The Contractual Obligations, Subsequent Impossibility and Commercial Hardship: A Study of Aspects of the English Doctrine of Frustration and the Use of Force Majeure Clauses with Some Comparison to the Law of Saudi Arabia

Rakan Fahad M Alrdaan

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Abstract

This study focuses on the effects of a contract of events and circumstances which occurred after the contract was entered into. The study principally examines the application of the English doctrine of frustration with comparative reference to the law applicable in Saudi Arabia. The main objective is to analyse how the English doctrine and its Saudi equivalents can provide an excuse or defence in circumstances where a party is prevented from performing contractual obligations. The study proceeds as follows. First, the doctrine of frustration is described in the context of a general overview of how a contract might be discharged. The historical development of the doctrine of frustration is then outlined together with its limitation and justifications. The application of the doctrine is then discussed in the most likely circumstances where it would be applied. The next step is to consider the central issue of commercial hardship, specifically whether it is recognised in English and also in Saudi law. Then remedies available when a contract has been frustrated are examined as well as the functionally equivalent rights and liabilities arising under the frustrated contract. The evidence presented to this point is then discussed in relation to the use of force majeure clauses and in particular their relationship with the doctrine of frustration. The study concludes that, while the English doctrine of frustration has witnessed significant developments, since it emerged as a departure from the rule of strict liability, it is still applied within a very narrow remit. Thus, the best way for contracting parties to deal with supervening events is by providing for force majeure clauses. The practical consequence of this is that where reliance upon these clauses becomes increasingly significant, with a consequent lessening of the importance of the 'default' rule of the doctrine of frustration. In Saudi Arabia, contract law is heavily reliant on Islamic jurisprudence, which does not have a general theory of impossibility. Instead, the concept of impossibility is drawn from scattered statements and applications in the jurisprudence, which appear broader and so perhaps less rigid than the English doctrine of frustration.

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INTRODUCTION TO THIS STUDY

Introduction

It is thought that when two parties voluntarily enter into an agreement, each party presumes the agreement serves its particular interests. However, commercial ventures sometimes might be thwarted by an occurrence that is out of the contracting parties' control. For example, the contractual subject matter may be destroyed, making performance impossible. Alternatively, war may suddenly break out, rendering the supply, manufacture, and delivery of relevant goods difficult or even illegal.

In contract law, such circumstances are classified under the topic of impossibility. When such a topic arises there is always a tension between two general principles. The first principle is known as the principle of sanctity of contract, sometimes expressed by the Latin maxim *pacta sunt servanda* (agreements must be kept), constitutes a fundamental principle in contract law.[1] This universal principle stresses the literal performance of contracts in spite of the fact that events occurring after the contract was made have interfered with the performance of one party or reduced its value to the other; it is based on the notion that one of the main purposes of the contract as a legal and commercial institution is precisely to allocate the risks of such events.[2]

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1 For English law see generally , D H Parry, *The Sanctity of Contracts in English Law* (Sweet & Mazwell 1959); P S Atiyah, *The Rise and Fall of Freedom of Contract* (Clarendon Press, Oxford 1979); K W Wedderburn, 'The Sanctity of Contracts in English Law' (1960) 5 Society of Public Techers of Law 142. In Islamic jurisprudence, this legal principle is emphasised in many places of the Holy Quran, for example, 'O you who have believed, fulfil [all] contracts.' Quran [5:1], see also, Quran [17: 34]; [16:91]. This principle is also emphasised in a prophetic report that is 'Muslims are bound by their stipulations.' Sunan at-Tirmithi [No. 1352]. According to Wehberg 'For the Islamic people, the principle, *Pacta sunt servanda*, has also a religious … This is clearly expressed by the Quran in many placed', Hans Wehberg, 'Pacta Sunt Servanda' (1959) 53 The American Journal of International Law 775. For more about the principle of sanctity of contract in Islamic law see for example, Nabil Saleh, 'Origins of the Sanctity of Contracts in Islamic Law' 13 (1998) Arab Law Quarterly 252, 259-264; M Zahid and R Shapiee, 'Pacta Sunt Servanda: Islamic Perception' (2010) 3 Journal of East Asia and International Law 375.

2 G Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 1-001.

The principle of the sanctity of contracts is universal: it is found in all legal systems, in all periods of history, in all cultures, and in all religions.[3] As a basic and universal principle, it is today recognised in Art. 1.3 of the UNIDROIT Principles, and codified in international law in Art. 26 (entitled 'Pacta sunt servanda') of the Vienna Convention on Contracts for the International Sale of Goods (CISG). This universal principle was expressed succinctly by Mahmassahi in *LIAMCO v Libya*:[4]

> The principle of the sanctity of contracts ... has always constituted an integral part of most legal systems. These include those systems that are based on Roman law, the Napoleonic Code (e.g. art 1134) and other European civil codes, as well as Anglo-Saxon Common Law and Islamic Jurisprudence 'Sharia.

Commercial activities on the contrary demonstrate that events and circumstances that may occur could render contractual performance impossible or very difficult to the contracting parties. In such circumstances the strict application of the principle of *pacta sunt servanda* will give rise to the opposite of justice and generate unfairness. In such situations, the principle of *rebus sic stantibus* (assuming things remain the same) operates as a counter-principle to that of *pacta sunt servanda*. Its effect of which is to relax the strict application of *pacta sunt servanda* in situations where the contractual performance becomes impossible or difficult for one party. Therefore, a tension between the two principles can be found in contract law regarding such an issue. *Pacta sunt servanda* would insist on performance in spite of the impossibility. On the other hand, reliance on *rebus sic stantibus* may provide uncertainty in contractual relations. As a result of this inherent conflict, each principle furnishes a different vision of contractual relations. As David Bederman commented: 'one is harmonious, predictable, and stable; the other is dynamic, dangerous and uncertain.'[5] This begs the question: how can a promise to perform a contractual obligation be reconciled with a fundamental change in circumstances? Contract law in every legal system must addresses this conflict between these two principles to achieve the best balance. This conflict will be illustrated throughout this study.

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3 W Paul Gormley, 'The Codification of Pacta Sunt Servanda by the International Law Commission: The Preservation of Classical Norms of Moral Force and Good Faith' (1969-70) 14 St Louis University Law Journal 367, 371.

4 [April 12 1977] YB Comm Arb [1981] 89, 101.

5 David J Bederman, 'The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations' (1988) 82 The American Journal of International Law 1, 2.

In discussion the conflict between sanctity of contract and discharge by supervening events, two further important points must to be kept in mind. The first point concerns the validity of an agreement to do an act impossible in itself. This is, for example, to promise to discover a treasure by magic or to bring a dead man to life. It is known to the parties at the time of making the agreement that the performance is impossible. In this regard, common law,[6] unlike the civil law principle *Impossibilium nulla obligatio* (no obligation is binding which is impossible),[7] recognises the validity of such an agreement.[8] In English law this principle has been repeatedly affirmed. It has been said that: 'when a man will for a valuable consideration undertake to do an impossible thing, though it cannot be performed, yet he shall answer in damages'[9] this is due to that the impossibility is only as to the promisor's ability to perform that which he had undertaken to perform, and 'the defendant ought to pay something for his folly.'[10]

The second point is that impossibility of performance may be 'initial' or 'subsequent' to the contract being made.[11] Initial impossibility involved a situation where both parties share a common misapprehension. This would be the case, for instance, for a contract for the sale of goods where the goods, unbeknown to either party, perished while their sale was being negotiated. For this reason, this type of mistake is often

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6 See, O W Holmes, *The Common Law* (Little Brown and Co 1881) 299-300, 'In the case of a binding promise that it shall rain tomorrow, the immediate legal effect of what the promisor does is, that he takes the risk of the event, within certain defined limits, as between himself and the promisee. He does no more when he promises to deliver a bale of cotton.'

7 Justinian's Digest 50.17.185. See for example, Swiss Code of Obligation, Art. 201. In Germany, prior to the 2002 amendment to the Civil Code (BGB), §§ 306 the position was that an agreement to do an act impossible in itself was void, but such a position was replaced by §§ 311a(1) BGB to validate such an agreement. For a comparative perspective in this regard see for example, K Zweigert and H Kötz, *Introduction to Comparative Law* (3rd edn, Clarendon Press 1998) 488ff; Peter J Mazzacano, 'Force Majeure, Impossibility, Frustration & the Like: Excuses for Non-Performance: the Historical Origins and Development of an Autonomous Commercial Norm in the CISG' [2011] Nordic Journal of Commercial Law 1, 12.

8 The difference of approach between the two legal systems in regarding this principle of *Impossibilium nulla obligatio* contributed to the fact that civil law remedies are concerned primarily with performance, not damages, while the primary remedy in common law is to pay damages. Accordingly, enforcing performance is inappropriate when the performance in question was, or had become, impossible, while paying damages still possible in such a situation. G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 1-002

9 *Thornborow v Whitcare* (1706) 2 Ld Raym 1164, 1165 (per Holt C J). See also, *Eurico SpA v Phillip Brokers (The Epaphus)* [1987] 2 Lloyd's Rep 215, 218.

10 ibid

11 See in general, G Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) ch 1.

referred to as 'common mistake'.[12] Whereas, subsequent impossibility occurs after the conclusion of the contract; the obligation is capable of being performed at the time it is made, but a subsequent event makes it impossible.[13] This is for instance, the good in the above example perished after the conclusion of the contract. This kind of situation is dealt with under the doctrine of frustration.

Both the doctrine of frustration and common mistake address the same problem, namely how the law should respond when the parties' assumptions are, or turn out to be, radically different from those which the parties assumed when they entered the contract.[14] The key factor for the distinction between the two doctrines is the precise time at which the impossibility occurs.[15] The legal effects of the two doctrines differ in that mistake makes a contract void[16] *ab initio*, while frustration discharge it with effect from the point of the frustrating event.

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12 See, S J Stoljar, *Mistake and Misrepresentation: A Study in Contractual Principles* (Sweet & Maxwell 1968); C MacMillan, *Mistakes in Contract Law* (Hart Publishing 2010); P S Atiyah, 'Couturier v Hastie and the Sale of Non-Existent Goods' (1957) 73 Law Quarterly Review 340.

13 It should be noted that when the term 'impossibility' and 'excuse' used throughout this study it refers to 'subsequent impossibility'.

14 For the relationship between the doctrine of mistake and frustration see for example, Swan John, 'The Allocation of Risk in the Analysis of Mistake and Frustration' in Barry J Reiter and John Swan (eds), *Studies in Contract Law* (Butterworths 1980) 181; Kull Andrew, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' (1991) 43 Hastings Law Journal 1.

15 Contrast the case of *Griffith v Brymer* (1903) 19 TLR 434 and *Krell v Henry* [1903] 2 KB 740. The former was decided on the grounds of mistake and the latter on the grounds of frustration. For a full details of these cases see chapter three under the discussion of 'frustration of purpose'. However, In certain circumstances the difference between the two doctrine is very fine, see for example, *Amalgamated Investment & Property Co Ltd v Hohn Walker & Sons Ltd* [1973] 3 All ER.

16 *Associated Japanese Bank (International) Ltd v Crédit du Nord SA* [1989] 1 WLR 255. This legal effect is given a statutory effect in the Sale of Goods Act 1979, s. 6 which states that: 'Where there is a contract for the sale of specific goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void.' In Islamic law this issue has been treated under an abroad concept referred to as *bay al-ma'dum* (the contracting on non-existence subject matter) at the time of contracting; the contract in such a case is void. It does not distinguish between whether or not the parties know about the status of the subject matter. Under this principle many transactions were viewed by Islamic law as void once, for example, the sale of an animal foetus while it is still in the womb. See, A Ibn Taymiyah, *Al-Qiyas fi Al-Shar' Al-Islami* (Dar Al-Fikr 1992) 26-28; M Ibn Al-Qayym, *I'lam Al-Muwqni'in*, Vol 4 (Dar Al-nafaes 2001) 267. This principle is applied in Saudi courts. In one case, a contract was concluded under which the claimant would buy a number of shares in a particular company from the defendant. Both parties believed the existence of the company, but later, it was realised that such a company was not, in fact, in existence. Upon an action brought by the claimant, the court held that the contract was *ab initio* void: The Board of Grievances, decision No. 3509/1/Q in (1430AH/ 2008). See, in general, M Zahraa and S Mahmor, 'The Validity of Contracts When the Goods Are Not Yet in Existence in the Islamic Law of Sale of Goods' (2002) 17 Arab Law Quarterly 379.

The aim and significance of the study

The aim and purpose of this study is to examine in detail one of the most prominent exemptions to the doctrine of the absolute contractual relationship in English and Saudi law. The doctrine of impossibility is fluid and complicated; it has over the years served as an avenue through which a party can be excused from the performance of the obligations of the contract and so be exempted from liability in damages if an unforeseen event occurs to renders the performance of contractual obligations impossible or difficult.

In English law, it has been argued that, 'although frustration is a difficult defence to invoke, it should not be thought that it has become a sterile doctrine which is incapable of development'.[17] This is true, as many issues under the doctrine of frustration under English law can be developed, such is the issue of 'foreseeability' and 'commercial hardship'. These issues, along with others, need to be re-examined and reconsidered. In Saudi law, contract law, in general, relies heavily on traditional Islamic jurisprudence. The rule of excuse, in particular, is not dealt with under a clear headings or categories. Instead, its legal principles are found scattered throughout the jurisprudence. This requires considerable effort and ordering to outline.

The contribution to knowledge will be due to the fact that the study will provide a detailed and critical account of the principles and concepts of the doctrine. The study will endeavour to go beyond the usual treatment of the doctrine and present a broader and deeper view of the doctrine by discussing many theoretical and practical components and issue. On a theoretical level, the research will address the so-called 'economic efficiency' notion and its connection to the subject under study. The notion stem from a complicated socio-economic analysis and seek to create a criterion upon which how the application and understanding of doctrine of contractual excuses can be derived. Another remarkable theory is that of the 'relational contract.' this theory consider a contract to represent a relationship between the parties because it involves special norms, such as cooperation, trust, and so on, and that the relationship should be taken into account legally. In other words, the contract is a contract-as-relation,

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17 Ewan McKendrick, *Contract Law* (11th edn, Palgrave Macmillan 2015) 248.

rather than a contract-as-transaction. On a practical level, the research will discuss the widely used 'force majeure clauses' that the parties provide in contract to qualify their obligations against the risk of supervening. There is a very close connection between these clauses and the doctrine of frustration, in that they overlap in many aspects.

The study also offers recommendations for legal reform. In terms of English law, the doctrine would, from this researcher's perspective, work better if the scope were to be expanded. This concerns in particular the problem of 'economic hardship' which is one of the most complex and difficult areas of contract law. This complexity to some extent result from the nature of the problem; it is a relative area, varying from one case to another. Given its importance, the entirety of Chapter Four will be devoted to a discussion of this issue. With regard to Saudi law, as previously mentioned, the doctrine is not dealt with under clear headings or categories. In addition, the current study will show that there are shortcomings attributed to contemporary legal commentators in leaving the doctrine undeveloped. Thus, the research can be said to constitute an attempt to frame a general doctrine of impossibility.

As the Saudi law heavily relies on Islamic law; the study of Islamic law would be useful for Western lawyers because it would help them enrich their knowledge of the law and understanding their own legal systems better. The study of how the law is applied in Saudi Arabia is of more than academic interest; it has practical benefits in the light of day by day increases in commercial exchanges between the Kingdom and the other wide world.

Methodology

The reason for choosing English law is because it represents one of the most major legal systems in the world – common law. In addition, the English doctrine of frustration has seen large-scale developments over decades, as will be shown throughout the thesis. With reference to Saudi law. This is because the applicable law mainly relies on religious legal system – Islamic law. There are more than 50 Muslim-majority countries and more than one billion Muslim around the world, most of whom regulate their lives to some extent by the provisions of Islamic principles.

The research method employed in the thesis is mainly library-based research. With respect to English law, reliance will be upon the primary sources, including judicial cases and legislation, as well as secondary sources, academic textbooks and academic journal articles. With regard to Saudi law, the situation is quite different. Thus, a brief explanation is of importance. The primary sources of *shari'ah* (Islamic law) the (Qur'an and Sunnah)[18] are the main reference points in Saudi contract law. The secondary source, which plays a prominent role in contract law, is classical Islamic jurisprudence,[19] which has not been codified through a uniform set of rules or articles.[20] Classical Islamic jurisprudence is heavily referred to by Saudi jurists and judges in seeking precedents to provide judgements relevant to contemporary practices.[21] Therefore, frequent reference regarding Saudi law is made in the study to the early traditional Islamic writings along with other contemporary references. For clarity, it should be emphasised that, when Islamic law is referred to, this means that it is confined to the four Sunni schools of thought: Hanafi, Maliki, Shafii and Hanbali.[22] It should be noted that, on some particular points there are multiple views by among Islamic jurists; however, because of the limitations of this thesis, it will be enough to discuss the most dominant ones. In addition to the jurisprudence, although judicial cases are not binding in the sense that they are not authoritative,[23] they will be a great help in identifying the legal view of the Saudi court in some issues. Most of the cases referred to in this study have been obtained by visiting judicial institutions.

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18 Sunnah is the prophetic tradition.

19 See Art. 1 of the Basic Regulation of Governance of the Kingdom of Saudi Arabia Act (1992). It states that the Qur'an and Sunnah are the country's constitution; Art. 7 also restates Islamic law as the foundation of the country, declaring that the government draws its authority from the Qur'an and Sunnah, and that these two sources govern all the regulations of the state. See, David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1991) 25 The George Washington Journal of International Law and Economics 131.

20 The issue of codifying Islamic law is strongly debated today in present-day Saudi Arabia. The main reasons for the opposition can be summarised as follows: Mandatory codes will limit judges' scope to practise their interpretation of the primary sources, which are sometimes different from their understanding. In addition, rules of Islamic law have been sufficient to serve legal needs from the beginning of Islamic history until the present. Regarding this issue, see, for example, P Abu-Zaid, *Fiqh Annoazil* (Al-Risalah foundation 1996) 57-100.

21 M El-Gamal, *Islamic Finance: Law, Economics, and Practice*, (Cambridge University Press 2009) 64.

22 This is according to a Royal decree issued in 1927 that states that the four Sunni schools are the only main reference of Islamic jurisprudence.

23 F Vogel, *Islamic Law and Legal System Studies of Saudi Arabia* (Brill 2000) 8.

The research will employ the methodology of critical analysis. Each chapter is divided into two parts; the first part is devoted to English law and the second part to Saudi law. In some cases, reference will be made to other legal systems. This will enable the reader to understand how both laws deal with every subject under the doctrine of impossibility. Because of the lack of a unified doctrine of excuse in Saudi law, it is reasonable for clarity to adapt the structure often followed in English contract law textbooks discussing the subject of the doctrine of frustration.

Along with the critical analysis, the research will also engage in a comparative analysis of the doctrine of impossibility in English and Saudi law. Although, generally speaking, in both legal systems the doctrine addresses the situation of supervening events, it does not mean exactly the same thing under both systems. There are some obvious points of convergence and divergence that need to be carefully examined, and will be worthwhile to attempt a critical comparison of the subject matter in this thesis.

Having a comparative approach this research aims to consider and explore the harmonious and divergent aspect between the legal system being studied. To the extent that the difference between these legal systems under studied are traceable and recognisable this thesis aims to examine the legal and factual reasons for such differences. Along with English and Saudi law, there will be in some occasional places a reference, by way of comparison to some national and international legal systems. This is to consider and explore how some problematical points have been dealt with from other legal perspectives.

CHAPTER ONE: DISCHARGE OF CONTRACTUAL RELATIONSHIPS

1.1. Introduction

It is assumed in all contracts, that the parties will perform their obligations. However, sometimes, that contractual relationship may encounter obstacles before performance is completed. The concept of discharge is simply the recognition that the contractual relationship has come to an end. If obligations under a contract are discharged, then the effect is to release the parties of the contract obligations. The remedies available will depend on the manner in which those obligations were discharged.

The main focus of this thesis is the concept of impossibility and such a concept generally operates to discharge the contract. However, although impossibility may bring the contractual relationship to an end, it is not the only one cause. To place this concept in contrast it is necessary to have a general idea of the other legal causes to identify the differences and the nature of each.

In this chapter, light will be cast on the causes for discharging a valid contract[1] under common and Islamic contract law. In common law, contracts may be discharged by performance, mutual agreement, breach and impossibility (frustration). In Islamic law, contracts may be discharged by performance, mutual agreement, breach, *khiyarat* (options), and impossibility. The discussion in this chapter will deal with these causes of discharge except the cause of impossibility which, will be dealt with in detail starting in chapter two, as it is the subject of the thesis.

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[1] That is, an invalid contract, as a result of illegality, for instance, is not included here.

1.2. PART ONE: English law

1.2.1. Discharge of contract

1.2.1.1. Discharge through performance

If both parties perform their obligations under a contract, the contract is discharged. This is the ideal method of discharge and, in fact, how the vast majority of contracts are discharged.[2] The general rule under common law was that performance must be precise and exact. In *Cutter v Powell,*[3]

> The claimant's husband agreed by contract to work for the defendant on the condition that the payment will be due upon the performance completion. After six weeks of performance and before the completion by about 20 days, the claimant's husband died. The claimant brought an action seeking for a sum to represent the six weeks' work undertaken.

This action was rejected. The claimant's husband had failed to perform completely his side of the contract.[4] The requirement that performance must be precise and exact has been applied very strictly in cases under s.13 of the Sale of Goods Act 1893 (now s.13 of the 1979 Act).[5] It imposes the condition that the goods must correspond with the description. The application of this section is illustrated by *Re Moore & Co Ltd Landauer & Co,*[6] in which:

> The defendant entered into a contract for the sale of canned fruit to be packed in cases containing 30 tins. Upon delivery, it was discovered that some of the consignment was packed in cases containing 24 tins. This, in fact, made no difference at all to the market value of the goods, but the court held that the defendant was entitled to reject the whole consignment.

However, this harshness of this law with respect to performance has been mitigated by the creation of various exceptions. Firstly, in a divisible contract, in the sense that the contract is divided into stages or parts and once a particular stage or part has been completed by a party, they are entitled to payment.[7] Secondly, in cases where a party

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2 E McKendrick, *Contract Law* (11th edn, Palgrave Macmillan 2015) 328.

3 (1795) 6 TR 320.

4 The claimant's husband's death was not, of course, a breach of contract; therefore, this case would today be treated under the case of discharge by frustration. This case was decided some time before the doctrine was established.

5 See also the Consumer Right Act 2015 ss. 9-18.

6 [1921] 2 KB 519.

7 *Ritchie v Atkinson* (1808) 10 East 295

who performs his contractual obligations *substantially*, though not exactly, he may be able to enforce the contract. If the enforcement holds, that party is entitled to the contractual sum with a deduction to reflect the imprecise performance.[8] If, however, the court finds that the performance did not amount to substantial performance, that party is entitled to nothing.[9] Thirdly, where one party is unable to complete performance without the assistance of the other party, they may make an offer or 'tender' of performance. If the other party does not accept the performance, then the party seeking to tender performance is discharged from the contract.[10] Thus, a tender of performance is equivalent to performance. Finally, where a party to a contract is prevented by the promisee from performing his contractual obligations, then he is entitled to payment for the work that has been done.[11]

1.2.1.2. Discharge through agreement

A contract is the result of an agreement; thus, the contracting parties may, at any time, discharge the contract by a further agreement. In doing so, the parties release one another from their contractual obligations.[12] This further agreement must be supported by consideration to be legally enforceable. The requirement of consideration is essential because it will prevent the possibility of one of the parties going back on their agreement and taking action against the other for breach of contract. However, if the agreement is contained in a 'deed' then no consideration will be required.

In situations where a contract is executory on both side, that is, neither party has carried out his obligations under the contract, the mutual release by agreement of the outstanding obligations is sufficient in itself to be consideration for each other. Thus, a buyer and seller may agree to cancel a contract; the seller need no longer supply the goods, and the buyer no longer has to pay. This situation is often described as 'accord

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8 *Hoenig v Isaacs* [1952] 2 All ER 176.

9 *Bolton v Mahadeva* [1972] 1 WLR 1009.

10 *Startup v MacDonald* (1843) 6 Mann & G 593.

11 *Planche v Colburn* [1831] 8 Bing 14.

12 Sometimes, parties may agree expressly in their contract that it will become discharged should certain circumstances arise; see, *Bland v Sparkes* [1999] All ER (D) 1382.

and satisfaction'.[13] The 'satisfaction' provided by the parties must be in any significant respect different from that which they were originally contractually bound to do.[14]

However, where a contract has been wholly performed by one party but not by the other, it will not be sufficient as consideration,[15] even by agreement, for the party with outstanding obligations merely to perform part of those outstanding obligations, as the agreement will not be binding.[16] It will be sufficient if the consideration for the new agreement is in any significant respect different from that which he was originally contractually bound to do, such as, paying earlier than he was bound to do or in a different manner.[17]

1.2.1.3. Discharge through breach

A breach of contract[18] occurs where one party, without lawful excuse, fails to fulfil or states that he does not intend to fulfil his obligations under the contract. The legal remedy for breach of contract depends on the type of the term[19] breached, so it is important to distinguish between them.[20] A 'condition'[21] is a major term of the contract that goes to the root of the contract, the breaching of which will give the

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13 The concept of 'accord and satisfaction' was explained by Scrutton L.J. in *British Russian Gazette and Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616.

14 *Pinnel's Case* (1601) 5 Co Rep 117a.

15 It should be noted that a 'waiver' is binding on both parties even though there was no consideration; see *Hartley v Hymans* [1920] 3 KB 475; *Charles Rickards Ltd v Oppenheim* [1950] 1 KB 616. See T Dugdale and D Yates, 'Variation, Waiver and Estoppel – a Reappraisal' (1976) 39 Modern Law Review 680.

16 *D & Builders Ltd v Rees* [1966] 2 QB 617.

17 *Re Charge Card Services Ltd* [1989] Ch 497.

18 See in general, J Stannard and D Capper, *Termination for Breach of Contract* (Oxford University Press 2014); F Reynolds, 'Discharge of Contract by Breach' (1981) 97 Law Quarterly Review 541; J W Carter, 'Discharge as the basis for termination for breach of contract' (2012) 128 Law Quarterly Review 283.

19 For a full account for the classification of contractual terms; see, for example, G Treitel, *Some Landmarks of Twentieth Century Law* (Clarendon Press 2002) Ch 3.

20 Traditionally, contractual terms were classified as either conditions or warranties. The category of innominate terms was created in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26. See, Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 18-042.

21 It should be noted that using the word 'condition' within a particular term of a contract does not automatically make that term a 'condition' in the legal sense. See, for example, *L Schuler AG v Wichman Machine Tool Sale Ltd* [1974] AC 235. See W Bojczuk, 'When is a Condition not a Condition?' [1987] Journal of Business Law 353.

innocent party, in addition to the right to claim damages, the right to treat himself as discharged from the contract.[22] A 'warranty' is a minor term in a contract that is not central to the existence of the contract, the breaching of which will merely entitle the innocent party to sue for damages.[23] 'Innominate' terms are neither conditions nor warranties, but depending on the effects of their breach, they may be classified as conditions or warranties.[24]

Upon the occurrence of breach, the termination of the contract does not arise automatically. After such a breach, the aggrieved party has the choice of either accepting the breach as a repudiation of the contract or affirming the contract, rejecting the breach.[25] However, where the innocent party wishes to accept the breach and terminate the contract he must generally communicate his decision to the party in breach.[26]

In certain circumstances, one party may expressly[27] or implicitly in his conduct[28] indicate that he will not fulfil his contractual obligations before the time of performance. This is known as 'anticipatory breach'.[29] In this situation, the innocent party may choose to affirm the contract, await the performance and then argue for breach, or treat the contract as immediately repudiated and himself as being discharged from the contract. To illustrate this proposition, reference should be made to *Hochster v De La Tour*,[30] in which

> The defendant employed the claimant to work as courier starting from June 1. On May 11, the defendant informed the claimant that the contract is terminated. On May 22, the claimant brought an action against the defendant who argued

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22 *Poussard v Spiers* (1876) 1 QBD 410.

23 *Bettini v Gye* (1876) QBD 183.

24 See *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26.

25 In reality, however, in many cases, they will have little choice but to accept the breach, as they may be unable to continue performance of the contract without the co-operation of the other party. A contract of employment is a good example. See, for example, *Soares v Beazer Investments Ltd* [2004] EWCA Civ 482. See G Treitel, 'Affirmation after Repudiatory Breach' (1998) 114 Law Quarterly Review 22.

26 *Vitol SA v Norelf Ltd, The Santa Clara* [1996] AC 800.

27 For example, *Hochster v De La Tour* (1853) 2 EI & BI 678.

28 For example, *Frost v Knight* (1872) LR 7 Ex 111.

29 See in general, Brian Coote, 'Breach, Anticipatory Breach, or the Breach Anticipatory?' (2007) 123 Law Quarterly Review 503.

30 (1853) 2 EI & BI 678.

> that there was no breach until June 1. The court held that the defendant was in breach and the claimant could claim damages immediately.

The claimant did not have to wait until June 1 to bring an action for breach of contract. Allowing the innocent party to sue at this stage is sensible, as it permits him to mitigate his losses and move on. However, if the innocent party does not accept the breach, there may be a danger of losing his right to sue for breach of contract. This possibility is illustrated by *Avery v Bowden*,[31] in which

> The defendant charted the claimant's ship to sail to Odessa and load cargo at the port within 45 days. When the ship arrived there was no cargo to load. The defendant told the claimant that he could not perform his part of the contract and instructed him to sail away. Instead, the claimant remained in Odessa hoping a cargo would arrive. Before the 45 days was passed, the Crimean War broke out between England and Russia, which would have rendered the performance illegal as the port of Odessa became an enemy port. The claimant then brought an action arguing that the defendant's notice that the cargo would not arrive was an anticipatory breach.

It was held that the defendant's failure to provide a cargo was an anticipatory breach and the claimant could have sued immediately, but he chose not to do so and affirmed the contract. The contract was frustrated,[32] with the result that both parties were discharged and therefore the claimant had lost the right to sue under the contract. It seemed that the defendants were lucky, as the outbreak of war rescued the defendant.

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31 (1855) 5 EI & BI 714. See also, *Fercometal SARL v MSC Mediterranean Shipping Co SA, The Simona* [1989] AC 788.

32 See the discussion of supervening illegality in chapter three.

1.3. PART TWO: Saudi law

1.3.1. Discharge of contract

1.3.1.1. Discharge through *tanfidh* (execution)

The main objective of contract is to execute the obligations undertaken.[33] Contracting parties must perfectly perform what they have promised. This is a religious and moral requirement before a legal obligation.[34] The Prophetic saying 'Give the worker his wages before his sweat dries.'[35] indicates that all obligations should be honoured immediately. Thus, a contract of sale, for example, ends with the transfer of the subject matter from the seller to the buyer and payment of the price by the buyer.

1.3.1.2. Discharge through *iqalah* (mutual agreement)

Iqalah[36] can be defined as 'termination of a contract by mutual consent of the parties in case one of them is regretful and wants to turn away from the contract'.[37] Contracting parties are encouraged[38] to discharge each other's obligations if one of them regrets the bargain and wishes to discharge his contractual commitments.[39] The requirement of 'mutual consent' is justified in the sense that a contract, in this case, is created by mutual agreement; thus, it can be terminated simply through the same mutual agreement. That is, this cannot be done by unilateral action.[40]

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33 See M Islam, 'Dissolution of Contract in Islamic Law' (1998) 13 Arab Law Quarterly 336.

34 Quran [5:1].

35 Sunan Ibn Majah [No. 2443].

36 The meaning of *igalah* in Arabic is associated with forgiveness. For the concept of *al-iqalah,* see, for example, M Islam, 'Dissolution of Contract in Islamic Law' (1998) 13 Arab Law Quarterly 336, 342-345.

37 W Al-Zuhayli, *Al-Fiqh Al-Islami wa Adillatuh*, vol 4 (Dar al-Fikr 1984) 277.

38 This permissibility does not extend to marriage contracts.

39 This is based on a Prophetic report: 'whoever discharges a regretful person of his undertaking, Allah will remove his obstacles in the hereafter.' Sunan Abi Dawud [Nn. 3460].

40 M Islam, 'Dissolution of Contract in Islamic Law' (1998) 13 Arab Law Quarterly 336, 342.

1.3.1.3. Discharge through breach

A party to a contract might sometimes not receive the performance due to him because of the failure of the other party to fulfil his side of the contract. Under traditional Islamic jurisprudence, it is contended,[41] the available remedies for the aggrieved party were, generally, specific performance and/or the equivalent in monetary compensation (damages). Therefore, *faskh* (termination) was not considered as a general remedy for breach of a contract.[42] One commentator argues that 'there is no mandatory rule of traditional Islamic law to be found against the adoption of this remedy by modern Arab contract law'.[43] Al-Zarqa, a prominent contemporary Islamic jurist, while asserting that 'termination' for a breach was not available under traditional Islamic law as a general relief, is of the opinion that there is no reason not to apply it.[44] He argues that such a relief can simply be concluded from the Islamic teaching of justice and equity.[45]

With respect to the above contentions, i.e. termination was not recognised under the traditional Islamic jurisprudence, it is not accurate. The 'termination', in fact, is recognised as a remedy for breach of a contract. Although it was not dealt with under a general concept, it was available. It is partly available under the concept of *khiyarat* (options).[46] Further, it is also recognised in scattered situations in traditional Islamic law. Under the treatment of insolvency, for example, if a buyer refuses to pay for the goods sold and his refusal is a result of procrastination, the majority of Islamic jurists

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41 Adnan Amkhan, 'Termination for Breach in Arab Contract Law' (1995) 10 Arab Law Quarterly 17; Nabil Saleh, 'Remedies for Breach of Contract under Islamic and Arab Law' (1989) 4 Arab Law Quarterly 269, 283-284; M Islam, 'Dissolution of Contract in Islamic Law' (1998) 13 Arab law Quarterly 336, 358.

42 In one case, Ibn Taymiyah, a prominent Islamic jurist, in dealing with a situation where one contracting party refused to pay the price (*matel*), was of the opinion that the aggrieved party had the right to terminate the contract: A Ibn Taymiyah, *Al-Fatawa Al-Kubra*, vol 5 (Dar al-kotob al-ilmiyah 1987) 391 'to avoid the difficulty of allegation'. See also, A Al-Mardawi, *Al-Insaf fi Marifat Al-Rajih min Al-Khilaf*, vol 4 (Dar Ihia al-Turath 1999) 459.

43 Adnan Amkhan, 'Termination for Breach in Arab Contract Law' (1995) 10 Arab Law Quarterly 17, 18.

44 M Al-Zarqa, *Al-fiqh Al-Islmi fi Thawbih Al-Jidid*, vol 2 (Dar al-Kalam 1955) 235.

45 ibid.

46 See the following discussion.

give the aggrieved party the right to terminate the contract.[47] Practically, today, 'termination' as a remedy for a breach of contract is applied in Saudi courts.[48]

1.3.1.4. Discharge through *khiyarat* (options)

The foremost legal means and complex system for contracting parties to terminate the contract is the principle of *khiyarat,* (pl. of *khiyar*; so options).[49] In general, it gives both parties or one of them, after concluding the contract, the right to choose between *faskh* (termination) or *imda* (ratification) of the contract. If the option is to terminate, the effect is to render the condition as if the contract never existed. During the option and until the choice, the contract, is *ghyr lazim* (non-binding).

Many options are mentioned in Islamic jurisprudence, some of which are agreed upon by the jurists and some are matters of disagreement. The following discussion will address the well-recognised options.

The first option is *khiyar al-majlis* (the option of the contractual session).[50] This option is exercisable only while the contracting parties are still 'on the session of contract', that is, before the communication between them is discontinued.[51] The option confers on both parties the right to terminate the contract.[52] The aim of this right is to give the parties the opportunity in case one of them has had second thoughts and no longer wishes to proceed.

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47 A Ibn Taymiyah, *Al-Fatawa Al-Kubra*, vol 5 (Dar al-kotob al-ilmiyah 1987) 391 'to avoid the difficulty of allegation'; A Al-Mardawi, *Al-Insaf fi Marifat Al-Rajih min Al-Khilaf*, vol 4 (Dar Ihia al-Turath 1999) 459. Other jurists argue that the aggrieved party cannot enjoy this right; instead, the contract should be carried out and the party in breach should be forced by the court to fulfil his duty. See, for example, A Al-Kasani, *Badai'a Al-Sanal'a*, vol 5 (Dar al-Kitab al-Arabi 1990) 511.

48 See, for example, the decision of the General Court in Riyadh, decision No. 32380495/ in (1433AH/ 2011), where the court held that a contract was terminated because of a fundamental breach of the seller.

49 The notion of *khiyarat* is based on the tradition of the Prophet. For an overview of the Islamic rights of option see S Rayner, *The Theory of Contracts in Islamic Law* (Graham & Trotman 1991) 305-51; W Al-Zuhayli, *Financial Transactions in Islamic Jurisprudence* (M El-Gamal tr, Dar al-Fikr 2007) 231; M Kamali, *Islamic Commercial Law: An Analysis of Futers and Options* (The Islamic Texts Society 2011) 181ff.

50 Sahih Al-Bukhari [No. 2079].

51 If the session is not face to face but occurs by other means, such as by phone, it refers to the time before they hang up. International Islamic Fiqh Academy, decision No. [1](3/6)52 in 1990.

52 This option is taken up by the UAE Civil Code 1985, Art. 136.

The second option is *khiyar al-shart* (stipulated option).[53] This option allows the contracting parties to stipulate for themselves or even a third party the right to terminate the contract within a certain time. For instance, the parties may, at the session of contract, stipulate that the contract is optional for the purchaser within three days, and once this period has passed the contract is binding.[54]

The third option is *khiyar al-'ayb* (defect option).[55] This option[56] is available upon the discovery[57] of defective[58] goods. In such a case, the buyer has the option either to terminate the contract and thereby return the goods, or to keep the contract alive with a price reduction corresponding to the defect.[59]

Khiyar al-ghabn (the option unfair price).[60] This option allows both parties to allege the termination of a contract upon the occurrence of fraudulent deception related to unfair prices.[61] To invoke such a right, the degree of *ghabn* should be significantly unfair according to commercial custom.[62] It seems that this option rests on the principle of good faith's priority over the contractual agreement.

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53 Sahih Al-Bukhari [No. 2407].

54 The length allowed for this option is a matter of disagreement among Islamic jurists. Some argue that this period should not exceed three days; see, for example, A Al-Kasani, *Badai'a Al-Sanal'a*, vol 5 (Dar Al-Kitab Al-Arabi 1990) 165; M Al-Shrbiny, *Mogni Al-Mohtaj Sharh Al-Menhaj,* vol 2 (Dar Al-Kotob al-Ilmiah 2009) 47. Others argue that it is a matter of agreement between the parties even if it exceeds three days; see, for example, M Al-Buhoti, *Sharh Mountaha Al-Iradat*, vol 3 (A'lam al-Kotob 1993) 187; M Al-Buhoti, *Kashaf Al-Qina' 'an Matn Al-iqna,* vol 3 (Al-Nasir Al-Hadithah 1982) 417. The latter view has been criticised because it 'contradict the normal rules establishing the boundaries of certainty in contracts, for it threatens normal and straightforward binding obligations with prolonged suspension, making them conditional upon the expiry of an unlimited term'. S Rayner, *The Theory of Contracts in Islamic Law* (Graham & Trotman 1991) 311.

55 Sahih Al-Bukhari [No. 2151].

56 Another option that is slightly similar to this option is *khiyar al-tadlis* (option misrepresentation), which is given to the aggrieved party when the condition of goods was deliberately concealed.

57 However, if the buyer knew about the defection upon the conclusion of the contract, there is no option.

58 The level of defect required to implement this option is any defect that results in a diminution of value, according to commercial customs. See, M Al-Buhoti, *Sharh Mountaha Al-Iradat*, vol 3 (A'lam al-Kotob 1993) 361; M Al-Buhoti, *Al-Rod Al-Morbi'* (Maktabat al-Riyadh al-Hadethah 1970) 230.

59 See the General Court in Riyadh, decision No.3331141/ in (1433AH/ 2012); the General Court in Riyadh, decision No. 32189741/ in (1434AH/ 2013).

60 This option was not recognised by the school of Hanafi and Shafi'I; see, M Al-Sarkhasi, *Al-Mabsot*, vol 12 (Dar Al-M'arifah 1986) 220; E Al-Nawawi, *Al-Majmo' Sharh Al-Mohathab*, vol 9 (Maktabat al-Irshad nd) 791.

61 See, for example, the General Court in Riyadh, decision No.32500212/ in (1433AH/ 2012), where the court held that a contract was terminated upon *ghabn* when it found that the price paid for the subject matter (a farm) was more than three times the price of nearby farms. However, see the General Court in Riyadh, decision No. 33225573/ in (1434AH/ 2013), where the court rejected the plea of *ghabn* when it found that the party alleging it had experience with the market of the item sold.

62 A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 36-37.

1.4. Conclusion

Common law and Islamic law share a commitment to the fulfilment of contractual obligations as a general rule in compliance with the principle of the sanctity of contract. Along with this fundamental principle, both legal systems also simultaneously provide for a legal exit from the contractual relationship in situations where impossibility comes into play.

This chapter has provided a general overview on the causes that allow a contract to be brought to an end; performance, agreement, breach, impossibility, and *khiyarat* (options). Both legal systems recognise the first four causes while the fifth is not recognised by common law. It is understood that the chance of discharging a contract according to Islamic law is greater than that under common law. The options of *al-majlis, al-shart,* and *al-ghabn* may seem odd to other legal systems. However, although the notion of options is not conceptually recognised in English law, some of its functions have its similarities under English law. The function of the option of *al-'ayb,* for instance, has its comparable function under s.13 of the Sale of Goods 1979 Act, which entitles the innocent party to terminate the contract.

The concept of 'breach' is closely connected with 'performance' and 'impossibility'. A contract, for example, to build a house may be the subject of a dispute; the builder feels that he has fulfilled all that he was obliged to do under the contract and thereby claim the contract price, while the promisee feels that the builder's performance is defective and he is thereby discharged from his obligation to pay the contract price or at least deduct a sum. Alternatively, the builder may encounter a supervening event that renders the performance, in his eyes, impossible, while the promisee on the other hand sees non-performance as breach of contract. It is not surprising, therefore, to observe the allegation of breach of contract against the allegation of impossibility throughout the cases addressed in this thesis.

Chapter Two: GENERAL FRAMEWORK OF THE DOCTRINE OF EXCUSE

2.1. Introduction

After the parties have concluded a contract, unexpected events beyond their control may occur that render the obligations impossible or difficult. For example, the contractual subject matter may have perished, rendering performance impossible. Alternatively, war may suddenly break out in a country, rendering the supply, manufacture, and delivery of relevant goods difficult or even illegal. In English law, such situations are treated under the doctrine of 'frustration'.[1]

Historically, until a little over a hundred years ago, English common law would never excuse a party who could not perform his contractual duties, even if this was through no fault on their side and the law was inflexible in providing any sort of relief in this situation. It is in *Taylor and Caldwell*[2] that the modern law of frustration originally started. Accordingly, the doctrine was developed to allow a contract to be discharged where the parties make an assumption when contracting that is later shown to be incorrect. Despite the recognition of the doctrine it is strictly applied. In this regard it has, for example, been expressed that the doctrine was only to operate 'within very narrow limits',[3] that 'it by no means follows that disappointed expectations lead to frustrated contracts'[4] and that the doctrine was 'not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.'[5]

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1 Originally, the term 'frustration' was confined to the discharge of maritime contracts by the 'frustration of the adventure', but it has now been extended to cover all cases where an agreement has been terminated by supervening events beyond the control of either party: J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 473. According to Treitel 'The expression "frustration of contract" refers to the whole doctrine of discharge by supervening event, irrespective of the type of event which bring about discharge.' G Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 2-046.

2 (1863) 3 B&S 826.

3 *Tsakiroglou & Co. Ltd v Noblee Thorl G.m.b.H* [1962] AC 93, 115; *Gold Group Properties Ltd v BDW Trading Ltd* [2010] EWHC 323 (TCC); [2010] BLR 323, [68]; *Bunge SA v Kyla Shipping Company Ltd* [2013] 1 Lloyd's Rep 565, [39].

4 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 715.

5 *Pioneer Shipping Ltd v BTP Tioxide Ltd* (The Nema) [1982] AC 724, 752.

This is because the courts were reluctant to allow to a party escape from a contract when the other party is not at fault. The courts prefer to see the doctrine as a last resort that should be used rarely and only with reluctance.

To conduct a thorough study of how both the English and Saudi law approach the law of discharge, this chapter will examine the general highlights of the law related to such a problem. Therefore, this chapter is divided into two parts. The first part of the discussion will address the rule of impossibility in common law, beginning with the historical development and background of the doctrine. Having laid the foundation for understanding the background for the doctrine of frustration, the discussion will shift to address the limitations and scope of the doctrine before finally focusing on the justification or theoretical basis of the doctrine. Part two of this chapter focuses on Islamic law. This discussion will examine the nature and concept of the law of impossibility, specific origins of impossibility that form the starting point of this doctrine, limitations, and finally justification.

2.2. PART ONE: English Law

2.2.1. Historical development

2.2.1.1. The doctrine of absolute liability

Historically, the principle of absolute contract or liability (the *'no excuses'* rule) was provided at common law.[6] The view was that 'the contractor must perform it or pay damages[7] for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible.'[8] The principle of absolute contract was enunciated in the classic case of *Paradine v Jane*.[9] The facts were as follows:

> The tenant of a farm was sued for non-receipt of two years rent that was due upon the lease. The tenant argued that he should be excused because he had been dispossessed and prevented from enjoying the profits of the land by 'Prince Rupert, an alien born, enemy to the King and Kingdom … with a hostile army of men.'

The plea was rejected and it was held that the tenant was not to be excused for his non-performance. In reaching its decision, the court stated that:

> Where the law creates a duty or charge and the party is disabled to perform it without any default in him, and hath no remedy over, there the law will excuse him . . . but the party by his own contract creates a duty or charge upon himself,

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6 A Simpson, *A History of the Common Law of Contrac*t (Clarendon Press 1975) 530-532; John D Wladis, 'Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law' (1987) 75 Georgetown Law Journal 1575, 1579-1593; D J Ibbetson, 'Absolute Liability in Contract' in F D Rose (ed), *Consensus ad Idem: Essays in the Law of Contract* (Sweet & Maxwell 1996) ch 1; D J Ibbetson, 'Fault and Absolute Liability in Pre-Modern Contract Law' (1997) Journal of Legal History 1; Cliona Kelly, 'Paradine v Jane: A Doctrine of Absolute Contractual Liability?' (2004) 12 Irish Student Law Review 64.

7 During the 13th century, the remedy of specific performance was occasionally granted in an action in covenant. The relief was discretionary and damages could thus be granted instead. However, specific performance later went into decline and damages became the standard relief available. See, Cecil H S Fifoot, *History and Sources of the Common Law: Tort and Covenant* (Stevens and Sons Ltd 1949) 259; A W Brian Simpson, *A History of the Common Law of Contrac*t (Clarendon Press 1975) 14; Joseph Biancalana, 'Actions of Covenant 1200-1333' (2002) 20 Law and History Review 1, 38.

8 *Taylor v Caldwell* (1863) 3 B & S 826, 833 (Blackburn J). See, Oliver W Holmes, *The Common Law* (Little Brown and Co 1880) 273.

9 *Paradine v Jane* (1647) Aleyn 26.

> he is bound to make it good, if he may,[10] notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract.[11]

This passage draws a distinction between two situations. Firstly, where the law imposes a duty, supervening impossibility is an excuse for non-performance of that duty, provided that the defendant does not have a remedy against a third party. For example, a tenant would not be liable for waste if a house were destroyed by a storm or enemies, but would be if it were destroyed by a third party who was a subject of the King. Secondly, where a party has 'by his own contract' imposed a duty he must perform it, 'notwithstanding any accident by inevitable necessity'. This latter phrase would include even a situation where the party has no remedy over, such as an accident caused by the act of God or the actions of an enemy alien. This is because he could have protected himself in the contract. For example, a tenant would be liable for breach of an express covenant to repair a house, even though it is struck by lightning or damaged by enemies of the King.

The absolute liability in *Paradine v Jane* was adverse to the tenant. Despite his inability to enjoy the benefits of the property, he was also not excused from his obligation to pay the rent. The harshness of the absolute liability was not only applied in the case of *Paradine v Jane*, but also has survived for a long period and many decisions were pronounced after this case in which the courts did not discharge a party

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10 The phrase 'if he may' has caused controversy in its interpretation. Wade interprets it as supporting his argument that this case does not stand for the principle of absolute liability: 'What is the significance of "if he may" and why are these words in the text? The position in which they stand makes it clear that they form a significant part of the sentence. They can, I think, mean nothing else than this: that the duty to perform his undertaking rests always upon the promisor while performance is still within the bounds of human possibility. That is to say, if the thing can be done at all, the promisor must do it. But if performance becomes impossible, the case then falls outside the terms of the judgment in *Paradine v Jane* and we have to inquire elsewhere whether the promisor remains bound.' H W R Wade, 'The Principle of Impossibility in Contract' (1940) 56 Law Quarterly Review 519, 524. See also, John D Wladis, 'Common Law and Uncommon Events: The Development of the Doctrine of Impossibility of Performance in English Contract Law' (1987) 75 Georgetown Law Journal 1575, 1583; Treitel is of the opinion that the phrase means 'if he is allowed' in the sense that performance must be legal. G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 2-011. Other commentators, however, disagree, and feel that Rolle J. in fact meant that impossibility was no excuse. D J Ibbetson, 'Absolute Liability in Contract' in F D Rose (ed), *Consensus ad Idem: Essays in the Law of Contract* (Sweet & Maxwell 1996) 3, 35 states: 'On balance, though we cannot be sure, it seems likely that the formulation of Rolle J. in *Paradine v Jane* was intended … to state the law in terms of absolute liability in contract.' See also, Roy G McElroy, *Impossibility of performance* (G L William (ed), Cambridge University Press 1941) 4; Arthur L Corbin, *Corbin on Contract* (West Publishing Co 1952) 328.

11 *Paradine v Jane* (1647) Aleyn 26, 27.

from his contractual obligations.[12] In the 19th century, the harshness of the rule of absolute liability was recognised. As one commentator observed that:

> The law of England differs from the law of all other countries by the peculiar strictness with which it construes and enforces contract. The act of God and the King's enemies, to which may be added those of the national government having a commanding or prohibitory force, are the only accident that can excuse an obligor from performing his engagement … the doctrine that it [*Paradine v Jane*] lays down is in direct opposition to common sense and common justice.[13]

However, during the period of absolute liability there were exceptional situations in which the contracting parties could be excused from their contractual obligations:

1) In the case of death or disability in personal performance.[14] This was not merely confined to the contracting parties, but also included the person who was meant by the contract.[15]
2) In a contract of bailment where a chattel that is the specific subject-matter is destroyed;[16] and
3) Illegality aspects arising from a subsequent Act introduced by Parliament.[17]

2.2.1.2. Emergence of the doctrine of frustration

In 1863, the famous case of *Taylor v Caldwell*[18] took the first step towards the modern doctrine of frustration in English law.[19] In this case, the strictness and rigidity of the

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12 For example, *Carter v Cumming* (1666) 1 Cas in Ch 84; *Belfour v Weston* (1786) 1 TR 310; *Izon v Gorton* (1839) 5 Bing NC 501; 132 ER 1193.

