, 206 P. 337, 339-40 (1922).

346. Schmitt and Pasterczyk, Specific Performance Under U.C.C. Will Liberalism Prevail? 26 De Paul L. Rev., 54, 67 (1976). See also *Continental Oil Co. v. P.P.G. Indus.*, 504 S.W.2d 616, 625 (Tex.Civ.App. 1973).

347. See for example, *Terry v. Atlantic Richfield Co.*, 72 Cal.App.3d 962, 140 Cal.Rptr. 510 (1977); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979); *Chemerton Corp. v. McLouth Steel Corp.*, 381 F.Supp. 245, 257 (N.D.ill. 1974); *Intermar, Inc. v. Atlantic Riechfield Co.*, 364 F.Supp. 82, 98 (E.D.Pa. 1973); *Mansfield Propane Gas Co., Inc. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974); *Roth Steel Products v. Sharon Steel Corp.*, 35 U.C.C. Rep. 1435; 705 F.2d 134 (CA, 1983).

are always unsure whether or not the court will accept or reject the suggested allocation scheme.

Another shortcoming is that the subsection and comment 11 do not list the priorities which a seller should give in his allocation plan so that it will be fair and reasonable. Should, for example, a seller prefer one buyer over another? The criteria are unclear.

Moreover, section 2-615(b) and comment 11 favour the seller by allowing the seller to include regular customers - not under the contract - in the allocation plan. Indeed, the seller is permitted not only to keep existing relationships but also to gain more customers in the future. By having this authorisation, the seller can keep regular customers happy and increase his credibility among them. In such a situation, the spot prices will be higher so that the seller will have an incentive to allocate a large percentage of his product to those customers whom he can charge the higher price. Although comment 11 recognises this problem and purports to prohibit the seller from doing so, a buyer is faced with the difficult task of proving the unfairness of the allocation scheme. Moreover, the costs which the buyer will incur in such litigation and the likely disruption of the business ties are other factors which will discourage from litigation. Thus, a seller can establish an allocation plan that might give 100% to one and a lesser percentage to another and yet fall within a fair and reasonable scheme. The following example illustrates the situation where a seller might favour one customer over another one. Suppose a seller has two contracts with A and B to deliver to each 1000 tonnes of wheat, time of delivery for A one month and time of delivery for B two weeks after the conclusion of the contracts. Instead of exactly 2000 tonnes, he only produces 1500 tonnes. If the seller notifies both buyers that due to partial impracticability he is not able to fulfil the contracts, then A and B will receive their related quota. However, if before A's shipment is due, the seller postpones notification to A until he has met B's order in full, how is A to prove that the seller acted unfairly?

The seller is not likely to be wholly impartial. The question is why should the seller be given the authority to make judgments concerning the relative priorities of different customers' need? Is he actually in the best position to make judgments of this kind?

Another issue giving rise to uncertainty is related to the concept of regular customer. What is a regular customer? What is the criterion for a person to be a regular customer? Length of dealing, quantity of purchases, frequency, *etc.*, could all be relevant factors. Once again, the seller can select

regular customers for inclusion in the allocation according to the seller's notion of the relevant criteria and the opportunity is open for an unscrupulous seller to take as much advantage of the situation as he can. Moreover, how can the addition of new customers in what is *ex hypothesi* time of shortage be justified? And more important, why the seller be allowed to include himself in the allocation scheme? Perhaps the rationale for the right to include the seller is that commercial reasonableness supports the idea that a seller who is bound to supply customers' needs during a shortage, must not be economically crippled. But this argument is not acceptable because it leaves the seller with a great deal of flexibility and can enable him to manipulate the shortage situation to his own advantage.

"Fair and reasonable attention to the needs of regular customers who are properly relying on spot orders for supply" is the rationale given by comment 11 for the right to include non-contract buyers in any allocation plan. This is also unjustifiable, since these customers strongly required the product, they should have entered into contracts with the seller. To allow them the benefit of the allocation scheme, while avoiding the burden of potential contractual liability is unfair. Given that a buyer who commits himself to a contract and accepts the related risks, should obtain a priority in the allocation scheme, why should a non-contract buyer who does not undertake any contractual risks be treated in the same way? Furthermore, inclusion of non-contractual customers in an allocation scheme leads to an anomalous situation.[348] Suppose, for example, a seller has ten contracts with buyers to deliver to each 1000 tonnes of rice. However, as the seller usually produces twice that amount, it is his practice to sell the surplus to 10 regular other customers. If due to partial crop failure, the seller only produces 10,000 tones of rice to sell, that is exactly enough rice to perform his obligations under his existing contracts. Section 2-615 UCC does not apply and there will be no allocation. However, if the seller only produces 9000 tones, partial impracticability occurs in respect of his contracts and the seller has the right to allocate under section 2-615(b). In this allocation, he may include not only the 10 buyers under the original contracts but also his 10 non contractual regular customers. Although the shortfall only amounts to ten per cent, the seller has the right to include non-contract customers in his allocation scheme. If the seller allocates the rice among all the customers each will only receive 450

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348. Thomas R. Hurst, Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risks under UCC Section 2-615, 54 North Carolina L. Rev., (1976), 545, 581.

tonnes of rice. Thus, a ten per cent shortfall gives the seller the right to reduce sales to contractual customers by fifty-five per cent. Such a result is irrational.

It is submitted that it would make sense to delete the seller's power to include himself and regular customers in the allocation plan. At present, the rules for allocating in a fair and reasonable manner, in accordance with good faith while being impartial in making a judgment regarding the relative priorities of customers' needs, are simply not workable. A "fair and reasonable" alternative is an allocation in a ratio based on the physical volume of goods ordered. In this alternative, proportional distribution provides equal treatment among contract buyers and each buyer receives a uniform pro rata of the supply for which he contracted. Ratable distribution on the basis of the amount of the supply which the buyers have bought, also limits the opportunity for abuse by the seller. Although some commentators have argued that proration is not the only fair and reasonable way of allocation, they have not given details.[349] Most American courts favour pro rata distribution.[350]

Although a pro rata allocation is the method defended in this thesis, there might be some exceptional situations where deviation would be justifiable. Common examples where a seller would be justified in allocating more than a pro rata share would be when it would be in the public interest to do so or help a buyer who would otherwise suffer extraordinary economic injury or social costs if ratable allocation only applied.

Pro rata allocation among buyers under contracts, is the fairest method of allocating the loss caused by partial impracticability. In order to avoid the unsatisfactory effects of the UCC, the parties to a contract especially at international level, should expressly agree proration in the *force majeure* clause in their contract. The seller will, of course, benefit if the contractual clause gives him greater discretion than the UCC, for example if the clause leaves the seller free to distribute the scarce goods in any manner he deems fit. On the other hand, the buyer will benefit if the clause gives him the opportunity to control the method of distribution which he lacks under the provisions of the code. The buyer will be in a strong bargaining position if he is authorised by the clause to place limits on the seller's allocation plan. If the parties were to agree on a contractual clause indicating that the seller has the

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349. White, Allocation of Scarce Goods under Section 2-615 of the UCC: A Comparison of Some Rival Models, 12 Uni. Mich. J. L. Rev., (1979), 503 at 528; 3 A. R. Duesenberg and L. King, Sales and Bulk Transfers under the UCC Section 14. 13 (3), at 14-100., (1975).

350. See generally pp. 203 *et seq.*

right to allocate in any method he likes, without regard to prior buyers or any pro rata plan, would American courts refuse to give it effect? It would appear that such a clause would be enforced because several courts have held that the parties to a contract are free to modify the provisions of section 2-615(b).[351] Moreover, there is authority that a seller can contractually commit himself to deliver all his output to one of several buyers.[352]

Sections 2-615 and 2-616 UCC are silent on how the buyer's obligation is to be altered or what relief is available to the buyer when the contract of sale is excused. The code has no provisions on whether the buyer can demand restitution or reliance damages. Nor is it clear under the code whether the buyer has an obligation to pay for performance rendered by the seller before the time of excuse. Resort will have to be made to the common law for a solution to these problems. Only section 2-613 expressly provides that in a case of total loss, the buyer is discharged and in the case of partial impossibility, he has the choice of avoiding the contract or accepting the partial performance with allowance being made from the contract price for the deficiency in quantity.[353]

2. ENGLAND

2.1. PROBLEM OF PARTIAL FRUSTRATION

English law has difficulty in accommodating the problems raised by partial frustration. Indeed, it might be said that partial frustration is unknown to English law as there is virtually no authority on the subject. As Kerr J. observed in the ***Zuiho Maro***,[354] a plea of partial frustration "will not do". Little guidance is to be found in the textbooks which either do not discuss the issue at all or doubt whether it is truly an aspect of frustration.[355] The reason for this is clear. In English law, if a contract is frustrated, the parties are automatically excused from further performance. As we have seen,[356] partial excuse is

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351. *Intermar, Inc. v. Atlantic Richfield Co.*, 364 F.Supp. 82 (E.D.Pa. 1973) (In this case, the court held that seller was not under any duty to allocate when contract contains provisions expressly excusing seller from duty of performance because of impossibility); *North Pen Oil and Tire Co., v. Phillips Petroleum Co.*, 358 F.Supp. 908 (E.D.Pa. 1973). *Cf. Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974).

352. *Mansfield Propane Gas Co. v. Folger Gas Co.*, 231 Ga. 868, 204 S.E.2d 625 (1974).

353. U.C.C., Sec. 2-613(b).

354. *Kawasaki Steel Corp. v. Sardoil S.P.A. (The Zuiho Maru)* [1977] 2 Lloyd's Rep. 552, at 555.

355. Chitty on Contracts, Sec. 1414, 24th ed. 1977; *Loc. cit.*, at Sec. 1643, vol. 1, 26th ed. 1989; Treitel, at 587, 4th ed. 1975.

356. *Supra.* pp. 200 *et seq.*

recognised in American law where it is considered as an aspect of the doctrine of impracticability. In American law, automatic discharge is not always the case and most of the time discharge depends on the intention or election of either or both parties.

In order to avoid facing the issue directly English courts resolve the problem by recourse to the common law device of interpreting the contract. That said, Lord Denning has observed:

"It seems to me that although illegality which completely forbids the performance of a contract may give rise to frustration in some cases, illegality as to the performance of one clause which does not amount to frustration in any sense of the word does not carry with it the necessary consequences that the party is absolved from paying damages."[357]

This approach has not however been followed.[358] Let us examine the relevant case law.

2.1.1. *MOORGATE ESTATES, LTD. V. TROWER AND ANOTHER*[359]

In this case, mortgagors of land and buildings (plaintiffs) contracted a mortgage executed in March 1936. In this contract, the plaintiffs were under an obligation to insure against war risks. After October 1936, it became impossible to insure against such risks. According to the provisions of the contract, the mortgagees (defendants) were entitled to exercise their power of sale without notice if the plaintiffs failed to comply with their commitments. On the other hand, if the plaintiffs complied with their commitments, the defendants could not call in the mortgage before March 25, 1946. The plaintiffs failed to insure against war risks at any time. For that reason, in January, 1939 the defendants demanded immediate repayment of the mortgage loan. The plaintiffs sought a declaration that performance was impossible and therefore the mortgagees were not entitled to repayment of the monies.

If this case had been considered by an American court, it would have been a case of partial impossibility under which the plaintiffs would have been released from performance of the obligation. However, Farwell J. held that this was not a case of frustration;

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357. *Eyre v. Johnson* [1946] 1 K.B. 481, at 484.

358. See for example *H. R. S. Sainsbury Ltd. v. Street* [1972] 1 W.L.R. 834.

359. [1940] Ch. 206.

"The contract itself remains, but, according, to the plaintiffs, one term of it has ceased to be enforceable. They say, in the first place, that it was an implied term of the contract when it was entered into, that if such an insurance policy were ever an impossibility, neither side should be entitled to rely upon the failure to comply with that covenant."[360]

On the facts, the learned judge refused to imply such a term. Accordingly, the plaintiffs were in breach of their obligation to insure and the defendants were entitled to foreclose.

2.1.2. *DENNY, MOTT AND DICKSON, LTD. V. JAMES B. FRASER AND CO. LTD.*[361]

In this case, a long-term agreement for the sale of timber provided that the defendants should purchase all their supplies of certain wood from the plaintiffs: moreover the defendants agreed to lease a timber yard to the plaintiffs with an option to purchase. When dealing in timber was prohibited, the plaintiffs continued to occupy the timber yard: they sent a letter to the respondents purporting to give notice to terminate the contract and also of their intention to exercise the option of purchase. The court held that the agreement was not composite but was an entire contract: as the main object of the contract, *viz.*, trading in timber, had become illegal, the whole contract was frustrated. In this regard, Lord Mcmillan said:

"in judging whether a contract has been frustrated, the contract must be looked at as a whole. The question is whether its purpose as gathered from its terms has been defeated. A contract whose purpose has been defeated may contain subsidiary stipulations which it would still be possible and lawful to fulfil, but to segregate and enforce such a stipulation would be to do something which the parties never intended." [362]

Accordingly, when the frustrating event undermines the principal part of a contract, the parties are excused from performing other parts which are nevertheless possible. Unlike American law, English law does not approach these difficulties from the standpoint of partial frustration but according to the doctrine of total frustration. If a frustrating event radically affects the substantial purpose of the contract, in English law the contract is frustrated even though performance of some provisions of the contract remains

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360. [1940] Ch. 206, at 211.

361. [1944] A.C. 265.

362. *James B. Fraser and Co. v. Denny, Mott and Dickson*, 1944, S.C. (H.L.), 35, at pp. 41, 42; see also at p. 40 *per* Viscount Simon; at p. 49, *per* Lord Wright. See also *James B. Fraser and Co. v. Denny, Mott and Dickson*, 1943 S. C. 293, at p. 315, *per* Lord Justice-Clerk Cooper.

possible. Nevertheless, in both legal systems the result is the same provided the substantial purpose of the contract is radically affected.

If partial destruction of the subject matter defeats the main purpose of the contract, the contract shall be frustrated. That is what happened in ***Taylor v. Caldwell***,[363] where the lease related to "the Surrey gardens and music hall". The contract was frustrated even though only the hall was destroyed and the gardens remained. The court resolved the issue not in terms of partial impossibility but under the doctrine of frustration.

If that part of the performance of the contract which has become impossible is so minor that substantial performance is practicable then those obligations which remain possible must be performed. In ***Leiston Gas Company v. Leiston-Cum-Sizewell Urban District Council***,[364] for example, the plaintiffs contracted with the defendants to light their district for five years from August 1911. The plaintiffs had to provide gas standards, lamps, and other plant, to connect the same with their mains in the district, to supply gas and to light, extinguish, clean, and repair the lamps, and maintain the plant during the term of the contract. The defendants agreed to pay the plaintiffs quarterly, a certain sum per lamp. In January 1915, an order was made which prohibited the lighting of lamps within the defendants' district. The defendants contended that the agreement was at an end and that they were absolved from making any further payments. The plaintiffs sued for the three quarterly instalments that had fallen due after the date of the order. The defendants denied their liability on the basis of illegality and impossibility of performance. The court held that:

"While part of performance of the contract had become illegal, other substantial parts of it, for example, the maintenance of the lamps and other plant, were lawful and the plaintiffs were bound to perform them and had performed them; for three and half years the defendants had had the benefit of the entire services contracted for, including expenditure by the plaintiffs in providing the plant; and it could not be said that the contract was frustrated by the prohibition against street lighting, and the defendants were justified in treating it at an end and refusing to make the payments provided by it."[365]

It was also added that the consideration for the plaintiff's services could not be apportioned. The better view, however, is that the consideration for the plaintiff's services should have been apportioned. In ***Eyre v. Johnson***,[366] a

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363. (1863) 3 B. and S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

364. [1916] 2 K. B. 428.

365. *Loc. cit.* [1916] C. A. 329.

tenant was held liable in damages for breach of his obligation to repair even though wartime regulations made it illegal or impossible. Again it would have been better to agree that the tenant was not liable for refusing to do an illegal act.[367] Nevertheless, the court held that:

". . . the fact that it [to keep in repair] had become difficult or even impossible for the tenant to perform certain of his obligations under the lease, did not amount in any sense of the word to frustration and did not relieve the tenant from the payment of damages for his breaches of covenant."[368]

2.1.3. *HOWELL V. COUPLAND*[369]

In this case, the defendant agreed to sell 200 tons of potatoes grown on particular land belonging to the defendant. After the conclusion of the contract, the crop was ruined by blight, so that the defendant was only able to deliver 80 tons. The plaintiff claimed for non-delivery of the other 120 tons. The defendant answered that he had duly delivered all that it was possible for him to deliver and that he was excused from delivering the remainder. The court held that the contract was an agreement to sell what may be called specific things and therefore fell within the principle of ***Taylor v. Caldwell***, *viz.*, that the contract must be taken to be subject to an implied condition that the parties should be discharged, if performance becomes impossible from the perishing of a thing without default of a party.

However, in spite of the use of the words "specific things" by Mellish L.J.[370] and the opinion of Sir McKenzie Chalmers that section 7 of the Sale of Goods Act applies to specifically described goods, whether or not in existence at the time the contract was made;[371] it is clear that the potatoes were not "specific goods" within the definition of "specific goods" in section 61(1) of the Sale of Goods Act 1979.[372] In ***Re Wait***,[373] it was held that a contract for a specific quantity of goods out of particular mass was not a contract for the sale of specific goods. The plain language of the Act prevents too wide a

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366. [1946] 1 K.B. 481. *Cf. Matthey v. Curling* [1922] 2 A. C.

367. See also G. H. Treitel, The Law of Contract, 1983, at 670.

368. *Loc. cit.*, at 482.

369. (1874) L.R. 9 Q.B. 462; *aff'd.* (1876) 1 Q.B.D. 258.

370. *Howell v. Coupland* (1876) 1 Q.B.D. 258, at 262.

371. Chalmer's Sale of Goods Act 1893, 18th ed., p. 100.

372. Sec. 61 (1) reads: "specific goods" means goods identified and agreed on at the time a contract of sale is made.

373. [1927] 1 Ch. 606, 631.

meaning being given to "specific goods".[374] Accordingly, it is submitted that in the ***Howell*** case it was not a contract for specific goods. Thus, it can not be covered by section 7 of the Sale of Goods Act 1979.

There are some authorities[375] that have suggested that the case might be covered by section 5(2) of the Sale of Goods Act 1893 (now section 5(2) of Sale of Goods Act 1979). This section provides: "There may be a contract for the sale of goods, the acquisition of which by the seller depends on a contingency which may or may not happen." In ***Re Wait***,[376] Atkin L.J., observed that the application in ***Howell*** of the doctrine of implied condition in ***Taylor v. Caldwell***[377] might be justified by regarding it as section 5(2) case. However, to treat section 5(2) as covering the doctrine of implied condition in ***Taylor v. Caldwell*** involves an unwarranted extension of the section.[378] Secondly, growing a crop can not be considered as the "acquisition" of goods within the meaning of section 5(2). Thirdly, the section only covers a contract of the type described in the section: it does not expressly say anything about the partial failure of such a contract.

There therefore appears to be no option but to regard the rule in ***Howell*** as a matter of common law which is still applicable as a result of section 62(2) of the Sale of Goods Act 1979.[379] This view is supported by Atkin L.J.'s suggestion that: "The case of ***Howell v. Coupland*** would now be covered either by section 5(2) of the code or, as suggested by the learned authors of the last two editions of Benjamin on sale, . . . section 61 (2) [now section 62(2) Act 1979] of the code."[380]

Because the agreement in ***Howell*** was for the sale of unidentified goods, the Law Reform (Frustrated Contracts) Act 1943 will now govern the situation where a buyer pays the purchase price in advance but the crop fails. In that case, the seller is able to set off his expenses of cultivating the crop

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374. *Loc. cit.*, at 631. See also *Kursell v. Timber Operators and Contractors Ltd.*, [1927] 1 K.B. 298.

375. *H. R. S. Sainsbury Ltd. v. Street* [1972] 3 All E.R. 1127; [1927] 1 W.L.R. 834. *Cf. Re Wait* [1927] 1 Ch. 606, at 630, C.A.

376. [1927] 1 Ch. 606, at 631.

377. (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

378. See Glanville L. Williams, The Law Reform (Frustrated Contracts) Act 1943, *op. cit.*, at 87.

379. Sec. 62(2) reads: " The rules of the common law, including the law of merchant, except in so far as they are inconsistent with the provisions of this Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, apply to contracts for the sale of goods."

380. *Re Wait*, [1927] 1 Ch. 606, at 631. See also Benjamin's Sale of Goods, (1992), at 270.

against any down payment made by the buyer. If we accept that 1943 Act applies to cases such as ***Howell***, it means that the case was a truly case of frustration. The court in ***Howell*** clearly relied on ***Taylor v. Caldwell***,[381] a leading frustration case. Moreover, it was suggested that the contract was frustrated as a result of an implied term that the parties will be excused performance if the potatoes perished. But it is difficult to accept that ***Howell*** is an example of frustration because, as discussed before,[382] frustration operates automatically. Yet in ***H.R. and S. Sainsbury Ltd., v. Street***,[383] it was observed that in ***Howell*** the defendant remained under an obligation to deliver 80 tons of potatoes. The result is that the obligation to deliver 120 tons of potatoes was excused while the obligation to deliver 80 tons was not. The buyer had the option to accept or reject the remainder.[384] If so, the contract did not automatically come to an end since the excuse of the entire performance depends on the election of the buyer. This is inconsistent with the principle that frustration is automatic. If we accept that ***Howell v. Coupland*** is truly a case of frustration, we must also be prepared to argue that frustration is not automatic.

The problem can, of course, be solved by arguing that ***Howell*** is a case of partial frustration., *viz.*, the delivery of 120 tons was excused automatically, but the obligation to deliver the remaining 80 tons was not frustrated. But it is generally accepted that English law does not recognise partial frustration. Thus the case of ***Howell*** remains problematic. *A fortiori*, in English law, the court can not alter or modify the terms of a contract or adjust the rights of the parties.

From a comparative point of view, American law[385] does allow partial impracticability in cases such as ***Howell***. It permits the buyer in cases of deterioration or partial destruction of the subject matter of a sale or contract to sell, to demand such performance as remains possible.

In the ***Howell*** case,[386] the 80 tons actually produced were tendered and accepted in part performance of the contract. Thus, no question arose in that case concerning the seller's obligation to deliver what he could. The question

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381. (1863) 3 B. & S. 826; 122 Eng. Rep. 309 (Q.B. 1863).

382. *Supra*, pp. 142 *et seq.*

383. [1972] 1 W.L.R. 834.

384. Sale of Goods Act 1979, 30 (1).

385. See generally pp. 200 *et seq.*

386. (1874) L.R. 9 Q.B. 462; *aff'd.* (1876) 1 Q.B.D. 258.

therefore remains whether the seller was obliged to deliver the part that was produced and whether the buyer was bound to accept partial performance. Moreover, would the buyer have been bound to pay the whole contract price or only an apportioned part of it? Although the judgments of Blackburn and Quain J. J. at first instance implied that the seller was obliged to deliver what he could, in ***Sainsbury v. Street***, these problems were considered in detail.

2.1.4. *H. R. AND S. SAINSBURY LTD. V. STREET*[387]

The facts of this case are very similar to those in ***Howell***.[388] On 1 July 1970, the seller agreed to sell 275 tons of barley from a crop growing on a farm. Through no fault of the seller, the crop turned out to be only 140 tons. That year the harvest in England was poor and the price of barley was rising rapidly. The seller sold the barley to a third party and claimed that he was discharged from delivering to his buyers any barley at all. The buyers accepted that the defendant was not liable for the non-delivery of the barley which the crop did not yield, but claimed damages for the failure to supply the tonnage actually produced. The seller's contention was that the contract of sale had been totally frustrated: In these circumstances, Mackenna J. held that "that there was no implied term in the contract that the seller need not deliver to the buyers the actual tonnage harvested in the event of his inability through no fault of his own to produce the whole amount."[389] In other words, the court implied a term in the contract that the seller was obliged to deliver the tonnage actually produced, provided that the buyers so requested. It is important to note that the buyers are under no obligation to accept the barley actually produced: if they request to receive the amount produced, the price will be reduced pro rata.[390]

Once again, the case is not analysed as one of partial frustration; instead, the court implies a term, which gives an option to the buyer. As a result, neither party will be liable on partial failure if the buyer elects not to take the part which can be delivered: in these circumstances, both parties would presumably also be released from their obligations in respect of the whole contract. In this situation, the contracts do not come automatically to an

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387. [1972] 1 W.L.R. 834.

388. (1874) L.R. 9 Q.B. 462; *aff'd.* (1876) 1 Q.B.D. 258.

389. [1972] 1 W.L.R. 834.

390. See also the Sale of Goods Act 1979, Section 30(1). The provisions of the section is not limited to cases where the seller's failure to deliver part is in breach of contract.

end and their discharge depends on the election of the buyer. Although Mackenna J. does not expressly make the point, by accepting that the seller in ***Howell v. Coupland***[391] was not liable for failing to deliver the 120 tons harvested, he is implicitly acknowledging that the contract was frustrated in the present case. If this is so, doubt must be cast on the accuracy of the view that frustration operates automatically.[392]

Apart from this difficulty we can conclude that when the source from which the goods are to be taken fails in part, the partial failure has three consequences: (i) the seller is discharged to the extent of deficiency; (ii) he remains under an obligation to deliver the amount actually produced if the buyer so elects; (iii) the buyer is under no obligation to accept the quantity produced if he elects not do so.

In American law, while these cases fall under the doctrine of partial impossibility or partial impracticability: the results are similar.[393] However, it should be noted that if the crops are not identified at time of contracting, *i.e.*, not planted,[394] the excuse question is governed by section 2-615(b) UCC. If the crops are identified at the time of contracting the relevant provision is section 2-613(b) UCC. Unlike American law, section 7 of the Sale of Goods Act 1979, does not deal with partial destruction of the subject matter of the contract. This means that if only part of the goods perish the position in English law is uncertain. It might probably be treated as a question of degree, *i.e.*, if the contract of sale is an indivisible contract, the buyer is not obliged to accept the remaining goods. The whole contract will be frustrated. In ***Barrow, Lane and Ballard Ltd. v. Phillip Phillips and Co.***[395] for example, the seller sold 700 bags, marked E.C.P. and known as lot 7, of Chinese groundnuts in shell then lying at the National Wharves in London. At the time of contracting the parties did not know that 109 bags had been stolen. The court held that a contract for a parcel of 700 bags is an indivisible contract and is different from a contract for 591 bags. The position was no different from what would have happened if the all 700 bags had ceased to exist. The court added that the case fell within section 6 of the Sale of Goods Act 1979 and the whole contract was consequently void. Although this case was decided under

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391. (1874) L.R. 9 Q.B. 462; *aff'd.* (1876) 1 Q.B.D. 258.

392. See also G. D. Goldberg, Is Frustration Invariably Automatic? 88 L. Q. Rev. (1972), 464.

393. See U.C.C. Secs. 2-613(b) and 2-615(b).

394. U.C.C. Sec. 2-501(1)(c).

395. [1929] 1 K. B. 574.

section 6, if the case fell within the circumstances of section 7, the result would have been the same. Sections 6 and 7 deal with cases which superficially, at least, have much in common. The major difference between them is that section 6 deals with case of common mistake, while section 7 is concerned with frustration.

It has to be added that the position is the same at common law. In ***Giepel v. Smith***,[396] for example, a ship was to go to A and take in coals, and then deliver the coals to H. Delivery at H was impossible by reason of an expected peril and the ship owner refused to load at A. The plaintiff charterer argued that the contract was divisible, but the court held that the contract was entire, and anything that happened to make the performance at one port impossible must be taken to apply to the whole.[397] The ship owner, therefore, was excused.

In contrast, if the obligation to deliver is divisible and part of the goods perish, the seller is absolved from his duty to deliver that part and the buyer is excused from paying for those goods. However, if the buyer demands part delivery the seller remains liable to deliver the remainder of the goods and the buyer is also liable to pay for them.[398]

2.2. PRORATING IN THE ENGLISH LAW OF FRUSTRATED CONTRACTS

As a result of partial failure of supply, a seller, who has contracted with a number of buyers, may be unable to meet all his obligations. The solutions provided under American law have already been discussed.[399] As we have seen under American law, the contracts are not frustrated completely and each buyer receives a quota under a reasonable allocation. The contracts are modified rather than excused. This solution can not easily be adopted in English law because the doctrine of frustration automatically leads to a total excuse of performance. Moreover, modification of contracts in such situations has been rejected by the English courts.[400] However, a solution can be found by reference to special clauses in the contracts.[401] Support for the principle of

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396. (1872) L.R. 7 Q.B. 404.

397. *Loc. cit.*, at 411.

398. *Cf.* R.M. Goode, Commercial Law, 1982, at 198.

399. *Supra*, pp. 203 *et seq.*

400. *Supra*, pp. 22 *et seq.*

pro rata division can be found in cases where the seller has an express provision in the contract, such as a *force majeure* clause. But here, of course, the parties are simply relying on an expressly agreed clause in the contract - not on the doctrine of frustration. In the absence of such clauses, the position in English law is not clear.

In ***Tennants (Lancashire) Ltd. v. C. S. Wilson and Co. Ltd.***,[402] the defendants, suppliers of magnesium chloride discovered that the outbreak of war in 1914 had the effect of reducing the quantity of chemicals available to them since the greater part of the supply of magnesium chloride came from Germany. A shortage in the supply led to a consequent rise in price. The defendants claimed to be released from their contract with the plaintiff by virtue of an exemption clause which provided that "deliveries may be suspended pending any contingencies beyond the control of sellers or buyers . . . causing a short supply of labour, fuel, raw material, or manufactured produce or otherwise preventing or hindering the manufacture or delivery of the article." The House of Lords held that, apart from the rises in price, a shortage had occurred which hindered delivery within the meaning of the above clause; the defendants were therefore justified in suspending delivery to the plaintiffs. Moreover, the House rejected the contention that if the defendants had ignored their other contract buyers and had concentrated all their supplies to carry out the contract with the plaintiff they would have been able to perform the contract completely. Lord Atkinson opined:
"The whole argument of the respondents has been directed to show that the appellants could have obtained the 240 tons necessary to fulfil their particular contract, and that the appellants were bound to supply them in preference to all others. The respondents were to get what they contracted for, and, if their contention be sound, the other customers were to be left with a cause of action. But the delivery, which might be prevented or hindered, was not the mere delivery to one purchaser amongst many of the quantity purchased by him, but delivery under the normal engagements of the appellants' trade to the whole body of the customers to whom they were bound to deliver in the year 1914."[403]

Lord Haldlane said:
". . . I do not see how the appellants could have lawfully delivered to the respondents without also delivering proportionately to the other firms with

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401. *Tennants (Lancashire) Ltd. v. C.S. Wilson and Co. Ltd.* [1917] A. C. 495; *Pool Shipping Co. Ltd. v. London Coal Co. of Gibraltar Ltd.* [1939] 2 All E.R. 432; *Intertradex Ltd. v. Lesieur-Tourteaux Ltd.* [1977] 2 Lloyd's Rep. 146; [1978] 2 Lloyd'a Rep. 509 (C.A.).

402. [1917] A.C. 495.

403. *Loc. cit.*, at 520.

whom they had entered into similar contracts. They were either bound to all their customers equally or they were not bound to any of them."[404]

It will be noticed that because there was an exemption clause in the contract, the court felt entitled to look beyond the buyer and seller and to consider the seller's obligations with other contract buyers. The House agreed that in such a situation the totality of the seller's obligations should be taken into account in judging his responsibilities. Moreover, two members of the House expressly suggested that a pro rata share was an appropriate solution in this kind of situation.[405]

In ***Pool Shipping Co., Ltd. v. London Coal Co. of Gibraltar Ltd.***,[406] the contract contained an exemption clause in similar wide terms. Again the court looked beyond the contract between the buyer and seller and took account of the seller's commitments to other purchasers. In this case, the court used prorating as an aid to the construction of *force majeure* clause.

If during the period of reduced supply, the seller wishes to be obliged to deliver only a percentage of the available supply, or, if he wants to favour one purchaser over others, he should expressly so provide in his contracts. In order to avoid any doubts on how the seller should act in this type of case, the exemption or *force majeure* clause must be appropriately drafted, clearly stating what the seller is required to do and what the purchaser is entitled to expect in these circumstances. Nevertheless, it seems that no single purchaser will be able to complain if the seller divides the available goods pro rata among the contract buyers, if the exact method of division is left open.[407] Moreover, it has also been suggested that the seller is obliged to allocate the available goods, so that each contract buyer is entitled to his pro rata share.[408] In other words, no buyer is entitled to delivery in full but each is entitled to his pro rata share. If a buyer does not receive this share, he would be entitled to damages.[409] However, it should be added that there is also authority that allocation of the supplies to earlier buyers is proper, even if as a result the seller delivers nothing to later buyers.[410]

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404. *Loc. cit.*, at 511-512.

405. *Loc. cit.*, at 508 (*per* Lord Finlay); at 511-512 (*per* Lord Haldlane).

406. [1939] 2 All E.R. 432.

407. *Bremer Handelsgesellschaft m. b. H. v. Vanden Avenne-Izegem P. V B. A.* [1978] 2 Lloyd's Rep. 109, 115, 128, 131. *Cf. Tennants (Lancashire) Ltd. v. C. S. Wilson and Co. Ltd.* [1917] A.C. 495, 511-512.

408. *Bremer Handeslsgesellschaft m. b. H. v. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221, 224.

409. *Loc. cit.*

Like American law, the English courts have not specified any particular method by which the seller is to divide the available goods among his buyers. For example, in ***Bremer Handelsgesellschaft m.b.H. v. Continental Grain Co.***,[411] the Court of Appeal approved "the principle of reasonable distribution".[412] In this regard, the court held that:

". . . This is because, in the absence of any contractual terms to the contrary, the buyer under a contract containing such a clause must contemplate that the seller has other customers besides himself, and must also contemplate that the seller will take reasonable steps to fulfil the needs of other customers; and the reasonable action so taken by the seller should not in these circumstances be regarded as a cause or shortage independent of the expected peril."[413]

In this case, the court again emphasises the principle that no single buyer is entitled to insist on delivery in full. In distributing the available supplies the court believes that it should be done in a reasonable manner. But what is a reasonable manner? This is not specified. In ***Intertadex v. Lesieur***,[414] Lord Denning M.R. said that the allocation of available supplies should be "in a way which the trade would consider to be proper and reasonable - whether the basis of appropriation is pro rata, chronological order of contracts, or some other basis."[415]

From these cases it could be argued that if a seller distributes the available supplies in a fair and reasonable manner, he might plead excuse of non-performance of the contract in so far as he can not perform all contracts. Thus, the unsatisfactory consequence of self-induced frustration,[416] *viz.*, that the contract is not discharged, can be sidestepped. Accordingly, if the seller apportions the goods in a way that is proper and reasonable, the effective cause is not the seller's apportionment, but whatever caused the shortage.

In comparing the American law with English law, these points should be taken into account. The problem has attracted more attention in the U.S. than in England. In America, the principle of "fair and reasonable allocation" is

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410. *Intertradex S. A. v. Lesieur Torteaux S. A. R. L.* [1978] 2 Lloyd's Rep. 509. *Cf. Continental Grain Export Corp. v. S. T. M. Grain Ltd.*, [1979] 2 Lloyd's Rep. 460, at 473.

411. [1983] 1 Lloyd's Rep. 269.

412. *Loc. cit.*, at 292 (*per* Ackner, L.J.).

413. *Loc. cit.*

414. [1978] 2Lloyd's Rep. 509.

415. *Loc. cit.*, at 513.

416. See *Maritime National Fish Ltd. v. Ocean Trawlers Ltd.* [1953] A.C. 524; The *Eugenia* [1964] 2 Q.B.226. See also Chapter three of this thesis, pp. 132 *et seq.*

applied by the courts whether or not an exemption clause has been included in the contract. The English common law, unlike American law, does not confer on a seller any rights or duties to allocate the available supply in a way that he thinks fair and reasonable. In English law where a legal commitment to one customer conflicts with a moral commitment to another, the seller is not allowed to take into account any moral commitments to his regular but not contracted customers.[417] In America, the seller is allowed to honour moral commitments to his regular customers.[418] In English law, where a seller has a binding contract with only one purchaser and a non-contractual arrangement with another one, if the whole amount of the supply is enough to satisfy the contract buyer, it must be allocated to that buyer. If a seller wishes to be allowed to take into account his moral commitments to regular customers, he must use an appropriately drafted *force majeure* clause .

The question arises whether a seller is allowed to include his own requirements in the apportionment. Although there is as yet no English authority, it is doubtful that the seller would be allowed to do so. This result, as the present writer has argued[419] is more desirable than American approach which does allow the seller to include his own requirements in the apportionment.

If a seller wants to be allowed to take account of his commitments under other contracts, he should ensure that an appropriate exemption clause is included in those contracts as well. In ***Hong Guan and Co., Ltd. v. R. Jumabhoy and sons Ltd.***,[420] a contract for the supply of cloves was expressed to be "subject to *force majeure* and shipment". The available supply which was enough to satisfy the appellants, was allocated to third parties under other contracts who had "definite" contracts not expressed to be subject to *force majeure* clauses. The argument in the case centred on the "subject to shipment" clause. The respondents claimed that the effect of clause was to give them a free choice whether or not to ship. The Privy Council held that the words in the clause were not sufficient to enable the suppliers to excuse their failure to deliver by reference to their other commitments. It was added that in the absence of express provision to the contrary, the fact that the respondents had other contracts to fulfil was

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417. *Pancommerce S. A. v. Veecheema B. V.* [1983] 2 Lloyd's Rep. 304, 307.

418. *Supra*, pp. 205 *et seq.*

419. *Supra*, pp. 211 *et seq.*

420. [1960] A. C. 684; [1960] 2 All E.R. 100.

irrelevant. Lord Morris of Borth-y-Gest, distinguished ***Tennants v. Wilson***[421] and ***Pool Shipping v. London Coal Co.***,[422] on the basis that it was the exemption clauses in these cases that enabled the courts to take account of seller's other commitments.[423]

What solutions are provided by English law if a seller who because of an embargo, is able to satisfy some but not all of his existing contracts where there are no exemption clauses? It seems that the seller can not rely on the embargo as an excuse for non-performance of any particular contract.[424] The only solution which remains is that he should perform in full any of the contracts for which he has enough supplies, but will be liable in damages for breach of the other contracts that are not performed. Because it is his own act or election which prevents performance, this is a case of self-induced frustration which means that whatever he did, he could not escape liability.[425]

Another significant difference between English and American laws is therefore apparent. However, it has been argued that English law should follow the American approach.[426] It is also the present writer's contention that English law should allow prorating whether or not the contracts contain exemption clauses. The solution can be justified by finding an implied term in the contracts - like the implied term approach which was used in the ***Sainsbury v. Street*** case.[427] However as argued before,[428] the adoption of prorating should not give the seller a wide discretion. The seller should not be authorised to include himself and regular customers in the allocation plan. In distributing the available goods, allocation in ratio to the physical volume of goods will be fair and reasonable. [429]

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421. [1917] A.C. 495.

422. [1939] 2 All E.R. 432.

423. *Loc. cit.*, A.C. at 700 and 2 All E.Rep. at 106.

424. See *Kawasaki Steel Corp. v. Sardoil S. P. A.* [1977] 2 Lloyd's Rep. 552, 555 (No partial frustration). *Cf. Hong Guan and Co. Ltd. v. R. Jumabhoy and Sons Ltd.* [1960] A.C. 684, 701-702.

425. *Supra*, pp. 132 *et seq.*

426. McElroy and Williams, Impossibility of Performance (1941), at 240-242; Hudson, Prorating in English Law of Frustrated Law of Contracts, 31 Mod. L. R. at 535 *et seq*; Benjamin's Sale of Goods, 3rd ed. Secs. 450, 1596. See also *Bremer Handelsgesellschaft m. b. H. v. Mackprang Jr.* [1979] 1 Lloyd's Rep. 221, 224.

427. [1972] 1 W.L.R. 834.

428. *Supra*, pp. 211 *et seq.*

429. *Supra*, pp. 214, 215.

2.3. THE DOCTRINE OF FRUSTRATED ELECTION

Where a contract gives a party the right to elect one of several modes of performance, if one method of performance becomes impossible due to a supervening event, must the party elect to perform the contract in one of the remaining modes? It seems to be well established that where one mode of performance has become impossible, the contract is not frustrated so long as at least another mode remains possible.[430] If a party has already elected one of several modes of performance, if that method becomes impossible, is he discharged from the performance of the contract? Or must he make a fresh election? Or is he absolutely bound by his choice even though the chosen mode of performance becomes impossible to perform? The questions are the subject of controversy in English law. Let us examine the problem case by case.