13 Anon, 'Execution of a Contract Impossible' (1833) 10 American Jurist and Law Magazine 250, 251.

14 *Hyde v The Dean and Canons of Windsor* (1579) 78 ER 798; *Marshall v Broadhurst* (1831) 148 ER 1480; *Wentworth v Cock* (1839) 10, AD&E 42, 45-46.

15 *Robinson v Davison* (1870-1871) LR 6 EX 269.

16 *Williams v Lloyd* 82 ER 95; (1629) W Jones 179 KB. In this case, it was held that the bailee was excused from liability to return the horse, since the horse had died through no fault of bailee. It has been said, however, this case does not come under the absolute contract framework; therefore, regarding it as an exception is not accurate, since cases such as this can be described as cases in which the law establishes a duty operating to exercise reasonable care. See G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 2-012.

17 *Abbot of Westminster v Clerke* 73 ER 59 (1536). The Court of King's Bench stated that if a seller undertakes to deliver wheat by a particular day in another country and by that day the law has been changed, then the seller is discharged from his duty.

18 (1863) 3 B&S 826

19 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 2-022_2051; Catharine MacMillan, 'Taylor v Caldwell (1863)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 127.

rule of absolute contractual liability was relaxed, allowing more flexibility. The facts of the case were as follows:

> Taylor had concluded a contract with Caldwell to hire out the Surrey Garden and Music Hall for concerts on four particular nights, which were to take place in the summer of 1861. The parties had agreed on the rent, which was £100 per night. Six days before the first concerts could begin, an accidental fire destroyed the hall, so that, "it became impossible to give the concerts". Taylor had been put to great expense in preparing for his concerts, and submitted that, as the contract was an absolute one, Caldwell must pay damages for the breach.

At first, Blackburn J acknowledged that the strict view of excuse was the general rule:

> There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burthensome or even impossible.[20]

Blackburn J continued to synthesise several lines of authority into an exception. He relied on three of the existing authorities, which were regarded as qualifications to the doctrine of the absolute liability in English law. He did that in order to ascertain the underlying basis to these authorities so as to develop the rationale. These authorities are: cases of contracts for personal services where death or incapacity prevented the performance,[21] cases of contracts for the sale of goods where the goods perished after the property in them had passed to the buyer, and cases of contracts for bailment where the subject-matter was destroyed through no fault of the bailee.[22] In addition to these authorities, Blackburn J referred to some authorities from the Roman and Civil law, [23] although he commented that while the civil law was not the reference for the English

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20 *Taylor v Caldwell* (1863) 3 B&S 826, 833.

21 *Hyde v The Dean and Canons of Windsor (1579) 78 ER 798*; *Marshall v Broadhurst* (1831) 148 ER 1480; *Wentworth v Cock* (1839) 10, AD & E 32; *Hall v Wright* (1859) 120 ER 695.

22 He cited *Sparrow v Sowgate* (1623) 82 ER 16; *Williams v Lloyd* 82 ER 95; (1629) W Jones 179 KB: *Coggs v Bernard* (1703) 92 ER 109.

23 He referred to Justinian's *Digest.* 45.1. 23, 33: 'If Stichus [a slave] is promised to be delivered on a certain day, and dies before that day arrives, the promisor will not be liable', 'If you owe me a certain slave on account of a legacy, or a stipulation, you will not be liable to me after his death; unless you were to blame for not delivering him to me while he was living. This would be the case, if, after having been notified to deliver him, you did not do so, or you killed him.' Translation from, S P SCOTT, *The Civil Law,* available online on < http://www.constitution.org/sps/sps.htm>. Blackburn J also referred to R J Pothier, *A Treatise on the Law of Obligations* (William D Evans tr, Strahan 1806) pt III, ch VI, Art III, s 633: 'the debtor of specific thing is discharge from his obligation, when the thing is lost, without any act, default or delay on his part,' this was 'subject to an exception, when he has, by a particular clause in the contract, expressly assumed the risk of such loss upon himself.' For the

court 'it affords great assistance in investigating the principle on which the law is grounded.'[24]

In his conclusion, Blackburn J stated:

> The principle seems to us to be that, in contract in which the performance depends upon the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.[25]

The ground upon which the principle was built was that it tends to carry out the intent of the contracting parties.[26] According to Blackburn J, because the continued existence of the hall was essential to the performance, when it ceased to exist both parties were discharged from their contractual obligations. So, the court found for Caldwell.

Blackburn J in his judgement did not attempt to challenge the validity of the rule in *Paradine v Jane*; in fact, he reconfirmed it. He sought a different path around the difficulty of strict liability by applying the device of implied condition although such an implication was not, in fact, a new notion.[27] What was new was the employment of that implied term by the court. This may raise the question of why such an implication was applied in this case. The answer is by no means obvious.[28] However, one possible answer may be that Blackburn J had considered and responded to the amount of criticism directed at the rule of absolute promise during the 19th century.[29] An alternative answer may lie in the intellect of Blackburn J himself. As he a learned lawyer whose concern was to order and explain the structure of the common law, he

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criticisms of Blackburn use of the Justinian's *Digest* see, W W Buckland, 'Casus and Frustration in Roman and Common Law' (1932-33) 46 *Harvard Law Review* 1281, 1287-8.

24 *Taylor v Caldwell* (1863) 3 B&S 826, 835.

25 ibid 839.

26 ibid 834: 'There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in making such contracts in general would, if it were brought to their minds, say that there should be such a condition.'

27 This implication had been previously argued in several cases before *Taylor v Caldwell* and had been dismissed. See for example, *Atkinson v Ritchie* 103 ER 877; (1809) 10 East 530 KB, in which counsel had argued that 'other necessary exceptions might be implied' and that a paramount duty was imposed by law to act for the benefit and safety to the crew, ship, cargo and state to which the master belonged. See also, *Hall v Wright* (1859) 120 ER 659.

28 Catharine MacMillan, 'Taylor v Caldwell (1863)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 127, 197.

29 See, for example (n 13).

may have found that this area of law was not satisfactory. Acquainted with the civil law, he was conscious that other legal systems addressed the difficulty of supervening impossibility by discharging both parties.[30]

The merit of the formulation of the exception gave the later judges the chance to extend the circle of exception. As McElroy remarked, it was the application of *Taylor v Caldwell* to the 'Coronation Cases' as well as to many cases that came before the courts as a result of the disruption caused by the First World War that extended the exception enormously.[31] It has been said that the large number of cases decided in the new exception caused a 'serious breach in the ancient proposition' of *Paradine v Jane*.[32] It has to be said that *Taylor v Caldwell* constituted the first step toward the modern doctrine of excuse, even though it did not at once create that doctrine.

Taylor v Caldwell did not at once established the modern doctrine of frustration as it is now, as there were many decisions shortly after *Taylor v Caldwell* that showed the doctrine of absolute liability was not overruled entirely.[33] This doctrine survived till a later time.[34] It was the case of *Appleby v Myers*[35] that regarded as the first case approving *Taylor v Caldwell*.[36]

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30 Catharine MacMillan, 'Taylor v Caldwell (1863)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 127, 198.

31 Roy G McElroy, *Impossibility of Performance* (G L Williams ed, Cambridge University Press 1941) 150.

32 *Ralli Brothers v Compania Naviera* [1920] 2 KB 287, 300. (by Scrutton L J).

33 Even commentators at that time did not give it that attention as they recognised it as an exception the *Paradine* rule and not a new doctrine. See for example, F Pollock, *Principles of Contract at Law and in Equity* (Stevens and Sons 1876) 415; G G Addison, *A Treaties on the Law of Contracts* (9th edn, Stevens and Sons 1892) 133-4; W R Anson, *Principle of the English Law of Contract* (Clarendon Press 1879) 314-17.

34 See for example, *Re Arthur* (1880) 14 Ch D 603; *Chartered Mercantile Bank of India v Netherlands India Steam Navigation Company* (1883) 122 ER 1135.

35 (1866) LR 1 CP 615. In this case the court gave its decision on the basis of the implied term: the ceasing of the continued existence of the essential thing without fault of either party, both parties were excused as result.

36 Catharine MacMillan, 'Taylor v Caldwell (1863)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 127, 200.

2.2.2. Limitations

As has been mentioned, a supervening event may be held to frustrate a contract; however, this is not always so. The court's attitude is a reluctant one in applying the doctrine of frustration. The courts do not want to give the parties the right to appeal to the doctrine simply to escape a bad bargain: frustration is 'not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains'.[37] Over the years the court developed some more specific limitations for applying the doctrine. Thus, at this point three limitations[38] highlight the operation of the doctrine; (i) self-induced frustration, (ii) a foreseen or foreseeable event and, (iii) express provisions. This section will address the first two limitations while the last one will be dealt with in a whole chapter due to its considerable overlap with the doctrine of frustration.

2.2.2.1. Fault 'self-induced'

A limitation of the application of the doctrine of frustration is that, if an act of one of the parties – while not necessarily a breach of contract in itself – has resulted in the circumstances which are alleged to frustrate the contract, this will be considered as 'self-induced frustration',[39] with the result that the contract will not be frustrated.[40]

For this principle, the best example to start with is the case of *Maritime National Fish Ltd v Ocean Trawlers Ltd.*[41] The facts were as follows:

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37 *Pioneer Shipping Ltd v B. T. P. Tioxide Ltd (The Nema)* [1982] AC 724, 752*; Edwinton Commercial Corpy v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] EWCA Civ 547, [111]. See also, *Group Properties Ltd v BDW Trading Ltd* [2010] All ER (D) 216 [68].

38 There used to be at one time considerable doubt as to whether the doctrine of frustration applied to leases. This is because a lease is more than a contract; it creates a legal estate in the land. Such a legal estate remains despite supervening events that may deprive the enjoyment of the land. However, in *National Carries Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 692, 697, the House of Lords held that, in principle, the doctrine of frustration is capable of applying to a lease. See generally, Jeffrey Price, 'The doctrine of frustration and leases' (1989) 10 Journal of Legal History 90.

39 See, P A Chandler, 'Self-Induced Frustration, Foreseeability and Risk' (1990) 41 Northern Ireland Legal Quarterly 362.

40 With regard to the burden of proof of self-induced events, the House of Lords in *Joseph Constantine SS Line Ltd v Imperial Smelting Cop Ltd* [1942] AC 154 held that it lies on the party who is alleging it.

41 [1935] AC 524.

> The appellants chartered a trawler called *St Cuthbert* from the respondents, which was fitted with an otter trawler. It was against Canadian law to use an otter trawler without a license, as required by the Canadian Fisheries Act. However, when the appellants applied for five licenses, they only obtained three. As a result, they decided to use the licenses for their own vessels and not *St Cuthbert*, which meant leaving it unused. Thus, the respondents sued for the hire charge and the appellants objected and argued that the contract had been frustrated.

It was held that the contract was not frustrated. The court's view was based on the fact that the election of the appellants was the reason preventing *St Cuthbert* from being engaged, not the government: *St Cuthbert* could have been given one of the three licenses.

The decision reached in *Maritime National* seems fair and reasonable; the appellants could have allocated one licence to *St Cuthbert* and therefore could have avoided the breach of any contract, since the trawlers to which the licences were allocated were all owned by the appellants.[42] However, this fairness may not be seen in a situation where a party finds himself in a position where there is no choice but to breach one of two agreement. This was the situation in *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)*.[43] The facts were:

> The defendant agreed to transport the claimant drilling rig using a special vessel. Specifically, the defendant agreed that the rig would either be transported by Super Servant One or Super Servant Two. The defendant intended to operate Super Servant Two for the contract, and allocated Super Servant One to other contract. Super Servant Two sank, and the defendant argued that the contract was frustrated.

It was held that the defendant could not rely on frustration: although the defendant was not negligent nor in breach of his duties, in the way in which he had allocated the vessels. Bingham LJ states that this is:

> … inconsistent with the doctrine of frustration as previously understood on high authority that its application should depend on any decision, however reasonable and commercial, of the party seeking to rely on it.[44]

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42 According to Treitel, this point should be treated as a significant part of the decision in *Maritime National Fish*, Peel Edwin (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-087_19-088.

43 [1990] 1 Lloyd's Rep 1.

44 ibid

Thus, according to this statement the existence of an election or choice was fatal, irrespective of how reasonable and commercial the decision to elect had been. Treitel criticised the court reasoning on the *Maritime National Flash* case as they were similarly concerned the point of 'choice'. The situation in the *Super Servant Two* case was different from that in the *Maritime National Flash* case, as the defendants in the latter case had a choice as to whether the contract was breached.[45] The defendant in *Super Servant Two* would have been more analogous to that of *Maritime National Flash* if he had had elected to operate the *Super Servant One* after knowing that *Two* sunk. Treitel, further, criticises the court reasoning that as frustration operates automatically, any degree of choice by the defendant must be fatal. This rule is one of the least attractive aspects of frustration and should not be extended, Treitel debated.[46]

It appears that the court in *Super Servant Two* gave a very broad notion of 'self-induced'. Even if Treitel's argument that the party acting reasonably in making the election, it could use such means remained available to fulfil some of the contracts and allege that the others were frustrated by the unexpected event, was not acceptable by the court.[47]

Super Servant Two therefore, seems to stand for the rule that any act or election by one of the parties which leads to a situation where the contract becomes impossible or radically different will preclude the operation of the doctrine of frustration. However, despite the criticisms directed at the decision in *Super Servant Two,* it 'has not been the subject of any reported challenge so perhaps it is not a difficult decision for the commercial world to cope with as might appear at first sight.'[48]

2.2.2.2. Foreseen and foreseeable events

A contract in terms of risk allocation is either expressly provided for[49]--and therefore the court should respect the contracting parties' allocation—or it is silent. In terms of

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45 Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-088.
46 ibid
47 *Super Servant Two* [1990] 1 Lloyd's Rep 1, 13-14.
48 Richard Stone and James Devenney, *The Modern Law of Contract* (11th edn, Routledge 2015) 401.
49 See Chapter 6.

the contract's silence, the general view is that a party cannot rely, as a premise of frustration, on an event that was, or should have been, foreseeable or foreseen.[50] There will be an inference that the parties contracted with the assumption that the risk was allocated. However, this proposition raises a difficulty. Foreseeability is a relative matter.[51] Was the frustrating event in Coronation Cases, the ill health of an elderly monarch, not foreseeable?[52] Thus, every event is more or less foreseeable. This, of course, leads to the saying 'Foreseeability is a slippery concept'.[53]

To solve this problematic uncertainty, one may suggest the argument put by Triantis—that is, since all risks cannot be foreseeable, they can be allocated as part of the package of a more broadly framed risk.[54] He said that 'risks of unforeseen contingencies are allocated by contract as part of more broadly framed risks to which they contribute as state variables.'[55] Therefore, 'advocates of the doctrine … are mistaken when they assert that the risks of unforeseen contingencies ... are not allocated by contract because they are not contemplated by the parties.'[56] Triantis argues that it is a myth that risks are contractually unallocated.[57] So, the risk of a nuclear catastrophe somewhere in the Middle East region that gives rise to a steep decrease in oil production and a consequent rise in its price might be unforeseeable. Accordingly, this risk cannot be allocated expressly in the contract. Yet, the broader risk of a great rise in the price of oil, for any reason, can be. Because of the ability of contracting parties to provide clauses for such a circumstance in wide framed risks

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50 Although no English case stands as a sole ground for this proposition, it is supported by (i) many dicta such as, *Krell v Henry* [1903] 2 KB 740, 752: 'The test [of frustration] seems to be whether the event which causes the impossibility was or might have been anticipated …' and *Edwinton Commercial Corpy v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517, [103]: 'if an event is foreseeable there is a rebuttable presumption that it is not a frustration event.', (ii) some American authorities, such as, *Baetjer v New England Alcohol Co* 66 NE 2d 748 (1946); *Glidden v Hellenic Lines Ltd,* 275 F 2d 253 (1960), and (iii) some authoritative textbook such as, Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-076.

51 In *The Sea Angel* [2007] 2 Lloyd's Rep 517, [104], it was stated that 'the less that an event … is foreseeable, the more likely it is to be a factor which, depending on other factors in the case, may lead to frustration'.

52 See the full discussion of Coronation Cases in Chapter 3.

53 Roger Halson, *Contract Law* (2nd edn, Pearson Education 2013) 390.

54 George G Triantis, 'Contractual Allocation of Unknown Risks: A Critique of the Doctrine of Commercial Impracticability' (1992) 42 University of Toronto Law Journal 450, 464-68. See also, Andrew Kull, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' (1991) 43 Hastings Law Journal 1, 42-43.

55 ibid 468.

56 ibid 466.

57 ibid 483.

there is no reason for the court to interfere.[58] Triantis goes further and maintains that the courts will not be better than the parties themselves in carrying out risk allocation since they lack the information.[59]

Triantis's argument is open to criticism. Firstly, it would involve 'the foresight of a prophet' if the contracting parties were expected to provide precise clauses for the unlikeliest obstruction. Lord Sands illustrated this issue when he gave an example of a tiger that has escaped from a 'travelling menagerie', causing fear to the milk deliverers, then the dairy may be excused from a breach of contract, but 'it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.'[60] McKendrick observes that 'the one thing which we do know about the future is that it is uncertain'.[61] It would, in fact, require the unforeseeable to be foreseeable and be described very specifically. Secondly, this would involve a very lengthy contract and ultimately wasteful costs since most obstructions would never occur. Thirdly, this can be seen as one for the adoption of the 'penalty default rule';[62] if the parties do not wish the losses to lie where they fall they should incorporate a clause to deal with the situation. It brings to the surface the old argument that the party 'might have provided against it by his contract.'[63] Fourthly, of course, parties can, and do, include clauses regarding supervening events, but such clauses do not always operate as the parties expect, as they may encounter narrow construction by the court.[64]

A completely different solution to the uncertainty resulting from foreseeability is to ignore foreseeability altogether. The argument that the parties foresaw a certain risk and therefore assumed its allocation is simply not always true.[65] In his discussion in

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58 ibid

59 ibid

60 *James Scott & Sons Ltd v Del Sel* [1922] SC 592, 597.

61 Ewan McKendrick, 'Force Majeure and Frustration—Their Relationship and a Comparative Assessment' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995) 43.

62 See, Ian Ayres and Robert Gartner, 'Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules' (1989) 99 Yale Law Journal 87, 97-106.

63 *Paradine v Jane* (1647) Aleyn 26, 27.

64 See Chapter 6.

65 Clifford Hall agrees with the direction that foreseeability should be ignored. However, Hall refers to a different premise in explaining contractual silence. Hall argues that a party who recklessly runs a known risk will be guilty of self-induced frustration. Of course they probably will not create the interruption itself, such as a war, but they do knowingly create the circumstances whereby those

the context of formation of contracts, Robert Goff LJ stated that 'it is difficult to imagine how silence and inaction can be anything but equivocal'.[66] Lord Denning MR observes that silence over a very foreseeable risk may indicate that the parties simply have failed to agree on a suitable clause, in the hope that the issue would not come to light but trusting the lawyers to solve it if it did.[67] Andrew Kull argues that foreseeable risks are simply left unallocated in the hope that they will never occur.[68] Trakman referred to the possibility that the parties feared that negotiating over the allocation of risk may be injurious to the relationship and that, as a result, the bargain might fall through,[69] or because they do not regard the risk sufficiently serious to receive attention.[70] However, this argument, again, is subject to objections. If the parties could not reach an agreement on what was to happen during the contracting time, it would be inappropriate for the court to reallocate the risk retrospectively. It may lead the courts to reverse the parties' allocation of risks in at least some cases where the risk had been foreseen and the parties had been content to leave it on the promisor, or where it should have been foreseen.[71]

A more realistic approach argues that it would be inadequate to consider foreseeable or foreseen as the only key to assigning risks to the promisor.[72] Instead, the court must, as the first step, comprehensively investigate the circumstances leading up to and

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conditions are likely to affect the contract in a material way. Clifford G Hall, 'Frustration and the Question of Foresight' (1984) 4 Legal Studies 300, 304-307. However, in the case of *The Super Servant Two* [1990] 1 Lloyd's Rep 1, which was held after Hall's argument, the court used a remarkably broad interpretation of the concept of 'self-inducement' to exclude frustration.

66 *Allied Marine Transport Ltd v Vale do Rio Doce Navegacao SA (The Leonidas D)* [1985] 1 WLR 925, 931.

67 *Ocean Tramp Tankers Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226, 234.

68 Andrew Kull, 'Mistake, Frustration, and the Windfall Principle of Contract Remedies' (1991) 43 Hastings Law Journal 1, 6.

69 Leon E Trakman, 'Interpreting Contracts: a Common Law Dilemma' (1981) 59 Canadian Bar Review 241, 246. See also, Harold J Berman, 'Excuse for Nonperformance in the Light of Contract Practices in International Trade' (1963) 63 Columbia Law Review 1413, 1415. From empirical perspective see, Stewart Macaulay, 'The Use and Non-Use of Contracts in the Manufacturing Industry' 9 (1963) The Practical Lawyer 13 'too often …businessmen really have not reached agreement on the difficult issues, but have ignore them to avoid argument.'; Stewart Macaulay, 'Non-Contractual Relations in Business: A Preliminary Study' (1963) 28 American Sociological Review 1, 12 'The legal position of the parties can influence negotiations; it makes a difference if one is demanding what both concede to be a right or begging for a favour.'; Lisa Bernstein, 'Private Commercial Law in the Cotton Industry: Creating Cooperation Through Rules, Norms, and Institutions' 99 (2001) Michigan Law Review 1724, 1753 refers to 'trust-based'.

70 ibid

71 Jonathan Morgan, *Great Debates in Law* (2nd edn, Palgrave Macmillan 2015) 141-44.

72 Roger Halson, *Contract Law* (2nd edn, Pearson Education 2013) 391.

surrounding the parties' agreement in order to ascertain the allocation of risk. The court may find from the parties' manner of dealing, including pre-contractual statements and behaviours, a considerable assistance.[73] Also, the court may draw some inference from an examination of the price terms of the contract, to help it ascertain the parties' desired risk allocation.[74] For example, the unusually high price of goods or services may lead the court to draw the conclusion that a certain risk is being taken by the promisor. In effect, the high price includes a risk premium to insure against that risk. Moreover, where the contract stipulates a remedy, for example discharge or modification, to one party's duty in a particular event, that might be evidence from which the court can infer that the party bore specific other risks.[75] It is clear from the above that the examination and investigation of the circumstances surrounding a contract plays an important role in ascertaining risk allocation. In the second step and when the court after its investigation reaches the conclusion that the risk is unallocated, the contract may be held to be frustrated.[76]

2.2.3. The theoretical basis of frustration

Much attention has been paid to the underlying theoretical or juristic basis for discharging contracts by the doctrine of frustration. This is perhaps due to the need to explain the departure from the doctrine of absolute contract. Therefore, two questions have been asked: why are contracts frustrated, and when? And as a result, various theories have been put forward at different times in order to reach a reasonable justification. Five theories will be addressed in the following section.

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73 ibid. for example, in an American case, *Austin Co v United States* (1961) 314 F 2d 518 cert den'd (1963) 375 US 830, the voluntary preparation by the promisor of specifications for information gathering systems led the court to conclude that the promisor bore the risk of failure to comply with those specifications.

74 ibid 392.

75 ibid

76 ibid 394.

2.2.3.1. Implied term

In the case of *Taylor v Caldwell*, which constitutes the real birth of the modern doctrine, the decision was based on the theory of the 'implied term', to the effect that; a contract will come to an end as a subsequence of a frustrating event.[77] This was explained by Lord Loreburn in *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*:[78]

> a court … ought to examine the contract … in order to see whether or not from the nature of it the parties must have made their bargain on the footing that a particular thing or state of thing would continue to exist. And if they must have done so, then a term to that effect will be implied, though it be not expressed in the contract ... Were the altered conditions such that, had they thought of them, the parties would have taken their chance of them, or such that as sensible men they would have said, 'if that happens, of course, it is all over between us'?

Although it seems an attractive explanation,[79] it is ambiguous and can be interpreted subjectively.[80]According to this, it can be said that, at the time of contracting, the parties seldom have any view in respect of the effects of the contract upon the occurrence of supervening events. Also, after the occurrence of such an event, the parties will rarely have a common view regarding the effect. For instance, one party may see that he is within, and the other that he is not within, the right to discharge the contract. In this regard, Lord Wright said: 'they would almost certainly on the one side or the other have sought to introduce reservations or qualifications or compensation.'[81]

Additionally, further criticism as to this theory is that Lord Loreburn did not put forward a purely subjective version of it when he stated: 'From the nature of the contract it can be supposed that the parties as reasonable men intended it to be binding

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77 This theory was accepted in later judgments, i.e. *Bank Line Ltd v. Arthur Capel* [1919] AC 435, 455 (Lord Sumner); *Joseph Constantine Steamship Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 163 (Viscount Simon) and 187 (Lord Siomnds). See, Leon E Trakman, 'Frustrated Contract and Legal Fictions' (1983) 46 Modern Law Review 39.

78 [1916] 2 AC 397, 404.

79 Roger Halson, *Contract Law* (2nd edn, Pearson Education 2013) 421.

80 J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 485.

81 *Denny Mott and Dickson v JamesB Fraser and Co* [1944] AC 265, 275.

on them under such altered conditions....'[82] However, presenting it in this form means that this theory loses its chief attraction, which is that the frustration merely gives effect to the intentions of the parties. As Lord Radcliffe has expressed:

> By this time it might seem that the parties themselves have become so far disembodied spirits that their actual persons should be allowed to rest in peace. In their place there rises the figure of the fair and reasonable man. And the spokesman of the fair and reasonable man, who represents after all no more than the anthropomorphic conception of justice, is and must be the court itself.[83]

2.2.3.2. Just and reasonable solution

The doctrine of frustration has been explained by reference to the notion of justice and fairness. This notion of fairness has been pronounced in many judicial statements. The doctrine has been described by Lord Sumner as 'a device, by which the rules as to absolute contracts are reconciled with a special exception which justice demands'.[84] Lord Simon pointed out that the doctrine was 'an expedient to escape from injustice'.[85] More recently, Rix LJ stated that although the court has no 'broad absolving power', justice provides the doctrine's 'ultimate rationale'.[86] The justice solution notion expressed in the above statements does, however, in fact, 'expresses the purpose of the doctrine, it does not provide it with any theoretical basis at all.'[87] It does not replace the rules that determine the circumstances in which the doctrine of frustration apply.[88] In other words, it concerns the question of *why* the contracts are frustrated but not *when*.

Even if considering the notion of justice solution as the test for *when* it has been rejected. One may argue that justice is actually achievable in holding parties to the

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82 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 404.

83 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 728.

84 *Hirji Mulji v Cheong Yue SS Co Ltd* [1926] AC 497, 510. See also, *Bunge SA v Kyla Shipping Company Ltd* [2013] 1 Lloyd's Rep 565, [39].

85 *National Carriers Ltd v Panalpina (Northern)* [1981] AC 675, 701. See also, *J Laurizen AS v Wijsmuller B V (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 8; R Wright, *Legal Essays and Addresses* (Cambridge University Press 1939) 259.

86 *Edwinton Commercial Corpy v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517, [113], [132].

87 *National Carriers Ltd v Panalpina (Northern)* [1981] AC 675, 687.

88 Treitel G H, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 16-009.

freely entered contract.[89] Lord Diplock states that 'The only merits of the case are that parties who have bargained on equal terms in a free market should stick to their agreement. *Justice is done by seeing that they do so*.[90'91] Additionally, adopting the justice solution results in giving the court the power to potentially discharge the parties from their contract whenever the court finds that it is fair and just to do,[92] and this might be applied where the effects of events have rendered the contract financially more onerous than the parties had assumed.[93] It has been stated that the notion of justice solution creates 'a morass of quasi-discretionary' decisions.[94] In addition, it is inconsistent with the fact that frustration brings the contract to an end forthwith, without more and automatically.[95] If the court is intent on exercising justice, it will, of course, collide with the rigidly automatic rule. Indeed, a suggestion has been put forward by Denning LJ that the court should enjoy a qualifying power 'in order to do what is just and reasonable in the new situation.'[96] However, this was disapproved by Lord Simonds on appeal.[97]

2.2.3.3. Radical change in the obligation

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89 Jonathan Morgan, *Great Debates in Law* (2nd edn, Palgrave Macmillan 2015) 133.

90 Emphasis added.

91 *Federal Commerce and Navigation Co Ltd v Tradax Export SA, The Maratha Envoy* [1978] AC 1, 8.

92 *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1 KB 190, 201-2. According to Chitty 'some judges have maintained that the doctrine seeks to give effect to the demands of justice, but these statements cannot be invoked to justify the conferral upon the courts of a wide-ranging discretion to re-write the parties' bargain in the name of "fairness and reasonableness".' Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-017.

93 Beatson J, Burrows A and Cartwright J, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 486.

94 *Edwinton Commercial Corpy v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517, [110].

95 See the discussion of 'the effect of frustration' in Chapter 5.

96 *British Movietonews Ltd v London and District Cinemas Ltd* [1951] 1 KB 190, 200. At a later time, Denning LJ argued that the contracting parties would never have agreed to an automatic discharge of the contract, had they considered the interruptive events. Rather, each party would have sought 'reservations or qualifications of one kind or another, *Ocean Tramp Tankers Corporation v V/O Sovracht (The Eugenia)* [1964] 2 QB 226.

97 [1952] AC 166, 188.

A 'radical change in the obligation' (sometimes known as construction),[98] which has been adopted in many cases,[99] has been generally seen as an appropriate test for frustration, as Lord Radcliffe said:

> … frustration occurs whenever the law recognizes 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 foederaveni*. It was not this that I promised to do.[100]

The court, therefore, will refer to the foundation of the contract in order to examine the situation of the obligation after the circumstances arise. The judgment will then be based upon a question: whether there would be a radical change in the enforceable obligation when the changed circumstances arise. It is important to note that a mere increase in prices will not be a sufficient excuse for frustration,[101] as Lord Radcliffe mentioned:

> 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.[102]

Incorporating a clear instruction and method to the court in order to construe the contract and at the same time respecting the parties' own assignment of risk is what distinguishes this approach.[103] However, despite the general acceptance of this test as the test for frustration, it will be shown elsewhere[104] in this research that this test suggests that it can be conceptually applied to situation in which the courts do not recognise it as a ground of frustration, that is of economic impossibility.

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98 Since it requires the court to first construe the terms of a contract in the light of its nature as well as the relevant surrounding circumstances at the time the contract was made.

99 *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, 131; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 744-745, 751; *Edwinton Commercial Corpy v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517, [111]; *Bunge SA v Kyla Shipping Company Ltd* [2013] 1 Lloyd's Rep 565; *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18, [24].

100 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 729. This statement has been reformulated by Lord Simon in *National Carriers Ltd v Panalpina (Northern)* [1981] AC 675, 700.

101 For full discussion of this point see Chapter 4.

102 ibid

103 Roger Halson, *Contract Law* (2nd edn, Pearson Education 2013) 425.

104 See chapter 4.

2.2.3.4. Foundation of the contract

The 'foundation of the contract' or 'frustration of the adventure' theory is based upon a question with respect to the event that occurred and its impact on the foundation of the contract: whether the event was of character and extent so sweeping that the foundation of what the parties agreed upon has disappeared.[105]

Despite Goddard J's positive statement that it is "the surest ground on which to rest the doctrine of frustration"[106], the word "foundation" of the contract seems not clear enough, as it raises an important question: what is the foundation of a contract in a specific case? It also, appears that there would be difficulty in applying this approach in the case of the unavailability of a contractual subject-matter.[107] Thus, the House of Lords has rejected this view.[108]

2.2.3.5. Total failure of consideration

The 'total failure of consideration' view suggests that the failure must indeed be total.[109] A clear problem with it, however, is that frustration can be applied in situations where the destruction is partial[110] or the obligation partly performed. On this basis this theory has been rejected by the House of Lords.[111]

2.2.4. Economic justification of frustration

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105 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 406.
106 *Tatem Ltd v Gamboa* [1939] 1 KB 132, 137.
107 Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-117.
108 *National Carriers Ltd v Panalpina (Northern)* [1981] AC 675.
109 ibid 687, 702.
110 For example, *Taylor v Caldwell* (1863) 3 B&S 826.
111 *National Carriers Ltd v Panalpina (Northern)* [1981] AC 675, 687, 702.

In a well-known article, Richard Posner and Andrew Rosenfield attempt to explain the doctrine of frustration from the perspective of economic analysis (superior risk bearer).[112] At first, Posner and Rosenfield recognise that the dilemma of the frustration is the matter of risk allocation, since the result of granting frustration is to allocate the risk of the interruptive event on the promisee, while the result of denying frustration is to allocate it on the promisor.[113] According to the rule of superior risk bearer, if the promisor was the superior risk bearer, than the contract should not be discharged; if the promisee was the superior risk bearer than the contract should be discharged. The superior risk bearer is the party who is in a better position to deal with the risk because he is the 'cheaper insurer'.[114] It is 'an aid to interpretation' in defining which party must be considered to have assumed a particular risk.[115] Theoretically, this rule is derived from the notion that the courts fill in the gap in the contract with respect to uncontemplated risks to reflect the view that the parties would have agreed upon had they negotiated over them.[116]

In assigning which party to the contract is the cheaper insurer Posner and Rosenfield give the following explanation:

> An easy case for discharge would be one where (1) the promisor asking to be discharged could not reasonably have prevented the event rendering his performance uneconomical, and (2) the promisee could have insured against the occurrence of the event at lower cost than the promisor because the promisee (a) was in a better position to estimate both (i) the probability of the event's occurrence and (ii) the magnitude of the loss if it did occur, and (b) could have

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112 Richard Posner & Andrew Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 Journal of Legal Studies 83. Consistent with Posner and Rosenfield's work, see Robert Cooter and Thomas Ulen, *Law and Economics* (5th edn, Pearson Addison-Wesley 2008) 277-81: arguing that courts should endeavour to fill the gap in contract with the rule of excuse in order to achieve efficient risk allocation. Christopher J Bruce, 'An Economic Analysis of the Impossibility Doctrine' (1982) 11 The Journal of Legal Studies 311: modifying slightly Posner and Rosenfield's economic theory, rather than asking which party could best have estimated the probability and extent of the risk in question, his test attempts to assign the party in a better position to mitigate the damages caused by the occurrence of the uncontemplated event.; Gerhard Wagner, 'In Defense of the Impossibility Defense' (1995) 27 Loyola University of Chicago Law Journal 55: arguing that the doctrine of frustration provides the incentive to promisees to make socially efficient reliance decisions.

113 ibid 87.

114 ibid 89.

115 ibid 90.

116 ibid 88-89.

> self-insured, whereas the promisor would have had to buy more costly market insurance. As we shall see, not all cases are this easy.[117]

In relation to the question as to whether the promisor or the promisee is the superior risk bearer, it must be inquired from an *ex-ante* perspective, in connection with the time of bargaining. Also, purchasing an insurance policy to cover the risk is not relevant in determining which party is the superior risk bearer:

> If this were the criterion of liability, it would give parties an incentive not to insure, for by not insuring they would increase the possibility that the court would assign the risk to the other party to the contract. So neither party might insure, or, fearing this possibility, both parties might insure. Neither result would be optimal.'[118]

At the end of their article, Posner and Rosenfield came to the conclusion that the superior risk bearer rule is generally implicitly employed under the doctrine of frustration and related doctrines.[119]

The Posner and Rosenfield approach, however, raises a number of difficulties, rendering its role in risk allocation ineffective. In the first place, the authors themselves admit that their theory is incomplete, and its empirical methods 'casual and crude'. It involves a broad standard with inherent disadvantages:

> A broad standard makes it difficult to predict the outcome of particular cases. If the purpose of contract law (so far as relevant here) is to supply standard contract terms in order to economize on negotiation, it will be poorly served by a legal standard so vague and general that contracting parties will encounter great difficulty in trying to ascertain the judicially implied terms of their contract; if the allocation of risks in the contract is unclear, neither party will know which risks he should take steps to prevent or insure against because he will be held liable if they materialize.[120]

Many commentators concur that Posner and Rosenfield's theory is indeterminate. But they go further in considering it as a mortal defect. According to Trebilcock, the factors involved are 'typically' equivocal.[121] Posner and Rosenfield use the case of

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117 ibid 92.
118 ibid 113.
119 ibid 100ff, 118.
120 ibid 96.
121 Michael J Trebilcock, *The Limits of Freedom of Contract* (Harvard University Press 1993) ch 5.

Krell v Henry[122] for the purpose of explaining their economic analysis.[123] They approve the decision in that case: Krell (the owner) was in a better place than Henry (the hirer) to cover the risk of cancelling the coronation procession by insurance as well as his ability to re-let the rooms for people to view the later postponed procession (once King Edward had recovered). For this reason, the promisor was the superior risk bearer and the court was right to treat the contract as discharged. However, Posner and Rosenfield's reasoning has been criticised. According to Treitel, this is an argument of doubtful weight. In the case of such a 'one-off' contract, neither party would be likely to consider the possibility of insurance. Some form of household insurance might cover Krell, but this would be unlikely to cover the risk in question.[124] As for the argument that Krell was able to recover his loss in full by again re-letting the rooms, it is not wholly compelling. The eventual (October) procession was in fact less glamorous and as consequence profits were considerably reduced. What if Krell had wasted expenditure in preparing the rooms for the original, June procession?[125]

The doubt whether the superior risk bearer rule is functional in practice goes wider than particular cases. Elofson says that answering the question of which party is in a better position to insure is likely to be 'arbitrary and unpredictable'; it is wholly unclear.[126] Sykes points out that 'it is exceptionally difficult to formulate a default rule of contract that limits discharge to the circumstances in which it is efficient – to administer such a rule, the courts will typically require more information than is reasonably available to them'.[127] Eric Posner remarks that three decades after introducing the theory, Posner and Rosenfield's approach generally has been a failure.

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122 [1903] 2 KB 730. For a full account of this case see Chapter 4.

123 Richard Posner & Andrew Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 Journal of Legal Studies 83, 110-111.

124 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 7-011.

125 ibid 7-012. John Swan, 'The Allocation of Risk in the Analysis of Mistake and Frustration' in Barry J Reiter and John Swan (eds), *Studies in Contract Law* (Butterworths 1980) 181: argues that the necessary information was not before the court. Letting rooms for coronation procession is an uncommon action for which there is no well-established market and there was no evidence of these parties' expectations. It is this absence of information that makes Krell a difficult case.

126 John Elofson, 'The Dilemma of Changed Circumstances in Contract Law: An Economic Analysis of the Foreseeability and Superior Risk Bearer Tests' (1997) 30 Columbia Journal of Law and Social Problems 1, 13.

127 Allen o Sykes, 'The Doctrine of Commercial Impracticability in a Second-Best World' (1990) 19 The Journal of Legal Studies 43, 93.

The main reason for this is the lack of the empirical data necessary to apply the superior risk bearer in practice.[128]

Posner and Rosenfield's approach, therefore, is inconsistent with the notion of filling a gap in the contract—that is, presenting an outcome that the contracting parties would choose themselves as an appropriate generalised default rule.[129] Kull observes that no rational contracting party would willingly adopt the Posner and Rosenfield proposal as a default rule, given the parties' inability to determine *ex ante* how the court would resolve the factual determination of risk-bearing capacity *ex post* and after the unforeseeable frustrating event has materialised.[130]

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128 Eric A Posner, 'Economic Analysis of Contract Law after Three Decades: Success or Failure?' (2003) 112 Yale Law Journal 829, 879.

129 Andrew Kull, 'Mistake, Frustration and the Windfall Principle of Contract Remedies' (1991) 43 Hastings Law Journal 1, 43-44.

130 ibid 46-47. See also, George G Triantis, 'Unforeseen Contingencies. Risk Allocation in Contract' [1999] University of Virginia 100, 111.

2.3. PART TWO: Saudi Law

2.3.1. The existence of the doctrine of excuse

As with many issues, Islamic law has not addressed and regulated the concept of excuse under a complete and unified doctrine that might be regarded as analogous to that applied in Western law.[131] Observers of traditional Islamic writings will find that the term 'excuse', or 'impossibility', or any equivalent of such does not appear as a heading in a book or section which under which the concept of the doctrine is theoretically treated.[132]

Many jurists have attempted to justify this lack of a coherent theory. Al-Sanhuri, one of the contemporary prominent legal scholars, maintains that Islamic law with regard to this point, in addition to other points, has not composed a coherent theory to address the concept of excuse; instead, it addresses each case individually and employ the functional and fair solutions for it. It is thus through these cases that judges and lawyers discover legal logic, which is then applied to other cases.[133]

El-Hassan, in an attempt to justify the lack of a comprehensive theory of impossibility, considers that impossibility usually exists within contracts the performance of which take time, such as supply and concession, and that these types of contracts were not well known in the early stage of Islamic history but emerged only after the Industrial Revolution. Early Islamic society was simple, and transactions were generally far from complex.[134] Although this is true, the efforts of contemporary legal commentators in regard to the development of the doctrine of excuse is behind the times, especially compared to the efforts undertaken to develop

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131 See, in general, A Al-Sanhuri, *Masadir Al-haqq*, vol 6 (Dar Ihia Al-turath 1997) 90; A Attermani, *Nadhariah Al-dhuruf Al-tari'iah* (Dar Al-fikr 1999) 81; S Ali Al-Said, *Nadhariah Al-dhuruf Al-tari'iah fi Al-uqud Al-idariiah wa Al-shari'ih Al-islamiah* (Dar Al-fikr Alarabi 2005) 61; Adnan Amkhan, 'Force Majeure and Impossibility of Performance in Arab Contract Law' (1991) ALQ 297, 298.

132 Coulson contends that the authoritative texts of traditional Islamic law do not have any exposition of a general doctrine of impossibility, Noel J Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Trotman, 1984) 83.

133 A Al-Sanhuri, *Masadir Al-haqq fi Al-fiqh Al-islami*, vol 6 (Dar Ihia Al-turath 1997) 90.

134 A El-Hassan, 'Freedom of Contract, the Doctrine of Frustration, and Sanctity of Contract in Sudan Law and Islamic Law' (1985) 1 *ALQ* 51, 58.

parallel doctrines in other legal systems, such as 'frustration' in English law and '*wegfal*' in German law.

Generally, two types of contracts were the main concern of traditional Islamic writings: the contracts of sale and contracts of hire. Through the treatment of these two contracts, on many occasions, the jurists lay out problematical hypothetical cases and then provide a just and fair solution. Islamic law of contract, therefore, emerges from the sparse details associated with different types of contract. Such incremental growth is similar to the development of the common law.

2.3.2. The nature of the doctrine

The terms *afat samawiyah* (misfortune from heaven) and *amr min Allah* (act of God) are occasionally found in traditional Islamic writings as the cause for rendering the performance of contractual obligations impossible.[135] For example, when a contract for the sale of fruits or crops has been made, its delivery may be rendered impossible by a natural form of misfortune, such as rain, cold, drought, or wind, that destroys the fruits or crops. Generally, such a misfortune or act of God is limited and restricted to natural phenomena that do not arise from human activity, although some jurists extend the limitation to include civil disorder, trespassing, and theft.[136] These above causes are also known in other legal systems. In common law, for example, the term 'act of God' has been used; defined by Lord Westbury LC as 'circumstances which no human foresight can provide for against and which human prudence is not bound to recognise the possibility'.[137]

Regarding the cause of impossibility, Al-Sanhuri[138] addresses the broad term *sabab ajnabi* (foreign cause),[139] under which he includes all events that claim impossibility on the grounds that the failure to perform is not caused by the contracting parties themselves but rather a result of external factors. It seems that this concept is wider than that of misfortune from heaven. It includes, for example, wars. Further, the

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135 See the discussion of the concept of *al-jawa'ih* (natural disasters) in Chapter 3.

136 Mahmassani S Rajab, *Al- nadhariah Al-'ammah Ll-mujibat wa Al-uqud* (Dar Al-alam Ll-malayin 1983) 498-499.

137 *Tennet v Earl of Glasgow* (1864) 2M, (H, 1) 22.

138 A Al-Sanhuri, *Masadir Al-haqq*, Vol 6 (Dar Ihia Al-turath 1997) 177.

139 *Sabab ajnabi* is identical to the French civil law concept of *cause etrangere*.

modern term *quwah qahirah* (superior force)[140] is also expressed as a cause of bringing a contract to an end.[141]

The perception of Islamic law tends to expand the scope of the doctrine of excuse. Although traditional Islamic law did not, conceptually, classify any distinctive components under the concept of excuse, modern legal jurists, based upon the principles of fairness and justice along with some known applications[142] that are occasionally found in traditional writings, have classified the concept of excuse to accommodate the concept of 'impossibility' and *nazariyyat al-zuruf al-tari'ah* (intervening contingencies).[143] Accordingly, when supervening circumstances have not rendered performance impossible but have simply resulted in an unreasonable burdensome on a party, that party may ask the court, on the basis of hardship, to intervene to adjust or discharge the contract.[144]

From the perspective of comparative contexts, Coulson, in his brief comparison between the Islamic concept of excuse and that of other legal systems, states that the Islamic concept of excuse in some respects is akin to that of frustration in common law. He states that both are:

> … used to indicate a situation in which a contracting party, through the arising of novel and unanticipated circumstances outside his control, finds the performance of his contractual obligations either to be impossible or to entail an unforeseen burden in the way of extra work or expenditure.[145]

The view of Islamic law toward the doctrine of excuse is summarised by Coulson:

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140 Sometimes '*quwah al-qanon*'.

141 This is expressly indicated by the Saudi Labour Law Art. 74 (5).

142 These famous applications will be discussed later in this chapter.

143 This principle will be dealt with in detail in chapter four.

144 This principle is incorporated in the modern law of many Arabic countries; see; for example, the Art. 249 of the UAE Civil Code provides that, 'If exceptional circumstances of a public nature which could not have been foreseen occur as a result of which the performance of the contractual obligation, even if not impossible, becomes oppressive for the obligor so as to threaten him with grave loss, it shall be permissible for the judge, in accordance with the circumstances and after weighing up the interests of each party, to reduce the oppressive obligation to a reasonable level if justice so requires, and any agreement to the contrary shall be void'. See also Kuwaiti Civil Code, Art. 198.

145 Noel J Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Trotman, 1984) 82. See also, N S Mahasneh, Liability Exemption for Failure to Perform under both the Vienna Convention for International Sale of Goods 1980 and Islamic Jurisprudence' (2010) 24 Arab Law Quarterly 73, 102.

> A brief summary, therefore, of the traditional Shari'ah doctrine of frustration is that virtually any supervening circumstances which were unforeseen by the contracting parties at the time of agreement and which render performance more difficult and burdensome than contemplated allows that contracting party who establishes the fact of such damage to rescind the contract.[146]

Accordingly, it would appear that the principle of equity and fairness in Islamic law takes priority over that of binding force of contract once the two principles come to stand in opposition to one another.[147]

2.3.3. Keys or featured applications of the doctrine of excuse in traditional law

As stated earlier, in Islamic law, there is no comprehensive legal doctrine of impossibility. However, certain concepts were identified in traditional Islamic jurisprudence that are relied upon as grounds and a starting point for the treatment of the rule of excuse: the concept of *al-udhur* (excuse) and *al-jawa'ih* (natural disaster), which will be addressed below.

2.3.3.1. The concept of *al-udhr* (Excuse)

The idea of the traditional Islamic concept of *al-udhr* (excuse),[148] which was mainly recognised by the Hanafi school,[149] revolves exclusively around contracts of lease and

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146 Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 1994) 87.

147 Christoph Marcinkowski (ed.), *The Islamic World and West: Managing Religious and Cultural Identities in the Age of Globalisation* (LIT & AEI 2009) 254.

148 See in general, Walied EI-Malik, 'The Islamic Concept of Changed Circumstances and its Application to Mineral Agreements' (1995) 2 Yearbook of Islamic and Middle Eastern Law 12, 18-24; Samir A Saleh, 'Some Aspects of Frustrated Performance of Contracts Under Middle Eastern Law' (1984) 33 International Comparative Law Quarterly 1046, 1047; M W Islam, 'Dissolution of Contract in Islamic Law' (1998) 13 Arab law Quarterly 336, 364-365.

149 See for example, A Al-Kasani, *Badai'a Al-Sanal'a*, vol 5 (Dar al-Kitab al-Arabi 1990); M Ibn `Abidin, *Hasheah ala Al-Dor Al-Mokhtar* (Dar Al-Fikr 1992). It was also recognised by the Majalla Art. 443 which provides that: 'if any event happens whereby the reason for the conclusion of the contract disappears, so that the contract cannot be performed, such a contract is discharged'. In addition to the above provision, the Majalla provides the following examples: (i) when a cook is hired for a wedding party, if one of the spouse's dies, the contract of service is discharged and (ii) if a man suffering

services. Within this concept the jurists list many supervening circumstances through which a party to a contract may be entitled to terminate his contract. For example, a contract to hire a riding animal for the purpose of carrying him to Makkah to perform pilgrimage and subsequently there was a discovery of banditry that put the party at a high risk[150] and a contract to hire a doctor for tooth extraction when subsequent recovery of the intended patient take place.[151]

However, the Hanafi school, unlike the other school, went further in expanding the scope of the *al-udhr* concept such that observers may say that there is almost no sanctity of contract. For instance, a lessor is entitled to invoke *al-udhr* to terminate his contract upon deciding to sell the house, and a lessee has also the same entitlement upon the desire to travel or to leave the area to change jobs.[152] These examples and others, of course, would definitely undermine the sanctity of contract. Therefore, the *al-udhr* concept as widened by the Hanafi school is unlikely to be applied by Saudi courts because of the force of binding contracts as well as this view does not reflect the view of the majority of jurists.

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from toothache makes a contract with a dentist to remove his tooth for a certain fee and the pain ceases, the contract of service is discharged. The Majalla was the first attempt to codify Islamic jurisprudence based on the Hanafi School, which was introduced in 1869 by the former Ottoman Empire and has survived as the civil law of many Islamic countries. The Majalla is translated into English and introduced in its legal and historical context in the two-volume work by C A Hooper, *The Civil Law of Palestine and Trans-Jordan* (Jerusalem 1933-36).

150 M Al-Sarkhasi, *Al-Mabsot*, vol 12 (Dar Al-M'arifah 1986) 15; A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 418; M Al-Buhoti, *Kashaf al-Qina' 'an* vol 3 (Al-Nasir Al-Hadithah 1982) 199.

151 ibid; A Ibn Qudamah, *al-Mugni 418.*

152 ibid. According to Al-Kasani, not allowing the party to invoke *al-udhr* in such circumstances would put him at a great difficulty. However, this can be debated by asking about the other party and the effects of discharging the contract on him.

2.3.3.2. The concept of *al-jawa'ih* (natural disaster)

The concept of *al-jawa'ih* (natural disasters),[153] which is only recognised by the Maliki[154] and Hanbali[155] schools, concerns contracts for the sale of crops and fruits.[156] It deals with a contract for the sale of fruits and crops while they are still on trees that, are partially or completely destroyed or damaged by natural disasters such as cold, drought, plant disease, or locust swarms after the conclusion of the contract and before the fruits and crops become ripe and ready for harvest. In such a situation, the buyer is entitled to claim for a proportionate price reduction for the corresponding amount of damaged crops and fruit, even if it amounts to a complete loss. [157]

Another controversial point between the schools regarding the *al-jawa'ih* rule is the amount of destruction or damage that can bring the rule into play. According to the Maliki school, it is a condition for this rule to be invoked that at least one-third of the crop must have perished, as any amount less than that is considered small.[158] Thus, if the percentage of lost fruits is less than one-third, such as a quarter, it is not considered sufficient to bring the rule into play. The Hanbali school, contrast, does not set a

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153 See in general, M Eiad, 'Athar al-Jawa'ih ala al-aqd' (1989) 6 Journal of Islamic University 1; Walied EI-Malik, 'The Islamic Concept of Changed Circumstances and its Application to Mineral Agreements' (1995) 2 Yearbook of Islamic and Middle Eastern Law 12, 24-25.

154 M Ibn Anas, *Muwatta,* vol 2 (Dar Ihia Al-turath 1985) 144-48; M Ibn Rushd, *Bedalat Al-Mujtahid wa Nehalat Al-Mogtasld*, vol 2 (Dar Al-Fikr 1995) 156ff.

155 See for example, A Ibn Qudamah, *Al-mugni*, vol 4 (Dar Al-fikr 1985) 177ff; A Ibn Taymiyah, *Al-fatawa Al-Kubra,* vol 5 (Dar Al-kotob Al-ilmiyah 1987) 66.

156 It seems that one of the reasons behind the disagreement among the four schools can be related to their adoption of the Prophetic statement that, 'If you were to sell fruits to your brother and these are stricken with calamity, it is not permissible for you to get anything from him. Why do you get the wealth of your brother, without justification? Sahih Muslim [No.1554]. Nevertheless, the discussion here will be treating this issue from a legal perspective only. It should be noted that there is a consensus amongst the different schools of thought that the sale of fruits that have not yet appeared is void since the subject matter of the contract is not in existence. Such a transaction falls under the forbidden principle of *gharar* (uncertainty or speculation); for deep details for the concept of *gharar,* see, for example, Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking*, (2nd edn, Graham & Trotman 1992); F Vogel and S Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Brill 2006) 71-96.

157 The concept of *al-jawa'ih* is not recognised by the Hanafi and Shafi'i schools. According to these schools, a contract for the sale of fruits and crops on trees before they become ripe is invalid since they consider the subject matter constructively not in existence, but when the fruits are sold when they are ripe, the risk passes to the buyer upon the conclusion of the contract, see, for example, A Al-Kasani, *Badai'a Al-Sanal'a*, vol 5 (Dar al-Kitab al-Arabi 1990) 239; M Al-Ramli, *Nihayat al-Muhtaj*, vol 2 (Dar al-Fikr 1984) 141-143.

158 M Ibn Anas, *Muwatta,* vol 2 (Dar Ihia Al-turath 1985) 144-48; M Ibn Rushd, *Bedait Al-Mujtahid*, vol 2 (Dar Al-Fikr 1995) 156ff.

minimum amount of loss to invoke the rule of *al-jawa'ih*.[159] Therefore, *al-jawa'ih* can be applied even if the amount lost is less than one-third.

Although *al-jawa'ih* is an issue only in the context of natural disasters, it has been concluded that its application can be extended to events where the cause was the result of a human act, such as a war.[160]

It seems that this transaction is dealt with in particular. In Islamic law, the risk passes[161] with the delivery of the subject matter and in the case of *al-jawa'ih* the delivery has been done by what is called *al-takhliah*, which means giving full access to the subject matter of sale and. One may find it unjust since the seller has completed his obligation by delivering the subject matter but found liable for the loss. However, it has been stated that the delivery in such a case is not a complete one, under which the seller has no liability.[162]

2.3.4. Limitations of the doctrine

To invoke the doctrine of excuse, some criteria should be met. As mentioned previously, Islamic law does not have a general theory of excuse; however, an attempt will be made to assess the available scattered authorities in Islamic writing to extrapolate the limitations and features of the rule of excuse. Two points will be dealt with here: (i) where the impossibility has been attributed to one of the contracting parties and (ii) where the supervening event was foreseen by both parties 'foreseeability'.

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159 A Ibn Qudamah, *Al-mugni*, vol 4 (Dar Al-fikr 1985) 177ff; A Ibn Taymiyah, *Al-fatawa Al-Kubra,* vol 5 (Dar Al-kotob Al-ilmiyah 1987) 166.

160 A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 87; A Ibn Taymiyah, *Al-Fatawa Al-Kubra*, vol 5 (Dar al-kotob al-ilmiyah 1987) 287

161 This point 'pass of risk' will be dealt with in chapter three.

162 A Ibn Qudamah, *Al-mugni*, vol 4 (Dar Al-fikr 1985) 216.

2.3.4.1. Beyond the control of the parties

The essence of impossibility is that it should not be due to an act of the party claiming impossibility.[163] Invoking impossibility should be subject only to circumstances where the supervening event is beyond the control of the parties to the contract. This principle, for example, was clearly asserted by Islamic jurists in their discussion regarding the concept of *al-jawa'ih*; they, limited its operation to acts of God, such as storm and droughts, and not the acts of the contracting parties.

Thus, where the alleged supervening event is due to the deliberate act or decision of one party or his negligence, the doctrine will not apply.[164] This principle has been applied by Saudi courts. In one case,[165]

> A contract was concluded by which the defendant undertook the obligation to transfer the claimant's goods to a particular place. However, during the transportation course, the goods were stolen by the defendant's drivers, who escaped. The defendant argued that he was not liable because a supervening event occurred beyond his control and the claimant replied that the defendant was in breach.

The court held that the defendant was in breach of the contract and rejected the argument that the disappearance of the goods and drivers was not beyond his control. Thus, establishing that the actions was not the party's conduct but rather his workers' does not excuse him from liability.

2.3.4.2. Foreseeability

In Islamic law, to invoke the impossibility rule, the supervening event must not have been anticipated or foreseen at the time the contract was made.[166] An event is

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163 See, A Al-Sanhuri, *Masadir Al-haqq*, vol 6 (Dar Ihia Al-turath 1997) 129-130; A Al-Ganayim, *Al-Udhur wa Atharoh fi Uqud Al-Mua'awadat Al-Maliyah fi Al-Fiqh Al-Islami* (Dar Al-Nafaes 2008) 131-132.

164 ibid.

165 The Board of Grievances, decision No. 4986/1/Q in (1427AH/ 2006). See also decision No. 4987/1/Q on (1427AH/ 2006), which have the same fact.

166 See, A Al-Sanhuri, *Masadir Al-haqq*, vol 6 (Dar Ihia Al-turath 1997) 129-130.

unforeseeable if, at the time of the conclusion of a contract, there were no immediate signs or particular circumstances that would make such circumstances reasonably likely. Therefore, impossibility as a plea would not be sufficient grounds if it appeared to the court that the event was anticipated at the contracting time.[167]

However, it seems that the degree of unforeseeability as an element for applying the law of discharge is low and not restrictive. This conclusion can be deduced from some hypothetical applications of impossibility in Islamic jurisprudence. In the discussion of the concept of *al-jawa'ih*, it was shown that a contract for the sale of fruits on trees would be discharged if after the conclusion of the contract and before the harvest a misfortune from heaven destroyed the fruits. The occurrence of a severe storm or drought, for example, cannot be said that it is totally unforeseeable, especially that the sold thing is in open space like a farm. Furthermore, an example delivered by Ibn Qudamah that is of a contract of service to dig a wall, which may be discharged should the contractor strike rock after the first few feet of digging.[168] Such an obstacle, i.e., the rock, would be normally anticipated in such work.

The requirement regarding unforeseeability for invoking the law of excuse has been applied by Saudi courts. In one case:[169]

> An administrative contract[170] was signed on 27th Dec 1990 between the contractor and the Minister of Interior to maintain the Ministry's networks connection for three years. However, after the expiration of the contract the contractor brought an action seeking for compensation for the loss incurred by him which arose from the high increase in the cost of materials due to the Second Gulf War (liberation of Kuwait).

The court rejected the contractor's argument. The war *inter alia* was not, in fact, an unforeseeable event; it started on 23 Jun 1990, i.e., about five months before the contract was made, and ended on 19 Feb 1991. The court stated that, 'in order for the court to operate the law of "intervening contingencies" the disruptive event must not be foreseeable'.

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167 The element of 'unforeseeability' is expressly indicated in many Arabic countries' civil codes as a constitutive element for operation of the doctrine of impossibility; see, for example, UAE Civil Code, Art. 249; Kuwaiti Civil Code, Art. 198.

168 A Ibn Qudamah, *Al-mugni*, vol 4 (Dar Al-fikr 1985) 422.

169 The Board of Grievances, decision No. 1717/1/Q in (1423AH/ 2006).

170 See Chapter 4, where a section is devoted to the administrative contracts.

2.3.5. The basis of the doctrine of excuse

Some modern legal writers[171] have attempted to justify the law of excuse by referring to some Quranic verses, such as '…Allah intends every facility for you: He does not want to put you to difficulties';[172] 'On no soul does Allah place a burden greater than it can bear';[173] and 'Allah commands justice and equity'.[174] These verses explain that any human should not undergo hardships, generally, as this is consistent with the spirit of Islamic law and with justice. However, it has been argued that these Quranic verses are not relevant, as it 'seems unconvincing in view of their religious and ritual context which would exclude the transposition of the verses with absolute certainty to financial transactions'.[175]

The very relevant basis and explanation for the doctrine is found in the principle of *al-darura* (necessity).[176] The idea of this principle, in general, is giving permission to an individual to adopt as a rule any position, even one contravening a categorical Islamic rule, when one is compelled by stark necessity. The result of this is to permit exceptional relaxation of rules. This principle is expressed in various legal maxims signifying equitable and common sense rules of necessity relating to the individuals' transactions, such as 'necessity allows actions which would otherwise be prohibited' and 'a major harm may be replaced by a lesser one'.[177] Therefore, breaking a promise would cause harm on one hand, but, on the other hand, it would be more harmful if the promise is kept in situations where, after the conclusion of the contract and before its performance, a supervening event that is not attributed to either party renders the contractual obligations impossible.

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171 See M Al-Zarqa, *Al-fiqh Al-Islmi fi Thawbih Al-Jadid*, vol 2 (9th edn, Dar al-Fikr 1978) 235; S Al-Mahmsani, *Al-Nazariyyah Al-'Amah lil Mujibat wa Al-'Uqawd*, vol 2 (Dar al-Alam 1983) 496.

172 Qur'an [2:185].

173 Qur'an [2:286].

174 Qur'an [19:90].

175 Samir A Saleh, 'Some Aspects of Frustrated Performance of Contracts Under Middle Eastern Law' (1984) 33 *International Comparative Law Quarterly*, 1046, 1048

176 For a further coverage of this principle, see, for example, W Al-Zuhayli, *Nazaryyat AL-Darurah Al-Shar'iyyah* (Resalah Publishers 1985); Abu Umar Ahmad and others, 'Shari'ah Maxims and their Implication on Modern Financial Transactions' (2010) 6 Islamic Bank Training and Research Academy 75.

177 These maxims and others are set out in the preliminary chapter of the Majalla.

According to Coulson, who has attempted to seek and explain the real grounds for the doctrine of excuse in Islamic law states,

> Briefly, therefore, the reluctance of the jurists to hold a contracting party to his promise in the face of changed circumstances may appear as a natural expression of an attitude of *resignation or fatalism*,[178] deriving from that total submission to the will of Allah which the faith of Islam itself demands.[179]

Although it is true that there is a notion in Islamic teachings that future circumstances are neither predictable nor controllable, Coulson's viewpoint is, in spite his excellent writings about Islamic law, incorrect. In response to Coulson, Shimizu argues that:

> … the essence of the Islamic legal system lies in not a simple religious character but a reasonable and flexible legal mechanism based on public interest (*maslahah*) … the real and ultimate purpose lies in a mutual satisfaction created by meeting necessities, which promotes the interests of the community.[180]

This is also asserted by Yamani, who indicates the pitfall of misunderstanding for many commentators:

> The religious essence and value of the Shari'a(h) must never be overestimated. Many Western Orientalists who wrote about Shari's(h), failed to distinguish between what is purely religious and the principles of secular transactions. Though both are derived from the same source, the latter principles have to be viewed as a system of a civil law, based on public interest and utility, and therefore always evolving to an ideal best. [181]

As shown above, the religious character should never be overestimated. This is to say, it is natural to explain that the rule of a binding contract was put aside because the principle of justice and fairness is considered to have priority by fully considering the total context based on the public interest. Overall, it appears that the notion of justice and fairness constitutes the answer of 'why' and 'when' the concept of impossibility operated. Thus, impossibility would be held in circumstances where it appears in the court's eye that it is just to do so.

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178 Emphasise added.

179 Noel J Coulson, *A History of Islamic Law* (Edinburgh University Press 1994) 75.

180 Hideyuki Shimizu, Philosophy of the Islamic Law of Contract: A Comparative Study of Contractual Justice [1989] M E S, International University of Japan 84-86.

181 Ahmad Z Yamani, *Islamic Law and Contemporary Issues* (University Press of the Pacific 2006) 13.

2.4. Conclusion

Tracing the history of the doctrine of frustration in English law reveals that there was a massive shift from a strict and rigid approach to a stance where fairness and justice prevailed. This relaxation started in the ninetieth century in the case of *Taylor v Caldwell.* The decision in this case represents the real birth of the frustration doctrine. Saudi law does not have the clarity of a general framework and concepts that the English law does. This is because the authoritative texts of traditional Islamic law, which Saudi law heavily relies upon, do not provide an exposition of a general doctrine of frustration. Only a few famous applications of a certain type of transaction are available, such as the concept of *al-jawa'ih* and *al-udhr,* which are considered the main references in discussing the rule of excuse.

Both systems require that to argue for frustration or impossibility, the event that occurred should not be the parties' fault, as well as the event not having been foreseeable at the formation of the contract. However, the factor of foreseeability of the risk should not be understood as allocation of the risk and therefore, exclude the operation of the frustration. Instead, it is suggested that, the court comprehensively investigate the circumstances leading up to and surrounding the parties' agreement in order to ascertain the allocation of risk, and upon not reaching any evidence of the risk is allocation, the contract may be held to be frustrated.

A long and considerable controversy has arisen with respect to the justification for the doctrine of frustration in English law. Theoretical tests such as the 'implied term', 'just and reasonable solution', 'foundation of the contract', and 'total failure of consideration' have failed. Even the 'superior risk bearer' theory did not succeeded. It appears that the test of 'radical change in the contract' is the one most accepted by the courts and seen as an appropriate justification for the doctrine. By contrast, the rejected test under English law, that 'justice', is the one dominant test under the rule of impossibility in Islamic jurisprudence. The difference in the basis would say that the Saudi court is potentially more receptive in its application of the law of impossibility cases that might be frustrated under the English doctrine of frustration. Thus, the Saudi courts will invoke the impossibility to excuse a party whenever it finds that it is just and fair to do so. The resultant effect of this basis appears throughout this study, in particular in chapter 4 and 5. In this regard, the defendant in

the *Super Servant Two* case would, if it had been litigated in the Saudi courts, likely been excused.

CHAPTER THREE: 'IMPOSSIBILITY OF PERFORMANCE', 'ILLEGALITY', AND 'FRUSTRATION OF PURPOSE'

3.1. Introduction

In the previous chapter, the discussion dealt with some concepts and elements regarding the rule of frustration. The discussion here will address the application of this rule. Sometimes in determining whether or not a contract is frustrated is not easy. This is attributed to the fact that frustration in some cases is a matter of degree. This is illustrated by Lord Roskill, as he states that:

> in some cases where it is claimed that frustration has occurred by reason of the happening of a particular event, it is possible to determine at once whether or not the doctrine can be legitimately invoked. But in others, where the effect of that event is to cause delay in performance of contractual obligations, 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 undertaken by the contract.[1]

In English law, the best statement can be said about the frustration doctrine is given by Lord Radcliffe:

> Frustration occurs whenever the law recognises that without the default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render 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.[2]

A similar statement is given regarding the doctrine in Islamic law by Coulson:

> A brief summary, therefore, of the traditional Shari'ah doctrine of frustration is that virtually any supervening circumstances which were unforeseen by the contracting parties at the time of agreement and which render performance more

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1 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752.

2 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 729.

> difficult and burdensome than contemplated allows that contracting party who establishes the fact of such damage to rescind the contract.[3]

This chapter will examine specific applications of these general summaries. It is stated that 'It is not possible to tabulate or to classify the circumstances to which the doctrine of frustration applied.'[4] However, it will be convenient to categories some of the circumstance in which the English doctrine of frustration and Saudi law of impossibility might be applied. The categories generally are impossibility of performance, supervening illegality, and frustration of purpose.

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3 Noel J Coulson, *Commercial Law in the Gulf States: The Islamic Legal Tradition* (Graham and Trotman, 1984) 87.

4 Michael Furmston (ed), *Cheshire, Fifoot and Furmston's The Law of Contract* (16th edn, Oxford University Press 2012) 574.

3.2. PART ONE: English law

3.2.1. Impossibility of performance

3.2.1.1. Destruction of the subject matter

In English law the clearest and most obvious case of setting aside a contract on the grounds of the frustration rule is when the frustrating event completely destroys the subject matter. Thus, if the subject matter, without the fault of either party, is destroyed after the contract has been concluded and before its performance, the contract will be brought to an end.

Taylor v Caldwell[5] offers a classic example of the impossibility of performance, namely the destruction of the subject matter of the contract. The contract was held to be frustrated when its main purpose, which was the hiring out of a music hall, was destroyed. The event was not the fault of either party, nor was there any express provision for dealing with such an event. The rule is also applied to a situation where the subject matter is regarded as destroyed; in other words, it had not ceased to exist but instead became something useless.[6]

3.2.1.4. Destruction of something essential for performance

The operation of the doctrine of frustration extends to situations where the thing destroyed was something essential for performance. In *Appleby v Myers*,[7] for instance, a contract to erect machinery in a particular factory and to maintain the machinery for two years was frustrated by the destruction of the factory before the work of erecting

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5 (1863) 3 B & S 826; for a full account of this case see Section 2.2.1.2, Chapter 2.

6 *Duthie v Hilton* (1870) LR 4 CP 138. In this case it was held that freight could not be recovered on a cargo of cement that had solidified before freight had become due as a result of an accidental fire, which led to the scuttling of the ship. It was said that 'the goods . . . were destroyed . . . and ceased to exist as cement'.

7 (1867) LR 2 CP 651.

the machinery had been completed, even though its subject matter was the machinery. To determine whether something is essential for performance depends on the terms of the contract. Thus, in *Turner v Goldsmith*,[8] a contract related to sale of goods to be manufactured by the seller was not frustrated by the destruction of the seller's factory, since he contracted not only as a manufacturer but also as a dealer in goods of the kind in question.

3.2.1.5. Frustration and risk

In the case of destruction of the subject matter of the contract, the rule of frustration may not be applicable. Particular types of contracts are subject to rules which are determined when the "risk of loss" passes from one party to the other. When these rules come into play, the contract will not be frustrated by the destruction of the subject matter, even though it may be frustrated by another reason, such as illegality.[9] The distinction between the two concepts is that, under the doctrine of frustration, both parties are discharged from all their obligations under the contract while, under the special rules as to the passing of risk, one party may be freed from some of his duties.[10] Although the two rules are distinct concepts it is sometimes difficult to delimit exactly the scope of these two rules.[11] Nevertheless, they are undoubtedly related in that, where a supervening event occurs, the resultant working out of the rights of the parties may mean that the burden of the loss falls more heavily on one than on the other.

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8 [1891] 1 QB 544.

9 This point will be addressed in Section 3.2.2, of this chapter.

10 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 3-008.

11 L S Sealy, 'Risk in the Law of Sale' (1972) 31 Cambridge Law Journal 225, 245.

3.2.1.5.1. Sale of goods

Where the contract involves the sale of goods,[12] in English law the Sale of Goods Act 1979 preserves a particular aspect of the doctrine of frustration. The Act contains two provisions s. 6 and s. 7 which deal in particular with supervening events. As for s.6 (which is not a frustration rule but simply an exemplar of the rule of common law rendering a contract void for antecedent impossibility) has already been discussed.[13] According to s.7:

> Where there is an agreement to sell specific goods,[14] and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk[15] passes to the buyer, the agreement is avoided.

The general rule is as Blackburn J stated in *Martineau v Kitching*[16] '*res perit domino* [the property is lost to the owner],[17] the old civil maxim, is a maxim of our law; and

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12 See John N Adams and Hector Macqueen (eds), *Atiyah's Sale of Goods* (12th edn, Person Education Ltd 2010); Michael G bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014); Ewan McKendrick (ed), *Goods on Commercial Law* (4th edn, Penguin 2010).

13 See chapter 2.

14 By the definition given under s. 61 (1) of the Act, these are goods which are "identified and agreed on at the time a contract of sale is made" and are stated to include "an undivided share, specified as fraction or percentage, of goods identified and agreed on as aforesaid". As amended by s.2 (d) of the Sale of Goods (Amendment) Act 1995.

15 To say that a party to a contract for the sale of goods bears the risk, means that he bears the loss of the goods are damaged or destroyed without fault on the part of either party to the contract. See John N Adams and Hector Macqueen (eds), *Atiyah's Sale of Goods* (12th edn, Person Education Ltd 2010) 342; L S Sealy, 'Risk in the Law of Sale' (1972) 31 Cambridge Law Journal 225, 227-234.

16 (1872) LR 7 QB 436, 454. See also *Hansen v Craig and Rose* (1859) 21 D 432, 438.

17 The principle as to linking the risk to property is always a matter of controversy. In *Leigh and Sillivan Ltd v Aliakmon Shipping Co Ltd (The Aliakmon)* [1985] 1 Lloyd's Rep 199, 204, Sir John Donaldson M R stated the following: 'It is usual to speak of the goods being at the buyer's risk, but the true analysis is that he has contracted to buy and pay for the goods in whatever state they may be when the voyage ends'. Despite this statement Gullifer strongly argues that it is the possession and not the property that should be the governing concept in determining the incident of risk. In supporting his view Gullifer has many reasons. 'First, it is more satisfactory that the possessor of goods (that is, the person who has control of them) should insure them. He is in a position to provide information to the insurance company about conditions of storage, transport etc. and my well be in a better position to comply with terms dictated by the insurance company as conditions of their liability relating to security, conditions of storage and other related matters. Secondly, it accords more naturally with most commercial people's expectation…: where property and possession are separated, it is seen as natural that risk passes with possession. Thirdly, payment and delivery are concurrent conditions: it makes sense for risk, which after all means that the buyer should pay the price irrespective of the damage or destruction of the goods, should pass when the obligation to pay the price arises. Fourthly, risk also means that the seller, if he bears the risk, is liable for damage for non-delivery. It thus makes more sense to have as the residual rule that the risk passes on delivery rather than on the passing of property. Fifthly,…there can be considerable doubt as to the moment when property passes, despite the fact that the ruling principle is the intention of the parties. Sixthly, the linking of the passing of risk to the transfer of possession is the solution preferred by both the Vienna Convention and the UCC.' Louise Gullifer, 'Risk' in Ewan McKendrick (ed), *Sale of Goods* (Informa Law 2000) paras 3-011_3-011.

when you can show that the property passed, the risk of the loss prima facie is in the person in whom the property is.' This rule is embodied in s.20 (1) of the Act, in cases where the buyer does not deal as consumer[18] which reads: 'Unless otherwise agreed, the goods remain at the seller's risk until the property[19] in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not.'[20] It follows therefore that, the risk and property usually pass together.[21] Consequently, that approach; linking the risk to the property, has left English law with some difficulties. Goode states that: 'One of the principal reasons why English law has been so troubled with questions of risk is that by s.20 of the Sale of Goods Act risk is tied to property and…is not depending on delivery.'[22] However, the link between risk and property provided by the Act only applies unless the parties have agreed otherwise.[23] In practice, most contracts either expressly provide for the passing of risk[24] or are contracts of a type, for example, c.i.f. or f.o.b., where the passing of risk is established by authority.[25] In c.i.f. contracts, risk passes on shipment or, when goods are bought afloat, as from shipment, whereas property usually passes on transfer of the bill of lading. In an f.o.b. contract, risk passes on lading, as does usually property.

3.2.1.6. Partial impossibility and partial allocation of contractual subject matter

Sometimes, a supervening event has only partially affected contractual obligations so that the promisor is otherwise discharged under the doctrine of frustration, the liability

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18 Where the buyer 'deals as consumer', risk does not pass until the goods are delivered to the consumer: Sale of Goods Act 1979, s .20 (4), as inserted by the Sale and Supply of Goods to Consumers Regulation 2002 (SI 2002/3045), reg. 4.

19 The Act uses the word 'property' to mean ownership.

20 See for example, *Healy v Howlett & Sons* [1917] 1 KB 337; *Pignataro v Gilroy* [1919] 1 KB 459; *Underwood Ltd v Burgh Castle Brick and Cement Syndicate* [1922] 1 KB 343; *Wardars (Import and Export) Co Ltd v W Norwood & Sons Ltd* [1968] 2 QB 663.

21 This approach is also followed by Art.1138 and 1583 of the French Civil Code

22 Ewan McKendrick (ed), *Goods on Commercial Law* (4th edn, Penguin 2010) 265.

23 Sale of Goods Act s.20 (1).

24 *Martineau v Kitching* (1872) LR 7 QB 436; *Castle v Playford* (1872) LR 7 Ex 98; *Bevington v Dale* (1902) 7 Com.Cas 112; *Horn v Minister of Food* [1948] 2 All ER 1036; Michael G bridge (ed), *Benjamin's Sale of Goods* (7th edn, Sweet & Maxwell 2006) para 6-003.

25 Michael G bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell 2014) para 6-003; John N Adams and Hector Macqueen (eds), *Atiyah's Sale of Goods* (12th edn, Person Education Ltd 2010) 411-413, 417-420; Raoul Colinvaux (ed), *Carver's Carriage by Sea* (13th edn, Stevens & Sons Ltd 1982); Lorenzon Filippo and others, *C.I.F. and F.O.*B. Contracts (5th edn, Sweet & Maxwell 2012).

and right of the contracting parties with respect unaffected part of the contract, the remaining or limited quantity of the contractual goods, have to be discussed.[26] The position is illustrated by reference to the case of *Howell v Coupland*,[27] where a contract was concluded to sell two hundred tons of potatoes to be grown specifically from the seller's land. As a result to a crop disease, only a partial quantity, eighty tons, was available. It was held that the seller was not liable for the failure to deliver the full quantity since the performance had been made impossible. Because the eighty tons were delivered to the purchaser, the matter was left open with regard to whether the seller, having been no liable for the failure to deliver one hundred and twenty tons of the goods, was obliged to deliver the remaining goods, the unaffected portion of the contract potatoes. In *HR & S Sainsbury Ltd v Street*[28] the court ruled that in such situations, although the contract was became impossible to the extent the crop failed, the seller was obliged to deliver the remaining quantity to the purchaser.

So as partial impossibility is concerned, additional problem arises in respect of a situation where a seller has contracted to deliver to a number of buyers. For instance, in an analogous situation to *Howell v Coupland* and *H.R. & Sainsbury Ltd v Street*, a seller, having contracted to deliver to several customers, might only be able to deliver to one, or some, but not to all customers. It then becomes necessary to ask whether he is in breach to those to whom he fails to perform, or whether he may be discharged under the rule of frustration. In dealing with this latter possibility, the concept of partial allocation of contract goods emerges. So the issue seems to be a complicated one.

3.2.1.6.1. The principle of partial allocation

The available authorities support the view that in circumstances involving partial impossibility, whether or not the contractual subject matter is divisible, a seller will

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[26] See, J W A Thornely, 'Seller Liability for Partial Failure of Crop to be Grown on Specified Land' (1973) 32 The Cambridge Law Journal 15.

[27] [1876] 1 QBD 258.

[28] [1972] 1 WLR 834. The buyer contracted to purchase 270 tons of barley to be grown on the seller's farm. As a result of an event outside of the seller's control the only 140 tons of barley were produced, which the seller sold to a third party. The buyer claimed damages for failure to deliver. It was held that the seller was liable for the remaining part.

not be freed from his liability to those contracts whom he has failed to fulfilled.[29] It has been suggested that providing the seller acts reasonably with respect to his allocation of the partial quantity of the subject matter, he should be excused from liability.[30]

Although the suggestion above seems reasonable for the seller the court will not free him from the liability. This circumstance can be compared to analogous circumstances where the contract does not concern (divisible) subject matter and the rules of partial allocation do not come into operation. An example is where a seller, as a result of frustrating event, found himself incapable of fulfilling all his contracts but only some, and is left with a choice in regard to which of those contracts he want to fulfil. In such circumstance the frustration will not be found to discharge the seller from performance. It has been ruled that where a seller, in such a situation, elects to which contract he want to perform he cannot invoke the frustration. Here the matter is considered as one of self-induced.[31] It is the seller's choice that ultimately determines whether the contract is fulfilled or not, rather than the frustrating event.

It is clear that partial frustration both in regard to contracts concerning subject matter (where rules of partial allocation might apply), and in contracts concerning other subject matter as for instance service or non-divisible subject matter (where rules of partial allocation do not apply but where the party's election comes into operation), will not be sufficient to bring about the frustration into play. The notion as to reasonableness of the reasonable act of the seller, for example, in allocating contractual subject matter amongst all his standing contracts (*pro rata* division) or in electing to fulfil some of the them, seems not recognised under the English law. This without doubt places the seller in an invidious position, and one aspect of the narrowness of the application of the doctrine of frustration.

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29 *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524; *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1. See, A H Hudson 'Prorating in the English Law of Frustrated contracts' (1968) 31 Modern Law Review 535

30 Roy G McElroy, *Impossibility of performance* (G L William ed, Cambridge University Press 1941) 24; G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) paras 19-028, 19-86 – 19-88; A H Hudson 'Prorating in the English Law of Frustrated contracts' (1968) 31 Modern Law Review 535, 539.

31 *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524; *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

In the case of *Super Servant Two* the court at first instance stated that in order to enjoy the excuse in such a situation a party must provide for it:

> It is within the promisor's own control how many contracts he enters into and the risk should be his. The proposition has to be supported if at all as a matter of the express or implied terms of the contract. If the promisor wishes this result he must bargain for the inclusion of a suitable force majeure clause in the contract.[32]

This is true, as the principle of partial allocation and the requirement of reasonableness of a party's election to perform certain contracts is recognised in the context of contractual provisions.[33] The courts have recognised that a seller can take other contractual commitments into account[34] and allocate in a reasonable manner available goods between his customers.[35] According to Donaldson:

> If the seller appropriates the goods 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* [36]– the effective cause is not the seller's appropriation, but whatever caused the shortage.[37]

The above shows that on the premise of contractual provisions, English law recognise the validity of the principle of partial allocation in multiway including the apportionment of the goods to one or some of the contracts as well as allocating it to earlier contracts. The limitation of the doctrine of frustration as compared to the application of the contractual clauses in this area is significant.[38] Thus, Hudson suggests that English law can 'establish prorating as an aid to the construction of

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32 *J Lauritzen AS v Wijsmuller BV (The Super Servant Two)* [1989] 1 Lloyd's Rep 148, 158.

33 See, A H Hudson 'Prorating in the English Law of Frustrated contracts' (1968) 31 Modern Law Review 535; Michael Bridge, 'The 1973 Mississippi Floods: "Force Majeure" and Export Prohibition' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract*, (2nd edn, Lloyd's of London Press Ltd 1995).

34 *Tennants Lancashir Ltd v Wilson C.S. & Co Ltd* [1917] AC 496; *Pool Shipping Ltd v London Coal Co of Gibraltar Ltd* (1939) 64 WLR 268; *Inertradex S.A. v Lesieur-Tourteaux S.A.R.L.* [1978] 2 Lloyd's Rep 509; *Bremer Handelsgesellschaft mbH v Continental Grain Co* [1983] 1 Lloyd's Rep 269.

35 *Inertradex S.A. v Lesieur-Tourteaux S.A.R.L.* [1978] 2 Lloyd's Rep 509; *Continental Grain Export Corp v S.T.M. Grain Ltd* [1979] 2 Lloyd's Rep 460; *Bremer Handelsgesellschaft mbH v Continental Grain Co* [1983] 1 Lloyd's Rep 269; *Pancommerce S.A. v Veecheema B.V.* [1983] 2 Lloyd's Rep 304.

36 Emphasis added.

37 *Inertradex S.A. v Lesieur-Tourteaux S.A.R.L.* [1977] 2 Lloyd's Rep 146, 155. The same statement was affirmed by Lord Denning in the Court of Appeal in the same case [1978] 2 Lloyd's Rep 509, 513.

38 Hudson argues that the little amount of English authority in respect of the principle of *pro rate* division is probably to be justified by the general prevalence of contractual clauses which would make express provision for many, if not all, of the questions which would arise in practice, A H Hudson 'Prorating in the English Law of Frustrated contracts' (1968) 31 Modern Law Review 535, 543

exemption clauses which could have been extended to contracts where no exemption clause appeared.'[39]

Comparing the English law approach to that of the United States in respect of the principle of partial allocation, it appears that such a situation is dealt with comprehensively in the United States. Such a principle is recognised and applied whether or not there are contractual clauses. It is clearly addressed in the Uniform Commercial Code. Art. 2-615(b) and (c) which provide that:

> (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.

These rules offer a more extensive and versatile scope than of English law. A seller can include his own requirements for further manufacture and production. Therefore, the rules offer a wider framework and sufficient commercial flexibility for the seller to allocate goods without necessarily damaging or imparting business relationships. Allocating in a 'fair and reasonable' manner[40] does not necessarily oblige the seller to fulfil the first contracted in line customer. The seller can, unlike the seller under English law,[41] take into account legally bound as well as non-contractually bound customers.[42] Both English and U.S. courts recognise that the method of allocation must be fair and reasonable. However, they differ in that, in English law, the concept

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39 ibid 539.

40 See *Roth Steel Products v Sharon Steel Corp*. 705 F 2d 134 (1983) where the seller sought to rely on the commercial impracticability in circumstances where the contract had been rendered partially impracticable, so that they were only able to deliver limited goods. The seller claimed that they had allocated the remainder in a fair and reasonable manner, and that they could therefore rely upon UCC s2-615(b). However, the court found that the seller had in fact supplied the goods to his own subsidiary, and as a result were precluded from asserting that their allocation was reasonable within the allocation provision of the UCC.

41 In *Pancommerce v Veecheema* (1982) 1 Lloyd's Rep 645, 652, Bingham J stated that 'there is to my knowledge no English authority for the proposition that where a seller's ability to perform is impeded by a government act he may act reasonably if he allocates available supplies among customers to whom he is not contractually committed as well as those whose he is.'

42 In this respect, Hurst argues that Art. 2-615(b) should be amended and that sellers should not be permitted to include customers not under contract in his allocation. Thomas R Hurst, 'Freedom of Contract in an Unstable Economy: Judicial Reallocation of Contractual Risk Under UCC Section 2-615' (1976) 54 North Carolina Law Review 545, 579-582.

of reasonableness of the seller's partial allocation merely comes into play if there is contractual clause, while the U.S. position is much wider and the concept of reasonableness can be operated within the context of relief according to the default law (Art. 2-615(b) of UCC) as well as contractual clauses.

Corbin approaches the question of pro rata division as primarily a principle to be applied in construing broad contractual clauses which purport to excuse parties because of the operation of 'causes beyond their control' or the like.[43] Should the causes not result in a total failure of supply, the party relying on the excuse should be liable to make a partial delivery and the other party to accept his appropriate quota.[44] Corbin goes on to argue that the principle of *pro rata* division should be applied whether or not a contractual clause has been included in the contract, since the 'fundamental assumption' on which contracts are made is the same whether or not there are express provisions in the contracts, and risks should be allocated on the basis of these shared assumptions.[45]

3.2.1.6. Contract of personal nature

3.2.1.6.1. Death

Contracts involving personal services such as employment, apprenticeship or agency, can be frustrated by the death of the promisor.[46] The rule is stated by Pollock C.P. in *Hall v Wright*:[47]

> All contracts for personal service which can be performed only during the lifetime of the party contracting are subject to the implied condition that he shall

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43 Arthur L Corbin, *Corbin in Contracts* (West Publishing Co 1962) s1342, 408-415.

44 ibid 409, 410.

45 ibid.

46 *Cutter v Powell* (1795) 6 TR 320; *Campanari v Woodburn* (1854) 15 CBNC 400; *Stubbs v Holywell Railway Co* (1867) LR 2 Ex 311; *Whincup v Hughes* (1871) LR 6 CP 78; *Graves v Cohen* (1930) 46 TLR 121. See, Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-037.

47 (1858) EB & E 746, 793. The actual decision in this case to the effect that the supervening illness of the defendant did not frustrate a contract to marry, even though the defendant could not consummate the marriage without endangering his life, might not have been followed, quite apart from the change in the law which now prevents promises to marry from giving rise to legal right: Law Reform (Miscellaneous Provisions) Act 1970 s. 1.

> be alive to perform them; and, should he die, his executor is not liable to an action for the breach of contract occasioned by his death.

If, however, performance is not of a personal character then the contract is not necessarily frustrated by death. In *Phillips v Alhambra Palace Co Ltd*[48], one of the partners in a firm of music-hall proprietors died after the firm entered into a contract with a troupe of performers to give certain performances at the company's music hall. It was held that the contract was not frustrated, since it was not of such a personal character as to depend on the deceased partner and so could be enforced against the surviving partners. This position has been held by English law from an early period. In fact, it has been suggested that if we go back far enough, the number of obligations which "died" with the person exceeds the number of those which survived against executors or heirs.[49]

3.2.1.6.2. Incapacity

In the event of an employee's illness or incapacity, the view is that invoking frustration is a matter of a question; that is, whether it was of such a nature or likely to continue for such a period, that future performance of his obligation would be either impossible or radically different from that contemplated by the contract.[50] The court will therefore question:

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48 [1901] 1 QB 59. See also, *Youngman v Health* [1974] 1 AII ER 461 (although the judgments do not discuss the case in terms of the doctrine of frustration). The question whether a contract was of such 'personal' would seem to depend on the same elements as those which determine whether a contract is "personal" for the purpose of the rule that the benefit of a personal contract cannot be assigned, and that such a contract cannot be vicariously performed. Therefore, the personality of a seller of goods is without a doubt is important to the buyer. For example, where the goods are to be manufactured by the seller or where the buyer on other grounds relies on the seller's reputation in relation to quality or other aspects of performance. Likewise, it is also possible for the seller to rely upon the personality of the buyer, for example, where the sale is on credit and the seller relies on the buyer's skills as a retailer (to realise the means of payment from his disposal of the goods). In the former case, the seller could not delegate performance to another manufacturer, and in the latter, the buyer could not assign the benefit of the contract; and where this is the position, it is submitted that the death of the party who could not delegate performance or assign the benefit of the contract would, on similar grounds, also frustrate the contract. G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 150.

49 W H Page, 'The Development of the Doctrine of Impossibility of Performance' (1920) 18 No 7 Michigan Law Review 589, 591.

50 *Storey v Fulham Steel Works* (1907) 24 TLR 89; *Condor v Barron Knights Ltd* [1966] 1 WLR 87; *Marshall v Harland & Wolff Ltd* [1972] 1 WLR 899; *Hebden v Forsey & Son* [1973] ICR 607; *Hart v A.R. Marshall & Sons Ltd* (1977) 1 WLR 1067; *Notcutt v Universal Equipment Co Ltd* [1986] 1 WLR 641; *GF Sharp & Co Ltd v McMillan* [1998] IRLR 632. See, M F Freedland, *The Personal Employment Contract* (Oxford University Press 2006) 440-449.

> Was the employee's incapacity . . . of such a nature, or did it appear likely to continue for such a period, that further performance of his obligations in the future would either be impossible or would be a thing radically different from that undertaken by him and agreed to be accepted by the employer under the agreed terms of his employment?.[51]

Thus, frustration may be held as a result of permanent illness in an apprenticeship,[52] while a short period of illness may discharge a shorter-term contract.[53] Also, a periodical contract of employment which is determinable by the employer at short notice may be discharged by illness as in the case of *Notcutt v Universal Equipment Co Ltd*,[54] where it was held to be frustrated as soon as it became clear to the parties that an employee had suffered a heart attack after which he would never work again.

Furthermore, a contract of personal service would be frustrated if continued performance involves or leads to a serious risk to the health of the person who had contracted to render the service.[55] However, there may be other means of dealing with particular situations. For example, where a consumer becomes ill to the extent that he cannot go on a pre-booked package holiday; he is 'prevented from proceeding with the package', and there is statutory provision which will allow him to transfer the benefit of the holiday to a suitably qualified person, thereby the contract is not discharged by the supervening event.[56]

Circumstances other than illness may interrupt a party from performing the personal contract. In such a case the court again, as with the situation in illness, will give its judgement based upon the proposition which the interruption, or likely interruption, bears to the period specified in the contract. Thus, the contract may be frustrated by conscription[57] or internment[58] of a party. Imprisonment of a party as a result of his conviction on a criminal charge cannot generally be relied upon by that party as a

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51 *Marshall v Harland & Wolff Ltd* [1972] 1 WLR 899, 903-905.

52 *Boast v Firth* (1868) LR 4 CP 1.

53 *Egg Stores (Stamford Hill) Ltd v Leibovici* [1977] ICR 260. cf *Blankley v Central Manchester and Manchester Children's University Hospitals NHS Trust* [2015] EWCA Civ 18.

54 [1986] 1 WLR 641.

55 *Condor v Barron Knights* [1966] 1 WLR 87.

56 Package Travel, Package Holiday and Package Tours Regulations 1992 (SI 1992/3288), reg. 10 (1).

57 *Morgan v Manser* [1948] 1 KB 184. See also, *Marshall v Glanvill* [1917] 2 KB 87.

58 *Unger v Preston Corp* [1942] 1 AII ER 200; *Horlock v Beat* [1961] 1 AC 486. But in *Nordman v Rayner & Sturgess* (1916) 33 TLR 87 where a long-term commission agency was not frustrated when the agent (an Alsatian with anti-German sympathies) was interned, since his internment was not likely to last long and, in fact, only lasted one month.

defence of discharge, since a party cannot rely on self-induced frustration[59]; on the other hand, it seems that it could be so relied upon by the other party.[60] It does not follow from that the sentence of imprisonment is always successful grounds of frustrating a contract as it sometimes does not have that effect.[61]

3.2.1.7. Unavailability

In some circumstances contractual performance is prevented not because of destruction of the subject matter or the death of one party, but because of supervening unavailability. Performance is not strictly impossible, because the thing still exists; however, for reasons beyond the control of the parties, it may not be put to the use for which they had intended it. Many supervening events may result in unavailability which gives rise to discharging the contract. Thus, requisition,[62] expropriation of mineral exploration rights by government action,[63] and war and its effects,[64] all of which are grounds for frustration of the contract.

3.2.1.7.1. Delay

As was noted in the previous discussion, the unavailability of the subject matter may justify holding the contract as discharged. However, more difficult problems in determining the existence of frustration arise in cases where unavailability is only

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59 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 157.

60 *FC Shepherd & Co v Jerrom* [1987] QB 301. See also, *Hare v Murphy Bros Ltd* [1974] ICR 603. G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 157.

61 *Chakki v United Yeast Co Ltd* [1982] 2 AII ER 446.

62 *Re Shipton Anderson & Co v Harrison Brothers & Co* [1915] 3 KB 676; *Dale SS Co Ltd v Northern SS Co Ltd* [1918] 34 TLR 271.

63 *BP Exploration (Libya) Ltd v Hunt* [1983] 2 AC 352.

64 *Kodros Shipping Corpn of Monrovia v Empresa Cubana de Fletes (The Evia)* [1983] 1 AC 736; *Kissavos Shipping Co SA v Emresa Cubana de Fletes (The Agathon)* [1982] 2 Lloyd's Rep 211; *International Sea Tankers Inc v Hemisphere Shipping Co Ltd (The Wenjiang) (No 2)* [1983] 1 Lloyd's Rep 400; *Vinava Shipping Co v Finlivet A C (The Chrysalis)* [1983] 1 Lloyd's Rep 503.

temporary.[65] One of the features which differentiate delay from some other causes of frustration is that the degree of interference with the performance of the contract which it will engender is unpredictable.[66]

The question whether the delay discharges a contract depends upon the actual circumstances for each case.[67] The principle itself is constant, but the difficulty lies in its application.[68] Discharge must be decreed only if the result of what has happened is that, 'to render the adventure absolutely nugatory',[69] 'to make it unreasonable to require the parties to go on',[70] 'to destroy the identity of the work or service when resumed with the work or service when interrupted',[71] 'to put an end in a commercial sense to the undertaking'.[72] Chitty says: 'To frustrate a contract, the delay must be so abnormal, in its cause, its effects, or its expected duration, so that it falls outside what the parties could reasonably contemplated at the time of contracting.'[73] The contract must be regarded as a whole and the question answered whether its purpose as gathered from its terms has been defeated.[74] Businessmen must not be left in indefinite suspense and as Lord Wright stated:

> If there is a reasonable probability from the nature of the interruption that it will be of indefinite duration, they ought to be free to turn their assets, their plant and equipment and their business operations into activities which are open to

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65 It should however be said that the mere fact that market conditions have changed during the time of delay in performance is not a sufficient excuse for bringing about discharge. Sometimes delays are not even due to temporary impossibility, but to elements such as shortages of labour and material; in principle, such obstacles can be overcome by paying more for the services or goods that are in short supply. The consequence of overcoming them may indeed render the contract unprofitable, and so it may raise the question of whether the contract should be discharged on the grounds of commercial impossibility.

66 M N Howard, 'Frustration and Shipping Law-Old Problems, New Context' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 129.

67 *Edwinton Commercial Corpy v Tsavliris Russ (Worldwide Salvage & Towage) Ltd (The Sea Angel)* [2007] 2 Lloyd's Rep 517; *Finlivet AG v Vinava Shipping Co Ltd [1983] 2 All ER 658*; *Kodros Shipping Corpn of Monrovia v Empresa Cubana de Fletes (The Evia)* [1983] 1 AC 736; *International Sea Tankers Inc v Hemisphere Shipping Co Ltd (The Wenjiang) (No 2)* [1983] 1 Lloyd's Rep 400; Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-035.

68 Michael Furmston (ed), *Cheshire, Fifoot and Furmston's The Law of Contract* (16th edn, Oxford University Press 2012) 728-729.

69 *Bensaude & Co v Thames and Mersey Marine Insurance Co* [1897] 1 QB 29, 31.

70 *Metropolitan Water Board v Dick, Kerr & Co Ltd* [1918] AC 119, 131; *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1919] 2 AC 397, 405.

71 *Metropolitan Water Board v Dick, Kerr & Co Ltd* (n 89) 128; *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 460.

72 *Jackson v Union Marine Inc Co Ltd* (1874) LR 10 CP 125.

73 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-035.

74 *Denny Mott and Dickson, Ltd v James B Fraser & Co Ltd* [1944] AC 265, 273.

> them, and to be free from commitments which are struck with sterility for an uncertain future period.[75]

It is however sometimes, difficult to determine whether the delay will be of indefinite duration. In this regard, Lord Roskill, in *Pioneer Shipping Ltd v BTP Tioxide Ltd*,[76] provided the following rule:

> 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, business men must not be required to wait 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.[77]

Difficulty in judging the likely effect on the contract of some event which causes delay is illustrated by the case of *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd*,[78] where a five year delivery by sea agreement signed in December 1912 was disrupted when the government requisitioned the vessel for war service in February 1915. The majority of the court found that it was likely at the time the case was decided that the vessel would be released in time to render further substantial services under the contract. On that basis, the contract was not held to have been frustrated even though the contract was in fact delayed for longer. On the other hand, and three years later, in *Bank Line Ltd v A Capel & Co*:[79]

> A contract for one year was made on February 16, 1915. The year was to run from the time at which the ship was placed at the charterer's disposal. It was contemplated that this would happen in April 1915, so that the contract was said to be "in substance, though not in form, an April to April charter". The ship was not delivered by 30 April, and on 11 May, before delivery, it was requisitioned by the Government and not released until September 1915.

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75 ibid 278.

76 [1982] AC 724.

77 ibid 752.

78 *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397. The fact that it was the ship-owner rather than charterers who were arguing that the contract was frustrated so that they could obtain the generous rate of compensation paid by the Government undoubtedly weighted with the majority.

79 [1919] AC 435.

The House of Lords held that the contract had been frustrated. These two cases, *Tamplin* and *Bank line* show that frustration raises the most difficult question of fact and principle.[80] However, they are can perhaps be reconciled on the basis that in *Tamplin*, the interruption was of a time charter for five years, while in the *Bank Line* case the interruption had a more serious effect, since the time charter was for the much shorter period of one year.[81]

3.2.1.8. Method of performance

In some circumstances supervening events may affect the method of performing contractual obligations. Such events can render the obligations more difficult, financially disastrous or even impossible. However, it is only for impossibility that allows courts to interfere with relief.[82] Indeed, a number of factors are taken into account such as whether the particular method is specified in the contract or merely contemplated, and if the latter, by one party or both.

It was in the case *Nicholl & Knight v Ashton, Edridge & Co*[83] that the impossibility of contractual 'method of performance' was first recognised as grounds for frustration. Generally speaking 'where a c.i.f. contract does not in terms provide for a particular method of performance, but both parties merely contemplate that it will be used, the contract will not be frustrated merely because that method becomes impossible.'[84] Frustration will not be a ground where only one party contemplates a

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80 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-043; J Beatson, A Burrows and J Cartwright, *Anson's Law of Contract* (30th edn, Oxford University Press 2016) 480.

81 ibid

82 *Nicholl & Kinght v Ashton, Edridge & Co* [1901] 2 KB 126; *Maine Spinning Co v Sutcliffe & Co* (1917) 87 LJKB 382.

83 ibid. In this case, the crucial factor leading to frustration was that the contract was construed (by a majority of the Court of Appeal) as providing for performance only by the stipulated method. If the method had not been regarded as exclusive, the seller might have been bound to perform by shipping the goods on a different ship; whether he would have been bound to do so would depend on whether such a different method of performance differed fundamentally from that called for by the express terms on the contract. Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 19-107.

84 Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 19-108.

particular method of performance. This position is illustrated by *Blackburn Bobbin Co Ltd v Allen TW & Sons Ltd*.[85] The facts were that:

> A contract was concluded to sell timber, delivery free on rail Hull. The sellers intended to import the timber from Finland. However, after the outbreak of war, it was impossible for the sellers to obtain any Finnish timber for delivery to the buyers.

The court held that there was no frustration. The buyers did not know nor had any reason to suppose the particular method of performance contemplated by the sellers. As the court stated they:

> were unaware at the time of the contract of the circumstance that the timber from Finland was shipped direct from a Finnish port to Hull. They did not know whether the transport was or was not partly by rail across Scandinavia, nor did they know that the timber merchants in this country did not hold stocks of Finnish larch.[86]

Even if the contract designates a particular method, frustration may not be found. In *Tsakiroglou & Co. Ltd v Noblee Thorl G.m.b.H*[87] the House of Lords held that the closure of the Suez Canal, due to Anglo-French invasion of Egypt in 1956, did not frustrate the contract since it would still be possible to ship the goods via an alternative route which was not commercially or fundamentally different from a journey by the Canal, but only more expensive. A significant point was raised by Viscount Simonds in this case when he commented that 'it does not automatically follow that, because one term of a contract, for example, that the goods shall be carried by a particular route, becomes impossible of performance, the whole contract is thereby abrogated.'[88] According to *Benjamin's Sale of Goods*, this statement suggests that:

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85 [1918] 1 KB 540.