In ***Alchorne v. Favill***,[431] an insurer had the option under a policy either to pay money or rebuild a house if damaged by fire. When the house was destroyed by fire, they elected to rebuild it. However, by reason of a statutory provision, they were prevented from reconstructing the house on its old site. It was held that they had no option: they had to pay the money. In ***Hindley and Company, Ltd. v. General Fibre Company, Ltd.***,[432] 250 bales of jute were sold to be shipped from Calcutta for Hamburg, Antwerp, Rotterdam, and Bremen. The buyers had to declare the port of destination. When the buyers declared Bremen, the sellers thereupon claimed that the contract must be regarded as cancelled because the war had recently broken out. The buyers withdrew their declaration of Bremen and declared Antwerp instead. The court held that the performance of contract was not impossible because it was still lawful to deliver in some of the other ports. As the seller had not delivered the jute, the buyers were entitled to damages for the seller's breach of contract.

On the other hand, in ***Brown v. Royal Insurance Company***,[433] insurers had the option to pay money or reinstate premises. They pleaded that

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430. *Waugh v. Morris* (1873) L.R. 8 Q.B. 202; *Hindly and Co. Ltd. v. General Fibre Co. Ltd.* [1940] 2 K.B. 517; The *Furness Bridge* [1977] 2 Lloyd's Rep. 367; *Cf. Warico A. G. v. Fritz Mautner* [1978] 1 Lloyd's Rep. 151.

431. (1825) 4 L.J. (O.S.) 47. See also *Barkworth v. Young*, (1856) 26 L.J.Ch. 153.

432. [1940] 2 K.B. 517. See also *Ross T. Smyth and Co. Ltd. (Liverpool) v. W. N. Lindsay Ltd. (Leith)*[1953] 1 W.L.R. 1280; *Pound v. Hardy* [1956] A.C. 588, 612.

433. (1859) 1 El.and El. 853.

they had elected to reinstate premises damaged by fire, but that the premises had been taken down under an administrative order as a result of their dangerous condition not caused by the fire. Lord Campbell C.J. maintained that "The fact that performance has become impossible is no legal excuse for their not performing it; and they are liable for damages". Crompton J. said that the insurers were bound by their election while Hill J. was of the opinion that the insurers' claim that they were not bound to do anything under the contract had no merit.

We can conclude that when chosen mode of performance becomes impossible to carry out, the promisor is normally bound to perform another alternative,[434] unless this rule is excluded by the terms of the contract.[435] However, where it becomes impossible to carry out one alternative, it depends on the construction of the contract whether the promisor is still bound to carry out the remaining alternative, or whether he is completely excused from his obligation. In ***Barkworth v. Young***,[436] Kindersley V.C. said that it would hardly admit of contradiction that if a promisor was allowed at his option to do a thing in one or other of two modes and one of those modes became impossible by act of God, he was still bound to perform the other mode. He added:
"if the court is satisfied that the clear intention of the parties was, that one of them should do a certain thing, but he is allowed at his option to do it in one or other of two modes, and one of the modes becomes impossible by act of God, he is still bound to perform it in other mode."[437]
In ***Anderson v. Commercial Union***,[438] the question of construction of the contract was again emphasised. In this case, an insurance policy contained a condition which gave the insurers the option to reinstate or replace property damaged or destroyed, instead of paying the amount of loss or damage. The insurers elected to reinstate, but argued that it had become impossible. Lord Esher M.R., said that "It is idle for the company to contend that . . . they may elect to reinstate . . . or pay the amount of the loss, and then do neither." While Bowen L.J. declared that "It is clear law that if one of two things which have been contracted for subsequently becomes impossible, it becomes a

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434. See *Barkworth v. Young* (1856) 26 L.J.Ch. 153, 163; *Brightman and Co. v. Bunge Y Born Limitada Sociedad* [1924] 2 K.B. 619; *Anderson v. Commercial Union Assurance Co.* (1885) 55 L.J.Q.B. 146.

435. *Sociedad Iberica de Molturacion S. A. v. Tradax Export S. A.* [1978] 2 Lloyd's Rep. 545.

436. (1856) 26 L.J.Ch. 153, 163.

437. *Loc. cit.*, at 163.

438. (1885) 55 L.J.Q.B. 146.

question of construction whether, according to the true intention of the documents, the obligor is bound to perform the alternative or is discharged altogether."[439]

It may be necessary to imply a term into the contract to decide whether the promisor is still obliged to perform the remaining alternative or whether he is excused from his obligation.[440] Lord Campbell's *dictum* in ***Brown v. Royal Insurance Co.***,[441] that "The fact that performance has become impossible is no legal excuse for their not performing it; and they are liable for damages.", may no longer be sound. The implication of such a term into the contract seems to be well established in English law. In ***Reardon Smith Line v. Ministry of Agriculture, Fisheries and Food***,[442] charterers had the right to nominate the loading port from a named range of ports. When the charterers nominated a port which had been threatened by strike action, the question arose whether they were bound to nominate a suitable substitute port. McNair J. concluded that it was not possible to imply into the charterparties an obligation upon the charterers to make a fresh nomination in such situations.[443] However, it appears that this conclusion has not been taken as having general application.[444]

From a comparative point of view, it should be pointed out that this approach is approximately similar to the provisions of section 2-614 UCC.[445] This section allows a seller to substitute a "commercially reasonable" means of delivery for the one agreed upon if it has become unavailable or commercially impracticable. Again the section allows the buyer to modify the means or manner of payment to any "commercially substitute equivalent" if the agreed means or manner fails because of a government law or regulation.[446]

The cases we have been discussing give a party a "performance option" which must be distinguished from a "contract option". According to the

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439. *Loc. cit.* at 150.

440. *Da Costa v. Davis* (1798) 1 B. and P. 242; *Stevens v. Webb* (1835) 7 C. and P. 60; *Bute (Marquis of) v. Thompson* (1844) 13 M. and W. 487.

441. 1 E. & E. 853.

442. [1959] 3 W.L.R. 665-718.

443. *Loc. cit.* at 694, 695.

444. Paoul P. Colinvaux, Doctrine of Frustrated Election, J. Bus. L. (1960), 236.

445. *Meyer v. Sullivan*, 181 P. 847 (1919).

446. See Chapter 2 of this thesis, pp. 64-68.

latter, the contract entitles one of the parties to choose which of two or more things must be carried out. The option is related to what should be done and not how it should be done.[447] For example, suppose that a contract provides for the delivery of A or B at seller's option. If A is destroyed, the seller has to deliver B. However, if the seller notifies the buyer of his choice to deliver B and B is then destroyed, performance of the whole contract will be excused.[448]

If the stipulated method of performance is regarded as exclusive, and it becomes impossible to perform, then performance of other alternatives becomes irrelevant and the contract is frustrated. That is what happened in ***Nicholl and Knight v. Ashton Edridge and Co.***[449] According to the contract of sale, cottonseeds were to be shipped by the steamship, Orlando. When the Orlando went aground, the court held that the contract was frustrated. Since as a matter of construction the contract had expressly and exclusively stipulated the manner of performance *viz.*, that the goods were to be shipped in the Orlando.

The Suez canal cases arose as a consequence of hostilities in the Middle East in 1956 and again in 1967. In some of these cases, the parties had not expressly stipulated for a particular method of performance. The contracts involved neither expressly nor impliedly provided that shipment would be *via* the Suez canal. When the canal was closed, the question to be decided was whether the seller was obliged to ship the goods *via* the Cape of Hope? In ***Tsakiroglou and Co. Ltd. v. Noblee Thorl GmbH***,[450] a C.I.F. contract was made for the sale of Sudanese groundnuts to be shipped to Hamburg. At the time the contract was made, the parties expected that shipment would be *via* Suez. However, after the closure of the canal, the House of Lords held that the contract was not frustrated and that the seller ought to have shipped the goods *via* the Cape of Good Hope. Although this would cause extra length and expense, this was not sufficiently serious to frustrate the contract. Accordingly, if the contract has not expressly or impliedly provided the method of performance, the contract must be performed if an alternative route is available even although the anticipated method of performance had become impossible.

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447. G. H. Treitel, The Law of Contract, 8th ed. 1991, at 778.

448. See *The Didymi and Leon* [1984] 1 LIoyd's Rep.

449. [1901] 2 K.B. 126.

450. [1962] A.C. 93.

B. CIVIL LAW
1. FRANCE

Unlike English law, French law does not have difficulty in recognising partial impossibility. Thus, the exemption is available when a party, because of *force majeure*, is unable to perform one of his obligations. Most of the time a contract contains a number of obligations and duties and failure to perform one of them may give rise to the question of excuse. This approach in terms of obligations is adopted in Civil law. To a common lawyer this approach is uncomfortable, for he does not usually think in terms of obligations *per se* but rather in express or implied terms[451] of the contract. While section 27 of the Sale of Goods Act 1979 speaks of the obligations of the seller and buyer in regard to delivery, this constitutes the minimum content without which a contract of sale can not exist at all. The remainder of the content is seen as deriving from express or implied terms. It is also difficult for a common lawyer to envisage frustration of single obligation, since, as discussed before,[452] the doctrine of frustration automatically applies to performance of the whole contract. Because in French law, *force majeure* is regarded as non-performance of one or more of the party's obligations, it is able easily to accommodate the concept of partial impossibility.

When *force majeure* prevents partial performance of a contract, termination of the contract can be denied, with a proportional diminution in the performance of the counter promise.[453] The court will consider whether the partial performance is in the interest of the creditor or whether it is in accordance with the intentions of the contracting parties. If partial performance has no utility for the creditor, he has the right to demand the termination of the contract. Nor can he be forced to keep what he has received. But where in divisible contracts, partial performance has already given a substantial benefit to the creditor, the court has a discretionary power to decide whether termination should be pronounced. If the court upholds the contract, it can only give an indemnity for the unperformed portion of the obligation.[454]

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451. See Nicholas, Rules and Terms, Civil Law and Common Law, 48 Tul. L. Rev. 1974, 946, 955 *et seq.*

452. *Supra*, pp. 142, 143.

453. See notes by Planiol, D. 1891 I. 329 and D. 1892 II. 137.

However, the contract will be terminated when partial impossibility affects an essential element of the contract without which the parties would not have contracted. This is, of course, similar to the court's approach in ***Denny, Mott, and Dickson, Ltd. v. James B. Fraser and Co. Ltd.***[455] In ***Ceccaldi v. Albertini***,[456] the Cour de Cassation declared that in cases of partial impossibility, it is the duty of the court to decide whether, in the particular circumstances, such non-performance is sufficiently material for immediate cancellation to be decreed. Thus, partial extinction of a contract normally occurs if the effects of *force majeure* is insignificant, in the sense that it does not affect the essential purpose of the contract. For example, if after the conclusion of a contract of sale, the seller can not send the goods because their carriage is impossible, the partial impossibility (*viz.* sending of goods) is insignificant, in the sense that it does not affect the original purpose of the contract (*viz.* transfer of property). Nevertheless, if it is proved that the delivery of the goods is an essential element of the particular contract, then the contract will be terminated completely.[457] In such circumstances, the contract has changed fundamentally as the principal part of the contract has altered.[458] Although the result of these kinds of cases in English law is the same (*i.e.*, frustration of contract with its own particular effects), the solution is based on the doctrine of frustration rather than partial impossibility.[459]

It should be emphasised that the intentions of the parties also play an important role. For example, in a case of partial impossibility in a contract of sale, the contract must be examined to discover whether it was the intention of the parties that the contract is divisible. This arises where the goods sold are to be delivered in instalments over a period so that each delivery can possibly be considered as a separate obligation.[460] Thus, each obligation will have its own price.

Article 1184[461] of the French Civil Code introduces a valuable element of flexibility. Under the Article, the courts have discretion and need not grant

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454. *Cf.* Cass., 26 May 1868, D. 1869. 1. 365, S. 1868. 1. 336; Cass., 14 April 1891, D. 1891. 1. 329; Cass., 5 Nov. 1895, D. 1896. 1. 8; Cass., Req., 9 March 1925, D. H. 1925, 266; 21 Dec. 1927, D. H. 1928, 82.

455. [1944] A.C. 265.

456. Cass. Civ., April 14, 1891, D. P. 1891. 1. 329.

457. Raduant, *op. cit.*, at 335.

458. *Loc. cit.* See also Fiatte, *op. cit.*, at 53.

459. See generally, 215 *et seq.*

460. Fiatte, *op. cit.*, at 42.

rescission if non-performance is partial. They may take other measures such as reducing or varying the obligations. In one case,[462] under a long-term contract, the plaintiff had taken advertising space on an illuminated pillar located in a station. Because of the outbreak of war in 1939, blackout regulations were imposed for the duration of hostilities and prohibited the illumination of advertising displays at night. While the contract did not provide for allocation of the payments due in such circumstances, the Cour d'Appel of Paris held that its performance had become partially impossible owing to *force majeure* and ordered a 20 per cent reduction of the hire due by plaintiff. The case is not an example of partial exoneration of a divisible contract but of a judicial rewriting of an entire contract in the event of partial impossibility. In another case,[463] due to the *force majeure* event, the proprietor was not able to fulfil his obligation to heat the hired premises; the court ordered an appropriated reduction of the hire charges.

Partial impossibility is expressly considered by the Civil Code in cases of leases of property. According to Article1772, if the property leased is wholly destroyed by *force majeure,* the lease is terminated. However, if it is only destroyed in part, the lessee has the choice either of claiming a reduction in the rent or terminating the lease. As the jurisprudence has not given any solutions in the context of other contracts, it seems that the provisions in respect of leases may be given general application. This would mean that in cases of partial impossibility, the party who receives partial performance, can either ask for a diminution of the price or termination of the contract. It will, of course, ultimately be for the court to decide whether to reduce the price or terminate the contract.[464] We can therefore say that when the debtor, under partial impossibility, is excused in part, the other party is also released in part of his obligations: the unaffected part of the contract will survive and the counter-obligation will be either reduced or modified accordingly.

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461. The Article reads: "A resolutory conditon is always understood in synallagmatic contracts for the case where one of the two parties does not satisfy his engagement

In such case, the contract is not rescinded as a matter of law. The party toward whom the engagement has not been executed has the choice either to force the other to execution of the engagement when it is possible or to ask the rescission of it with damages.

Rescission must be requested at law, and the defendant may be granted a delay according to the circumstances."

462. C. A. Paris 13. 11. 1943, Gaz Pal. 1943. 2. 260.

463. Trib. Civ. Sein, 23 Dec. 1940, Gaz. Pal., 1941, I, 19.

464. Fiatte, *op. cit.*, at 45, 46.

In contracts of sale, if non-performance is due to *force majeure* which prevents a seller from performing a part of the contract, he is released from his performance of that part. However, it should be noted that where there is a contract of sale of a specific thing and the property has passed to the buyer, the risk of partial destruction of the thing will be borne by the buyer. In contrast, if the seller remains owner, the risk of partial destruction rests on him. The seller will not be liable for damages, but he can no longer claim the price from the purchaser and the contract is simply void.

Again, in case of partial destruction of a specific thing, where the ownership has not passed to the buyer, he has the option either of accepting a part only of that thing and paying the equivalent of what he receives, or he has the right to demand the termination of the contract completely.[465] There is, however an exception in Article 1182, paragraph 3. According to this Article, which is concerned with obligations subject to a suspensive condition, "If the thing deteriorates without the fault of the debtor, the creditor has the choice either to rescind the obligation or to demand the thing in the state in which it is found, without diminution of the price." This Article only applies in cases of partial loss, because the word "deterioration" used therein, seems to be contrary to the idea of total loss provision for which is to be found in the preceding paragraph. However, it is hoped that the provisions of paragraph 3 of Article 1182 will not be used by analogy in the context of other contracts.[466]

In cases of sale of a "chose de genre", the question of the risk of either partial or total destruction does not arise: the seller bears the risk. So, if the things sold perish in part and buyer accepts partial performance, he will pay the equivalent of what he receives.[467] This provides a similar solution to that reached by English law in ***Howell***[468] and ***Sainsbury***[469] which were, of course, based on frustration rather than partial impossibility.

2. GERMANY

While in English law, partial impossibility has not been recognised, the BGB mentions it specifically in paragraph 323. According to this provision, in a

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[465]. *Loc. cit.*, at 115.

[466]. Ripert, Obligations, 1952, at 568.

[467]. Fiatte, *op. cit.*, at 111-114.

[468]. *Howell v. Coupland*, (1874) L.R. 9 Q.B. 462; aff'd. (1876) 1 Q.B.D. 258.

[469]. *Sainsbury (H&R.S.) Ltd. v. Street* [1972] 1 W.L.R. 834; [1972] 3 All E.R. 1127.

case of partial impossibility, the counter-performance is reduced in accordance with paragraphs 472 and 473.

Paragraph 472 requires that:

"(1) In case of reduction, the purchase price shall be reduced in the proportion which at the time of sale the value of the thing in a condition free from defect would have borne to the actual value.

(2)If, in the case of a sale of several things for an aggregate price, reduction is effected only in respect of some of them, then in reducing the price the aggregate value of all the things shall be taken as a basis."

Paragraph 473 in this regard adds that:

"If there is provision, besides the purchase price fixed in money, for a performance by the purchaser which involves non-fungible things, then such performance, . . ., shall be estimated in money according to its value at the time of sale. The reduction of the purchaser's counter-performance is made out of the price fixed in money; if this is less than the amount to be deducted, the seller shall make good the balance to the purchaser."

In one case,[470] the parties entered into a lease. The property was hired for the purpose of establishing and carrying on a restaurant during an international exhibition to be held in Leipzig in 1914. Due to the outbreak of war, the exhibition had to be reduced in soope. Accordingly, the attendance at the exhibition was sharply reduced. The innkeeper asked for a corresponding reduction in the rent payable by him. The German Supreme Court accepted the claim and held that this demand was justified because, according to the contract, it was promised to hold an exhibition of a certain size. The promise could not therefore be completely performed. The performance had become partly impossible and this justified an appropriate reduction of rent.

In another case,[471] the parties entered into a contract of sale of English tin in 1914. It was agreed that 5000 Kg. of the tin bought was to be delivered in five instalments of 1000 Kg., between the months of August and December. Owing to the outbreak of war, the price of the tin increased sharply. The defendant delivered in August and September, but later refused to deliver the remaining three instalments. The plaintiff sued the seller for damages of 9,244.95 mark for non-performance. The court did not accept the defendant's claim of partial impossibility of the contract and gave judgment for the plaintiff.

If because of partial failure of supply, a seller who has contracted with a number of buyers is unable to meet all his obligations, is he released from all the contracts concluded, or should he allocate the available supply among his

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[470]. RGZ, Vol. 88, p.108. (Cited in Cohen, Frustration of Contract in German law, *op. cit.*, at 18).

[471]. 21 March 1916, 88 ERG (Z) 172. (Cited in Mehren, *op. cit.*, at 279 *et seq.*).

buyers? The German courts have solved this problem through the principle of good faith.[472] In one case,[473] a seller had contracted to deliver a special type of rape-seed, grown only by him. After the conclusion of the contract, as a result of an unusual drought, smaller quantities of the crop were available than could have been expected. The question was whether the seller had to satisfy the buyers who had brought claims, or whether he had to allocate the available supplies in proportion among the buyers. The court argued that the buyers formed a community of risk and that consequently, proportional allocation had to take place.

In cases where the basis of the contract has only partly lapsed, in addition to recession, the German courts are authorised to vary the terms of the contracts in order to adjust them to the changed circumstances.[474] This power is based on paragraph 242 BGB. However, English law does not give courts the power to adjust the contracts.[475]

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[472]. Para. 242 German Civil Code.

[473]. RGZ, vol. 84, p. 125. (Cited in Cohn, Frustration of Contract in German Law, *op. cit.*, at 18). See also RGZ, vol. 95, p. 264; RGZ, vol. 100, pp. 134 *et seq.*

[474]. See *e.g.*, RGZ, vol. 107, p.124. (Cited in Cohn, *op. cit.*, at 21). See also Dawson, *op. cit.*, at 1066-1070.

[475]. See *British Moveitonews v. London District Cinemas Ltd.*, [1952] A.C. 166.

PART THREE - THE EMERGING INTERNATIONAL CONCEPT OF EXCUSE OF NON-PERFORMANCE

We have considered the concept of excuse doctrines and their effects in different legal systems. As we have seen, the various national laws respond in different ways to the problems arising from excuse of non-performance. It is now appropriate to examine and analyse the problem on an international level. For this purpose, solutions given by international conventions, standard form contracts and what is perhaps more important, theoretical solutions proposed by scholars will be examined.

CHAPTER SIX:
INTERNATIONAL CONVENTIONS
A. HAGUE CONVENTION (ULIS)

In order to unify the law relating to international sales, the Uniform Law on the International Sale of Goods (ULIS) was adopted at Hague conference in 1964 and was ratified by eight countries. While the United Kingdom also adhered to the convention,[1] her ratification was subject to the reservation that ULIS would be applicable only to contracts in which the parties choose it as the law of the contract. It should be added that there is no reported case in British courts which involves the convention.[2]

The doctrine of excusable non-performance is dealt with under the heading of "exemption" in Article 74 of the convention. This provides:

"1. Where one of the parties has not performed one of his obligations, he shall not be liable for such non-performance if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account or to avoid or to overcome; in the absence of any expression of the intention of the parties, regard shall be had to what reasonable persons in the same situation would have intended.

2. Where the circumstances which gave rise to the non-performance of the obligation constituted only a temporary impediment to performance, the party in default shall nevertheless be permanently relieved of his obligation if, by reason of the delay, performance would be so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract.

3. The relief provided by this Article for one of the parties shall not exclude the avoidance of the contract under some other provision of the present law or

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[1]. The Uniform Laws on International Sales Act which came into force in 1972.

[2]. Barry Nicholas, The Vienna Convention on International Sales Law, 105 L. Q . REV. 1989, 201, 202.

deprive the other party of any right which he has under the present law to reduce the price, unless the circumstances which entitled the first party to relief were caused by the act of the other party or of some person for whose conduct he was responsible."

As extracted from the wording of the provision, the intention of the parties is considered decisive (subjective standard), but in the absence of any expression of the intention of the parties, the problem becomes a question of interpretation. This means that the test will have a more objective character taking into account the reasonable person's intention in an identical situation.

"Intention of the parties" must be ascertained in order to establish that the circumstances were not foreseen and that the party seeking relief could not avoid or overcome them. However, where intention can not be ascertained from the contract, the Article substitutes the objective test, *viz.*, the "reasonable man test" according to which the party seeking relief will either be liable for not having avoided or overcome events which an ordinary contracting party would have foreseen that he ought to avoid or overcome or he will not be liable, because an ordinary contracting party would not have foreseen that he would have to avoid or overcome them. It will be clear that convention's approach concerning the foresight test is very similar to "concrete abstract test" advocated by the present writer in chapter 3.[3]

Some commentators believe that the approach adopted in the above Article owes much to the Common law, particularly where the problem is solved by reducing it to a question of interpreting the intentions of the parties.[4] At the Hague conference in 1964, in a comment the United Kingdom also expressed the view that Article 74 of ULIS resembled the English law of frustration of contract.[5] However, it is difficult to accept the idea that Article 74 is identical with English law. There are some points which are familiar in English law but not all. For example, while foreseeability is a matter of controversy in English law, the approach adopted in the first paragraph of the Article - *viz.*, if the intention is not clear it will be discovered objectively - reflects the Common law method of dealing with the problem of frustration in terms of interpretation of the contract. However, it appears that the Article is a mixture of Common law and Civil law approaches to the problem of excusable

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3. *Supra*, at 127, 128.

4. R. H. Graveson, E. J. Cohn and Diana Graveson, The Uniform Law on International Sales Act 1967: A Commentary (London, 1968), at 95.

5. Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague, 2-25 April 1964, vol. II, Documents 167 (1966).

non-performance. It seems that the test of "intention of the parties" was used so as to avoid incompatibility with unique national law formulations.[6]
Another point which corresponds to English law is the formula adopted at the end of paragraph 2: ". . . so radically changed as to amount to the performance of an obligation quite different from that contemplated by the contract".[7]

According to the Article, the excuse is available when a party has not performed "one of his obligations". This is inconsistent with English law, because frustration in English law covers the whole performance of the contract and not one or more obligations of the contract, which is, of course, the Civil law approach.[8] However the second paragraph of the Article confusingly speaks in terms of release from an obligation. Can we equate the paragraph with the English approach by arguing that when there is a change in obligation, is simply another way of saying that there is a change in the contract. In this regard, even Common law writers[9] and judges sometimes use the word, obligation, instead of the word, contract. For example, in ***Marshal v. Harland***,[10] Sir John Donaldson in defining the doctrine of frustration stated:
". . . all that the lawyer means by frustration of contract . . . [is a case] in which a contractual obligation becomes impossible of performance or in which performance of the obligation would be rendered a thing radically different from that which was undertaken by the contract."

The crucial part of this Article is paragraph 1, where it is stated: "due to circumstances which . . . he was not bound to take into account . . . ". This shows the influence of the Civil law which has adopted the principle that contractual liability is based on fault. Accordingly, the non-performing party must prove that the contingency was beyond his control and foresight. The burden of proof is clearly on the non-performing party to show that he was not at fault (Para. 1: ". . . if he can prove. . ."). This approach is quite different from English law because, as discussed before,[11] the non-performing party must prove that performance of his contract is rendered impossible or its purpose has been frustrated. Moreover, in English law the burden of proof that the

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6. Gunnar Lagergren, A Uniform Law of International Sales of Goods, J. Bus. L. 1958, 131, 139.

7. See Lord Radcliffe in *Davis Contractors v. Fareham U. D. C.*, [1956] A.C. 696, 728.

8. See B. Nicholas, *Force Majeure* and Frustration, 27 Am. J. Comp. L. 1979, 231, 233-234.

9. See *e.g.*, Chitty on Contracts, vol. I, 25th ed., 1983, at Para. 1526-1527; Clive M. Schmitthoff, Helsinki Discussions, *op. cit.*, at 128.

10. [1972] 1 W.L.R. 899, at 904.

11. *Supra*, pp. 137, 138.

event was caused by the fault of one of the parties rests on the party denying frustration. In this regard, American law is like French and German law., namely, the burden of proof rests on the party relying on the doctrine of excuse.[12]

Paragraph 1 of Article 74 gives no right to claim damages, no matter what the nature of the non-performance might be. This approach will still be taken even where the goods do not conform to contract, unless the parties agreed to the contrary.[13]

It should be added that paragraph 3 of the Article governs the extent of consequences of supervening events. It deals with the remedies for the aggrieved party in case of non-performance. Under the paragraph, the remedies available are: reduction of the price[14] and avoidance of the contract with the consequence[15] that restitution must be made by both parties for any performance received. Finally, the obligee may not sue the obligor for specific performance.

1. CRITICISMS OF ARTICLE 74 OF ULIS

The main object of the draftsmen was to produce a formula to define the circumstances in which excuse of non-performance would occur. In attempting to countenance different legal doctrines, the formula has created too many areas of doubt. The language of the Article is abstract, artificial and sometimes vague. This is because the Article does not provide accurate and comprehensive definitions for various terms used. Thus, the application of the provisions of the Article to particular facts will obviously be difficult. For example, paragraph 1 speaks in terms of exemption from liability which echoes French law, whereas like German law paragraph 2 speaks in terms of release from the obligation.[16] Paragraph 1 talks of "one of his obligations", this means that where a contract creates a lot of obligations, one of them might be excused. While contrary to the English law of frustration,[17] it is in accord with the French law of *force majeure*. Moreover, excuse of non-performance of one of the obligations of the contract amounts to partial frustration, which is not

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12. *Supra*, at 140.

13. Gravson and the others, *op. cit.*, at 96.

14. Art. 46.

15. Art. 78.

16. B. Nicholas, *op. cit.*, at 234.

17. *Supra*, pp. 215 *et seq.* & 234 *et seq.*

recognised in English law where the entire contract is terminated by frustration.

In describing the relationship between the seller and the buyer, the Article states that the non-performance must be "due to" the unforeseen "circumstances". It does not use the words, "prevented", "precluded" or "rendered impossible". Accordingly, it can be said that the provision favours sellers in that the drafting commission of the ULIS voted in favour of the idea that a mere rise in price will satisfy the criteria for excusing the seller's non-performance.[18] Accordingly, Tunc[19] argues that the adoption of the word "circumstances" in paragraph 1, include cases in which non-performance was due to an unforeseen rise in prices, a possibility which is in accord with German doctrine of Wegfall der Geschaftsgrundlage. The use of the elastic words, "due to" and "circumstances", may excuse the party seeking relief in many more circumstances than the English doctrine of frustration, or, though less markedly, the UCC concept of impracticability. Given these points, Article 74 of the ULIS is clearly not entirely in accord with English law. As Nicholas has argued, those who suggested otherwise were misled by their own conceptual presuppositions.[20]

It should be added that the ULIS also does not impose any duties of notification or alternative performance. It also does not permit adjustment of the contractual obligations. Thus, these rules might operate harshly. However, the parties can expressly exclude the application of the Article from their contract[21] and provide for excusable non-performance enabling the courts to effect an equitable adjustment of their rights.

Expenses incurred in performance of the contract which result in a benefit to the other party, can be the subject of restitution; but if the expenses incurred do not result in any benefit to the other party it appears, from the provisions, that there is no basis for restitution.

Avoidance of the contract under Article 78 (which is also applicable in case of breach of contract) has been criticised on the ground that it might be too drastic a remedy where the non-performance is not due to the fault of a

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18. Zweigert, Aspects of the German Law of Sale, Int'l. & Comp. L. Q. Special Pub. No. 9, Symposium on Some Comparative Aspects of the Law Relating to the Sale of Goods, 1964, 8, at 48.

19. See Records and Documents of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague 1964. (The Hague 1966), vol. I, p. 384.

20. B. Nichlas, *op. cit.*, at 239.

21. Art. 8.

party.[22] The argument has been illustrated by the case of an F.O.B. buyer who is not able to give effective shipping instructions. The buyer will be exempted from damages for his non-performance and the seller will be excused of his obligation to deliver the goods. The problem here is that it is not clear whether the seller can avoid the contract, since this will give him the right of restitution of any part-performance he has rendered, subject to the restoration of the price. This could lead to injustice to both parties where there is a rise or fall in the market.

Although in theory the ULIS can be welcomed as a compromise between different legal systems in defining excusable non-performance, in practice there will be serious difficulties in its application. For example, those words and terms of the Article which are vague or elastic will result in different interpretations in different legal systems. This is contrary to the purpose of uniform code of law. It illustrates that the creation of an accurate and comprehensive uniform law which at the same time countenances different legal doctrines, is a very difficult task.

B. VIENNA CONVENTION (CISG)

Because of various inherent defects in the provisions of the ULIS, few countries accepted it. Accordingly, another Convention under the title of the United Nations Convention on Contracts for the International Sale of Goods was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and issued for signature through a United Nations Diplomatic Conference in Vienna in 1980.[23] This convention (hereinafter CISG) came into force on 1 January, 1988. Until 7 December, 1993, thirty six countries including the United States of America, France and Germany adopted and ratified the new convention. The United Kingdom has not yet ratified.

In this Convention, the question of excusable non-performance is regulated by Article 79 under the title of "exemptions". It is one of the longest in the Convention. Although drafting of Article took up a great deal of time, the result is not satisfactory. Let us examine the first, and key, paragraph of Article 79 and paragraph 5, which provide the general rule of exemptions.

1. GENERAL RULE ON EXEMPTIONS (PARAGRAPHS 1 AND 5)

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22. B. Nicholas, *op. cit.*, at 239.

23. United Nations Convention on Contracts for the International Sale of Goods, U. N. Doc. A/ Conf. 97/ 18 Annex I (1980).

1.1. PARAGRAPH 1

The paragraph reads:

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

According to the language of the paragraph, a party seeking relief from liability for damages, has to prove that:

(i) the non-performance was "due to an impediment beyond his control";

(ii) at the time of the conclusion of the contract, he or she could not reasonably have been expected to have taken the impediment into account; and

(iii) subsequent to the contract, he or she could not reasonably be expected to have avoided or overcome the impediment or its consequences.

1.1.1. IMPEDIMENT

The substantial change in the formulation between ULIS and CISG is that whilst the former (Article 74(1)) refers to "circumstances", the latter speaks of "impediment", although the expression "temporary impediment" also appeared in Article 74 (2) of the ULIS.

According to the legislative history of the Convention,[24] this change - the substitution of the word "impediment" for "circumstances" - was intended to ensure that excuse from liability did not include defective performance and, in particular, the supply of goods which did not conform to contract. The word "circumstances" was regarded as having a wider scope that extends exemption to include delivery of defective goods where the defect is not due to the seller's fault.[25] By using the word "impediment", it was envisaged that it would be difficult, if not impossible, for the seller to escape liability for defective goods.[26] Some commentators doubt whether this objective was achieved. Nicholas illustrates his doubt by considering the case where a defect has been fraudulently concealed by a third supplier. At least in a fault-oriented system, this could be regarded as an "impediment" to the performance by the seller of his duty to supply goods which conform to

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24. 5 UNCITRAL Yearbook, 1974, 39-40; 6 UNCITRAL Yearbook, 1975, 60-61.

25. Records and Documents of the Diplomatic Conference on the Unification of Law Governing the International Sale of Goods, The Hague 1964, The Netherland Ministry of Justice (The Hague 1966), vol. I, pp. 121-122; vol. II, pp. 21, 351.

26. 5 and 6 UNCITRAL YEARBOOK, 1975, 60-61.

contract.[27] Moreover, Huber also firmly believes that the change in wording, though subject to so much argument, is without significance. In his view, a defect present in the goods at the time of contracting, could be an impediment to the performance of the seller's obligation to deliver conforming goods.[28]

It is surprising for a common lawyer to envisage that frustration could ever be relied upon as an excuse for breach of the implied warranty of merchantability. While the Civil law, for example, Germany,[29] bases contractual liability on fault, in Anglo-American law, there is no place for fault in contractual liability. At Common law, contractual obligations have been traditionally thought to be absolute.

In the present writer's view, the word "impediment" presupposes the absence of fault before there is a ground of excuse, and accordingly the seller will not be allowed to escape liability for defective performance. The following reasons support the contention:

First, the intention of the draftsman in replacing the word "circumstances" by "impediment" is clear enough: exemption does not apply to defective performance such as the supply of non-conforming goods.[30] Secondly, according to the CISG, if the seller fails to perform any of his obligations[31] including his obligation to supply conforming goods, the buyer may claim damages.[32] Similar provisions on breach by the buyer are to be found in the Convention.[33] The Convention is based on the fundamental principle of a contractual obligation to perform the terms of the contract. If excuse was available where performance was defective, this would undermine the Convention's contractual approach to performance of the parties' obligations and its unitary approach to the remedies for breach.[34] Thirdly, comparative

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27. B. Nicholas, *Force Majeure* and Frustration, *op. cit.*, at 240.

28. Die UNCITRAL - Entwurf eines Ubereinkommens Uber International Warenkaufvertrage, 43 RabelsZ 413, 165 (1979). (Cited in B. Nicholas, "Impracticabiity and Impossibility in the U. N. Convention on Contracts for International Sale of Goods", 5-1, at 5-11, (In International Sales: The United Nations Convention on Contracts for the International Sale of Goods, Edited by N. Galston and H. Smit, New York, 1984).

29. *Supra*, at 128 *et seq.* & 132 *et seq.*

30. John O. Honnold, Documentary History of the Uniform Law for International Sales, Deventer, 1989, at 631.

31. Art. 45.

32. Art. 35.

33. Art. 61 (1)(b).

34. John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, Deventer, 1982, at 435.

analysis of excusable non-performance,[35] indicates that relief is generally based on events such as war, embargo, flood, fire, storm, crop failure and the like, *i.e.*, which are not the result of a party's breach. Fourthly, exemption based on absence of fault might call for inquiry into the manufacturing processes of the seller and more remote suppliers. This inquiry might require long, uncertain and expensive investigations.[36] Fifthly, the words "beyond control" also emphasise that a party is not allowed to be excused for merely defective performance, such as non-conformity. Finally, for the sake of equity, the seller or manufacturer should bear the risk in such a case, otherwise, the buyer may suffer serious losses.

1.1.2. OPERATION OF THE IMPEDIMENT

For the impediment to be operative, the party seeking relief must prove that the impediment was "beyond control". Owing to the differences that exist between Civil law and Common law, this condition is not easy to explain. It can be argued that the issue of fault is involved. But this argument is unsound since an early draft of the Convention which had required that the impediment should have occurred without the fault of the party seeking exemption was abandoned.[37] If we accept that "beyond control" reflects the French doctrine of *force majeure* according to which the contingency must be unforeseeable, insurmountable and irresistible, the Article will not cover other situations such as change of circumstances, commercial impracticability and wegfall der geschaftsgrundlage. But as we shall see,[38] comparative analysis of the text of the paragraph reveals that the Convention could be capable of covering both Civil and Common law doctrines.

Other questions arise. Would the insolvency of the buyer *per se* constitute an impediment beyond the buyer's control? What happens if an unanticipated exchange control is imposed? It has been argued that the insolvency of the buyer by itself should not be considered an impediment beyond control,[39] but the imposition of exchange control appears to be an

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35. See generally chapter two.

36. *Loc. cit.*

37. 6 UNCITRAL Yearbook, 1975, 68; 8 UNCITRAL Yearbook, 1977, 56.

38. *Infra*, 250 *et seq.*

39. See United Nations Secretariat's Commentary to the UNCITRAL Draft Convention (A/ Conf./ 97/ 5), 1979, at 172.

impediment beyond control so that the buyer can exempt himself from liability for damages for non-payment.[40]

Another important condition before the impediment operates concerns the foreseeability of the impediment. This is the most difficult issue facing the party seeking relief. According to the Secretariat's commentary[41] and paragraph 4 of Article 79,[42] the concept of foreseeability in the text of the Article does not differ from that in Article 74 of the ULIS. In other words, paragraph 1 of Article 79 by providing ". . . that he could not reasonably be expected to have taken the impediment into account . . .", considers the actual foresight of the parties (subjective test) before considering foreseeability (objective test). The Vienna Convention's foresight test is therefore different from that in French law. However, as discussed before,[43] it is thought that the two-stage approach adopted in the ULIS and CISG is much preferable than the one-stage, objective criterion adopted by French law. The former is a comprehensive solution similar to the "concrete, abstract foresight test" suggested by the present author.[44] Under this test, it is only when express and implied terms of the contract and the circumstances surrounding do not indicate that the occurrence of a particular event was actually foreseen by the party seeking relief that it is necessary to determine objectively whether the non-performing party could reasonably have been expected to take the event into account at the time of contracting.

Again a party seeking relief must prove that he has been unable to avoid or overcome the impediment or its consequences. The word "consequences" is a new addition in the CISG, in comparison with the ULIS. The reason for the addition of this word is that sometimes the impediment itself is foreseen or foreseeable, whereas its consequences are not. However, avoiding or overcoming the impediment or its consequences will, in most

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40. See also Albert H. Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Deventer, 1989, at 508.

41. "However, where neither the explicit nor the implicit terms of the contract show that the occurrence of the particular impediment was envisaged, it is necessary to determine whether the non-performing party could reasonably have been expected to take it into account at the time of the conclusion of the contract. In the final analysis this determination can only be made by a court or arbitral tribunal on a case-by-case basis." (United Nations Secretariat's Commentary to the UNCITRAL Draft Convention (A/ Conf./ 97/ 5), 1979, at 170).

42. ". . . after the party who fails to perform knew or ought to have known of the impediment, he is liable . . ."

43. *Supra*, pp. 127, 128.

44. *Supra*, pp. 127, 128. See also *infra*, pp. 322 *et seq.*

cases, overlap with the concept of beyond control. The behaviour of the defaulting party should be taken into account. This rule also indicates that the obligor must do all in his power to perform his obligation and may not await impediments that might later justify non-performance. Thus, the obligor may not be liable for damages if he provides a commercially reasonable substitute for the performance which was required under the contract.[45] For example, a particular vessel is delayed because of contingencies beyond control, the obligor must attempt to overcome the impediment by providing an alternative vessel. An example in the Secretariat's commentary[46] is, however, open to criticism. The example concerns a contract requiring goods to be packed in a specific type of container: if the container happened to be unavailable, it is suggested in the comment that the seller would not be liable if he provided "commercially reasonable substitute packing material". However, this can be criticised on the following grounds:

Article 79 does not expressly stipulate such a solution and it is difficult to accept that such a result is implicit in the provision. Secondly, the solution conflicts with the provisions of Article 35(1) of CISG, according to which the seller must deliver goods which are contained or packed in the manner provided in the contract. Thirdly, this interpretation opens the way for modification of contract leaving it open to subjective manipulation with undesirable results. Fourthly, if the buyer does not accept the alternative performance, the seller might claim damages. In that case, it would be irrational to speak of non-performance and exemption where the only question is whether the contract has been performed.[47]

1.1.3. COMPARATIVE ANALYSIS OF PARAGRAPH 1

Nicholas believes that the above formula used in paragraph 1 echoes the French requirement that *force majeure* must be unforeseeable, insurmountable and irresistible. He argues that a proposal was made at Vienna that the non-performing party should be permanently excused if at the end of a temporary impediment, "circumstances had so radically changed that it would be manifestly unreasonable to hold him liable." This proposal was rejected on the ground of reluctance to discuss frustration and imprevision.[48] If

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[45]. Secratararit's Commentary, *op. cit.*, at 172.