86 ibid 552.

87 [1962] AC 93, overruling *Carapanayoti & Co Ltd v ET Green Ltd* [1959] 1 QB 131. See also, *Ocean Tramp Corp v V/O Sovfracht (The Eugenia)* [1964] 2 QB 226. In Suez cases, English and US courts both reached the same results_ both refused to excuse the parties and both held that the parties would not have suffered any excessive or server hardship_ but their approach to the issue differed. The English courts refused to excuse the parties primarily on the basis that hardship was not recognised within the doctrine of frustration, and, therefore, increased costs could not afford contractual relief. The US courts refused to excuse the parties on the basis that, although hardship could in principle excuse the parties, the hardship was not excessive or unreasonable in law so as to provide an excuse. *Glidden v Hellenic Lines Ltd,* 275 F 2d 253 (1960); *Transatlantic v U.S.* 363 F 2d 312; *American Trading and Production Crop v Shell International Marine Ltd (The Washington Trader)* 453 F 2d 939 (1972). See, Sukhnam Digwa-Singh, 'The Application of Commercial Impracticability Under Article 2-615 of the Uniform Commercial Code' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 315-316.

88 *Tsakiroglou & Co. Ltd v Noblee Thorl G.m.b.H* [1962] AC 93, 112.

> even if the contract had expressly provided for shipment via Suez, it would not have been frustrated merely because such shipment became impossible. Frustration would only have occurred if shipment by the designated route was a matter of fundamental importance.[89]

However, if the contract specifically contains a number of specific methods of performance, frustration will not be applied if merely one or some of these methods have become impossible[90] or illegal.[91] If performance can be rendered by employing one of the remaining methods, the party is obliged to do so.

3.2.1.9. Failure of a particular source

Many of the principles of impossibility of the method of performance also relate to the principles of the failure of a particular source. According to Treitel:

> Where the subject matter was to be obtained from a particular source which without the fault of either party becomes unavailable: e.g. where goods were to be taken from a particular crop which fails as a result of drought or disease; or where they are to be imported from a particular country and such import is prevented by war, natural disaster or prohibition of export.[92]

Thus, if the parties designated a particular source in their contract and subsequently the source becomes unavailable without the fault of either of the parties, frustration can would be found.[93] On the other hand, the contract will not be frustrated if it refers to several sources and merely one or some of them becomes unavailable.[94]

An interesting comparison arises in circumstances where parties have specified the source of the contract goods and the method of performance. In the latter

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89 Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 19-108. The same opinion is shared by Treitel who states that 'where . . . there is no such fundamental difference, the contract may stand even if does provide for performance by the method which becomes impossible.' Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-031.

90 *Roth T Smyth Ross & Co Ltd (Liverpool) v W.N. Lindsay Ltd (Leith)* [1953] 1 WLR 1280; *Seabridge Shipping Ltd v Antco Shipping Co Ltd (The Furness Bridge)* [1977] 2 Lloyd's Rep 367.

91 *Hindley & Co Ltd v General Fibre Co Ltd* [1940] 2 KB 517.

92 Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-024.

93 S.7 Sale of Goods Act 1979; *Howell v Coupland* [1876] 1 QBD 256; *HR & S Sainsbury Ltd v Street* [1972] 1 WLR 834.

94 *Turner v Goldsmith* [1891] 1 QB 544.

circumstance, in reference to Viscount Simonds' statement[95] in *Tsakiroglou v Noblee Thorl,* if a method rendering the contract impossible had been specified in the contract, the doctrine of frustration would not necessarily come into play. It is suggested that since the doctrine applies to excuse parties in the former context, the basis for the apparent distinction so as to deny the possibility of excuse in the latter (by virtue of Viscount Simonds statement) is unsatisfactory.

However, in a case where the contract has not expressed a particular source and has merely contemplated one, the contemplation might be by one party or mutual. If the source is contemplated by one party, the position would be analogous to that position where one party has contemplated a particular method of performance, hence there is no ground for frustration.[96] It does not make any difference that this is attributable to the inability of the seller's supplier to supply the contract goods.[97] Where the source is contemplated by both parties, where most difficulties arise,[98] it is important to ascertain whether the mutually contemplated source is the only source the parties intend to use to the exclusion of any other. This would be the minimum requirement if there is to be any chance of a successful plea of frustration. Otherwise, it is submitted that despite *Re Badische,*[99] frustration would certainly not apply.[100] In this case, an agreement was reached for the supply of chemicals. Both parties intended that the source of supply would be Germany. As a result of the First World War, the seller claimed that performance had become impossible. The court found that the war frustrated the contract. However, this case should be approached with some caution. It would clearly be contrary to public policy to allow such a contract to subsist; and this would be so whether the parties had specified the source or merely contemplated that it should be used.[101]

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95 See (n 88).

96 *Blackburn Bobbin C Ltd v Allen TW & Sons Ltd* [1918] 1 KB 540; *CTI Group Inc v Transclear SAThe* [2008] 2 Lloyd's Rep 526. The same rule applies where a buyer's source of payment fail *Universal Corpn v Five Ways Properties Ltd* [1979] 1 All ER 552.

97 *Intertradex SA v Lesieur Torteaux SARL* [1978] 2 Lloyd's Rep 509.

98 Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-027.

99 *Re Badische Co Ltd* [1921] 2 Ch 331.

100 *Lipton Ltd v Ford* [1917] 2 KB 647. Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) 936.

101 Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) 936.

3.2.2. Supervening illegality

The second category upon which a contract might be brought to an end on the grounds of the doctrine of frustration is "supervening illegality".[102] Supervening illegality is distinguished from supervening impossibility and frustration of purpose in that, where a contract has become illegal, the court has to consider not only the relative interests of the parties, but also the interests of the public in seeing that the law is observed. These public interests occasionally outweigh the importance of reaching a fair distribution of loss. This, on the contrary, is the rule governing supervening impossibility and frustration of purpose which provides a satisfactory means of distributing the loss.[103]

The concept of legal impossibility, has since early times, been recognised as an exception to the rule that contracts are absolute. Since the seventeenth century the court has used two propositions to exemplify the operation of this principle.

> Where H. covenants not to do an act or thing which was lawful to do, and an Act of. Parliament comes after and compels him to do it, the statute repeals the covenant: So if H. covenants to do a thing which is lawful, and an Act of Parliament comes in and hinders him from doing it, the covenant is repealed.[104]

The general rule is that a contract become frustrated where, owing to a change in the law, further performance becomes illegal. The contract will prima facie be discharged by such a change in the law, although the performance, in fact, is not physically

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102 It should be remembered that, if the illegality exists before the contract is made, the contract ab initio is void. See for example, *Willison v Patteson* (1817) 7 Taunt 439. However, arguing from the analogy of *Waugh v Morris* (1873) LR 8 QB 202, Pollock considered that, where a contract is unlawful when made, but the parties do not know this, the contract becomes enforceable if by a subsequent change in the law such a contract becomes lawful. Percy H Winfield (ed), *Pollock's principles of contract* (12th edn Stevens & Sons Ltd 1946) 439. See, Glanville L Williams, 'The Legal Effect of Illegal Contracts' (1942) 8 Cambridge Law Journal 51; J M Hall, 'The Effect of War on Contracts' (1918) 18 No. 4 Columbia Law Review Association 325.

103 *Constantine Joseph S.S. Line Ltd v Imperial Smelting Corporation Ltd* [1942] AC 154, 163 (Viscount Simon L. C.). See, Raoul Colinvaux (ed), *Carver's Carriage by Sea* (13th edn, Stevens & Sons Ltd 1982) 588; R G McElory, *Impossibility of Performance* (Glanville L Williams ed, Cambridge: University Press 1941); Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-044.

104 *Brewster v Kitchell* (1698) 1 Salk 198, 198 (Lord Holt C.J.). See also *Furtado v Rogers* (1802) 127 ER 105, 109 (Lord Alvanley); *Baily v De Crespigny* (1869) LR 4 QB 180, 185 (Lord Hannen J.).

impossible, nor have the obligations under the contract been radically altered. The rule is that 'the elementary proposition that if further performance of a contract becomes impossible by legislation having that effect the contract is discharged'[105] because 'there cannot be default in not doing what the law forbids to be done'.[106]

Supervening illegality encompasses two types of situations. The first situation occurs when the law is altered. A contract may be discharged when there is a subsequent change in the law or in the legal position affecting its performance. For instance this occurred in, *Denny, Mott and Dickson Ltd v James B. Fraser & Co Ltd*,[107] when a contract for the sale of timber was frustrated by subsequent legislation rendering it illegal. The second situation arises when there is an alteration in the operation of the law by reason of new facts supervening. It arises in circumstances where the contract is one which involves commercial dealings with the enemy.[108] The public policy consideration in this situation is so strong that it leads to a complete discharge of the contract,[109] even where an express clause was provided for such an event.[110] *Fibrosa Spolka Akcyjan v Fairbairn Lawson Combe Barbour Ltd*[111] involved a contract for

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105 *Reilly v The King* [1934] AC 176, 180 (Lord Atkin).

106 *Denny Mott and Dickson Ltd v James B. Fraser & Co Ltd* [1944] AC 265, 278 (Lord Macmillan). A person may, however, contract in such a way as to even take the risk of supervening illegality if the intent is clear enough. Stephen A Smith (ed), *Atiyah's Introduction to the Law of Contract* (6th edn, Oxford Clarendon Press 2005) 184.

107 [1944] AC 265. See also, *Brown and Others v The Mayor and Commonalty and Citizens of the City of London* (1863) 143 ER 327; *Baily v De Crespigny* (1869) LR 4 QB; *Gamerco SA v ICM/Fair Warning (Agency) Ltd and Another* [1995] 1 WLR 1226; However, in order to frustrate the contract through illegality, the change in the law had to strike at the root of the agreement, and not merely suspend or hinder its operation in part. See, for example, *Cricklewood Property and Investment Trust Ltd v Leightons Investment Trust Ltd* [1945] AC 221, in which it was held that a 99-year building lease was not frustrated by government restrictions on building for only a small part of the term. See also, *Cornelius v Banque Franco-Serbe* [1942] 1 KB 29.

108 See, generally, McNair and Watts, *The Legal Effects of War* (4th edn, Cambridge University Press 1966) ch 3; George J Webber, *Effect of War on Contracts* (2nd edn, Solicitors Law Stationery Society 1946). However, it is a mere fact that war itself does not operate the doctrine of frustration. See *Finelvet AG v Vinava Shipping Co Ltd (The Chrysalis)* [1983] 1 WLR 1469, in which the war was one to which the UK was not a party, so that no question of trading with the enemy could arise.

109 Foreign illegality was finally recognised in *Ralli Bros v Compania Naviera Sota y Aznar* [1920] 2 KB 287. Prior to this case, English courts had refused to acknowledge illegality by foreign law. Where an English contract was to be performed abroad (*lex loci solutionis*), and had become illegal by the law of that country, non-performance was no excuse for parties in English law. See, *Atkinson v Ritchie* (1809) 10 East 530 (foreign embargo); *Forster v Christie* (1809) 11 East 205; *Sjoerds v Luscombe* (1812) 16 East 201; *Barker v Hodgson* (1814) 3 M & S 267 (foreign regulation); *Jacobs Credit v Lyonnais* (1884) 12 QBD 589 (insurrection). See, Dicey and Morris, *The Conflict of Law*, vol 2 (11th edn, Stevens & Sons Ltd 1987) 1218-1225.

110 *Ertel Bieber & Co v Rio Tinto Co Ltd* [1918] AC 260; *Fibrosa Spolka Akcyjan v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32.

111 [1943] AC 32. See also, *Re Badische Co Ltd* [1921] 2 Ch 331.

the sale of machinery to a Polish company. The machinery was to be manufactured in England and delivered to Gdynia. Gdynia was later invaded and occupied by the enemy. The contract was discharged despite a clause in the contract which expressly dealt with the consequences of delay due to 'any cause whatsoever … including war'. Trading with a country occupied by the enemy would have been contrary to public interest.

3.2.3. Frustration of Purpose

The plea of 'frustration of purpose' succeeded in some of the so-called (coronation cases),[112] which arose out of the postponement of the coronation of King Edward VII as a result to his sudden illness. Frustration was applied to contracts the performance of which depended on the existence or occurrence of a particular state of things forming the basis on which the contract had been made. At that time, many contracts had been concluded in anticipation of the coronation. Performance of these contracts did not, by reason of the supervening events, become physically impossible or even commercially impossible. That is, it remained possible for both parties to perform their contract.

Due to the cancellation of the procession and the review, a series of cases came before the courts. These cases are of three types: those in which the contract was made after the date of cancellation and in ignorance of that fact,[113] those in which the parties had made express provision for their rights and liabilities in the event of cancellation[114] and those in which the cancellation of the event occurred after the conclusion of the contract. It is the third type which is the concern of the discussion here, it was alleged that the contracts were discharged on the ground of frustration of purpose, i.e. because the facilities to be provided by the owners were no longer of any use for the

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112 *Civil Service Co-Op Soc Ltd v The General Navigation Co* [1903] 2 KB 756; see, G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 314 – 325; R G McElroy and Glanville Williams, 'The Coronation Cases' (1941) 4 Modern Law Review 241.

113 *Clark v Lindsay* (1902) 88 LT 198; *Griffith v Brymer* (1903) 19 TLR 434, in the latter case, it was dealt with on a different ground, namely "common mistake" and not the "frustration of purpose" because the parties made the contract in ignorance of the fact that the coronation had already been cancelled.

114 *Victoria Seats Agency v Paget* (1903) 19 TLR 16; *Elliott v Crutchley* [1906] AC 7. For full account of the discussion of force majeure clauses, see chapter 5.

contractually contemplated purpose. Two legal issues were raised by the coronation cases: first, whether the contracts were discharged by the cancellation of the originally planned festivities, and secondly, what were the exact legal effects of discharge, especially in relation to payments made or to be made under the contracts.

The most prominent of the coronation cases is *Krell v Henry*[115] in which:

> Henry hired a room in Krell's flat in Pall Mall for the sole purpose of seeing King Edward VII's coronation. The rent agreed was £75 for two days. Henry had paid on the contract £25. Due to illness of the King, the coronation was abandoned. Consequently, Henry did not use the room though. Krell sought to claim the outstanding £50.

It was held that the contract had been frustrated on the ground that 'the Coronation procession was the foundation of this contract and that the non-happening of it prevented the performance of the contract.'[116] Although literal performance was possible, in that the room could have been made available to Henry at the agreed time, and Henry could have sat in it and viewed out of the window, in the absence of the procession it had no point, and the true purpose of the contract had disappeared. The court also held that Krell was not entitled to the £50 and Henry not to return the £25 already paid.

The end-result can therefore be described as a form of rough loss splitting: Henry did not have to pay the £50, while Krell kept the £25 and this sum would cover any expenses which he might have incurred in connection with the transaction, for example, the fee that he presumably paid to his solicitor for negotiating the contract with Henry. The loss splitting, according to Treitel, 'was of course no more than rough, since there is no evidence of the relationship between the £25 which Krell was allowed to keep and the expenses actually incurred by him.'[117]

The debate to which *Krell v Henry* gave rise is, however, concerned, not with such details of adjustment in consequence of discharge, but with the more fundamental question of whether the doctrine of discharge should have been applied at all in the

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115 [1903] 2 KB 740. See also, *Chandler v Webster* [1904] 1 KB 493; *Blakeley v Muller* [1903] 2 KB 760.

116 ibid 751.

117 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 320. However, legislation now provides that Krell would have to pay the £25 subject to the court's power to allow him to retain out of that sum the whole or any part of his actual expenses. Law Reform (Frustrated Contracts) Act 1943.

circumstances of the coronation cases. When those cases were decided, they stood for a new principle: namely that, even though performance had not become impossible (in the sense that the room or seat remained available and could be paid for), the contracts were discharged because their purpose, of enabling the hirers to watch the processions had been frustrated. There were obvious, it has been argued, dangers in such a rule since it was, in theory, capable of extension to many cases in which a contract had simply, as a result of supervening events, become for one of the parties a bad bargain.[118]

However, although *Herne Bay Steamboat Co v Hutton*[119] was one of the coronation cases and brought before the same court and the same judges that decided *Krell v Henry*, the result was not the same. The facts were these

> A contract had been concluded for the hire of a pleasure boat at Spithead on 28 June 1902 "for the purpose of viewing the Naval Review and for a day's cruise round the fleet." After the making of the contract, the Naval Review was cancelled. The defendant thereupon refused to have anything to do with the contract or to pay for the hire of the ship. He was sued for the hire of the ship. In this instance, the court held he was liable, again on the application of the principle of *Taylor v Caldwell*.

At first glance, the two cases seem not entirely easy to reconcile. However, the distinction between the cases can be justified on the ground that the vital factor in *Krell* was probably that the flat was hired for the days but not the nights and so the only conceivable purpose of the contract was to view the coronation procession as Lord Phillips M. R. has said, one for "a room with a view".[120] Contrastingly, in *Herne Bay* the particular purpose was not the subject of the contract; that is, the contract was not intended by the parties to stand or fall upon whether the naval review took place. The distinction is also sometimes explained in term of the fact that part of the purpose in the *Herne Bay* (the cruise round the fleet) was not frustrated.[121] However, it is clear

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118 *Blackburn Bobbin Co Ltd v TW Allen & Sons Ltd* [1918] 1 KB 540 at 551-552 (affirmed [1918] 2 KB 467); *Larrinaga v Societe Franco-Americaine des Phosphates de Medulla* (1923) 92 LJKB 455, 459; *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524 at 529 ('not to be extended').

119 [1903] 2 KB 683.

120 *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd (The Great Peace)* [2002] EWGA Civ 1407; [2002] QB 697 [66].

121 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-34; Michael Furmston (ed), *Cheshire, Fifoot and Furmston's The Law of Contract* (16th edn, Oxford University Press 2012) 727-28; G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 323-25; Jack Beatson, Andrew Burrows and John Cartwright (eds), *Anson's Law of Contract* (30th edn,

that it is Krell which is the exceptional case[122] and as an authority it "is certainly no one to be extended".[123] Thus the case has been kept within very narrow confines so that it cannot be invoked by a party whose aim is simply to escape from what has proved to be a bad bargain.[124]

Oxford University Press 2016) 478; R G McElroy and Glanville Williams, 'The Coronation Cases' (1941) 4 Modern Law Review 241, 254-56.

122 ibid

123 *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524, 529 (Lord Wright); *North Shore Ventures Ltd v Anstead Holdings Inc* [2010] EWHC 1485 (Ch), [310].

124 *Amalgamated Investment & Property Co Ltd v John Walker & Son Ltd* [1977] 1 WLR 164; *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752.

3.3. PART TWO: Saudi law

3.3.1. Impossibility of performance

3.3.1.1. Destruction of the subject matter

The clearest and most obvious situation of bringing the rule of impossibility into play is when a supervening event destroys the subject matter. Thus, if the subject matter, without the fault of either party, is destroyed after the contract has been concluded and before its performance, the contract will be brought to an end.

This rule has been employed in more than one place in traditional Islamic writings; for example, according to Al-Kasani 'if it [i.e., the subject matter] by misfortune from heaven, is *halak* (destroyed) before delivery, the contract is discharged.'[125] Moreover, Al-Ramli contends that, 'if the subject matter has been destroyed by misfortune from heaven or it has been rendered in the meaning of destruction the contract then is discharged.'[126] This rule is also given a statuary effect in the recently enacted Financial Lease Law (2012) which provides in Art. 22 (1) that 'The contract shall terminate upon total loss of the leased asset'.[127]

3.3.1.2. Partial destruction of the subject-matter

In the previous discussion, the concern was situations where the destruction of the subject contract has been total; however, the question here is how the impossibility rule responds to situations in which the destruction is partial.

In a case where there is a contract to sell ascertained goods and, before the risk has passed to the buyer, such goods are partly destroyed; in such a case, the issue is a

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125 A Al-Kasani, *Badai'a Al-Sana'ia*, vol 5 (Dar al-Kitab al-Arabi 1990). 235. See also, A Al-Shirazi, *Al-Mohathab*, vol 1(Dar AI-Fikr n.d.) 296.

126 M Al-Ramli, *Nihayat al-Muhtaj*, vol 2 (Dar al-Fikr 1984) 76.

127 A translated version of this law is available online at <http://www.sama.gov.sa/en-US/Finance/FinanceLib/L_EN_Finance%20lease%20Law.pdf> 'accessed 13 April 2016'

matter of a controversy among Islamic jurists. According to the majority of Islamic scholars,[128] when there is a partial destruction of the subject matter, the impossibility rule applies to that portion and the buyer has the option either to accept the remaining goods with a price reduction or to terminate the contract altogether. They argue that the price is for all the goods; therefore, as a principle of justice, partial destruction constitutes a portion of the price and a reduction in the price should therefore be allowed. The second view given by Ibn Qudamah,[129] who argues that, in the case of partial loss, the buyer is given the option either to take the goods *without* a price reduction if he chooses to hold to the contract or, alternatively, to terminate. Ibn Qudamah justifies his approach, not allowing such a reduction, by having given the buyer two options; if the buyer chooses not to terminate the contract, despite the fact that he could have, and instead upholds the contract, it is as if he has accepted the goods in a new condition.[130] Al-Kasani,[131] offers the third view; in case of a partial destruction, if the presumption can be made that a certain portion of the price can be attributed to the part of the goods damaged or destroyed, then the buyer can either terminate the contract or keep it with a price reduction. However, if such a presumption cannot be made, the buyer then has the same option but without a price reduction. This is because the goods in the first instance can be said to have formed an identifiable part of the contract price and not in the second one.[132]

To illustrate the above, suppose that, there is a contract to sell identified goods, such as 10 tons of wheat, for the consideration of £10,000 and, without fault of either party, half of the goods was destroyed before the passing of risk. In such a case, under all the above views, the buyer is entitled either to accept or to terminate the contract.[133] However, if the buyer elects to continue with the contract, he is entitled to pay half the contract price, £5,000, according to the first and third views, whereas such a

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128 See for example, Al-Buhoti M, *Kashaf Al-Qina' 'an Matn Aligna*, vol 4 (Al-Nasir Al-Hadithah 1982) 276; A Al-Mardawi, *Al-Insaf fi Marifat al-Rajih min al-Khilaf*, vol 4 (Dar Ihia al-Turath 1999) 464.

129 A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 378. Surprisingly, Ibn Qudamah is of the view that there should be a price reduction if there is a partial loss when he dealt with concept of *al-jawa'ih*; see chapter two.

130 ibid

131 A Al-Kasani, *Badai'a Al-Sana'ia*, vol 5 (Dar al-Kitab al-Arabi 1990) 239.

132 ibid.

133 It should be noted that the seller still under the obligation to deliver the remaining goods if the buyer claim it.

reduction is not offered under Ibn Qudamah's view; instead, the buyer is bound to pay for goods at the contract rate.

Suppose further that there has been a contract for the sale of a particular car but before the passing of risk and without the fault of the parties, the car engine is stolen. In such a case, the buyer, according to the above views, has the right either to avoid the contract altogether or keep it. However, if he chooses to keep the contract, he is entitled to the rateable reduction of the contract according to the first view but not to the second and third views.

It seems that the first opinion, which was put forward by the majority of Islamic scholars, provides more flexibility. However, it should be said that, despite the fact that this view enjoys the merit of flexibility it has is a negative side. It may lead to the unwanted uncertainty.

In the wheat case in the above example, there would be no difficulty in reaching certainty, but such a difficulty would arise in the car case, the second example, as the lost part, the engine, may give rise to a dispute regarding its due portion of the price.

It seems that the approach adopted in Saudi law is the first view.[134] This can be inferred by tracing some statutes. For instance, the Financial Lease Law Art. 22 (2) provides that:

> In case of a partial loss of the leased asset that undermines use thereof, and the lessor fails to restore the leased asset to its earlier condition or replace it with a similar asset acceptable to the lessee, the lessee may terminate the contract or agree with the lessor to continue with the contract and amend the rent value in proportion to such loss …

Although this article concerns the contract of a lease, the same rule as to partial destruction can be applied in a sale of contract. In addition, many cases have been ruled on by Saudi courts concerning *khiyar al-ayb* (option of defect),[135] in which the courts ruled for the claimants upon discovering a partial defect or loss without distinguishing between whether or not the subject matter was capable of being divided with respect to the contract price.[136]

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134 It is also applied in many Arabic countries; see, for example, the Egyptian Civil Law Art. 438; Moroccan Civil Law Art.336; and Kuwaiti Civil Law Art.479.

135 See chapter one.

136 See for example, the General Court in Riyadh, decision No. 3331141 in (1433AH/ 2011). It should be noted that, if the lost part is a minor one, the court may reject the discharge of the contract. In one

3.3.1.3. Destruction of something essential for performance

According to authoritative traditional Islamic writing, a contract can be discharged on the grounds of the destruction not only of the subject matter of the contract, but also something essential for performance. Ibn Qudamah, in exemplifying circumstances under which a contract can be discharged, states that 'a contract to employ a woman for the purpose of breastfeeding an infant, in the event of the infant's death the contract is discharged'.[137] In this case, although the infant is not one of the contracting parties, his continuing life constitutes something essential for performance. It can be concluded that the same rule would be similarly applied in a situation where there is a contract for the manufacture of a particular pieces of equipment to be installed at a particular factory or site, but before the performance, a supervening event destroys the factory or site. The contract in such a case would be discharged despite the fact that the thing destroyed was not the subject matter.

3.3.1.4. Unavailability

In some circumstances, the contractual performance is prevented not because of the destruction of the subject matter but because of supervening unavailability. Performance is not strictly impossible because the thing still exists; however, for reasons beyond the control of the parties, it may not be put to the use for which they had intended it. Many supervening events may result in unavailability, which gives rise to the discharge of the contract.

In searching traditional Islamic writings to find an authoritative case presenting the rule of unavailability, a hypothetical case laid down by the scholars was found

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case, for example, the claimant bought a car from the defendant under a lease purchase contract but later, after a fire that damaged a small part of the car, the claimant argued that the contract should be discharged. The court rejected the claimant's argument on the basis that the affected part was almost nothing. The General Court in Riyadh, decision No. 458/25 in (1427 AH 2006).

137 A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 382. See also, M Al-Buhoti, *Al-Rod Al-Morbi'* (Maktabat Al-Riyadh Al-Hadethah 1970) 434; I Al-Shirazi, *Al-Mohathab* (Dar aI-Fikr n.d.) 522.

concerning a contract for the sale of a slave,[138] but after the conclusion of the contract and before its performance, the slave escaped. The contract in such a case would be discharged as a result of the unavailability of the subject matter.[139] This principle extends to the unavailability not of the subject matter itself but to something essential for the performance. This is exemplified by a contract of *muzara'a* (an agricultural partnership agreement), by which the farmer agrees with the landlord to rent the land for the growing of seeds; the contract would be discharged should the only means of irrigation dry up.[140]

In Saudi law, this principle is given statutory effect by Art. 291 of the Commercial Court Law.[141] It reads that, 'If a ship was requisitioned because of a war and can no longer be possibly considered a free ship and its sailing has totally ceased…the contract than can be discharged '

The unavailability not of the subject matter but of something essential may be sufficient grounds for discharge. This has been applied by a Saudi court. In one case:[142]

> A contract of carriage of goods has been concluded between the transporter, the defendant, and the owner of goods, the claimant, by which the former would carry, on his two trucks, the goods from Jeddah to Riyadh. However, prior to loading of the goods, two drivers escaped with the two trucks. Thereupon, the claimant brought an action for damages for the defendant's breach of contract.

The court ruled in favour of the defendant, as it found that the unavailability of the truck was sufficient grounds for excusing him. The unavailability here was not of the goods but the trucks, which constitutes, something essential for the performance. However, the court would be unlikely to excuse the defendant if the trucks were available but not the escaped drivers.

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138 It should be noted that the sale of slaves at that time was allowed under extreme restrictions, but now, such slavery transactions no longer exist.

139 See for example, A Al-Mardawi, *Al-Insaf fi Marifat Al-Rajih min al-Khilaf*, vol 4 (Dar Ihia al-Turath 1999) 58; M Al-Sarkhasi, *Al-Mabsot*, vol 12 (Dar Al-M'arifah 1986) 15-17.

140 M Al-Sarkhasi, *Al-Mabsot*, vol 12 (Dar Al-M'arifah 1986) 31; A Al-Mardawi, *Al-Insaf fi Marifat al-Rajih min al-Khilaf*, vol 4 (Dar Ihia al-Turath 1999) 58.

141 Issued by Royal Decree M/32 (1931).

142 The Board of Grievances, decision No. 45/D/T/G/16 in (1420H/ 2000).

3.3.1.5. The rule of risk

In addressing the rule of excuse, it is important to shed light on the rule of the passing of risk. This is because the rule of the passing of risk has a close connection with the rule of excuse and plays a significant role in invoking the doctrine of excuse. It is a point of time at it is decided whether or not the rule of impossibility is to be applied.

Most Islamic scholars, in dealing with the contract of sale, are of the opinion that, the general principle is that, the risk remains with the seller after contracting and the passing of property until *al-qabd* (delivery) is made to the buyer. [143] Thus, if a supervening event occurs and destroys the subject matter after the delivery, which represents the passing of risk, it would not invoke the operation of the law of impossibility and the buyer would thereby bear the loss.[144] Other scholars argue that the risk of loss passes depending on the nature of the subject matter. If it is a movable one, the risk is linked with its delivery and not the property, but if it is immovable, the risk passes upon the contracting time.[145] Thus, under a contract for the sale of, for example, phones, the risk passes with the delivery according to both views, but under a contract for the sale of, for example, a tract of land, the risk passes with the delivery, and such a delivery is a matter of custom (the registration, for example), according to the first opinion, whereas such the risk is passed with the contract, according to the second view. It seems that the law of excuse has high probability of being invoked according to the first opinion than the second one, as the risk passes at a later point.

Interestingly, in an exceptional case, the risk may still lie with the seller even with the delivery of the subject matter. In chapter one of this thesis, in discussing *khiyarat* (options), it was shown that the *khiyar al-shart* (stipulated option) gives the buyer the

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143 This principle is based upon a statement of the Prophet that expressly provides for it: 'Any subject matter destroyed before delivery is within the seller's risk'. Scholars have tried to find an answer as to why the risk of loss remains with the seller until the delivery. They argue that the nature of the contract requires that a party who does not receive his part of the bargain should not be asked to perform his obligation vis-à-vis the other contractor. See, M Al-Ramli, *Nihayat al-Muhtaj*, vol 2 (Dar al-Fikr 1984) 76-80; A Al-Kasani, *Badai'a Al-Sana'ia*, vol 5 (Dar al-Kitab al-Arabi 1990) 323.

144 The principle is embodied in the Civil Codes of many Arabic countries. For example, Art. 437 of the Egyptian Civil Code states, 'If the subject matter perishes before delivery, without a fault of the seller's part, the sale shall be ended and the price refunded to the buyer, unless he was summoned to take delivery before the loss'. See also Art. 179 (2) of the Iraqi Civil Code and Art. 287 of the Kuwait Civil Code. This principle is also applied in Art. 69 (1) of Vienna Convention on Contracts for the International Sale of Goods.

145 See, M Al-Dasuqi, *Hashiyat Al-Dasuqi*, vol 3 (Dar Ihia al-Turath 1995) 146; A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 111.

right either to ratify or to terminate the contract. Thus, if the subject matter was destroyed while it is with the buyer during the option time the seller would be liable!

3.3.1.6. Contracts of personal services

3.3.1.6.1. Death

In Islamic law, under a contract of personal nature, the death of one of the contracting parties may be grounds for discharging the contract. It must not, of course, be assumed that, because the obligation of the promisor is personal, that of the promisee must also be personal. This principle is exemplified by scholars by reference to a contract to employ a woman for the purpose of breastfeeding an infant; should the woman die the contract is discharged.[146] However, the death of one who has agreed to pay the woman will not free his estate from liability.[147] This principle also extends to a situation involving not only the death of one of the contracting parties but also by the death of a third party whose continued life is essential for performance. For instance, under a contract between A and B to paint a portrait of C or a contract between A and B to nurse C, in the event of the death of C before performance begins, the contract is brought to an end.[148]

The same approach is laid down by the Art. 79 of the Saudi Labour Law,[149] which states:

> A work contract shall not expire by the death of the employer unless his person has been taken into consideration in concluding the contract, but shall expire with the *death or incapacity*[150] of the worker in accordance with a medical report approved by the competent health authority or the authorised physician designated by the employer.

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146 This is also the view under the discussion of 'the death of a servant'. See, A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 382. See also, M Al-Buhoti, *Al-Rod Al-Morbi'* (Maktabat al-Riyadh al-Hadethah 1970) 434; I Al-Shirazi, *Al-Mohathab* (Dar aI-Fikr n.d.) 522.

147 Ibid.

148 See the 'death of infant' example in (n 137).

149 Issued by Royal Decree No. M/51, 2005. See, in general, A Lerrick & Q Mian, *Saudi Business and Labor Law* (Graham & Trotman 1982) 37ff; Nail A Al-Said, *Al-Waseet fi Sharh Nedami Al-Amal we Al-Taminat Al-Ejtimaiah fi Al-Mamlakah* (Maktabat Al-Madenah 1994).

150 Emphasise added.

As indicated by this article, the death of the employer shall not be grounds for discharging the contract unless his person has been taken into consideration. This situation can be envisaged, for example, in a contract between A and B to nurse A in the event of the death of A.

3.3.1.6.2. Incapacity

In traditional Islamic writings in the context of hiring servants, the matter of temporary illness or incapacity is addressed generally. It does not attach the discharge of a personal contract to the length of the servant's illness or incapacity itself but to the test of whether or not such an illness leads to deficiency in the 'benefit' of the contract to the promisee.[151] That is, the test here is a subjective one.

The Saudi Labour Law addresses an employee's illness or incapacity. Art. 74 (5) considers *quwah qahirah* (superior force) as a reason for discharging the contract. In addition, Art. 79 (5), which quoted above, expressly lists the 'incapacity' as a reason for bringing the contract to the end.

The views of both, Saudi Labour Law and Islamic law, are, however, subject to criticism; they do not offer a clear rule in terms of temporary illness. In terms of the Art. 79, it can be said that its application is unclear in that it leaves open the question of how it would be applied in a situation where the contract is for a short period of time, such as three or four months. It is clearly paradoxical to apply Art. 79 in the aforementioned type of contract. In addition, the test under Islamic law, deficiency in the benefit, is an ambiguous one. However, it can be suggested that to determine whether or not a personal contract is discharged, the court should adopt the means of questioning whether the illness or incapacity is likely to last for a long period of time as well as the length of the contract. On other words, the test is a matter of degree.

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151 See, for example, M Al-Dasuqi, *Hashiyat al-Dasuqi*, vol 3 (Dar Ihia al-Turath 1995) 28-30; M Al-Buhoti, *Kashaf Al-Qina' 'an Matn Al-iqna,* vol 3 (Al-Nasir Al-Hadithah 1982) 23.

3.3.1.7. Temporary impossibility

The effect of 'temporary impossibility' on the continuation of the contractual relationship is an issue that has not been addressed sufficiently by either classical Islamic writings or legal commentators. Islamic jurisprudence has only mentioned the possibility of setting aside a contract of personal service because of permanent impossibility.

However, between the insistence on the principle of respecting the contractual relationship and the principles of equity and fairness, exemplified by the rebalancing of contractual obligations in situations of commercial hardship,[152] it can be said that, in the event of a temporary impossibility, the test as to whether or not a contract is discharged would be a matter of degree. In addition, the principle of recognising partial impossibility in cases where the subject matter is partly destroyed can also be looked to by way of analogy. In other words, there is some flexibility under Islamic law and so on 'all or nothing' approach may not always be applied.

Thus, a short impossibility would not discharge a long-term contract, while a prolonged impossibility may discharge a short-term contract. For example, a building contract would not be discharged because of the temporary illness of the builder, but a contract to be performed in a certain time would be discharged if the temporary impossibility lasted for all that time. Difficulty would sometimes arise in situations where it is not clear when the temporary impossibility will end.

It is worth mentioning Art. 274 of the UAE Civil Code, which deals with the issue of temporary impossibility. It provides that:

> In the case of partial impossibility, that part of the contract which is impossible shall be extinguished, and the same shall apply to temporary impossibility in continuing contracts, and in those two cases it shall be permissible for the obligor to cancel the contract provided that the obligee is so aware.[153]

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152 The problem of 'commercial hardship' will be discussed in the following chapter.

153 Notably, none of the Arabic countries civil codes addresses the problem of 'temporary impossibility' except the UAE Civil Code.

3.3.2. Supervening illegality

In some circumstances, the obstacle to contractual performance is not the destruction or unavailability of the subject matter but, rather, a subsequent change in the law. In such a case, a contract concluded but not performed is discharged by supervening impossibility. The reason rests on the requirements of public policy. In Islamic jurisprudence,[154] the term *amr al-sultan*, which literally means 'the act of princes', is mentioned many times with regard to different subjects. It is regarded as an excuse for the non-performance of a contractual relationship. It is not confined to the narrow sense, that is, referring to the king or president, but also encompasses any bodies that represent the government. The term *amr al-sultan,* together with its meaning, has been transferred to French jurisprudence under the expression *fait du prince*.[155]

Upon the Saudi government's abolition of slavery,[156] many disputes arose before the courts. Before the abolition, many contracts were made for the sale of slaves but not yet performed. On one hand, the sellers argued to be discharged from their contracts because the compensation offered by the government was higher than the contract price; buyers, on the other hand, claimed that the contracts are to be performed, they were aware of such a right of the compensation. However, it was held that all the contracts were discharged as a result of the intervention of the new law that banned slavery.[157] The rule of supervening illegality is also given a statutory effect in the recent Financial Lease Law in s.22 (3), which reads as follows:

> If the competent authorities pass an order preventing the full benefit from the leased asset for a reason not attributed to the lessee, the contract shall be terminated and no rent shall be payable as of the date of such prevention.

Furthermore, illegality as a ground for setting aside a contract has been ruled on by Saudi courts. For instance, in one case:[158]

> A contract was entered into by which the claimant was to pay SR45,000 and the defendant to import three housemaids from the Philippines. After the sum was

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154 See for example, A Ibn Taymiyah, *Al-Fatawa Al-Kubra*, vol 5 (Dar Al-kotob Al-ilmiyah 1987) 344-46.

155 Ahmad M Fahmi, *Force Majeure and Hardship* (Saudi Chambers Council 1994) 15.

156 This was in 1962.

157 See, for example, the General Court in Riyadh, decision No. 387/4 on (1382AH/ 1963).

158 The General Court in Riyadh, decision No. 69/25 on (1431AH/ 2010).

> paid and before the performance, the Saudi government banned the importing of housemaids from the Philippines. This led the claimant to bring an action to discharge the contract and recover the sum paid to the defendant, and the defendant refused on the grounds that the government might lift the ban soon.

It was held that the contracting parties were discharged because the performance was no longer legal. Another example is provided in a case[159] in which:

> A contract of supply was concluded between the claimant and a supplier to supply particular iron wire rolls. However, before the first instrument of supply, the Ministry of Commerce announced that all the suppliers must stop importing such goods as a result of discovering a manufacturer defect, and thereupon, the supplier did so. The claimant brought an action alleging that the supplier had breached his contract.

The court held that the supplier was not liable because of the government intervention. Thus, a contract may be discharged as a result of a subsequent law prohibiting trade in particular types of goods or administrative powers requisitioning property for the public interests. This rule extends to situations where the illegality arises from a foreign country; thus, a contract for exports or imports may be discharged by a new foreign law that prohibits such an action.[160]

3.3.3. Impossibility of the contractual purpose

In some circumstances, after the conclusion of the contract and before its performance, an obstacle intervenes that renders it not physically or legally impossible, but the intended purpose of the creation of the contract is no longer of any use. In other words, the contract can be physically performed but is useless to the recipient. This point is not dealt with in Islamic writings as a separate category under the discussion of excuse; however, its meaning is recognised. In searching amongst the hypothetical applications scattered throughout the authoritative books, it was found all the events recognised as applicable to bring about the discharge of contracts were reasoned on the general basis that of *fawat al-manfa'a* (absence of benefit). Many hypothetical cases are given to explain this rule.

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159 The Board of Grievances, decision No. 39/3/G in (1422AH/ 2001).

160 A Al-Sanhuri, *Masadir Al-haqq*, vol 6 (Dar Ihia Al-turath 1997) 130-131; M S Abdulrhman, *Estehalt Tanfith Al-Eltezam* (Dar Al-Nahdha Al-Arabiyah 2005) 59.

One example is, a contract to rent a shop for the purpose of selling a particular type of product, and, before the performance, the product were destroyed. In such a case, the contract is discharged.[161] In fact, there is no impossibility; the subject matter, the shop, is neither destroyed nor unavailable, but the tenant's purpose, selling the products in that shop, is no longer possible. Another example is a contract to hire a riding animal for the purpose of going to Makkah to perform Pilgrimage or carrying goods to a particular place, but later the hirer is unable to travel because of the discovery of banditry. The hirer in such a case is discharged.[162] A further example, but slightly different, is a contract to hire a dentist to extract a tooth because of pain, but before the extraction, the party in pain recovers; the contract in this situation is also discharged.[163]

As shown by the aforementioned examples, it can be said that the rule of 'frustration of purpose' is recognised, although it is not treated as a separate category under the doctrine of excuse in Islamic law.[164] One commentator states that 'traditional Islamic law recognised a rule which is very much akin to the common law concept of frustration of purpose'.[165] In the above examples, the contractual goals or purposes were no longer available. In the shop case, the purpose for the hirer was to sell his products, and this purpose disappeared because the destruction of the goods even though the place of contract, the shop, was available. Likewise, in the riding animal example, the hirer could have used the animal to carry him to another place, but such a use was not the intended purpose for which the contract was made. Interestingly, in the dentist example, the situation is slightly different from the other examples. Despite the fact that the contract in all three cases would be discharged for disappearance of purpose, in the shop and animal cases, the tenant or hirer could have used the subject matter for another purpose but in the dentist case no other reasonable benefit can be expected.

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161 M Ibn Abidin, *Radd Al-Muhtar ala Al-Mukhtar*, vol 5 (Daar Al-Fikr 2000) 78.

162 A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 418; A Al-Kasani, *Badai'a Al-Sana'ia*, vol 5 (Dar Al-Kitab al-Arabi 1990) 198.

163 Ibid; M Ibn Abidin, *Radd Al-Muhtar ala Al-Mukhtar*, vol 5 (Daar Al-Fikr 2000) 71.

164 It is worth mentioning that the Majalla expressly recognises this rule. Art. 443 of the Majalla it provides that, 'if any events occurred whereby the underlying reason for the conclusion of the contract disappears so that the contract cannot be performed, such contract is rescinded'. Similarly Art. 478 states, 'If the *benefit* to be obtained from the thing hired is entirely lost no rent is payable'. [Emphasise added].

165 Adnan Amkhan, 'Force Majeure and Impossibility of Performance in Arab Contract Law' (1991) Arab Law Quarterly 297, 299.

The rule of impossibility of the contractual purpose has been applied in Saudi courts. For instance, in one case:[166]

> A contract was concluded by which the claimant rented land from the defendant for the purpose of using it for an exhibition of local products. Later the local authorities passed an order postponing the exhibition. Thereby, the claimant argued to be discharged from his contract as his contractual purpose was no longer achievable. The defendant, on the other hand, responded that there was no impossibility; the claimant could use the land.

The court held that the contract was discharged since the contract expressly indicated that the land was rented for the purpose of an exhibition and that the exhibition no longer existed as a result of no fault of either party. It seems that, even if the contract does not expressly state the intended purpose but is clear from the circumstances of the contract, the contract might be discharged.

In the above case, the contract was excused on the grounds of frustration of purpose that took place before the contract was due to be performed. In another case (filming case),[167] the discharge was held to has occurred after partial performance of the contract:

> The claimant contracted with the defendant to film the defendant's housing project starting from the commencement of building and until the completion of the project and then introducing it as a film. During the course of building the project and after filming the initial stages, the defendant was ordered by the Ministry of Housing to stop working on the project without fault of his part. The claimant brought an action demanding the remaining contract sum (SR80,000), and the defendant argued that the purpose was frustrated.

The court found that the contract was discharged because the defendant's purpose, filming all the project building stages until its completion, was no longer achievable. Nevertheless, it seems that such discharge is not open simply to the contracting parties whenever one of them finds himself merely in a bad bargain or that one of his intended purposes is useless. In one case:[168]

> A contract was concluded under which the defendant was to let his signboards for the advertisements of the claimant. The contract price was to be paid in advance. A term in the contract provided that 'the claimant must pay a sum of

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166 The General Court in Taif, decision No. 312/11 in (1422 AH/ 2001).

167 The Board of Grievances, decision No. 72/T/4 in (1409AH/ 1989).

168 The Board of Grievances, decision No. 3396/2/Q in (1426 AH/ 2005). See also, The General Court in Al-Ahsa, decision No. 85/9 in (1417AH 1997).

> money to the defendant every time he wishes to change the content of the advertising messages'. In fact, the claimant's main purpose was to use the signboard to advertise his own commercial products. However, upon a ban of the authorities on advertising of the claimant's products, the claimant sought to discharge the contract and claim the money to be paid back.

The court rejected the claimant's argument and held that the contract was binding. The court interpreted the term quoted above as an indication that the claimant could use the signboard for another purpose. It would be likely that the contract would be discharged if was expressly indicated that the *only* purpose of the signboard was to advertise the claimant's commercial products.

3.4. Conclusion

This chapter discussed the most important featured circumstances in which the rule of frustration might be invoked and demonstrated that the English doctrine of frustration applies to excuse a party in circumstances of 'impossibility of performance', 'supervening illegality', and 'frustration of purpose'. It was also shown that, through seeking and gathering the scattered principles in Islamic jurisprudence as well as some legislations, these circumstances are recognised to operate the rule of impossibility in Saudi law.

It was shown that English law does not recognise an intermediate solution where there is a partial impossibility. In a situation involving partial destruction, the doctrine of frustration cannot be applied, so the contract is either deemed wholly discharged or not. It is a 'black or white' solution, although, in some situations the partial impossibility can easily be applied. To better explain this issue, it can be supposed that A contracted with B to buy identified goods from a source identified in the contract. However, before the risk of loss passed to A, half the goods were destroyed without fault from either party. In such a situation, the English and Saudi courts would provide the same result, but through applying a different process of reasoning. In Saudi law, B would be excused with regard to the affected half of the goods, but he would remain under the obligation to deliver the remaining unaffected goods to A. A, on the other hand, has a choice between partially upholding the contract with the

rateable reduction, as the contract would automatically become partly impossible in regard to the affected goods, or bringing it to an end because of the partial impossibility. In English law, the same choice would be offered to A, however, this choice is not, in the English case, regarded as an option to treat the contract as partly frustrated. It is regarded simply as an application of A's right to choose between rescinding and affirming the contract on account of B's non-performance; and while on the one hand the right to rescind is not dependent on any breach by B, it is, on the other hand, equally independent of the requirements of frustration.[169] Thus, there is so such concept as partial frustration, as the contract either is frustrated or remains in force.

English law is not adequate with regard to the problem of partial allocation. Suppose, B, in the above example, had entered into other contracts beside A's, and that the available goods were sufficient to fulfil only A's contract, or some of his contracts but not all of them. In such a situation, under English law, B would be not be excused if he acted reasonably in allocating the available goods. Thus, choosing to allocate the available goods to fulfil in full some particular contracts and allege frustration in respect to others contracts, or to allocate the available goods in a form of *pro rata* division between the contracts would not be sufficient for relief. Rather, B's action would be considered as amounting to 'self-induced frustration'; that means, it was his choice that brought the frustration and not the frustrating event. This is of course a harsh position for B. By way of contrast, B, under the U.S. Uniform Commercial Code, would be excused if he showed that he acted reasonably in allocating the partial goods. This is due to the notion of 'reasonableness' and 'fairness' recognised by the UCC. In English law, such a notion is not considered in situations of this type. The notion of 'reasonableness', however, is only recognised in the context of contractual provisions. In Islamic jurisprudence, although such a problematic issue has not been discussed, it would appear that from the widespread recognition of the philosophy of justice when applying the concept of impossibility, B would not be liable.

It seems that the probability of invoking the doctrine of impossibility, in cases where the rule of risk is involved is higher in Saudi law. This is because the risk of loss, generally, passes with the delivery and not with the property as it does in English law.

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169 G Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 15-018.

Thus, in English law, the risk and property together, in the above example, will pass to A, while in Saudi law the risk will remain with B until delivery.

As a final point, this chapter also showed that the answer to the question whether or not a contract has been frustrated is sometimes very difficult. This is true, in situations where the matter of degree is involved, for example temporary impossibility. Frustration in the legal sense may occur in some cases at a stage—often not easy predictable—subsequent to events in gradual transition, then becoming a matter of degree whether an unanticipated event does, or does not, amount in law to frustration.

CHAPTER FOUR: COMMERCIAL IMPOSSIBILITY

4.1. Introduction

In this chapter the discussion concerns the complex issue of commercial hardship. It is sometimes expressed through many terms, such as, 'commercial hardship' or 'changed circumstances'. The main purpose of this chapter is ascertain whether a contract that has not become impossible but commercially difficult and onerous, in the sense that a party would say it is not commercial.[1]

English courts sometimes do not differentiate precisely between commercial impracticability and impossibility. However in a number of cases, the phrase 'impracticability' or 'commercial impossibility'[2] has been used in judicial statements. In some judicial statements, 'commercial impossibility'[3] or 'commercial impracticability'[4] has been expressed for the purpose of excusing non-performance. It is also stated that some 'serious impediments' may be grounds for discharge.[5] However, it should be noted that these phrases have been expressed for the context of contractual provisions.

Many agreements are concluded to run over a period of time, and it may be difficult, if not impossible, to predict in advance how the future will be, in particular the change

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1 Notably, the concepts of 'frustration of purpose' and 'commercial impossibility' are similar to some extent. They are considered circumstances not amounting to physical impossibility. They are usually distinguished who brings the action. In a case of alleged 'frustration of purpose', it is normally the promisee who argues that the contract should be discharged. His own obligation, being merely to pay money, cannot have become impossible, nor has any impossibility affected the obligation of the promisor, whose task can still be performed. However, the promisee's case is that the contract should be discharged because the promisor's performance is no longer of any use to the promisee for the purpose for which both parties had intended it to be used. In cases of 'commercial hardship', in which the performance has not been rendered physically impossible but more expensive, it is often the promisor who pleas for discharge.

2 See for example, *Horlock v Beal* [1916] 1 AC 486, 492.

3 For example, *Blane Steamship v Minister of Transport* [1951] 2 KB 965, 989; *Seabridge Shipping Ltd v. Intco Shipping Ltd (the Furness Bridge)* [1977] 2 Lloyd's Rep 367, 377; *Tekrol Rederierne v Petrole Brasilerio SA (The Badagry)* [1985] 1 Lloyd's Rep 395, 399.

4 *Naylor Benzon & Co Ltd v Aron Hirsch & Son* (1917) 33 TLR 432, 433; *Owners of Steamship Matheos v Louis Dreyfus & Co* [1925] AC 654, 660.