[46]. *Loc. cit.*

[47]. See also C. M. Bianca, M. J. Bonnell and D. Tallon, Commentary on the International Sales Law, the 1980 Vienna Sales Convention, 1987, at 582.

we accept this argument, the result is that the paragraph is not the language of the Common law. The Article will not therefore apply to cases which would be frustrated in English law, when performance is discharged by a radical change of circumstances: nor will it cover French imprevision.

It is, however, difficult to accept this argument. The fact that there are some similarities between the text of the paragraph and *force majeure* in French law does not necessarily lead to the conclusion that the Article has the same scope as the national law doctrine. The reason for this is that Article 7 of CISG emphasises the international character of the Convention which has developed a system of its own, resulting from a process that started with ULIS. Any interpretation of the provisions of the Convention should take into account its international character and the need to promote uniformity in its application. This goal can be achieved if, as Honnold argues,[49] we clean our minds of ideas derived from national laws and read the paragraph in the context of the Convention as a whole and in the light of the practices and needs of international trade. In practice this is very difficult, since in order to avoid referring to their domestic law concepts and achieve uniformity, the courts will have to refer to international cases where the Convention has been discussed. Moreover, the interpretation of the Convention by scholars will also have an important part to play. But how many cases have been concerned with the provisions of the Convention and how uniform is the interpretation of the Convention among commentators? The answers are clear. In regard to the first question, there is little case law. In the United Kingdom, for example, there is no reported case in relation to ULIS.[50] If a court can find decisions in other jurisdictions, they may be limited and unreliable. In regard to the second question, the situation is even worse. The commentators disagree on many issues. For example, some believe that "change of circumstances" may constitute an impediment;[51] others take an opposite view.[52] Why is there such divergence of opinion on the interpretation of Article 79 among the commentators? Nicholas[53] maintains that the Article is "vague or imprecise"

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48. B. Nicholas, The Vienna Convention on International Sales Law, *op. cit.*, at 235-236.

49. John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, *op. cit.*, at 429.

50. B. Nicholas, The Vienna Convention on International Sales Law, *op. cit.*

51. See *e.g.* John O. Honnold, *op. cit.*, at 442-443; Schlechtriem, Uniform Sales Law, Vienna, 1986, at 102.

52. B. Nicholas, *op. cit.*, at 235-236.

and adds that it contains "elastic words". The result is that the language can not give guidance to the courts and will be read in the context of the existing doctrines in the domestic legal system. Tallon[54] emphasises that the general wording of the Article leaves too much room for judicial interpretation which, in turn, opens the way for the judges to refer to similar concepts in their own law. The present writer believes that the Convention was inevitably drafted as a multi-cultural compromise between different legal systems. The result of this is a lack of coherence and consistency, which leads to uncertainty in the scope and application of the Convention. That is why uniformity of interpretation of the Article is impossible. Because of the flexibility in its wording, the Article can be interpreted in such a way as to cover *force majeure*, frustration and even commercial impracticability. The flexible word, "impediment", in the paragraph has such potential. However, is the language of Article 79 so flexible that French imprevision and the German doctrine of wegfall der geschaftsgrundlage are included? It seems that the Article does not apply to such situations because, as will be seen, modification of the contract is not allowed in the CISG.

Two important points should be noted. The paragraph speaks of non-performance of any obligation. Thus, it explicitly refers to all the obligations of the seller[55] and all the obligations of the buyer[56] which derive from the Convention or individual contracts. Moreover, Article 79 of CISG expressly refers to both parties in respect of any obligations. This contrasts with section 2-615 of UCC which, read literally, provides excuse only for the seller in limited situations *viz.*, non-delivery, delay in or partial delivery.[57] Article 79 also covers both obligations de moyen and obligations de resultat of French law.[58]

The exemption in CISG from liability in relation to performance of "any of his obligations", is in accord with French but is contrary to English common law. As discussed before,[59] in English law, frustration automatically releases both parties from performance of all their obligations, while according to Article

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53. B. Nicholas, Impracticability and Impossibility in the U. N. Convention on Contracts For International Sale of Goods, *op. cit.*, at pp. 5-4 *et seq.*

54. C. M. Bianca, M. J. Bonnel & D. Tallon, *op. cit.*, at 594.

55. Art. 30 of the CISG.

56. Art. 53 of the CISG.

57. However, as discussed before, (*Supra* pp. 79 *et seq.*), the most American courts have extended the excuse also to buyers. See also comment 9 of Sec. 2-615 of UCC.

58. Tallon, *op. cit.*, at 577.

59. *Supra*, pp. 215 *et seq.*, & 234 *et seq.*

79, exemption can be in respect of performance of only one obligation. Further, the Article only exempts the non-performing party.

By stating "failure to perform . . .", the Article does not express the nature of the non-performance. It therefore includes both total and partial non-performance. By referring to non-performance of "any obligation", it again emphasises that partial excuse of non-performance is also recognised in the CISG.

Another important point is that the text of the Article is silent on the time the impediment arising. In particular, the Article does not deal with the situation where the impediment which may have existed at the time of conclusion of the contract. However, it would appear implicit from the phrase ". . . have taken the impediment into account at the time of the conclusion" that it does not apply to situations where the impediment existed at the time of contracting and was known to the party seeking exemption. But what of an impediment which is unknown to both parties at the time of contracting and is only revealed at a later time, for example, when the subject of the contract of sale are specific goods which have already perished at the time of contracting? The Convention itself is silent. From a comparative point of view, it should be said that in English law, it is possible to rely on theory of mistake in this situation, with the result that the contract is void. In Germany, this is a case of initial impossibility and the contract is null. In French law, the non-existence of the subject matter of the contract invalidates the contract *ab initio*.[60] It seems then that Article 79 should cover this situation provided that it was reasonable not to have expected such an impediment at the time the contract was formed.[61]

1.2. PARAGRAPH 5 (EFFECTS OF IMPEDIMENT)

Paragraph 5 states:
"Nothing in this article prevents either party from exercising any right other than to claim damages under this Convention."

Paragraph 5 elaborates the meaning of the words, "is not liable", in paragraph 1. It confines the scope of the Article to an exemption from liability in damages. The word "damages" covers all damages including damages for over-due performance, interests on damages and direct or consequential damages *etc.*[62] If a contract contains a penalty clause and liquidated damages

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60. However, the problem of validity is not governed by CISG (Art. 4(a)).

61. The Secretariat's Commentary, *op. cit.*, at 169. See also Tallon, *op. cit.*, at 577.

provisions the question whether the failure to perform excuses the defaulting party from paying the sum provided in the contract is a matter of national law.[63] But apart from damages, all other remedies which are available on the occurrence of the impediment remain. The remedies in question are: avoidance of the contract, reduction of price in case of non-conformity and specific performance.[64]

1.2.1. AVOIDANCE OF CONTRACT

The remedy of avoidance is available both to the buyer[65] and the seller.[66] The effects of avoidance are stipulated in Articles 81-84, according to which both parties are released from performance of their obligations. Under the Convention, the buyer retains the right to declare the contract avoided either in the case of a fundamental breach committed by the seller or failure of performance of the contract within a period of extra time fixed by the buyer.[67] The period of time fixed by the buyer must be of a "reasonable length".[68]

By Article 51 of the CISG, if a seller delivers only part of the goods or part of the goods fails to conform to contract, the buyer may either exercise his remedies concerning the missing part or avoid the contract as a whole, if the failure to perform fully amounts to a fundamental breach of the whole contract. This remedy will be useful for the buyer if the non-performance is partial and he refuses to accept partial performance where the failure amounts to fundamental breach. It should be added that the buyer will lose his right to declare the avoidance of the contract or demand substitute goods if he can not return the original goods in the condition they were in when he received them. But this provision does not apply if the alteration in goods is not due to the buyer's act or omission or if it is because of an examination required by Article 38 or if the goods have been sold in the normal course of business or have been consumed in the course of use.[69]

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62. Tallon, *op. cit.*, at 589.

63. Secretariat's Commentary, *op. cit.*, at 170-171.

64. A. H. Hudson, Exemptions and Impossibility under the Vienna Convention, at 189-192 (In *Force Majeure* and Frustration of Contract, Edited by McKendrick, *op. cit.*).

65. Art. 49.

66. Art. 64.

67. Art. 49.

68. Art. 74 (1).

69. Art. 82.

If in order to overcome the impediment, a seller furnishes a commercially reasonable substitute performance, then the buyer is still entitled to avoid the contract and reject the substitute performance if it is so imperfect in comparison with the original performance required in the contract that it constitutes a fundamental breach of contract. It should be added that the seller is also authorised to declare the avoidance of the contract if the failure of the buyer is regarded as a fundamental breach of contract or he does not perform his obligation within an additional period fixed by the seller. Where the buyer has paid the price, the seller loses his right to declare the contract avoided unless, in respect of late performance, he does so before he is aware that performance has been provided and, in other cases, unless he exercises his right within a reasonable time.[70]

In case of avoidance, the Convention requires[71] the parties to make restitution of whatever they have received under the contract. The party who avoids the contract must also take into account the benefits that he has derived from the goods. He is bound to return such benefits to the seller and the seller is bound to refund the price with the interest thereon.[72]

1.2.2. REDUCTION OF THE PRICE

Under the Convention, the remedy of reduction of price is available if the goods do not conform with the contract. However, if the seller remedies any failure to perform his obligations according to Articles 37 and 48, or if the buyer refuses to accept performance by the seller under those Articles, the buyer may not reduce the price.[73] The remedy of reduction of the price is also available in a case of partial destruction of the specific goods due to impediment. It can therefore be said that the buyer may declare the contract avoided or demand the delivery of the goods with an appropriate reduction in price. In any event, he can not claim damages arising from the impediment.

It should be noted that under the Convention, if the goods do not conform with the contract - whether or not non-conformity or an impediment causing lack of conformity comes within article 79 - the buyer may, instead of reduction of price, require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach of contract and a request for

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70. Art. 64.

71. Art. 82 (2).

72. Art. 84.

73. Art. 50.

substitute goods is made either in conjunction with notice given under Article 39 or within a reasonable time thereafter.[74] The buyer may also require the seller to remedy the lack of conformity by repair.[75]

1.2.3. SPECIFIC PERFORMANCE

According to CISG, the right to specific performance is available for both the buyer[76] and the seller[77] when the occurrence of impediment is of such a nature as to render the performance impracticable or impossible! According to paragraph 5, the exemption stated does not prevent either party from exercising any right other than damages. This provision has puzzling results. How can we accept that performance is impossible and yet parties can be compelled to carry it out? If so, it would permit the buyer to raise an action for specific performance in a case where specific goods have perished! It also allows the seller to bring an action for payment where the transfer of the buyer's funds are prohibited. Although an attempt was made completely to exclude specific performance as a remedy, this was rejected at Vienna.[78]

In the present writer's view when performance of the contract has become physically impossible, the courts will not award specific performance because it will not compel a defendant to attempt the impossible. Moreover, under Article 28 of the CISG, a court is not bound to grant a decree of specific performance unless it would have done so in a contract of sale which does not fall within the CISG. However, specific performance may be an appropriate remedy in the case of either temporary or partial impediment where, for example, part performance is available.

Another perplexing, indeed astonishing, problem arises in relation to impracticable cases. For example, a judge can impose penalties for non-compliance with an order for specific performance and those penalties can exceed the amount of damages in relation of which the seller is *prima facie* exempted. Schlechtriem states the problem in the following way: "You are exempt from paying damages for your non-performance, but you are required to pay an even larger sum by way of penalty for the same non-performance".[79]

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74. Art. 42 (2).

75. Art. 42 (3).

76. Art. 46 (1).

77. Art. 62.

78. United Nations Conference on Contracts for the International Sale of Goods, Official Records, at 383-385.

In comparing the ULIS and CISG in this regard, it should be said that Article 74(3) of the ULIS merely preserves avoidance of the contract and reduction of the price, with the result that a party may not be sued for specific performance under the ULIS.

However, the remedies available under the CISG were drafted for the purposes of breach. Article 79 is not concerned with breach. It is dealing with the case of two innocent parties and raises problems of restitution, adjustment of the rights of the parties and reliance losses which are not remedies expressly recognised in the Convention.

1.3. PARAGRAPH 2 (THIRD PARTY)

Paragraph 2 of Article 79 provides:
"If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if:
(a) he is exempt under the preceding paragraph; and
(b) the person whom he has so engaged would be so exempt if the provisions of that paragraph were applied to him."

The paragraph deals with the special case of non-performance by a defaulting party due to the failure of a third party whom he engages to perform the whole or a part of the contract. In such a case, the defaulting party may be exempted from liability under the conditions provided in the paragraph. This provision in respect of responsibility for third parties is novel: it is not found in ULIS nor in the national laws that have been discussed, with the exception of German law.[80] It constitutes a response to the increasing use made of third parties in contracts, especially in international level. In its initial draft Convention, the working party used the term "sub-contractor". However, as that term has close associations with building and engineering contracts in many legal systems, it was replaced by the term, "third person".[81]

According to the paragraph, a seller's non-performance due to the third party's failure is not in itself excused even if all the requirements laid down in paragraph 1 are met, unless the third party in his turn is similarly exempted by the impediment. The party seeking relief must not only prove that the

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[79]. P. Schlechtriem, Einheitliches UN-Kaufrecht, 1981, at 97. (Cited in B. Nicholas, Impracticability and impossibility in the U. N. Convention on Contracts for the International Sale of Goods, *op. cit.*, at 5-19).

[80]. See Para. 278 BGB. See also *infra*, p. 334.

[81]. John O. Honnold, Documentary history of the Uniform Law for International Sales, *op. cit.*, at 349-446, 631-634.

requirements provided in paragraph 1 are met, but also must show that the failure of the third party could not have been expected to have been foreseen or overcome.[82]

What is clear is that the Convention in this regard has rigidified the limits of exemption. The rule will be harsh in cases where the sub-contractor is imposed upon the seller by the buyer. It seems that in this situation, the seller is authorised to rely on Article 80 of the CISG, according to which the buyer will not have rights if they arise from his own wrongful action. This would be satisfied if the seller can prove that the buyer should have foreseen the possibility of the third party's failure which caused the seller's failure to carry out the contract.[83] What is clear is that the sub-contractor's non-performance will rarely lead to the excuse of the party seeking relief.

Would the bankruptcy of the third party give rise to exemption of the party to the main contract? It seems that the answer is negative because, as discussed before,[84] insolvency of the parties is not considered an impediment. This should apply *a fortiori* to a third party's insolvency. Moreover, a person is generally responsible for his personnel including a third party, as long as he controls them. Thus, insolvency is not an impediment justifying exemption. This rule should also apply where deficiencies and poor performance are caused by individual workers.

There must be an organic link between the main party and third party in that the main party organises and controls the sub-contractor's work and the sub-contractor knows that this work is a means of performing the main contract. The commentary states that the "third party" in paragraph 2 does not include general suppliers of goods or raw materials, since a supplier is not described as a person engaged to carry out any part of the seller's contract.[85] However, it appears that there is no a reasonable justification why the failure of a supplier should not have exempting effect where the conditions of impediment are met.

1.4. PARAGRAPH 3 (EFFECTS OF TEMPORARY IMPEDIMENT)

According to paragraph 3 of Article 79:

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82. Tallon, *op. cit.*, at 586.

83. B. Nicholas, The Vienna Convention on International Sales Law, *op. cit.*, at 237.

84. *Supra*, PP. 248-250.

85. United Nations Secretariat's Commentary to the UNCITRAL Draft Convention (A/ Conf./ 97/ 5), p. 172; Honnold, *op. cit.*, at 349, Paras. 12, 446, 449.

"The exemption provided by this article has effect for the period during which the impediment exists."

The text of the Article speaks of temporary non-performance. It does not expressly provide anything about partial excuse. Although the Article speaks of non-performance of one obligation, it remains silent regarding the effects of non-performance on the contract as a whole. However, paragraph 3 has two important effects. First, the obligor is exempted of liability for delay in performing during the period during which the impediment exists. Secondly, the obligor is obliged to carry out his obligation when the impediment is removed.

Paragraph 5 also preserves the innocent party's right to avoid the contract, if the impediment amounts to a fundamental breach of contract. If the contract is not avoided, it continues in existence. The paragraph can be criticised on the ground that a similar right is not given to the party who fails to perform, *viz.*, he can not avoid the contract in the case of a long-term impediment where the circumstances have so radically changed that it would be unrealistic to impose performance. For example, suppose a seller is faced with enormous cost increases. He can argue that the increase in costs is an impediment that excuses him from liability. Comparative analysis[86] shows that he will probably not meet with success.

However, it seems that Article 74(2) of the ULIS is more practicable and preferable than the present Convention. According to the ULIS, the party in default will be permanently relieved of the obligation if by reason of delay performance of the obligation would be so radically changed as to amount to a performance quite different from that contemplated by the contract. At diplomatic conference, a similar provision was suggested for paragraph 3, but this was rejected because of a reluctance to enter into problems of frustration or imprevision.[87] As an alternative, the word "only" in paragraph 3, which until then had remained in the text after "has effect", was deleted so as to allow the temporary impediment to become permanent when appropriate.[88] However, without the assistance of the Convention's legislative history, it will be very difficult for the courts to support this interpretation. Moreover, even if the non-performing party persuades the judge to come to this conclusion, he may

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86. See generally chapter two, pp. 33 *et seq.*

87. Official Records, 1964 Conference, at 381-382.

88. *Loc. cit.*

discover that though he is excused from liability in damages, he may still be compelled to carry out the contract.[89]

1.5. PARAGRAPH 4 (NOTIFICATION)

Article 79(4) reads:

"The party who fails to perform must give notice to the other party of the impediment and its effects on his ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt."

The defaulting party must notify the other party of the impediment and its effects in order to enable him to take all the steps necessary to overcome the effects of the non-performance.

This paragraph has no equivalent in the ULIS. A provision requiring notice both of the commencement and the cessation of the obstacle to performance was rejected by the committee which prepared the 1964 Hague Diplomatic Conference, on the ground that it would raise difficult problems when obstruction of performance was imminent. Moreover, consecutive threats of disruption would give rise to a duty to give successive notifications.[90]

Some important points must be made concerning Article 79(4). From the wording of the paragraph, it is clear that the party seeking relief must give notice when he is convinced that the occurrence of the impediment is certain and unavoidable. The notice should indicate whether the non-performance will be total, partial or temporary. When the party intends to carry out the contract by furnishing a commercially reasonable substitute, notice of his intention to do so must be given.[91]

The notice must reach the other party within a reasonable time after the party in default knew, or ought to have known, of the impediment. Otherwise, he will be liable for damages resulting "from such non receipt". In this regard, two important points should be noted. By requiring that the notice be "received" within a reasonable time, the paragraph adopts the theory of receipt. The risk that the notice will not be received by the other party within a reasonable time is borne by the sender.[92] Secondly, the party is only liable for

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89. B. Nicholas, Impracticability and Impossibility in the U. N. Convention on Contracts for International Sale of Goods, *op. cit.*, at p. 5-18.

90. Records and Documents of the Hague Conference 1964, vol. II, pp. 115, 202, 349-350. See also A. H. Hudson, *op. cit.*, at 189.

91. Secretariat's Commentary, *op. cit.*, at 174. See also Tallon, *op. cit.*, at 587.

92. *Cf.* Arts. 15 and 18 (2) of the Convention relating to provisions of offer and acceptance.

losses resulting from the failure of the other party to receive the notice: the defendant is not liable for losses resulting from non-performance of the contract. Thus there is an important difference between CISG and UCC, for in the latter ineffective notice vitiates the excuse.[93]

What happens if the impediment also prevents the notification? For example, if the impediment is a national strike which also paralyses the postal service, would the defaulting party be liable for the failure to give notice? It is thought that the defaulting party is not liable in such a case for any damages arising out of the failure to give notice, provided that the conditions required in paragraph 1 are met[94] and no other means of communication is available because of the supervening event.

Another question is whether or not the notice must be in writing. If the other party has actual or constructive knowledge of the impediment, for example, by oral notification or through his agent, is it enough to say that requirements set forth in paragraph 4 are met? It appears that the answer should be positive. The reasons for that are as follows: First, according to Article 8 of the Convention, statements made by, and other conduct of, a party are to be interpreted in accordance with his intent or that of a reasonable person in his position in the light of custom and practice. There is no reason why Article 8 should not apply to the issue under the discussion. Secondly, under Article 11 of the Convention "a contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witness". This applies *a fortiori* to notices under paragraph 4. Thirdly, Article 27 provides:

"unless otherwise expressly provided in this Part of the Convention, if any notice, request or other communication is given or made by a party in accordance with this Part and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication."

2. ARTICLE 80 (FAILURE OF PERFORMANCE CAUSED BY OTHER PARTY)

The provision of Article 80 of the Vienna Convention reads as follows:

"A party may not rely on failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission."

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93. See Sec. 2-615 (c) UCC; *Bunge Corp. v. Miller*, 381 F.Supp. 176 (W.D.Tenn. 1974). See also *Supra*, pp. 207, 208.

94. Tallon, *op. cit.*, at 587.

This provision is very similar to the last sentence of Article 74(3) of the ULIS. However, in comparing Articles 79 and 80, it is clear that if the non-performance is due to an impediment as provided by Article 79, the Article applies with all its consequences. But if the failure is caused by the other party's act or omission, Article 80 will be triggered. The result is that the party who caused the failure can not rely on the obligor's non-performance to claim the remedies that are normally available to the seller,[95] to the buyer[96] or to both[97] since he is not permitted to take advantage of his own wrong, for example, if a party gives inadequate specifications for the goods to be manufactured or fails to supply delivery facilities.

At the Vienna conference, it was submitted that the situation specifically treated in Article 80, was already covered by general principles of the Convention such as the principle of good faith, therefore the Article was unnecessary. However, this view did not prevail and the Article was approved in order to remove any doubt as to the applicability of the general principle.[98]

If the non-performance is partly attributable to a seller and partly imputable to the buyer, what will then be the solution? It seems that in such a case, under the principle of good faith, the buyer will not be allowed to obtain total compensation when the non-performance is partly caused by him. Since the loss arises from two causes, the extent to which each party was liable for the non-performance should be taken into account by the court when determining damages.[99]

As discussed in the above, the failure to perform must be imputable to an act or omission of the party concerned. Although the matter is not expressly addressed in the CISG, it follows from the general wording of the text that the Article also covers tortious behaviour.[100]

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95. Arts. 45 to 52.

96. Arts. 61 to 65.

97. Article 71 to 73.

98. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention, *op. cit.*, at 444.

99. Tallon, *op. cit.*, at 598 *et seq.*

100. *Loc. cit.*, at 597-598.

3. CONCLUSION

International draftsmen of Conventions have attempted to create a new concept of excusable non-performance by combining the different legal approaches in several domestic systems. In spite of these endeavours, as we have seen the results are unsatisfactory. The vagueness and the flexibility inherent in the wording of the Articles are, inevitably, the cause of different possible interpretations. This runs counter to the aim of the Conventions. Indeed, there is no uniformity of interpretation even among those commentators who themselves played important roles in drafting the ULIS and CISG. Moreover, the system of remedies is also not satisfactory. Once again it is submitted that for these reasons parties to international contracts of sale should exclude the application of the Convention in whole or in part,[101] in favour of a well drafted *force majeure* clause.

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[101]. Art. 6.

CHAPTER SEVEN:
STANDARD FORM CONTRACTS

It is intended in this chapter to give a brief analysis of the problem of excusable non-performance under the relevant clauses of standard form contracts for various types of transnational transactions which are provided by international agencies or trade associations. The principal purpose is to examine the potential contribution which standard conditions can make to the unification and harmonisation of the law of excuse of non-performance in international commercial transactions. It is also intended to discover whether standard contracts have been developed to facilitate the transnational transactions by avoiding or reducing the degree of uncertainty which has been shown to exist.

There are a number of contracts that expressly provide clauses on excusable non-performance. Of the various sets of standard conditions in common use, those which are most frequently encountered are contracts drafted by the United Nations Economic Commission for Europe (E.C.E.), the Federation Internationale des Ingenieurs Conseils' (or F.I.D.I.C.'s) conditions for contract for work of civil engineering construction, and those laid down by the working group at the International Chamber of Commerce (I.C.C.) (clauses dealing with hardship and *force majeure*) and other independent bodies.

It should be noted that the most important difference between these standard form contracts is that while those provided by international agencies such as ECE and ICC, protect both parties, most of them are designed to protect the seller or just one party when an exempting event occurs. Let us examine the above mentioned clauses one by one.

(A) E. C. E.

The ECE general conditions of sale and model contracts are drafted under the auspices of the United Nations Economic Commission for Europe. All of these contracts contain provisions relating to the circumstances that relieve the parties of their liability for non-performance of their obligations. The standard forms of relief clauses are as follows:

General conditions (ECE) No. 188[102] provides:

"10. Reliefs

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[102]. General Conditios for the Supply of Plant and Machinery for Export, 1953, E.C.E. Contract No. 188; General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, 1957, E.C.E. Contract No. 188 A, Cl. 25.

10.1. The following shall be considered as cases of relief if they intervene after the formation of the contract and impede its performance: industrial disputes and any other circumstances (e.g. fire mobilization, requisition, embargo, currency restrictions, insurrection, shortage of transport, general shortage of materials and restrictions in the use of power) when such other circumstances are beyond the control of the parties.
10.2. The party wishing to claim relief by reason of any of the said circumstances shall notify the other party in writing without delay on the intervention and on the cessation thereof.
10.3. The effects of the said circumstances, so far as they affect the timely performance of their obligations by the parties, are defined in clauses 7 and 8. Save as provided in paragraphs 7.5., 7.7., and 8.7., if, by reason of any of the said circumstances, the performance of the contract within a reasonable time becomes impossible, either party shall be entitled to terminate the contract by notice in writing to the other party without requiring the consent of any court.
10.4. If the contract is terminated in accordance with paragraph 3 hereof, the division of the expenses incurred in respect of the contract shall be determined by agreement between the parties.
10.5. In default of agreement it shall be determined by the arbitrator which party has been prevented from performing his obligations and that party shall bear the whole of the said expenses. Where the purchaser is required to bear the whole of the expenses and has before termination of the contract paid to the vendor more than the amount of the vendor's expenses, the purchaser shall be entitled to recover the excess.

If the arbitrator determines that both parties have been prevented from performing their obligations, he shall apportion the said expenses between the parties in such manner as to him seems fair and reasonable, having regard to all the circumstances of the case.
10.6. For the purposes of this clause "expenses" means actual out-of-pocket expenses reasonably incurred, after both parties shall have mitigated their losses as far as possible. Provided that as respects plant delivered to the purchaser the vendor's expenses shall be deemed to be that part of the price payable under the contract which is properly attributable thereto."

General conditions (ECE) No. 574[103] provides:

"10. Reliefs
10.1. Any circumstances beyond the control of the parties intervening after the formation of the contract and impeding its reasonable performance shall be considered as cases of relief. For the purposes of this clause circumstances not due to the fault of the party invoking them shall be deemed to be beyond the control of the parties."[104]

General conditions (ECE) No. 730[105] provides:

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[103]. General Conditions for the Supply of Plant and Machinery for Export, 1955, E. C. E. Contract No. 574; General Conditions for the Supply and Erection of Plant and Machinery for Import and Export, 1955, E. C. E. Contract No. 574 A. Cl. 25.

[104]. Paragraphs of 10.2-10.7 of contrat No. 574 are the same as in contract No. 188, *op. cit.*

10. Reliefs
10.1. Any circumstances beyond the control of the parties intervening after the formation of the contract and impeding . . . " (same as 574).[106]

General Conditions (ECE) No. 312[107] and 410[108] provide:
"Any circumstances beyond the control of the parties, which a diligent party could not have avoided and the consequences of which he could not have prevented, shall be considered as a case of relief where it intervenes after formation of the contract and prevents its fulfilment whether wholly or partly."

Contracts for the sale of cereals (ECE) No. 1A[109] provides:

"19. Reliefs
19.1. Where the fulfilment of the contract in whole or in part is rendered absolutely and permanently impossible by exceptional circumstances, beyond the control of the parties and arising after the conclusion of the contract, the contract or the unfulfilled part thereof shall be cancelled but neither party shall be liable to pay damages.
19.2. Where the fulfilment of the contract in whole or in part is, at any time within the last twenty-eight calendar days of the time allowed by the contract, temporarily prevented by circumstances beyond the control of the parties, their obligations shall be suspended.
19.3. If in case to which paragraph 19.2 applies the circumstances are other than ice, the contract shall be extended for that part of its term which remained when the said circumstances arose but for not more than twenty-eight calendar days, or, where the remainder of the term of the contract was twenty-one calendar days or less, then for at least twenty-one calendar days. Where a contract is thus extended, the date of default shall be postponed by a corresponding period. Where ice prevents shipment or access to port of shipment through the Sund, the Preveds or the Dardanelles during the term of the contract, the contract or the unfulfilled part thereof shall be fulfilled not later than three weeks after the official reopening of navigation . . .".

As these standard clauses show, the word "reliefs" is used in all of them so as to avoid national concepts of excusable non-performance and to present an independent definition.[110] Although the draftsmen by using the word "reliefs" desired to emphasise the international character of the contract,

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105. General Conditions of Sale for the Import and Export of Durable Consumer Goods and of other Engineering Stock Articles, 1961, E. C. E. Contract No. 730.

106. Paragraphs 10.2 and 10.3 are similar to provisions of contract No. 188.

107. General Conditions for the International Sale of Citrus, E. C. E. Contract No. 312, Cl. 13.1.

108. General Conditions for Export and Impopt of Swan Softwood, E. C. E. Contract No. 410, Cl. 18.1.

109. Contract for the Sale of Cereals C. I. F. (Maritime) 1957.

110. Clive M. Schmitthoff, The Unification or Harmonisation of Law by Means of Standard Contracts and General Condition, 17 Int'l. and Comp. L. Q. 1968, 552, 566.

the word is flexible - like the word "exemption" in CISG - and might give rise to the same problems discussed in that context.[111]

It should be noted that the ambit of these clauses varies in terms of their scope and effect. The fundamental reason why relief clauses in ECE general conditions do so is that they reflect the different character and needs of each particular trade in which they are designed to operate.[112] In the field of contracts for the supply of plant and machinery for export, for example, where considerable periods of time elapse between an order and performance, it is necessary to have a flexible relief clause so as to allow the parties to withdraw from the contract whenever exempting events occur. Moreover, in these kinds of transaction there is a wider variety of circumstances which might impede the performance of the contract. Location of the plant and machinery which may only be possible on a specified site, is a factor which might make performance illegal, for example, by a change in zoning regulations.[113] In contracts such as trade in cereals which are highly speculative by nature since it is an extremely rapid trade which is subject to price fluctuations have obviously different requirements from the engineering trade. It is therefore necessary to draft a rigid and restrictive clause in order to preclude all possibility of manoeuvre by the interested party.[114] An intermediate solution is found in other trades such as citrus fruit, sawn softwood, and solid fuels in the ECE general conditions since they reflect the fact that these trades, while not having speculative character, nevertheless, have different requirements from the contracts for the supply of plant and machinery.[115]

A comparison of the above standard clauses indicates that while they vary in terms of their scope and effect, they all refer to supervening "circumstances" that excuse non-performance of the party seeking relief. In some conditions, circumstances are defined in very general terms such as circumstances beyond the control impeding a reasonable performance.[116] In

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111. See generally pp. 246 *et seq.*

112. Travaux du Colloque de L'Association Internationale des Sciences Juridique, in Some Problems of Non-performance and *Force Majuere* in International Contracts of Sale (hereinafter, Helsinki Discussions), 261 (Int'l Ass'n of Legal Science, Helsinki, 1961) at 250 (P. Benjamin); Henry Cornil, The ECE General Conditions of Sale, 3 J. W. T. L. 1969, 390, 394.

113. Richard J. Cuminns, Notes, The General Conditions and the Trading Form Contracts of the United Nations Economic Commission for Europe, 38 N. Y. Uni. L. Rev. 1963, 548, 561.

114. Henri Cornil, *op. cit.*, at 103.

115. Schmitthoff, Helsinki Discussions, *op. cit.*, at 251.

116. Contracts 574, 574A, 574D and 730.

others, the method used is to list particular events where relief is allowed.[117] This enumerative method is not usually exclusive but merely indicative, *viz.*, the clauses indicate a list of contingencies and then add the expression "and any other circumstances".[118] It is thought that an enumerative method which is indicative is to be preferred to the exclusive.[119] Contracts 188 and 188A pay particular attention to "industrial disputes" as a contingency. Reference to "industrial disputes" has been omitted in contracts 574 and 574A which are prepared for use in East-West trade. This is because a strike is not generally considered as a ground for relief in East-West transactions.[120] It is thought that special treatment of strikes is unwarranted not only because of ideological attitudes which may no longer be relevant but also because strikes are not always beyond control of the parties. A strike should only be a cause of relief in exceptional and serious circumstances, for example, a political strike which can not be readily settled.[121]

The clauses do not make clear whether or not absence of foresight is a precondition for relief. It can however be argued from the language that the exempting event must be unforeseen or unforeseeable because the requirement that the impeding circumstances must intervene after the conclusion of the contract would appear to imply that this is the case. This implication therefore requires that the foresight test is a precondition for exemption, but does not make clear whether it is subjective or objective.[122] Thus, in one country a subjective test of foreseeability might be employed while an objective test is used in another. The possibility of different approaches is contrary to the harmonisation and unification of excusable non-performance at an international level.

The "circumstances" must be "beyond control". Although the present writer has argued that the standard of "beyond control" is different from the standard of fault,[123] "beyond control" has been interpreted to mean that a party has not been guilty of any form of fault, *viz.*, intentional, *culpa lata* or *culpa*

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117. Contracts 188 and 188A.

118. *Loc. cit.*

119. See *infra*, pp. 325 *et seq.*

120. Helsinki Discussions, *op. cit.*, at 237.

121. Affolter, Helsinki Discussions, *op. cit.*, at 248.

122. See generally pp. 322 *et seq.*

123. *Infra*, pp. 319 *et seq.*

levis.[124] Contracts 410 and 312 refer to the "diligence" of the parties which implicitly requires the absence of any fault.

Almost all the contracts contain provisions relating to the effects of the supervening events. Some contracts, nevertheless, draw distinction between cases where performance is rendered totally or partially impossible and cases where performance is simply delayed. All general conditions require that where performance is absolutely impossible, the contract will be cancelled. Other formulations, such as contract 188, require that in a case of delay or temporary impossibility the contract will be suspended and the main consequence is that the period within which performance is to be effected is extended as far as is reasonable having regard to the all circumstances of the case.[125] Thus, while the supervening event operates, no remedies are available. However, if after a reasonable time the performance becomes impossible, either party will be entitled to terminate the contract by notice to the other party. Both parties are entitled to declare the contract avoided; both of them therefore have the opportunity to escape from an unfavourable contract. In doing so, the draftsmen of the ECE contracts have clearly intended to reduce the effects of any difference in bargaining power between the parties. All the clauses refer to parties, rather than seller or buyer.

When the contract is terminated, special provisions apply to the allocation of expenses incurred in respect of the contract. Restitution must be made for a partial performance. For example, contract 188 provides that if the parties do not agree on division of the expenses, this will be determined by the arbitrator as provided in clause 10. In this regard, the ECE general conditions differ greatly from the regimes to be found in the Conventions. The present writer supports this development as he believes that there should be greater freedom in adjustment of the rights and duties of the parties in commercial transactions.

(B) F. I. D. I. C.

The deficiencies of traditional notions of excusable non-performance in the construction industry have led to a search for a better solution. For this purpose a number of standard clauses - such as clauses provided in JCT standard form of building contract,[126] the ICE conditions of contract[127] and the

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[124]. Affolter, *op. cit.*

[125]. Contract 188, Cl. 7.2.

[126]. The Joint Contracts Tribunal, 1980 edition.

international FIDIC conditions of contract[128] - have been drafted. The FIDIC conditions,[129] which are often used in international contract practice, deal with civil engineering construction works where the employer receives the contractor's services and skill in using labour and materials to produce the construction. This standard contract provides several clauses covering special risks and exempting events. We shall examine the FIDIC conditions in detail.

1. CLAUSE 12.2 (ADVERSE PHYSICAL OBSTRUCTIONS)

The clause provides as follow:

"If however, during the execution of the Works the Contractor encounters physical obstructions or physical conditions, other than climatic conditions on the site, which obstructions or conditions were, in his opinion, not foreseeable by an experienced Contractor, the Contractor shall forthwith give notice thereof to the Engineer, with a copy to the Employer. On receipt of such notice, the Engineer shall, if in his opinion such obstructions or conditions could not have been reasonably foreseen by an experienced Contractor, after due consultation with the Employer and the Contractor, determine:

(a) any extension of time to which the Contractor is entitled under clause 44, and

(b) the amount of any costs which may have been incurred by the Contractor by reason of such obstructions or conditions having been encountered, which shall be added to the contract price,

and shall notify the Contractor accordingly, with a copy to the Employer. Such determination shall take account of any instruction which the Engineer may issue to the Contractor in connection therewith, and any proper and reasonable measures acceptable to the Engineer which the Contractor may take in the absence of specific instructions from the Engineer."

Unlike the JCT conditions, the above mentioned clause does not expressly refer to *force majeure*, but the means employed are much the same. The wording of the clause refers only to adverse physical obstructions or conditions which could not have been foreseeable by an experienced contractor. What is understood from the expression "physical obstructions" is that it refers to a number of possibilities such as physical impossibility and legal impossibility. The expression "physical conditions" could be restricted to some continuing state such as physical conditions of the ground below the

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127. 5th edition. This standard form contract is issued and approved by the Institution of Civil Engineers, the Federation of Civil Engineering Contractors and the Association of Cosulting Engineers, 1979.

128. The terms of the fouth edition (1987) of the conditions for works of civil engineering construction have been prepared and approved by the Federation Internationale des Ingenieurs Conseil (FIDIC).

129. These conditions are mainly found in ICE conditions which in turn drawn on expressions and principles of English law.

surface such as landslide or flood[130] rather than events. It is arguable whether or not the clause also covers artificial obstructions, such as obstructions caused by ancient mine working or unchartered sewers. The previous edition of the FIDIC conditions which used the expression ". . . or artificial obstructions . . ." answered the question in affirmative,[131] but the provisions of the new edition are silent on this point. However, the general expression "physical obstructions or physical conditions" has, it is thought, the potentiality to cover artificial obstructions, provided that the geological information provided by the employer and used by the contractor does not indicate that such obstructions exist.

Physical conditions or obstructions do not include weather or climatic conditions on site. This does not seem to be rational because weather conditions may be unusually severe for the time of year and greatly hinder the performance of the contract. For example, suppose a situation in which an unusually heavy rainfall supervenes and completely prevents the performance of a particular type of work. Although the contractor assumes the risk of normal local conditions such as rain, snow, high winds or unsettled weather, he should not bear the risks of exceptional and unusually severe weather. Of course, the contractor must be responsible if events such as tropical storms and hurricanes are the normal conditions during that time of year.[132] Although the clause does not include climatic conditions on site, it must be read in conjunction with the exceptional risks clause, 20.4(h), which expressly refers to "any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions". The general expression "any operation of the forces of nature" would include unusually severe weather conditions. Thus, while a claim in respect of the occurrence of unforeseeable climatic conditions will not be permitted under clause 12.2, it will be covered by clause 20.4(h).[133]

The phrase ". . . in his opinion, not foreseeable by an experienced contractor . . ." suggests that an objective foresight test is to be used. In other words, a party must take into account all those things which are reasonably

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130. I. N. Duncan Wallace, The ICE Conditions of Contract, a Commentary, London, 5th ed. 1978, at 43.

131. See John G. Sawyer and C. Arthur Gillott, The FIDIC Conditions, Digest of Contractual Relationships and Resposibilities, London, 2d ed., at 48; I. N. Duncan Wallace, The International Civil Engineering Contract, London, 1974, at 42.

132. See generally Michael S. Simon, Construction Contracts and Claims, New York, 1979, at 158.

133. John G. Sawyer and C. Arthur Gillott, *op. cit.*, at 47.

foreseeable by an experienced contractor. He has also the obligation to do everything which, in his opinion, an experienced contractor can be expected to do to acquaint himself with the conditions of the site; otherwise, he will not be entitled to additional payments and extensions of time. As we have seen,[134] the "experienced contractor" criterion is open to criticism. What is understood from the criterion is that it only refers to an experienced contractor and not the actual contractor who presents a tender. Accordingly, if a contractor foresees a physical obstruction which is not foreseeable by an experienced contractor, it would follow that the clause applies! Moreover, the application of the test to a given set of circumstances is also very difficult and the result is likely to differ according to the particular views of the court determining the issue.

When a contractor encounters physical conditions or obstructions, he must elect to initiate the process of claiming additional payments and extensions of time. Nevertheless, his entitlement to these remedies is dependent upon the decision made by the engineer. To some extent, the powers of the engineer are discretionary. It is difficult to accept that his decision will always be correct and impartial.[135] The better alternative might be to introduce a referee or expert.[136] However, judgments made by the engineer are open to arbitration at the initiative of either the employer or the contractor.[137]

This clause can be criticised on the ground that it does not protect the employer. For example, suppose a situation in which the ground conditions are found to be much easier than expected at the time the engineer prepared the bills of quantities or at the time when the contractor examined the site. According to the provisions of the clause, the employer is not permitted to claim unforeseen physical conditions so as to seek a reduction in any rates or prices.

2. CLAUSE 20.4 (EMPLOYER'S RISKS)

The contents of clauses 20.1, 20.2 and 20.3 generally refer to the contractor's obligation to repair and make good any damage, loss or injury to

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134. *Supra*, pp. 123 *et seq.*

135. J. J. Goudsmit, The FIDIC Conditions in Legal perspective, Int'l. Contract L. & Financial Rev. 1980, 91, at 96, 106; Gotsa Westring, Construction and Management Contracts (In Transnational Law of International Commercial Transactions, edited by N. Horn and Clive M. Schmitthoff, Kluwer, 1982, at 178).

136. J. J. Goudsmit, *op. cit.*, at 96.

137. Clause 67.1 of FIDIC Conditions of Contract, 1987.

the works owing to any event whatsoever that occurs prior to the completion date. However, there are certain excepted risks whereby the contractor is excused from his obligations if one of the risks occurs (clause 20.4). It should be noted that in the event of loss or damage resulting from any of these risks, while the contractor shall repair and make good any damage, or loss he does so at the expense of the employer, not himself; clause 20.3. However, there is no specific provision or machinery laid down for the determination of the contractor's costs.

Clause 20.4 provides:
"The Employer's risks are:
(a) war, hostilities (whether war be declared or not), invasion, act of foreign enemies,
(b) rebellion, revolution, insurrection, or military or usurped power, or civil war,
(c) 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,
(d) pressure waves caused by aircraft or other aerial devices travelling at sonic or supersonic speeds,
(e) riot, commotion or disorder, unless solely restricted to employees of the Contractor or of his Subcontractors and arising from the conduct of the works,
(f) loss or damages due to the use or occupation by the Employer of any Section or part of the Permanent Works, except as may be provided for in the contract,
(g) loss or damage to the extent that it is due to the design of the Works, other than any part of the design provided by the Contractor or for which the Contractor is responsible,
(h) any operation of the forces of nature against which an experienced contractor could not reasonably have been expected to take precautions."

As the clause indicates, many of the above risks such as war, rebellion, invasion are considered as *force majeure*, but the clause defines as precisely as possible, the situations which are not to be the risks of the contractor. Indeed, these events which are not expressly stipulated in the clause but which would fall within a normal *force majeure* clause, will not be considered excepted risks. It has therefore been contended that the clause should include a general definition of circumstances in which the contractor is excused. This would give the courts greater leeway to decide whether the event is within the risk of the contractor or the risk of the employer.[138] The method which is currently used in the clause is enumerative and exclusive and might therefore lead to disputes.[139]

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[138]. J. J. Goudsmit, *op. cit.*, at 97.

If any of the above risks occurs, the contractor will be entitled to extend the time[140] of performance and is released from any liability if the event is a special risk (clause 65).

3. CLAUSE 65 (SPECIAL RISKS)

According to the provisions of clause 65, the contractor is released from any liability whatsoever when he is faced with events which are categorised as "special risks".[141] These special risks are the risks defined under paragraphs (a), (c), (d) and (e) of sub-clause 20.4, and the risks defined under paragraph (b) of sub-clause 20.4 in so far as they relate to the country in which the works are to be executed. This clause enumerates the same risks provided in clause 20.4 of the FIDIC conditions, except that these risks in paragraphs (f) (use and occupation by the employer), (g) (design of works) and (h) (operation of the forces of nature). As discussed before, the effect of the above clause is that if physical damage happens from any of the risks defined in sub-clause 20.4, the contractor is not liable to repair and make good the same unless required to do so by the engineer at the cost of the employer.[142] However, under the present clause, the contractor has much wider protection. The protection covers not only physical risks (for example, destruction of or damage to the works, destruction of or damage to property, whether that of the employer or third parties) but also physical injury or loss of life.[143] It should be noted that the listing and allocation of the risks in clauses 65.1 and 65.2, prevents the English doctrine of frustration arising in relation to the events included in the clause.[144]

Clause 65.5 also entitles the contractor to any increased costs of the execution of the works which are in any way connected with the special risks.

As to the risks, clause 65.6 gives a detailed definition of war to include a war whether declared or not, in any part of the world. There is a lack of balance between the events cited in clauses 24.4, 65.2 and 65.6. For example, war need not be within the country in which the contract is performed, while rebellion, revolution, *etc.*,[145] are restricted to the country in

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139. See *infra*, pp. 312 *et seq.*

140. Clause 44.1.

141. Clauses 65.1 and 65.2.

142. *Supra*, pp. 272-274.

143. Clause 65.1.

144. See *The Euginia* [1964] 2 Q.B. at 239, *per* Lord Denning.

which the works are being carried out. Both contingencies might be unforeseeable and out of the contractors' control. The clause clearly favours the contractor. For example, a Greek contractor could claim from his Indonesian employer indemnification for the effects of a war that has broken out between Greece and Turkey. A more reasonable solution would be to restrict the contractor's right of indemnification to those risks which occur in the employer's country.[146]

In the case of occurrence of war, the contractor must continue to use his best endeavours to complete the execution of the works. The employer - not the contractor - is entitled at any time after the outbreak of war to terminate the contract.[147] If this is done, the contractor will remove all his equipment from the site and will provide similar opportunities to his sub-contractors to do so.[148] The contractor will be paid for all amounts to which he is entitled to date in respect of all work executed prior to the date of termination, at the rates and prices provided in the contract.[149] Moreover, he will be paid amounts in respect of any preliminary items referred to in the Bill of Quantities and services contained therein, either wholly or partly performed.[150] The contractor will also recover the cost of materials, plant or goods reasonably ordered for the work, which have been delivered to the contractor or for which the contractor is legally bound to accept delivery, such materials, plant or goods becoming the property of the employer once he has made appropriate payments to the contractor.[151] The contractor will also receive the amount of any expenditure reasonably incurred in the expectation of the completing the whole of the works, provided that such an amount is not covered by any other form of payments.[152] It is not clear whether this includes loss of profit.[153] The contractor will be paid the cost of removal of his equipment from the site to the country of registration or other destination provided this includes no greater cost. This will also apply to his sub-

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145. Clause 20.4(b).

146. See W. Walter Oberreit, Turnkey Contracts and War: Whose Risk? (In Transnational Law of International Commercial Transacions, edited by N. Horn and C. M. Schmitthoff, 1982) at 196.

147. Clause 65.6.

148. Clause 65.7.

149. Clause 65.8.

150. Clause 65.8(a).

151. Clause 65.8(b).

152. Clause 65.7(c).

153. Sawyer, *op. cit.*, at 14.

contractor's plant.[154] The contractor will also receive the reasonable cost of repatriation of all his staff and workmen employed on or in connection with the works at the time of such termination.[155] Finally, the employer is entitled to set off any sums due to him by the contractor in connection with advances for constructional plant and materials and for any other sums which at the date of termination were recoverable by the employer from the contractor under the terms of the contract. However under clause 65.7, any sums payable shall, after due consultation with the employer and the contractor, be determined by the engineer.

4. CLAUSE 66.1 (RELEASE FROM PERFORMANCE)

The clause reads as follows:

"Payment in the 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 party to fulfil 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 if the contract had been terminated under the provisions of Clause 65."

If the performance of the contract becomes impossible or illegal or if the parties are released from further performance under the applicable law, the contract will be terminated and the contractor will be paid exactly in the same manner as provided in clause 65. Although previous editions of FIDIC referred to the concept of frustration in this clause, it is the present writer's view that this concept should not be used at an international level. Apart from its inadequacies, the fact that it can be invoked in only a few very extreme situations is a reason why it should not be used in international construction contracts. By omitting the word "frustration" from the clause and replacing it with the expression "release from performance", suggests that draftsmen of the current FIDIC conditions did not want the doctrine to be applicable at international level. However, the current clause is open to criticism as it does not expressly provide for partial excuse of non-performance.

Instead of the rather arbitrary number of clauses of the FIDIC conditions, it remains the present writer's view that the parties should have a comprehensive and well drafted *force majeure* clause in their contract. In the

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154. Clause 65.7 (e).

155. Clause 65.7(f).

last chapter of this thesis, it will be explained why parties need such a clause in their contract and such a clause should be drafted so as to be compatible with the circumstances and the needs of commercial transactions.

(C) I. C. C.

The International Chamber of Commerce (ICC) has drawn up a *force majeure* (exemption) clause[156] which aims to provide assistance for parties to international commercial transactions. This clause is the result of extensive consideration by a working group at the ICC. The parties who wish to incorporate the clause in their contract may either write it out in full in their contract or incorporate it by reference using the following words: "The *force majeure* (exemption) clause of the International Chamber of Commerce (ICC publication No. 421) is hereby incorporated in this contract".

This clause under the title of "*force majeure* (exemption) clause" is as follows:

"Grounds of relief from liability

1. A party is not liable for a failure to perform any of his obligations in so far as he proves:

-that the failure was due to an impediment beyond his control; and

-that he could not reasonably be expected to have taken the impediment and its effects upon his ability to perform into account at the time of the conclusion of the contract;

and

-that he could not reasonably have avoided or overcome it or at least its effects.

2. An impediment within paragraph (1) above, may result from events such as the following, this enumeration not being exhaustive:

(a) war, whether declared or not, civil war, riots and revolutions, acts of piracy, acts of sabotage;

(b) natural disasters such as violent storms, cyclones, earthquakes, tidal waves, floods, destruction by lightning;

(c) explosions, fires, destruction of machines, of factories and of any kind of installations;

(d) boycotts, strikes, and lock-outs of all kinds, go-slows, occupation of factories and premises, and work stoppages which occur in the enterprise of the party seeking relief;

(e) acts of authority, whether lawful or unlawful, apart from acts for which the party seeking relief has assumed the risk by virtue of other provisions of the contract; and apart from the matters mentioned in paragraph 3, below.

3. For the purposes of paragraph (1) above, and unless otherwise provided in the contract, impediment does not include lack of authorisations, of licences,

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156. *Force Majeure* and Hardship, published in March 1985 by ICC, Publication No. 421.

of entry or residence permits, or of approvals necessary for the performance of the contract and to be issued by a public authority of any kind whatsoever in the country of the party seeking relief.
Duty to notify
4. A party seeking relief shall as soon as practicable after the impediment and its effects upon his ability to perform became known to him give notice to the other party of such impediment and its effects on his ability to perform. Notice shall also be given when the ground of relief ceases.
5. The ground of relief takes effect from the time of the impediment or, if notice is not timely given, from the time of notice. Failure to give notice makes the failing party liable in damages for loss which otherwise could have been avoided.
Effects of grounds of relief
6. A ground of relief under this clause relieves the failing party from damages, penalties and other contractual sanctions, except from duty to pay interest on money owing as long as and to the extent that the ground subsists.
7. Further it postpones the time for performance, for such period as may be reasonable, thereby excluding the other party's right, if any, to terminate or rescind the contract. In determining what is a reasonable period, regard shall be had to the failing party's ability to resume performance, and the other party's interest in receiving performance despite the delay. Pending resumption of performance by the failing party the other party may suspend his own performance.
8. If the grounds of relief subsist for more than such period as the parties provide [the applicable period to be specified here by the parties], or in the absence of such provision for longer than a reasonable period, either party shall be entitled to terminate the contract with notice.
9. Each party may retain what he has received from the performance of the contract carried out prior to the termination. Each party must account to the other party for any unjust enrichment resulting from such performance. The payment of the final balance shall be made without delay."

On the whole, it should be said that this clause is laudable and illustrates an interesting new development in the rule-making activities of international agencies: it is undoubtedly capable of facilitating international trade by the avoidance or reduction of some of the uncertainty that surrounds transnational commercial transactions. In comparing the clause with other individual standard clauses, it should be said that the clause by using the expressions "a party. . .", "each party. . ." and "either party. . ." reflects equalities in the bargaining power of the parties and protects both parties against all contingencies beyond their control. Most standard contracts merely protect one of the parties. For example, clause IV of Westinghouse Electric Corporation general conditions of sale[157] states that "Westinghouse shall not

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[157]. Form 21436U, 8/1971, reprinted in International Private Law (by A. F. Lowenfield, 1981).

be liable for loss or damage due to delay in manufacture, or shipment, or passage of title, resulting from any cause beyond Westinghouse's reasonable control . . .".

Again, in a typical standard form contract,[158] only the seller is protected: "In the event of any delay in seller's performance due to fire, explosion,. . . or any cause beyond manufacturer's or seller's reasonable control, . . .". In another clause[159] of this contract, any increased or additional expense because of war, hostilities *etc.*, falls to the buyer's account. In addition, the seller is authorised to allocate the available goods in such a manner as the seller considers equitable.

There are a few individual standard contracts which give a slight degree of protection to the buyer, although the seller remains in a much more powerful position. The following standard clauses provide illustrations:

"Delivery shall be subject to and contingent upon strikes, labour difficulties, riot, war, . . . In the event of such delay the seller shall have the option to extend the time for delivery for a period equal to the number of days of such delay, provided, however, that in the event that such delay shall exceed sixty days, then the buyer shall have the right to cancel this contract . . . . Seller shall not be required to allocate among its customers in case of shortage."[160]

Standard conditions of sale of the Super Electronic Company (seller) in clause V[161] provides that: ". . . If delay resulting from any of the foregoing cases extends for more than 60 days . . . either party may terminate the order . . .".

However, in certain cases, because of the nationalist character[162] of the contract, buyer may be in a more powerful position than the seller. For example, the former Soviet Union standard purchase contract[163], defines the *force majeure* very narrowly and merely enumerates fire, flood, and earthquake. In addition, if the contract is cancelled, the seller must immediately reimburse the buyers for all the amounts received from the latter plus 4% per annum. Again, despite the express character of the contract

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158. United States Steel International (New York), inc., conditions of sale, C. I. F. clause 7, reprinted in International Private Law, By A. F. Lowenfiel, *op. cit.*

159. Clause 3.

160. Standard Contract Sale of International Fibre Inc.(seller), clause 8, reprinted in *ibid.*

161. See also Standard Contract of World-Wide Metals Sales Agreement, clause 3. *Cf.* Standard Contract of World-Wide Metals Purchase Agreement in which a contrary position, which favours the buyer, has been taken.

162. See Rapsomanikis, *op. cit.*, at 580 *et seq.*

163. Form of V/O "Technopromimport", clause 12, reprinted in International Private Law, *op. cit.*

being F.O.B., the foreign seller must take care of, and bear all the expenses connected with, obtaining the necessary export licence. If the seller is unable to obtain the licence, the Soviet buyer is entitled to cancel the contract and the seller must pay liquidated damages.[164]

Compared with these clauses, the ICC's *force majeure* clause is well-balanced, protecting both parties. Although the clause is drafted under the title, "*force majeure* clause", it is not intended to introduce the French concept of *force majeure* or, intended, any other domestic law doctrines into the contract.[165] The first part of the clause is very similar to Article 79 of the Vienna Convention. While there is doubt whether the Article applies to defective goods,[166] the comments made on the ICC *force majeure* clause express the view that it is applicable to defective goods.[167] There is another important difference between Article 79 and the ICC *force majeure* clause. While the former is limited to sales, the latter is not limited to this type of contracts and is of general application. In this respect the ICC clause can be criticised. It is not practicable for a single clause to be suitable for all types of transactions and adequately cover every kind of failure of performance. The ambit of relief clauses should vary in terms of their scope and effect depending on the particular contract concerned. Moreover, *force majeure* clauses should reflect the different characteristics and needs of the particular trade for which they are designed. That is why the relief clauses in ECE general conditions are variable[168] and why comments made on the ICC clause recommend that the parties check in every case whether or not the clause should be amended or modified in the light of the particular circumstances.[169]

Like the Vienna Convention, the ICC clause uses the word "impediment", but unlike the CISG, the word "impediment" in the present clause has not the same degree of elasticity. The comments to the ICC state that the expression does not refer to inconvenient or more onerous circumstances.[170] Secondly, the ICC has drafted another clause to deal with

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164. Standard Purchase Contract Form of V/O "Technopromimport" clauses 9, 11. (Reprinted in Internationa Private Law, by A. F. Lowenfeld *op. cit.*).

165. *Force Majeure* and Hardship, ICC Publication No. 421, at 10.

166. *Supra*, pp. 246-248.

167. ICC Pub. No. 421, *op. cit.*, at 11.

168. *Supra*, pp. 264 *et seq.*

169. ICC Pub. No. 421, *op. cit.*

170. *Loc. cit.*

"hardship". Thirdly, paragraph two of the present clause expressly enumerates the events when a party is not liable for failure to perform.

According to the clause, the impediment must be beyond control, the same criterion as is used in Article 79 of the CISG. The foresight test used in the clause is notably similar to the test adopted by the Vienna Convention.[171] In order to be able to rely on the clause, the party seeking relief must also prove that he could not reasonably have avoided or overcome the impediment or, at least, its effects.

In paragraph 2, a number of events is listed as unforeseeable: however, this enumeration is not intended to be exclusive but merely indicative. Thus events which are not cited in the paragraph but qualify as unforeseeable under paragraph 1, constitute grounds of relief from liability. According to comments,[172] violent storms or cyclones may qualify as *force majeure*, but bad weather alone does not. But if, for example, an unusually heavy rainfall supervenes and totally hinders performance will the clause be applied? The answer should be positive if the circumstances qualify under the conditions of paragraph 1 of the clause.

In comparing the present clause with Article 79 of the CISG, it should be noted that the clause does not define the seller's responsibility for failure to perform when this is attributable to a third party. In this regard, the Article is more valuable than the present clause.

According to the clause, acts of authority are other examples of *force majeure* which have been listed in the clause. Such events could take the form of restrictions on export, import, payments, building, labour, and various types of business activities.[173] Parties to transnational commercial transactions are therefore recommended to stipulate which party has the responsibility of applying for such authorisation and which party, in the case of refusal or withdrawal of authorisation, should bear the risk. According to paragraph 3, if the contract does not specifically deal with this matter, the obligor bears the risk of refusal or withdrawal of authorisation, when such authorisation must be granted by authorities in his own country.

In order to minimise damages caused by a failure to perform, paragraphs four and five of the clause require the party to give notice to the other party of his intention to rely on *force majeure*. By stating that "The

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171. *Supra*, p. 249.

172. ICC Pub.No. 421, *op. cit.*, at 13.

173. *Loc. cit.*, at 14.

ground of relief takes effect from the time of the impediment or, . . ." paragraph 5 makes it clear that failure to give such notice in time not only makes the defaulting party liable in damages but also deprives him of the right to rely on *force majeure* in respect of the period before the notice. As comment 11[174] states, the latter consequence may have harsh and serious consequences in some situations. For in some contractual relations it may be difficult for a party immediately to appreciate that he needs to rely on the *force majeure* clause. The Vienna Convention specifies that the party seeking relief will only be liable for damages resulting from failure to give such notice: it does not deprive him of the right to rely on *force majeure* in respect of the time before the notice is given. If parties take the view that such a limitation on excusable performance is unfair, they are free to omit the first sentence of paragraph 5 in their clause.

By stating that, "A party . . . as soon as practicable" paragraph 4 makes it clear that if the impediment also prevents notification, for example, a general strike which paralyses the postal service, then the defaulting party will not be liable for any damages. As we have seen, the Vienna Convention is silent on this point.[175]

Under paragraph 6, *force majeure* relives the defaulting party not only from liability for damages but also from any penalties or other sanctions stipulated in the contract. However, the paragraph specifies that it does not relieve the party from interest on any sum due. But the clause does not impose any duty to pay interest, for example, on a down payment on the purchase price which would not follow from other legal or contractual provisions. If restitution of the price is due, the clause does not relieve the obligor from any duty to pay interest on such a debt.[176]

Under paragraph 7, *force majeure* postpones the time for performance for such period as may be reasonable. Thus, contrary to Article 79 of the CISG and the position in many other legal systems the supervening event protect the defaulting party from rescission or termination of the contract. It seems that this provision may not provide a fair result in every transaction. As discussed before,[177] circumstances may vary very much from case to case. For example, in the field of contracts for the supply of plant and machinery

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174. *Loc. cit.*, at 15.

175. *Supra*, pp. 260-261.

176. ICC , *op. cit.*, at 15-16.

177. *Supra*, at 267.

where considerable periods of time elapse between an order and performance, the provision will work well. However, in contracts which are highly speculative by nature (for example, where trade is extremely rapid or is subject to price fluctuations), cancellation of the contract rather than postponement may operate more fairly. In those contracts where postponement instead of cancellation is required, parties are advised expressly to fix the length of such period, otherwise, the "reasonable period" criterion which depends on the facts of the particular case will be applied.[178] However, if the grounds of relief subsist beyond that periods, under paragraph 8, either party will be entitled to terminate the contract. While under the clause, the termination of the contract operates for both parties, this right under the CISG and most national laws is only available to the performing party and not the party in default. Moreover, according to the CISG and most domestic laws, in a case of termination each party must provide restitution. Under the present clause, restitution is not required and each party is allowed to retain what he has received, but he must account to the other party for any unjust enrichment resulting from the other party's performance. On this point, the clause is not comprehensive. It is silent on reliance losses and matters of the same nature. Secondly, it is a very general formulation which is not suitable for all commercial transactions: remedies suitable for contracts such as the supply and erection of plant and machinery are not applicable in contracts of sale.[179]

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178. ICC, *op. cit.*, at 16.

179. See also *infra*, pp. 325 *et seq.*

CHAPTER EIGHT
PROPOSED THEORIES OF EXCUSABLE NON-PERFORMANCE AT INTERNATIONAL LEVEL

Legal scholars have considered and analysed the problem of excusable non-performance with a view to obtaining general doctrines which are applicable to contracts at international level. Berman has adopted the theory of enumerative test.[180] According to this theory, in international trade transactions, party autonomy and security of contractual obligations are of primary importance. General doctrines of excusable non-performance should therefore yield to express contractual provisions for excuse and should not go beyond the terms of the contract. Thus, listing of specific types of circumstances in the contract means that those risks which are not specifically mentioned are borne by the obligor. *A fortiori*, no general doctrine that speaks in terms of catastrophic expense or changed circumstances should be applicable where the parties have themselves provided in the contract an express excusable non-performance clause which lists the discharging contingencies. He adds that examination of contract clauses at international level confirms the belief that the parties assume a limited rule of excuse for non-performance insofar as the contract so provides. In such a situation, there is no need for gap-filling principles of general contract law, since no appropriate contingency will have been omitted by open-eyed and profit seeking merchants. From Berman's point of view, liberalisation of excuse is a means of escape from contractual liability for the - usually more economically powerful - seller. It is the contract itself which reveals how the parties have allocated the various risks between them. The excuse clause must be read only with the other terms of the contract, and the interpretation of the excuse clause will therefore depend on a determination of the parties' understanding as to which of them will bear what risk. He illustrates the point[181] by explaining a decision[182] dealing with frustration of an international charterparty. During the preliminary negotiations the charterer asked the buyer to accept a clause discharging him from his obligation to perform if the Suez canal were closed; the buyer refused to agree. The contract therefore contained a typical *force majeure* clause in general terms. When the canal was closed, the charterer

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180. Harold J. Berman, Excuse for Non-Performance in the Light of Contract Practices in International Trades, 63 Colum. L. Rev. 1963, 1413, at 1416 *et seq.*

181. Helsinki Discussions, *op. cit.*, at 260.

182. *Glidden Co. v. Hellenic Lines, Ltd.*, 275 F.2d 253 (2d Cir. 1960).

refused to ship the goods around the cape of Good Hope. When the United States Court of Appeal for second circuit examined the negotiations between the parties, it held that the charterer was not excused.

Berman comments that "The basic question is not whether the closing of the Suez canal was foreseeable or unforeseeable. Nothing is unforeseeable. Nor is the basic question whether the closing of the canal made performance impossible. Very little is impossible. The basic question is how the parties allocated the particular risk involved, or, if they were silent with respect to it, what common understanding of people in the trade would be with respect to how it ought to be allocated."[183]. But this ignores the general conditions of excusable non-performance which are adopted by most legal systems, Conventions, standard form contracts *etc.* Instead, Berman supports a harsh criterion, *viz.*, allocation of risks under the provisions of the contract which might impose unreasonable and excessive responsibility on the obligor, as in this case.

Berman states that the "*force majeure* clause is an extremely difficult branch of the law of international trade. It is necessarily difficult, for in drafting a contingency clause the parties are dealing with the future, an unknown future, which they nevertheless must explore tentatively."[184] But how can we expect parties in international trade to appreciate all the risks that might arise and list them in their contract. Moreover, fearing that their contract might not be concluded they deliberately avoid to negotiate the question in detail, or sometimes they are unaware of the risks or unable to formulate the clause as precisely as Berman's theory requires.

A theory according to which the problem of excusable non-performance should only be solved through autonomous principles without taking into account the general contract law rules is not acceptable. Should parties be able arbitrarily to pass over certain fundamental general principles of contract law such as the rules of offer and acceptance, parties' capacity, *etc.*, and still consider other general principles to be applicable? The lawyer should take into account not only the particular characteristics of a particular transnational commercial transaction as a supplementary tool of interpretation, but must also pay attention to general principles of contract law.[185]

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[183]. Helsinki Discussions, *op. cit.*, at 261.

[184]. *Loc. cit.*,at 264.

[185]. See Rapsomanikis, *op. cit.*, at 563.

In practice, the failure of parties to international commercial transactions to manifest their will clearly in a *force majeure* clause, has the result that they will be subject to the applicable national law, if controversy arises over excuse for non-performance. This runs counter to Berman's theory under which the general doctrines of excusable non-performance should yield to express contractual provisions. Thus, his theory is not workable in practice and instead of solving, creates problems. Considerations of fairness require that where the terms of the contract give no guidance, the court should consider what the parties would have provided if they had addressed the question.

Berman's suggested solution would tempt a party who has the bargaining power to minimise his liability by listing specifically all the likely contingencies that will release him from performance.[186] Indeed, if he is in a strong enough economic position, he will force the other party to "accept all the risks, otherwise I will not sell my products."

Moreover, the majority of standard form contracts employ an indicative list of events and add the phrases such as "and any other causes beyond control", or "this enumeration is not to be exhaustive".[187] Some of them use another standard, for example, "qualitative test" or general definition of *force majeure*.[188] These methods of drafting run counter to Berman's theory.

Tunc rightly states[189] that the consequences of the listing method will differ from one situation to another one. For example, an outbreak of war might have different effects on a contract, *viz.*, dissolution of the contract from the time of the occurrence, suspension of the performance until the end of the war or no effect. While disagreeing with Berman's theory, Tunc introduces his own criterion, *viz.*, the "diligence suffisante" test.[190] According to this test, an obligor is expected to take ordinary efforts to overcome whatever adverse circumstances may interfere with his performance. He adds that adequate diligence and *force majeure* are two complementary concepts in the sense that *force majeure* occurs when diligence is overtaken by events.[191]

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186. *Loc. cit.*

187. See generally chapter seven, pp. 264-283.

188. See pp. 312 *et seq.*

189. Helsinki Discussions, *op. cit.*, at 255-256.

190. *Loc. cit.*, at 256. See also M. Andre Tunc, *Force Majuere* et Absence de Faute en Matiere Contractuelle, 43 Revue Trimestrielle Civil, 1945, 235, at 243.

191. M. Andre Tunc, *op. cit.*

The standard suggested by Tunc is subject to an important criticism. It overlooks or does not pay attention to the nature of the supervening events and the foresight test. The diligence of the obligor is the centre of concentration (subjective test). Moreover, if we accept that the obligor has exercised normal care in fulfilling his contractual duty then talking about unforeseeability and irresistibility of the contingency is useless or absurd.

The enumerative method was also rejected by Schmitthoff at the Helsinki conference. He said that this method which is an illustration of a "normative test" is old fashioned and has been abandoned in many countries. A "qualitative test", is more modern, more widely accepted and more practicable and therefore preferable.[192] The English doctrine of the "fundamental change in the obligation" falls into Schmitthoff's "qualitative test" and he maintains that it might well serve as a basis of a uniform international standard. This theory which pays no attention at all to "diligence suffisante", is too objective. However, Schmitthoff believes that if used as an international standard, it will serve as a practical guide for the judges and arbitrators who have to decide the related questions.[193]

Bluntly, it is very difficult to accept Schmitthoff's theory as an international test. After more than a century, the English doctrine of frustration generally and the theory of fundamental change in the obligation in particular, have not acquired much precision or clarity of meaning.[194] Today, the doctrines are unsatisfactory. Inconsistent approaches of the courts concerning the pre-condition of the foresight test,[195] the scope of fault[196] and, most importantly, the difficulty in applying the doctrine in actual cases, with the consequence of different results in similar cases,[197] are some of the reasons why Schmitthoff's suggested solution is not capable of serving as a uniform international standard.

Another theory has been suggested by Schlegel.[198] Criticising the doctrine of frustration, he concludes that while it is good that contracts should

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[192]. Clive M. Schmitthoff, Frustration of International Contracts of Sale in English and Comparative Law, (International Association of Legal Science, Helsinki, 1961), 127, at 146-147.

[193]. Helsinki Discussions, *op. cit.*, at 252.

[194]. See chapter two, pp. 33-51, and chapter four, pp. 142-165.

[195]. See chapter three, pp. 111-116.

[196]. See chapter three, pp. 132-138.

[197]. For a discussion of the varying results in the Suez Canal cases, see Ropsomanikis, *op. cit.*, at 582-600.

be performed economically and socially, it does not follow that all contracts should be kept. It is time for English law to accept the fact that courts can, do, and should revise the contracts for the parties. He believes that contracts should be performed for only as long as it is reasonable that they should be enforced. He adds that "where an unusual event occurs and frustration is alleged, contracts should be enforced only when the contract in question is essentially similar to the archetypical contract situation: the contract between brokers, each essentially speculating on a narrowly fluctuating market. To the extent that the contract deviates from this model, it should be held frustrated and essential reliance damages - those resources consumed - as well as the cost of any partial performance, should be split between the parties. Thus, an event should be held frustrating when it is not one within that narrow range of events normally incidental to the average broker's or wholesaler's contract - slight delay and small market fluctuations."[199] Schlegel considers that "more like the archetypical transaction is the international sales pattern. Yet, the likelihood that differences in delivery routes will make a difference in the archetypical transaction are small; in the sales pattern, on the other hand, such differences can be large, as the Suez cases show. Further, the chance of disruptive events is far greater in the international pattern than in the domestic."[200] Finally, Schlegel concludes that at the international level, in cases of sale contract and charterparty, the buyer in the former and the charterer in the latter, are the better loss-bearers. However, the loss should be split only when the contract deviates from the "archetypical" model.[201]

For the following reasons, the above solution is not acceptable. The theory fails to provide the courts with a comprehensive and practical criterion with which to decide the cases. Secondly, the lack of a comprehensive standard means that questions of frustrating and non-frustrating events, identification of losses, whether they should be split between parties and the identification of better loss-bearer, would have to be examined and decided by the courts. This means arbitrariness, subjectivity and inconsistency. Thirdly, the equal division of loss is not always appropriate, for example, where a party incurs unusually high reliance losses, it is unfair to make the other party share the loss. Fourthly, in some cases, the theory seems to be too strict while in

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198. Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things - The doctrice of Impossibility of Performance, 23 Rutgers L. Rev. 1969, 419, at 446 *et seq.*

199. *Loc. cit.*, at 447.

200. *Loc. cit.*, at 448.

201. *Loc. cit.*

others it is too liberal. For example, where a contract exists between speculative dealers performance should not be excused even if the contingency is extraordinary and varies the performance from Schlegel's suggested "archetypical" model. Conversely, there are other contracts where the contingency is not so abnormal but the performance varies from the "archetypical" model that it should be excused.[202] Fifthly, another problem with the theory relates to its presumption that the buyer or charterer are "the better loss bearers", because they can spread the loss among their customers. In this regard, it has been rightly criticised.[203] Merchants in international level very rarely enter into one contract at a time but, rather, they only purchase when they have already agreed to sell to another one. Accordingly, a series of simultaneous transactions take place. Thus, in most cases, the buyer or charterer is not able to increase the agreed price so as to spread the loss among the customers. In short, the theory of "better loss-bearer" is not always operative and practical.

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[202]. Rapsomanikis, *op. cit.*, at 567.

[203]. *Loc. cit.*

PART FOUR - *FORCE MAJEURE* CLAUSES

CHAPTER NINE:

THE USE OF *FORCE MAJEURE* CLAUSE IN CONTRACTUAL RELATIONSHIP

1.GENERAL REMARKS

From this comparative study of different legal systems, it is clear that there exists no uniform set of rules regarding excusable non-performance. Each legal system has its own unique set of regulations. These rules on supervening events are not entirely satisfactory and reliance on them may lead to unpredictable results. The situation becomes more critical when parties are involved in international as opposed to domestic contracts. Here the national rules are often ill-adapted to cope with the needs of modern, transnational commercial transactions. The traditional excuse doctrines may not therefore be particularly valuable in the case of, for example, construction contracts being carried out in other countries. While the idea that when a supervening event occurs each party must bear its own loss is relatively simple and may provide an acceptable solution in some contracts, it is too simplistic to deal with contracts such as turnkey projects and other long-term contracts. In these contracts, the risks are much greater than in a simple contract of sale. Consequently, if the parties rely on national laws, when a supervening event occurs, their positions in respect of excusable performance may be left in doubt and not capable of a precise solution.

On the other hand, it has to be acknowledged that there is no acceptable universal standard of excusable non-performance (*autonomous lex mercatoria*) embodying its own practices and customs which is respected by all nations.[204] As we have seen, the 1980 Convention on International Sale of Goods, just as 1964 Hague Convention, contains certain important deficiencies. Although the draftsmen of the Conventions attempted to advance a new concept of excusable non-performance by combining different national approaches, no satisfactory result has been achieved.[205] Moreover, the solutions advocated by scholars are neither clear nor comprehensive and are difficult to apply in actual situations.[206]

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[204]. See generally E. Langen, Transnational Commercial Law, 1970, 2-12, 20-22 (Denying the autonomy and clearness of the international trade rules. For different view, see Berman and Kaufman, The Law of International Commercial Transactions (*Lex Mercatoria*), 19 Harv. Int'l. L. J. 1978, 265, at 272-277.

[205]. See chapter six, pp. 240-263.

[206]. See chapter eight, pp. 284-289.

Notwithstanding some of the useful practical effects of the ICC recommendations and ECE exemption clauses,[207] the problems arising from excusable non-performance remain, in particular in regard to drafting clauses. Other standard form contracts have not introduced an acceptable *force majeure* clause which would unify and harmonise the law of excuse of non-performance in international, commercial transactions. They do not treat both parties impartially and employ different models which reflect relative strength of the parties' bargaining positions.[208]

Given their uncertainties, it will often be imprudent for lawyers to leave the parties' fate in the hands of so-called "rules". Rather, the good lawyer should consider alternative method of protecting the parties' expectations in the event of supervening occurrences.

What is this alternative solution? It is the present writer's contention that the only possible alternative is to rely more heavily upon the terms of the contract itself by drafting a comprehensive *force majeure* clause. The parties can thus make their own applicable law rather than allow their position to be regulated by national law doctrines.

Force majeure clauses are common but have not been the subject of extensive research either in domestic or international law contexts. Although some theoretical analysis can be found,[209] this is basically a summary of practical experience, and while constituting a positive step towards solving the problems of excusable non-performance, much remains to be written on the difficulties which arise from typical *force majeure* clause.

This thesis purports to contribute to this issue by discussing some specific problems concerning *force majeure* provisions. For this purpose, this chapter will examine drafting techniques and provide suggestions for the formulation of the clause and its elements. It is hoped that this will help to introduce the clause as a means of contract security and a method of avoiding potential conflicts. Contrary to the ICC approach, it is submitted that the introduction of a single clause to fit all types of transactions will not always

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207. *Supra*, pp. 264-269 & 277-283.

208. *Supra*, pp. 278-280.

209. See for example, B. J. Cartoon, Drafting an Acceptable *Force Majeure* Clause, J. Bus. L. 1978. 230; David Yates, Drafting *Force Majeure* and Related Clauses, J. C. L. 1991, 186; H. O. Hunter, Commentary on "Pitfalls of *Force Majeure* Clauses", J. C. L. 1991, 214; Thomas R. Hurst, Drafting Contracts in an Inflationary Era, 28 Uni. Fla. L. Rev. (1975-76), 879; N. Sokolov, *Force Majeure* dans les Contrats entre Societes Occidentales et Centrales Commerciales Sovietiques, D. P. C. I. 1978, 323; H. Strohbach, *Force Majeure* and Hardship Clauses in International Commercial Contracts and Arbitration, J. Int'l. Arb. 1984; W. Melis, *Force Majeure* and Hardship Clauses in International Contracts in View of the Practice of the ICC Court of Arbitration, J. Int'l. Arb. 1984, 213.

cope adequately with every sort of failure in performance which can arise in different contracts. It is the present writer's view that the ambit of *force majeure* clauses must vary in terms of their scope and effect in different types of contracts.[210] Accordingly, to attempt to devise a model *force majeure* clause is pointless: instead, the present writer will suggest some guidelines for drafting the clauses which will be suitable in particular contracts.

2. WHAT IS A *FORCE MAJEURE* CLAUSE?

The words, *force majeure,* are alien to English law.[211] *Force majeure* or its Latin equivalent is a Civil law concept which has derived from Roman law.[212] While the English courts have not attempted to define the meaning of the term,[213] the term has been translated by the United States Supreme Court as "superior force", "unforeseen event", "over-powering force", "fortuitous event or irresistible force" and a "fact or accident which human prudence can neither foresee nor prevent".[214]

While the history of the definition of a *force majeure* clause is far from clear, it is believed that the term was developed by the draftsmen of the French Civil Code.[215] But it must be recognised that in an European context, the meaning of the term is open to different interpretations.[216] Moreover, it is clear that the traditional definition of a *force majeure* provision as used on the Continent does not provide an adequate solution to the problems of parties faced by supervening events in their contracts.

In this thesis, *force majeure* is intended to be used as a broader and much more comprehensive concept than in European legal systems. The question arises that since a broader concept is intended, why does this thesis employ the term "*force majeure*", rather than, for example, "reliefs",

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210. *Infra*, pp. 301 *et seq.*

211. Ewan Mckendrick, *Force Majeure* and Frustration of Contract, 1991, at 27.

212. Neville Maryan Green, *Force Majeure* in International Construction Contracts, Int'l. Bus. L. 1985, 505.

213. *Matsoukis v. Priestman and Co.*, [1915] 1 K.B. 681.

214. *Viterbo v. Friedlander*, 120 U.S. 707, 727-728 (1887). However, more recent cases have a tendency toward a broader definition of *force majeure.*, see, *e.g. Pacific Vegitable Oil Corp. v. C. S. T. Ltd.*, 29 Cal.2d 228, 238, 174 P.2d 441 (1946) (Holding war or governmental action provoked by the necessities of war constituted *force majeure*).

215. See Squillante and Congalton, *Force Majeure*, 80 Com. L. J. 1974, 4, at 5. See alse *Matsokis v. Priestman and Co.* [1915] 1 K.B. 681, at 685, 686, *per* Bailhache J.

216. Council of Europe, Certain, Aspects of Civil Liability, 1976, Paras. 26-36. For an English approach, see *Lebeaupin v. Crispin* [1920] 2 K.B. 714, *per* McCardle J. at 719; *Zinc Corporation Ltd. v. Hirsch* [1916] 1 K.B. 541 (War not *force majeure*).

"exemptions", "exceptions", "excusable clause", "contingency clause", "cause d'exoneration", *etc.*? Moreover, it could be argued[217] that the use of the same terminology as is to be found in French law to describe the clause leads to the damages that it will carry certain legal implications that may not be consistent with parties' intentions.