5 *Jackson v Eastbourne Local Board* (1885) 2 *Hudson on Building Contracts* (10th edn, Sweet & Maxwell 1970) 81, 94 H. L.

of costs. In this vein, it is open for the parties to attempt to create a degree of flexibility into the contract by the use contractual clauses.[6] However, some provided clauses may not work to protect the parties as they incompletely drafted or, no clauses at all provided. Thus, many parties and firms, as a result of commercial hardship, inevitably regret having entered into contracts. Many of them will be looking for ways to limit or, even avoid the consequences.

This chapter will examine the English and Saudi law to establish whether the problem of commercial hardship has been considered and whether any legal relief has been presented to alleviate the affected party in a contract which has been affected by the supervening hardship. The discussion will proceed as follows: in the first part, an attempt will be made to identify the general approach of English law to commercial impossibility, and the discussion will proceed to shed a light on how this was dealt with in some special cases and finally address the court's justification for its approach. In the second part, the discussion will shift to the exhibit the approach of the Saudi law commercial hardship. The general approach, justification, and the absence of a clear threshold test of hardship, will be covered. In the third part, brief consideration will address how the issue of commercial hardship is dealt with under other legal systems so as to compare with the English and Saudi proposition.

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6 The topic 'force majeure clauses' will be dealt with in details in Chapter 6.

4.2. PART ONE: English law

4.2.1. Commercial hardship as a ground for frustration

4.2.1.1. Illustrative cases of the general approach

Generally, it has been contended that the available authorities do not support the position that an increase in expense, however substantially and however seriously it may affect the contract, can by itself work to frustrate the contract.[7] Professor Treitel argues that 'The English cases do not provide a single clear illustration of discharge on such grounds alone [i.e. commercial impossibility] and the possibility of such discharge appears to have been denied in a number of occasions in the House of Lords.'[8] However, commercial impossibility has been the subject of discussion in a number of English cases some of which will be considered below.

The case of *Davis Contractors Ltd. v. Fareham Urban District Council*[9] is a significant one in English law concerning the issue of commercial impossibility. This case is regarded as an illustration of the position of the English view towards commercial or economic impracticability.[10] The facts were as follow:

> Davis entered into a contract to build 78 houses for a fixed sum £94,000 within a period of eight months. It ended up taking twenty-two months, because Davis was short of labour and materials. It cost £115,000. Davis claimed to be discharged from the contract and to be entitled to the additional payment, i.e. £17,650, on a *quantum merit* basis for the work in fact done.

In the first stage, the arbitrator concluded that the additional cost and expenses properly and unavoidably incurred by Davis amounted to £17651 and, in any event,

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7 Roy G McElroy, *Impossibility of performance* (G L William ed, Cambridge University Press 1941); G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) ch 6; Jack Beatson, 'Increase Expense and Frustration' in F D Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract* (Sweet & Maxwell 1996); A D M Forte, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom' (1986) Juridical Review 1.

8 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-022, 283.

9 [1956] AC 696.

10 G H Treitel, *Frustration and Force Majeur*e (3rd edn, Sweet & Maxwell 2014) para 6-026, 287.

he was entitled to the sum of this additional cost.[11] Nevertheless, the House of Lords rejected the claim and held that there was no frustration found.

Viscount Simon first observed that disappointed expectations do not lead to frustrated contracts; the fact that a job cannot be completed within an expected time and price affords no grounds for discharge. He then remarked that if the true purpose of frustration is to offer relief to parties when an unexpected event makes it unjust to hold them to their bargain, the doctrine must be kept 'within very narrow limits.'[12] Viscount Simon questioned whether the factual setting of the case contained an 'unexpected disruptive event' which put an end to the contract, and concluded his opinion with the proposition that an 'unexpected turn of events' that renders performance under a contract more onerous than contemplated provides no basis for a finding of frustration.[13] Lord Reid stated that frustration involves the 'termination of an agreement by operation of law on the emergence of a fundamentally different situation.'[14] If it appears that the new situation is fundamentally different from that contemplated by the parties, so that the contract is not 'wide enough to apply to the new situation'[15] the contract is frustrated.

Lord Radcliffe argued that: 'the application's case seems to me a long way from a case of frustration.'[16] In the opinion of Lord Radcliffe, though the new condition results in the fixed price so unfair to Davis, such an event cannot be regarded as grounds for frustration. He stated that 'If that sort of consideration were to be sufficient to establish a case of frustration, there would be an untold range of contractual obligations rendered uncertain and possibly unenforceable.'[17] It is not, however, clear from the words of Lord Radcliffe whether he considered that an increase in the cost of performance of a contract cannot totally be regarded as relevant under the doctrine of

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11 The arbitrator bases his decision on the ground that: (1) the letter of 18 March 1946 became a condition of the agreement. (2) In any event, the contract was entered into on the basis that adequate supplies of labour and materials would be available at the times required. (3) Because adequate supplies of labour and materials were not available the footing of the contract was removed and the claimants were entitled to be paid on the basis of a *quantum meruit*. ibid 700.

12 ibid 715.

13 ibid 714-16.

14 ibid 723.

15 ibid 721.

16 Ibid 730

17 ibid 730-731.

frustration or if it must be a very drastic one to be sufficient to bring the doctrine of frustration into play.

Nonetheless, it should be noted that the increase in the price of the contract in the *Davis Contractors* case was less than 23 per cent and this amount of increase would not be regarded as a ground for discharge or adjustment, even in legal systems which have more liberal views concerning the matter of commercial impossibility. On that basis, therefore, the decision of this case by itself cannot be said to illustrate the definite English law attitude towards the problem of commercial impossibility.

Wates Ltd v Greater London Council[18] is another case in which the alleged frustration due to a rise in the costs of performance of the contract, as a result of inflation, was also rejected. The facts of the case were:

> Wates agreed to build houses. The contract provided that the price to be paid to Wates might be increased in accordance with a particular formula. Wates' costs subsequently rose much faster than had been contemplated. As a result Wates claimed that the contract had been frustrated.

The claim was rejected. According to Purchas L. J., who relied on the *Davis Contractors* case, Wates' obligation was not radically or fundamentally altered as a result of the alleged frustrating event. It is true that the agreement had become onerous for Wates to perform by virtue of inflation but this alone was insufficient ground in the court's eyes.

The reasoning given by the court in the case was influenced by the fact that the parties had actually provided for the circumstances which had occurred and this undermined Wates' argument that the contract had been discharged. According to Stephenson L J.:

> Things may have turned out differently from what the parties contemplated in that inflation increased, not at a trot or a canter, but at a gallop. But that difference in degree and tempo was not so radical a difference from the inflation contemplated and provided for as to frustrate the contract … And in fact the contract did provide for it by clause 3(6), though not as effectively as Wates would have liked if they had contemplated it.[19]

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18 (1983) 25 Build LR 1.

19 ibid 35.

Although the alleged frustration in the case, was rejected, it does not mean that the finding in the case precluded inflation from being a ground of frustration in all situations. It may be concluded from the above-mentioned passage, that an implication that: if the limit of inflation was radically beyond the contemplation of the parties, it could have been said that the contract was frustrated.

Whilst it can be said that, the amount of rise or increase in the cost of the contractual obligations in the two above discussed cases was not, at least in an English law sense, severe and difficult enough to be regarded as relevant under the doctrine of frustration, these two cases cannot be regarded as plain illustrations of the position of the English law in terms of commercial impossibility.

4.2.1.2. Is there hostility to commercial hardship as a ground of frustration?

It has been emphasised that, not only do the existing English cases not support the concept of commercial impossibility but that there is also hostility to commercial impossibility as grounds for invoking the doctrine of frustration.[20] This hostility is reflected in a number of judicial statements. In the *Tennants (Lanchashire) Ltd v C. S. Wilson & Co Ltd*[21] Earl Loreburn contended, and this is probably the general view of English law regarding commercial impossibility that:

> the argument that a man can be excused from performance of his contract when it becomes commercially impossible ... seems to me a dangerous contention, which ought not to be admitted unless the parties have plainly contracted to that effect.[22]

In the case of *British Movietonews* Lord Simon stated that:

> 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

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20 See, G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-021 – 6-028.

21 [1917] AC 495.

22 ibid 510.

> to the execution, or the like. Yet this does not in itself affect the bargain which they have made.[23]

The statement, according to Treitel, 'suggests a rejection of the very principle of "impracticability" as an independent ground of discharged.'[24] In *Davis Contractors* case, Lord Radcliffe expressed that 'it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play.'[25] In the *Tsakiroglou* case, Lord Simonds clearly asserted that 'an increase of expense is not a ground of frustration.' In *The Elli and The Frixos* case, where the owner of time-chartered tankers suffered some loss in his performance it was said that there '[could] not be a financial limit to [that] obligation.'[26]

Further hostility to commercial impossibility as a basis of excusing parties is stated in a number of cases in which the concern was the hardship stemming from the First World War. In one case, for example, the court said that it could not be 'said that grave difficulty on the part of the vendor in procuring the contract articles will excuse him from the performance of his bargain.'[27] In addition, in another case, where the increase in the price of the goods to be supplied amounted 88 per cent was not recognised as a ground for frustration.[28]

4.2.1.3. Is there any glimmer of possibility for commercial hardship?

There is significant advantage in conducting a deeper examination of the approach of English law to commercial impossibility by considering some judicial statements for the purpose of clear judicial support and for the view that frustration may be applied in commercial hardship.

There are some judicial statements that might be considered to be in support of the position that commercial hardship might be a ground of frustration. A glimmer of

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23 *British Movietonews Ltd v London and District Cinemas* [1952] AC 166, 185.

24 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-023.

25 [1956] AC 696, 729.

26 *Golden Fleece Maritime Inc v ST Shipping & Transport Inc (The Elli and The Frixos)* [2008] 2 Lloyd's Rep 262, [59].

27 *Blackburn Bobbin Co Ltd v Tw Allen & Co* [1918] 1 KB 540, 545.

28 *S Instone & Co Ltd v Speeding Marshall & Co Ltd* (1916) 33 TLR 202. See also, *E Hutton & Co Ltd v Chadwick Taylor & Co Ltd* (1918) 34 TLR 230.

possibility might be found in the case of *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials)*.[29] Where a force majeure clause did not protect the seller as a result of the change in the export regulations which increased the costs of the seller's performance. According to Denning LJ 'one *hundred times*[30] as much as the contract price, that would be "a fundamentally different situation".'[31] This dictum indicates the possibility that if the cost of the performance amounted to hundredfold, then frustration might be applied.[32] However, it has been argued that Denning LJ's dictum, in fact, does not necessarily indicate that such a rise would excuse the seller under the doctrine of frustration as this dictum is inconsistent with many other dicta that were stated earlier.[33] Instead, the dictum perhaps means that the hundredfold rise would let the court to apply the 'force majeure clause'.[34] Even if the dictum was meant to consider the operation of frustration a 'hundredfold' is very fantastic.

In the passage of Lord Simon *British Movietonews* which aforementioned,[35] it continues:

> If, on the other hand, a consideration of the terms of the contract in the light of the circumstances when it was made, shows that [the parties] never agreed to be bound in the fundamentally different situation which has now emerged, the contract cease to bind at that point.[36]

This quotation, however, according to Treitel refers to other events earlier listed in the judgment, such as temporary impossibility causing delay, so that they are capable of bringing the frustration if they resulted in a 'fundamentally different situation'.[37]

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29 [1952] 2 AII ER 497.

30 Emphasis added.

31 ibid 501.

32 See, Sukhnam Digwa-Singh, 'The Application of Commercial Impracticability Under Article 2-615 of the Uniform Commercial Code' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 326.

33 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-028.

34 Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 18-363, 18-364.

35 See (n 22)

36 *British Movietonews Ltd v London and District Cinemas* [1952] AC 166, 185

37 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-046. See also, Forte A D M, 'Economic Frustration of Commercial Contracts: A Comparative Analysis with Particular Reference to the United Kingdom' (1986) Juridical Review 1, 11.

Some further support is found within the context of cases concerned with inflation. In *Wates Ltd* case, it was pointed out that:

> Things may have turned out differently from what the parties contemplated in that inflation increases, not at a trot or at a canter, but at a gallop. But that difference in degree or tempo was not so radical a difference from the inflation contemplated and provided for as to frustrate the contract.[38]

This dictum may leave open the possibility of frustration of a contract where inflation is of such a degree or tempo that it amounts to a 'radical difference' from what the parties could have anticipated. It might be argued however, that the passage in this case was attached to an expressed provision of the contract and therefore it cannot be regarded as plain support for the discussion. As far as inflation is concerned, Mann[39] has suggested that extreme depreciation of currency might be a ground of discharge. Although, even if it did occur it would be dealt with by legislation not by common law.[40]

It appears that there is an emphatic rejection to the view that commercial hardship is not a sufficient ground for operating the doctrine of frustration. Treitel is right when he asserted that 'the English cases do not provide a single illustration of discharge on such grounds alone [i.e. commercial impossibility] and the possibility of such discharge appears to have been denied on a number of occasions in the House of Lords.'[41] In fact, what appears is hostility for commercial hardship.

It appears from the English law approach on the problem of commercial hardship that English law projects great emphasis on the principle of sanctity of contract even through the consequences of doing so may sometimes seems be harsh for the affected party.[42]

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38 (1983) 25 Build LR 1, 35.

39 Charles Proctor (ed), *Mann on the legal aspect of money* (7th edn, Oxford University Press 2012) 120.

40 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-047.

41 ibid para 6-022.

42 This harshness was considered by a Report, made in 1918 by a committee appointed by the Board of Trade, to consider the position of British Manufacturers and Merchants in respect of pre-war contracts (Cd 8975 (1918). It was stated in this report that 'Mere increase in cost of performance, unless to an enormous and extravagant extent, does not make it impossible. A man is not prevented from performing by economic unprofitableness, unless the pecuniary burden is so great as to amount to physical prevention.' However, the report did not recommend any legislation. See, G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 6-021.

4.2.2. Special Cases

The foregoing discussion shows the general attitude of English law towards the issue of commercial hardship. It is, nonetheless, still possible to indicate to another line of authority which shows that there is some support for the view that an increase in expense may be indirectly relevant in bringing frustration into operation, by means of linking it to some causes. In other words, the economic hardship was accepted as a factor in rather than a primary cause of the frustration. It is, therefore, worthwhile examining these authorities to see whether this is true or maybe to go further and suggest that it forms the primary cause of the frustration? At this stage the issue of commercial impossibility will be dealt with when it is accompanied by a long-term contract and temporary impossibility.

4.2.2.1. *Staffordshire* case

In *Staffordshire Area Health Authority v South Staffordshire Water Works Co*,[43] the facts were that:

> The water company agreed to provide the hospital 'at all times hereafter' with water at a price. After about 60 years the cost of supplying the water rose to over 18 times the contract price. As a result the water company wrote to the hospital giving six months' notice of its intention to terminate the contract. The hospital refused to accept this notice and argued that the agreement was expressed as applying 'at all times hereafter'.

The Court of Appeal held that the company's notice was effective. Although the members of the court reached the same decision, they differed in their reasoning over this decision. Lord Denning held that, having regard to the steep fall in the value of money since the contract had been concluded, circumstances had emerged since the agreement was signed which the parties had not foreseen, due to these circumstances,

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43 [1978] 3 AII ER 769. See, Demetrios H Hadjihambis, 'Notes: At All Times Hereafter' (1979) 30 Northern Ireland Legal Quarterly 136.

it was no longer binding on the parties and could be terminated by reasonable notice.[44] It is interesting to note that Lord Denning, in the *British Movietonews v London and District Cinemas*[45] case, was of the opinion that if events occur for which the contracting parties have made no provision and which are outside the realm of their speculations altogether, or of any reasonable person sitting in their chair, the plea of discharge would not be acceptable. However, some 20 years later in the *Staffordshire* case, he said that it 'seems to have come into its own now'.[46] He continued and said:

> But times have changed. We have since had mountainous inflation and the pound dropping to cavernous depths ... The time has come when we may have to revise our views about the principle of nominalism ... Here we have in the present case a striking instance of a long-term obligation entered into 50 years ago. It provided for yearly payments for water supplied at seven old pence a 1,000 gallons. In these 50 years, and especially in the last 10 years, the cost of supplying the water has increased twentyfold. It is likely to increase with every year that passes. Is it right that the hospital should go on forever only paying the old rate of 50 years ago?[47]

Therefore, according to Lord Denning the reasoning behind his judgment that the contract was terminable was economic hardship. In his view the contract had been frustrated by inflation 'outside the realm of their speculations altogether, or of any reasonable person sitting in their chairs'.[48] In fact, both contracting parties needed this contract to carry on in the future; the hospital needed water, and the water company wanted to pursue its transaction but the approach of English law and its narrowness concerning the problem of economic hardship caused the water company to invoke such a device, namely the determination of the contract.[49]

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44 ibid. See, Alfred Denning, *The Discipline of Law* (Butterworths 1979) 48-50.

45 [1952] AC 166. Lord Denning also emphasised the principle of nominalism in the *Treseder-Grin v Co-Operative Insurance Society* [1956] 2 AII ER 33, 36; [1956] 2 QB 127, 144, when he stated that 'in England we have always looked on a pound as a pound whatever its international value ... creditors and debtors have arranged for payment in our sterling currency in the sure knowledge that the sum they fix will be upheld by the law. A man who stipulates for a pound must take a pound, whenever payment is made, whatever the pound is worth at that time'. For the concept of nominalism see Charles Proctor (ed), *Mann on the legal aspect of money* (7th edn, Oxford University Press 2012) 90-91.

46 *Staffordshire Area Health Authority v South Staffordshire Water Works Co* [1978] 3 AII ER 769, 775.

47 ibid 777.

48 ibid. See, Alfred Denning, *The Discipline of Law* (Butterworths 1979) 48-50.

49 Alfred Denning, *The Discipline of Law* (Butterworths 1979) 48-50.

On the other hand, Goff and Cumming Bruce LJJ were of the view that in the absence of an express power to terminate, the contract was not to be construed narrowly but in the context of the circumstances in which it was made. They argued that the phrase 'at all times hereafter' was not to be taken literally; it merely obliged the water company to supply water at all times during the existence of the contract and the contract in terms of its true construction was intended to be one of indefinite rather than one of perpetual duration. According to them, the case fell within the general principle that in commercial agreements of indefinite duration[50] a term is often implied entitling either party to terminate the agreement using reasonable notice.[51]

It has been argued that the latter reasoning is the preferable one. According to Treitel:

> This seems to be the preferable basis for the decision in the sense that it is consistent with other cases concerning agreements of indefinite duration; and in that it is not inconsistent with the views expressed by the House of Lords in *British Movietonews* case.[52]

He continues that:

> The view that the contract was discharged by a radical change of circumstances also makes it hard to explain why the contract was (as Lord Denning said) terminated by notice: it should (on his view) have been discharged automatically, by operation of law, when the radical change occurred.[53]

However, these arguments are subject to criticism. With respect to the argument that termination on the basis that the agreement was to be considered terminable by reasonable notice, it does seem a little strained when the contract was silent on the matter. It involved interpreting the wording 'at all times hereafter' as 'at all times

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50 Whether or not the contract is of permanent duration is a matter of construction. See, A R Carnegie, 'Terminability of Contracts of Unspecified Duration' (1969) 85 Law Quarterly Review 392, 403.

51 In general, where such a term is implied, it entitles a party to terminate the agreement at any time upon the giving of notice, which must be of reasonable length so as to enable the parties to readjust their relationship. An implied term permitting notice of termination has been implied in long-term contracts as in the present case and *Re Spenborough U.D.C.'s Agreement* [1968] Ch 139. It has also been implied into some commercial contracts within a few years of their commencement, for example, *Martin-Bank Aircraft Co Ltd v Canadian Flight Equipment Ltd* [1955] 2 QB 556 (within three years of a franchising contract). The image seems to be clearer in the United States, where art. 309(2) of the UCC contains an explicit presumption of revocability upon notice. Carnegie (n 67) 392.

52 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) 298. This is also the view of Michael Furmston, *Cheshire, Fifoot & Furmston Law of Contract* (16th edn, Oxford University Press 2012) 732.

53 ibid 298.

hereafter during the subsistence of the agreement', which is a very different matter.[54] In addition, this argument is open to the question that if the contract, in this case, is one of indefinite, not perpetual, duration and if the general principle of commercial agreements of indefinite duration that a term would be implied to permit either party to terminate the contract by reasonable notice could be applied to this case, then the question is whether, for example, the water company could have given notice to terminate the contract ten years after the contract was made or by 1975 without the occurrence of any supervening events which would change the economics of the contract. What would be the decision of the court in these hypothetical situations? It is very strange that one can say in such a contract that the parties can terminate the contract at the earliest time after its conclusion. It is not acceptable for the court to impose such an artificial view which is not contemplated by the parties at all.

It seems that the decision of the court would have gone the other way if such hypothetical situations (whether after the water company had given notice to terminate the contract ten years after the contract had been made or by 1975 without the occurrence of any supervening events which would change the economics of the contract) had happened. It is obvious that the fundamental change in the economics of the contract was the reason for the water company giving such a notice for the termination of the contract because they alternatively could have paid the normal rate for the water. If they had accepted that they would pay the normal rate, the water company would not have given notice for termination. It goes without saying that the dispute between the parties and the decision of the court were due to an increased cost for the performance of the contract and the contracting parties could not have given such a notice for termination after a few years since the contract was made without such economic changes occurring; Lord Denning stated that 'I do not think that the water company could have determined the agreement immediately after it was made. No rule of construction could sensibly permit such a result'.[55]

A question may be asked, if the usual application of frustration is to automatically discharge the contract, why then did Lord Denning consider the effectiveness of the given notice? The answer may be that termination by six months' notice was all that

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54 Roger Halson, *Contract Law* (2nd edn, Person Education Ltd 2013) 396.

55 *Staffordshire Area Health Authority v South Staffordshire Water Works Co* [1978] 3 AII ER 769, 777.

the water company requested.[56] Alternatively, in fact, Lord Denning meant it, that is, frustration with a different remedy, not the ordinary one of automatic discharge, but termination by reasonable notice due to the sensitivity of the contractual relationship. There is no reason to exclude the fact that Lord Denning meant to 'involve a massive change in the law as previously understood'.[57] It seems that Lord Denning meant by this view that the duty of the court in such a case is not merely to order that the contract be discharged or not, but the court should impose the duty of adjustment of the contract on the parties to respond to inflation which caused this problem and without which the water company could not have given the notice for termination.

It can be argued that, as long as the basis of the operation of the doctrine of frustration is a 'radical' or 'fundamental' change from that originally undertaken by contracting parties, there is no reason to exclude cases of exceptional increases in cost. It does not matter whether the cause is physical impossibility or commercial impossibility or any other cause because in all these situations the contracting parties, on their true construction, did not contemplate this when concluding the contract. Inflation is external to the contracting activities, and may occur suddenly, rather than gradually. The parties may, therefore, find it difficult to make adequate provision for inflation. Rosenn argues that, in such circumstances, judicial revision of the price may be appropriate, though he recognises the limited ability of the courts to obtain and assess the information necessary for making a revaluation.[58] However, it might be asked why contracting parties should be specially protected from the ravages of inflation to which all members of their community are subject. The answer seems to be that the issue in long-term contracts is how the burden of inflation should be borne between the contracting parties.[59] Where a steep inflation affects the parties unequally, and no attempt has been made to allocate this risk in the contract, then an attempt by the courts to adjust the original contractual equilibrium would seem to fit the objectives of the parties and fairness better than leaving the loss to fall where it lies. In contrast, commodity prices are part of the risk involved in the contract. Any trader takes

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56 Michael Furmston, *Cheshire, Fifoot & Furmston Law of Contract* (16th edn, Oxford University Press 2012) 731; Roger Halson, Contract Law (2nd edn, Person Education Ltd 2013) 396.

57 ibid 732.

58 K S Rosenn, *Law and Inflation* (University of Pennsylvania Press 1982) 112-113.

59 John Bell, 'The Effect of Change in Circumstances on Long-term Contracts 1: English Report' in Donald Harris and Denis Tallon (eds), *Contract Law Today: Anglo-French Comparative* (Clarendon Press 1989) 195, 217.

account of the risks involved in market fluctuations. Rosenn argues that such risks are best allocated by the parties.[60] The difficulty lies in the degree of provision which can be made for such risks. Dramatic and unforeseeable changes in commodity prices may outstrip the usual risks faced by the market. The result is a very heavy loss for one party and a windfall gain to the other far in excess of the expectation of the parties in entering the agreement.[61] In such extreme cases, it could be argued that some form of revision might best fit the original objective of the contract.

4.2.2.2. When Commercial Impossibility occurs after a Temporary Impossibility

It has been seen in the previous chapter[62] that the effect of temporary impossibility is in some cases the ground for discharging contracting parties. This is so when performance again becomes (or is expected to become) possible, and circumstances are or (would be likely to be) so radically different from that contemplated by contracting parties upon contracting.

This was, for example, the situation in *Acetylene Corp of G.B. v Canada Carbide Co*[63] and *Metropolitan Water Board v Dick Kerr & Co*,[64] where as a result of delays caused by governmental action in the First World War the contracts in these cases were held to have been frustrated. In the *Acetylene* case the fact was that:

> A contract for the sale of carbide to be shipped from Canada to the UK provided that the shipment was to begin in 1917. The war-time requisitioning of all available ships made shipment impossible at the agreed time, and it remained impossible until 1920. It was held that the seller was no longer bound to ship when performance became possible again, because by then market conditions had radically changed.[65]

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60 K S Rosenn, *Law and Inflation* (University of Pennsylvania Press 1982) 111.

61 John Bell, 'The Effect of Change in Circumstances on Long-term Contracts 1: English Report' in Donald Harris and Denis Tallon (eds), *Contract Law Today: Anglo-French Comparative* (Clarendon Press 1989) 195, 218.

62 See Section 3.2.1.7.1, Chapter 3.

63 (1922) 8 LL Rep 456.

64 [1918] AC 119.

65 Scrutton L J argued that 'The period of suspension is three times as long as the original contract period, and the time of suggested resumption of the contract is in quite different circumstances as to

In the *Metropolitan* case:

> The contractors agreed in July 1914 to construct a reservoir within six years. In the event of delays they were to be allowed a time extension. In February 1916, the contractors were required by a war-time government order to stop the work and to sell their construction plant. It was held that the contract was frustrated.

It has been argued - and might be extracted from the reasoning of the cases under consideration - that the reason for discharging of the contract in such cases is an unreasonable and inordinate delay. However, in determining whether the delay is unreasonable the increase in the costs of performance caused by the delay is an important criterion which is taken into consideration.[66] In other words, the cause for discharge in the cases in question is a combination of actual temporary impossibility and an increase in the expense of the performance at the end of delay.

These arguments are not consistent with reality in such cases. Firstly, this is because these are circular arguments as the determining of each of these two factors depends on the other. The question is, what kind of delay is inordinate? The answer according to the argument would be when it is combined with an increase in expense of the performance; and when would an increased cost be sufficient to discharge a contract? The answer, again, according to the argument, would be when it is linked with an inordinate delay. Secondly, this argument is itself incomplete because, if we accept that increased costs in performance of a contract in the case of a delay is enough to be a determinative criterion in that the delay is unreasonable and inordinate so that the contract is frustrated, it follows that it would be so, even in a relatively short period of delay. According to the English law authorities, a short period of delay would not be a sufficient ground for discharge and this is the assumption of the arguments in the cases in question. It is arguable that when a long-term delay is an alleged factor for frustration why it should be accompanied by increased costs in the performance of the contract while it is not of itself considered as a ground for discharge under the general

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cost of labour and raw material. It may be put that there is an implied term in any contract with any clause in the nature of a suspension clause, excepted peril or allowance of extra time, which may extend the performance of the contract, that the suspension which is ancillary to the main contract, shall only be valid for a reasonable time; and that a time is unreasonable which makes the resumed contract an entirely different one from the interrupted contract. In my view of the case, the suspension claimed here is for an unreasonable time, and is of sufficient duration to frustrate the contract'. *Acetylene Corp of G.B. v Canada Carbide Co* (1922) 8 LL Rep 456, 460.

66 Roy G McElroy, *Impossibility of performance* (G L William ed, Cambridge University Press 1941) 191-196.

doctrine of frustration in English law. Furthermore, determining the unreasonableness of a delay by increasing cost seems so artificial because determining a prolonged and inordinate delay depends on some other factors, such as the custom of trade and usage. One can probably argue that a delay is a quantitative matter and economic hardship imposed by an increase in the cost of performance after temporary impossibility is a qualitative matter there not being a coherent relationship between these two. Furthermore, there is no consensus as to how much of an increase in the costs would be relevant in this regard.

4.2.3. Rationale behind the English approach

After seeing that rigidity of the English law approach that increased expense is not by itself a sufficient ground for frustration, it is necessary to ask what is the reason behind the courts' rejection in recognising such a rule? A number of reasons have been presented.[67] Firstly, the courts do not wish to reallocate contractual risk. Thus, when a party elects to sell on c.i.f. terms, as the seller did in *Tsakirogou & Co v Noblee Thorl*,[68] he by his election took the risk of the freight price fluctuating. The seller could alternatively choose to contract on –the f.o.b. contract- which was available to him if he did not wish to bear the risk. Likewise, the choice of a fixed price contract in the *Davis Contractors* case is, as Lord Reid stated, a choice to take 'the risk of the cost being greater or less than'[69] the contractor contemplated.

The second reason in the approach towards commercial impossibility is that "certainty" is a preferable concept of English contract law. Recognising than an increase in expense is a frustrating event may give rise to the tendency of the doctrine of frustration to undermine the certainty of the contract. The requirement of certainty is significant, even though applying it may occasionally give rise to harshness for one party, as in the case of a huge increase in cost. Parties who are concerned about actual or potential hardship can mitigate this by inserting in their agreements contractual

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67 See generally, Jack Beatson, 'Increase Expense and Frustration' in F D Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract* (Sweet & Maxwell 1996) 133-136.

68 [1962] AC 93.

69 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 724.

provisions to deal with such a difficulty.[70] If the argument that an increased cost is accepted as frustrating, it is considered that there will be uncertainty as to exactly how great the change must be. The fears in the First World War cases were that there would be a tendency to take this point in many cases—the floodgates argument.[71] Lord Radcliffe, in the *Davis Contractors* case, stated that 'if that sort of consideration were to be sufficient to establish a case of frustration there would be an untold range of contractual obligations rendered uncertain and, possibly, unenforceable.'[72]

However, it has been argued that 'none of them justify an absolute and automatic rule'.[73] The reasons are synonymous with the *Paradine* rule, but they are not immutable.[74] In terms of the risk argument, an absolute rule that an increased cost cannot discharge the contract assumes that all the monetary risks in a contract are always allocated to one side or the other. It is, however, clear that not all risks are in fact assigned by the contract to one or other of the parties. It is difficult to see why the risk of increased cost should be dealt with differently, that is, by an automatic rule, from other subsequent events rather than the ordinary rules of frustration. All performance obligations can ultimately be characterised as raising issues of cost and changes in cost can often be characterised in some other way. The *Bank Line*[75] case may be an example of the latter, where a charterparty contract was to run from an April to April but as a result of requisition was not available until September. According to the court a September to September charter, which remained possible, was 'quite a different thing'. In a short or fixed-term contract the court may regard the horizon of risk as fixed by the relevant period, so, if there is a delay beyond the period, that takes the case out of the risk allocated, even though in many cases the only real

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70 See *Comptoir Comm Anversois v Power, Son & Co* [1921] 1 KB 868, 879; *J Lauritzen A.S. v Wijsmuller B.V. (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 8 (Bingam L.J.). For an example for such a clause, see *Superior Overseas Development Corp v British Gas Corp* [1982] 1 Lloyd's Rep 262. The topic of contractual provisions will be discussed in Chapter 6.

71 Jack Beatson, 'Increase Expense and Frustration' in F D Rose (ed), *Consensus Ad Idem* (Sweet & Maxwell 1996) 133.

72 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 730.

73 Jack Beatson, 'Increase Expense and Frustration' in F D Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract* (Sweet & Maxwell 1996) 134.

74 J A McInnis, 'Frustration and Force Majeure in Building Contracts' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyds of London Press 1995) 213. See also, John J Gorman, 'Commercial Hardship and the Discharge of Contractual Obligations under American and British Law' (1985) 13 Vanderbilt Journal of Transnational Law 107, 126.

75 [1919] AC 435. For a full account of this case see the discussion of temporary impossibility in Section 3.2.1.7.1, Chapter 3.

question is about cost. Why should there be an automatic rule in those cases in which the court cannot or chooses not to characterise the matter other than in monetary terms?[76]

With regard to the 'certainty' argument, without doubt, certainty is a very significant requirement. However, it is questionable whether it justifies singling out commercial hardship for treatment by an automatic rule, while other supervening events are dealt with by the ordinary, and less certain, frustration test. It has also been argued that, where the contractual duty is a qualified one to take reasonable steps, in assessing whether the requirement for reasonableness requires a party to take a particular step, that is, whether the contractual duty has been frustrated, account may be taken of the great rise in cost. The rules governing discharging by frustration are the 'default' rule provided by the law, and it is arguable that a default rule should seek to provide a reasonable person's estimation of what the parties would have done had they considered the matter; that is, in certain circumstances a very great rise in cost can produce what Denning LJ described as a 'fundamental change' and can accordingly lead to a discharge.[77] In addition, the argument that, recognising that a very exceptional increase cost may of itself frustrate constitutes a danger has to a large extent been exaggerated. Treitel in examining the concept of impracticability in the United States[78] shows that commercial impossibility has only very rarely sufficed to discharge contracts.[79]

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76 Jack Beatson, 'Increase Expense and Frustration' in F D Rose (ed), *Consensus Ad Idem: Essays on the Law of Contract* (Sweet & Maxwell 1996) 134.

77 Ibid.

78 The approach of the U.S. law will be dealt with in detail in the next Section 4.4.1 of this chapter.

79 G H Treitel, *Frustration and Force Majeure* (2nd edn, Sweet & Maxwell 2014) 262-280

4.2.4. Long-term and relational contracts

4.2.4.1. Long-term contracts

The notion of the court to take a interventional role is sometimes linked to circumstances that emerge in the context of long-term contracts.[80] This is opposite to short-term contracts, where the performance of which will be within a comparatively short time scale. It is presumed that in the situation of long-term contracts the contractual obligations take place over a long period of time, giving rise to a number of problems regarding the limited capacity of the parties (sometimes known as 'bounded rationality') to foresee and provide for the risks that may interrupt the performance of the contract in the future. That is to say 'the longer the period of time for which the contract is intended to subsist, the more difficult it is to allocate the risks of future event at the moment of entry into the contract.'[81] essentially suggesting that the contract is incomplete.

Because of this inherent issue, parties to long-term contracts very often provide for future risks so as to deal with them when they occur.[82] The clauses create flexibility, so they call for arbitration, termination or contain a price escalation formula.[83] Nevertheless, unexpected events not covered by the clause may occur, resulting in one party severe commercially suffering. For this, it has been suggested that traditional contract law is inadequate to deal with complex contracts of long duration, because of their different nature.[84] Therefore, according to the long-term contract concept, cases

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[80] See, John Bell, 'The Effect of Change in Circumstances on Long-term Contracts 1: English Report' in Donald Harris and Denis Tallon (eds), *Contract Law Today: Anglo-French Comparative* (Clarendon Press 1989) 195; Ewan McKendrick, 'The Regulation of Long-term Contracts in English Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 307.

[81] McKendrick Ewan, 'The Regulation of Long-term Contracts in English Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 307. See also, Michael N Zundel, 'Equitable Reformation of Long-Term Contract—The 'New Spirit of *ALCOA'* (1982) Utah Law Review 985, 991 'Long-term obligations tend to be riskier than short-term contracts.'

[82] Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854, 865.

[83] See the discussion of 'force majeure clauses' in chapter 6.

[84] Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854, 855; Richard E Speidel, 'Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management' (1980) 22 South Carolina Law Review 241, 274-75.

such as *Staffordshire* which involved long duration and were affected by cost increased (proximately 20 times the usual cost) should be treated in a special manner.

However, the concept of long-term contracts is unclear and elusive. In principle, by definition the time of performance should be the major parameter for its determination, however the length of that time is far from clear. Thus, are a series of short-term contracts or deferred performance contract type of long-term contracts? It has been stated that the concept of a long-term contract is 'sociological, not a legal, category.'[85] Alternatively, it has been suggested that it is a combination of the nature and duration of the relationship between the parties, that is the definitive feature.[86] Without paying due regard to the above considerations, it seems that there is no justifiable reason to see that the law should be reconsidered in situations of long-term contracts and not short-term ones. Unforeseeable events are equally capable of interrupting both type of contracts.

Besides, in the concept of long-term contracts there is the theory of a relational contract which seem to some extent to closely match each other. This theory will be addressed in the following discussion.

4.2.4.2. Relational contract

The prominent Ian Macneil[87] has identified and described a variety of contractual relationships that fall outside the boundaries of the classical 'bargain' model, wherein

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85 John Bell, 'The Effect of Change in Circumstances on Long-term Contracts 1: English Report' in Donald Harris and Denis Tallon (eds), *Contract Law Today: Anglo-French Comparative* (Clarendon Press 1989) 195

86 McKendrick Ewan, 'The Regulation of Long-term Contracts in English Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 307. See, T Daintith, 'The Design and Performance of Long-term Contracts' in T Daintith and G Teubner (eds), Contract and Organization: Legal Analysis in the Light of Economic and Social Theory (De Gruyter 1986) 164, 175 where a duration of five years was accepted, on the basis of industry practice, as the minimum period which justified calling the contract 'long-term'.

87 See, Ian R Macneil, 'The Many Futures of Contracts' (1974) 47 Southern California Law Review 691; 'Relational Contracts: What we Do and Do not Know' (1985) Wisconsin Law Review' 438; 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854; 'Economic Analysis of Contractual Relations: Its Shortfalls and Need for a "Rich Classificatory Apparatus"' (1981) 75 Northwestern University Law Review 1018.

'relational contracting' was developed in response.[88] This considers a contract to represent a relationship between the parties and introduces a degree of flexibility into the contract on the basis of understanding the other party's objectives. In other words, the contract is contract-as-relation rather than contract-as-transaction. The notion of relational contracting has been well summarised by Robert Gordon:

> In the 'relational' view … parties treat their contracts more like marriages than like one-night stands. Obligations grow out of the commitment that they have made to one another, and the conventions that the trading community establishes for such commitments; they are not frozen at the initial moment of commitment, but change as circumstances change; the object of contracting is not primarily to allocate risks, but to signify a commitment to cooperate. In bad times parties are expected to lend one another mutual support, rather than standing on their rights; each will treat the other's insistence on literal performance as willful obstructionism; if unexpected contingencies occur resulting in severe losses, the parties are to search for equitable ways of dividing the losses; and the sanction for egregiously bad behavior, is always, of course, refusal to deal again.[89]

According to this theory, expanding the doctrine of frustration is not contrary either to freedom of contract or to the agreement of contracting parties. In case of an interruptive event which results in hardship, ameliorating such hardship and avoiding unfair advantage are not based on excuses external to the contract, but they arise from the very nature of the contractual relationship. It is somewhat similar to the idea of 'presumed intent', that is, contracting parties are assumed to have intended an open-ended relationship, with the contract providing a framework within which adjustment may continually occur. The law functions as a kind of gyroscopic monitor, keeping the parties on a more or less even course.[90]

When the focus becomes the 'contractual entity',[91] in other words, the 'mutual reliance and consensual reciprocity inherent in contract',[92] traditional treatment, that

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88 It should be noted that, while contracts of long duration are more likely to be relational than contracts of short duration, 'temporal extension per se is not the defining characteristic' of a relational contract. Charles J Goetz & Robert E Scott, 'Principles of Relational Contracts' (1981) 67 Virginia Law Review 1089, 1091. See also, Ewan McKendrick, 'The Regulation of Long-term Contracts in English Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 307.

89 Robert W Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' (1985) Wisc. L Review 565, 569.

90 Sheldon W Halpern, 'Application of the Doctrine of Commercial Impracticability: searching for "The Wisdom of Solomon"' (1987) 135 Univ of Pennsylvania Law Review 1123, 1171.

91 Jeffrey L Harrison, 'A Case for Loss Sharing' (1983) 56 Southern California Law Review 573, 586.

92 ibid

is, sanctions and termination, becomes irrelevant and inappropriate.[93] This is so because they 'aim not at continuing the contractual relations but at picking up the pieces of broken contracts and allocating them between the parties on some basis deemed equitable.'[94] A contract, particularly a long-term contract, is an inherently incomplete, evolving mechanism rather than an embodiment of fully formulated intent 'complete consent is a mirage.'[95] Long-term contracts produce very complex and specialised reliance.[96] The reliance by a party upon the long-term agreement will often manifest itself in a way that increases the incentive for continued performance.[97]

The relational model preserves cooperation, placing specific unilateral economic needs in a subordinate position and rejecting 'opportunistic' advantage taking.[98] The position is analogous to marriage[99] or an on-going partnership[100] and thus primacy is given to the continuance of the relationship.[101] Thus, according to these assumptions, a greater receptivity to arguments of frustration, divorced from an intent-based analysis, and some form of equitable adjustment by the court upon the disagreement between parties, follow axiomatically. Only a small 'logical synapse' need then be

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93 ibid 577. Harrison goes on 'reliance on the integrity or the soundness of the contract as an entity is mutual reliance… It is this type of reliance that causes one to be uncomfortable with a remedy that forces one party to bear the entire reliance loss.'

94 Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854, 875.

95 Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1981) 76 Northwestern Univ Law Review 369, 375. See Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854, 865, pointed out that 'Two common characteristics of long-term contracts are the existence of gaps in their planning and the presence of a range of processes and techniques used by contract planners to create flexibility in lieu of either leaving gaps or trying to plan rigidly.'

96 Richard E Speidel, 'Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management' (1980) 22 South Carolina Law Review 241, 273-74

97 ibid 274

98 According to Macneil, opportunism is '[s]elf-interest seeking contrary to the principles of the relation in which it occurs' Macneil, 'Economic Analysis of Contractual Relations (n 119) 1024. See Richard E Speidel, 'The New Spirit of Contract' (1982) 2 Journal of Law and Commerce 193, 207, according to whom, 'comparing the tort doctrine of duty to rescue to a contract doctrine of duty to adjust, and arguing that a duty to adjust in "necessary to avoid opportunism"'.

99 Robert W Gordon, 'Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law' (1985) Wisconsin Law Review 565, 569.

100 Jeffrey L Harrison, 'A Case for Loss Sharing' (1983) 56 Southern California Law Review 573, 592-95.

101 Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854, 891, 893-95.

bridged to impose a duty upon an advantaged party to accede to a reasonable proposed modification offered by the disadvantaged party.[102] According to Professor Halpern:

> The fact that the result of such adjustment is the creation of a compromise that neither party may have wanted becomes secondary to the goal of fairly maintaining the relationship. The new operative fiction then is that the law is doing merely what the parties would have done in the interest of the relationship had they been required to deal with the matter at its inception.[103]

The conceptual basis for adjustment appears to founder on the assumptions made as to the motivation and behaviour of contracting parties. It is assumed that parties not only share the relational model's goals of cooperation and flexibility, but they also share its priorities and order their values accordingly.[104]

However, the notion of relational contract rises some issues. The major flaw is that it is difficult to ascertain. Subsequently, many criteria have been suggested by academics,[105] including: the length of the contract duration,[106] and, the amount of detail contained in the provisions.[107] The relative imprecision of these criteria goes

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[102] See Richard E Speidel, 'The New Spirit of Contract' (1982) 2 Journal of Law and Commerce 193, 206-08; See also, Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1981) 76 Northwestern Univ Law Review 369, 395-404. According to Williamson, once parties have entered what he calls 'mixed and highly idiosyncratic' transactions, there are 'strong incentives to see the contract through to completion.' The costs of termination and the inadequate nature of market relief reinforce the 'interests of the principals in sustaining the relation.' Oliver E Williamson, 'Transaction-Cost Economics: The Governance of Contractual Relations' (1979) Journal of Law and Economics 233, 249.

[103] Sheldon W Halpern, 'Application of the Doctrine of Commercial Impracticability: searching for "The Wisdom of Solomon"' (1987) 135 Univ of Pennsylvania Law Review 1123, 1173.

[104] Victor P Goldberg, 'Price Adjustment in Long-Term Contract' (1985) Wisconsin Law Review 527, 531.

[105] McKendrick summarises the criteria identified by Ian Macneil in the following way: 'Macneil has identified a number of ingredients of discrete transaction which, he argue, are not present in the case of a relational contract. There are: (1) a clearly defined beginning, duration and termination; (2) clear and precise definition of the subject matter of the transaction, its quantity and the price; (3) the substance of the exchange if planned at the moment of formation of the contract; (4) the benefits and burdens of the contract are clearly assigned at the moment of formation; (5) there is little emphasis upon, interdependence, future co-operation and solidarity between the parties; (6) the personal relationship created by the contract is extremely limited; and (7) the contract is created by a single exercise of bilateral power.' Ewan McKendrick, 'The Regulation of Long-term Contracts in English Law' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 308.

[106] See, R E Speidel, 'The Characteristics and Challenges of Relational Contracts' (2000) 94 Northwestern Law Review 805 esp 815.

[107] See, C J Goetz et R E Scott, 'Principles of Relational Contracts' (1981) Virginia Law Review 1089 1091.

without saying that it impossible to put together a precise list of relational contracts. As one commentator observes that:

> it is impossible to locate, in the relational contracts literature, a definition that adequately distinguishes relational and non-relational contract in a legally operational way—that is, in a way that carves out a set of special well-specified contracts for treatment under special well-specified rules.[108]

The values of cooperation, flexibility, and mutual problem-solving are not only socially good; they also inform and influence commercial life. However, they are not the only factors in such a life. While to analogise a contractual relationship to a marriage or a partnership is helpful in considering specific issues, to extend that analogy to the point of expanding judicial intervention or imposing correlative duties on the parties is to distort reality. Whatever their relational motivations, if the parties to a contract wanted a marriage or a partnership model to regulate their conduct, they would have chosen one. These are not esoteric or subtly differentiated alternatives. They represent clear choices in ordering a relationship. When sophisticated bargaining entities choose a long-term contract rather than a joint venture or partnership, they consciously choose one legal mode over another. We should not cavalierly vitiate that choice.[109] In addition, the relational construct, with its focus on adjustment, has been criticised as antithetical to the value of contract as individual expression and responsible commercial behaviour.[110]

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108 M A Eisenberg, Relational Contracts' in J Beatson and D Friedmann (eds), *Good Faith and Fault in Contract Law* (Clarendon Press 1995) 291.

109 ibid 1175.

110 See Clayton P Gillette, 'Commercial Rationality and the Duty to Adjust Long-Term Contracts' (1985) 69 Minnesota Law Review 521, 523-24, 571-75. Gillette goes on criticising 'the adjustment arguments assume a view of rational commercial behaviour that understates the ability of commercial actors to engage in conduct for which they can be considered, from an ethical or behavioural perspective, responsible… [We should]… reject recent commentary that views contract necessarily as a communitarian exercise and instead adopt a conception of contract as a mechanism for individual expression by commercial actors capable of considering and bearing the consequences of reasoned choice.' See also, John P Dawson, 'Judicial Revision of Frustrated contracts: The United States' (1984) 64 Boston University Law Review 1, 30-31. See also, John Kidwell, 'A Caveat' (1985) Wisconsin Law Review 615, 620. Kidwell expresses that 'Doctrine that reflects a world of long-term relationships will necessarily be less formal, hence less certain, hence less communicative.'

Having working against the advocators of the relational contracts is the case of *Baird Textiles Holiday Ltd v Marks & Spencer plc*.[111] Where the court plainly rejected an invitation to enforce the relational dimension of the parties. The facts were:

> Baird had supplied clothes to M&S for thirty years. Suddenly, M&S said they were cancelling their order. Baird sued M&S on the grounds that they should have been given reasonable notice.

The court was found in favour of M&S, stating that the test of necessity, required for a contract to be enforced, had not been satisfied. There was no intention to create legal relations since the alleged contract was not sufficiently certain in its terms. It appears that Baird having not had an express contract was to maintain flexibility in the commercial relationship. This relationship as well as the 'academic discussion' to which the counsel had referred the court had apparently not suggested any legal effect.[112] Thus, the norms of trust and cooperation which lasted for a long time (30 years) between the parties, did not play any legal role.[113]

4.2.5. Imposed modification

As a general rule, English courts faced with a frustration claim have two alternatives: either to discharge the contract or not, that is, an all-or-nothing approach. As

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111 [2002] 1 AII ER (Comm) 737. See, Jonathan Morgan, 'In Defence of *Baird Textiles*: A Sceptical View of Relational Contract Law' in David Campbell, Linda Mulcahy and Sally Wheeler (eds), Changing Concepts of Contract: Essays in Honour of Ian Macneil (Palgrave Macmillan 2015) 166.

112 Ibid [16]. Mance LJ expressed that 'The more I have heard and read about the closeness of the parties' commercial co-operation in the past, the less able I have felt to see how its effect could be expressed in terms having any contractual certainty. [65].

113 The decision in *Baird Textiles* was not safe from critique. Referring to Morritt V-C's statement that implying the contract was 'not necessary to give business reality to the commercial relationship between M&S and Baird' [30] Linda Mulcahy and Cathy Andrews argue the opposite. They debate that imposing the contract was necessary in order to make sense of the parties' relationship and uphold their reasonable expectations. While a long relationship has existed, M&S had been intricately involved in Baird's affairs. For instance, M&S had frequently shared out in Baird's investment and design decisions and required disclosure of Baird's commercially confidential information. Many characteristics of the relationship and of Baird's decision-making were explainable only on the grounds of a sound future order book—indicating that M&S would not cease the dealing. Linda Mulcahy and Cathy Andrews 'Baird Textile Holdings v Marks and Spencer Plc' in Rosemary hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Hart Publishing 2010).

illustrated in the foregoing sections, the court is reluctant to discharge parties when commercial hardship is pleaded as a frustrating ground. However, contract modification can be a remedy as an alternative for the English court's rigid view when increased cost is involved. Yet, as articulated, English law does not provide mechanisms for adjustment; hence, if the parties want these, they must agree to them explicitly. However, in an era in which costs and prices vary drastically over time, the need to develop a method for adjusting contracts is especially pressing.[114]

In the United States, some courts have experimented with judicial relief, as in the unprecedented case *Aluminium Co of America v Essex Group Inc (the ALCOA case)*.[115] The facts are as follow:

> Alcoa agreed to process molten aluminium for Essex. It included a flexible pricing formula, allowing ALCOA to increase its prices to take account of increases in respect of certain elements in its costs. After 1973 energy crisis, ALCOA's costs increased substantially. Unfortunately for ALCOA, that formula did not make adequate allowance for the steep increase in the price. The result of that increase was that ALCOA stood to lose some $60 million if the contract ran its full course. ALCOA brought an action claiming for excuse.

It was held that ALCOA was entitled to relief on the grounds of impracticability.[116] The court thus revised the contract so as to allow an adjustment on the basis of a specially designed formula. In reaching this decision, the court acknowledged that Restatement 2d requires 'extreme and unreasonable' difficulty or cost, so as to justify relief on the basis of the commercial impracticability doctrine. It found that standard was "clearly met" on the facts of the cases.[117]

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114 See Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1981) 76 Northwestern Univ Law Review 369, 392-400.