In spite of these observations, it is thought that it is justifiable to use the term *force majeure* for the following reasons. First, the term "*force majeure*" has assumed, both as a concept and in its consequences, a much broader meaning in modern legal practice.[218] Secondly, *force majeure* may be incorporated into a contract not by reference to its narrow meaning in French law, but as having a much broader meaning within the context of the particular contract.[219] Thirdly, many transnational commercial transactions[220] including standard form contracts[221] contain *force majeure* clauses: however, in international contracts these clauses are usually drafted more widely than the corresponding clause in a French domestic contract.[222] Indeed, merely to use the term "*force majeure*" does not necessarily imply that such a clause incorporates the French doctrine in order to relieve the non-performing from responsibility in cases of supervening events. For example, in ***Matsoukis v. Priestman and Co.***,[223] after hearing evidence from a Belgian lawyer, Bailhache J., said that he was not sure whether he was bound or entitled to give the words the full meaning they had on the Continent. Fourthly, the term

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217. UNCITRAL, Legal Guide on Drawing up International Contracts for the Construction of Industrial Works, United Nations, New York, 1988, at 235.

218. John S. Kirkham, *Force Majuere* - Does It Really Work? 30 Rocky Mountain Mineral Law Institute, 1984, 6-1, at 6-3.

219. See pp. 306 *et seq.*

220. See G. R. Delaume, Transnational Contracts, Booklet 6, 1989, at 21 *et seq*; Gregory P. Williams, Coping with Acts of God, Strikes, and Other Delights - The Use of *Force Majeure* Provisions in Mining Contracts, 22 Rocky Mountain Mineral Law Institute, 1977, at 433.

221. See, *e.g.*, ICC Model Form of *Force Majeure* Clause, Pub. No. 421, *op. cit*; Article 34 of UNIDO Model Form Turnkey Lump Sum Contract for the Construction of a Fertilizer Plant (Prepared by the United Nations Industrial Development Oraganisation, hereinafter UNIDO), 1 June 1983; GAFTA 100 (Now renumbered GAFTA 97), clause 23, (A c. i. f. Contrat issued by the Grain and Feed Trade Association, 1987); FOSFA (Federation of Oils , Seeds and Fats Association Ltd.) Forms; Standard Contract 2-A of the Cocoa Merchant's Association of America Inc., reprinted in E. Farnsworth, W. Young, and H. Jones, Cases and Materials on Contracts 270 (Supp. 1972); Standard Form Contract of Hide and Skin Seller's Association, 1973, Cl. 19, reprinted in A. F. Lowenfield, *op. cit.*, at DS-23.

222. M. Fontain, Les Clauses de *Force Majeure* dans les Contrats Internationaux, D. P. C. I. 1979, 469; G. Delaume, Excuse for Non-performance and *Force Majeure* in Economic Development Agreements, 10 Colum. J. Trans'l. L. 1971; M. Bartel, Contractual Adaptation and Conflict Resolution, 1985, at 28 *et seq.*

223. [1915] 1 K.B. 681, 685.

is used in EC law where *force majeure* is a specific defence to particular obligations being original both as a concept and in its effects.[224] Finally, it has been argued that excusable non-performance at an international level is a general principle that does not depend on national law.[225]

3. ADVANTAGES OF A *FORCE MAJEURE* CLAUSE (IMMUNITY CLAUSE)

The *dictum* in the English case of ***Paradine v. Jane***,[226] according to which the parties should protect themselves from destabilising influences of supervening events through express provisions in their contract, is to be supported to the extent that it draws the attention of the court to the specific contractual provisions. The purpose of these contractual provisions is to provide the parties with immunity from liability for non-performance so that they may take advantage of the provisions which they have in their contract to regulate their position. This case possibly explains why English and American contracts are detailed, leaving less latitude to a judge to impose the solution which would arise in the absence of specific contractual provisions. However, the most common of these contractual provisions are *force majeure* and hardship[227] clauses: in this chapter, they will be designated as immunity clauses. There is no doubt that under the principles of "sanctity of contracts" and the "binding force of promises", most, if not all, jurisdictions permit parties to a contract to extend the implications and consequences of excusable non-performance beyond the rules provided by the applicable law.[228] By delegating law-making authority to the parties, they are permitted freely to agree on the

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224. See Heather Cornwell-Kelly, The Community Concept of *Force Majeure*, New L. J. 1979, 245; James Flynn, *Force Majuere*, Pleas in Proceedings before the European Court, 6 European L. Rev. 1981, 102; Peter Gilsdorf, La *Force Majeure* dans le Driot de la CEE a la Lumiere de la Jurisprudence de la Cour de Justice, 18 Cahiers de Driot Europeen, 1982, 137; James E. Thomson, *Force Majeure*: The Contextual Approach of the Court of Justice, 24 Common Market L. Rev. 1987, 259; Konstantin D. Magliveras, *Force Majeure* in Community Law, 15 European L. Rev. 1990, 460; Michael Parker, *Force Majuere* in EC Law (In *Force Majeure* and Frustration of Contract, edited by Ewan McKendrick, 1991, Lloyd's of London Press Ltd.), 213.

225. See John A. Westberg, Contract Excuse in International Business Transactions: Awards of the Iran - United States Claims Tribunal, ICSID Rev. 1989, 215, at 218, note 8; Crook, Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal, Experience, 83 Am. J. Int'l. L. 1989, 278, 293 and note 75.

226. 82 Eng. Rep. at 897.

227. However, it should be pointed out that the issue of "hardship clause" is beyond the scope of this thesis and requires another research. Thus, this thesis will not not go into this matter in greater length.

228. For example, one of the American court in this regard stated that: "the parties were at liberty to define *force majeure* in whatever manner they desired." (*Atlantic Richfield Company v. ANR Pipeline* Co. 768 S.W.2d 777, 781 (Tex.App. 1989). See also chaprte 2 of this thesis, pp. 33-104.

creation, substance, modification and termination of their own contractual relationship. The use of detailed and explicit immunity clauses in commercial contracts provides clarity of content and predictability of result. Through drafting techniques, the parties themselves determine the ambit and effects of their immunity clause. Each party knows the terms of his contracts as well as the binding nature of his own duties. Moreover, these clauses provide an excellent and unique opportunity for the parties to determine beforehand the nature and extent of performance required in the event of change of circumstances and *force majeure* events, without the need to resort to the courts. This can be achieved by providing detailed and comprehensive rules on the effects of supervening factors on their contractual obligations.

Moreover, immunity clauses are more flexible in their potential application when compared with the rules under domestic laws. If these clauses are drafted correctly, then the courts will be prevented from intruding into the parties' contractual realm *via* judicial construction. Immunity clauses subsume domestic laws under which many *force majeure* clauses are interpreted in an inflexible manner which does not, in fact, represent the wishes of the parties. When circumstances have fundamentally changed, many legal systems, for example, French law,[229] do not assist the parties in adapting their contracts to the changed situation. In English law, as discussed before, the doctrine of frustration operates within very narrow confines and it is often difficult to persuade the courts to invoke the doctrine at all. Further, the judicial basis of the doctrine is unclear and, despite the intervention of statute, the consequences may be drastic for both parties.[230] However, an immunity clause, in the form of *force majeure* offers the parties the opportunity to escape from the limitation of these doctrines: in the form of a hardship clause, it gives the parties a flexible device to deal with unforeseen circumstances and ensure the stability of their long-term contractual relationship.

The role of the immunity clauses in international commercial transaction is also important because the parties will usually be from different countries and are subjects of different systems of national law. As we have seen, different legal systems deal with excusable non-performance in different ways and the diversity of domestic rules is further aggravated by the vagaries of case law. Moreover, because of the physical distances between the parties, extraordinary obstacles of performance, such as war, governmental

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229. *Supra*, pp. 82-89.

230. *Supra*, 33-37, 142-165. See also Ewan Mackendrick, The Consequences of Frustration - The Law Reform (Frustrated Contracts) Act 1943 (in *Force Majeure* and Frustration of Contract, *op. cit.*).

intervention of various kinds, currency fluctuations and the like, present greater hazards in international contracts than in domestic transaction. In the context of an international contract, difficulties occur because of profound differences between domestic legal systems. The parties are not always aware of these differences assuming that the law relating to excusable non-performance is basically the same everywhere. Sometimes this assumption may result in disaster for the party who agrees that a particular foreign law is applicable. To bring these matters into focus, consider the following hypothetical case:[231]

An Austrian company has a nuclear plant and contracts with an American seller of nuclear fuel. It is a long-term agreement, designed to cover the operation of the plant for some 25 years. Accordingly, a huge amount of money is involved. American law is the applicable law of the contract. After a few months, the Austrian people by referendum decide against the use of any form of nuclear energy. Consequently, the Austrian legislature prohibits the operation of nuclear power plants. Thereupon, the buyer-company sends a notice to the seller, declaring their performance of the contract is discharged on the basis of German doctrine of wegfall der geschaftsgrundlage[232] which is acknowledged by the Austrian courts. The seller refuses to accept the buyer's notice and insists on the validity of the contract. Since American law is the applicable law, the seller can insist on performance because the doctrine is unknown to U.S. law and American courts are very reluctant to accept excusable non-performance.[233] The result is at the very least, unfortunate for the Austrian company. It was clearly a mistake to have agreed that American law was the proper law of the contract. This could have been avoided if their lawyers had drafted a comprehensive *force majeure* clause so as to allow the buyer company to terminate the contract in the case of supervening legal prohibition of the operation of the nuclear plant.

This example makes it completely clear that carefully drafted immunity clause is highly desirable, if it is intended to exclude unpleasant surprises in the future.

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231. This hypothetical case is cited in Willibald Poch, "On the Law of International Sale of Goods": An Introduction (In Survey of the International Sale of Goods, edited by Louis Lafili, Franklin Gevurtz and Deniss Campble, 1986, Kluwer, at 4).

232. For the concept and effects of the doctrine, see pp. 97-104, 194-199.

233. *Supra*, pp. 53-82.

4. GENERAL POINTS AND SUGGESTIONS FOR DRAFTING AN IMMUNITY CLAUSE (*FORCE MAJEURE* CLAUSE)

As was discussed before,[234] immunity clauses are often found in a number of different kinds of transactions. The clause usually appears towards the end of the contract and, as a result, its importance is not fully appreciated. Most of the forms currently in use are defective in one or more respects and are drafted with far less specificity than is desirable. When contracting, parties tend to turn a blind eye to any downside risk in their bargain and consequently deny themselves the opportunity to draft an acceptable and comprehensive immunity clause. This failure to make adequate provisions for *force majeure* events and changes in circumstances can cause the unpleasant consequences discussed in the example above. Any uncertainty of the applicability of immunity clauses can and should be reduced by including a carefully drafted clause that makes advance provisions for the occurrence of events which are unforeseen and beyond control. Here, the immunity clause acts as a preventative device aimed at solving in advance any problems which might arise if a supervening event occurs. It is submitted that draftsmen should take into account the following guidelines and suggestions when drafting *force majeure* clauses.

4.1. IMPORTANT FACTS WHICH SHOULD BE CONSIDERED BEFORE ANY *FORCE MAJEURE* IS DRAFTED

(i) Before any transnational contract is drafted, care should be taken to ensure that any *force majeure* clause does not conflict with any mandatory rules of the law of the contract,[235] some legal systems, such as India, do not permit the parties to devise their own *force majeure* provisions.[236]

(ii) In transnational business transactions, before any clause is drafted, consideration should be given to the relevant country's political and economic situation; this would include such matters as the stability of the government, the rate of inflation and any existing or pending legislation that might affect the performance of the contract. The parties can then ensure that the *force majeure* or hardship clause can be drafted to take account of such

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234. *Supra*, pp. 278-280.

235. ICC. *op. cit.*, at 7.

236. R. Christou, A Comparison between the doctrines of *Force Majeure* and Frustration, 3 Int'l. Contract-Law and Finance Rev. 1982, 75, at 81. For Chinese approach, see Herve Leclerc, *Force Majeure* in Chinese Commercial Law, 7 Journal of Energy and Natural Resouces Law, 1989, 238-241.

contingencies. This should be done regardless of the status of the country concerned *i.e.*, whether or not it is developed or developing.[237]

4.2. THE CLAUSE MUST BE EXPLICIT AND CONTAIN MORE ELABORATE PROVISIONS THAN THE APPLICABLE LAW

Careful attention and great skill is needed to tailor *force majeure* clauses to the particular circumstances of the transaction. But by properly formulated provisions, the parties provide themselves with the means of avoiding deadlock and dissatisfaction over non-performance. If properly drafted, these clauses avoid many of the difficulties which would be imposed on the parties by the courts or statutory provisions under the applicable domestic law. The fact that some risks to each party will continue despite a well drafted contract, should not inhibit the parties from doing their best in drafting such clauses. Indeed, in their negotiations, the contracting parties can, at least, minimise these risks and their effects. What is more important, the parties will ensure that they are not left in doubt as to the nature and extent of their duties to perform and their respective responsibilities in the event of non-performance. To achieve these ends, the clause must be explicit and comprehensive. The parties should say what they actually mean to say and say it clearly.[238] To ensure that the clause is not subject to more than one reasonable construction, it should be read by an independent lawyer to check whether or not there is any ambiguity.

However, it may be argued that any immunity clause, even if in general terms, such as "*force majeure*" or "act of God" is better than none. This argument is incorrect since such clauses are of little value to the courts. On the contrary, a carelessly drafted clause may create more problems than it solves. The vulnerability of less than comprehensive and detailed clauses lies in the unknown vagaries of the applicable domestic law and the long established rules of construction of documents.[239] A review of *force majeure* cases at both international[240] and domestic levels indicates that arbitrators and judges tend to construe a *force majeure* clause in a very restrictive way. For

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237. Ved P. Nanda, The Law of Business Transnational Transactions, 1991, vol. 1, at 4-17.

238. John, H. Stroh, The Failure of Doctrice of Impracticability, 5 Corporation L. Rev. 1982, at 238.

239. David Green, *Force Majeure* Clauses and International Sale of Goods - Comparative Guidlines for the Common Lawyer, Australian Bus. L. Rev. 1980, 369, at 374.

240. Wener Melis, *Force Majeure* and Hardship clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration, 1 J. Int'l. Arb. 1984, 213, at 221. (See also the cases cited in, pp. 217 *et seq.*).

example, under English law, a detailed and comprehensive clause is necessary, since English courts have refused to define the meaning of *force majeure*.[241] Thus, if the clause is not drafted comprehensively, its meaning will be difficult to establish. In ***Thomas Borthwick (Glasgow) Ltd. v. Fairclough Ltd.***,[242] Donaldson J. stated that "the precise meaning of this term, if it has one, has eluded lawyers for years". Accordingly, because English courts are uneasy in dealing with an alien concept such as *force majeure* since they are unaware of its meaning they have interpreted *force majeure* clauses restrictively.[243] In both England and the United States, the courts have warned that the use of a generic phrase such as "subject to *force majeure*" without any further detailed provisions, is limited in its scope by the words which precede or follow it. In ***Lebeaupin v. Richard Crispin and Co.***,[244] McCardie J. stated:

"I take it that a *force majeure* clause should be construed in each case with a close attention to the words which precede or follow it, and with due regard to the nature and general terms of the contract. If a seller desires to escape from liability in such a case as the present, he must take care to use words of adequate clearness and width . . . ".[245]

Thus, the use of generic words in a contract is fraught with danger. The point was cogently put by Lord Mcnaughten in ***Elderslie Steamship Co. v. Borthwick***,[246] when he said: "an ambiguous document is no protection."

By applying the doctrine of *ejusdem generis* American courts have also construed the term "*force majeure*" narrowly and have denied excusable non-performance unless the supervening event is similar to those listed in a *force majeure* clause.[247] In ***Wheeling Valley Coal Corp. v. Mead***,[248] the court stated:

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241. *Matsoukis v. Priestman and Co.* [1915] 1 K.B. 681.

242. [1968] 1 Lloyd's Rep. 16.

243. Edward, Veitch, Contracts - Frustration - *Force Majeure* Clauses - Non-availability of Market, Can. Bar Rev. 1976, 161, at 162.

244. [1920] 2 K.B. 714, at 720.

245. *Loc. cit.*, at 718. In this regard, there is also a *dicta* in Angelia, [1973] 1 W.L.R. 210, at 230.

246. [1905] A.C. 93, at 96. *Cf. British Electrical Associated Industries (Cardiff), Ltd. v. Patly Pressengs, Ltd.* [1953] 1All E. R. 94 (A phrase in contract such as "subjective to *force majeure*" was considered too vague).

247. See *Eastern Air Lines, Inc. v. McDonnell Douglas Corp.*, 532 F.2d 957, 988 (5th Cir. 1976); *Bumpus v. United States*, 325 F.2d 264, 266-267 (toth Cir. 1963).

248. 186 F.2d 219 (4th Cir. 1950). See also *Carnegie Steel Co. v. United States*, 240 U.S. 156 (1916); *Austin Co. v. United States*, 314 F.2d 518 (Ct. Cl. 1963), *cert. denied*, 375 U.S. 830 (1965); *New York Coal Co. v. New Pittsburgh Coal Co.*, 99 N.E. 198 (Ohio 1912). *Cf.* In *re* An Arbitration between the *Podar Trading Co. Ltd., Bombay, & Francois Tagher Barcelona* [1949] 2 K.B. 277, at 286.

"Under familiar principles of interpretation, the general expressions 'acts of government' and 'causes beyond control of lessee' are limited to things of the same general sort as those specifically set forth in the same connection . . . ".

Apart from the fact that the courts are reluctant to grant relief when the clause is in general terms, the danger is that reference to *force majeure* in general will work to the advantage of the party who is acquainted with the substantive rules of the applicable law.[249] The hypothetical case involving the fictitious Austrian merchant[250] illustrates the nature of the problem.

Like other contractual provisions, *force majeure* clauses are not construed in isolation. The general rules governing the construction of contracts are applicable when interpreting of *force majeure* clauses.[251] In order to determine the intention of the parties, the court construes the clause with due regard to the nature and general terms of the contract as well as the precise words of the clause itself.[252] Thus before drafting a *force majeure* clause, the draftsman should consider the contract as a whole including the nature of the subject matter and the positions of the parties,[253] in order to ensure that the provisions of the immunity clause do not conflict with other terms in the contract. Otherwise, a two edged sword situation could arise.[254] On one hand, the *force majeure* clause and its contents can be used to interpret other provisions in the contract: on other hand, other stipulations in the contract such as warranty clauses, can be used to interpret the *force majeure* clause. Thus, for example, a party who has assumed a risk by deliberately warranting something over which he has no control, will not be excused from the consequences of non-performance of that warranty as a result of a *force majeure* clause.

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249. G. R. Delaume, Transnational Contracts, *op. cit.*, at 2.08.

250. *Supra*, at 296.

251. See *Silver v. White Star Coal Co.*, 190 Ky. 7, 226 S.W. 102 (1920); *Bangor Peerless Slate Co. v. Bangor Vein Slate Co.*, 270 Pa. 161, 113 A. 790 (1920).

252. William Swalding, The Judicial Construcion of *Force Majeure* Clauses (in *Force Majeure* and Frustration of Contract, Edited by Ewan Mckendrick, *op. cit.* 3, at 5); Gregory P. Williams, Coping with Acts of God, Strikes, and other delights - The Use of *Force Majeure* in Mining Contracts, 22 Rocky Mountain Mineral Institute, 1976, 433, at 435.

253. The courts may also look outside of the contract in order to cosider the facts known to the parties at the time of contracting so as to give effect to the intent of parties. (See *Collins v. White Oak Fuel Co.*, 69 W.Va. 292, 71 S.E. 277 (1911).

254. John, S. Kirkham, *op. cit.*, at p. 6-30.

4.3. THE *FORCE MAJEURE* CLAUSE MUST RELATE TO THE SUBSTANCE OF THE CONTRACT IN WHICH IT IS INCLUDED

The formulation of *force majeure* clause in respect to its effects and contingency list will vary in different commercial transactions. A *force majeure* clause should therefore not be regarded as a standard term to be included in any contract. It is important that *force majeure* provisions should not be drafted in the abstract. Before any drafting, the parties' salesmen, engineers and financial experts should engage in negotiations after which lawyers can draft a contract whose terms are clear and "tailor-made" so that little is left open to interpretation. There is no doubt that the type of the contract will have a direct impact upon the specific *force majeure* clause used. For example, different sale contracts such as the sale of coal, cereal, machinery, timber, *etc.*, as well as related factors such as scarcity or abundance of the goods, are important elements that will affect the form of the clause. Moreover, international commerce no longer primarily consists of selling and buying goods. These newer transactions include a variety of arrangements and take many forms such as: -

(a) technology transfer agreements;

(b) design and construction of large plants, turnkey projects or construction and civil engineering contracts;

(c) joint ventures agreements;

(d) mining agreements such as mineral leases, operating agreements, joint venture agreements for mining or milling services, and agreements for the sale of mineral products;

(e) management contracts;

(f) long-term contracts for the sale of raw materials and manufactured goods (long-term supply contracts), contracts on patent licences or the use of industrial, or other know how;

(g) consultant's contracts;

(h) manufacturing and marketing agreements, *etc.*

The diversified character of these transactions affect both the scope and precision of a *force majere* clause. Thus, for example, a *force majeure* clause which is used in a 'spot sale' may not be particularly helpful in the case of long-term contracts such as sale of steel products or construction contracts. In long-term contracts such as turnkey projects,[255] we are no longer

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[255]. For more detailed features of these kinds of contracts see: United Nations, Guidelines for Contracting for Industrial Projects in Developing Countries, New York, 1975; United Nations, Guide on Drawing up International Contracts on Industrial Co-operation, New York, 1976; United Nations,

concerned with the cash sale of a widget for future delivery, but with far more complex transactions in which the arrangements are not restricted to a single transaction or even a series of transactions. Rather they establish a continuing relationships. The capital investments in these contracts are usually much more than involved say, for example, trade in cereals. Other factors such as costs, imbalance between various parts of the world with respect to technical knowledge and material resources, often require joint business arrangements, many of which extend across national frontiers. In these contracts, there are much greater risks than in a short term contract. There are also other factors which threaten the stability of the contract, such as increase in costs of performing of contract. This will be discussed later.[256] In the light of these factors, a broader coverage is required than that afforded by a typical *force majeure* clause included in, for example, a 'spot sale' contract, since a greater variety of circumstances may contribute to make performance impossible or highly undesirable. Thus, an ingenious draftsman in drafting a *force majeure* clause for such complex contracts should add other supervening events to the usual contingency list which is currently used in short term contracts. These additional events can be as follows: explosion, sabotage, machinery breakdown, failure of plant, collapse of structures, requisition of materials, inability to obtain suitable raw materials, equipment, fuel, power or components. Moreover, the party may add in the clause that it will not be liable for any loss and injury thereby suffered by the other party.[257] The scope of the effects of *force majeure* clause can therefore exclude liability for loss or injury. Such additional provisions are not needed in, for example, on contract of sale.

In a joint venture agreement, the clause may be drafted in such a way that it can be exercised not only in the event of the traditional provisions of *force majeure* but also in the event of cessation of special conditions which are essential to the success of the project: these would include preferential

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Features and Issues in Turnkey Contracts in Developing Countries: Technical Paper, New York, 1983; United Nations, Guide for Drawing up International Contracts on Consulting Engineers, Including Some Related Aspects of Technical Assistance, New York, 1983; United Nations, Analysis of Engineering and Technical Assistance Consultancy Contracts, Model Form of Conditions of Contract for Process Plants (Suitable for Lump Sum Contracts in the United Kingdom), 1968; United Nations, Guide on Drawing up International Contracts for Services Relating to Maintenance, Repair, and Operation of Industrial and Other Works, New York, Economic Commission for Europe (Geneva), 1987. See also, UNIDO, *op. cit*; UNCITRAL, *op. cit.*

256. *Infra*, 306-309.

257. See the related clause in L. W. Melville, Forms and Agreements on Intellectual Property and International Licensing, 3rd ed. 1979, (revised 1986), at pp. 3A20, 4C32.

access to raw materials, preferential local foreign exchange laws, tariff protection, tax incentives and price controls which ensure reasonable buying and selling prices.[258] The clause may also provide for the excusable cessation of performance of the contract should the safety of the foreign partner's expatriate personnel be jeopardised and they must therefore be evacuated. The clause should also cover expropriation of the joint venture. A careful definition of expropriation should be contained in one of the paragraphs of the *force majeure* clause. Moreover, other events can be added to the *force majeure* contingency list, such as inconvertibility of currency and political strife which may interfere with the effective and profitable operation of the joint venture.[259]

Consider an agreement to construct a new chemical plant. The performance of this agreement is obviously only possible in a specified location. Complex events may render the performance undesirable or illegal (for example, a change in zoning regulations). Accordingly, the draftsman should ensure that the clause can cover such events. In the field of engineering or export of steel products, a considerable period of time may elapse between the formation of the contract and performance[260]. While in the trade of cereals, for example, this is not normally the case. It is therefore not surprising that *force majeure* provisions relating to excusable non-performance are quite different in these two types of transactions. In the former, it is necessary to provide a flexible excuse clause allowing the parties to suspend performance of the contract; while in the latter, which is speculative by nature and the parties usually anticipate fairly rapid price fluctuations, cancellation of performance of the contract is desirable. Thus it is necessary in the latter case, to draft the relief clause in a restrictive way so as to preclude any possibility of manoeuvre by either of the parties.[261]

In conclusion, it is submitted that the search for one single perfect *force majeure* clause will be elusive. However, it is unnecessary. There is and can not be uniformity. What is an appropriate *force majeure* clause in one contract may be completely inappropriate in another. The characteristics of the

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258. Terrence F. McLaren, and Walter G. Marple, Jr., Licensing in Foreign and Domestic Operations, Joint Ventures, vol. 4, New York, 1985, Chapter 3, at 3.02[9], 3-23.

259. *Loc. cit.*

260. See Harold J. Berman, Excuse of Nonperformance in the Light of Contract Practices in International Trade, *op. cit.*, at 1431.

261. Peter Benjamin, The ECE General Conditions of Sale and Standard Forms Contract, *op. cit.*,at 116.

particular transaction influence the manner in which the clauses are drafted. The ICC suggestion[262] of a model *force majere* clause for every different type of contracts can be criticised not only because of the extreme diversity of the types of transactions involved but also because different parties may want different results in similar situations.[263] Moreover, factors such as the national law of the place where the contract is made or to which it refers, the characteristics of the parties (their nationality, whether such parties are private or public, *etc.*)[264] and occurrences which may be relevant to the nature of the contract concerned, are important factors upon which the precise formulation of the clauses depends.

Because of all these factors, there is no doubt that *force majeure* clauses are difficult to draft.

4.4. AVOID THE USE OF A *FORCE MAJEURE* CLAUSE CONTAINED IN STANDARD FORM CONTRACTS

For similar reasons, parties should be careful not to incorporate standard form *force majeure* clauses in their contract. Although there are many standard forms of *force majeure* clauses[265] which parties may use, these should be modified or re-drafted very carefully. The automatic use of a standard "boilerplate" *force majeure* clause in a particular transaction, may cause more problems than it solves.[266] To illustrate these difficulties, let us examine a hypothetical case:[267] Take the case of trading house which both buys and sells commodities on world markets. It incorporates a standard *force majeure* clause in both its buying and selling contracts, which will discharge either party from performance due to circumstances beyond that party's control. The trading house then enters into a contract to buy chemicals from an Italian company for resale to a British company. If the Italian company's plant blows up as a result of an industrial accident, its obligation to deliver to

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262. *Supra*, at 262.

263. *Cf.* M. Fontain, Les Clauses de *Force Majeure* dans les Contrats Internationaux, D.P.C.I. 1979, at 504 *et seq.*

264. Karl-Heins Bockstiegel, Hardship, *Force Majeure* and Special Risks Claused in International Contracts (In Adaptation and Renegotiation of Contracts in International Trade and Finance, edited by N. Horn, Kluwer, 1985), at 162, 163.

265. For example, see some of these standard clauses in David Yates, and A. J. Hawkins, Standard Business Contracts: Exclusions and Related Devices, Appendix 1, at 466-469. See also pp. 256-261.

266. See Bernard J. Cartoon, *op. cit.*, at 233; Thoms R. Hurst , Drafting Contracts in an Inflationary Era, *op. cit.*, at 900.

267. Cited in Bernard J. Cartoon, *op. cit.*

the trading house will be excused under the *force majeure* clause. However, the trading house will not be discharged from its obligation to deliver to the British company. The fact that the Italian company can not perform its obligation does not mean that the trading house can not deliver alternative goods to the British company. The British company would be entitled to insist on performance of the contract and the trading house would be obliged to look elsewhere for its source of supply.

Thus, copying of provisions of standard clauses and inserting them in a particular contract may be quite unsuitable for the transaction in question. Accordingly, the clause must be adapted in such a way as to fit the particular contract. For example, in mining contracts, attention should be focused on what specific events should be added to the standard list of occurrences so that the *force majeure* may address the types of problems that are most likely to occur and in respect of which the parties intend to allow excusable non-performance. Attention should also be given to determining which obligations should be discharged, which are to be revised and which obligations should remain in full force during the continuance of the supervening event.[268]

Another problem is that in most standard contracts a *force majeure* clause is usually drafted in favour of only one of the parties *i.e.*, the party who has greater bargaining power.[269] For example, the *force majeure* clauses contained in GAFTA 100,[270] merely refer to delays in, or prevention of, shipment, *i.e.* the seller's obligation. In these clauses, the buyer is not afforded *force majeure* protection.

Finally, most standard *force majeure* clauses are not clear and comprehensive. As discussed before,[271] they might consequently be ineffective if, for example, the applicable law is English or American law, where the courts interpret these clauses very strictly. Given the variety of *force majeure* conditions, if parties do not make it clear what supervening events are relevant, the courts will be unable to discover the real intentions of the

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268. Gregory P. Williams, *op. cit.*, at 448.

269. See chapter 7 of this thesis under the title of "Standard Form Contracts".

270. For example, clause 23 provides: "*Force majeure* strikes, *etc.* - Sellers shall not be responsible for any delay in shipment of the goods . . . occasioned by any Act of God, strike, lockout, riot or civil commotion, combination of workmen, breakdown of machinery, fire or any cause comprehended in the terms of *force majeure* . . .". (Published by Grain and Feed Trade Association, effective 1 April 1987).

271. *Supra*, pp. 298-301.

parties. *A fortiori*, if the contract merely refers to "subject of *force majeure*", this will exacerbate the situation.[272]

4.5. DO NOT INCLUDE *FORCE MAJEURE* AND HARDSHIP PROVISIONS IN THE SAME CLAUSE

Hardship clauses have a potential overlap with *force majeure* clauses. Although there is great confusion as to the use of these concepts, these clauses are frequently found in long-term international contracts of sale, even where the contracts are on a "take or pay" basis.[273] Therefore, a general review of the concept of hardship and its place in the contract is needed. Issues related to the drafting of hardship clauses will not be analysed in detail.

Hardship and other clauses such as intervener clauses, have been said to be variations of *force majeure* provisions.[274] Indeed, modern hardship provisions sometimes labelled *force majeure*.[275] The inclusion of a hardship clause in a contract is valuable, particularly, as its existence is evidence that the parties intended some sort of adaptation of the contractual terms. The clause is very useful in long-term contracts where the parties need immunity against unforeseen events which may disrupt the initial economic and financial equilibrium of the contract. As discussed before,[276] long-term agreements present a number of common features. In these contracts, such as gas or oil supply, coal sale and joint ventures, the performance is intended to go on for ten years or more, perhaps even twenty or thirty years.[277] Every agreement, whatever its form or purpose, creates a significant close relationship between the parties. Another feature of these contracts is their complexity, since highly sophisticated industrial and scientific arrangements will often require multiparty collaboration.[278] In these contracts we are no longer concerned with

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272. See pp. 298-301. *Cf. Bishop and Baxter Ltd. v. Anglo-Eastern Trading and Industrial Co. Ltd.* [1944] K.B. 12, C.A. (Sale subject to "war clause" too uncertain).

273. E. J. Wright, Legal Framework of Coal Trade in the Region, IBA/ Law Asia Seminar, 'Energy Law in Asia and the Pacific' (Singapore 1982), 581, at 611; M. E. Wright, Effects of Changed Circumstances on Mineral and Petroleum Sales Contracts, AMPLA Yearbook, 1984, 331, at 347.

274. See Schmitthoff, Hardship and Intervener Clauses, J. Bus. L. 1980, 82.

275. Norbert Horn, Standard Clauses on Contract Adaptation in International Commerce, (In Adaptation and Renegotiation of Contracts in International Trade and Finance, Edited by N. Horn, 1985, 111, at 132).

276. *Supra*, pp. 172-3, 178.

277. E. J. Wright, *op. cit.*, at 612; A. H. Peulinckx, Frustration, Hardship, *Force Majeure*, Imprevision, Wegfall der Geschaftsgrundlage, Unmoglichkeit, Changed Cicumstances, J. Int'l. Arb. 1986, 47, at 53.

278. Georgio Bernini, Techniques for Resolving Problems in Forming and Performing Long-term Contracts, New Delhi, 1975, 5th International Arbitration Congress, CIVa1, at CIVa3.

a simple contract of sale, but with complex transactions[279] which are exposed to a wider range of risks than most other contracts. Under such circumstances, it is difficult initially to foresee and evaluate in advance all possible, future occurrences; thus, there is much greater likelihood of gaps occurring than in a simple international contract for the sale of goods.

During the performance of these contracts, events may occur which render the performance of contract difficult, hazardous or more onerous. The parties can not be sure whether or not unforeseen technological, economic or political developments may occur during the existence of the agreement which make it necessary to revise prices, royalty rates or other contractual terms.[280] Of course, the applicable law may not be able to provide appropriate solutions for these problems. The economic circumstances of these contracts may change and the initial values of assets vary. Currencies may also lose their value, yet the contract still remains operative. On the other hand, the contract is only meaningful as long as it provides for mutual economic benefits: nobody should be obliged to work for nothing.[281] Therefore, there is a pressing need to provide some mechanism in the contract to deal with changing future circumstances so that performance of the contract remains economically sensible. Termination of the contract would be costly and destructive. There is no doubt that a *force majeure* clause may provide an adequate solution to the problems faced by a party as the result of an event which disturbs the contract's economic and financial equilibrium. It is the present writer's view that the attempt to solve these problems by a *force majeure* clause should be abandoned. It is better to deal with these problems in clauses specifically designed to allow adjustment in such circumstances,[282] the so-called hardship clause.

Although the concepts of hardship and *force majeure* appear to be related to each other, particularly since they share some features, such as being exceptions to the basic rule of *pacta sunt servanda* and are concerned

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279. See Victor P. Goldberg, Toward an Expanded Economic Theory of Contract, Journal of Economic Issues, 1976, 45, at 49 *et seq.*

280. Georgio Bernini, *op. cit.*, at pp. CIVa 5, CIVa 6; Geogio Bernini, Adaptation of Contracts, ICC Congress Series No. 1 (VIIth International Arbitration Congress, Hamburg, June 7-11, 1982, Kluwer, at 193 *et seq.)*; Georgio Bernini, Adaptation during the Progress of Long-term Contracts, 43 Arbitration, 1977, 51, at 63, 67.

281. Oppetit, L'adaptation des Contrats Internationaux aux Changement de Circonstances: La Clause de Hardship, 4 Journal de Droit International (Clunet) 1974, 784-814.

282. See Gregory P. Williams, *op. cit.*, at 450; John Kelly, Commentary on Effects of Changed Circumstances on Mineral and Petroleum Sales Contracts, AMPLA Yearbook, 1984, 389, at 393.

with unforeseen supervening events, the provisions should be drafted separately, under the titles of *force majeure* and hardship in the contract, for the following reasons.

It is important to appreciate the difference which exists between the two concepts. Hardship relates to unforeseen circumstances beyond the control of the party which render the performance of the contract not impossible but only more burdensome.[283] A hardship clause can therefore be compared to the French concept of imprevision as well as the German concept of wegfall der geschaftsgrundlage.[284] Obviously, a hardship clause has a wider scope than the general *force majeure* clause, which is only operative when performance by the party concerned has become impossible, even if only temporarily. The legal consequence of a hardship clause is the continuation of the contract, albeit on different terms. The aim of the clause is therefore the adaptation of the contract,[285] rather than the termination of the contract which a *force majeure* clause generally provides. Thus, while *force majeure* clauses may be described as passive, hardship clauses are dynamic and seek to modify the provisions of the contract and allow performance to continue.[286] The hardship clause also provides a complementary mechanism that distributes the costs of unexpected events among the parties and gives guidance for achieving a flexible response to particular events.[287] It may provide that parties should solve their problems through renegotiation, or the necessary adaptation may be determined through the good offices of a trusted, distinguished third party who does not perform the function of an arbitrator, but rather encourages the parties to reach a settlement[288] *i.e.*, acts as a mediator or conciliator. A typical hardship clause should therefore have two aspects: a definition of hardship and a method of adapting the contract. Bruno Oppetit offers the following definition:

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283. Clive M. Schmitthoff, Hardship and Intervener Clauses, *op. cit.*, at 85.

284. *Supra*, pp. 89-104.

285. See B. Oppetit, L'adaptation des Contrats Internationaux aux Changement de circonstances: la Clause de Hardship, 4 Journal de Droit International, 1974, 784; Van Ommeslaghe, Les Clauses de *Force Majuere* et d'imprevision (Hardship) dans les Contrats Internationaux, Revue de Droit International et de Compare, 1980, 7; Lando, Renegotiation and Revision of International Contracts, German Yearbook of International Law, vol. 23, 1983, 37.

286. Adrian A. Montague, Hardship Clauses, Int'l. Bus. L. 1985, 135.

287. N. Horn, *op. cit.*, at 131.

288. Clive M. Schmitthoff, *op. cit.*, D. Yates, Drafting *Force Majeure* and Related Clauses, *op. cit.*, at 188.

"A hardship clause may be defined as a clause by which the parties will be able to modify the contract if an intervening change in the initial basis on which they obligated themselves changes the equilibrium of the contract to the point that one of the parties sustain a hardship."[289]

The draftsman has to consider two quite different situations: *viz.*, supervening events which may make the performance impossible (*force majeure*) and those events which render the performance more difficult or onerous but not impossible (hardship). To prevent the confusion, which sometimes exists among the lawyers who regard the two different clauses as synonymous,[290] he should not place the hardship clause in the *force majeure* clause. A *force majeure* clause which is too wide in its application may prove to be far less effective than the draftsman intended.

4.6. THE BENEFIT AND PROTECTION OF THE *FORCE MAJEURE* CLAUSE SHOULD BE PROVIDED FOR BOTH PARTIES

For reasons which will be discussed later, it is recommended that both parties should be enabled to invoke the *force majeure* clause. In other words, the clause should be for the benefit of both parties. Failure to extend the clause to each party may have harsh and unconscionable effects.

Why should both parties be protected? Why should, for example, a buyer in a contract of sale be afforded the same protection against the *force majeure* events as the seller? It can be argued that it is very difficult to conceive of circumstances where a buyer should be released from his performance. But while the performance of a seller in a sale contract or a contractor in a contract for the construction of industrial works is more likely to be affected by an event of *force majeure* than the performance of the buyer or purchaser, cases could arise in which the *force majeure* also affects the buyer's or purchaser's performance. For example, in construction contracts, the purchaser may be prevented by legal impediment from making a payment to the contractor., or, a physical impediment qualifying as *force majeure* may prevent him from performing any limited construction obligation he has undertaken.[291] In a typical current of sale of goods, the obstacles to performance of the buyer's obligations could include financial embarrassment,

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289. B. Oppetit, L'adaptation des Contrats Internationaux aux Changements de Circonstances: la Clause de Hardship, Journal du Droit International, 1974, 794, at 797.

290. Melis, *op. cit.*, at 215.

291. UNCITRAL, *op. cit.*, at 234.

price controls or some breakdown in the agreed method of delivery. In these situations, it may be vital for the buyer to have immunity against *force majeure* events. In an F.O.B. contract, for example, the buyer's obligation to present a vessel to take delivery may be affected by circumstances beyond his control. The vessel may be sunk by perils of the sea before reaching the port of shipment. According to the Common law, the buyer would not be able to invoke the doctrine of frustration to avoid liability attaching to him by virtue of the non-arrival of the vessel. The Common law would require him to charter another vessel.[292]

Another illustration is non-availability of market. A buyer who has agreed to buy 1000 units per year of a commodity for a period of ten years, may wish to invoke the immunity clause if, for example, because of the non-availability of market or a downturn in his business in an economic recession, he needs only 600 units. Difficulties can arise in respect of the meaning of the phrase "non-availability of market". Does it mean actually available market as opposed to market which is advantageous or profitable to the purchaser? In ***Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Co. Ltd.***,[293] the New Brunswick Court of Appeal decided that "available" does not mean "existing" but rather implies that the purchaser can take advantage of the market. However, whilst overturning the decision of the Appeal Court, the Supreme Court of Canada,[294] stated that the meaning of "non-availability" was to be determined by the preceding words of the clause under scrutiny, so that the cause of non-availability of the market had to be one beyond the control of the purchaser. After stating that "available market" does not mean a market which is advantageous or profitable to the purchaser, the Supreme Court came to the conclusion that the lack of market was due to the ineffectiveness of the defendant's marketing plans and to the unreality of their appreciation of the demand for their product *i.e.*, it was not beyond their control. Accordingly, the court held that the purchaser could not lawfully refuse to accept delivery owing to non-availability of market and was liable in the damages to the supplier. In the light of this decision, if a buyer wishes to take advantage of an immunity clause there are good reasons why he should define exactly what he means by "non-availability of market".

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292. Cartoon, *op. cit.*, at 233; D. Yates, (1991), *op. cit.*, at 204.

293. (1974), 46 D.L.R. (3d) 732. See also Edward Veitch, *op. cit.*, at 168-169.

294. (1975), 56 D.L.R. (3d) 409 (S.C.C.).

Apart from the above situations, there are other cases when extensive *force majeure* conditions could be used by the buyer. For example, in an uranium supply agreement reciprocal protection is required when the buyer is prevented from using the materials as specifically designated in the contract, *i.e.*, as a result of delay, cancellation or licensing difficulties the buyer is unable to use the specific reactor for which the materials were intended.[295]

The above discussion indicates that *force majeure* clauses should be reciprocal protecting both parties; otherwise, if one of the parties is not specifically protected by the clause he will be left to rely on domestic laws such as the doctrine of frustration which, as we have seen, are rarely satisfactory. Thus, by using phrases such as "Neither party shall be liable to" or "Either party can assert *force majeure*", both parties can benefit from the clause on the occurrence of supervening events.

There are other reasons for reciprocal protection. If the clause protects the buyer as well as the seller, the buyer will feel that he is benefiting from an equal bargain. Protecting the seller and leaving the buyer with no protection at all may be a factor inhibiting the buyer from entering into the contract.[296] Such a clause will be an indication of the seller's good faith and will operate to encourage the parties' contractual relationship in the future.[297] If a party can not rely upon the immunity clause and performance of the contract becomes extremely onerous or difficult due to unforeseen circumstances then that party may decide to break or, in an extreme case, repudiate the contract, because it may be financially or economically more advisable to do so rather than incur the additional expense which performance would involve. Any action by the other party to recover damages would also have an adverse effect on their future contractual relationship.[298] Finally, if the immunity clause provides adequate protection for both parties, a court will be more likely to come to the conclusion that the clause is a correct and complete expression of the intentions of the parties.[299]

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[295]. H. M. Donndorff, Uranium Supply Agreements, Int'l. Bus. L. (Special issue) 1979, 37, at 42.

[296]. Cartoon, *op. cit.*, at 233.

[297]. David Green, *op. cit.*, at 379; Dvid Yates, *op. cit.*, at 204.

[298]. David Green, *op. cit.*

[299]. Gregory P. Williams, *op. cit.*, at 449.

5. POINTS AND SUGGESTIONS WITH REGARD TO THE CONTENTS OF A *FORCE MAJEURE* CLAUSE

It is now appropriate to examine and analyse the contents of a *force majeure* clause from the drafting point of view. In order to have a comprehensive and a well drafted *force majeure* clause, it is possible to identify at least four main issues for which a *force majeure* should provide, *viz*:

(A) A definition and description of *force majeure* and the events which will excuse a party from performance of his obligations;

(B) Provisions on the consequences of these events on the contractual relationship;

(C) Machinery provisions, such as requirements as to notice;

(D) Specifying what restitutionary and other procedures should be applied so as to achieve justice and to minimise the loss between the parties.

5.1. CONTENTS OF DEFINITION OF *FORCE MAJEURE* AND ITS ELEMENTS

5.1.1. *FORCE MAJEURE* MUST BE PRECISELY AND CAREFULLY DEFINED

As regards the definition of *force majeure*, there seems to be at least four alternatives used in the contracts:

(i) A general reference to *force majeure* is quoted in the clause without any definition. In this case, the meaning of the *force majeure* clause is that expressly or impliedly to be found in the system of law which is the proper law of the contract. In both cases, questions of interpretation are not excluded. Examples[300] of such a clause are as follows:

"The parties shall not be responsible for non-performance due to *force majeure.*"; or,

"Les parties ne seront pas responsables des defauts d'execution de la present convention dus a un cas de *force majeure.*"

The advantage of this approach - if the concept of *force majeure* is part of the proper law - is that the parties know from the outset what system of law will govern the problem of excusable non-performance. Some writers[301] who support this approach offer the following clauses:

"In the performance of their rights and obligations, the parties expressly reserve the case of *force majeure.*"; or

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300. All examples quoted were selected by the author from different types of contracts studied.

301. See, *e.g.*, Jean-Flavien Lalive, International Commercial Contracts: Negotiations with American Lawyers - A Foreign Lawyer's View, 12 The Practical Lawyer, 1966, 71, at 84.

"the case of *force majeure* is reserved."; or
". . . without prejudice to the case of *force majeure*".

This alternative is open to criticism. Where the concept of *force majeure* is not indigenous to the proper law, for example, in English law, there is uncertainty as to the meaning a court will give it.[302] Such a clause in effect surrenders the problem to the proper law of the contract. The provision obviously adds little to the solution that would be obtained under the proper law in the absence of the stipulation. All that is accomplished in clauses of this kind is to make apparent the unity in legal status between the clause and the rest of the contract.[303] The danger is that this approach may only work to the advantage of the party acquainted with the proper law. Such clauses should not be used as they may create more problems than they solve.[304]

(ii) An exhaustive list of exempting events is quoted in the clause without any definition. Here the parties simply enumerate in more or less detail, situations deemed to constitute valid excuses for non-performance of the contract, without any further definition. Here are two examples:
"For the purpose of this contract, *force majeure* shall include war, riots, fire, storm, earthquake . . . ."; or
"The contractor shall be discharged from honouring its obligations under this agreement on the happening of any of the following contingencies: war, riots, fire, floods, earthquake, storm, explosion, strike, act of authority . . . ."

The advantages of this method are various. The list of specific contingencies is not restricted to a specific pattern of events. They are capable of expansion or contraction. The events can be changed in accordance with what the parties had in mind concerning the allocation of risks of non-performance. Through the list method, the parties provide their own choice of contingencies and they are able to determine the scope of their contingency clauses. They can list those events which are in line with their needs and their interests. Indeed, they are able to discriminate among contingencies, selecting those which reflect the circumstances of their trade, discarding irrelevant events.[305] This method reduces the scope for any argument that the contingencies listed are not within the provisions of the *force majeure* clause.

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302. See Evan McKendrick, *op. cit.*, at 23.

303. G. R. Delaume, Excuse of Non-performance and *Force Majeure* in Economic Development Agreements, 10 Colum. J. Transn'l. L. 1971, 242, at 245.

304. *Supra*, pp. 298-301.

305. See Leon E. Trakman, The Contractual Allocation of Unusual Contingencies in International Oil Sales (S.J.D. thesis, Faculty of Harward Law School, 1977), at 369 *et seq.*

Although the clause has these advantages, it is not acceptable as a comprehensive clause for the following reasons: First, contingencies which are not mentioned in the list will not be considered as *force majeure.* Not every contingency that may occur in future can be specified in advance: even the most comprehensive clause may have its omissions. This method is exposed to the danger that a certain contingency which later proves to be of major significance may not have been listed in the clause. If such a contingency is not listed, it may give rise to the inference that its omission was intentional. Secondly, this approach does not provide criteria which the listed events must meet, so as to be considered as *force majeure.* In other words, it does not prescribe the conditions under which the party is excused. For instance, a reference to "war" *per se* is insufficient to disclose the intentions of the parties: the word can be interpreted as a narrow concept such as a declared war by which the performance of contract is physically impossible, or it can be interpreted as a wider concept to include, for example, the situation where threats of war have not prevented the performance of the contract.

(iii) "Qualitative clauses",[306] *viz.*, clauses which only give a general definition of *force majeure.* In this case, the clause provides either an abstract definition of *force majeure* or general criteria for determining whether or not an event amounts to *force majeure.* Here are some examples:

"*Force majeure* means any cause or circumstances that a party can not reasonably control."; or

". . . tous les evenements echappant au control des parties et paralysant totalement les actives de l'Entreprise."; or

"For the purpose thereof *force majeure* shall mean all causes and events beyond the control of the parties which can not be foreseen and, if foreseeable, are unavoidable."

This alternative has the utility of being able to cover events which the parties did not anticipate at the time of contracting and enables them to ensure that contingencies having the characteristics provided in the definition will be regarded as *force majeure.*[307] It avoids the need to compile a list of contingencies which would have been regarded as *force majeure* by the parties.[308]

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306. The expression is borrowed from Clive M. Schmitthoff, Frustration of International Contracts of Sale in English and Comparative Law, 127 (In Helsinki Discussions, *op. cit.*).

307. See UNCITRAL, *op. cit.*, at 236; Karl-Heinz Bockstiegel, Hardship, *Force Majeure* and Special Risks Clauses in International Contracts, In Adaptation and Renegotiation of Contracts in International Trade and Finance, Edited by N. Horn, 1985, at 166).

308. UNCITRAL, *op. cit.*

However, this type of general definition of *force majeure* clearly has the disadvantage of being less precise than the list method. In some situations, it may be difficult to determine whether or not a particular contingency is covered by the clause.[309] The parties may have different views as to the scope of the clause. *A fortiori*, this is so when judges or arbitrators are confronted by such a general definition since they afford no more than a general directive to the solution of actual cases. Thus, nice questions of interpretation are not excluded and the clause may give rise to different constructions.

(iv) A clause which contains a general definition followed by illustrative exempting impediments. This alternative is much preferable to those discussed above. As we have seen, these clauses give rise to difficult questions of construction. The list method may not be comprehensive, and the general definition of *force majeure* is often uncertain in its scope. A general reference to *force majeure* without any further definition may give rise to the application of the general doctrines prevailing in one country or another with unpredictable results. To avoid these difficulties, the parties should draft a clause which provides a detailed list of events and also has a general definition of *force majeure* in order to cover those events not listed but which meet the criteria contained in the definition.[310] In such a clause, the general definition provides guidance but is supplemented by an illustrative list of events which the parties intend to recognise as constituting *force majeure*. This alternative, which is unfortunately seldom found in the contracts, would combine the flexibility afforded by the definition with the certainty arising from expressly specifying of *force majeure* events in the list. Two points should, however, be taken into account. The first is that the parties should expressly state that the list is illustrative and not exhaustive. The second is that the illustrative list of *force majeure* events should also meet the criteria contained in the general definition. Two examples of such clauses are as follows:

"In this contract, *force majeure* shall be deemed to be any cause beyond the reasonable control of the contractor or the purchaser (as the case may be) which prevents, impedes or delays the due performance of the contract by the obligated party and which, by due diligence, the affected party is unable to control, despite the making of all reasonable efforts to overcome the delay, impediment or cause. Without prejudice to the generality of the foregoing, *force majeure* may include, but shall not be limited to any one or other of the following: any war or hostilities; any riot or civil commotion, earthquake, flood, tempest, lightening . . . .";[311] or

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309. Karl-Heinz Bockstiegel, *op. cit.*

310. *Cf.* ICC *Force Majeure* Clause, *op. cit.*

"(1) A party is exempt from the payment of damages, or of an agreed sum, in respect of a failure to perform an obligation under this contract if he proves that the failure was due to a physical or legal impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences (General definition).
(2) The following are examples of events which are to be regarded as exempting impediments, provided that they satisfy the criteria set forth in paragraph (1), above: . . ".[312]

5.1.2. ANALYSIS OF THE ELEMENTS OF THE SUGGESTED DEFINITION

The provision defining *force majeure* should follow a pattern in which certain conditions must be met before an event of *force majeure*, as defined, can be recognised as such. The general definition should be circumscribed within reasonably precise limits. In this respect, a comprehensive definition should clearly provide the elements necessary to establish the occurrence of *force majeure*. It is now appropriate to discuss and analyse which elements should be included in the definition of *force majeure*.

(i) PROXIMATE CAUSE

The problem of cause is perhaps the most difficult part of the *force majeure* clause which can be dealt with satisfactorily. However, as Hurst rightly says, it is probably better for the draftsmen to attempt to come to grips with the problem than to ignore it completely.[313] The following example illustrates the problem. Suppose a situation where there is an oil embargo which greatly reduces the supply of oil. The embargo, however, does not totally cut off the production of oil. If a seller is unable to carry out a contract for the delivery of crude oil, should a judge conclude that the embargo caused the non-performance even though oil is available on the black market? To take another example, should a seller be excused performance because of a lengthy strike caused by excessive wage demands made by the seller's labourers when the seller could have settled the strike by accepting the labourers' demand?

It is accepted by writers'[314] and courts'[315] that the general rule is that the occurrence which is relied upon to invoke the *force majeure* clause must be

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311. Article 34.1 of UNIDO, *op. cit.*

312. This clause is cited in UNCITRAL, *op. cit.*, at 240.

313. Thomas R. Hurst, Drafting Contracts in an Inflationary Era, *op. cit.*, at 902.

the proximate or effective cause of the failure to perform. For example, in ***Wheeling Valley Coal Corp. v. Mead***,[316] the trustee in bankruptcy of a mining company contracted with the lessee of a mine. The contract provided for a minimum payment of royalties by the trustee to the lessee. The contract also contained a *force majeure* provision that excused the above payment upon the occurrence of certain events including interruption of mining due to government acts. Shortly after the execution of the contract, wartime regulations increased labour costs but prohibited price increases for the mineral product. The lessee brought an action to recover arrears in the payments of the minimum royalty. The trustee relied on *force majeure*.[317] The court held that, although the government acts were significant factors leading to the shutdown of the mining operation, inasmuch as these were only some of the factors involved, the proximate cause requirement was not satisfied since the financial insolvency of the operator was the major cause for non-performance of the minimum payment obligation.[318]

When it is clear that national courts will apply the proximate cause doctrine, to provide such a rule in a *force majeure* clause may seem unnecessary as it only restates the appropriate law. However, if the parties wish other causes or events which are not effective or proximate causes, nevertheless to constitute *force majeure*, they must do so clearly and precisely in the clause.

There is also the problem of multiple causation. This occurs when the performance of the contract is prevented by two or more causes of *force majeure* but the impact of each on the party's performance can not be assessed. The non-performance is not attributable to any one particular event of *force majeure* but rather to the aggregate effect of two or more events of *force majeure*. It is therefore desirable for a *force majeure* clause to include that in these circumstances the party seeking relief may rely upon the aggregate effect of all relevant events.[319] A typical example is as follows:

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[314]. See, *e.g.*, Notes, Clauses in Contracts Excusing Default in Performance, Colum. L. Rev. 1920, 776, 777; Gregory P. Williams, *op. cit.*, at 437; John Kelly, *op. cit.*, at 397; H. A. Lewis, Comments, Allocating Risk in Take-or-Pay Contracts: Are *Force Majeure* and Commercial Impracticability the Same Defence? 42 SW. L. J. 1989, 1047, 1062. See also Williston, Sec. 1968 (1920).

[315]. See, *e.g. Ill. Mid-Continent Co. v. Tennis*, 122 Ind. 17, 102 N.E.2d 390 (1951); *Swift and Co. v. Columbia Ry., Gas and Elec. Co.*, 17 F.2d 46, 48 (4th Cir. 1927) (Cotton crop shortage did not discharge mill from obligation because shortage not the cause of failure of mill to perform).

[316]. 186 F.2d 219 (4th Cir. 1950).

[317]. *Loc. cit.*, at 221.

[318]. *Loc. cit.*, at 223.

"Multiple causation: Whenever interrupted or diminished performance is traceable to two or more events or causes of *force majeure,* and whenever under such circumstances it is not feasible or practicable to trace a precise quantum of performance to any one such cause, but only to all such causes in the aggregate shall suffice as an excuse whenever each such cause would have been a *force majeure* cause by itself."[320]

(ii) LITIGATION STRATEGY (ONUS OF PROOF)

The clause should assign to the party claiming the benefit of *force majeure* the burden of showing that he falls within the clause. Typical examples of this can be as follows:
"A party is not liable for failure to perform any of his obligations in so far as he proves: . . . "; or
"The failing party will not be excused unless it is in a position to establish that: it is not in default at the time of the occurrence of an event of *force majeure* and has made all reasonable efforts to avoid . . . ".

Most of the contracts studied did not lay down a duty to prove the existence of *force majere*, although this is not uncommon in general contractual practice.[321] However, the rationale underlying this requirement is logical because the party seeking relief, in fact, claims the *force majeure* so as to benefit from its effects; thus, it seems fair that he should prove it. Moreover, this requirement in the clause also prevents the party from evading its obligations by causing a *force majeur*e event. There are a number of cases in national courts establishing that the party claiming the benefit of a *force majeure* clause bears the burden of proof.[322] However, an express provision to that effect in the general definition of *force majeure* seems to be unnecessary because it only repeats the general norm that the party who relies upon it must prove the existence of *force majeure.* Thus, if this requirement is not expressed in the clause it will probably be implied in any event.

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319. John Kelly, *op. cit.*, at 397.

320. Cited in Marvin O. Young, Construction and Enforcement of Long-Term Coal Supply Agreements - Coping with Conditions Arising from Foreseeable and Unforeseeable Events - *Force Majeure* and Gross Inequities, Rocky Mountain Mineral Law Institute, 1981, 127, at 160.

321. *Cf.* M. Fontain, Les Clauses des *Force Majuere*, *op. cit.*, at 483-484; G.R. Delaume, Excuse for Non-performance and *Force Majuere* in Economic Development Agreements, *op. cit.* at 254.

322. For English cases see *Brauer and Co. (Great Britain) Ltd. v. James Clark (Brush Materials) Ltd.* [1952] 2 All E.R. 497, C.A.; *Tradax Export S. A. v. Andre and Cie S. A.* [1976] 1 Lloyd's Rep. 416, C.A.; *Bremer Handelsgesellschaft mbh. v. Westzucker Gmbh (No. 2)* [1981] 1 Lloyd's Rep. 214; *Tradax Export S. A. v. Cook Industries Inc.* [1982] 1 Lloyd's Rep. 358; *Andre v. Tradax* [1983]1 Lloyd's Rep. 251, 254. For Amerincan cases see *Bangor Peerless Slate Co. v. Bangor Vein Slate Co.*, 270 Pa. 161, 113 A. 790 (1920); *Logan v. Blaxton*, 71 So. 2d 675 (1954).

(iii) USE THE CRITERIA OF "BEYOND CONTROL" AND "NON-FAULT" OF THE PARTY SEEKING RELIEF IN *FORCE MAJEURE* CLAUSE

The circumstances under which a party claims constitute *force majeure* must be beyond his control and not occasioned by his fault or negligence. This principle should be expressed in the definitional provision of *force majeure*. The test of "beyond control" has distinct value in commercial contracts as the test of responsibility. Roughly speaking, circumstances beyond control are those for which the party is not liable. It is clear that circumstances which can be controlled or manipulated by a party may never be considered as an excuse for non-performance. If a party caused an event or allowed it to occur, then to use its occurrence as a basis for excuse would amount to a gross violation of the good faith principle. This is, in effect, the principle of Roman law, "*venire contra factum proprium*".[323] It is probably the most widely recognised characteristic of *force majeure* definitional provisions.[324] However, the criterion introduces a cause and effect analysis into the *force majeure* clause, *i.e.*, an event or a contingency must cause an effect which is beyond the party's control.

Although it may appear that the test of "beyond control" means circumstances not due to the fault of the party,[325] in the present writer's view, "fault" is different from "beyond control". Fault in its broad sense means intentional and negligent acts;[326] whereas "beyond control" is a standard applying irrespective of intention or negligence.[327] For example, a strike may not be caused by the fault of the employer but nevertheless may be within the employer's control. References to "fault" without mentioning "beyond control" or references to "beyond control" without specifying "fault" are therefore misleading. If both are included in the clause, a more accurate picture of the circumstances in which *force majeure* arises is obtained. Therefore, from a drafting point of view, the occurrence of events should be beyond control, and arise without the fault of the promisor. This approach is a better way to

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323. N. Horn, *op. cit.*, at 135.

324. See G. R. Delaume, Excuse for Non-performance and *Force Majeure* in Ecocomic Development Agreement, *op. cit.*, at 255. See also *Force Majeure* clauses contained in ICC, Publication No. 421, *op. cit.*, and UNIDO, *op. cit.*

325. Affolter, Helsinki Discussions, *op. cit.*, at 248.

326. See chapter three, pp. 128 *et seq.*

327. See W.W. McBryde, The Law of Contract in Scotland, Edinburgh, 1987, at 353.

regulate the parties' actions so as to prevent abuses of *force majeure* excuse. This test is also suggested by an American court:
"In order to use a *force majeure* clause as an excuse for non-performance the event alleged as an excuse must have been beyond the party's control and not due to any fault or negligence by the non-performing party. Furthermore, the non-performing party has the burden of proof as a duty to show what action was taken to perform the contract, regardless of the occurrence of the excuse."[328]

It has to be added that in order to emphasise that the word "fault" also covers "negligence", the latter should be expressly mentioned in the clause. As discussed before,[329] in English law, for example, it is not yet clear that whether fault includes negligence in the context of frustration.

In addition, the party seeking relief under the clause must be in good faith. This requires that he has made reasonable efforts to avoid or overcome the supervening event and its impact, so as to resume performance as soon as it is possible to do so.[330] Thus, according to the suggested definition, no party will be entitled to rely on an event of *force majeure* unless he can demonstrate three facts:
(i) that the occurrence of the event was beyond his control and not occasioned by his fault or negligence;
(ii) there were no reasonable steps which he could have taken to avoid or overcome the consequences of that event ;
(iii) the occurrence of the event was unforeseen or unforeseeable.

In practice, most *force majeure* clauses impose an obligation upon the party claiming *force majeure* to take all reasonable alternative measures to continue performing the contract. For example, the UNIDO model form contract,[331] provides that a party is obliged to take all reasonable steps to overcome the circumstances of *force majeure* to the degree possible to facilitate the execution of the contract. The duty to take reasonable steps to avoid or overcome the event of *force majeure* is of great importance in the context of long-term contracts; since the long period of time over which the contractual performance is to be rendered will usually permit almost any event of *force majeure* to be avoided or overcome before the time for the completion

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328. *Martin v. Department of Environment Resources*, 548 A.2d 675, 678 (Commonwealth Ct. Pa. 1988).

329. See chapter three, pp. 136, 137.

330. H. O. Hunter, Commentary on Pitfalls of *Force Majeure* Clauses, J. C. L. 1991, 214, at 216.

331. *Op. cit.*, Art. 34. Cf. ICC, *op. cit.*

of performance has expired.[332] Another rationale underlying this rule is that if the party has the ability to prevent the occurrence of an event, this suggests that the event by itself did not actually prevent the performance and thus, the *force majeure* event was within the control of the party. Therefore, this rule provides a standard by which an event qualifies as "beyond control" or "within control".

However, an important point which a draftsman will need to address is to define the standard of performance required of a party in seeking to avoid or overcome the event. This, of course, involves determining what degree of impossibility or impracticability should excuse the party under a *force majeure* clause. Must the event be one which is completely insurmountable or is it sufficient that it must be extremely difficult or burdensome to overcome? This standard can vary substantially from contract to contract. In some contracts the standard is that performance must be prevented and materially affected by the *force majeure*. In others, it may be sufficient that *force majeure* renders the performance impracticable. At any rate, the draftsman should clarify the standard in the clause. In the present writer's view, the most appropriate standard is that the event renders performance impossible since, as argued before,[333] this avoids confusion and uncertainty. The problem of hardship and other related matters should not be dealt with in a *force majeure* clause but in other clauses such as a hardship clause.

What should be the basis of reference in relation to "beyond control"? What should be the test to determine whether the *force majeure* event could have been avoided or overcome? Should the test be subjective or objective? Draftsmen are free to stipulate either an objective or subjective test or even refer to mixed criterion. On an objective test, reasonable behaviour and control is expected of the party. The parties are expected to act in the way that an ordinary and reasonable person would act under the circumstances to remove an obstacle which prevents the performance of the contract. On a subjective test, reasonable ability is not the criterion but the ability of the actual party to control such an event. Sometimes it will be difficult to discover the ability of the actual party, in which case, the reasonable control standard does ensure that the parties conform to an objective standard of competence in fulfilling their duties. Nevertheless, whatever test is chosen, it should be

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332. Edmond M. Carney, The Nature and Extent of the Excuse Provided by a *Force Majeure* Event under a Coal Supply Agreement, East. Min. L. Rev. 1983, 11-1, at 11-33.

333. Supra, 306-309.

clearly expressed in the definitional provision of the clause. The present writer believes that the basis of reference should be the mixed criterion, *viz.*, "subjective, objective test". "Actual control" should be the first reference in the clause, *viz.*, the obligor must do all in his "actual" power to avoid or overcome the impediment. The clause should then provide that if from the surrounding circumstances it is not possible to discover whether "actual" diligence was exercised, reference should be made to the reasonable control test or "due diligence", which is used in Civilian systems.[334]

In summary, the definitional provision of *force majeure* must include, at least, the following elements in its definition:

- the criterion of beyond control;
- non-fault(including non-negligence) of the party seeking relief;
- duty to avoid or overcome the event; and
- the foresight test.

A typical example of such a definition is as follows:

"For the purpose of this agreement, a failure shall be regarded as caused by *force majeure* only if the party seeking relief proves that the event was actually unforeseen (or reasonably unforeseeable), outside the actual (or reasonable) control of the party failing and was not caused by that party's fault or negligence and that the party failing has taken all its actual (or reasonable) precautions or measures with the object of avoiding or overcoming the event and of carrying its obligations hereunder."

It should be noted that the parties should make completely clear what is the basis of reference *viz.*, subjective, objective or mixed. Moreover, the wording of the definition can be modified as long as it contains the above elements.

(iv) USE THE CRITERIA OF "CONCRETE-ABSTRACT FORESIGHT" IN *FORCE MAJEURE* CLAUSE

The "foresight test" is another important and essential element which should be contained in the definitional provisions of *force majeure*. It is generally held that the party seeking relief can not claim the benefit of relying on *force majeure* with respect to an event the occurrence of which was foreseen at the time of contracting. Some writers[335] believe that a foreseeable event should sometimes be regarded as *force majeure* and suggest that in

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334. Objective standard which is often used in Civilian systems, is under the rubric of "due dilegence". See de Vries, Civil Law and Anglo-American Lawyer, 1976; Von Mehren, The Civil Law System, *op. cit.*

335. For example, see N. Horn, *op. cit.*, at 134.

interpreting a *force majeure* clause, too much emphasis should not be placed on the issue of foresight. It is the present writer's view that such an "anti foresight test" should not be preferred to the use of the foreseeability criterion. There is no good reason why there should not be a foresight test in the clause. The existence of the test in the clause gives more weight to the stability of contracts, removes future uncertainty and it is more consistent with the principle of freedom of the contract. Moreover, it is irrational to say that a party who has foreseen the contingency, has not assumed the risk of its occurrence. If the contingency is foreseen by the obligor, he can either refuse to contract or make provision for its occurrence in the contract. Otherwise, it should be inferred that he has consciously entered into such a contract and has assumed the risk. For example, in construction contracts in Britain, certain types of works are more difficult and more expensive to perform in December than in June. Although a British contractor is not expected to control the weather, he is expected to know the problems bad weather causes. If he enters a contract to work in December, the contractor's claim that the work is more difficult or more expensive should not be accepted., since the weather conditions at that time of year are foreseeable.

Most legal systems address the issue of excusable non-performance when there is an unforeseen or unforeseeable contingency.[336] In interpreting a *force majeure* clause or other general clauses such as "acts of God" and "unavoidable delays or accidents", national courts often employ the foreseen or foreseeable criterion .[337] However, according to the principle of freedom of contract, the parties are at liberty to define *force majeure* in whatever manner they desire.[338] The operation of *force majeure* due to the lack of a foresight test will not be affected, unless the clause otherwise provides.[339] Parties may wish to negate the "foresight test" in the clause or stipulate that the clause may be relied upon by the party seeking relief notwithstanding that the contingency relied upon was foreseeable if not foreseen, *viz.*, using subjective criterion. They may also use the objective instead of subjective criterion. However, whatever the intention of draftsman, it is clearly useful to indicate in the clause the test that is to be used.

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336. See chapter three, pp. 105-128.

337. See for example *Logan v. Blaxton*, 71 So.2d 675 (1954).

338. *Atlantic Richfield Co. v. ANR Pipeline Co.* 768 S.W.2d 777, 781 (Tex. App. 1989).

339. 6 Williston, Contracts, Sec. 1931 (Rev. ed. 1938); Restatement of Contracts, Sec. 457 (1932).

Each criterion has its own effects since there exists a distinction between an event which is "foreseen" (subjective test) and an event which is "foreseeable" (objective test). An "unforeseen" event is one which was not actually contemplated by the party. An "unforeseeable" event is one which could not reasonably have been contemplated by a reasonable man. In the foreseeability test, the standard of the reasonable man is used which may penalise a party who fails to anticipate the foreseeable event. Although such a standard is often employed by the courts[340] and the overwhelming majority of *force majeure* clauses use this criterion, the disadvantage of this test is that while a court may deem a contingency foreseeable, it does not mean that the parties actually contemplated it. The deficiency inherent in the test is its unrealistic overestimation of the foreknowledge of parties.

The objective foreseeability test raises a special problem in the context of strikes. According to the test, the occurrence of strikes will be rarely unforeseeable by the parties to contracts.[341] Courts which use this test will always consider a strike to be foreseeable. For example, in ***Mishara*** case,[342] the court held that a labour strike was foreseeable so its occurrence could not constitute an event upon which an impracticability claim could be founded. Hindsight is another factor which decreases the value of the objective test.[343] There is a danger that once an event has occurred, it will appear in retrospect to have been reasonably foreseeable, although before its occurrence it was not actually contemplated by the parties. For example, in 1944 it was very easy in the United States to say that a reasonable man must have contemplated the war when he considered the matter in 1940. Nevertheless, in 1940 many did not actually think war would come.

Because of these problems, it is suggested that the "concrete abstract foresight test" should be used by parties when drafting *force majeure* clauses. According to this criterion, which is a combination of the subjective and objective standards, attention is primarily focused on whether the party seeking relief has actually foreseen the event. Where the party is actually able to foresee the occurrence of the event, he will not be entitled to excuse of performance even though the event may not have been foreseeable by a prudent party at the time of contracting. The fact that a particular risk was not

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340. See chapter three, pp. 105-128.

341. See Note, Labor Strife and UCC Sec. 2-615: On Strike and You're out? *op.cit.*, at 682.

342. *Mishara Constr. Co. v. Transit-Mexed Concrete Corp.*, Mass. 122, 310 N.E.2d 363 (1974).

343. Cf. Stewart Macaulay, *op. cit.*, at 835, 836; Hurst, Freedom of Contract, ... *op. cit.*, at 568.

foreseeable by a reasonable man in and of itself is an insufficient justification to grant excuse when the event was actually foreseen by the party seeking relief. Conversely, a promisor should be granted excuse if he actually did not foresee the event even though it was foreseeable by a reasonable man. In determining what the parties actually foresee the following factors are relevant *viz.*, the provisions of the contract, the specific facts involved, the bargaining power of the party, surrounding contingencies, the parties' negotiations before the conclusion of the contract, provisions in similar contracts which the party seeking relief has entered, the nature and source of the contingency and its remoteness to the subject matter. All are indicative of whether it was the type of a risk of which a party would generally be aware. If after considering these factors, the court can not determine whether the contingency was or was not foreseen by the obligor, only then should reference be made to the objective test.

(v) DEFINE AND ENUMERATE THE RELEVANT EVENTS OF *FORCE MAJEURE* AS COMPREHENSIVELY AS POSSIBLE

Apart from the definition of *force majeure*, the typical well-drafted clause should list as many types of events as the parties imagine or envisage as necessitating excuse of non-performance of the contract. Two points should be taken into account. The first is that the list should be illustrative and not exhaustive. If the list is exhaustive it means that events which are not enumerated in the list will not be considered as *force majeure*. The difficulty with exhaustive list is that it is not, and never will be, complete. Draftsmen are simply not capable of foreseeing and incorporating all categories of every contingency which may occur in future.[344] To create such a list excludes by implication those *force majeure* events that are not listed in the clause.[345] However, in order to ensure that a list is merely illustrative, the clause should expressly stipulate that the list is not intended to be exclusive. The list will be open-ended if the following words or phrases are used: *viz.*, "not limited to", "such as", "any such similar causes", "the enumeration is non-inclusive", "etc.". Examples of illustrative lists are as follows:
"A *force majeure* event within the above mentioned definition may result from events such as the following, this enumeration not being exhaustive: war, natural disasters, explosions . . ."; or

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344. See Norman Prance, Energy Contract Planning: Allocating the Risks and Consequences of Commercial Impracticability, 3 Hasting Int'l. L. Rev. 1980, 435, 445.

345. *Field Container Corp. v. Interstate Commerce Comm'n.*, 712 F.2d 250, 257 (7th Cir. 1983).

". . . for the purpose of this article, *force majeure* shall include but not limited to any events such as war, insurrection, civil commotion, strike, storm, tidal wave, flood, epidemic . . ."; or
"The damages resulting from war, earthquake, civil commotion . . . *etc.*"; or
"Any failure or delay in the performance by either party . . . to the extent that it is caused by the occurrences unforeseen . . . beyond the control of the party affected . . ., including, but without limiting the generality of the foregoing, acts of governmental authority, acts of authority, acts of God, strikes, fires, floods, explosions, war, . . .".

The second point is that the illustrative list should meet the criteria contained in the provisional definition of *force majeure* in the clause, otherwise, the definitional provision of *force majeure* and its list of events will fulfil different functions. Moreover, the parties will have to rely on varying judicial interpretations of the clause. But, as discussed before,[346] a general definition supplemented by an illustrative list of exempting events which meet the criteria of the definition can give guidance to the judges and arbitrators to settle disputes under the intended scope of the general definition. In addition, this method ensures that the listed events will be treated as *force majeure* if they meet the criteria provided in the definition.[347]

The list should be drafted in the widest terms to cover as many events as possible. The parties will have to plan for such contingencies in advance and preference should be given to those events which are more likely to affect the contract. Indeed, the parties should discriminate among the events, selecting those events which reflect, for example, their trade circumstances, and discard unrelated events. Thus, lists of events will be different in different types of contracts. For example, specific events in international oil contracts will differ in fundamental aspects from the list of events in international sale of machinery. While in the former, specific contingencies would be events such as explosions in oil refineries, blockages in oil pipelines, tanker collisions, oil spills at sea *etc.*,[348] in the latter, specific contingencies would include rust and changes in the tensitility of the machinery sold. For example, in a contract for the sale of steel, the list may contain the following clause:
"Natural and superficial rust due to atmospheric conditions shall not entitle the buyer to refuse payment or acceptance of the products . . .".[349]

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346. *Supra*, 298-301.

347. UNCITRAL, *op. cit.*, at 236.

348. Leon E. Trackman, S. J. D. thesis, *op. cit.*, at 370.

349. Cited in Leon E. Trackman, *op. cit.*, at 407.

In other words, the parties should list those events which are more related to their contract and are more likely to occur. The definitional provision in the clause may be supplemented by natural events or acts of God (such as violent storms, cyclones, avalanches, earthquakes, tidal waves, floods, lightning); or
man made ones (such as war, riots, revolutions, political disasters, hostilities, insurrection, strikes, acts of authority); or
other events such as explosion, fire, destruction of machines, changes in national and international financial, political or economic conditions, changes to currency exchange rates and exchange control regulations.

5.1.3. SUGGESTED DEFINITION AVOIDS THE APPLICATION OF THE MAXIM OF *EJUSDEM GENERIS*

It is common in *force majeure* clauses to list various events and then include a "wrap-up" or "catch-all" clause in such terms as "any cause beyond the control of the party seeking relief" or "any accident or incident of any nature beyond control". This feature of *force majeure* clauses leads to uncertainty and instability in contracts. Moreover, the parties actually do not know when the defence can be invoked, since the construction of the clause may be subject to *ejusdem generis* rule. This maxim is a rule of judicial interpretation, according to which where general terms are preceded by a list of specific events, the general words are not to be given their wide meaning but are to be considered as applying only to persons or things of the same general class or the same general type as those things which are specifically enumerated.[350] There are a number of American cases where the maxim has been applied. In ***New York Coal Co. v. New Pittsburgh Coal Co.***,[351] for example, the *force majeure* clause in a coal lease provided that in cases of strikes, walkouts, fires, floods, and "any other cause beyond the control of the lessee" the clause would be operative. However, the roof in a portion of the mine could not be supported by any means and was so dangerous that the

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[350]. See *e.g.*, *Goldsmith v. United States*, 42 F.2d 133 (2d Cir. 1930); *Aleksich v. Industrial Accident Fund*, 116 Mont. 69, 151 P.2d 10 (1944); *Bumpus v. United States*, 325 F.2d 264, 266-267 (10th Cir. 1963); *Eastern Air Lines, Inc. v. McDonnel Douglas Corp.*, 532 F.2d 957, 988 (5th Cir. 1976).

[351]. Ohio St. 140, 99 N.E. 198 (1912). See also *Bennett v. Howard*, 175 Ky. 797, 195 S.W. 117 (1917); *Standard Silk Dyeing Co. v. Roessler and Hasslacher Chemical Co.* (D.C. 1917) 244 Fed. 250 (A British order in council putting an embargo on goods shipped from Germany was not within the the meaning of the phrase, "causes beyond their control"); *Elkhorn-Huzard Coal Co. v. Fairchild*, 202 Ky. 635, 260 S.W. 1115 (1924); *Langham-Hill Petroleum, Inc. v. Southern Fuel Co.*, 813 F.2d 1327, 1329-30 (4th Cir.), *cert. denied*, 108 S.Ct. 99 (1987). See also *Eastern Air Lines, Inc. v. McDonnel Douglas Corp.*, 532 F.2d 957, 988 (5th Cir. 1976).

miners refused to work in that area. By applying *ejusdem generis* rule, the court held that the refusal of miners to work in that area for safety reasons did not constitute a strike and that the general language concerning causes beyond the lessee's control did not apply to a permanent situation such as the condition of the roof inasmuch as all the preceding events listed in the clause were temporary in nature.

Unlike the position in America, the predominance of authority in England is that a "wrap up" clause will not be construed in accordance with the *ejusdem generis* rule.[352] For example, in ***Ambatielos v. Anton Jurgens Margarine Works***,[353] the House of Lords held that such a "wrap up" clause should not be construed *ejusdem generis* with the specific events enumerated earlier in the *force majeure* clause. However, in ***Sonat Offshore S.A. v. Amerada Hess Development Ltd., and Texaco (Britain) Ltd.***,[354] the court reached a contrary decision. There it was held by the Court of Appeal that the general clause, "or other cause beyond the reasonable control of such party", was to be construed *ejusdem generis*, and not disjunctively, with the words in the catalogue, and therefore did not extend to breakage or failure of drilling equipment on an oil rig caused by the alleged negligence or wilful default of a party.

At an international level, this issue arose in a well-known case where the Ex-USSR ban on oil export led to the arbitration in ***Jordan Investment Ltd. and Sojusneftexport of 1985***.[355] In this case, refusal to grant export licences was not listed in the *force majeure* clause. Therefore, the buyer relying on the maxim of *ejusdem generis*, argued that the general principles of construction of contracts would apply. In rejecting the buyer's argument, the award stated that the refusal of licences by the Ministry was covered by the words "any other cause beyond the control of the non-performing party".

It is the present writer's contention that there are drafting solutions to this problem. In order to negate the *ejusdem generis* rule, the general provision should be added to the definitional provision of *force majeure*. This provides the solution as the general definition with its elements, precedes the specific enumeration of events. It might be argued that by so doing, the

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352. *Bremer Handelsgesellschaft mbH v. Westzucker GmbH (No. 2)* [1981] 2 Lloyd's Rep. 130, C.A.; *Bremer v. Handelsgesellschaft mbH v. Continental Grain Co.*, [1983] 1 Lloyd's Rep. 269, at 283, Anker J.

353. [1923] A.C. 175.

354. 1 Lloyd's Rep. 145, 148.

355. This case will be disdcussed later. See *infra*, pp. 341-343.

construction of the clause will fall under a variant of the maxim *inclusio unius est exclusio alterius.*[356] The answer to this question is that the specific events are listed in an illustrative way and not by way of limitation.[357] Thus, the use of such phrases as "including but not being limited to", "not limited to", "such as" and "the enumeration is non-inclusive"[358] has the effect that the list of events is not exclusive. To include events which may give rise to disputes, the language of the clause should be of the utmost clarity. In this way, the clause being limited by rules of construction such as the *ejusdem generis* rule will be avoided.

5.1.4. POSSIBLE EXEMPTING EVENTS

There are a few events that may give rise to dispute and call for special attention when drafting the clause. These events may not be beyond control yet are treated as sufficient excuse for non-performance. From the outset, the parties should make it completely clear whether or not they wish these events to be regarded as *force majeure.*

(i) STRIKES:

Where there is a strike by the obligor's own employees, it may be difficult to determine whether he can rely on the strike as *force majeure.* Strikes may be within the control of the party asserting the defence, since he could meet the strikers' demand and some degree of performance may be possible if attempts are made to operate the enterprise during the strike.