115 499 F Supp 53. The decision in this case evoked a flurry of both positive and negative commentary. Positively, some hailed the decision as the harbinger of the "new spirit" of the law of contracts. See, Thomas Black, 'Sales Contracts and Impracticability in a Changing World' (1981) 13 St. Mary's Law Journal 247; Richard E Speidel, 'The New Spirit of Contract' (1982) 2 Journal of Law and Commerce 193; Leon E Trakman, 'Winner Take Some: Loss Sharing and Commercial Impracticability' (1985) 69 Minn L Review 471, 471 states that *ALCOA* indicative of a movement of the doctrine of impracticability from "a rare all-or-nothing remedy to . . . an embryonic loss-sharing doctrine." Negatively, some was against the decision; John P Dawson, 'Judicial Revision of Frustrated contracts: The United States' (1984) 64 Boston University Law Review 1, 26, 36; Sirianni, 'The Developing Law of Contractual Impracticability and Impossibility: Part 1' (1981) 14 Uniform Commercial Code Law Journal 30, 55.

116 The U.S. concept of Impracticability will be dealt with in Section 4.4.1. of this chapter.

117 *Aluminium Co of America v Essex Group Inc (the ALCOA)* 499 F Supp 53, 73.

One of the problems inherent in the application of all-or-nothing approach is that it creates a situation in which the promisee usually wins. First, the promisee will usually win if an economic analysis is applied to the case, because the promisor is often in the best position to insure against possible unexpected events.[118] After an extended analysis of Posner's theory, Speidel concludes that the theory heavily militates against a successful assertion of commercial impracticability by the promisor.[119] Speidel also claims that the present interpretation of commercial impracticability strongly militates in favour of the promisee. He argues that incorporating a foreseeability test into commercial impracticability favours the promisee since the experienced promisor usually knows that a wide array of unexpected events might occur.[120] This, according to Speidel, causes courts to find that the promisor foresaw the event notwithstanding that the promisor could not have predicted the probability of the event occurring so that the parties may not have intended to impose the risk upon the promisor.[121]

The approach of modifying contracts has the advantage over the right to terminate in that neither party is given the option to walk away from the contract altogether, which avoids the possibility of opportunism in the light of changed circumstances. Some commentators supporting the remedy of modification argue that the disadvantaged party does not 'deserve' the loss and the party benefitted does not 'deserve' the gain.[122] 'Undeserved loss', according to Alan Schwartz, is a 'loss resulting from the materializing of a risk a party was not paid to bear, or a gain a party bought the right to enjoy but which a court prevented him from realizing by excusing the other party.' Similarly, 'undeserved gain' is rooted in the understood bargain of the parties: 'An "undeserved" gain means a gain a party did not buy the right to enjoy or a loss resulting from a risk a party was paid to bear but which a court shifted to his contract partner.'[123] The parties should 'share through compromise the unbargained for gains

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118 Richard Posner & Andrew Rosenfield, 'Impossibility and Related Doctrines in Contract Law: An Economic Analysis' (1977) 6 Journal of Legal Studies 83, 90-91.

119 Richard E Speidel, 'Excusable Nonperformance in Sales Contracts: Some Thoughts about Risk Management' (1980) 22 South Carolina Law Review 241, 248-71; Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1981) 76 Northwestern Univ Law Review 369.

120 ibid 260-65.

121 ibid 265-71. See the discussion of 'foreseeability' in Section 2.2.2.2, Chapter 2.

122 Alan Schwartz, 'Sales Law and Inflations' (1976) 50 Southern California Law Review 1, 8.

123 ibid

and losses.'[124] Parties after unexpected events are, according to Charles Fried, 'joined in a common enterprise, and therefore they have some obligation to share unexpected benefits and losses in the case on an accident in the course of that enterprise.'[125] So, if the gains and losses are 'undeserved', why should not the losses be split? At the very least, the advantaged party should not be free to take all and leave.[126]

Modifying contracts better serves the purpose of encouraging cooperation in the form of renegotiation to handle supervening events than the right to terminate. The courts to possess such a power, there would be an incentive to renegotiate the contract on terms comparable to those likely to be imposed by the court.[127] For example, it has been argued that, if both parties in the *ALCOA* case had known that litigation of the commercial hardship issue might have resulted in an adjustment, they never would have litigated the issue. Accepting the premise that ALCOA would have brought the suit only if it were the most prudent course of action, that is, if the benefits to be gained by the litigation outweighed the costs, ALCOA would not have brought suit if the result of the litigation was equivalent to what it could have achieved in an out-of-court settlement. Supporting this conclusion is the avoidance of significant legal fees that would have resulted from an out-of-court settlement.[128]

However, the argument that usually arises when the discussion about modification of contract emerges is that the English courts do not have an express power to do so.[129] This argument, however, can be argued by referring to the case of *Staffordshire*,[130] in which the court has been prepared to modify the contract in the teeth of apparently contrary express terms. Although the contract expressly provided 'at all time

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124 Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1981) 76 Northwestern Univ Law Review 369, 421.

125 Charles Fried, *Contract as promise: a theory of contractual obligation* (Harvard University Press 1981) 72-73.

126 Richard E Speidel, 'Court-Imposed Price Adjustments Under Long-Term Supply Contracts' (1981) 76 Northwestern Univ Law Review 369, 406.

127 See Hugh Collins, *The Law of Contract* (4th edn, Cambridge University Press 2003) 363.

128 Robert W Reeder, 'Court-Imposed Modification: Supplementing the All-or-Nothing Approach to Discharge Cases' (1983) 44 Ohio State Law Journal, 1079, 1090.

129 This claim is emphasised by the courts several time, see *FA Tamplin Steamship Co v Anglo-Mexican Petroleum Co Ltd* [1916] 2 AC 397, 403: Earl Loreburn stated that: 'a court can and ought to examine the contract and the circumstances in which it was made, not of course to vary, but only to explain it', this is quoted by Lord Radcliffe in *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 727. See also, *Joseph Constantine Ltd v Imperial Smelting* [1942] AC 154, 185 Per Lord Wright: 'It is thus seen that the court is not claiming to exercise dispensing power to modify or alter contracts'.

130 *Staffordshire Area Health Authority v South Staffordshire Water Works Co* [1978] 3 AII ER 769.

hereafter', the court construed the contract to contain an implied term allowing termination on reasonable notice. This response, alongside the judicial expressions of the justice principle underpinning the doctrine of frustration, as in the just and reasonable solution as well as the implied term theory, all impair such an argument.[131]

Also, the argument that the parties could have provided for supervening events in their contract,[132] has attracted criticism. It has been argued that 'such definitive obligations may be impractical because of inability to … characterize complex adaptations adequately even when the contingencies themselves [have been] identified in advance.'[133] According to Macaulay, 'too often … businessmen really have not reached agreement on the difficult issues, but have ignored them to avoid argument.'[134] Macneil has confirmed that 'planning is inherently filled with gaps.'[135] Therefore, the argument that the parties could provide for everything is, in short, 'unrealistic'.[136]

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131 See Roger Halson, *Contract Law* (2nd edn, Pearson Education 2013) 399-400.

132 For the discussion of contractual provisions see Chapter 6.

133 Charles J Goetz & Robert E Scott, 'Principles of Relational Contracts' (1981) 67 Virginia Law Review 1089, 1091. See also, M A Eisenberg, 'Impossibility, Impracticability, and Frustration' (2009) 1 Journal of Legal Analysis 207, 212.

134 Stewart Macaulay, 'The Use and Non-Use of Contracts in the Manufacturing Industry' (1963) 7 Practical Lawyer 13.

135 Ian R Macneil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1978) 72 Northwestern University Law Review 854, 873.

136 Ewan McKendrick (ed), *Goods on Commercial Law* (4th edn, Penguin 2010) 139.

4.3. PART TWO: Saudi law

4.3.1. General overview

4.3.1.1. The general rule

Before proceeding to the discussion of commercial hardship, it is worth shedding light on how it has been conceptually dealt with by contemporary Arabic commentators. Observers of legal writings on the issue of *al-zuruf al-tari'ah* (intervening contingencies) will find that it is dealt with almost as a distinct concept, separately from the concept of impossibility. It is justified on the premise that the legal effect of impossibility is to leave the contractual obligations impossible to perform while the intervening contingencies render the contractual obligations not impossible but very difficult to perform. However, such concepts should be treated under a unified doctrine, the concept of excuse. A difference in one aspect should not mean that they are completely different concepts. In short, they share the general characters; it is enough to say that they are the result of a supervening event beyond the control of either party, so they should always treated under one concept.

The problem of commercial hardship is recognised by Saudi law. Thus, after making a contract, if a supervening circumstance renders the contract not physically impossible or illegal but, more onerous and excessive, the affected party may invoke the rule of intervening contingencies, and accordingly, the court, at its discretion, may

intervene to discharge or adjust the contract.[137] This principle of law is based on the principles of fairness and justice, which impose the requirement to rebalance the contract if severe hardship occurs.[138]

This principle is also the view taken by the Muslim World League (MWL),[139] which state that a serious change in economic conditions that renders the contractual obligations more onerous for one party may justify the court in either adjusting or discharging the contract to meet the requirements of justice and reasonableness.[140] To illustrate the position, MWL's report presents examples in which the court can adjust or discharge the contract. One example relates to a contract to build a large building within a specific time, and the parties entered the contract on the basis that the cost per cubic metre was SR100. Subsequent to the signing of the contract, a supervening event occurred that resulted in a great and serious increase in the cost of performing the contract. On that grounds, the court is justified in intervening in the contract.[141] It should be noted in the example given that the MWL did not specify the extent to which the court can modify a contract on the grounds of supervening commercial difficulties, as such difficulties can vary depending on the actual circumstances. It seems that this matter is left to the court's discretion.

4.3.1.2. A mere loss not a sufficient ground

At a general level, it is always expected in the commercial environment that either one of the contracting parties may find himself in a bad bargain and thereupon suffer some loss. Such a situation can naturally be envisaged therefore. Therefore, invoking

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137 This principle is applied and expressly indicated by many Arabic countries civil codes; see, for example, the Egyptian Civil Code Art. 147(2) and the Jordanian Civil Code Art. 205.

138 See the discussion of the 'justification of the rule of excuse' in chapter two.

139 Muslim World League, decision No. 7 in 1982 p 104. MWL is an independent organisation founded in 1962 in Saudi Arabia to discuss the affairs of the Muslim community. One of its intents is to discuss the contemporary issues within Islamic teaching. Under the MWL there are 57 member countries. It can be reached online at < http://en.themwl.org/>
This principle is also embodied in Art. 18 of the Majalla.

140 The justification of such a principle is the same one discussed in Section 2.3.5, Chapter 2.

141 Muslim World League, decision No. 7 in (1982) p 104.

the law of hardship whenever a party finds himself in a bad bargain would without doubt undermine the principle of sanctity of contract.

Many cases have been filed in Saudi courts under the law of hardship; however, such cases were rejected on the grounds that the loss alleged was not sufficient to be considered, according to the courts, fundamental commercial hardship. For instance, in one case (the iron case),[142] the facts were as follows:

> A contract was signed by which the claimant, as a sub-contractor, undertook the obligation to build a bridge for a fixed sum SR15.9 million for the purpose of developing a particular street. However, during the course of performing the agreed work, a rise in building material costs, especially for iron, led the claimant to declare that he incurred a loss amounting to SR2,6 million. Therefore, an action was brought by the claimant seeking relief.

The claimant's action was rejected. Along with other reasons, the court found that the rise in the cost of the materials was not onerous enough to enable the court to intervene. The size of the loss, SR2,6m, does not represent a fundamental increase in cost that would enable the court to intervene. The court further clarified that, generally, to invoke the intervening hardship rule, the lost must be enormous and extravagant.

The increase in costs in the aforementioned case amounted to 17 per cent of the total contract price, and such an increase would not be regarded as grounds for invoking the rule of commercial hardship, as the loss incurred by the party cannot be considered onerous. The court seems to have been correct in refusing such a claim since a 17 per cent as a loss cannot be said unreasonable and severe. Instead, it is one undertaken within the contract risk. It would be absurd if such a case had succeeded. However, the court in this case did not give any indication as to the amount or percentage that might be considered sufficient grounds.

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142 The Board of Grievances in Dammam, decision No. 2448/3/Q in (1431AH/ 2009); Court of Appeal decision No. 46/Q in (1433AH/ 2011).

4.3.1.3. Administrative contracts

In administrative contracts,[143] where one of its parties is a public authority, the problem of commercial hardship is also recognised.[144] This has been approved in many cases. For instance, in one case,[145]

> A contract was signed between the contractor and the Ministry of Transportation. The contractor was to pave a certain street with asphalt. One ton of asphalt was SR79 when the contract was made. However, during the course of the contract performance, the asphalt prices excessively increased. They increased gradually, from SR79 to SR150, then to SR200, then to SR250, and then to SR300. Thus, the total amount of loss was around 165%. After the completion of the performance[146] the contractor brought an action seeking for the law of hardship.

The court found in favour of the contractor because the rise in asphalt prices, in the court's view, was excessive. The Ministry of Transportation was liable for the *full* loss. The court, in fact, found that the cause behind the rise in the asphalt prices was contributed to by the action of another administrative department. Although the Ministry of Transportations did not, in itself, caused the supervening event, it bore the full losses incurred by the contractor. According to the court, both the Ministry of Transportation and the other administrative department represent the government. In other words, they are referred to as one unit. The court stated that the situation fell under the principle of the 'act of prince'. The court, in response to a counterclaim, stated that the way of adjusting the contract, allowing a full compensation, would have

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143 An interesting point regarding an administrative contract that is worth mentioning here is the case of *Saudi Arabia v Arabian American Oil Company (ARAMCO)* [1963] 27 ILR 117. This case is regarded as the first case of arbitration under Islamic law. In this case, a controversial debate and argument was arose concerning many aspects, particularly, with regard to views of the arbitrators about 'administrative contract law' in Saudi Arabia. According to the Arbitration Tribunal 'Moslem law does not distinguish between a treaty, a contract of public or administrative law and a contract of civil, commercial law … All these types are viewed by Moslem jurists as agreements or pacts which must be observed …' However, in fact, administrative contracts and an administrative judiciary have been recognised since 1953.

144 For information on administrative contract law in Saudi Arabia, see, in general, Omar Al-Khouli, *Al-Wajeez* (Maktabt al-Shigree 2009); Saed Ali, *Nazariyat al-Zuruf al-Tariah fi al-Aqd al-Idari wa al-Shariah* (Dar al-Kitab al-Arabi 2006).

145 The Board of Grievances, decision No. 452/1/Q in (1426AH/ 2005).

146 It should be noted that, in administrative contracts, the contractor is strictly obliged to perform his contractual obligations; the restriction is derived from the fact that the other party represents the public interest. See Art. 29 of the Executive Regulation of the Regulations of Governmental Competitions and Procurements (1977).

been different had the supervening event not been an act of the government in any way. This would be the case if the rise in prices was caused, for example, by the commercial atmosphere. One may infer that the court would likely split the loss between the parties if the contract were civil or commercial.

In a similar case,[147] the loss amounted to two-thirds of the contract, approximately 66%. The court fully compensated the contractor and premised its judgement on the same reason as in the above case, was the cause of another administrative department. The important point in this case is that the losses that amounted to 66% was considered as a sufficient grounds to invoke the rule of hardship according to the court' view.

The discussion in this section was not intended to go deeply into administrative contracts and their ramifications but, rather, to address one particular point, the recognition of the rule of commercial hardship.

4.3.2. The sphere of its application

The foregoing discussion clearly shows the attitude of the Saudi courts when there is an allegation of commercial hardship. An interesting point related to the problem of hardship is the sphere of its application, that is, as to whether the rule of hardship can be applied to all types of contracts. This issue has witnessed a considerable debate among contemporary legal commentators.

At first, it should be noted that a contract can be categorised as an *aqd mutarakhiah* (long-term contract), which refers to any contract that takes place within a certain time span; that is, the time span originally constitutes a natural feature of the performance of the contract. This is, for example contracts of construction or concession. Alternatively, a contract may be categorised as an *aqd fawri* (one-off or instantaneous contract), where the performance is more or less instantaneous, such as the purchase of petrol from a motorway garage.

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147 The Board of Grievances, decision No. 454/1/Q in (1426AH/ 2005).

In terms of long-term contracts, there is a consensus among contemporary commentators that the rule of hardship applies to long-term contracts.[148] Axiomatically, supervening events that render the performance of a contract burdensome for one party require a time span to occur, and this time span can be said to be a feature long-term contracts. It has been stated that 'there should be a long-term contract to envisage the occurrence of intervening contingences which render the contractual obligations detrimental for one party'.[149]

However, the disagreement among the commentators is regarding the point that whether or not the rule of commercial impossibility may operate in one-off or instantaneous contracts.[150] One view is that the law of commercial impossibility is merely confined in terms of its application to long-term contracts and does not embrace one-off contracts. It even excludes one-off contracts when the performance has been deferred. It has been argued that a long-term contract is distinguished from other types of contracts in that its nature requires a time span to be in place for the contract to be performed. Within this period of time, the performance comes one after another, such as in a contract of supply, or continuously, such as in a contract for a lease. Each performance of these successive activities should be considered as being done in return for an independent contract; that is to say, one can envisage a number of contracts forming one contract. Therefore, there should be a contractual equilibrium between the parties' obligations in each of these contracts.

The second view does not give the type of the contract any importance and argues that, although the prevailing place for the law of hardship is in situations of long-term contracts, there is no reason to exclude its operation in cases of instantaneous contracts, as the possibility of supervening events that make the performance financially difficult, though rare, may occur in instantaneous contracts. In this regard, Al-Sanhuri, a prominent legal scholar, states that 'there is no reason to exclude the application of the law of intervening contingencies in instantaneous contracts, as it is

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148 See, for example, A Attirmani, *Nadaryah A'ddorof Attaria* (Dar Al-fikr d.n) 123; A Hijazi, *Al-Nadaryah Al-ammah Lil eltizam*, vol 2 (Nahdat Misr 1954) 194; Fathi Al-Drini, *Al-nadaryat Al-fiqhiyah* (Damascus University 1996) 150.

149 Fathi Al-Drini, *Al-nadaryat Al-fiqhiyah* (Damascus University 1996) 150.150.

150 See generally, A Al-Sanhuri, *Al-waseet*, vol 1 (Dar Al-marif d.n) 742-748; A Al-Sanhuri, *Masadir Al-haqq fi Al-fiqh Al-islami*, vol 6 (Dar Ihia Al-turath 1997) 23-25; A Attirmani, *Nadaryah A'ddorof Attaria* (Dar Al-fikr d.n) 123-125.

still possible that changed circumstances occur immediately after the conclusion of the contract, notwithstanding it is rare'.[151] This is in line with the position of the Egyptian Civil Law. Although Art. 147,[152] which addresses the problem of intervening contingences, is generally silent on this regard Egyptian courts on several occasions have articulated that the article encompasses contracts in general. In one Egyptian case,[153] where the court based its decision on Art. 147, it was stated that:

> The law of intervening contingencies which is embodied in Art. 147 should be applied whenever its conditions have been met. This is so in this case, the contract [contract of sale] signed on 22/5/1952, but has been rendered more enormous as a result of the Agricultural Law Reform which was enacted immediately after the contract.

4.3.3. Threshold test of the hardship rule

As shown by the aforementioned discussion, Saudi courts recognise commercial hardship as grounds for invoking the rule of excuse. Having said that, it is of importance to ask whether any percentage of the cost of the performance is likely to amount to a fundamental alteration of the equilibrium of a contract, upon which the courts might intervene, in essence a legal yardstick. Therefore, the points regarding the usefulness of a threshold test of hardship as well as its availability in the Saudi law will be addressed.

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151 A Al-Sanhuri, *Al-waseet*, vol 1 (Dar Al-marif d.n) 748.

152 This article reads as follows: '… when, however, as a result of exceptional and unpredictable events of a general character, the performance of contractual obligations, without becoming impossible, becomes excessively onerous in such a way as to threaten the debtor with exorbitant loss, the judge may, according to the circumstances, and after taking into consideration the interests of both parties, reduce to reasonable limits the obligation that has become excessive'.

153 Cairo Court of First Instance, decision No. 3774 in (21/06/1954).

4.3.3.1. The usefulness of a threshold test as a basic legal yardstick

The question of whether an alteration of the equilibrium of a contract is to be considered 'fundamental' to bring about court intervention is of paramount practical importance but at the same time very difficult to answer.[154] A distinction should be drawn between circumstances where, because of unexpected events, the contractual obligations become a bad bargain for one of the parties and circumstances where the contractual obligations become so excessively onerous that the affected party cannot reasonably be expected to perform in accordance with the terms of the contract. The adoption and use of a common threshold test, that is, the determination of a percentage of the cost likely to amount to a 'fundamental' alteration of the equilibrium of the contract, certainly fulfils a need in practice. However, it should be remembered that any threshold test functions as a general starting point for the court, and not cannot preclude an assessment of the surrounding circumstances of each case.

The development of such a yardstick therefore seems to be both useful as a practical tool and possible. As shown at the beginning of this thesis, Saudi contract law is not codified, nor do the court cases constitute law. It goes without saying that, in any case of commercial hardship, the threshold test as to the percentage of loss that is capable of invoking the hardship law is potentially unclear.

4.3.3.2. Is there any threshold test?

Theoretically, in searching through all Islamic writings and the work of contemporary legal commentators, it appears that the issue with regard to setting or adopting a test for invoking the hardship rule *in toto* has not been addressed. Regarding the concept of *al-jawa'ih*, which was discussed in chapter two, some jurists have set a minimum limitation for invoking the doctrine of excuse. It has been said that, to excuse the buyer

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154 See, Christoph Brunner, *Force Majeure and Hardship under General Contract Principles* (Wolters Kluwer International 2008) 426-437.

in terms of the partial destruction of the fruits sold, that amount of destruction should be one-third or over.[155] This view, however, is not accepted by a majority of jurists, as the limitation is not based on any justification. Even if it were premised on a justification, it is still not relevant. It is concerned with the matter of partial loss and not the case here.

Going back to administrative contracts, it has been clearly shown that the court ordered that the hardship rule be invoked upon the 165 and 66 per cent increases in prices. Yet, such contracts should be looked at with some caution for a few reasons. The supervening events in these cases were, in fact, caused by the authorities, although it was not the same administrative department, as the one which contracted. The second reason, and more importantly, is that the government seems to have the tendency, in general, to compensate the contractor in cases where there was a change in prices after the contract was made.[156] Therefore, it can be said that the percentages involved in those cases did not furnish a clear answer.

The percentage of expenses that can be said, with some confidence, to represent the point at which the court can intervene is 100%. In the discussion of the concept of 'frustration of purpose', it was shown that the court would discharge the contract. In such a situation, the loss of the 'recipient' of the contractual performance if it has to perform the contract is approximately 100% of the contract price. Thus, one may say that an alteration amounting to at least 100% or more of the cost of the performance should be likely to amount to a 'fundamental' alteration allowing the court to intervene.

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155 See Section 2.3.3.2, Chapter 2.

156 For example, Art. 44 of the Regulations of Governmental Competitions and Procurements (2006) provides that the contractor should be compensated should there be any change in price of the materials used for the contract as a result of changes in tariffs, fees, or taxes. More recently, the Cabinet Ministers issued, decree No. 155 in (1429AH/ 2008) which compensates the government contractors in some particular contracts.

4.4. PART THREE: The approach of American law and UNIDROIT Principles

In dealing with the issue of commercial hardship, it is worthwhile examining different approaches towards such an issue in order to contrast them with the approach taken by the English and Saudi law. At this stage, two models will be dealt with briefly here; United States law and UNIDROIT Principles. The reason why United States law has been chosen in because it is a legal system from the common law family which, after having a rigid approach, has taken steps towards some flexibility. It has revealed a range of more realistic situations in which contracts may be dealt with better when commercial hardship is involved, although its approach on the ground still to some extent reluctant. The UNIDROIT Principles were chosen as they represent modern restatements that seek fairness and justice. They are the result of an intensive study over a period of 20 years by contract lawyers from all over the world, both from common law and civil law countries.

4.4.1. The approach of American law

The traditional doctrine of impossibility was substituted by the modern doctrine of impracticability,[157] which establishes more a lenient test for excuse in cases of economic hardship.[158] In addition to all the rules concerning supervening events which preceded this new doctrine, the rules of impossibility and frustration of purpose, the doctrine introduced the concept of commercial impracticability in order to adopt some sense of reality in commercial contracts. The UCC, under the section 'excuse by failure of presupposed conditions',[159] explains impracticability as follows:

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157 See James J White and Robert S Summers, *Uniform Commercial Code* (4th edn, West Group 2000) 142-50; E Allan Farnsworth, *Contracts* (4th edn, Little Brown 2004) 670-705.

158 It was in the pre-Code case of *Mineral Park Land Co v Howard* 172 Cal 289 156 P 458 (1916) in which the American doctrine of impracticability can be said to have originated, where the performance of the contract could only have been rendered at the "prohibitive cost" of 10 or 12 times the usual cost of such an operation.

159 UCC §2-615(a). It requires three conditions to be satisfied before a party's performance is excused: (1) the occurrence of a supervening contingency; (2) the non-occurrence of the resulting contingency was a basic assumption upon formation of the contract; (3) the occurrence of the contingency rendered

> …not in 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 the basic assumption on which the contract was made...[160]

The Restatement (2d) § 261, Comment d defines impracticability so as to include "extreme and unreasonable difficulty, expense, injury or loss to one of the parties".[161]

However, this rule is subject to qualifications, according to Comment 4 of § 2-615:

> Increased cost alone does not excuse performance unless the rise in cost is due cost to some unforeseen contingency, which alters the essential nature of the performance. Neither is a rise or collapse in the market in itself a justification, for that is exactly the type of business risk which business contracts made at fixed price are intended to cover.

Thus, a simple rise or collapse of the market, the comment suggests, is a risk that business contracts were designed to cover. It is not surprising, then, that "promisors seeking to establish impracticability by reason of increased expense have not generally found a sympathetic ear in court."[162] It is only when the rise or fall in prices is tied directly to an unforeseen contingency that the price change becomes relevant.

> But a severe shortage of raw materials or of supplies due to a contingency such as war, embargo, local crop failure, unforeseen shut down of major sources of supply or the like, which either causes a marked increase in cost or altogether prevents the seller from securing supplies necessary to his performance, is within the contemplation of this section.[163]

Despite the ambivalence and confusion in the statements[164] the general message of all such expressions seems to mean that a contracting party may be discharged if, as a

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the agreed performance impracticable. See E Allan Farnsworth, *Contracts* (4th edn, Little Brown 2004) 678-86.

160 The Restatement (2d) § 261 provides similar language: 'Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event, the non-occurrence of which was a basic assumption in which the contract was made, his duty to render that performance is discharged…'

161 It continues to give some examples of impracticability 'A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the like, which … cause a marked increase in cost may bring the case within the rule'.

162 *Florida Power and Light Co v Westinghouse Electric Corp* 517 F Supp 440 (1981), 453.

163 Comment 4 of § 2-615.

164 E Allan Farnsworth, *Contracts* (4th edn, Little Brown 2004) 679; James J White and Robert S Summers, *Uniform Commercial Code* (4th edn, West Group 2000) 148.

result of unexpected supervening events, performance of the contract has become severely more burdensome for that party.

However, the crucial question about economic hardship, as recognised by the doctrine of impracticability, is what situation would make the performance of a contract severe and unreasonable? How much increase in the cost of performance would be necessary to establish an acceptable claim or defence of impracticability before United States courts? So far the practice in United States law has not rendered a unanimous criterion for this.[165] Whilst United States courts and writers have realised that hardship is essentially relative[166] and peculiar to the facts of each case,[167] they have continued to analyse the issue in terms of an actual percentage of increase that can or cannot bring the doctrine into operation.

It has been held that increases of 10.4%,[168] 15%,[169] 38%,[170] 50-50.8%[171] and over 100%[172] of production costs over the contract price are not excessive within the context of common law or statutory doctrines of excuse. The doctrine is not invoked merely because 'costs have become more expensive than originally contemplated',[173] or there has been a contract loss.[174] Excuse will not be provided because performance has become "economically burdensome or unattractive'[175] so that it 'requires a departure from the least costly to the most costly means of operation.'[176] However,

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165 See Sheldon W Halpern, 'Application of the Doctrine of Commercial Impracticability: searching for "The Wisdom of Solomon"' (1987) 135 Univ of Pennsylvania Law Review 1123l, 134-40.

166 See, for example, Paul L Joskow, 'Commercial Impossibility, the Uranium Market and the Westinghouse Case' (1977) 6 J Legal Stud 119, 160 states that 'it appears, then, that moderate increases in cost of up to 100 percent do not satisfy the requirement, while extreme increases of 1,000 percent or more do'; John Gerald Ryan, 'U.C.C. § 2-615: Excuse the Impracticable' (1980) 60 Boston University Law Review 575, 592.

167 *Florida Power and Light Co v Westinghouse Electric Corp* 517 F Supp 440 (1981), 454.

168 *Maple Farms v City School District* 76 Misc ed 1080 (1974).

169 *Roth Steel Products and Toledo Steel Tube Co v Sharon Steel Corp* 705 F 2d 134 (1983).

170 *Louisiana v Allegheny* 517 F Supp 1319 (1981).

171 *Lowa v Atlas 467 F Supp* 129 (1978).

172 See *Maple Farms v City School District* 76 Misc ed 1080 (1974) where the court stated that "We are not aware of any cases where something less than a 100% cost increase has been held to make a seller's performance impracticable"; *Publicker Indus v United Carbide Corp*, 17 UCC Rep 989 (1975), 992.

173 *Jennie-O Foods v U.S.* 580 F 2d 400 (1978), 409.

174 *Eastern Airlines v Gulf Oil Corp* 415 F Supp 429 (1975), 440-441.

175 *Neal-Cooper Grain v Texas* 508 F 2d 283 (1974), 293.

176 *Natus v U.S.* 371 F 2d 450 (1967), 457. See also, *Transatlantic v U.S.* 363 F 2d 312 (1966); *American Trading and Production Corp v Shell International Marine Ltd (The Washington Trader)* 453 F 2d 939 (1972).

commercial impracticability results only when the performance required would be 'economically unrealistic',[177] would involve 'commercial senselessness',[178] would involve 'extreme economic hardship',[179] or be 'economically prohibitive.'[180]

An example in which the plea of commercial hardship was successful was in the case of *Florida Power and Light Co v Westinghouse Electric Corp*.[181] The facts were that:

> Westinghouse agreed to remove and dispose of spent fuel discharged by Florida's plant reactors. However, as a result of changes in government policy, Westinghouse was not able to perform his obligation by the contemplated method (repressing the fuel). As a result Westinghouse stood to lose $80 million if he had to perform the contract by an alternative method, (a difference of 400 to 500 per cent).

It was held that Westinghouse was excused. Although the doctrine of impracticability contains potentially broad language for discharging a contract, in practice the courts have adhered to the common law reluctance to excuse parties when commercial hardship is involved.[182] As some writers have said, 'the doctrine of impracticability is easy to state and difficult to apply.'[183] To some degree, this is due to the fact that the courts have not really been able to establish any firm and solid guideline as to what is sufficient in law that amounts to 'excessive hardship'.[184]

If, on the whole, American courts are reluctant to declare contracts discharged by economic events, are they any more willing to adjust a contract whose economic

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177 ibid.

178 *Jennie-O Foods v U.S.* 580 F 2d 400 (1978), 409.

179 *Gulf Oil Corp v FPC*, 563 F 2d 588 (1977), 599.

180 *Clark Grave Vault Company v U.S.* 371 F 2d 459 (1967), 461.

181 826 F 2d 239 (1987). See also, *Aluminium Co of America v Essex Group Inc (the ALCOA)* 499 F Supp 53.

182 See George Wallach, 'The Excuse Defense in the Law of Contracts: Judicial Frustration of the U. C. C. Attempt to Liberalize the Law of Commercial Impracticability' (1979-1980) 55 Notre Dame Law Review 203, 218; John J Gorman, 'Commercial Hardship and the Discharge of Contractual Obligations under American and British Law' (1985) 13 Vanderbilt Journal of Transnational Law 107, 118; Walt Steven, 'Expectations, Loss Distribution and Commercial Impracticability' (1990) 24 Indiana Law Review 65. See, *Eastern Airlines v Gulf Oil Corp* 415 F Supp 429 (1975); *Northern Indiana Public Service Co (NIPSCO) v Carob County Coal Co* 799 F 2d 265 (1986).

183 Walt Steven, 'Expectations, Loss Distribution and Commercial Impracticability' (1990) 24 Indiana Law Review 65.

184 Sukhnam Digwa-Singh, 'The Application of Commercial Impracticability Under Article 2-615 of the Uniform Commercial Code' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 324.

equilibrium has been severely disrupted? The UCC[185] and the Restatement (2d)[186] suggest that equitable adjustment should be used only as a last resort. The courts probably will use the remedy only when the normal "excuse or no excuse" solutions are found inadequate to provide a fair solution. In practice, only one case provides some evidence of an attempt to expand such an adjustment. It is in the *ALCOA* case[187] that a plea to reform or equitably adjust the contract has succeeded.

4.4.2. UNIDROIT Principles approach

The UNIDROIT Principles[188] are a non-binding restatement of general principles of international commercial contracts, which are the fruits of a study carried out over the course of 20 years by contract experts representing all of the major legal systems of the world. It consists of a set of persuasive rules which, in practice, could be applied optionally. The Principles offer an approach to solving the problem of commercial impossibility in a way that is perceived to be the best solution, even if it still is not generally adopted.[189] Prior to exhibiting the Principles' approach to hardship, Art. 6.2.1 of the Principles provides a general rule on the application of hardship that 'where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship'. Thus, there is such an affirmation on the importance of the

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185 The Official Comment 6 of § 2-615 provides: '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'.

186 Restatement (2d) § 272 (2) states: 'In any cases governed by the rules stated in this chapter, if those rules together with the rules stated… will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.'

187 *Aluminium Co of America v Essex Group Inc (the ALCOA)* 499 F Supp 53.

188 UNIDROIT stands for The International Institute for the Unification of Private Law, the first edition of which was published in 1994. It is an independent inter-governmental organisation with its seat in Rome. Its purpose is to study needs and methods for modernising, harmonising and co-ordinating international commercial contracts law. See UNIDROIT at <http://www.unidroit.org/english/principles/contracts/principles2010/integralversionprinciples2010-e.pdf>. See M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005).

189 In ICC case no. 7110, the arbitral tribunal stated that the UNIDROIT Principles is the most genuine expression of general rules. See also Court of Arbitration of International Chamber of Commerce rendered in 1996 and an ad hoc arbitral tribunal sitting in Rome on 4 December 1996. All cases are reported in M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 244–148.

principle *pacta sunt servanda*, that is, even where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations.[190]

However, the preceding article is not an absolute one. Art. 6.2.2 of the Principles offers exceptional circumstances where there is a hardship. The article defines hardship as: such an occurrence of events which fundamentally alters the equilibrium of the contract, either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, provided that:

> (a) the events occur or become known to the disadvantaged party after the conclusion of the contract;
>
> (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract;
>
> (c) the events are beyond the control of the disadvantaged party; and
>
> (d) the risk of the events was not assumed by the disadvantaged party.

The crucial question that arises is, when is the change regarded as fundamental? According to the commentary, it depends on circumstances.[191] Furthermore, two objective criteria are employed by the Principles to determine whether an alteration of the equilibrium is fundamental: an increase in expense of the performance or a decrease of the performance value. In terms of the former instance, the party so burdened is usually the one to perform the non-monetary obligation, for example as a result of an increase in prices of the materials necessary for production of the goods. In connection with the latter instance, two main examples are given by the commentary of the Principles: drastic changes in market conditions or frustration of purpose.[192] It is thus clear that the drafters of the Principles consider "frustration of purpose" to be an inherent cause of hardship. It is wider than the frustration of purpose

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190 See Comment I on Article 6.2.1. See also an award rendered in 1996 by the Court of Arbitration of the International Chamber of Commerce where the Arbitral Tribunal stressed that hardship is to be regarded as an exceptional character which requires a fundamental alteration in the original contractual equilibrium and not just a mere increase in the cost of performance. The case is reported in M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 243.

191 It is interesting to note that in Comment 2 to article 6.2.2 in the 1994 edition (the first edition) of the UNIDROIT Principles, it is stated that '… an alteration amounting to 50% or more of the cost or the value of the performance is likely to amount to a "fundamental" alteration.' However, this sentence was omitted in the 2004 edition and replaced by the general statement that 'depend upon the circumstances'.

192 Art. 6.2.2, Comment 2.

that exists under English law, as it covers not only the situation of impossibility but also the situation of more burdensome performance, including the disappearance of purpose.

Art. 6.2.3 introduces two legal processes for the treatment of an alleged hardship.[193] The first process is the stressing of communication: in a case of hardship, the affected party is entitled to demand that the other party enter into a process of renegotiation. This renegotiation is intended to amount to adaptation of the contract to the changed circumstances. The demand must be made without undue delay –immediately after the time at which hardship is alleged to have occurred. Having started the renegotiation process, the parties must intend to reach an agreement, must conduct themselves in the principle of good faith, and may not use the renegotiations as a pure tactical manoeuvre.[194] If, however, the parties fail to reach an agreement within a reasonable time, either party is authorised to resort to the court.[195] The court, upon finding that a hardship situation exists, may, if reasonable:

(a) terminate the contract at a date and on terms to be fixed; or

(b) adapt the contract with a view to restoring its equilibrium.[196]

It may seem that the two remedies, termination and modification, are available for the court without preference, as the word "or" in the article may indicate, but even the commentary note does not clearly establish such a preference. Alternatively, one might interpret that the termination remedy is the preferable one , as it is the first remedy laid down by the article. Nevertheless, a systematic analysis of the Principles reveals that *favor contractus* (favouring keeping the bargain alive) is a basic idea or general principle underlying the Principles. The Principles accommodate many provisions which are aimed at preserving contractual relationships, and a hardship by its legal nature undoubtedly falls within the category of such provisions. Such interpretation is also asserted in the legal doctrine written by Professor Bonell, who

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193 It should be noted that the remedies are not available for the disadvantaged party in all cases. As "A request for renegotiations is not admissible where the contract itself already incorporates a clause providing for the automatic adaptation of the contract (e.g. a clause providing for automatic indexation of the price if certain events occur)". However, such a clause does not always preclude renegotiation if it did not contemplate the events giving rise to hardship. Art. 6.2.3, Comment 1.

194 Art. 6.2.3, Comment 1-5.

195 The length of time a party must wait before resorting to the court will depend on the complexity of the issue to be resolved and the particular circumstances of the case. Comment 6 of article. 6.2.3

196 Art. 6.2.3, Comment 6, 7.

was the Chairman of the Working Group for the preparation of the first edition of the Principles.[197] Notwithstanding, it can be argued that there should be an amendment to Article 6.2.3 in order to clearly indicate the preference of modification and that the termination remedy comes as a second remedy. Therefore, two changes to article 6.2.3 might be suggested: that the modification remedy should be stated as the first possible solution, that is in paragraph (a) instead of (b), as well as adding the phrase (and if not possible) instead of (or) at the end of paragraph (a).

It is worth mentioning a statement of Bonell in his comment on the actual practices of the Principles. According to him:

> It is fair to say that of the nine reported decisions referring to the provisions of the UNIDROIT Principles on hardship in only one did the arbitral tribunal expressly state that, if in the case at hand the changed circumstances had actually amounted to hardship, it would have adapted the contract so as to restore the original equilibrium thereof; however, in all other cases the approach adopted by Arts. 6.2.1 et seq. was considered to be in accordance with current practice in international commercial contracts, while only one decision found that this was not (yet) the case; finally, in yet another case the arbitral tribunal, in deciding that one of the effects of the termination of the contract should not take effect immediately but only some time later, in substance adopted a solution corresponding to Art. 6.2.3(4)(a), though without openly admitting it.[198]

4.5. Conclusion

This chapter examines one of the critical issues related to the application of the law of frustration. It has been shown that English courts are very reluctant to recognise commercial impossibility. The courts have been unwilling to consider the hardship in particular in the context of long-term contract, in which the changed circumstances are more likely to occur and it is also more difficult for the parties to provide for it. Even the academic development and recognition of the concept of the so called 'relational contract', which calls for consideration of norms between parties, such as cooperation, has failed to persuade courts to promote flexibility. In contrast to English

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197 M J Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, Transnational Publishers 2005) 117–124.
198 ibid 123-124.

law, Saudi law recognises commercial hardship as grounds for invoking the rule of excuse. Saudi courts adopt a flexible approach and acknowledge the right to modify contracts.

To illustrate how English and Saudi courts would respond to such a problem a reference can be made to the American case of *Florida Power*. Suppose the case had been litigated before both courts. It would appear that, had the case been decided under an English court Westinghouse would have been excused under the doctrine of frustration. Upon the fact of the case, the contemplated method of performing the contract was impossible but the alternative one was still possible. However, the alternative method would be fundamentally different from that contemplated at the contract time (a difference of 400 to 500 per cent of the usual cost). This is to say that, the frustration had it been found would not have been based on Westinghouse's obligations being "commercially impossible" but on the basis that the contemplated method had been impossible and the alternative one was 'radical different'. However, having supposed that the contemplated method, "reprocessing", had been possible but as a result of a supervening event, Westinghouse's costs had increased, to the same actual increase, Westinghouse would not have been excused under the doctrine of frustration. There are no English authorities to support the view that Westinghouse's contractual obligation could be excused. In fact, in general, a hostility to hardship was the courts' view, and no possibility that the court would modify it to meet the new circumstances.

In contrast if the facts of the *Florida Power* case were subjected to Saudi law it would have been approached and resolved differently. The unreasonable costs of Westinghouse's performance would, according to the Saudi courts, have been likely to amount to a fundamental alteration, upon which the court may intervene. Once the court had intervened, the contract would then need either to be discharged or adjusted to meet the new circumstances. However, a problem arises over when either 'discharge' or 'adjustment' is the most appropriate remedy. Further, the remedy of adjustment raises other issues, as there is no obvious basis to guide the court as to how it should modify the contract, i.e. should adjustment shift all the loss to the other party, half of it, or just some portion of it? It seems that this issue is left to the discretion of the court, depending on the facts of the case. The UNIDROIT Principles for example, share a flexibility with Saudi law, concerning the issue of hardship. However, the

process followed when claiming hardship by applying those Principles is different. Under the Principles, both parties Westinghouse and Florida would have as a first step (Art. 6.2.3) engage in a process of communication, as Westinghouse is entitled to demand that Florida enter into a process of renegotiation. If, however, the parties fail to reach an agreement within a reasonable timeframe, then either party is consequently authorised to resort to the courts. The court, upon finding that a situation of hardship exists, may, if it seems reasonable, terminate or modify the contract.

As shown, Saudi law enjoys greater flexibility than that of the English doctrine of frustration. Conversely, the English doctrine of frustration enjoys a high degree of certainty in comparison to Saudi law.

In English law, it is suggested that commercial hardship can be better served by the modification of a contract than by the only and severe relief under the doctrine; automatically discharge the contract irrespective of the wishes of the parties. It might be true that the parties would never agree to an automatic discharge of the contract, had they previously considered the potential interruptive events. Rather, each party would have sought reservations or qualifications of some form. Therefore, a court imposed modification is consonant with 'gap-filling' in contracts philosophy, and furnishes a flexible process for dispute resolution. Therefore, a court imposed modification is consonant with 'gap-filling' in contracts philosophy, and furnishes a flexible process for dispute resolution. England has not experienced events of such a magnitude as those suffered, for instance, by Germany, subsequent to the two World Wars, which drastically affected the equilibrium of commercial contracts necessitating the reconsideration of the law.

With regard to the theories of both long-term and relational contracts, they are unclear and elusive. The ambiguity and difficulty lies in identifying what constitutes long-term or relational contracts. It is true that in long-term contracts there is a difficulty for parties to allocate the risks of future events at the time of the contract and therefore, the possibility of it being interrupted by the risks is high. Likewise, relational contract bears valuable norms such as trust and cooperation between the parties. Nevertheless, there is no valid reason to see why the promisor in long-term contracts might be excused and not in discrete or short-term ones. So, as the changed circumstances might take place during long-term and relational contracts, this is so for short-term contracts.

CHAPTER FIVE: EFFECTS OF FRUSTRATION

5.1. Introduction

When a contract is frustrated a question arise as to what are the legal consequences of a frustrated contract. When discussing this question, a distinction must be made between two issues: the first issue concerns the legal effect of frustration on the contract. It will be seen that, in English law, when frustration comes into play it works to automatically discharge both contracting parties from their contractual obligations. In Saudi law, on the other hand, the legal effect of frustration can result in different consequences; these include automatic discharge, optional discharge, and/or partial optional discharge.

The second issue relates to the legal rights and obligations already accrued and due before holding the contract be frustrated. It will be seen that the English rules that govern this rights and obligations have not escaped judicial criticisms. For instance, Lord Simon stated that 'the English doctrine of frustration could be made more flexible' so as to avoid 'the all or nothing situation, the entire loss … falling exclusively on one party, whereas justice might require the burden to be shared.'[1] Likewise, a criticism can be directed against Saudi law in that, Islamic jurisprudence with regard to the stage did not provide sufficient treatment. One commentator has argued that:

> It is unclear what remedies are available if a contract is terminated due to an unforeseen condition. With the absence of rules to bind judges to their prior decisions, the use and type of remedies may be largely a function of the individual perspective and experience of the judge who hears the case.[2]

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1 *National Carriers Ltd v Panalpina (Northern) Ltd* [1981] AC 675, 707.

2 David Karl, 'Islamic Law in Saudi Arabia: What Foreign Attorneys Should Know' (1991) 25 The George Washington Journal of International Law and Economics 131, 161. See also, Peter D Sloane, 'The Status of Islamic Law in the Modern Commercial World' (1988) 22 The International Lawyer 743, 747.

This chapter will address the consequence of frustration under the English doctrine of frustration and Saudi law. The discussion will examine the legal effects of frustration on the contract and then move on to deal with gains and losses that incurred by parties to a frustrated contract.

5.2. PART ONE: English law

5.2.1. Discharge

5.2.1.1. Automatic discharge

The English common law view is that the occurrence of the frustrating event 'brings the contract to an end forthwith, without more and automatically'.[3] According to Lord Wright:

> In my opinion the contract is automatically terminated as to the future because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failure on either party.[4]

What the word 'automatically' means is that the discharge is without the choice or election of either party.[5] This appears from the metaphors in many cases referring to the life or the death of the contract: it is said that 'the life of the contract goes',[6] that frustration 'kills the contract itself'[7] and that 'the contract is ended and dead'.[8] However, the contract is terminated as to the future only. Unlike one vitiated by mistake, it is not void *ab initio*. It starts life as a valid contract, but comes to an abrupt and automatic end the moment that the frustrating event has occurred.

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3 *Hirji Mulji v Cheong Yue Steamship Co* [1926] AC 497, 505 (per Lord Sumner); *Maritime National Fish Ltd v Ocean Trawlers Ltd* [1935] AC 524, 527; *Joseph Constantine Shipping Corp v Imperial Smelting* [1942] AC 154, 163, 170, 171, 187; *Denny Mott & Dickson v James B Fraser & Co Ltd* [1944] AC 265, 274; *Blane Steamships v Minister of Transport* [1951] 2 KB 965, 989; *J Lauritzen A/S v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1, 8, 11. See Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) paras 23-071; G H Treitel, *Frustration and Force Majeure* (3rd ed, Sweet & Maxwell 2014) ch 15.

4 *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 70.

5 It has been argued that such a discharge is based on two principles: frustration and consideration. According to Williams, it 'is a discharge only for the party who is to do the act that becomes impossible of performance. The other party, who is to render consideration for the act that becomes impossible of performance, cannot be discharged for impossibility of performance proper, for the simple reason that his obligation is not impossible of performance … the discharge of this latter party, if it takes place, takes place not for impossibility of performance but for *failure of consideration* resulting from impossibility of performance on the other side.'[Emphasis added] Glanville L Williams, *Law Reform (Frustrated Contracts) Act 1943* (Stevens 1944) 21-28; Roy G McElroy, *Impossibility of Performance* (Glanville L Williams ed, Cambridge University Press 1941) 88-89, 99-100. However, this view is not accepted by the Law Reform (Frustrated Contracts) Act 1943, in which it states in s.1 (1) that 'the parties thereto have *for that reason* been discharged' [emphasis added] nor in many judicial statements.

6 *Joseph Constantine Shipping Corp v Imperial Smelting* [1942] AC 154, 187.

7 ibid 163.

8 ibid 188.

5.2.1.2. Optional discharge

From the previous section it appears that common law does not recognise the discharge at the option or election of one party; generally automatic discharge is the one applied.[9] It does, however, in exceptional situations recognise the possibility of discharge at the option of the party who affected by the supervening event in cases of alleged 'self-induced' frustration.[10] For instance, where an employee is prevented from performing his obligation of a contract of employment as a result of a deliberate act, for example having been imprisoned for committing a crime. In such a case the employee cannot plead frustration since he cannot rely on self-induced frustration whereas the employer may be able to do so.[11] The result is that the contract is frustrated (or not) at the option of the employer. Moreover, the rule of optional discharge was found in the Landlord and Tenant (War Damage) Act 1939-1941. It deals with situation where premises which were the subject of a lease were destroyed by enemy action during the Second World War. In such circumstance, tenants were given a statutory power to choose between disclaiming the lease and retaining it.[12]

5.2.2. Losses and gains under the contract[13]

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9 See the authorities considered in section (Automatic Discharge). In the United States, the Restatement (2d) §270 Illustration 4, takes the view that where performance of services for a lump of sum becomes partly impossible, their prospective recipient can enforce the contract for the balance if he is willing to pay the agreed sum in full.

10 For a discussion of 'self-induced frustration' see (Chapter 2).

11 *FC Shepherd & Co Ltd v Jerrom* [1987] QB 301. See also the discussion of 'incapacity' in (Chapter 3).

12 Landlord and Tenant (War Damage) Act 1939-1941. See Glanville L Williams, *Law Reform (Frustrated Contracts) Act 1943* (Stevens 1944) 28-29.

13 See C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) ch 15; Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 249-264; Ewan McKendrick, 'The Consequences of Frustration: The Law Reform (Frustrated Contracts) Act 1943' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995); Ewan McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991); Andrew Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 361-371; A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of

Once the contract came to the end, a crucial question arise; how do the law response to the issue of losses suffered and/or benefits conferred by the parties? The following discussion will cast a light on the position of common law and the rule before the new legislation and then move to deal with the Law Reform (Frustrated Contracts) Act 1943.

5.2.2.1. The rule under common law

At outset, it is of significance to cast a light on the effects of frustration at common law. The position at common law was encapsulated in the rule that 'the loss lies where it falls'. Any sum paid before the frustrating event was unrecoverable and any sum due before the frustrating event still had to be paid. This was justified on the basis that parties remained liable for their contractual duties which fell due before the frustrating event. This position can best be understood by looking at the case of *Chandler v Webster*.[14] The facts were:

> The claimant contracted to hire from the defendant a room in Pall Mall for the purpose of watching the coronation procession. The price for the hire of the room was to be £141. 15s, and it was payable immediately. The claimant paid £100, but before he paid the balance, the procession was cancelled. The claimant sought to recover back the money he had paid.