Another problem arises in view of the ideological controversies which exist between the capitalist and socialist societies. In the latter, there may be ideological resistance to *force majeure* where the event consists of a strike or other industrial actions, because it is assumed that the term "industrial disputes" are not beyond control.[359]

Apart from socialist societies, the prevailing opinion today considers a strike to be an event of *force majeure.* It is expressly provided in the ICC suggested *force majeure* clause[360] and is cautiously reflected in Article 34 of

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356. The inclusion of one is the exclusion of another., or, the certain designation of one person is an absolute exclusion of all others (*Burgin v. Forbes*, 293 Ky. 456, 169 S.W.2d 321, 325).

357. See also John H. Stroh, The Failure of the Doctrine of Impracticability, The Corporation L. Rev. 1985, 195, at 226, note 100.

358. See pp. 312-316.

359. See Helsinki Discussions, *op. cit.*, at 237.

360. *Supra*, at 277.

the UNIDO model form turnkey contract.[361] Domestic laws also consider strikes as having exempting effects provided that certain preconditions are met. In English law, where the industrial action is carried out by the employees of the party seeking relief, the courts may conclude that the contract is not frustrated on the basis of "self-induced frustration".[362] However, the English courts have generally accepted that if the party claiming benefit of *force majeure*, has taken reasonable steps to avoid the strike, he may be able to rely on clause. In ***B. and S. Contracts and Design Ltd. v. Victor Green Publication***,[363] where a party to a join-venture agreement failed to establish that it had taken all reasonable steps to solve the dispute, the court did not permit the party to rely upon the *force majeure*.

In the case of a strike by a third party, and in the absence of an express contractual provision on the point, if the strike causes a radical change in the nature of the obligation,[364] for example, by causing delay, the contract may be held to be frustrated.[365]

In the Civil law a strike is also treated as having exempting effect.[366] In French law, a strike is an event of *force majeure* provided that it was unforeseeable as well as irresistible and not imputable to the obligor. In ***Bouvier v. E.D.F.***,[367] the court held that the strike was in fact irresistible, since it concerned all the employees and covered the whole territory of France; but it did not constitute *force majeure* because before the strike there was evidence of dissatisfaction amongst the employees and the negotiations had not been satisfactory, with the result that the strike was foreseeable by the employer.

These points should be taken into account when drafting the clause. When contracts are concluded between parties from socialist and non-socialist countries, the party from non-socialist country should make it clear

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361. ". . . any strikes, lock out or concreted acts of workmen (except where it is within the power of the party invoking the *force majeure* to prevent);. . . ."

362. *Budgett and Co. v. Binnington and Co.* (1890) 25 Q.B.D. 320, *affirmed* [1891] 1 Q.B. 35 (C.A.). For the concept and analysis of self-induced frustration, see chapter three, pp. 132 *et seq.*

363. [1984] I.C.R. 419 (C.A.). See also *Channel Island Ferries Ltd. v. Sealink U.K. Ltd.* [1987] 1 Lloyd's Rep. 559, *affirmed* in [1988] 1 Lloyd's Rep. 323 (C.A.).

364. See *Davis Contractors Ltd. v. Fareham U.D.C.* [1956] A.C. 696, at 729.

365. See *Hick v. Raymond and Reid* [1893] A.C. 22 (H.L.); *The Nema* [1982] A.C. 724.

366. P. Le Tourneau, La Responsibilite Civil, 1982, pp. 240-241, 248; Mazeaud, Responsibilite, (1970), at 710; Mazeaud, Lecons, (1985) at 637.

367. Trib. Gde Instance April 29th 1963, D. 1963. 673; *Ste Anon. Musee Grevin v. E.D.F.*, (Civ. Com. Nov. 21st 1961 D. 1968. 279. C. Cass.).

from the outset whether or not strikes are considered as *force majeure.* Secondly, a strike should be expressly included in the list of events. Moreover, the particular kinds of strikes which are intended should be specified *viz.*, legal or illegal, wildcat or organised, industry wide or local, *etc.* The parties may choose to give exempting effect only to certain kinds of strikes, for example, strikes recognised by respective trade union. Thirdly, it could be argued that the existence of a strike in the clause will encourage employees to take industrial action if they believe that the potential termination of a contract is a pressure which they can put on their employer.[368] The draftsman can counter this: he may restrict the possibility of termination to strikes by the employees of third party. He may provide that only those strikes that do not arise from labour relations between the party and his employees, for example, a strike which covers the whole country or sympathy strikes, are to be considered as having exempting effect.[369] Finally, he may provide that settlement of strikes and other disputes is a matter wholly in the discretion of the party claiming the benefit of *force majeure.*[370] In that case, there will be *force majeure* even though the strike can be settled by acceding to the demands of the strikers. Such a clause may be as follows:

". . . A strike or other labour disturbance shall be deemed to be beyond the control of the party whose performance is prevented by such strike or labour disturbance, and nothing in this Agreement shall be construed as requiring either party to accede to the demands of employees, whether or not represented by a union or other organisation, which such party considers contrary to its interests. Subject to the foregoing, a party claiming excuse by reason of *force majeure* shall exercise good faith efforts to remedy the cause thereof as soon as practicable under all the circumstances."[371]; or

"Party in removing or remedying such cause, shall not be required to settle strikes or lockouts or government claims by acceding to any demands when in the discretion of the party it would be inadvisable to accede to such demands."[372]

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368. McBryde, *op. cit.*, at 356.

369. UNCITRAL, *op. cit.*, at 238.

370. M. E. Wright, Effects of Changed Circumstances on Mineral and Petroleum Sales Contracts, AMPLA Yearbook, 1984, 331, at 345.

371. Cited in O. Young, Construction and Enforcement of Long-Term Coal Supply Agreements - Coping with Conditions Arising from Foreseeable and Unforeseeable Events - *Force Majeure* and Gross Inequities Clauses, Rocky Mountain Mineral Law Institute, 1981, 127, at 159.

372. Cited in Trackman, S.J.D. thesis, *op. cit.*, at 400, note 63.

Although leaving the resolution of strikes and other labour disputes to the sole discretion of the affected party is defended by some writers,[373] in the present writer's opinion this should not be supported since a strike is an event which can be controlled and manipulated by the employer. Indeed, the employer could precipitate a strike in order to use its occurrence as a basis for a claim under *force majeure* clause and thus be excused performance of a contract which he found unsatisfactory. Thus, it is submitted that a strike by the party's employees should not be regarded as *force majeure*.

(ii) WAR:

War is another event which is listed in most *force majeure* clauses. It is sometimes difficult to determine when a war can be regarded as a *force majeure*. The word "war" has many potential meanings. For example, it may be claimed that there is a war, when there is no actual fighting on the ground, at sea or in the air. Such was the position for several years between Egypt and Israel until their final peace treaty in 1979.[374] Moreover, there may be an actual war which does not affect the performance of a contract, for example, in the construction of industrial works,[375] frequent air raids near the construction site may be very dangerous but may not actually prevent the performance of the contract.

The parties should therefore make it clear whether to allow excusable non-performance if there is any type of war, declared or undeclared, or whether only "declared war" should constitute a circumstance beyond control. Again the parties should make it clear whether the existence of war is to be decided as a matter of common sense or international law (formal declaration). They should therefore avoid using the word "war" without giving it an express meaning. For example, the following clause ". . . including but not limited to earthquake, flood, war, . . .", is open to criticism, because it is not clear whether it refers to declared or undeclared war. Nor is it clear whether it refers to actual war or whether it refers to a situation where the performance of contract is actually prevented. In ***Kawasaki Kisen Kabushiki Kaisha v. Bantham Steamship Co. Ltd. (No.2)***,[376] the charterparty provided

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[373]. For example see John Kelly, *op. cit.*, at 394; M. E. Wright, *op. cit.*, at 345; Edmund M. Carney, The Nature and Extent of the Excuse Provided by a *Force Majeure* Event under a Coal Supply Agreement, Eastern Mineral Law Institute, 1983, 11-1, at 11-36.

[374]. See Brian Davenport, War Clauses in Time Charterparties (In *Force Majeure* and Frustration of Contract, Edited by McKendrick, *op. cit.*), at 135.

[375]. See UNCITRAL, *op. cit.*, at 237.

that: "Charterers and owners to have the liberty of cancelling the charterparty if war breaks out involving Japan." Relying on this clause, the owners cancelled the charterparty on the ground that such a war had broken out. The charterers did not accept the cancellation and claimed damages. The Court of Appeal rejected the argument that the word "war" had any technical meaning derived from international law.[377] The matter was to be decided in a "common sense way". This case clearly illustrates that how the word "war" could be interpreted in different ways. While the charterer meant the word to mean an official declaration of war, the court regarded it to be construed in a "common sense way".

Having made clear what type of war is intended, the parties should also expressly provide in the clause whether the commencement of war is sufficient or whether hostile action which actually prevents the performance is intended. Otherwise, and in view of uncertainty that abounds in this area, the parties may encounter an unpredictable result.

(iii) ACTS OF A THIRD PARTY

Further difficulties arise where the failure of a party to perform his obligation under a contract has been caused by a third party, *viz.*, supplier or subcontractor. The question arises whether, and to what extent, the party is exempt from the payment of damages for a failure caused by persons to whom he entrusts performance or with whose help he performs. For example, in a construction contract, it is common to engage subcontractors to perform some of the contractor's obligations under the contract.[378] In international contracts, it is also common for a seller, for example, a trading house,[379] to buy and sell commodities on the world market. The trading house will often buy the commodity from a third party and runs the risk that the third party will not supply the commodity with the result that the seller can not deliver the goods he had sold.

However, contractual clauses rarely deal with this problem and accordingly general legal rules of the proper law of the contract will be applicable. An exception is Article 79 of Vienna Convention which attempts to

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376. [1939] 2 K.B. 544. See also Brian Davenport, *op. cit.*, at 134-135.

377. For the meaning of war in public international law, see McNair and Watts, The Legal Effects of War, 4th ed. 1966.

378. See chapter XI, "Subcontracting" in UNCITRAL, *op. cit.*

379. See the example in pp. 304, 305.

deal with the difficulty.[380] But, as we have seen, there are various opinions on how this Article should be interpreted. National laws rarely solve the problem. According to German law,[381] for example, the obligor is *prima facie* liable for such persons. This means that his performance is excused if his supplier's performance is likewise excused under the *force majeure* provisions of the principal contract.[382] However, the scope of this general rule may be restricted by provisions of law or judicial practice and doctrine, which charge the obligor in some kinds of contracts with the full risk of obtaining the subject matter of the contract.[383] In these circumstances, the party is not released from his obligation to perform. For example, in a contract of sale, the trade house is obliged to seek alternative sources of supply or face the prospect of being in breach.[384] If the *force majeure* clause does not expressly refer to this event in its list, the party concerned will remain liable. Accordingly, if relief is intended, the clause must expressly so provide. In the example of the trading house, it has been suggested[385] that the seller can protect itself in one of two ways: It could provide in the clause that performance is to be suspended or terminated if it is unable for any reason to obtain the goods, or specifically identify the country of origin of the contract goods. An example of such clause is as follows:

". . . including but not limited to defaults of suppliers or sub-contractors for any reason whatsoever, . . .".

Such a general provision in a *force majeure* clause is, however, open to subjective manipulation because circumstances will vary from case to case and the formula may not, therefore, produce a fair result in every case. The relation of the supplier or the sub-contractor to the two main parties or to one of them should be made explicit, for example, where the supplier has been named in the contract whether the goods can be obtained from other available sources. Again, it should be stated whether the supplier or sub-contractor has been appointed by the obligee or obligor. If the third party is appointed by the obligor, he will remain liable even though it was the third party who had defaulted, whatever the reason for the default. If the particular supplier or sub-

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380. *Supra*, pp. 257, 258.

381. See Para. 278 of German Civil Code.

382. A. Wisniewski, *Force Majeure* Clauses in Polish Trade with the West, Yearbook on Socialist Legal Systems, 1987, 343, at 353.

383. See *e.g.*, Para. 279 of German Civil Code.

384. Cartoon , *op. cit.*, at 233; Yates, Drafting *Force Majeure* and Related Clauses, *op. cit.*, at 204.

385. See Cartoon, *op. cit.*, at 234; Yates, *op. cit.*, at 205.

contractor was imposed upon the seller by the buyer, then the seller could escape liability by arguing that non-performance was as a result of the buyer's action,[386] provided the seller could establish that the buyer should have foreseen the possibility of the third party's failure which caused the seller's failure to perform.[387]

In drafting such a clause, attention should be also focused on whether there is a very specific product, whether any raw material concerned is commonly available, or whether a public utility such as a water or electricity supplier, which often has a monopoly, is involved.

Thus, in general, the failure of a supplier or a sub-contractor is not *per se* an extraordinary event, unless the failure by the third party whom the obligor has engaged to perform the whole or part of the contract, is also due to an extraordinary event. In other words, the party is only exempt from liability if its non-performance complies with the conditions described in the suggested definition of *force majeure* and the third party whom he has engaged would also be exempt under the suggested definition. Thus, the clause may be drafted as follows:

"If the party's failure to perform by a third person whom he has engaged to perform that obligation, the party is exempt . . . only if:
(a) with respect to the party, the criteria [suggested definition] set forth in paragraph (1) are satisfied and
(b) the third person would be exempted if the provisions of paragraph (1) [suggested definition] were applied to him."[388]

(iv) ACTS OF AUTHORITY

Another event which may give rise to dispute is acts of authority or acts of state. An act of authority refers to any unforeseeable hindrance arising from an act by a public authority exercising effective powers.[389] These acts could take the form of restrictions on import, export, payment, exploiting natural resources, building, labour, *etc.*[390] It is common in contracts to include acts of state or government among those events which constitute a defence to an action for breach of contract if these acts prevent performance. Refusal by a

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386. *Cf.* Article 80 of the Vienna Convention, at pp. 261-262.

387. Barry Nicholas, The Vienna Convention on International Sales Law, *op. cit.*, at 237.

388. Cited in UNCITRAL, *op. cit.*, at 240. The phrase in square brackets relates to this writer's suggested definition. *Cf.* Para. 2 of Art. 79 of the CISG.

389. Council of Europe, *op. cit.*, at 16.

390. See ICC, Publicaion No. 421, *op. cit.*, at 14.

government to grant official licenses which are necessary for the fulfilment of the contract, where, for example, export and import are prohibited, is one of governmental intervention.[391]

With respect to acts of authority in general and export and import prohibitions, in particular, the following important points should be taken into account:

It is advisable to make clear in the contract which party has responsibility for applying for such a licence, and in case of refusal or withdrawal of authorisation, which party will bear the risk.[392] If the contract makes express provision, then no problem will arise. If there is no express provision the solution will differ according to the applicable law. Under English law, for example, the duty is imposed on the party who is in the best position to obtain the licence. In practice, this will usually be the seller,[393] because he is familiar with the rules of export in his country.[394] Sometimes, this duty falls upon the buyer,[395] or, indeed on both parties (co-operation). In ***Kyprianou v. Cyprus Textiles Ltd.***,[396] although the responsibility for obtaining the licence rested with the seller, his inability to obtain the licence resulted from the buyer's failure to send him a certificate which was required by the authorities and without which the licence could not be obtained.

Secondly, the party responsible for obtaining authorisation would be well advised to ensure that the contract provides that performance is conditional upon the authorisation being obtained. If the contract expressly stipulates the nature of this duty, there will be little difficulty. For example, if the contract is made "subject to licence", then that party will only be required to use reasonable efforts or due diligence to obtain the licence. Indeed, as he does not warrant to obtain it, if he uses his best endeavours but nevertheless fails to get the licence, the contract is discharged.[397] If the contract does not

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391. See Basil Eckersley, International Sale of Goods - Licences and export prohibitions, L. M. C. Q. 1975, 265.

392. ICC, Publication No. 421, *op. cit.*, at 14.

393. See *A.V. Pound ans Co. Ltd. v. M.W. Hardy and Co. Inc.*, [1956] A.C. 588. According to the INCOTERMS, in the absence of contrary provision, the seller under a C.I.F. and F.O.B. sales contracts, has to bear the risk and the expense to obtain the authorisation necessary for the export of goods.

394. Basil Eckersley, *op. cit.*, at 266.

395. See, *e.g.*, *H.O. Brandt and Co. v. H.N. Morris and Co.* [1917] 2 K.B. 784. See also Benjamin's Sale of Goods, 1974, at 1479.

396. [1958] 2 Lloyd's Rep. 60.

provide that performance of the contract is conditional upon the necessary export licence being obtained, the obligor is clearly at risk if the licence is not granted. In these circumstances, his obligation is absolute. An example is ***Peter Cassidy Co. Ltd. v. Osuustukkukauppa I.L. Ltd.***[398] In this case, there was a provision in the contract which read: "delivery: prompt, as soon as export licence granted". Although the sellers used all due diligence to obtain an export licence, they failed in their application. Devlin J. held that as a matter of construction the seller had undertaken an absolute obligation that a licence would be granted. Thus, the sellers were liable to pay damages for failing to deliver under the contract.

Thirdly, the question of obtaining authorisation or a licence becomes more difficult where legislation is modified after the inception of the contract and a new regulation is introduced that prevents the acquisition of a necessary licence which the parties envisaged would be granted. Nonetheless, in the absence of quite special circumstances, it is generally considered that these events are not *force majeure.*[399] This result may appear particularly unfair when the other party is an agency of the government responsible for issuing the licence. The parties have three alternatives to counter this situation.[400]

(I) They may agree that the contractor take absolute responsibility for obtaining necessary licence, allowing no excuses for failure. This solution is obviously unfair.

(II) They may divide responsibility or restrict the contractor's liability where authorisations or approvals can not be obtained. This solution appears to be much better than the first alternative, especially if a government or its agency is not involved in the contract.

(III) The third alternative is that the clause provides that any refusal by a government to grant an official licence will not be the responsibility of the contractor if he acted in good faith; the refusal of the licence will therefore be a *force majeure* event, justifying the contractor's excusable non-performance and entitling the contractor to an extension of time or compensation. This solution is particularly desirable where the other party is an agency of the state.

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397. See *Brauer Co. v. Clarke* [1952]2 All E.R. 497, 499, 500 (C.A.). See also Benjamin, *op. cit.*, at 1478; B. Eckersley, *op. cit.*, at 266.

398. [1957] 1 W.L.R. 273.

399. Karl-Heinz Bockstigel, *op, cit.*, at 167.

400. See McNeil Stokes, Construction Contracts, 2d ed. New York, 1980, at 118.

Sometimes the effect of governmental acts is merely to suspend or postpone the performance of the contract. Thus, it is desirable for parties to provide in the *force majeure* clause for the suspension rather than the termination of the contract. However, if the government prohibition extends beyond a stipulated time, then the clause should provide that the party has then the right to terminate the contract. This problem will be discussed in detail later.[401]

Finally, an important question is whether a state trading organisation can rely on the act of its own government as a *force majeure* defence. For example, a state trading organisation is subject to an act of its government that prevents or delays the performance. In this situation, delicate issues arise in the context of contracts between state trade organisations and foreign purchasers or sellers. The government agency may argue that the governmental act is a supervening illegality, but the other party may reject it on the basis of self-induced *force majeure.* This issue had been explored in number of cases. The cases are: ***C. Czarnikow Ltd. v. Centrala Handlu Zagranieznego*** (***Rolimpex*** case) and ***Jordan Investments Ltd. v. Soiuznefexport*** (***Jordan Investment*** case).

(a) THE *ROLIMPEX* CASE[402]

In this case, a Polish exporting monopoly for sugar (Rolimpex) contracted to sell 200,000 tons of sugar to an English company. The contracts were subject to the rules of the London Refined Sugar Association (R.S.A.). These rules provided that performance of the contracts was subject to *force majeure* as defined by rules 18(a)[403] and 21.[404] Because of heavy rain and

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401. *Infra*, pp. 344-348.

402. [1979] A.C. 351; [1978] 3 W.L.R. 274 (House of Lords).

403. The rule contained the following provisions:
"Should the delivery in whole or in part within the delivery time specified be prevented or delayed directly or indirectly by Government intervention, ie in the shipping port, . . . war, strikes, rebellion, insurrection, political or labour disturbances, civil commotion, fire, stress of weather, Act of God, or any cause of *force majeure*(whether or not of like kind to those before mentioned) beyond the seller's control, the seller shall immediately advise the buyer (by cable or teleprinter if abroad) of such facts and of the quantity so affected . . . . [T]he buyer shall have the option of cancelling the contract for the affected quantity . . . . Should the buyer elect not to cancel the contract but the delivery of the sugar in whole or in part still remains impossible 60 days after the last delivery date provided for by the contract, the contract shall be void for such quantity without penalty payable or receivable."

404. The rule contained the following provisions:
"The buyer shall be responsible for obtaining any necessary export licence. The failure to obtain such licence/s shall not be sufficient grounds for a claim of *force majeure* if the regulations in force at the time when the contract was made, called for such licence/s to be obtained."

flooding, the harvest of sugar proved insufficient to meet both domestic and export requirements. The Polish government imposed an immediate ban on the export of sugar and cancelled all export licences. In arbitral proceedings, the English buyer claimed damages against Rolimpex for non-delivery. Rolimpex, relying on the clause, argued that it was excused performance by reason of government intervention outside its control. The tribunal held for Rolimpex on the basis that Rolimpex was an entity independent of the government and there has been no collusion between Rolimpex and the government. The award was upheld by the House of Lords.

The critical issue was whether Rolimpex was consulted or controlled in the conduct of its business by the Polish government and whether the enterprise had played any part in creating the turmoil that led to its failure to perform. The decision raised considerable concern in international business community.[405]

The view of House of Lords was that Rolimpex could not, on the evidence, be regarded as an organ of the Polish state and was not controlled by the government. The delivery of the sugar in pursuance of the contracts was therefore prevented by the intervention of the government. Those Law Lords who dismissed the appeal,[406] accepted that the action taken by the government was beyond the respondent's control. Moreover, the directors employed in Rolimpex did not induce the Council of Ministers to authorise the ban and did not influence its continuance or effect. They also opposed the government decree prohibiting exports. Thus, there was no collusion or conspiracy between Rolimpex and the Polish government. The House also found that the government was not using its powers with the intention of affecting this specific contract and had acted from general considerations. Their Lordships accepted the argument that the state trading enterprise and the government were separate entities and there was therefore *force majeure* as defined in rule 18(a) of RSA. Lord Wilberforce added[407] that the word "obtain" in rule 21 of RSA, meant "get" and did not give rise to any obligation or warranty that once the licence was obtained it would remain in force. Thus rule 21 did not operate as a saving clause for the appellant and did not take the case out of rule 18.

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405. M. Fontain, Les Clauses de *force Majeure* dans les Contrats Internationaux, *op. cit.*, at 502.

406. *Czarnikow Ltd. v. Rolimpex* [1979] A.C. 351 (Lord Wilberforce, Viscount Dilhorne, Lord Fraser of Tullybelton and Lord Keith of Kinkel) (Lord Salmon dissenting).

407. [1979] A.C. 351, at 364.

The view of the House of Lords with regard to the issues of "control" and "separateness" may be correct where a capitalist society is involved. In a capitalist economy, exports are in commercial hands rather than state controlled ones. But in socialist economies, there is no genuine separate legal personality between the state and a state agency such as Rolimpex. While independence from the state is equally true of the export departments of most large corporations in the West,[408] this is not the case where exports are controlled by government through state trading enterprises for the purpose of implementing the country's economic plan. Lasok[409] forcefully argues that the House of Lords failed to grasp a basic understanding of how a socialist economy works. All economic activities were owned by the Polish government and, in accordance with Polish constitution, these activities were removed from the hands of private individuals.[410] Lasok concludes that the apparent separate legal personality of Rolimpex was no more than an administrative convenience and did not actually represent an organisation whose economic interests were independent of the government, such as exist in Western countries.[411]

The case is therefore unsatisfactory on two grounds: First, on the interpretation of the export licence obligations provided in rule 21 of RSA, it is the present writer's view that under rule 21 the seller has accepted an absolute obligation to obtain a licence. The defence of *force majeure* can not ordinarily be invoked by a party that has disabled itself from performance. Secondly, the House of Lords was wrong in finding that Rolimpex was independent from the Polish government. As Lasok has explained, the so-called independence of Rolimpex to decide whether or not it should implement the contract with Czanikow did not, in reality exist. Accordingly, it is submitted that the act of the Polish government amounted to self-induced *force majere* and the plaintiff should have been entitled to damages for breach.

The case again illustrates the importance of a properly drafted *force majeure* clause. If the clause in question had been better drafted the buyer might, indeed, have won the case. Traders should be very careful when contracting with state trading enterprises. For if the words "government

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408. J. Becker, The Rolimpex Exit from International Contract Resposibility, 10 New York University Journal of International Law and Politics, 1978, 447, at 455.

409. K. Lasok, Government Intervention and State Trading, 44 Mod. L. Rev. 1981, 249.

410. *Loc. cit.*, at 254.

411. *Loc. cit.*, at 257.

intervention" are used in the clause, the rule in ***Rolimpex***, in spite of its critics, will probably apply.

Another solution is that the parties to contracts with governments or governmental agencies, should use stabilisation clauses.[412] Under such a clause, the government undertakes not to change its legislation in a manner adversely affecting the performance of the contract.[413] However, it is not completely clear to what extent a government may undertake an obligation which limits sovereign powers.[414] Such a clause may still leave room for a government to declare an emergency situation that could excuse non-performance, but it seems that it does not permit excusable non-performance where there is a mere prohibition on exports.[415] Detailed analysis of stabilisation clauses is beyond the scope of the current thesis.

(b) *JORDAN INVESTMENTS* CASE

The second case is the arbitration ***Jordan Investments Ltd. and Sojusneftexport*** of 1958.[416] By an agreement made on July 17, 1956, the Ex-Soviet corporation undertook to deliver a quantity of fuel oil to Jordan Investments Ltd. The contract contained a clause[417] exempting the parties from performance in case of *force majeure*. In pursuance of the contract, the seller applied to the Soviet Ministry of Foreign Trade for an export licence on August 4, 1956, *i.e.*, a few days after the outbreak of Israeli-Egyptian conflict which led to the Suez crisis. On November 5, 1956, the Ministry advised the seller that export licences would not be granted and that the performance of

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412. N. Horn, *op. cit.*, at 135.

413. See Delaume, Transnational Contracts, vol. 1, part 1 ch. v (1980), at 25; Walde, Negotiating for Dispute Settlement in Transnational Mineral Contracts, 7 Denver J. Int'l. Law and Policy, pp. 33-75.

414. N. Horn, *op. cit.*, at 128.

415. *Loc. cit.*, at 135.

416. For the facts and analysis of the case, see David M. Sasson, The Soviet -Israel Oil Arbitration, J. Bus. L. 1959, 132; Harold J. Berman, *Force Majeure* and the Denial of an Export Licence under Soviet Law: A Comment on *Jordan Investment Ltd. v. Soiuzneftexport*, 73 Harv. L. Rev. 1960, 1128; Martin Domke, The Israel-Soviet Oil Arbitration, 53 Am. J. Int'l. L. 787.

417. The clause (clause 7) had provided that:
"*Force majeure*. Neither of the parties shall be liable for any damage or non-compliance with the terms of this contract or any part of these terms, if this damage or non-compliance is due to one or more of the following events preventing one or the other party from performing his duties under the contract in whole or in part: natural disasters, fire, flood, warlike, acts of any kind, blockades, strikes on the vessel carrying goods under this contract, acts or demands of the Government or other authoritative agency of the country under whose flag the chartered tanker belongs (but excluding the Government and authoritative agencies of the state of Israel), and any other cause of whatever nature beyond the control of the non-performing party."

the contract was prohibited. Thereupon, the seller informed the buyer that the contract was cancelled on the ground that the denial of a licence constituted *force majeure* under clause 7. In the arbitration proceedings before the Foreign Trade Arbitration Commission in Moscow, the buyers submitted that the seller had undertaken an absolute obligation to obtain an export licence and the clause had not included any terms excusing the defendant's performance. The buyers argued that since the refusal of an export licence was not mentioned in clause 7, it could not be invoked by the seller as an excuse for non-performance. It was also contended that the Ministry's prohibition could not affect the question of liability vis-a-vis the buyers, since both the Ministry and the sellers were one at the same time, *i.e.*, organs of the Russian state. Denial of an export licence may constitute *force majeure* in a capitalist economy, where government is distinct from commercial firms, but not in a socialist economy where all trading enterprises are controlled by the government.[418] The buyer stated that the seller, contrary to the requirement of Article 18, did nothing to overcome the obstacles created by the Ministry. The buyer's arguments did not succeed. In the opinion of the Arbitration Commission, the denial of a licence, though not specifically listed in the clause, was nevertheless covered by the "catch-all" provision at the end of the clause.

Apart from the question whether or not the above cases are decided correctly, the most important point to be gleaned is that the parties should draft the *force majeure* clause with as much clearly as possible.

5.1.5. PRE-EXISTING CAUSE

Can a *force majeure* clause excuse performance even although the event relied upon existed prior to performance of the contract? In ***Trade and Transport Inc. v. Iinco Kauin Kaisha Ltd. (The Angelia)***,[419] Kerr J. held that a party would not be excused by relying on an event or cause which was already in existence at the time of contracting where: (a) the pre-existing cause would inevitably operate on the adventure; and (b) the existence of facts which constitute the excepted cause are known to the parties at the time of the contract, or at least, to the party who seeks to rely on the exception. In so holding, the court extended the criterion which had earlier been advanced

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[418]. See Harold J. Berman, *op. cit.*, at 1136; Nicholas Sokolow, La *Force Majeure* dans les Contrats entre Societe Occidentales et Centrales Commercials Sovietiques, International Trade Law and Practice, 1978, 323, 327-328.

[419]. [1973] 1 W.L.R. 210; 2 All E.R. 144.

in ***Reardon Smith Line Ltd. v. Ministry of Agriculture, Fisheries and Foods***[420] by adding that the pre-existing cause can not be relied upon "if the existence of such facts should reasonably have been known to the party seeking to rely upon them and would have been expected by other party to the contract to be so known."[421] Although the House of Lords in ***Poineer Shipping Ltd. v. BTP Tioxide Ltd. (The Nema)***[422] subsequently doubted the result in ***The Angelia***,[423] their Lordships did so by relying upon other grounds, and did not question the correctness of the principle explained by Kerr J.

However, if the parties wish to be entitled to rely upon a pre-existing cause of *force majeure,* the draftsman should take steps to ensure that the clause so entitles the parties.[424]

5.2. CONTENTS OF THE CONSEQUENCES OF *FORCE MAJEURE* CLAUSE

5.2.1. PROVIDE CERTAIN AND PROPER CONSEQUENCES

The provisions of the clause should clearly indicate what is to be the effect on the contract of a *force majeure* event. The draftsman should give careful attention to the consequences of *force majeure*. A number of major factors should be taken into account when drafting the clause. Otherwise, the clause may be defective, with the result that the issues will be governed by the applicable law. The absence of precise directions by the parties may therefore lead to the termination of the contract under the proper law which is not always a desirable solution in many commercial transactions. In practice, many *force majere* clauses are not drafted comprehensively and are defective in that they merely excuse performance on the occurrence of events amounting to *force majeure.* However, the circumstances may differ, they may be temporary or uncertain, lengthy or permanent. Moreover, the nature of the contract also plays an important role with regard to the consequences of *force majeure*. An acceptable clause should serve, at least, the following purposes:

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420. [1962] 1 Q.B. 42.

421. [1973] 1W.L.R. 220, at 227.

422. [1981] 2 All E.R. 1030.

423. [1973] 1 W.L.R. 210; 2 All E.R. 144.

424. See John Kelly, *op. cit.*, at 393.

The fundamental purpose of *force majeure* is to excuse the party relying upon the *force majeure* event what would otherwise constitute a breach of contract. Such performance may be excused partially, totally, temporarily or permanently. This is accomplished by using phrases such as "Neither party hereto shall be liable for any non-performance . . ." in the definitional provision of the clause. This will relieve the party not only from damages but also from penalties and other contractual sanctions. Secondly, the clause should also clearly provide whether the contract is terminated, suspended or can be modified. The draftsman should ask himself the question, "If *force majeure* circumstances arises should the contract be suspended or cancelled or modified". He should take into account the two categories of intervening events of *force majeure*; those which have the effect of putting an end to the contract and those which have the effect of merely suspending the performance. Moreover, he should also consider the nature of the contract concerned, because different contracts demand different consequences.[425] If suspension is the desirable alternative, then the draftsman should stipulate how long it will be suspended.

(i) TERMINATION OR SURVIVAL OF THE CONTRACT?

This is a very important question which should be clearly addressed in the clause. The nature of the events and the nature of the contract concerned will be crucial factors in determining whether *force majeure* should have the effect of suspension or termination. In short, the draftsman should use suspension, termination, or integrated suspension-termination procedures in accordance with what is most appropriate in the context of the particular contract concerned.

(ii) SUSPENSION OF PERFORMANCE OBLIGATIONS

Commercial transactions may be affected by delays as a result of *force majeure* events. For example, production facilities may suffer temporary breakdown or the performance of the contract may be impeded by government restrictions, inspections, licensing controls, *etc.* In such cases, the performance of the contract is temporarily impaired: thus, obligations can not be performed by the date specified in the contract. To illustrate the point, suppose a temporary sugar embargo makes it impossible for the seller to perform his obligation, but after the embargo is lifted, delivery again becomes possible. Does the buyer have the right to terminate the contract completely

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425. *Supra*, 301-304.

when the performance can not be made at the time specified in the contract, or is he required to accept performance at a later time? With regard to the seller, is he required to perform at the earliest possible date or is his obligation to deliver terminated completely by the embargo? In the absence of express stipulations in the contract, a court will probably take the view that the contract is terminated upon the happening of the *force majeure* event, on the basis that the parties did not agree to be bound in the event of such an occurrence. Moreover, as we know, the English doctrine of frustration suffers from a high degree of remedial rigidity and, in a temporary interruption in supply, performance of the contract may be terminated immediately.[426]

The parties have two choices open to them to regulate delays in performance. They may suspend it on a temporary basis or they may terminate the contract. It is desirable that the contract should be made as flexible as is possible. Increased use should be made of contractual devices such as suspension which are intended to restore rather than terminate performance, when performance is only temporary affected by a *force majeure* event. Suspension of the contract seems a better solution, since performance will be resumed when the supervening event or its impact has abated. A suitably drafted *force majeure* clause can provide the contracting parties considerable remedial flexibility.

For example, in a temporary interruption in supply where the parties do not want the contract to be terminated immediately, a clause can give the party affected by *force majeure* clause a long period in which to perform his obligations. The parties, have usually a strong interest that performance should continue. Suspension of contract is based upon the business interests and upon the needs of parties. In long-term contracts such as natural resources agreement, the device of suspension in the clause ensures the continuity of performance by suspending the contract if there is a supervening event. This device ensures the survival of the agreement between the parties in the future. The seller can not rely upon delay caused by *force majeure* so as to terminate the contract and, in turn, the buyer can not reject the seller's performance when the contract is performed upon the abatement of the *force majeure* event. Through a properly drafted clause, both parties are prohibited from avoiding their obligations on the ground of delay where the delay gives rise to tolerable, rather than intolerable, harm. Moreover, relations between

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426. See Ewan McKendrick, *Force Majeure* Clause: An Explanation, 4 Law for Business, 1992, 59, at 61.

the parties in long-term agreements, such as natural resources agreements, will not be curtailed prematurely.[427]

Contracts calling for performance over a period of time should therefore provide that if *force majeure* occurs, its immediate consequence will be suspension rather that termination of performance of the contract. Such is the case, in contracts for the export and erection of machinery, turnkey contracts and long-term supply contracts.[428] For example, in the engineering trade, a considerable period of time elapses between the date when the contract is concluded and the end of the period when performance should have been completed. In this kind of situation, a far more flexible solution is required than termination of performance. To give another example, a party is obliged to build a hotel. Before the aluminium panels needed for the construction have been imported into the country, the government lays a temporary embargo on the entry of aluminium in any form. In that case, the better solution is suspension rather termination. Termination not only puts an end to the contract but will usually harm the parties' business relationship. A properly drafted clause should, however, provide that if the *force majeure* event continues beyond a certain time, either party will have the right to terminate the contract.[429]

It is the present writer's contention that performance should be allowed to continue in situations where it remains possible, and accordingly would encourage and propagate the use of suspension *force majeure* clauses in long-term contracts. In drafting construction contracts, natural resources agreements or turnkey contracts, *etc.*, which are long-term contracts, the parties should favour continuity rather than termination. While this is contrary to the approach in the Vienna Convention[430] and several national legal systems,[431] it protects the defaulting party from rescission or termination of the contract by the other party.[432] Therefore, the old fashioned *force majere* clause which only allows for the termination of the contract, should be abandoned by lawyers who draft long-term contracts.

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427. For the advantages of suspension provision in international oil sales, see Leon E. Trackman, S.J.D. thesis, *op. cit.*, at 212 *et seq.*

428. George R. Delaume, Transnational Contracts, (issued 1988), *op. cit.*, at 22,23.

429. See Nevill Maryan Green, *op. cit.*, at 506.

430. *Supra*, pp. 245 *et seq.*

431. See generally chapter four, pp. 141 *et seq.*

432. *Cf.* ICC, Publication No. 421, *op. cit.*, and UNIDO, *op. cit.*

The provision allowing suspension has to be drafted with extreme care, to avoid possible abuse by either of the parties. Clear and precise standards for suspension, as well as the circumstances under which performance is to be suspended, should be prescribed by the parties. The suggested definitional provision[433] should be used in the *force majeure* clause. This definition makes it clear under what conditions performance will be suspended. It will prevent any disagreement and disputes as to whether or not a particular set of circumstances qualify for suspension.

The value of a suspension provision will in practice depend upon the way it is formulated in the clause. The parties should make clear how long the suspension is to operate. They should also stipulate what effect the suspension will have upon their obligations. However, particular caution is needed in considering each of these issues. It is not sufficient merely to provide for suspension: attention should also be given to what is to happen on the expiry of the period, if the supervening event still subsists.[434] This will obviously depend upon the facts, the nature of the contract, the needs, and commercial judgment of the parties at the time of contracting and finally upon the parties' respective performance. The parties can agree to provide for a further extension of time or for the automatic cancellation of the contract. The deficiency in this approach is that the possibility of a number of extensions may give rise to uncertainty and delay.[435] Accordingly, they may provide a time limit for suspension of contractual obligations, after which either party or one party has the right to terminate the contract so as to limit their losses.[436] The parties may agree that the time for performance is prolonged for a reasonable period. The criterion of reasonableness may be taken into account, not only with regard to the defaulting party's ability to resume performance, but also the interests of the other party to continue with the contract in spite of late performance.[437] It is obvious that the party is obliged to minimise losses or resume performance as quickly as possible.[438]

The parties may agree on additional rights and duties. For example, in a contract of sale the parties may agree that during the period of suspension or the period when there is a reduction in the quantity of material delivered,

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433. *Supra*, 315-316.

434. See Ewan McKendrick, *Force Majeure* Clause: An Explanation, *op. cit.*, at 61.

435. *Loc. cit.*

436. See Green, *op. cit.*, at 506.

437. ICC, Publication No. 421, *op. cit.*, at 16.

438. *Cf. force majuere* provided in Article 34 of UNIDO.

the buyer will be free to purchase material from alternative sources to remedy the disruption or augment the shortfall.[439] However, in this case, the buyer should be careful to provide in the contract that he need not accept delivery of material, the supply of which was suspended by the supervening event. The parties may also agree that the seller be required to make up any shortfall of delivery during a specified period after suspension has ended or, alternatively, to the extent that the seller is able to do so within its normal delivery schedule. Moreover, attention should be given to the question whether such shortfall quantities are to be supplied at the price at the time of actual delivery or at the time when deliveries should have been made, if they had not been suspended.[440]

Where an event is of short duration or limited in its impact so that little hardship results, it would not be appropriate to provide the right of suspension. It is submitted that to do so would be contrary to the spirit of cooperation which characterises the relations of the parties. Thus, the parties should agree to restrict suspension or extension of contractual time limits, to situations in which performance is made impossible for stipulated minimum periods.[441]

(iii) TERMINATION OF THE CONTRACT

Termination of the contract will sometimes be the desirable remedy. The basis upon which termination can be sought will vary. For example, termination is available when a *force majeure* event which has been deemed temporary, lasts for more than a specified period. Termination of the contract may also be sought immediately when performance is definitely "frustrated" *i.e.*, is absolutely or permanently "impossible". For example, in mineral and petroleum sales contracts, permanent, total *force majeure* should result in termination of the contract in which case there will be no obligation to make up supply. In this example, termination of contract is contingent upon impossibility. In international contracts between parties associated for the purpose of executing a specific project,[442] a unique specialised member of the group may be prevented by *force majeure* from further participation in the

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439. See Trackman, *op. cit.*, at 294-296 who discusses this issue in international oil sales.

440. John Kelly, *op. cit.*, at 398.

441. Delaume, Excuse of Non-Performance and *Force Majeure* in Economic Development Agreements, *op. cit.*, at 256, 257.

442. See United Nations (E.C.E.), Guide for Drawing up International Contrats between Parties Associated for the Purpose of Executing a Specific Project, *op. cit.*, at 91, Sec. 76.

work. Consequently, the continuation of the performance of the contract with the client becomes impossible., since the unique specialisation of the member affected by *force majeure* makes a replacement impossible. This is a situation in which the early termination of the contract is inevitable.

Sometimes termination is preferable even though suspension of contract is available. For example, a seller may be unable to perform for an extensive period of time and his expected performance is too far in the future to warrant suspension or where the conditions existing after the delay fundamentally diverge from the circumstances existing before the delay. In these situations, where the costs exceed the benefits of awaiting performance, suspension of performance is not desirable. In other words, the convenience associated with terminating performance outweighs the convenience of performing at a later time.[443] This is the position taken by the Restatement of Contract (First)[444] under which temporary impossibility merely suspends the promisor's duty of performance unless the delay would impose a burden on the promisor substantially greater than would have been imposed on him had there been termination.

The nature of the contract, is also a factor which plays a significant role with regard to the effect of *force majeure* leading to termination of the contract. In certain contracts, such as those which presuppose rapidly concluded performance and those which are more or less speculative, such as contracts for sale of commodities, the usual consequence of the clause should be the termination of the contract[445] to prevent a party from taking advantage of the circumstances for personal gain. This restrictive approach precludes the possibility of manoeuvre by the interested party. Thus the provisions of GAFTA[446] under which extension is automatically granted is open to criticism, although the relevant clause is in favour of the seller only, it

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443. See Trackman, *op. cit.*, at 212, 213.

444. Sec. 462. See also Restatement of Contrats (Second), Sec. 269. However, the American cases are divided on this point, *e.g.*, *compare United States Trading Corp. v. New mark Grain Co.*, 56 Cal.App. 176, 205 P. 29 (Dist. Ct. App. 1922) & *Nordman v. Royner*, 33 T.L.R. 87 (K.B. 1916) (No discharge for temporary impossibility) With *Wasserman theatrical Enterprise v. Harris* 137 Conn. 371, 77 A.2d 329 (1950) and *Citizens Home Ins. Co. v. Glisson*, 191 Va. 582, 61 S.E.2d 859 (1959) (Promisor excused for temporary impossibility).

445. See *supra*, at 267.

446. Clause 23 provides: ". . . If shipment be delayed for more than one calendar month, Buyers shall have the option of cancelling the delayed portion of the contract, such option to be exercised by Buyers giving notice to be received by sellers not later than the first business day after the additional Calendar month. If Buyers do not exercise this option, such delayed portion shall be automatically extended for a further period of one month. If shipment under this clause be prevented during the further one month's extension, the contract shall be considered void . . .".

gives the buyer certain advantages as well. For example, the buyer has the option to cancel the contract if the interrupting circumstances still prevail at the end of the period of suspension. The point is that he can watch the market and exercise the option to cancel if the market goes against him. If the market rises, he can decide not to cancel, in which event the period of shipment is automatically extended. On the other hand, if the market falls, he can cancel the contract and obtain the goods a lower price elsewhere. If he has entered into a contract to resell, his margin of profit will be greater.[447]

No doubt, the draftsmen will take these factors into account when drafting the consequences of *force majeure*.

(iv) SUBSTITUTE PERFORMANCE

If it is the intention of the parties that in the event of *force majeure* a substitute performance is expected, then it is essential that the parties state this clearly in the clause. For example, in a contract of sale, the seller should ensure that in the event of *force majeure* he is not obliged to supply from another source to perform the contract. In a coal supply agreement, the seller can make the following provision:

"If seller is excused from supplying coal from the mine or mines designated in this agreement as the source of coal . . . seller shall not be required to substitute coal from any other source . . .".[448]

However, if the contract identifies the source from which the commodity is to be supplied, then it is unnecessary that the clause should state that the seller is not required to substitute the commodity from another mine. The nominated source may be the only source owned by the seller.[449] It should be noted that if, for example, the contract confers on the seller the right to supply coal from a mine other than that provided in the agreement, the draftsman should ensure that such a right is not interpreted as an obligation to do so upon the occurrence of supervening event at the mine designated in the agreement.[450]

(v) PARTIAL EXCUSABLE NON-PERFORMANCE AND ALLOCATION OF SUPPLIES

If due to a *force majeure* event, the promisor can give part performance, should he do so? For example, in an oil contract, the event may

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447. See Cartoon, *op. cit.*, at 35.

448. Cited in Marvin O. Young, *op. cit.*, at 161.

449. See John Kelly, *op. cit.*, at 394-395.

450. *Loc. cit.*

prevent the contractor from delivering all or only some of the supply. A well-drafted clause should deal with this problem[451] and its consequences. A comprehensive clause not only should take proper account of those causes which are permanent and totally prevent performance, but should also take proper account of causes which, while permanent, only prevent part performance of the contract. In such cases, the clause may operate to excuse partial performance for remainder of the contract. Thus partial excusable non-performance may not necessarily terminate the parties' relationship in toto. Whatever the intentions of the parties, it should be expressed clearly in the clause. If they intend that under certain circumstances and under certain specific instances of *force majeure* that total performance is not expected, then the clause should be drafted with clarity and cogency. Conversely, if full performance is expected, the clause should say so.

A seller may have sufficient product to satisfy one individual buyer but not enough to satisfy his contractual obligations to other buyers.[452] The causes of shortage in the production and supply of commodities may range from physical factors to administrative regulations. A breakdown in production or transmission facilities, unfavourable weather conditions leading to the damage or loss of cargoes at sea, and new conservation regulations which require producers to cut back on production are illustrative of events which could lead to this situation. Disruptions in supply should not necessarily terminate the contact. In such circumstances, an adjustment in performance through the device of shortage provisions in the contract may be a better solution than terminating the contracts. Such a provision in the *force majeure* clause enables the seller to reduce supplies to the buyers if there is a curtailment in production caused by a supervening event.

If the clause does not deal expressly with this problem, the proper law of the contract will operate. In this respect, the position under English law is far from settled.[453] In the United States of America, section 2-615(b) of the UCC imposes on the seller the duty to allocate his output among his purchasers in such a manner as he may determine to be "fair and reasonable". As discussed before,[454] the inherent defect of allocation of goods based on the seller's discretion, lies in the fact that the seller may abuse his discretion. The seller may be tempted to discriminate in favour of more

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451. For a detailed analysis of this problem, see chapters 5.

452. For a detailed discussion of this issue see chapter 5.

453. *Supra*, pp. 224-229.

454. *Supra*, 211-215.

profitable customers to the detriment of the other buyers. UCC grants the seller almost unrestricted discretion. Buyers have no insurance that the seller will exercise his discretion fairly. Indeed, the seller is free to provide no reasons at all or, at best, artificial reasons for allocating the goods. Moreover, restriction on the seller's discretion imposed by the provisions of section 2-615(b) of UCC does not necessarily avoid possible abuse. The seller who is allowed by UCC to allocate the available goods as he considers "reasonable and equitable" may, it is true, impose upon the buyers his own perception of fairness and reasonableness, giving minimum weight to the buyers' reasonable needs. Thus the seller is free to avoid his commitments to less important customers. In short, the allocation of available goods will be based on the business interests of the seller and his personal relations with his customers.

These shortcomings of UCC should not however prevent the buyer from trying to provide a mechanism in a *force majeure* clause which will give a fairer result. No doubt, the seller will seek an unrestricted discretion in allocating the goods. He may wish to favour one customer over another and reserve that right to do so in the contract. In such circumstances, he may include a priority clause to favour his most important customers. This could be alleviated, if the buyer is given the choice to terminate the contract or accept a reasonable share. As discussed before,[455] allocation in a ratio based on the physical volume of the goods ordered is a fairer and more reasonable mechanism. It provides equal treatment among buyers as each buyer will receive a uniform pro rata of supply for which he contracted.

The parties should also agree that during the period of reduction in supply, the buyer will be free to purchase from other suppliers such quantities as the seller does not deliver because of excusable partial non-performance.

5.2.2. SPECIFY A PROPER RESTITUTIONARY PROCEDURE SO AS TO ACHIEVE JUSTICE AND TO MINIMISE THE LOSS BETWEEN THE PARTIES

Although termination of a contract by excuse doctrines does not constitute breach, the parties may still have certain obligations after the occurrence of *force majeure.* Indeed, the simple determination that one party or the other is excused from further performance by reason of supervening event is only part of the solution. There remains the question of what to do with the parties when the contract is excused. The *force majeure* event may

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455. *Supra,* at 214.

discharge further performance, but what about part performance before that event? What is the solution when one party has expended an excessive portion of his resources at the time of excuse? Should the loss be left where it falls or should there be an adjustment procedure to be used to achieve some albeit rough, equality in sharing the costs?

These are very difficult and complex questions that can not be easily answered by courts in the absence of a negotiated agreement between the parties. Unfortunately, in practice, most *force majeure* clauses simply leave the question to be resolved by the courts. There is therefore much to be said for providing an effective contractual mechanism resolving these issues in a just and fair way . This mechanism should define the parties' mutual rights and obligations consequent upon excuse. By providing such a mechanism, the related questions will be resolved easily and speedily. Moreover, the parties should stipulate that in a case of excusable non-performance where the principal obligations are not fulfilled, competent court will have jurisdiction to make adjustment according to the negotiated agreement between the parties. No doubt contractual regulation offers greater flexibility than existing national regimes.[456] In this respect, some important recommendations have already been discussed.[457] The English Law Reform (Frustrated Contracts) Act 1943 in comparison with the British Columbia Frustrated Contracts Act 1974, the New South Wales Frustrated Contracts Act 1978 and the South Australia Frustrated Contracts Act 1988, suffers from a number of significant deficiencies. The deficiencies of sections 1(2) and1(3) of the 1943 Act can be avoided by the parties using a *force majeure* clause which expressly provides a more equitable solution. It is not enough merely to exclude the operation of the 1943 Act, since the situation will then be governed by the common law rules which will make matters worse.[458] Secondly, it will not suffice to rely upon the *force majeure* clause because the contract may be frustrated despite the presence of the clause.[459] In that case, when the contract is frustrated, the clause can not regulate its consequences.

The solution lies in the parties making express provision in the clause for the consequences of frustration of that contract, so as to exclude the

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456. See chapter four and five.

457. See generally part one, two and three.

458. *Supra*, pp. 143-145.

459. See Ewan MacKendrick, Frustration and *Force Majeure* - Their Relationship and Comparative Assessment (in *Force Majeure* and Frustration of Contract), *op. cit.*, at 27 *et seq.*

operation of the 1943 Act.[460] It has been suggested[461] that in order to exclude the operation of the that Act, the parties could draft the following:
"in the event of frustration (for whatever reason) of this contract it is agreed that each party shall make restitution for all benefits conferred (with an agreed method of identification and valuation of the benefit) and that any loss caused by frustration of the contract shall be divided equally between the parties."
It should however be noted that in some cases operation of this clause may not achieve a fair result. As discussed before,[462] where a party incurs unusually high incidental reliance losses, to make the other party share the loss will not be just and may force him to spend much more than he would have spent if the contract had not been discharged.

In the present writer's view, if it is at all possible, the traditional rules of restitution should not be abrogated. For example, when a party's loss has actually benefited the other party, the remedy of restitution should be applied. Secondly, since both parties are *ex hypothesi* faultless, any loss caused by *force majeure* should be divided between them. Thirdly, in exceptional cases, where equal division of loss would be inequitable, the clause should provide an appropriate adjustment procedure.
There is no doubt that other solutions lie in the hands of the parties themselves. For example, the parties may agree that the non-performing party should reimburse the expenses reasonably incurred in reliance on the contract by the party willing and able to perform. The parties may provide that in case of permanent *force majeure*, that a cancellation charge be paid by the party claiming *force majeure*. For example, in a coal agreement,[463] the parties may wish to provide that the buyer will pay an agreed cancellation charge which will be a charge representing some portion of the capital investment of the seller in developing the mine. The parties may also agree that the seller should receive a proportion of the anticipated profit which has been eliminated by the buyer's successful claim of *force majeure*. If the *force majeure* proves to be temporary and for other reasons it proves possible to sell the product of the mine after the termination of the contract, then the *force majeure* clause could provide for a return of the cancellation charge to the buyer on a pro rata

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460. See Sec. 2(3) of the 1943 Act. See also *supra*, pp. 160-161.

461. Ewan McKendrick, The Consequences of Frustration - The Law Reform (Frustrated Contracts) Act 1943, *op. cit.*, at 69.

462. *Supra*, at 150.

463. See Jeffrey J. Scott, Coal Supply Agreements, Rocky Mountain Mineral Law Institute, 1977, 107, at 134.

basis.[464] Whatever the mechanism, it is the present writer's contention that it should result in a "no winner", "no loser" situation.

At this point, the views expressed by the ICC are open to criticisms. The ICC suggested *force majeure* clause - contrary to the Vienna Convention and most national laws - provides that in the case of termination of the contract, each party is allowed to retain what he has received, but should account to the other party for any unjust enrichment resulting from the other party's performance.[465] This mechanism is silent about reliance expenditure and performance which has not led to the end product. This mechanism is too general and may not be suitable for every kind of contract. In contrast with ICC, the general conditions for supply of plant and machinery for export, ECE contract No. 188,[466] provide in the contract that division of the actual out-of-pocket expenses is placed on both parties. In machinery know-how agreements, a party may not be allowed to retain what he has received. In such contracts, on termination the party must return to the other party all existing manifestations of the know-how in the form of drawings, models and the like.[467] In this context, accounting to the other party for any unjust enrichment appears irrelevant. If an international services contract is terminated due to a *force majeure* event, what is to be accounted is the allowances of the personnel as are payable up to the date of their departure from the obligee's country, in so far as such payments or allowances have not been paid before such termination. The obligee may also agree to pay the costs of repatriating the obligor's personnel.[468] What is important for the obligee is to receive the obligor's services: he pays as long as he receives the services. Therefore, when the contract is terminated, what he pays is related to those services which he has received, not any enrichment he has obtained.

In spite of these criticisms, it may not be advisable to strike out the ICC suggested solution entirely, as long as the defaulting party retains the right to terminate the contract., since in some situations, the ICC may provide a better solution than the other alternatives, or, indeed, may be the only solution of the problem.

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464. *Loc. cit.*

465. ICC, Publication No. 421, *op. cit.*, Para. 9. See also United Nations, Economic Commission for Europe, Guide for Drawing up International Contracts on Consulting Engineering, Including Some Related Aspects of Technical Assistance, *op. cit.*, Sec. 87.

466. See *supra*, pp. 264, 265.

467. See generally L. W. Melville, Forms and Agreements on Intellectual Property and Industrial Licensing, *op. cit.*, at 4F-21, 4F-22.

468. *Loc. cit.*, at 6M-20.

Parties are therefore advised to pay careful attention by allowing a party to retain what he has received is suitable in the context of their particular contract and, if not, what other alternative should be adopted. The present writer has argued that when performance of the contract is excused, parties should at first attempt to return to their position as it was before the contract (*restitutio in integrum)* or, if this is not possible, to provide reasonable remuneration for what has been done. For example, in international contracts on industrial co-operation,[469] when the contract is excused, it seems that an appropriate way of solving the problem is that the parties draw up a balance-sheet of what has been obtained by each of the parties and to grant compensation to each party in proportion to the difference. It would also be necessary to make it clear in the clause the fate of any licenses which have been granted by one party to the other party, since in the case of termination of the contract, the party holding a technology license may keep using it for a further periods; or even indefinitely, with or without payment. In that case, where it is intended that the license should continue in force beyond the period of the validity of the contract, the question should have been already settled in the contract. Moreover, it is also advisable to provide in the clause that parties will discharge their respective duties towards creditors and sub-contractors at the date of termination of the contract.[470]

In turnkey contracts being performed in countries far from the contractor's home base, a reasonable solution to the problem is that the employer pays for any services or performances which have been done. He should also pay the costs of materials or goods which have been ordered by the contractor as being necessary for works, including the contractor's plant and temporary works. Insofar as the contractor's construction plant is concerned, the employer may agree to share the cost of its removal from the site to the country of registration of the contractor. With regard to payment for costs of repatriating the contractor's staff or workmen, the employer may also agree to share the costs or to pay a proportion of the related costs. Finally, against all of these payments due to the contractor, the employer should be entitled to set off any sums due to him by the contractor in respect of advance payments for construction, plant and materials and for any other monies which were likewise recoverable from the contractor under the terms of the contract at the time when the termination took place.[471]

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469. United Nations, Economic Commission for Europe (Geneva), Guide on Drawing up International Contracts on Industrial Co-operation, *op. cit.*, Sec. 57.

470. *Loc. cit.*, Sec. 58.

Another important matter which should be taken into account when drafting a *force majeure* clause relates to the additional costs required for continuation of performance during a period of suspension. Unfortunately, most clauses deal only with the question as to whether, and under what conditions, a contract is terminated or suspended. According to these clauses, neither party can claim from the other any extra payment whether in compensation, indemnity, damages, demurrage or whatever. The clause leaves open the question of who must bear the additional costs of postponement. Consider a construction contract which is suspended by an embargo of aluminium panels which are required in the construction. Who must pay the additional costs during the suspension? The parties may wish to include a provision requiring them to share the costs required for continuation of the performance of contract.[472] They may agree that during a period of suspension one of them pays a proportionate share of the expenses. For example, in a coal supply agreement,[473] the buyer may accept to pay some proportionate share of the seller's actual expenses in maintaining the mine and mining property during the postponement. In engineering contracts, the contract may even provide that the owner is obliged to reimburse the consultant for the payment of costs incurred during a *force majeure* suspension.[474]

As discussed before, the essential feature of most *force majeure* clauses is that each party bears his own losses. What is clear is that this traditional *force majeure* provision does not provide an adequate solution for every different contract. For example, in turnkey contracts, suspension of a project can spell financial disaster for a contractor.[475] He will only be paid for the work actually done or goods actually delivered. He will probably not be reimbursed for the often heavy costs of keeping his personnel idle or repatriating them and having to reassemble a team on short notice at a later time; nor for the costs of equipment lying idle and deteriorating, nor for consequences of inflation which will make performance at a later date very

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471. *Cf.* F.I.D.I.C. Conditions of Contract, 1987, Art. 65.8.

472. See United Nations, Economic Commission for Europe (Geneva), Guide for Drawin up International Contracts on Consulting Engineering, Including Some Related Aspects of Technical Assistance, *op. cit.*, Sec. 87.

473. See Jefferey J. Scott, *op. cit.*

474. See United Nations Centre on Transnational Corporations, Analysis of Engineering and Technical Assistance Cosultancy Contracts, *op. cit.*, at 504, 505.

475. See Walter W. Oberreit, Turnkey Contracts and War: Whose Risk? (In The Transnational Law of International Commercial Transactions, Edited by N. Horn and C. M. Schmitthoff, 1982, edited by Horn and Schmitthoff), at 193.

much more expensive. The contractor may also suffer additional, unreimbursed expenses in having to take delivery of equipment from suppliers and having to settle claims from third parties involved in the project. His contracts with sub-contractors may not be identical to his contract with the client and therefore, it may not always be possible to rely upon the *force majeure* clause against his suppliers and sub-contractors.[476]

Because of these inadequacies, wider coverage than that afforded by the traditional *force majeure* clause is needed. It has been suggested that the client or the host government should bear the effects of the *force majeure*.[477] But this "solution" only shifts the loss from one party to the other. The solution is similar to the effect of a typical *force majeure* clause the only difference being that in traditional *force majeure* clauses it is the obligor who bears the loss while here it is the obligee who bears the loss. A provision requiring both parties to share the costs equally is a better solution.

Another issue relates to the cost of repairing or rebuilding all or any part of the facility destroyed by *force majeure* event during the period of suspension. Who is required to repair or rebuild the facility destroyed by *force majeure*? To what extent do insurance provisions affect the contractor's duties after the occurrence of *force majeure*? As most of the contracts require the contractor to keep the facility adequately insured as construction progresses, it should be clearly stipulated that the proceeds of the policy should be used as a fund available for the cost of repairing or rebuilding.[478]

To sum up, it should be said that to provide a suitable mechanism in the clause for solving these issues, will resolve the related problems much more easily and speedily than reliance on the applicable law. It is contended that a *force majeure* clause can not be considered comprehensive or acceptable unless provision is expressly made for solutions to these problems.

5.2.3. PROVIDE A NOTICE REQUIREMENT IN A *FORCE MAJEURE* CLAUSE

It is advised to provide in the clause what the party invoking excuse must do to establish that a *force majeure* event has happened. This is most easily accomplished by a notice provision that requires the party to give notice

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476. *Loc. cit.*

477. *Loc. cit.*

478. See United Nations Centre on Transnaional Corporations, Fearures and Issues in Turnkey Contracts in Developing Countries: Technical Paper, *op. cit.*, at 66.

to the other party outlining the event claimed to be *force majere* and the performance that has been prevented by the occurrence of the event. The overwhelming majority of clauses include a notice requirement under which the party seeking relief has to report to the other party within a prescribed time. There are obvious advantages of such a requirement. If the parties do not have a notice requirement, different opinions could arise concerning the date of commencement of any legal consequences as there is no recorded notification of the occurrence of the *force majeure.*[479] Moreover, if notice is promptly reported, it will be much easier to investigate the true extent of the *force majeure* event than if it is, for example, suddenly revealed several years later.[480] This requirement will also be to the advantage of both parties., since its consequences will be a speedy resolution of any dispute which may arise. Indeed, when the *force majeure* is reported, the parties have the opportunity to resolve any problems through negotiation. Further, upon notification, it will be much easier for the parties to consider what measures to take to prevent or limit the effects of *force majeure*, and to prevent or mitigate the loss caused or which is likely to be caused by the failure of the performance.[481]

What matters should be addressed in a reporting clause? In response, it is suggested that an acceptable reporting clause should contain the following elements:

The clause should specify the person by whom the report is to be made. For example, in sale contracts, this would usually be the buyer or seller, but in construction contracts it is commonly the architect or engineer. Secondly, time limits should be stipulated in the clause. Generally, the clause should require that the party asserting the *force majeure* should notify the other party promptly, when feasible, or within a definite numbers of days, such as 7 days, 14 days, or 30 days. In practice, a relatively short-time span, *viz.*, between 7 days and three months, is often to be found.[482] Much will obviously depends upon the type of the contract and the importance which the parties attach to the passage of time. At the time of occurrence of *force majeure*, a party may not actually know whether the *force majeure* event is so serious as to produce a delay which would justify reliance upon the clause at all. If he sends a notice promptly, the other party may rightly challenge whether the event upon which

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[479]. See Martin Bartels, *op. cit.*, at 32.

[480]. See M. P. Furmston, Drafting of *Force Majeure* Clauses (In *Force Majeure* and Frustration of Contract, Edited by Ewan McKendrick, *op. cit.*), at 24.

[481]. UNCITRAL, *op. cit.*, at 240.

[482]. M. P. Furmston, *op. cit.*

he relies does in fact prevent performance so as to excuse him. If, on the other hand, he leaves notification until he is certain of the effect of the *force majeure*, then on the ground of a mere technicality, it may be too late to comply with the notice provisions required before he can rely upon the clause. It seems that the safest way of solving this dilemma is expressly to provide that the party should send a notice specifying the grounds for bringing the clause into operation whenever he comes to the conclusion that he is likely to suffer delay in performing the contract because of *force majeure* which has already occurred, even if the occurrence of *force majeure* has happened sometimes in the past.[483]

Thirdly, the party seeking relief should not send a vaguely worded notice. The clause should require that the statement of notice specify details of the event describing the asserted circumstances. This is particularly significant where the party who receives the notice has an adjudicating function., because a reasonable decision requires an adequate supply of information. That is why construction contracts often require the contractor not only to notify the extent of the effect of the event but also to report an estimate of its consequences on his progress.[484] A comprehensive clause should also provide for the anticipated duration of the event to be notified, where possible, and that the affected party should continue to keep the other party informed of all circumstances which may be relevant for an assessment of the *force majeure* event.

Fourthly, it is desirable for the clause to specify the form which the notice is to take. It should be clear whether the notice will be in writing or by fax or by telex, *etc.* This will prevent any dispute which may arise in future.[485]

Fifthly, when the contract is suspended due to *force majeure*, it is advisable to require double notices *viz.*, a notice to trigger suspension of contractual obligations and a second notice to terminate the contract.

Finally, the clause should provide for the consequences of a failure to report. It should be made clear whether the requirements provided in the notice provision are directory or mandatory[486] *i.e.*, whether failure to report at the right time and in the right way is fatal to any claim. This will enable the party concerned to know precisely when the other party's failure to comply with the notice requirement will prevent him from relying on the clause and so put him

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[483]. Christo, *op. cit.*, at 81.

[484]. M. P. Furmston, *op. cit.*, at 25.

[485]. See chapter 7, pp. 208, 209, and 261.

[486]. Furmston, *op. cit.*

in breach. Such certainty can not be attained if the terms of the clause are silent on the matter. The clause should make it clear whether failure to give such notice would only make the defaulting party liable in damages or deprives him of the right to rely upon the *force majeure*. According to the ICC standard *force majeure* clause, a party who fails to notify in time will not only be liable in damages but also will be deprived of the right to rely on the clause in respect of any time before notice was given.[487] In some contractual relations, this may be rather harsh if it was difficult for the party seeking relief to realise at once whether he required to rely upon the clause. It seems that in these situations, the party invoking relief should merely be liable for any damages resulting from the omission.[488]

The parties may agree that the notice should not only specify the details of the event but also furnish certain proof that the conditions of *force majeure* do in fact exist. Usually, confirmation by a public authority, notary public, a consulate or Chamber of Commerce may be required by the clause.[489] In the absence of such certificate, the obligor may find it difficult to prove his claim in possible arbitration or court proceedings. Proof of existence of *force majeure* may also prevent the other party taking action against the party affected by *force majeure*. Without such a certificate, the obligor may be faced with court or an arbitration proceedings.

The parties may also provide that in any case, the party receiving the notice may, after appraisal of the information received, object to the assertion of *force majeure*. Here a solution may be found through negotiation or, failing a satisfactory result, by the appropriate means for settlement of disputes, *viz.*, by arbitration, if so agreed, or in court.[490]

6. FINAL SUGGESTION: CHOOSE A CERTAIN LEGAL SYSTEM AS A PROPER LAW OF THE CONTRACT AS AN ADDITIONAL SAFEGUARD

Parties should depend on the express terms of their agreement rather than on the rules of the system of law applicable to their relations. Obviously, the more detailed and more comprehensive a *force majeure* clause is, the

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487. Para. 5.

488. ICC, Publication No. 421, *op. cit.*, at 15.

489. See UNCITRAL, *op. cit.*, at 240.

490. See United Nations, Economic Commission for Europe (Geneva), Guide for Drawing up International Contracts on Consulting Engineering, Including Some Related Aspects of Techcnical Assistance, *op. cit.*, at 22, Sec. 83.

less room there is for issues to be determined under the applicable law. However, even if the parties have the opportunity and time to draw up *force majeure* or hardship clauses to the best of their ability, the uncertainties of future developments can never be securely covered. Moreover, no clause can ever be completely planned; every clause presents the possibility that events will occur for which planning was incomplete by reason of omission or ineffectiveness, or both. Therefore there will remain certain questions which must be decided in accordance with applicable law.[491]

As we have seen, no generally accepted international law is applicable in this situation and different domestic laws deal with excusable non-performance in different ways. In case controversy arises over the interpretation of the clause, it would be advisable that the parties specifically refer to the legal system[492] with which they are most familiar, for the interpretation or supplementation of, their own *force majeure* provisions as additional protection and security so that any undesirable result of an unfamiliar domestic law is eliminated.

7. CLOSING REMARKS

It is hoped that the chapter has been helpful to lawyers who are faced with the challenging assignment of drafting *force majeure* clauses. These clauses are very important and must be carefully negotiated and drafted in order to avoid unexpected consequences and costly litigation. We have considered past mistakes in drafting such clauses, and hopefully this thesis will assist in avoiding most of these, if not all, in the future. Although it is virtually impossible to foresee and satisfactorily deal with all the related problems, the parties should certainly make every effort to reach a sensible and fair solutions. The greater the efforts made by the parties to draft a comprehensive clause, the lesser is the probability that the courts will have to deal with the issue.

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491. See Bockstigel, *op. cit.*, at 166.

492. It has been said that the private international rules should supplement the adopted international norm as well. See Nadelmann, The Uniform Law on the International Sale of Goods: A Conflict of Laws Imbroglio, 74 Y. L. J. 1965, 449, 456-459; Berman, The Uniform Law on International Sale of Goods: A Constructive Critique, 30 L. & Contemp. Prob. 1965, 354, 357.

CONCLUSION:

As demonstrated by our comparative survey, it can unhesitatingly be concluded that a viable practical standard of excusable non-performance, satisfying the purpose of universality and uniformity in international level, does not exist. Each legal system has its own unique set of regulations. The reason is that these differences are on the one hand sometimes reflected in the techniques and methods used by the above systems and, on the other, are rooted in a dissimilar socio-political and economic background. As has been seen, at Common law, the doctrine of frustration operates to discharge a contract when the performance has become impossible or if there is a fundamental change of circumstances under which performance becomes totally different from that contemplated by the parties at the time of the conclusion of contract. It seems that the Common law views the contract as an instrument of liberalism and private autonomy, whereas Civil law has ascribed a social function to private agreements, which are thereby affected by extra-contractual considerations. This fundamental differences find expression in the unwillingness of the Common law to recognise a liberal excusable non-performance on the one hand and the rejection of modification of contract as a general form of relief on the other. On the contrary, in Civil law, particularly in Germany, owing to the occurrence of a series of developments, more than one doctrine have been developed to deal with the question of supervening events. These include impossibility, which is provided in BGB, and the doctrine of wegfall der geschaftsgrundlage which has been developed as a result of academic and judicial opinion. Obviously, German law has a more flexible approach in dealing with excusable non-performance in the sense that excusable non-performance does not always lead to termination of the contract. Since the effect of intervening events may vary in accordance with the nature of the event upsetting performance, the court may terminate the contract or adjust the contract to the changed circumstances.

Despite the *prima facie* differences between the various legal systems under discussion, all systems of law provide some form of contractual relief in certain supervening circumstances, for example, a party may be excused in circumstances where contractual performance is rendered physically or legally impossible. However, the scope and application, as well as the terminology of such legal relief, varies between jurisdictions. Having briefly presented the development and the present condition of the way different legal regimes have faced the problem of excusable non-performance, we can observe that there is insignificant similarity in result which is not enough for achieving a uniform

standard of excusable non-performance to resolve the problem at international level. Under French law, the yardstick of *force majeure* is that no excuse is allowed unless the performance has become absolutely impossible. Under German law, though the concept of impossibility of performance is not substantially different from French law, nevertheless, the fact that certain obligations may become ruinous, is not ignored. In such cases, a modification of the contract is conceived so as to restabilise it and to prevent it from becoming a source of injustice.

With regard to the doctrine of frustration, it should be said that *force majeure* is much more limited than frustration. However, frustration is sometimes close to *force majeure* and sometimes to imprevision, but it never coincides completely with either of them. Thus, while French *force majeure* is very strict, the German law probably stands at the other extreme, with the common law systems in the middle.

In comparing the English doctrine of frustration and the American doctrine of impracticability, the narrowness of the scope and the application of English doctrine is underlined. It is clear that the doctrine of impracticability, at least in theory, is wider in scope - recognising claims of impossibility, commercial impracticability, and frustration of purpose. It also provides a wider range of remedies - incorporating modification and adjustment, and the principle of partial excusable non-performance. This is because the American doctrine is inspired with a general policy to use equitable principles of good faith, fairness and reasonableness. Such notions are therefore irrelevant in the application of doctrine of frustration. However, although the American doctrine may, in comparison with English law seem less restrictive, its application, like the application of other doctrines of excuse, remains rather uncertain. Given that the American doctrine of impracticability is generally more comprehensive and has wider remedies, it may be argued that this element of uncertainty is perhaps even more significant. Thus, an English lawyer who is not familiar with the words like "impracticable" or "occurrence of contingency" or "performance which would be materially more burdensome", will be surprised to find how little the actual decisions differ from what he would have expected. Even within a single system there are differences between the formulation of law and its application. Further, the doctrines used in this field are very confused, uncertain and even conflicting. To some extent this is probably the result of the policy of the judiciary, inasmuch as the Common law is developed partly by deliberate techniques used by the courts to avoid or to enlarge previous decisions.

Apart from the above differences, the doctrines of excuse in England, America, and Germany, and to lesser extent, the rules of excusable non-performance in France, reveal difficulty in conceptualisation and classification problems. For example, although the American doctrine of impracticability recognises notions of impossibility, commercial impracticability, and frustration of purpose, the distinction between claims based upon the above are not always distinguishable. The problem is further complicated by the fact that the terms, impossibility and commercial impracticability, are invariably and interchangeably used with impossibility. In English law, conceptual and classificatory problems stem from the historical origins of some of these rules and principles, and from the development of the doctrine of frustration in the early part of twentieth century.

We can conclude that the above laws on supervening events are not entirely satisfactory and reliance on them may lead to unpredictable results. Thus, it is proposed that a legal system will face the consequential risk of insufficiency and inadequacy in regulating the problems of excusable non-performance. Another conclusion which can be drawn is that it may not be possible to indicate which legal system is, on the whole, preferable or more conceivable as to the question of excusable non-performance, since each legal regime has its own particularities and characteristics and has developed as a result of social, economic and political conditions surrounding its jurisdiction. However, it is possible to suggest that a particular system has a better and more workable approach in certain circumstances and as to certain issues.

It is clear that the problem of excusable non-performance becomes much more critical when parties elect to remove their relationships from domestic level to international level. In that case, parties usually face distinctive risks and burdens. The particularities of these contracts arise out of their two typical elements; namely, the transnational character and the long-distance nature of the stipulated shipments. Specifically, with respect to the intervening events, there are special complications of international trade contracts. For example, a change in the circumstances occurring after the conclusion of the contract and relied upon by the parties is more likely to occur and be more critical than in domestic transactions, because of the stricter governmental regulations, the frequent fluctuations of exchange rates and the greater risk of damage to the goods. In that case and *a fortiori*, domestic rules are often ill-adapted to cope with the needs of modern transnational commercial transactions and may not be particularly valuable.

For example, as discussed above, most doctrines of excuse operate within very narrow confines and that they do not possess the flexibility which parties may look for in a rapidly changing and uncertain world. The English doctrine of frustration, although improved by the Law Reform (Frustrated Contracts) Act 1943, is still narrow. The courts are not sympathetic toward expanding the scope and application of the doctrine. Even the concept of partial excusable non-performance, especially with regard to allocation of available goods, fails to persuade courts to introduce an element of flexibility in determining claims of partial frustration.

It should also be acknowledged that there is no acceptable universal standard of excusable non-performance (*autonomous lex mercatoria*) embodying its own practices and customs respected by all nations. Even the 1980 Convention on International Sale of Goods, just as 1964 Hague Convention, suffers from certain important deficiencies. Although draftsmen of the Conventions have tried to advance a new concept of excusable non-performance by combining different approaches, no satisfactory result has been achieved. The specified international rules, as has been seen, have adopted a mixed approach from both Civil and Common law. Flexibility of the wording of the Articles has caused different interpretations which is contrary to the aim of the Conventions. There is not even a uniform interpretation of the Conventions among those commentators who themselves played important roles in drafting the ULIS and CISG. Contracts for the sale of goods governed by the Vienna Convention should still include express *force majeure* or hardship clauses, where appropriate, since Article 79 of that Convention which seems to be designed to deal with impossibility of performance, is more restricted in scope than the doctrine of frustration and most well-drafted express clauses. Attention should, at the same time, be given by draftsmen explicitly to exclude the Article under the provisions of Article 6.
Moreover, widely different criteria for solving the problem of supervening events have been suggested by certain scholars. These are not completely clear, nor comprehensive and are difficult to comply with the related situations. The suggested tests are either too strict, too objective or too subjective. Further, the different needs and practices of different type of contracts can not easily fall within them.

Notwithstanding some of useful practical effects of the ICC suggestions and ECE exemption clauses, there are other matters to be considered and the problem of excusable non-performance should not be regarded as closed. There are important factors from a drafting point of view which should be

taken into account. With regard to other standard form contracts, it is clear that they have not introduced an acceptable *force majeure* clause contributing to the unification and harmonisation of the law of excuse of non-performance in international commercial transactions. Standard and individual contracts, furthermore, employ very dissimilar standards. Most of them do not treat both parties impartially, and employ different models echoing the superior and inferior bargaining situations of the parties.

However, since reliance on the doctrines of frustration, impossibility, impracticability, French *force majeure* and German wegfall der geschaftsgrundlage might lead to unpredictable and even surprising results; as there exists no homogenous and universal standard of excuse of non-performance respected by all nations with the support of all scholars; as standard form contracts do not treat the parties impartially and each of them reflects the superior or inferior bargaining power of the parties, it can be argued that the only possible alternative is to rely more heavily upon the terms of the contract by drafting a comprehensive *force majeure* or hardship clause rather the general legal doctrines prevailing in one country or another. Thus, the parties can make their own law and this need not necessarily be a system of national law. Given the uncertainties attending the above mentioned rules and approaches, it is clear that a prudent lawyer will not rely upon the so-called rules but will consider another alternative so as to protect the parties' expectations in the event of supervening events. Thus, parties who want to preserve such flexibility would be well advised to incorporate into their contract appropriately drafted *force majeure* or hardship clauses. It seems that this is the only unquestionable way to solve the harsh questions of excusable non-performance. By delegating law-making authority to the parties, the law permits them to agree freely on the creation, substance, modification and termination of their own contractual relationship. The use of more explicit immunity clauses in commercial contracts provides a clarity of content and predictability of result. Through drafting techniques, the parties themselves determine the ambit and effects of their immunity clause. Each party knows the terms of his contract as well as the binding nature of his own duties. Moreover, these clauses provide an excellent and unique opportunity to determine beforehand the nature and extent of performance in the event of change of circumstances and *force majeure* events without suffering the effects of judicial gap filling. Immunity clauses are, indeed, much more flexible in their potential application in comparison with domestic laws. An immunity clause in the form of *force majeure* offers to the parties the opportunity to

escape the limitation of the above doctrines and in the form of the hardship clause it affords parties a flexible approach to deal with unforeseen circumstances and ensure the stability of long-term contractual relationship as well.

However, in the course of writing and particularly in the final chapter of this thesis, I have given, as far as possible, my opinion on certain questions without purporting that they are the only or certainly the right deductions. Thus, in order not to overlabour the point, this conclusion restates very briefly the important suggestions and recommendations, which have already been made and discussed, as follows:

- It seems that the best possible solution for the problem of excusable non-performance lies in the contract itself by providing a well-drafted immunity clause.
- Immunity clauses should be drafted according to the facts surrounding the circumstances.
- Beware of using imprecise clauses such as "usual *force majeure* conditions apply" or "unforeseen circumstances excepted". They may have no effect.
- The *force majeure* clause must relate to the substance of the contract in which it is to be included.
- Avoid the use of *force majeure* clause contained in standard form contracts.
- Hardship may arise in circumstances that do not amount to *force majeure.* In such a case, a properly drafted hardship clause will be helpful.
- Do not include *force majeure* and hardship provisions in the same clause.
- As an indication of the parties' good faith, the benefit and protection of *force majeure* clause should be provided for both parties.
- *Force majeure* must be precisely and carefully defined and should incorporate a list of specific related events. Further, it is preferable to:

(i) use the criteria of "beyond control" and "non-fault of the party seeking relief"; and,

(ii) to use the criteria of concrete-abstract foresight in the definitional provision of the clause.

- Beware of the problems of partial excusable non-performance such as failure of the sources of supply and always provide a right to pro rate.
- Provide certain and proper consequences of *force majeure* on the contractual relationships.
- Specify a proper restitutionary procedure so as to achieve justice and to minimise the loss between the parties.
- Provide a notice requirement in the clause.

- Choose a certain legal system as a proper law of the contract as an additional safeguard.

It is hoped that the foregoing discussion and drafting suggestions will be helpful to the lawyers who are faced with the challenging assignment of drafting *force majeure* clauses. The draftsmen should draft proper clauses so as to prevent past mistakes, and hopefully this thesis will assist in avoiding most of these, if not all. It is hoped that deficiencies will be reduced to a minimum by the inclusion of the ideas set forth in this thesis. Although it is virtually impossible to foresee and satisfactorily deal with all the related problems, the parties should certainly make every effort to reach a desirable solution. The greater the efforts made by the parties to draft a comprehensive clause, the lesser is the probability that the courts will have to deal with the issue if excuse is aided by some indication of the intent of the parties to the contract.

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