It was held that the claimant could not recover the £100 and was liable for the remaining £41. 15s. as this obligation had fallen due before the frustrating event occurred. In spite of receiving nothing in return, the claimant was still under obligation for the hire of the room. According to Lord Collins MR, in justifying the decision:

> If the effect [of a frustrating event] were that the contract were wiped out altogether, no doubt the result would be that the money paid under it would have to be repaid as on a failure of consideration. But that is not the effect of the doctrine; it only releases the parties from further performance of the contract. Therefore the doctrine of failure of consideration does not apply.[15]

Business Law 207; Andrew Stewart and J W Carter, 'Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal' (1992) 51 Cambridge Law Journal 66.

14 [1904] 1 KB 493.

15 ibid 499.

The harshness and severity of this law, as laid down in this case has attracted considerable criticism.[16] Accordingly, it was suggested by The Law Revision Committee[17] that the rule should be altered. However, prior any implementation of its report took place, *Chandler v Webster* was overruled by *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*.[18] The facts were as follows:

> An English manufacturer agreed with a Polish company, to manufacture certain machinery and deliver it to Gdynia. The contract sum was £4,000, and £1,000 of the price was paid on the contract time. The contract was frustrated by the occupation of Gdynia by hostile German forces in September 1939. The Polish company thereupon requested the return of the £1,000.

On the basis that there had been a total failure of consideration it was held that the Polish company was entitled to recover the £1.000. Such money according to the rule of *Chandler v Webster* would not have been recoverable on the ground that it had already been paid before the frustration. Despite the fact that the decision in *Fibrosa* improved the harsh rule of *Chandler v Webster* it did not completely solve the problem of money paid under a contract which was then frustrated.[19] This is true because a payee under *Fibrosa* rule could only recover money paid only on a 'total failure of consideration', which means he could not recover that money in situations where the failure was partial. Furthermore, the payee could not keep any portion of the money to be repaid for any expenditure which he had incurred in the performance of the contract.

Thus, the common law rule prior the enactment of the Law Reform (Frustrated Contracts) Act 1943 was left with issues of difficulty that rose potential injustice. The first issue was the total failure of consideration upon which the money paid could be recovered; partly performed consideration, no matter how little, would preclude such a claim from succeeding. Thus, Beatson states that 'legislation was needed to get away from the requirement of total failure of consideration'.[20] Secondly, it took no account

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16 This rule has been described by Scottish judge, (Lord Shaw of Dunfermline), as working 'well enough among tricksters, gamblers, and thieves'. For further criticisms see the Scottish case *Cantiare San Rocco S.A. v Clyde Shipbuilding and Engineering Co Ltd* [1924] AC 226, 257.

17 Seventh Interim Report, 1939, Comnd 6009.

18 [1943] AC 32. See also *Whincup v Hughes* (1871) LR 6 CP 78.

19 ibid 49, 72, 76.

20 Jack Beatson, 'Should There Be Legislative Development of the Law of Restitution?' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991) 290.

of the fact that the payee may have incurred expenses which had been done in the performance of the contract. Thirdly, the common law did not solve the situation which is exemplified by *Appleby v Myers*.[21] Where a service provider could not claim restitution in respect of work which had been done and subsequently destroyed by the frustrating event and the sum was paid upon the completion of the work.

5.2.2.2. The position under Law Reform (Frustrated Contracts) Act 1943

As a result of the unsatisfactory treatment of the common law towards the consequential losses and gains of the frustrated contract, the Law Reform (Frustrated Contracts) Act 1943 was passed. The Act apply to contracts which are 'governed by English law',[22] contracts which have become 'impossible of performance or been otherwise frustrated',[23] and all contracts other than; any charterparty, any contract of insurance and contract to which [section 7 of the Sale of Goods Act 1979] applies.[24] It should be noted that the Act is not concerned with the question that; when a contract is frustrated, as this is left to the common law; rather deals with the legal consequences of the contract when it is held to be frustrated under the rules of the common law. Two important points are addressed under the Act; monetary benefit and non-monetary benefits. The following discussion will cast a light on the two points.

5.2.2.2.1. Money paid or payable

Subsection 1(2) of the Act states that:

> 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

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21 (1867) LR 2 CP 651. See also *Cutter v Powell* (1795) 6 TR 320.

22 Law Reform (Frustrated Contracts) Act 1943, s.1(1).

23 ibid. the Act does not apply where a contract is discharged by breach or for any reason other than frustration.

24 ibid 2(5).

> 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 so 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.

Two important principles are introduced by this subsection. First, it provides that advance payment paid in pursuance of the contract prior to the frustrating event to be recoverable and it also provides that any obligation to pay money under the contract prior the frustrating event, but not yet paid, ceases to be payable. Thus, there is no need to show a total failure of consideration to determine the right of recovery; this is in contrary to the common law rules which limited the right of recovery to cases of *total* failure of consideration having been abolished in the case of frustration by this subsection. Secondly, it provides a mechanism to deal with alleviation of loss suffered by the payee who has incurred expenses before frustrating event.

The subsection, however, raises the difficulty of not providing any principle which indicates to what extent the payee should retain or recover in respect of the expenses that he has incurred. For a better explanation of this issue, suppose the following situation:

> C has signed a contract with D upon which C has made a payment to D of £10,000. Before the contract has been held to be frustrated, D has incurred expenses of £3,000 for the purposes of the contract. The very question is that, how much should C recover?

The Revision Committee stated that 'it is reasonable to assume, in stipulating for prepayment, that the payee intended to protect himself against loss under the contract.'[25] Accordingly, D, in the above example, by seeking prepayment expresses an intention to be compensated fully for any loss he incurs and, C would recover no more than £7,000. However, this approach has attracted criticism. First, from the conclusion that D, by stipulating prepayment, intended to protect himself against any loss which would otherwise have been incurred as a result of C's breach does not

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25 Seven Interim Report (1939), Cmnd. 6009.

follow automatically that he intended to protect himself against loss resulted from frustration, as it is known that frustration occur as a result of unforeseen event.[26] Second, this approach generally operates unfairly against the payor; it places all the risk of loss upon him.[27] For example, D, in the above example, may need liquidity in advance for the purpose of purchasing the necessary materials and so forth.

An alternative approach which lead to the same result, that is, C, in the above example, is entitled no more than £7,000, is suggested by Goff J. He treated the proviso as 'a statutory recognition of the defence of change of position.'[28] Again, this approach has been criticised. Firstly, English law at Goff J time did not yet acknowledge the existence of such a defence.[29] Even without paying attention to the law having recognising that 'defence' it 'is difficult to see the logic of binding the proviso to such a particular format.'[30] Secondly, the wording of the subsection does not cater the defence of change of position. The subsection expressly indicates that the payee must incur 'expenses before the time of discharge in, or for the purpose of, the performance of the contract' while the defence of change of position would be available (in principle) for any extraordinary expenditure that the payee would not otherwise have undertaken.[31] Therefore, McKendrick states that 'The invocation of change of position as a 'rationalization' has great potential to cause confusion and hence must

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26 A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of Business Law 207, 214; Ewan McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991) 158; Ewan McKendrick, 'The Consequences of Frustration: The Law Reform (Frustrated Contracts) Act 1943' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 233.

27 ibid.

28 *B. P. Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783, 800.

29 The defence of charge of position first recognised was in *Lipkin Gorman v Karpnale* [1991] 2 AC 548. According to McKendrick, this argument is not, of course, conclusive because the refusal of the common law to recognise such a defence is no bar to its statutory recognition, Ewan McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991) 156.

30 A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of Business Law 207, 215. The position of American law seems settled with this issue, Restatement on Restitution state that: 'The right of a person to restitution from another because of a benefit received is terminated or diminished if, after the receipt of the benefit, circumstances have so changed that it would be inequitable to require the other to make full restitution.'

31 C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) 423; Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 257; Ewan McKendrick, 'The Consequences of Frustration: The Law Reform (Frustrated Contracts) Act 1943' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 231.

be used with great care.'[32] Thirdly, as in the criticism levelled against the Revision Committee, it appears to throw the risk of loss entirely upon the payor by enabling the payee to retain or recover the whole of his wasted expenditure.[33] Thus it can be said after all these challenges that the defence of change of position 'seems to be unconvincing.'[34]

On a different view, Glanville Williams argued that 'natural justice … decrees that the distribution of loss should be equal' on the ground that the 'situation with which the Act is concerned is the familiar one in which one of two parties has to suffer loss for which neither is responsible.'[35] Thus, by splitting the loss between the two parties, C in the above example would be compensated £8,500.[36] However, this approach has been criticised on the ground that 'loss splitting contradicts the basic individualistic tradition of contract law whereby contracting parties are viewed as pursuing their own self interest and taking their own risk.'[37] Furthermore, this approach may be found by adherents to a wholly flexible discretionary approach as too restrictive and narrow and would prefer to leave the entire question to each judge in each case as and when it arise.[38]

In *Gamerco SA v ICM/Fair Warning (Agency) Ltd*:[39]

> The claimants had agreed to promote a rock concert to be held at a stadium in Madrid on 4 July 1992. The claimants had paid $412,500 on account and had contracted to pay a further $362,500. Both parties had incurred expenses, the

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32 McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991) 157.

33 ibid 158

34 C Mitchell, P Mitchell and S Watterson (eds), *Goff & Jones: The Law of Unjust Enrichment* (8th edn, Sweet & Maxwell 2011) 423.

35 Glanville L Williams, *Law Reform (Frustrated Contracts) Act 1943* (Stevens 1944) 35. This view is supported by McKendrick when he says that 'the frustrating event which has occurred is one which neither party has foreseen and neither party has assumed the risk of its occurrence. Moreover, neither party has been at fault. The expenditure was incurred justifiably in the pursuance of what was at the time a valid and subsisting contract. Justice and reasonableness surely demands that such expenditure be brought into account so that, on the frustration of a contract … benefits conferred must be paid for and losses suffered as a result of wasted expenditure be apportioned between the parties.' Ewan McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991) 168-169.

36 Such an approach has been expressly adopted in section 5(3) of the British Columbia Frustrated Contracts Act 1974.

37 Andrew Burrows, *The Law of Restitution* (3rd edn, Oxford University Press 2011) 366.

38 A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of Business Law 207, 215.

39 [1995] 1 WLR 1226.

> claimants of about $450,000 and the defendants of about $50,000. Subsequently, the stadium was declared unsafe by the local authority, frustrating the contract. The claimant sued for the $412,500 that it had paid.

Garland J. allowed the claimant to recover the sum in full. Garland J. concluded that, despite the fact that defendants had incurred some expenses for the purpose of the performance of the contract, justice would be done by making no deduction from the ordered repayment under s.1(3). It seems that the precise nature of the defendants' expenses was not very clear and the judge found it impossible to determine an accurate amount: 'the best I can do is to accept that [defendants] did incur some expenses, but the extent of them is wholly unproven'.[40] Garland J. said the court is empowered by the words of s.1(2) which 'clearly confer a very broad discretion'.[41] Thus, the decision emphasises the very broad power which the court has in relation to s.1(2).

5.2.2.2.2. Work done by payee

Subsection 1(3) of the Act states 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 … [section 1(2)] … 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 … [section 1(2)], and
> >
> > b) the effect, in relation to the said benefit, of the circumstances giving rise to the frustration of the contract.

The purpose of this subsection is to provide a counterpart to section 1(2) concerning non-monetary benefit. It empowers the court with a discretion to allow one party to

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[40] ibid 1235
[41] ibid

recover a just sum if that party has conferred a non-monetary benefit upon the other in performing the contract, before the frustrating event, the value of that benefit representing the ceiling for the award. Again, as in section 1(2) there are difficulties of interpretation. It has been described by McKendrick as 'the most controversial and difficult section in the Act.'[42] This is true, as Goff J said 'By their nature, services cannot be restored … Furthermore the identity and value of the resulting benefit to the recipient may be debatable.'[43]

In *B. P. Exploration Co (Libya) Ltd v Hunt (No. 2)*[44] the facts were that:

> Hunt who had an oil concession in Libya contracted with B.P. to exploit the oil. B.P. were to do the work of exploration, which they would finance; they were also to make certain "farm-in" payment to Hunt in cash and oil. In return they would get a half share of Hunt's concession. As soon as the oil field became productive, B.P. were to receive half of all the oil produced from it, together with "reimbursement oil" (taken from Hunt's share) to meet the cost of the company's "farm-in" payment and to cover Hunt's share of the development expenses. Fortunately, a very large field was found. However, the contract was frustrated by Libyan government cancelled the concession. At the time of the frustrating event, B.P. had received about one-third of the reimbursement oil to which they were entitled. B.P. brought a claim under s 1(3) of the Act for an award of a just sum.

The claim was allowed by Robert Goff J. and he awarded B.P. a just sum under s.1(3) of the Act. Goff J. began by stating that the 'fundamental principle underlying the Act … is prevention of the unjust enrichment of either party to the contract at the other's expense' and not the apportionment of the loss.[45] He then approached s.1(3) on the basis that it involves three tasks; identification of the benefit, valuation of the benefit and, assessment of the award of a just sum.

The first question to be resolved is, therefore, what constitutes a "benefit". Goff J. stated that as a matter of construction 'benefit' in s.1(3) normally meant the end-product of services rather than the services themselves,[46] although he would have

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42 Ewan McKendrick, 'The Consequences of Frustration: The Law Reform (Frustrated Contracts) Act 1943' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 234.

43 *B. P. Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783, 802.

44 [1979] 1 WLR 783.

45 ibid 799-800.

46 ibid 801.

preferred the legislature to have treated the services themselves as the benefit.[47] He, however, indicated to other situations in which the definition of 'benefit' as an end-product would be inappropriate. The first situation is where the service by its very nature does not result in an end-product, for example, 'where the services consist of doing such work as surveying, or transporting goods'.[48] In such a situation the value should be the services themselves. The second situation arises where the services performed resulted in an end-product which has no objective value. Goff J. gave the example of a claimant who commences 'the redecoration, to the defendant's execrable taste, of rooms which are in good decorative order'.[49] In such a case, the work of the claimant may even reduce the value of the defendant's rooms, but Goff J. nevertheless held that the services must be regarded as a benefit because they were requested by their recipient. The conclusion that the existence of an end-product was a necessary ingredient of a section 1(3) claim would have led to ridiculous arguments as to what constitutes an "end-product". Thus, Peter Birks argues that:

> there is no purpose in insisting on an end-product if one which is eccentric and worthless will suffice. Whitened coal might be said to be the end-product of coal whitening, whereas book burning arguably leaves no product at all. It would be absurd to say that a maximum award can be calculated for whitened coal simply because a visible end-product can be identified when the work is done. It would lead to ridiculous inventiveness in the identification of end-product.[50]

Such "inventiveness" can be resolved by considering the services themselves in identifying and valuing the benefit.

The second task is, once the benefit has been identified, the valuation of the benefit. Again, there are difficulties arise. These difficulties stem from the conclusion that it is the end-product and not the services themselves which are to be regarded as the benefit. Goff J. stated that 'benefit' must be valued as at the date of the frustrating event, and accordingly the claimant has no claim under s.1(3) since the value of the benefit is reduced to nil by the frustrating event.[51] Goff J. justified this conclusion on

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47 ibid 802.
48 ibid
49 ibid 803.
50 Peter Birks, *An Introduction to the Law of Restitution* (Clarendon Press 1989) 252.
51 *B. P. Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783, 803. Andrew Stewart and J W Carter, 'Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal' (1992) 51

the basis that 'benefit' in s.1(3) clearly refers to the end-product of the services rather than the services themselves. His interpretation of the subsection has, however, been criticised. Treitel states that s.1(3) refers to benefit obtained 'before the time of discharge'; the reference to the event frustrating contract in s.1(3)(b) appear to be directed to the 'just sum' than the benefit.[52] Haycroft and Waksman point out that if Goff J. is right, the Act would not alter the outcome of one of the most criticised of the pre-1943 authorities, *Appleby v Myers*.[53]

The third task of Goff J.'s approach of s.1(3) is the calculation of the just sum to be awarded. Goff J. suggested that the guiding principle ought to be the 'prevention of the unjust enrichment of the defendant at the plaintiff's expense' and not to 'apportion the loss between the parties'.[54] While the Court of Appeal appeared to decline to interfere with the way that Goff J. had calculated the just sum, they stated that the court had 'no help from the use of words which are not in the statute'.[55] They also suggested that 'what is just is what the trial judge thinks is just … unless it is so plainly wrong that it cannot be just'.[56] As the Act remain silent on this matter; its words do not indicate expressly any conclusive purpose, that suggests that leaving the issue virtually to the untrammelled discretion of the trial judge more appropriate.[57]

5.2.2.3. Loss sharing

Unlike the unjust enrichment rule, the principle of loss sharing or loss apportionment is not generally recognised in common law rule in England.[58] In *Taylor v Caldwell*,[59] the claimant, the hirer, sought for his incurred expenditure in preparing for the concert

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Cambridge Law Journal 66, state Goff J's decision on this point on the basis that where the recipient never in fact received any of the performance he has not been enriched and therefore, the value of the benefit truly is zero and he should not be required to make restitution.

52 Edwin Peel (ed), *Treitel the Law of Contract* (14th edn, Sweet & Maxwell 2015) para 19-103. See also Michael Furmston (ed), *Cheshire, Fifoot and Furmston's The Law of Contract* (16th edn, Oxford University Press 2012).

53 A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of Business Law 207.

54 *B. P. Exploration Co (Libya) Ltd v Hunt (No. 2)* [1979] 1 WLR 783, 799-800.

55 [1982] 1 AII ER 925, 983 (per Lawton L.J).

56 ibid 980.

57 A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of Business Law 207, 225 maintained that the 'real basis of the Act is that it is designed to provide a flexible machinery for the adjustment of loss'.

58 Treitel G H, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 15-073.

59 For a full account for this case see Section 2.2.1.2, Chapter 2.

which would eventually not take place. The action was rejected since the contract had been frustrated. In fact, the loss incurred in that case was to some extent split between the parties. The claimant lost his expenditure and the defendant lost the music hall itself.[60] However, such a scenario is not the same in every frustrated contract because in some cases the loss may place all on one side.[61] In such a case, the question arise as to whether there should be a rule for loss apportionment?

As an answer to the question one may say that there should be a rule that deals with loss sharing simply because justice and fairness require it. Lord Shaw criticises the English approach of (the loss lie where it falls) that it works 'well enough among tricksters, gamblers, and thieves.'[62] McKendrick argues that so long as the doctrine of frustration promises on the idea of fairness then 'Justice and reasonableness surely demand that such expenditure be brought into account.'[63] Loss apportionment is seen as natural and just.[64] However, the notion of fairness has been attacked for the reason that not being what constitute just.[65]

Harrison argues that contracting parties are involved in a joint endeavour, analogous to business partners.[66] Therefore the contract law should embrace the notion that embodied in the law of partnership which calls for the losses and profits to be shared. The position of common law is thus, contented, to be:

> in stark contrast with the essence of the contract. A loss sharing arrangement is more consistent with the express provisions of the joint undertaken. From the partnership or common enterprise view, the parties can be regarded as having consented, as a single entity, to bear any losses associated with their endeavour.[67]

However, although the trust and cooperation constitutes significant elements in contractual relationship, there is opposition to the notion that those elements should be incorporated into binding legal transactions.[68] Goff and Jones when they first heard

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60 It is worth noting that the defendant, owner, had received insurance for their loss; MacMillan Catharine, 'Taylor v Caldwell (1863)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in the Law of Contract* (Hart Publishing 2008) 191.

61 Treitel G H, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 15-073.

62 *Cantiare San Rocco SA v Clyde Shipbuilding & Engineering Co Ltd* [1924] AC 226, 259.

63 Ewan McKendrick, 'Frustration, Restitution, and Loss Apportionment' in Andrew Burrows (ed), *Essays on the Law of Restitution* (Oxford University Press 1991).

64 See, A M Haycroft & D M Waksman, 'Frustration and Restitution' [1984] Journal of Business Law 207, 215-16; L E Trakman, 'Winner Take Some: Loss Sharing and Commercial Impracticability' (1985) 69 Minnesota Law Review 471, 504.

65 See the discussion of 'just and reasonable solution' see Section 2.2.3.2, Chapter 2.

66 Jeffrey L Harrison, 'A Case for Loss Sharing' (1983) 56 Southern California Law Review 573, 592-95.

67 ibid 591-92

68 See the discussion of 'relational contract' in Section 4.2.4.2, Chapter 4.

the idea of loss share based on the notion of joint venture, preferred the common law approach as it 'being more in accordance with business ethics and commercial expectations.'[69] Stewart and Carter concur, adding that 'contracting parties do not generally engage in relations out of a spirit of mutual welfare, but rather to serve their own interests.'[70]

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69 R Goff and G Jones, *Law of Restitution* (1st edn, Sweet and Maxwell 1966) 333.

70 Stewart Andrew and Carter J W, 'Frustrated Contracts and Statutory Adjustment: The Case for a Reappraisal' (1992) 51 Cambridge Law Journal 66, 87.

5.3. PART TWO: Saudi law

5.3.1. Discharge

5.3.1.1. Automatic Discharge

At the outset, under Islamic law, when the rule of excuse is applied it operates so as to discharge the contracts prospectively; thus, any further agreements that are to exist in the future are terminated. In this way, the rule operates only as grounds of discharge of future obligations. This rule will be illustrated in the following discussion in regard to the gains and losses after the contract been discharged.

The view of Islamic law on the effect of an excused contract is that *infisahk* (automatic discharge) is the main, but not the only, effect. That is, when a supervening event has occurred it does not necessarily result in the automatic discharge of the contract. Therefore, automatic discharge seems to be regarded simply as a logical consequence when the contractual subject matter is completely destroyed by a supervening event. This law is provided for in the jurisprudence. For instance, Al-Kasani stated that 'if it [i.e. the subject matter] by misfortune from heaven, is completely destroyed before delivery, the contract is discharged'.[71] Moreover, al-Ramli contends that 'if the subject matter has been destroyed by misfortune from heaven or it has been rendered in the meaning of destruction the contract then is discharged'.[72] However, situations such as partial loss, extreme hardship or temporary impossibility may not lead to the same result (i.e. automatic discharge), but instead to other remedies. In the discussion of the (filming case)[73] it was shown that the court stated that the contract is discharged by itself without resorting to the court.

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71 A Al-Kasani, *Badai'a Al-Sana'ia*, vol 5 (Dar al-Kitab al-Arabi 1990) 235. See also, I Al-Shirazi, *Al-Mohathab*, vol 1 (Dar AI-Fikr n.d.) 296.

72 M Al-Ramli, *Nihayat al-Muhtaj*, vol 2 (Dar al-Fikr 1984) 76.

73 See the facts of this case in Section 3.3.3, Chapter 3.

5.3.1.2. Optional Discharge

The notion of optional discharge is occasionally mentioned in traditional Islamic writings. Chapter three illustrates a situation in which there is a partial destruction of the contract.[74] It was shown that the contract is automatically discharged in terms of that partial loss and, at the same time, the party for whom the performance is to be rendered, has the option either to terminate the contract or to keep it with a price reduction.

Oddly, Ibn Qudamah, in dealing with a contract of service to dig a well, states that, if the contractor strikes a rock after the first few feet of digging which render his performance very difficult he then has the right to terminate the contract in addition to the right to be paid for the work already performed.[75] He justified his view on the basis of the contractor's encounter, i.e. the rock, being unforeseeable.[76] That unforeseen difficulty entitled the contractor to the option of either discharging or holding onto the contract.

This remedy appears to come as a result of hardship, and does not arise due to the impossibility of performance. This is confirmed by providing the contractor with options. In the discussion of commercial hardship,[77] it was explained that the party affected by the hardship or difficulty may turn to the court which at its discretion, may intervene to adjust or discharge the contract price; however, the case here is different in that, it provides the party who encounters the difficulty the option to discharge the contract.

With respect, Ibn Qudamah's view is open to criticism. Usually, a confrontation with a rock while digging a well is something that is likely to occur rather than to be an unforeseen event. Taking the performance difficulty into consideration as grounds for optional discharge, without resorting to the court, can lead to uncertainty due to the fact that it opens the door for any party to escape a bad bargain on the grounds of difficulty. Thus, a party may claim performance difficulty even if the related difficulty is, contrary to being an extreme case, trivial.

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74 See the discussion of 'partial destruction of the subject matter' in Chapter 3.
75 A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 293.
76 ibid
77 See Chapter 4

5.3.1.3. Judicial discharge

In the discussion of 'commercial impossibility' in chapter four it was said that, in cases where there is a supervening event that rendered the contractual performance very burdensome, the court may either adjust or discharge the contract. With respect to the latter solution, i.e. the discharge, in fact, there are no judicial cases reported that can illustrate this positions where the court held the contract as being discharged due to commercial hardship.

In all likelihood, this may occur in situations wherein the cost increase is very excessive and unreasonable to be bore; even with the court's adjustment, for example by splitting up the loss, a discharge would present a better solution than an adjustment.

5.3.2. Suspension

In some instances, impossibility of performance is of a temporary nature and thus, the question arise: is there any room for the contract to be suspended?[78] Little information has been found in regard to this point; however, a general comment made by Malik[79] in regard to the issue of temporary impossibility and the suspension of contractual obligations is important to consider here. In regard to a contract to hire a riding animal, during the contract period, a subsequent event, such as the illness of the animal or theft, that renders the performance temporarily impossible, in regard to this issue, he stated that the contract would be discharged; however, if performance was later found to be possible (i.e. the animal was recovered or found) so long as the contract period has not ended, the contracting parties would carry on performance for the remaining period.[80] It can be concluded from Malik's statement that the contract is not discharged if the supervening event no longer existed, provided that it occurs during

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78 See A Farah, *Nadaryah Al-Aqd Al-Mauqof fi Al-fiqh Al-Islami* (Dar Al-Nahdah Al-Arabiah 1969) 43.

79 Malik Ibn Anas Malik was one of the most highly respected Muslim scholars (A.D. 711- 795).

80 M Ibn Anas, *Al-Mudawwana Al-Kubra*, vol 11 (Sahnun ibn Sa'id ed, Dar Al-nawader n.d.) 56.

the period of contract. This means that, in fact, the contract during the temporary impossibility is not discharged but suspended.

The above discussion indicates that the part of the contract performance that was excused never has to be rendered at all, while true suspension would indicate that the *whole* of the performance originally bargained for has to be rendered, though at a later time. For instance, if the animal in the above example was hired for one month, and later, performance was found to be temporarily impossible for the first 15 days, there is then a question as to whether it is possible to perform the entirety of the contract as opposed to only the remaining 15 days of that month, even if at a later time? It is true that the notion of 'suspension' would be a source of uncertainty; in particular, it would be hard for the courts to determine for how long the suspension of the contract is to continue. Despite the aforementioned difficulty, the commentators[81] consider that 'suspension', in principle, can be applied in some circumstances where the courts find it an appropriate to do so. That is, the whole contract can be rendered. They support their argument by the principle of 'negation of hardship' which is asserted in traditional Islamic jurisprudence.[82]

5.3.3. Losses and gains under the contract

Some principles as to the rights and liabilities that follow the discharge of the contract due to impossibility are recognised in Islamic jurisprudence. With regard to monetary obligations, an advance payment made under a discharged contract can be recovered and, in addition money payable should cease to be paid. Malik[83] illustrated this statement well when he stated that:

> A man may say that he will pay someone in advance for the use of his animal on the *hajj* [pilgrimage], and the *hajj* is still sometime off, or he may say something similar to that about ... a house. When he does that, he only pays the money in advance on the understanding that if he finds the animal to be sound at the time the hire is due to begin, he will take it by virtue of what he has already paid. If an accident, or death, or something happens to the animal, *then he will*

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81 See, for example, A Al-Roumi, *Al-Istihalah w Athruha ala Al-Eltizam Al-Aqadi* (University of Jordan 1994) 758-62.

82 See Chapter 4.

83 M Ibn Anas, *Al-Muwatta* (Dar Ihya Al-Ulum Al-Arabiah 1994) 267.

> *get his money back and the money he paid in advance will be considered as a loan*.[84]

It follows that this rule well be extended to be applied to situations where the money is payable. For instance, if the man in the above example, contracted on the basis that the money would be payable, this payment would cease to be due.

In terms of non-monetary benefits, where a contract is partly performed by the promisor, the other party is obliged to pay for that performed part. According to Malik, as a further illustration of the above example, the owner of the animal or house must be paid if the hirer has used the animal or the house.[85] This principle has been applied in Saudi courts. For example, in one case:[86]

> The claimant agreed to let his two garages to the defendant for the sum of RS.40,000 each year. The contract was for three years. However, after one year and seven months the local authorities demolished the garages, along with other buildings for the sole purpose of expanding the street. When the contract became impossible the defendant already paid only for the first year and not for the seven months. Thus, the claimant sought for payment for that months.

The court held that the price of rent for the seven month period was due before the supervening event occurred and that the defendant received a benefit during that period. Therefore, the court ruled that the defendant must pay the claimant for that period.

The aforementioned discussion clearly illustrates the proposition of a party that benefited from the other party's performance. Therefore, it is simply based on the principle of unjust enrichment; however, a question may then arise in regard to what the legal proposition would be if one party incurred a loss and the other received no benefit in return? For example, if there existed a contract to build a house but, before completion, a supervening event occurred that destroyed the work performed thus far and made it impossible for such work to be resumed. This point does not appear to have been considered in Islamic jurisprudence and contemporary commentators. To go further in this point, consider the two situations:

1) A contractor entered into an agreement by which he builds a house, for a total sum of £120.000, on the assumption of a profit of £20.000. However, once the

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84 Emphasis added.

85 ibid.

86 The General Court in Taif, decision No. 41/11 in (1422AH 2001).

contractor has finished about 90% of the work, a supervening event destroyed the work completed due to no fault of either party. Even so, the contractor resumes the work and completes the house.

2) A contractor entered into an agreement by which he builds a house, for a total sum of £120.000, on the assumption of a profit of £20.000. However, once the contractor has finished about 90% of the work, a supervening event destroyed the work completed due to no fault of either party and it is impossible to resume.

In the first example, the contract was fulfilled; however, in the second example the contract was discharged because of impossibility. The contractor incurred expenses (approx. £90.000), in both scenarios; however, in the first example, the contractor is likely to mitigate the loss by invoking the principle of hardship.[87] On one hand, the contractor may allege that the cost of their work has been excessively increased almost 75% due to no fault by either party; on the other hand, the court at its discretion may consider such an increase to be a hardship and intervene to adjust the contract price. Whereas, in the second example, the contractor would not be relieved, on the assumption that the contract is an *obligation de résultat*, (obligation to achieve a specific result)[88] whereby they are not entitled to recover, nor share, the loss with the other party.

If the aforementioned scenarios are true; the contractor's loss would be mitigated, although they would acquire a profit of approximately £20.000 in the first example as opposed to nothing in the second example. This collides with the general principles of Islamic law concerning justice and prevention of undue loss. One may say that the different results reached in the two examples is because they are based on different principles. The first example was based on the rule of hardship while the second was based on impossibility. Formally, this is true; however, it should be asked why the principle of hardship is recognised at all? The answer would be to mitigate harshness and prevent unfair and undue loss. No one could say that the contractor did not lose a substantial amount in the second example. Accordingly, it would be arbitrary to consider justice and fairness in the first example, and not consider such concepts in the second as, in both situations, the contractor incurred a major loss. Justice would

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87 See Chapter 4

88 Cf, '*obligation de moyens*' (obligation of due care, or best endeavours obligation).

require that the all losses not be made to fall on the contractor if none of the parties contributed to the event that interrupted work. Therefore, such a loss should be shared by both parties.

5.4. Conclusion

In summary, this chapter has endeavoured to exhibit and analyse the legal effect of the doctrine of frustration under English and Saudi law. In English law, the legal effect of the operation of frustration is to discharge the contract immediately and automatically whereas, in Saudi law, the legal effect is mainly the automatic discharge besides others effect namely optional discharge and suspension. Upon discharging the contract due to frustration, the discharge operates from the moment of occurrence onwards. As a result, the rights and liabilities of the parties that existed before the frustrating event are preserved, whereas the rights and liabilities that accrued after the frustrating event are extinguished.

After the contract has been held to be frustrated, the stage of dealing with the rights and liabilities that are relevant arise an issue of complexity. Historically, the legal effect under English law was that 'the loss lies where it falls' but that proposition was recognised and qualified by the case of *Fibrosa Spolka* and more so by the establishment of the Act of 1943. The current proposition of the English and Saudi laws concern, and deal with, many aspects of rights and liabilities, such as monetary benefits or non-monetary benefits. Nevertheless, it is the issue of loss apportionment that has attracted criticism. With respect to the Act of 1943 in English law, it has been criticised for failing to provide a clear view with regard to the issue of loss incurred. Such criticisms can also be directed to Islamic law because of the ambiguity raised by the same issue.

CHAPTER SIX: FORCE MAJEURE CLAUSES

6.1. Introduction

Earlier in this thesis[1] it was shown that there are a number of limitations on the scope of the doctrine of frustration. One of these limitations is when a contract has expressly provided for the occurrence of the alleged frustrating event.[2] These provisions are known as 'force majeure' clauses. The expression 'force majeure' comes from French law.[3] It is not a term of art in English law.[4]

In practice either 'force majeure' is used as a label or heading for a clause; or it is a term defined in the clause; or it is supplemented by a series of defined events which trigger the operation of the clause. A force majeure clause will usually define the event which brings the clause into operation and the effect of bringing the clause into operation. It may also deal with the process by which one party notifies the other that the specified event has occurred.[5] It need hardly to be said that the precise effect of a force majeure clause depends principally on its words.[6] Thus, a 'force majeure clause should be construed in each case with a close attention to the words that precede or follow it, and with due regard to the nature and general terms of the contract'.[7]

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1 See Section 2.2.2, Chapter 2

2 This proposition has a long history. In the case of *Paradine v Jane* (1647) Aleyn 26, it was said: 'when the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract. For a full account of this case see Section 2.2.1.1, Chapter 2.

3 French Civil Code Art.1148 which provides that 'There is no occasion for damages where, in consequence of *force majeure* or accident the debtor has been prevented from conveying or doing that to which has was obliged or has done what has was debarred from doing.' B Nicholas, *The French Law of Contract* (2nd edn, Clarendon 1992) 200.

4 *Hacknet BC v Dore* [1922] 1 KB 431, 437; Beale Hugh (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-147.

5 See, Michael Furmston, 'Drafting of Force Majeure Clauses _ Some General Guidelines' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995); Alan Berg, 'The Detailed Drafting of a Force Majeure Clauses—Some General Guideline' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract*, (2nd edn, Lloyd's of London Press Ltd 1995).

6 *Coastal (Bermuda) Petroleum Ltd v VTT Vulcan Petroleum SA (No.2)* [1996] 2 Lloyd's Rep 383.

7 *Lebeaupin v Richard Crispin and Co* [1920] 2 KB 714.

In general, there is an inter-relationship between a force majeure clause and the doctrine of frustration. Although they are both concerned with the supervening events the presence of a force majeure clauses may operate to exclude the doctrine of frustration. Frustration is rarely involved in modern commercial practice, largely because of the width of the force majeure clauses which are to be found in the commercial contracts. In the vast majority of cases it is, the force majeure clause which will regulate the impact on the parties' contractual obligations of events that are beyond their contract.[8] Thus, it would be inappropriate to address the doctrine of frustration without giving the concept of force majeure clauses its deserved importance. Unlike in English law, force majeure clauses are not theoretically discussed within Islamic law and are poorly dealt with by contemporary commentators. Bearing this in mind, it would be appropriate to devote most of in this chapter to the operation of force majeure clauses in English law. This will be followed by a brief discussion of such clauses in Saudi law.

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8 Ewan McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 233.

6.2. PART ONE: English law

6.2.1. The applicability of the doctrine of frustration in the presence of force majeure clauses

Where a contract contains a force majeure clause that covers[9] precisely and completely an event[10] that would otherwise frustrate the contract, that clause will preclude the courts from holding the contract as being frustrated. According to Lord Simon 'There can be no discharge by supervening impossibility if the express terms of the contract bind the parties to performance, notwithstanding that the supervening event may occur.'[11] This is because a frustrating event is an unexpected, unforeseen event; it is not an event which has been anticipated in the contract itself.[12] This is also reflected by the Law Reform (Frustrated Contracts) Act 1943, which states that the court shall give effect to any provision in a contract to which that Act applies 'which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate, or which would but for the said provision operate, to frustrate the contract …'[13]

However, a view that differs from that above suggests that the mere fact that there is the presence of a clause for a supervening event in a contract is sufficient in itself to exclude the operation of the doctrine of frustration. This argument was first found in the case of *Bremer Handelsgesellschaft m.b.H. v Vanden Avenne-Izegem P.V.B.A.*[14] by Mocatta J. when it was stated that 'there was no room for the doctrine of frustration

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9 In some circumstances frustration may be excluded even though force majeure clauses do not precisely cover the supervening event, if it shows that the parties had *anticipated* the event and had allocated the risk of its occurrence, *Bangladesh Export Import Co Ltd v Sucden Kerry SA* [1995] 2 Lloyd's Rep 1; *Robert Purvis Plant Hire Ltd v Brewster* [2009] CSOH 28; 2009 Hous LR 34.

10 Except where the event is the prohibition by legislation for reason of public policy, see *Ertel Bieber & Co v Rio Tinto Company* [1918] AC 260. See the discussion of legal impossibility in Section 3.2.2, Chapter 3.

11 *Joseph Constantine SS Line Ltd v Imperial Smelting Cop Ltd* [1942] AC 154, 163. See also, *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435, 455; *Kuwait Supply Co v Oyster Marine Management (The Safeer)* [1994] 1 Lloyd's Rep 637.

12 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 23-007. The doctrine of frustration first time was recognised was based on an effort to give effect to the presumed intention of the parties. In other words, it could not operate if the parties had dealt with a particular event by express provisions.

13 s.2 (3).

14 [1978] 2 Lloyd's Rep 109.

to apply' as a result of the elaborate force majeure clauses inserted in the contract. Mocatta J. was of the opinion that there was 'much to be said for this submission'.[15] In support of Mocatta J.'s view, one commentator points out that it 'is perhaps time to take up the suggestion of Mocatta J.' and concluded that 'if two companies draw up a comprehensive contract complete with force majeure clauses, then the courts should take them at their word and entirely refuse to apply the doctrine of frustration. Parties strong enough to strike equal bargains be should allowed to do so'.[16] However, such an argument is weak, for a number of reasons. The first is the available authorities which support the proposition that the presence of a force majeure clause does not, of itself, preclude the application of frustration.[17] The second reason is that the argument was not unambiguously accepted; there was simply 'much to be said',[18] while the third reason is that Mocatta J. based his argument on the theory of "implied term", and that such a theory has been rejected and is no longer valid for frustration on the ground that it is a fiction.[19]

6.2.2. The purpose of force majeure clauses

Generally speaking, it can be said that the purpose of force majeure clauses is to escape from the doctrine of frustration. The English courts' approach in applying the doctrine is a strict one. This is made manifest by statements such as, the doctrine operates 'within very narrow limits';[20] and by the affirmation that it is only a 'fundamental change'[21] which can bring the doctrine into play and by the rejection of

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15 ibid 123. McKendrick is, to some extent, attracted by this opinion, as he points out that "there may be much to be said for this proposition as a matter of principle", Ewan McKendrick, Force Majeure and Frustration- their Relationship and a Comparative Assessment' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 34.

16 Steve Hedley, 'Carriage by Sea—Frustration and Force Majeure' [1990] The Cambridge Law Journal 209, 211.

17 See the following discussion of "Interpretation".

18 Ewan McKendrick, 'Force Majeure and Frustration- their Relationship and a Comparative Assessment' in Ewan McKendrick' (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 34.

19 See the discussion on implied term theory in Section 2.2.3.1, Chapter 2.

20 *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93, 115.

21 ibid

'commercial hardship' as a frustrating event.[22] As a result of the narrowness of the frustration doctrine, force majeure clauses have come to play a significant role. In fact, force majeure clauses, of course if enforceable, allow for a large amount of flexibility and this gives such clauses a significant advantage over the doctrine of frustration. In general, three advantages can be gained from the force majeure clauses: (i) certainty; (ii) covering non-frustrating events and (iii), a variety of remedies.

6.2.2.1. Promote certainty

One of the advantages of an enforceable force majeure clause is that it provides the contracting parties with greater certainty than is afforded to them under the doctrine of frustration. Indeed, under the doctrine, it is difficult to know whether or not a contract has been frustrated. There are many examples through which it can be illustrated that how force majeure clauses can afford certainty. The first example is the issue of the partial failure of a source, in which a seller or supplier of goods may, as a result of circumstances beyond his control, be unable to fulfil all his existing contracts, but nevertheless can fulfil one or more of those contracts. It has been shown[23] that the available authorities do not provide a clear cut answer for such a situation in terms of whether (i) all or some of the contracts are discharged upon frustration, (ii) no discharge at all and the supplier still obliged to perform in full otherwise he would be liable or (iii) allocating the available supply in a way of partial allocation "pro rata". Such uncertainty can be overcome by incorporating force majeure clauses in the contract. In doing so, the degree of certainty is increased. In *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd*[24]

> A contract concluded for the sale of magnesium chlorate to be performed in monthly instalments over the year 1914. The contract provided that 'deliveries may be suspended pending any contingencies beyond the control of the seller … causing *short supply*[25] … hindering … delivery.' The outbreak of a war put

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22 See Chapter 4.

23 See the discussion of the principle of partial-allocation in Section 3.2.1.6, Chapter 3.

24 [1917] AC 495. See also, *Kawasaki Steel Corpn v Sardoil SpA, (The Zuiho Maru)* [1977] 2 Lloyd's Rep 552, 555; *Bremer Handelsgesellschaft mbH v Continental Grain Co* [1983] 1 Lloyd's Rep 269, 280-281, 291-294.

25 Emphasis added.

> an end to the main source of supply with the consequence of preventing the seller from procuring enough to fulfil all his running contracts, though he was able at an increased price to supply the claimant if he disregarded the other contracts.

It was held that the seller was not liable since the clause quoted above worked to protect him. The clause also ensure that the available goods are allocated in a way that the trade would regard as proper and reasonable, for example on a pro rata basis, or in chronological order, or on some other basis.[26]

Another example is where a supervening event causes a "delay". It has been shown that,[27] in such a circumstances, the possibility of holding the contract to be frustrated depends on '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'.[28] Of course, the factors of waiting by the courts and the inability of the contracting parties to see into the future result in a situation in which the parties do not know where they stand. For this reason, it is often for contracts to provide for such a circumstance by, for example, allowing an extension of time or giving the option of termination of the contract to both parties.[29] For example, in the case of *A F Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co*[30] it was held that the contract was not frustrated as it appeared to the court that it was likely that the ship would still be available for a substantial part of the contract after the war ended, but the court's assumption turned out to be wrong. Such a result could have been avoided by inclusion in the contract of a well drafted force majeure clause to deal with "delay" for example, by allowing an extension of time, at the end of which the contract might automatically be terminated, or the parties be given the option to terminate it.

A further example of the certainty afforded by force majeure clauses is the closure of the Suez Canal in 1956, in which much litigation was brought about before the courts

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26 *Intertradex SA v Lesieur Tourteraux SARL* [1978] 2 Lloyds Rep 509, 512; *Bremer Handelsgesellschaft mbH v Mackprang* [1979] 2 Lloyd's Rep 221,224; Hugh Beale (ed), *Chitty on Contracts* (31st edn, Sweet & Maxwell 2012) para 14-154.

27 See the discussion of 'delay' in Section 3.2.1.7.1, Chapter 3.

28 *Pioneer Shipping Ltd v BTP Tioxide Ltd (The Nema)* [1982] AC 724, 752.

29 See the following discussion of 'Remedial Flexibility'.

30 [1916] 2 AC 397. For a full account of this case see Section 3.2.1.7.1, Chapter 3.

over whether contracts for shipment by an intended route were frustrated.[31] The uncertainty of the application of the doctrine of frustration gave rise to considerable inconvenience and expense to contracting parties; engaging in expensive litigation in order to ascertain the impact of closure on their contractual obligations. Such a difficulty could have been avoided to a large extent by inserting in the contracts a well drafted force majeure clause. Thus, many contracts list the closuring of canals as force majeure. For example, in *Super Servant Two*[32] a clause provided that 'closure of the Suez or Panama Canal' constitutes force majeure. On the assumption that the Suez Canal had been closed after contracting and before performance, both parties would have known that closure is provided for and therefore the defendant is protected by the force majeure clause.

However, it does not follow from the above that any contract that include a force majeure clause will guarantee complete certainty. Even when a force majeure clause has been well drafted, difficulties of interpretation may arise.[33] For example, difficulties might arise in relation to the ambit of the clause: some events may be held, as a matter of interpretation, not to be within the ambit of the clause. Despite occasional difficulties of interpretation, it can still be said that force majeure clauses play an important role in minimizing uncertainty.

6.2.2.2. Non-frustrating events

Force majeure clauses may operate to cover a list of events which would *not* terminate the contract under the doctrine of frustration.[34] Parties by including a force majeure clauses in their contract the position would be; what constitute a force majeure event would be a matter under the clause and not under the doctrine of frustration. For example, closure of the Suez Canal; this was held not to be a sufficient ground as a

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31 Eventually it was held that they were not frustrated, on the ground that the difficulties caused by the closure did not amount to frustrating event: *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93; *Ocean Tramp Tankers Corporation v V/O Sovracht (The Eugenia)* [1964] 2 QB 226.

32 *J Lauritzen SA v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1.

33 See the following discussion of 'Interpretation' in this chapter.

34 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12-021; Ewan McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 241.

frustrating event,[35] but parties can provide for such event to constitute a force majeure event. Another example is an unexpected increase in prices; this also held not to amount to a frustrating event,[36] but again parties can, by inserting a clause, provide for it.

6.2.2.3. Remedial flexibility

One of the reasons that the doctrine of frustration is described as rigid is that when it operates[37] it operates too drastically because it kills[38] the contract, irrespective of the parties' wishes. This is what caused McKendrick to point out that the 'remedial flexibility which contracting parties enjoy in this respect [i.e. force majeure clauses] compares favourably with the remedial rigidity of the doctrine of frustration'.[39] Very often the contracting parties wish to keep their contractual relationship alive and this cannot be done under the doctrine of frustration. But the force majeure clauses can give the parties certain options of how to deal with their affairs in the occurrence of unexpected events.

6.2.2.3.1. Termination

Many contracts provide for termination or cancellation upon the occurrence of a specific event. In some contracts, force majeure clauses may give one or both parties the option to cancel the contract,[40] or ensure that the termination operates

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35 *Tsakiroglou & Co Ltd v Noblee Thorl GmbH* [1962] AC 93; *Ocean Tramp Tankers Corporation v V/O Sovracht (The Eugenia)* [1964] 2 QB 226.

36 *Davis Contractor Ltd v Fareham Urban District Council* [1956] AC 696. See the discussion of "Commercial Impossibility" in Chapter 4.

37 See the discussion of consequences of frustration in Chapter 5.

38 However, there is a class of event which may excuse non-performance without bringing the contract to an end, for example short-term but serious illness in an employment contract. See Chapter 3.

39 Ewan McKendrick, Force Majeure and Frustration- their Relationship and a Comparative Assessment' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 44

40 *Bank Line Ltd v Arthur Capel & Co* [1919] AC 435.

automatically.[41] It is thought that a clause which provide for immediate termination[42] upon the occurrence of an event is undesirable on the ground that it is inflexible and so replicates the difficulties apparent in the doctrine of frustration.[43] Such a clause has been described as a "contractual frustration clause".[44] However, the point of this description is that the effect of such a clause resembles that under the doctrine of frustration to the extent that the occurrence of the event or events specified in it gives rise to automatic discharge.[45]

6.2.2.3.2. Extension of time

Force majeure clauses frequently provide for suspension or extension of performance for an agreed period of time upon the occurrence of a specified event or events. Once this agreed period of time has elapsed, one party may have the right to cancel the contract or opt for the allowance of another period of extension. Such a solution might offer a better resolution for both parties than that under the doctrine of frustration. For example, a clause which gave one party the right of extension of time was effective in the case of *Fairclough Dodd & Jones Ltd v L.H. Vantol Ltd.*[46] Here facts were:

> A contract for the sale of hundred tons of Egyptian cottonseed oil was concluded in November 1950. The delivery took place during the months of December 1950 and January, 1951. The contract was in a form issued by the London Oil & Tallow Trades Association and clause 11 thereof, which was a force majeure clause, provided, so far as is relevant, as follows:
>
> > A. In the event of war, hostilities or blockades preventing shipment, this contract or any unfulfilled part thereof shall be cancelled . . . B. Should the shipment be delayed by . . . prohibition of export . . . or any other cause

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41 *Continental Grain Export Corpn v STM Grain Ltd* [1979] 2 Lloyd's Rep 460; *Bremer Handelsgesellschaft mbH v Finagrain SA* [1981] 2 Lloyd's Rep 259. See GAFTA 100 (clause 19).

42 It does not follow from this remedy that the Law Reform (Frustrated Contracts) Act 1943 is applicable. The termination or cancellation here is brought by a force majeure clause and not by frustration.

43 Ewan McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 241, 245.

44 *Bremer Handelsgesellschaft m.b.H. v Vanden Avenne-Izegem P.V.B.A* [1978] 2 Lloyd's Rep 109, 112.

45 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12-021.

46 [1956] 2 Lloyd's Rep 437. See also, *Tradax Export SA v Andre et Cie SA* [1976] 1 Lloyd's Rep. 416.

> comprehended in the term force majeure other than war, hostilities, blockade, the time of shipment shall be extended by two months . . .
>
> The Egyptian Government imposed a ban on the exportation of the oil from December 12th to January 3rd (during which period the seller, in fact, arranged to ship) but shipment was possible on January 31st when the shipment period expired. The seller did not ship within the original shipment period, and the buyer brought an action claiming for damages. The seller insisted that he was protected by the clause and the performance of the contract was extended by two months.

It was held that on the construction of the clauses provided in the contract, the seller was protected by clause 11B through the intermittent delay although the delay was no longer in existence at the end of the shipment period.

Due to the importance of the remedy of extension of period of time many standard form contracts are often incorporate it. For example, the International Federation of Consulting Engineers (FIDIC Contracts)[47] clause 8.4 provides that:

> The Contractor shall be entitled … to *an extension of the Time* for Completion if and to the extent that completion … is or will be delayed by any of the following causes: … (c) exceptionally adverse climatic conditions, (d) Unforeseeable shortages in the availability of personnel or Goods caused by epidemic or governmental actions …[48]

Another example is the clause 44 (1) of the ICE Conditions of Contract[49] which provides that:

> Should … exceptional adverse weather conditions or other special circumstances of any kind whatsoever, which may occur be such as fairly to entitle the Contractor to an extension of time for the completion of the Works … the Contractor shall within 28 days after the cause of the delay has arisen or as soon thereafter as is reasonable in all the circumstances deliver to the Engineer full and detailed particulars of any claim to *extension of time* …[50]

Further example is GAFTA[51] 100 clause 19 which provide that:

> If shipment be delayed for more than 30 consecutive days, Buyers shall have the option of cancelling the delayed portion of the contract, such option to be

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47 It is an international standards organization for the construction industry

48 Emphasised added.

49 It is intended for use on civil engineering work.

50 Emphasised added.

51 Grain and Feed Trade Association.

> exercised by Buyers serving notice to be received by Sellers not later than the first business day after the additional 30 consecutive days. If Buyers do not exercise this option, such delayed portion shall be automatically extended for a further period of 30 consecutive days. If shipment under this clause be prevented during the further 30 consecutive days extension, the contract shall be considered void.

6.2.2.3.3. Adjustment of the contract

It has been shown[52] that English law does not recognise economic hardship as a sufficient ground to bring about the doctrine of frustration to operate. To mitigate this, contracting parties can refer to clauses, known as "hardship clauses",[53] generally define what constitutes hardship. Such clauses create a system of "internal regulation"[54] designed to protect the financial equilibrium of their contractual obligations from the undesired effects of a constantly changing economic environment. The process of adjustment may take a different basis, for example, by requiring the parties to enter into negotiation,[55] an escalation basis[56] or providing for a third party to resolve the dispute.[57]

Although a hardship clause provides a solution for the rigid attitude of English law toward financial hardship such a 'clause is notoriously difficult to apply on account of its nebulous character and requires a commitment by the parties to reach

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52 See Chapter 4.

53 Clive M Schmitthoff's, 'Hardship and Intervener Clauses' (1980) Journal of Business Law 82; Karen Kemp, 'Applying the Hardship Clause' (1983) Journal of Energy and Natural Resources Law 119.

54 Karen Kemp, 'Applying the Hardship Clause' (1983) Journal of Energy and Natural Resources Law 119.

55 *Petromec Inc Petroleo v Brasileiro SA Petrobas* [2006] 1 Lloyd's Rep 121. C.f. *Walford v Miles* [1992] 2 AC 128.

56 *Quepensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205.

57 *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] AC 334; *Quepensland Electricity Generating Board v New Hope Collieries Pty Ltd* [1989] 1 Lloyd's Rep 205. See FIDIC Contract and ICC Rules.

agreement."[58] This difficulty is illustrated by the case of *Superior Overseas Development Co Ltd & Others v British Gas Co,*[59] the facts of which concerned:

> In 1968, sales agreements for the supply of natural gas, were signed between the British Gas Co, the defendants, and seven companies headed by Phillips Petroleum Company group, known as the Phillips Group, the plaintiff. Article X of the agreement provided for a periodic price review at either party's request based on a formula. Clause 7 of the agreement was the hardship clause which provided:
>
> > (a) If at any time or from time to time during the contract period there has been *any substantial change in the economic circumstances relating to this Agreement* and (notwithstanding the effect of the other relieving or adjusting provisions of this Agreement) *either party feels that such change is causing it to suffer substantial economic hardship* then the parties shall (at the request of either of them) meet together to consider what (if any) adjustment in the prices then in force under this Agreement or in the price revision mechanism ... are justified in the circumstances in fairness to the *parties to offset or alleviate the said hardship* caused by such change.
> >
> > (b) If the parties shall not within ninety (90) days after any such request have reached agreement on the adjustments (if any) in the said prices or price revision mechanism which are to be made then the matter may forthwith be referred by either party for determination by experts.
> >
> > (c) The experts shall determine what (if any) adjustments in the said prices or in the said price revision mechanism shall be made for the purposes aforesaid and any reviewed prices or any change in the price revision mechanism so determined by such experts shall take effect six (6) month after the date on which the request for the review was first made.[60]
>
> In October 1980, after earlier problems with the interpretation of the clause, the plaintiffs claimed hardship against the defendants, and issued originating summonses seeking decisions on its construction.

In the Court of Appeal, three issues arose from this case. The first issue concerned the word "substantial" and its meaning in clause 7(a) as it was used to qualify both the phrase "economic change" and "hardship". According to Waller L.J.:

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58 Karen Kemp, 'Applying the Hardship Clause' (1983) Journal of Energy and Natural Resources Law 119, 121.

59 [1982] 1 Lloyd's Rep 262.

60 Emphasis added.

> A 'substantial' change in economic circumstances means something more than the ordinary everyday variations which were current in the late 60s. 'Substantial hardship' must mean something more than difficulties arising from day to day economic variation. It must have a real impact and not a mere transient effect. I would myself suggest that it must be real hardship. Hardship alone would be something more than that which should be disregarded as *deminimis,* but not sufficiently great as to justify by itself a claim followed by reference to experts. There is support for this use of the word 'real' as a meaning of substantial in that it is one of those given in the Shorter Oxford Dictionary. I would therefore read cl. 7(a) as meaning in the earlier part 'if there has been any real change in the economic circumstances' and in the later part 'causing it to suffer real economic hardship.[61]

The second issue was related to at which point or points in time the 'substantial economic hardship' had to exist. Here Waller L.J. stated that:

> the words 'substantial economic hardship' refer to a condition or state of affairs which exists at the time of request for a meeting. This condition must have existed for some time as a result of a 'substantial change in economic circumstances' but at the time of the request it must be such that it '*is* causing it to suffer substantial hardship'. It would not be sufficient to look at a period of days before the date of request; it would have to be a longer period of months or in a rare case more than a year.[62]

The third issue was related to whether, at the end of clause 7(a), the phrase 'to offset or alleviate the said hardship' has the effect that the experts could fix adjustment that would completely eliminate all hardship or adjustments that would merely reduce "substantial hardship" to, as it were, ordinary hardship. The majority agreed with Waller L.J. when he stated that:

> In my opinion the said hardship refers to the substantial hardship mentioned earlier in the case, and offsetting or alleviating refers to a condition of normality, that is to say without hardship, not merely without the substantial part of the hardship… there is not good reason for not offsetting or alleviating the whole of the substantial hardship.[63]

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61 *Superior Overseas Development Co Ltd & Others v British Gas Co* [1982] 1 Lloyd's Rep 262, 266. Similar view were expressed by Donaldson L.J. 269-270.

62 ibid 266.

63 ibid

However, Ackner L.J., dissented and considered that there was no difficulty in separating substantial hardship from ordinary hardship and making an award which only covered substantial hardship.

The fourth issue was related to the periods of hardship that should be covered by an offset or alleviation. Three possibilities were envisaged: (i) from the effective date of any adjustment made by the experts under clause 7(a) (i.e. six months after the date on which a party first requested a clause 7 review); (ii) from the date of the request; (iii) from the beginning of the substantial hardship. After considering each of these three possibilities, Waller L.J. stated that:

> I have come to the conclusion that when adjusting the price there is no good reason for not going back to the beginning of the substantial hardship. The obligation is to offset or alleviate and the overriding duty of fairness to the parties gives the experts the discretion, if they think it right, not to offset in full but to alleviate in part.[64]

Although a hardship clause gives rise to difficulties in its operation as in the *Superior Development* case, the Court of Appeal sought to 'dispel the anxiety that a hardship clause might be void for uncertainty[65] if it does not provide a formula according to which the experts are to determine the adjustment, but merely sets out a broad approach which they are to follow.'[66]

6.2.3. Interpretation

In this section the discussion will cover the English courts approach of construction of the force majeure clauses[67] as well as casting a light on some sensitive formula and

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64 ibid 267. Similar view is expressed by Donaldson L.J.

65 It has been held that an agreement to negotiate which "lack the necessary certainty" has "no legal content", *Walford v Miles* [1992] 2 AC 128, 138. See also *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd* [1975] 1 WLR 297.

66 Alan Berg, 'The Detailed Drafting of a Force Majeure Clauses—Some General Guideline' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract*, (2nd edn, Lloyd's of London Press Ltd 1995). 113. See also, Karen Kemp, 'Applying the Hardship Clause' (1983) Journal of Energy and Natural Resources Law 119, 121.

67 See, K Lewison, *The Interpretation of Contracts* (6th edn, Sweet & Maxwell 2015) ch 13.

words which play an important role in determining whether the clauses should be applied or not.

6.2.3.1. Restrictive interpretation

Although the courts acknowledge that a force majeure clause may preclude the application of the doctrine of frustration,[68] they have followed a narrow approach in the process of construing the words of the force majeure clauses. The narrow interpretation start with the proposition that where a contract which is capable of being frustrated by one of two or more events, a clause covering the consequence of only one of them will obviously not exclude frustration by the other or others.[69]

The strictness of construction appears more plainly in the proposition that where a force majeure clause covers a list of specified events, an event falling within the literal words of the clause may be insufficient to operate the clause. This is well illustrated by the case of *Metropolitan Water Board v Dick Kerr and Co*.[70]

> In 1914 contractors agreed to construct a reservoir to be completed within six years, subject to an express provision that, in the event of delays "whatsoever and howsoever occasioned", the contractors were to be granted an extension of time. Two years later, the contractors were required by a Government Order to cease work and sell their plant. The Water Board argued that the disruptive event fell within the scope of the clause and could be dealt with by an extension of time.

The House of Lords rejected the Water Board's argument and held that the contract was frustrated. Although the 'delay clause' can be said to fall under the ordinary or literal meaning of the formula 'whatsoever and howsoever occasioned', the court stated that it did not 'cover the case in which the interruption of such a character and

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68 It should be noted that if a force majeure clause is construed not to be operative, it does not follow that the doctrine of frustration will be applied. This is so if such a clause was made for events which would *not* (but for the clause) frustrate the contract. In such a circumstance the contract will remain in force and neither party will be able to rely on the clause. See, G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12-010.

69 *Intertradex SA v Lesieur Tourteraux SARL* [1978] 2 Lloyds Rep 509, 515.

70 [1918] AC 119. See also *Acetylene Co of GB v Canada Carbide Co* (1922) 8 LIL Rep 456; *Fibrosa Spolka Akcyjna v Fairbairn, Lawson, Combe Barbour Ltd* [1943] AC 32; *Wong Lai Yin v Chinachem Investment Co* (1979) 13 Build LR 81; *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171.

duration did not 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'.[71]

Asquith LJ stated that a 'delay clause' provided in a contract does not 'apply where the delay was so abnormal, so pre-emptive, as to fall outside what the parties could possibly have contemplated.' And therefore, delay 'has been read as limited to normal, moderate delay, and as not extending to an interruption so differing in degree and magnitude from anything which could have been contemplated as to differ from it in kind.'[72] The clauses will not come into play if the events render further performance of the contract 'unthinkable'.[73] This is to say, the greater the magnitude of the event, the less likely it is that it will be covered by a general clause or even a clause which covers that event "whatsoever and howsoever occasioned".

Although it has been illustrated from the above that the English courts have followed a strict approach of construction, according to Treitel, 'there is no rule of law to this effect.'[74] Such a narrowness of construction has attracted criticisms. Michael Furmston described this rule as:

> … fundamentally misconceived. We need to remind ourselves that the classic justification for the narrow doctrine of frustration in English law is that it is for the parties to agree what the effects of unforeseen event outside their control is to be. It is fundamentally misconceived to start applying to such a party-agreed provisions preconceived notions of where the risk of such events should lie derived from a blind application of the doctrine of frustration.[75]

Furmston appears to saying that there is some circularity of reasoning. McKendrick also argues that there should be a more natural interpretation of such clauses.[76] It has been believed that the construction of force majeure clauses appears uncertain and

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71 ibid 126

72 *Sir Lindsay Parkinson & Co Ltd v Commissioners of Works* [1949] 2 KB 632, 665.

73 *Empresa Exportadora De Azucar v Industria Azucarera Nacional SA (The Playa Larga)* [1983] 2 Lloyd's Rep 171, 189.

74 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12-027.

75 Michael Furmston, 'Drafting of Force Majeure Clauses _ Some General Guidelines' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995) 58.

76 Ewan McKendrick, Force Majeure and Frustration- their Relationship and a Comparative Assessment' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press Ltd 1995) 34, 36-37.

unpredictable, and require urgent clarification if their benefits are not to be diminished.[77]

6.2.3.2. 'Sweeping words'

Typically, force majeure clauses include a list of specific events coupled with "sweeping up" phrases, such as 'and any other event outside the parties' control', which are designed to extend the list, *ejusdem generis,*[78] to other similar events. The courts now appear to construe such phrases naturally, although in early times the principle of *ejusdem generis* was applied automatically.[79]

In *Chandris v Isbrandtsen-Moller Co Inc*[80] a clause in a voyage charterparty provided that: 'The cargo to consist of lawful general merchandise, excluding acids, explosives, arms, ammunition *or other dangerous cargo*.'[81] Devlin J. in refusing to apply the principle of *ejusdem generis* stated that the 'general words were prima facie to be considered as having their natural and larger meaning and not to be restricted to things ejusdem generis previously enumerated, unless there was something in the deed to show an intention so as to restrict them.'[82] According to Devlin J.'s view, the only common factor amongst the specified events was that the shipowner objected to them because they were dangerous. He could be taken to have the same objection to other dangerous cargo.

However, this does not mean that the general words would cover every event. *Benjamin's Sale of Goods* qualifies this rule as follows:

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77 See further, W Swadling, 'The Judicial Construction of Force Majeure Clauses' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995) 14

78 For the principle of *ejusdem generis* see for example, Gerard McMeel, *The construction of contracts* (2nd edn, Oxford University Press 2011).

79 See for example, *SS Knutsford Limited v Tillmanns & Co* [1908] AC 406. See Bernard Eder and others (eds), *Scrutton on Charterparties and Bills of Lading* (22nd edn, Sweet & Maxwell 2011) para 218-219.

80 [1951] 1 KB 240. See also, *Navrom v Callitsis Ship Management SA* (The Radauti) [1987] 2 Lloyd's Rep 276; Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-141.

81 Emphasis added.

82 ibid 244.

> Frequently a number of events are specified and then followed by the words 'or any other cause beyond our control'. Such general words in a commercial document are prima facie to be construed as having their natural and larger meaning and are not limited to events *ejusdem generis* with those previously enumerated. They should be construed as applying only to matters which have some connection with the performing party's obligation.[83]

In the recent case of *Tandrin Aviation Holdings Ltd Aero Toy Store LLC*[84] Hamblen expresses that:

> (a) The expression 'any other cause beyond the Seller's reasonable control' cannot sensibly be construed to include matter with which the seller was never expected to be concerned. For instance, the seller would never have been expected to be concerned with, still less to have any control or influence over, the purchaser's financing arrangements; or any back-to-back sale by the purchaser to a third party which would have provided the purchase monies.

6.2.3.3. 'Prevention' and 'Hindrance'

Force majeure clauses often use the words "prevention" and "hindrance" as a result of a specific event. However, the two words differ in scope. Where a clause excuses non-performance on the grounds that performance has been "prevented"[85] by a specified event, it will apply only if performance is rendered legally or physically impossible, rather than as difficult or uneconomic.[86] According to *Benjamin's Sale of Goods*:

> Where the seller seeks to invoke the protection of a clause which states that he is to be relieved of liability if he is 'prevented' from carrying out his obligations under the contract or is 'unable' to do so, he must show that performance has

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83 Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 8-89

84 [2010] 2 Lloyd's Rep 668, [46].

85 It is submitted that the words "unable" is equivalent to "prevented". *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep 441. Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 14-144.

86 *Blythe & Co v Richards Turpin & Co* (1916) 114 LT 753; *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495; *Brauer & Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd* [1952] 2 All ER 497; *Exportelisa SA v Giuseppe and Figli Soc Coll* [1978] 1 Lloyd's Rep 433; *Thames Valley Power Ltd v Total Gas & Power Ltd [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep 441*; *Tandrin Aviation Holdings Ltd Aero Toy Store LLC* [2010] 2 Lloyd's Rep 668, [49]; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep 619, [29], [31]; Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-144.

> become physically or legally impossible, and not merely more difficult or unprofitable.[87]

A force majeure clause may also contain the word "hindrance"[88] and this word gives the clause a wider scope than "prevention", in the sense that it may apply even though performance is not impossible. In *Tennants (Lancashire) Ltd v CS Wilson & Co Lord,*[89] a clause provided that 'deliveries may be suspended pending any contingencies beyond the control of the sellers or buyers, such as war, causing a short supply of labour, fuel, raw material, or manufactured produce, or otherwise preventing or *hindering*[90] the manufacture or delivery of the article'. It was held that the event had "hindered delivery" though it might not have prevented it.

Lord Loreburn stated that:

> By "hindering" delivery is meant interposing obstacles which would be really difficult to overcome ... If that had been intended different language would have been used … to place a merchant in the position of being unable to deliver unless he dislocates his business and breaks his other contracts in order to fulfil one surely hinders delivery.[91]

Lord Atkinson said:

> "Preventing" delivery means, in my view, rendering delivery impossible; and "hindering" delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible.[92]

It would seem that if the clause only referred to the word "prevention" and not "hindering", it would likely hold the supplier for liability.

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87 Michael G Bridge (ed), *Benjamin's Sale of Goods* (9th edn, Sweet & Maxwell Ltd 2014) para 8-092.

88 It is thought that the words "impeded", "impaired" and "interfered with" may be construed as equivalent to "hindered". Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-146.

89 *Tennants (Lancashire) Ltd v CS Wilson & Co Ltd* [1917] AC 495. See also, *Peter Dixon Sons Ltd v Henderson Craig & Co* [1919] 2 KB 778; *Navrom v Callitsis Ship Management SA (The Radauti)* [1987] 2 Lloyd's Rep 276.

90 Emphasis added.

91 ibid 510.

92 ibid 512. However, it has to be mentioned that a mere rise in cost resulting in the contract more expensive to perform will not be regarded as "hindrance". *S Instone & Co Ltd v Speeding Marshall & Co Ltd* (1915) 32 TLR 202; ibid 510 522, 526.

6.2.4. Party's obligations

6.2.4.1. Burden of proof

As a matter of principle the burden of proving that the force majeure event or events has happened must be upon the party seeking to rely on the clause.[93] In *Bremer Handelsgesellschaft m.b.H. v C Mackprang Jr,*[94] Lord Denning M.R. treated this as an application of the common law principle that 'a party who relies on an exception clause must prove the facts to support his exception'.

It is not enough to show that an event has occurred but it must be shown that such an event was the cause of being "prevented" or "hindered" (or whatever the relevant expression is) from performing the contract.[95] In *Agrokor AG v Tradigrain SA*,[96]

> A contract to sell 60,000 tonnes of European milling wheat provided that the seller is entitled to cancel the contract to the extent that government prohibition of export prevented fulfilment of the contract. The seller intended to supply goods originating in a particular country, but the authorities of that country prohibited the export of goods of the contract description, but that description left it open to the seller to supply goods from other source, not affected by the prohibition.

It was held that the clause in the contract did not protect the seller. According to Longmore J.

> (a) that it is for the sellers to prove that they are entitled to rely on cl.20 or equivalent; and (b) that, in order to do so, the sellers must show not merely that there was a ban which restricted the export of wheat, but also that the ban had the effect of restricting the performance of the actual contract with Tradigrain.

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93 *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, 245; *P J Van der Zijden Wildhandel NV v Tucker & Cross Ltd* [1975] 2 Lloyd's Rep 240, 242.

94 [1979] 1 Lloyd's Rep 221.

95 *Raiffeisen Hauptgenossenschaft v Louis Dreyfus & Co* [1981] 1 Lloyd's Rep 345, 351; *Channel Island Ltd v Sealink U.K. Ltd* [1988] 1 Lloyd's Rep 323; *Dunavant Enterprises Inc v Olympia Spinning & Weaving Mills Ltd* [2011] EWHC 2028 (Comm), [2011] 2 Lloyd's Rep 619.

96 [2000] 1 Lloyd's Rep 497.

6.2.4.2. Notice

Many force majeure clauses impose an obligation on the party who wishes to rely on the clause to serve a notice to the other party. In this respect, the main issue is whether this obligation-- that is, to serve a notice-- is mandatory; that the failure to do (which often includes time limits of reporting) deprives the affected party from relying on the clause, or the obligation is merely directive; the failure to do will not deprive the affected party of seeking to rely on the clause, but will only give a right to damages.

In *Bremer Handelsgesellschaft m.b.H. v Vanden Avenne-Izegem PVBA*[97] the contract provided that:

> In the event of shipment proving impossible during the contract period by reason of any of the causes enumerated herein, sellers shall advise buyers of the reasons therefor.

It was held that such a clause was insufficiently precise to be characterised as a condition, rather it was an intermediate term. One reason for this was that no definite time limit were prescribed. For this part, Lord Wilberforce said that:

> Whether this clause is a condition precedent or a contractual term of some other character must depend on (i) the form of the clause itself, (ii) the relation of the clause to the contract as a whole, (iii) general consideration of the law.[98]

However, the fact that a clause should contain a time limit in order to be a condition term is not always necessary. In *Mamidoil-Jetoil Greek Petroleum Company SA v Okta Crude Oil Refinery*,[99] a force majeure clause provided that the party seeking to rely on the clause 'shall give prompt notice' to the other party. According to Aikens J.:

> The form of the notice provision is imperative: a party 'invoking *force majeure* shall give a prompt notice to the other party'. The implication behind that imperative is that, if the party does not, than it cannot rely on *force majeure*. The reason for requiring notice to be given is that the 'other party' can then investigate the alleged *force majeure* at the time. It can challenge whether it does prevent performance or delay in performance by the party invoking the *force majeure*. Alternatively it can see if there are other means of enabling

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97 [1978] 2 Lloyd's Rep 109.
98 ibid 114.
99 [2005] 1 Lloyd's Rep 1.

> performance to be continued. Lastly, if the notice provision is only an innominate term, then I find it difficult to see when the innocent party could allege it had suffered additional damages that it would wish to receive for the first party's failure to perform the contract at all. These factors would all lead me to conclude that the parties intended the notice provision to be a condition precedent.[100]

6.2.5. Are force majeure clauses exemption clauses?

From the outset the question that must be addressed is whether or not a force majeure clause is distinguished from an exemption clause.[101] The starting point is the case of *Fairclough, Dodd & Jones*[102] which has been considered by some commentators as authority for the proposition that force majeure clauses are not exemption clauses[103] and by others as authority for arguing that they are to be dealt with as a type of exemption clauses[104] whereas other commentators believe that some are whereas some are not.[105] In that case Lord Tucker stated that:

> Force majeure clauses are of different kinds. In the case of an exception clause it is generally true to say that it only operates on the happening of an event which would otherwise result in a breach, but there is nothing to prevent the parties providing for an extension of the time for performance or for a substituted mode of performance on the occurrence of a force majeure event whether or not such event would have prevented performance.[106]

From this, it can be said that an exemption clause seek to exclude or restrict a liability or a legal duty which would otherwise arise while a force majeure clause operate to

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100 ibid 9.

101 An exemption clause can be defined as a 'clause in a contract or a term in a notice which appears to exclude or restrict a liability or a legal duty which would otherwise arise'. David Yates, *Exclusion Clauses in Contracts* (2nd edn, Sweet & Maxwell 1982) 1.

102 [1956] 2 Lloyd's Rep 437, 443.

103 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-140.

104 Michael Furmston, 'Drafting of Force Majeure Clauses _ Some General Guidelines' in Ewan McKendrick (ed), *Force Majeure and Frustration of Contract* (2nd edn, Lloyd's of London Press 1995) 58.

105 Gerard McMeel, *The Construction of Contracts* (2nd edn, Oxford University Press 2011) para 22.35.

106 *Fairclough, Dodd & Jones* [1956] 2 Lloyd's Rep 437, 443.

define the extent of that which would otherwise be an absolute obligation, rather than excluding or limiting what is to happen in the event of a breach of that obligation.

However, the distinction between the two types of clauses is not, in general, easy to draw[107] since the effect of each may be to relieve a contracting party of an obligation or liability to which he would otherwise be subject.[108] One test that has been suggested is, to ask whether the event in which the clause operates is one beyond the control of the party relying on it. If this is the case, the clause is likely to be considered as defining contractual obligations, rather than as an exemption clause.[109]

Another question which arises from the difficulty in drawing a distinction between force majeure clauses and exclusion clauses is the applicability of the Unfair Contract Terms Act 1977[110] specifically in term of whether force majeure clauses are subject to s.3, which imposes the requirement of "reasonableness". It has been said that such a section is unlikely to apply to a clause which merely gives a contracting party an excuse upon the occurrence of a circumstance beyond his control.[111]

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107 G H Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 12-022; Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-140; Gerard McMeel, *The Construction of Contracts* (2nd edn, Oxford University Press 2011) para 22.35; W Swadling, 'The Judicial Construction of Force Majeure Clauses' in Ewan McKendrick (ed), Force Majeure and Frustration of Contract (2nd edn, Lloyd's of London Press 1995).

108 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-140.

109 Such a suggestion is expressed by Kerr J. when he says 'No case was cited on either side, nor have I been able to find one, in which it has ever been suggested that a party can commit a fundamental breach when the breach occurs due to circumstances beyond its control and the contract provides that non-performance due to such circumstances is to be excused. It seems to me that by its nature the doctrine cannot have any application in such a case. The authorities in which the doctrine has been applied by holding that a party cannot rely upon a protective provision in the contract have all been cases so far as I can find, when the breach was due to a cause within the control of the defendant, so that, to put it colloquially, the breach was in some way the fault of the defendant; and when the nature of the fault, or the seriousness of its consequences, or both, were such that the relevant protective provision in the contract could on its true construction not be relied upon to excuse the breach.' *Trade & Transport Inc v Lino Kaiun Kaisha Ltd (The Angelia)* [1973] 1 WLR 210, 231.

110 It should be noted that the scope of the protection of s.3 changed with the Consumer Rights Act 2015 so as no longer to benefit persons 'dealing as consumer'.

111 Hugh Beale (ed), *Chitty on Contracts* (32nd edn, Sweet & Maxwell 2015) para 14-155. However, the possibility of applying s.3 to such clauses can be envisaged, for example, in an exclusive dealing agreement, if the seller was entitled to suspend delivery in such events but the buyer was nevertheless not entitled, during the suspension, to purchase supplies from elsewhere. *Chitty on Contracts* para 14-155.

6.2.6. Party's negligence

An important question arise as to whether a force majeure clause can operate to cover events brought about negligence. This issue has arisen in the case of *The Super Servant Two*[112] where a clause provided that one party (carrier) would be entitled to cancel performance of his obligation, 'in the event of force majeure, Act of God, *perils or danger and accident of the sea* … or any other circumstances whatsoever … which reasonably may impede, prevent or delay … performance'.[113] The party argued that, while the majority of the events listed in the force majeure clause cover circumstances beyond the control, 'perils or dangers or accidents of the sea' was apt to encompass losses brought by negligence; the clause therefore plainly envisaged that events constituting negligence should fall within its ambit.

Employing *Canada Steamship*[114] principles, which operate in the context of exemption clauses, Bingham L.J., concluded that the clause 'was not deprived of sensible application' if limited to events which are not resulted from the party's negligence; as such, the clause was in his opinion confined to such events and did not extend to operate to protect the party from other events for which it had been alleged he or his servant were to blame.

The conclusion was reached as a matter of construction and not a rule of law which means that it is possible for force majeure clauses to provide for negligence act within its scope. It would seem from *Super Servant Two* that the court will apply the same

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112 *J. Lauritzen SA v Wijsmuller BV (The Super Servant Two)* [1990] 1 Lloyd's Rep 1. See also, *Sonat Offshore SA v Amerada Hess Development Ltd and Another* [1988] 1 Lloyd's Rep 145.

113 Emphasised added.

114 *Canada Steamship Lines Ltd v The King* [1952] AC 192. These principles are that (i) if a clause expressly excludes liability for negligence (or an appropriate synonym) then effect is given to that. If not, (ii) the court should ask whether the words used are wide enough (in their ordinary meaning) to cover the party's own negligence and if there is doubt, that is resolved against the one relying on the clause. If that is satisfied, then (iii) the court should ask whether the clause could cover some alternative liability (but one that is not too "fanciful or remote") other than for negligence, and if it can, it covers that. See also, *EE Caledonia Limited v Orbit Valve Co Europe* [1994] 2 Lloyd's Rep 239. However, the court has recently shown a more clement approach. It emphasised that the scope of the parties' right to invoke the operation of a force majeure clause in circumstances of their negligence of contract turns in each case upon its proper interpretation. Where such clause can be sensibly interpreted in a manner which does not excuse liability for negligence the court will normally presume that this was the parties' intention. The principles laid down by the case of Canada Steamship are therefore tools to be used by the courts and they are not their masters. *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 2 Lloyd's Rep 61; *Greenwich Millennium Village v Essex Services Group and plc* [2014] EWCA Civ 960; [2014] 1 WLR 3517.

rule of construction to force majeure clauses generally.[115] The acts of negligence will be construed as falling outside the scope of force majeure clauses unless there is a clear indication to that effect. For example, if the clause in Super Servant Two could have been rephrased so that it provide 'perils or dangers and accidents of the sea (whether caused by negligence or not)'. This would have been enough, as a matter of construction, to cover events caused by negligence.[116] Indeed, a party presented with such a clause is unlikely to be willing to accept it.

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115 Indeed, Lord Bingham, in the recent case of *HIH Casualty and General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6; [2003] 2 Lloyd's Rep 61, [67] re-acknowledges the authority and soundness of the Canada Steamship principles (concerning the non-express reference to negligence).

116 Ewan McKendrick, 'Force Majeure Clauses: The Gap between Doctrine and Practice' in Andrew Burrows and Edwin Peel (eds), *Contract Terms* (Oxford University Press 2007) 241, 241, 249.

6.3. PART TWO: Saudi law

6.3.1. Contractual provisions in general

Since the legal concept of force majeure clauses is unclear within Islamic law, even according to contemporary commentators, it is important to shed light on the view of traditional Islamic jurisprudence regarding contractual provisions in general.[117] This, without doubt, will help to identify the legal proposition of the force majeure clauses.

The general principle is, as expressed by Ibn Taymiyah, that 'men shall be permitted to make all the transactions they need, unless these transactions are forbidden by the Book[118] or by the Sunnah.'[119] The 'transactions' referred to here includes all types of contracts and stipulations. This principle is demonstrated by many Qur'anic and Prophetic authorities. The Qur'an states, '… Allah has permitted trade and has forbidden *riba* (interest).'[120] The word 'trade' refers to its general meaning. The Qur'an also states that, following some forbidden transactions, '... except it be a trade amongst you, by mutual consent'.[121] This verse, having first prohibited the unjust acquisition of people's property, permits trade with mutual consent. The Prophet also said, 'Muslims are bound by their stipulations unless it be a stipulation, which declares unlawful what is permissible or permits what is unlawful.'[122] The tone of these authorities promotes the freedom of individuals to determine the clauses and stipulations within their contract except regarding some prohibited transactions,

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117 See in general, M Musa, 'The Liberty of the Individual in Contracts and Conditions According to Islamic Law' (1955) 2 Islamic Quarterly 79, 84; S Rayner, *The Theory of Contracts in Islamic Law* (Graham & Trotman 1991) 93.

118 Holy Qur'an.

119 A Qasim (ed), *Majmo'a Fatawa Ibn Taymiyyah*, vol 29 (King Fahad Complex 2004) 170. See also M Ibn Al-Qayyim, *I'lam Al-Muwqni'in, vol 4 (Dar Al-nafaes 2001)* 323,324; M Al-Buhoti, *Kashaf al-Qina' 'an Matn al-iqna,* vol 3 (Al-Nasir Al-Hadithah 1982) 349.

120 Qur'an [2:275]

121 Qur'an [4:29]

122 Sunan Attirmithi [No. 1352].

mainly *riba* (interests or usury) and *gharar*[123] (risk or speculation),[124] which are considered, in the eye of Islamic teaching, a cause of disputes among people.

6.3.2. Force majeure clauses

In the 'iron case'[125] it was stated that the court rejected the alleged hardship because the loss incurred was not a 'fundamental' one. Besides the court finding in that case, the contract, in fact, provided that the contractor took the risk of an increase of cost. This indicates that Saudi courts, in principle, recognise and enforce contractual provisions that deal with supervening events.

Surprisingly, however, the court in a different case[126] showed a contrasting view to the above, which did not recognise the validity of a force majeure clause. A contract for the five-year lease of a commercial shop provided that 'the lessor will not be responsible for any damage for the leased property, even if it has been rendered by (superior force).' A storm occurred and partially destroyed the property. Upon a litigation, the court *inter alia* held that such a clause was invalid. The court justified its judgment on a principle that was laid down by some Islamic jurists, which was that any clause that provides that one party should bear the liability of loss that originally should have been borne by the other party is not valid one.[127] Accordingly, a stipulation that a tenant should bear the loss resulting from the destruction of the subject matter of a contract as a result of a supervening event beyond the control of either party is unenforceable, as it goes against what the contract naturally involved.[128] With this taken into account, any clause in the sale of contract that provides that the

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123 Qur'an [5:90].

124 For a full account of the concept of '*riba'* and '*gharar'* see for example, Nabil Saleh, *Unlawful Gain and Legitimate Profit in Islamic Law: Riba, Gharar and Islamic Banking*, (2nd edn, Graham & Trotman 1992); Abdulkader Thomas (ed), *Interest in Islamic Economics: Understanding Riba* (Routledge 2006); F Vogel and S L Hayes, *Islamic Law and Finance: Religion, Risk and Return* (Brill 2006) 71-96.

125 See the fact of this case in Section 4.3.1.2, Chapter 4.

126 The General Court in Riyadh, decision No. 3414350 in (1434AH/ 2012).

127 M Al-Buhoti, *Al-Rod Al-Morbi'* (Maktabat Al-Riyadh Al-Hadethah 1970) 366; A Ibn Qudamah, *Al-Mugni*, vol 4 (Dar Al-fikr 1985) 115.

128 It should be noted that under Islamic law, the general principle is that a lessor assumes all risks of loss (not caused by the lessee) and the risks of maintenance.

buyer bears the risk of a loss before the delivery[129] of the subject matter would not be enforced.

It is very difficult to reconcile between the two judgments in the above cases; however, it may be said that excessive expense is not, in fact, an obligation which is within the contract nature. This is demonstrated by the fact that in cases of burdensome loss the court intervenes to modify the loss. So, because of this, the contracting parties could provide for this event and place such a risk on one party. In the second case, the loss or destruction is linked to the one who bear the risk.

Despite the above attempt for explanation between the two different court decisions it is very difficult to see why force majeure clauses cannot, in general, be enforced. If both parties to a contract choose freely and voluntarily how the risk should be borne then that stipulation should be respected. The Islamic jurists did not provide any explanation for this principle except that it works as to contradict the contract's nature. Therefore, it can be argued that force majeure clauses should be recognised and enforced. It is an absurdity not to enforce the parties' stipulations regarding the shift of risks. The principle of freedom of contract and conditions supports it. From this principle, many types of clause that are not even known to Islamic law are found, often in commercial contracts, and recognised by Saudi courts, such as liquidated damages clauses.[130] Furthermore, commercial activities nowadays necessitate the application of force majeure clauses, as they play an important role in preserving rights and duties, and therefore increase the degree of certainty.

6.4. Conclusion

This chapter has been mainly devoted to examining the role that is played by force majeure clauses in English law. It was shown that if a contract provides a force majeure clause, and that clause precisely covers the events that would otherwise

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129 It should be remembered that the general rule in Islamic law is that the risk pass with the delivery, see Section 3.3.1.5, Chapter 3.

130 Such types of clauses are also embodied in the Regulations of Governmental Competitions and Procurements (2006) Art. 48 and 49. It is also judicially recognised: see, for example, the Board of Grievances, decision No. 1140/2/Q in (1414AH/ 1993) and decision No. 3094/1/Q in (1426AH/ 2005).

frustrate the contract, this that means the doctrine of frustration has no role to play. This is because the risk allocation that is meant by the rule of frustration is replaced by the contracting parties' allocation.

Although the doctrine of frustration applies within a narrow scope, considerable advantages can be earned by inclusion into a contract a suitably drafted force majeure clauses. This is the best way of avoiding the rigidity and uncertainty of the application of the doctrine. However, this scenario is not easy as it appeared. The problematic issue with such clauses lies in the fact that drafting precise and functional contractual provisions is not always, if not impossible, an easy task. This is because it requires the parties to foresee the unforeseeable of the future. Force majeure clauses also involve the transaction being costly for the parties. Further issue can be attributed to the fact that contractual provisions are subject to court restrict interpretation, which might be constructed not to extend to cover the alleged event. Bearing these difficulties in mind, a suggestion can be made is to subject the doctrine of frustration to reconsideration, with the objective of expanding its scope. In particular, in situations where a contract have become very onerous as a result of the occurrence of an expected event.

This chapter also illustrated the view of Islamic law towards contractual provisions in general. It gives the contracting parties the freedom of stipulation in their contracts, except for any provision that involves *riba* or *gharar*. The current unjustified court attitude toward force majeure should be reviewed and reconsidered. It is an absurdity not to enforce force majeure clauses that are agreed upon freely and mutually by the contracting parties.

CHAPTER SEVEN: CONCLUSION

All systems of law must address the problem of subsequent impossibility or hardship which may be expressed as the question: what is the effect upon a contract of changes in circumstances that have occurred subsequent to the conclusion of the contract may prevent or impede a party from performing it? However, the scope and application, as well as the terminology associated with any available legal relief, varies between jurisdictions. This thesis addressed this issue in relation to both English and Saudi law. Two thirds of this thesis examine the more developed English doctrine of frustration, while the remaining third was devoted to the doctrine of impossibility under Saudi law.

This thesis commenced with comparisons of the doctrine of impossibility between English and Saudi law, and, where appropriate, with other national and international legal systems. This comparative approach has contributed to current understandings of how the two legal systems adopt individual approaches to deal with this problem. Comparison has shown that in their treatment of the problem impossibility, both legal systems are harmonious in many aspect and divergent in others. The most pertinent harmonious and divergent aspects will be addressed in the following discussion.

Both systems of law recognise the value and importance of the principle of the sanctity of a contract. Meanwhile, both legal systems recognise that a party may be excused in particular circumstances when a contractual obligation has been subject to interruption. In English law, this issue is now addressed under the doctrine of frustration. The general doctrine first emerged in the nineteenth century, in the case of *Taylor v Caldwell*; before that time the general prevailing approach was to apply a strict rule prescribing 'absolute liability' for the non-performance of contractual obligations. The doctrine now offers relief in situations where, after a contract has been made, events occur that make performance of the contract impossible, render it illegal or otherwise radically different from what could be contemplated by the parties at the time they entered into the contract.

Nevertheless, the English doctrine of frustration remains very narrow. This restrictive nature of the doctrine is intended to prevent it from being used as an escape route by those seeking to escape from a poor bargain. The narrowness of the doctrine is apparent in both its scope and associated legal effects which are now partially regulated by the Law Reform (Frustrated Contracts) Act 1943. In terms of its scope, it appears in the doctrine's rejection of claims based upon increased cost in performance or 'commercial hardship'. This study reveals that there is very little, if any, support for the view the commercial hardship can be considered a sufficient grounds to apply the doctrine of frustration; rather many judicial statements explicitly reject commercial hardship alone as a sufficient ground of frustration. The courts have been unwilling to consider the hardship in particular in the context of long-term contract, in which the changed circumstances are more likely to occur and it is also more difficult for the parties to provide for it. Even the academic development and recognition of the concept of the so called 'relational contract', which calls for consideration of norms between parties, such as cooperation, has failed to persuade courts to promote flexibility. Furthermore, narrowness in scope can be observed when not recognising the principle of the partial allocation of goods. The narrow scope of the doctrine of frustration is also apparent with regard to the partial frustration of contracts. The English courts have refused to developed the concept of 'reasonableness'—in regard a party's partial allocation of available goods, or their election to perform one among some contracts in order to introduce an element of flexibility when making determinations over claims of frustration. This particular refusal reflects the more general intransigence of English courts to provide a broader doctrine of excuse in respect to subsequent hardship and impossibility.

With regard to the legal effect of the English doctrine of frustration, the doctrine when it operates causes the contract to end irrespective of the wishes of parties and relieving both parties from further performance. The rigidity of this proceeds from the fact that the contract cannot be kept alive or revived based on the option of either party, nor can the court keep the contract on foot and grant, for example 'suspension' or 'adjustment' the contract to meet the new changed of circumstances. The Law Reform (Frustrated Contracts) Act 1943 was introduced to amend the old common law 'the loss to lie where it has fallen'. The main focus of the Act is on 'the prevention of

unjust enrichment', as stated by Robert Goff J.[1] The Act does not deal with the recovery of reliance losses which do not result in a benefit to the other party, nor does it provide for apportionment of losses between the parties.

In addition to the excuse by operation of the law, the study has examined excuse provided under contract, and in particular under force majeure clauses. It was shown that irrespective of the meaning and the different events ascribed to the concept of force majeure within a force majeure clause by a particular legal system, the importance of the clause is then recognised in English law. Considering the narrowness of the English doctrine of frustration, the value of force majeure clauses, of course only where they are enforceable, is indisputable, as their advantages are considerable and their versatility reassuring. Thus, by contextualising excuse in law and excuse under force majeure clauses within a comparative framework, the potential of the latter method so as to avoid liability becomes more apparent. This is evident, for example, with regard to its functionality in cases where there is a problem experienced with partial allocation.[2] As well as the possibility of providing remedies such as 'suspension' and 'modification' of a contract. Despite the advantages of force majeure clauses, inserting them into a contract does not guarantee contractual protection against the risk of all supervening events, or that every problem arising because of a supervening event is dealt with. This is because of the need to draft adequate clauses to address all unforeseeable events in an uncertain world, as well as being very costly, is a difficult, if not impossible, task. Furthermore, force majeure clauses might not be construed by the courts as adequately expressing the intentions of both parties to the contract when making it.

Saudi Arabia, does not have a codified contract law or a system of precedent like the UK where judicial cases are considered authoritative, rather, reliance is mainly based on the principles of Islamic jurisprudence. Traditionally Islamic writings were not directed to creating theories to address concepts under the subject of a contract; rather their focus was upon seeking practical solutions when problems arise. This is the case for the topic of impossibility, as demonstrated in this thesis. There is no consolidated

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1 See Section 5.2.2.2.2, Chapter 5.

2 See Section 6.2.2, Chapter 6.

theory of impossibility similar to that in any other system of law, such as the doctrine of 'frustration' in English law or 'force majeure' in French law.

Despite the lack of an identified theory of impossibility in Islamic jurisprudence, rules and principles relevant to the factual scenarios addressed by the common law doctrine of frustration are to be found dispersed throughout traditional Islamic writings. In this research, two featured applications known to traditional jurisprudence were highlighted. These are the concept of *al-udhr* (excuse), which concerns the contract of hire, and *al-jawa'ih* (natural disasters), which concerns contracts concerning the sale of fruits and crops. These applications, when considered alongside other rules and principles attached to scattered statements and hypothetical cases set out by jurists, reveal how the case of impossibility can be approached under Islamic law.

This study has shown that the rule of impossibility in Saudi law is relatively broad one, a fact this is readily emphasised by its wide scope and flexible approach to remedy. With respect to its scope, the courts might excuse a contractual relationship in circumstances where, after the formation of a contract, and before the performance of it, an unexpected event occurs, which is not the fault of either party, resulting in an obligation to be either physically or legally impossible, its contractual purpose is valueless or, bringing about commercial hardship. In particular it is the recognition of commercial hardship that signifies a breadth of scope.

With regard to the legal effect of impossibility in Saudi law there are various different reliefs made available. In general, the relief offered depends on the situation itself; thus in cases where there has been a total destruction of the contractual goods an obvious effect is to automatically terminate the contract. However, other remedies are recognised in addition to termination, for instance, in clear contrast to the common law, 'suspension' and 'adjustment' of the contract. It was shown that the related rights and liabilities after having a contract excused is dealt with poorly in Islamic jurisprudence thus, issues such as 'losses apportionment' are unclearly addressed, if not.

The study highlighted a number of critical differences between the treatment of situations involving impossibility or hardship under English and Saudi law. The key points raised are repeated here to illustrate how the courts, under both legal systems

have approached cases associated with the rule of frustration or impossibility. The objective here is to determine whether the same results would have been attained separately under different jurisdictions, by applying the same principle, or according to an entirely different basis.

When analysing how English law and Saudi law approach the doctrine of frustration or impossibility, it is important to note that both recognise that the promisor does not assume all the risks inherent in the performance of a contract. Both English and Saudi courts have excused parties in situations of impossibility of performance, illegality and frustration of purpose. However, both have been distinguished in both scope and effect. In comparative terms, the English doctrine of frustration appears somewhat narrow. This is evidenced by the rejection of commercial impossibility as sufficient grounds for invoking the doctrine. To illustrate how English and Saudi courts would respond to such a problem a reference can be made to the American case of *ALCOA*,[3] based on the assumption that there had not been the price escalation clause (which turned out not be working adequately).

It would appear that, had the case been decided under an English court, the defendant (ALCOA) would not have been excused under the doctrine of frustration. English law (applied strictly) would not relieve ALCOA from the commercial hardship it was suffering despite the fact that the increased costs were unreasonable and excessive (almost 500 per cent greater than the anticipated costs). There are no English authorities to support the view that ALCOA's contractual obligation could be excused. In fact, in general, a hostility to hardship was the courts' view, and no possibility that the court would not discharge the contract but, instead, as the U.S. court did, modify it to meet the new circumstances. Even the fact that the contract could be classified as a long-term or 'relational' contract would not be considered a factor justifying flexibility. In this research, it was shown that the *Staffordshire* case,[4] where expenses had increased to twenty times the contract price, does not furnish clear support for such a situation. The contract in *Staffordshire* was set aside, according to the reasoning of the two judges, on the grounds of construing a contract term over which the agreement could be terminated at reasonable notice, and not on the

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[3] *Aluminium Co of America v Essex Group Inc (the ALCOA)* 499 F Supp 53. For a full account of this case see Section 4.2.4, Chapter 4

[4] See Section 4.2.2.1, Chapter 4.

commercial hardship in the performance. The judgment of Lord Denning judgment,[5] in which the contract was discharged because of the steep fall in the value of the currency since the contract had been concluded, is not alone sufficient to imply clear support for argument in favour of commercial hardship. This is because he held that the contract had to be terminated with reasonable notice, and that the doctrine of frustration operates effectively to automatically discharge the contract.

It may appear paradoxical that English law, which recognises the concept of 'frustration of purpose', has been reluctant to recognise its mirror image, the circumstances of hardship. However, it must be recalled that English law has not expanded the rule of frustration of purpose since the coronation cases. Alternatively, the most satisfactory test for the operation of frustration, 'radical difference in performance' can be invoked here. Theoretically, the prohibitive cost of performance (500 per cent increase of the cost) can be said to result in effectively meeting the test described for of radical change of performance.

In contrast if the facts of the *ALCOA* case were subjected to Saudi law it would have been approached and resolved differently. The unreasonable hardship that occurred in this case would have been likely to amount to a 'fundamental' alteration, thereby allowing the court to intervene. Once the court had intervened, the contract would then need either to be discharged or adjusted to meet the new circumstances. However, a problem arises over when either 'discharge' or 'adjustment' is the most appropriate remedy. Further, the remedy of adjustment raises other issues, as there is no obvious basis to guide the court as to how it should modify the contract, i.e. should adjustment shift all the loss to the other party, half of it, or just some portion of it? It seems that this issue is left to the discretion of the court, depending on the facts of the case. The UNIDROIT Principles for example, share a flexibility with Saudi law, concerning the issue of hardship. However, the process followed when claiming hardship by applying those Principles is different.[6] Under the Principles, both parties ALOCA and Essex would have as a first step (Art. 6.2.3) engage in a process of communication, as ALOCA is entitled to demand that Essex enter into a process of renegotiation. If, however, the parties fail to reach an agreement within a reasonable timeframe, then

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5 ibid

6 See Section 4.4.2, Chapter 4.

either party is consequently authorised to resort to the courts. The court, upon finding that a situation of hardship exists, may, if it seems reasonable, terminate or modify the contract.

It does not follow, under the notion of flexibility in Saudi law, that the court will intervene wherever there has been an increase in the costs associated with contractual performance. To justify intervention the case of commercial hardship must be of an unreasonable and severe nature. To illustrate this issue, a reference might be made to the well-known Suez Canal cases. It would appear that the judgment reached by the English court would have been the same had the cases been litigated before the Saudi courts. That is the court would have rejected the claim to excuse the parties, as they would not have been deemed to have suffered large losses (approximately 23-26 per cent). Nevertheless, the approach to the issue would have differed. The English court refused to discharge the parties primarily on the basis that hardship was not recognised within the doctrine of frustration; therefore, increased costs alone would not be a sufficient reason for affording contractual relief. Instead, the cases were dealt with as cases where there was actual impossibility in the contemplated method of performance.[7] A Saudi court would have ultimately declined to excuse the parties on the basis that, although hardship could in principle excuse the parties, the hardship was not considered sufficiently excessive or unreasonable in law so as to provide such an excuse.

There is however a possibility that the English courts would hold that a contract could be discharged in circumstances of hardship. This is true only in situations where the hardship may be represented as having an effect beyond a mere increase in the cost of performance. Suppose the increase in expenses in the Suez Canal cases were very high and unreasonable, for example tenfold times normal costs, had the defendant taken the alternative route. Then, in such a case, the frustration would likely be found for the reason that the alternative method of performance was regarded as a 'radical' or fundamental change in the contemplated obligations of the parties.[8] Yet, in this cases,

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7 See Section 3.2.1.8, Chapter 3.

8 *Davis Contractors Ltd v Fareham Urban DC* [1956] AC 696, 729 (Lord Radcliffe). See Section 2.2.3.3, Chapter 2.

the frustration would not then have only been upon hardship, but primarily, upon impossibility in the originally contemplated method of performance.

A further differentiating point, between the scope of the application of the English doctrine of frustration and the Saudi law rules of impossibility, related to the notion of 'partial impossibility'. To explain this issue better, we can suppose that A contracted with B to buy identified goods from a source identified in the contract. However, before the risk of loss passed to A, half the goods were destroyed without fault from either party. In such a situation, the English and Saudi courts would provide the same result, but by applying a different process of reasoning. In Saudi law, B would be excused with regard to the affected half of the goods, but he would remain under the obligation to deliver the remaining unaffected goods to A. A, on the other hand, has a choice between partially upholding the contract with the rateable reduction, as the contract would automatically become partly impossible in regard to the affected goods, or bringing it to an end because of the partial impossibility. In English law, the same choice would be offered to A; however, this choice is not, in the English case, regarded as an option to treat the contract as partly frustrated. It is regarded simply as an application of A's right to choose between rescinding and affirming the contract on account of B's non-performance; and while on the one hand the right to rescind is not dependent on any breach by B, it is, on the other hand, equally independent of the requirements of frustration.[9] Thus, there is so such concept as partial frustration, as the contract either is frustrated or remains in force.

Suppose further, that B in the above case had entered into other contracts beside A's, and that the available goods were sufficient to fulfil only A's contract, or some of his contracts but not all of them. In such a situation, under English law, B would be not be excused if he acted reasonably in allocating the available goods. Thus, choosing to allocate the available goods to fulfil in full some particular contracts and allege frustration in respect to others contracts, or to allocate the available goods in a form of *pro rata* division between the contracts would not be sufficient for relief. Rather, his action would be considered as amounting to 'self-induced frustration'; that means, it was his choice that brought the frustration and not the frustrating event.[10] This is, of

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9 G Treitel, *Frustration and Force Majeure* (3rd edn, Sweet & Maxwell 2014) para 15-018. See Section 3.2.1.6, Chapter 3.

10 See Section 2.2.2.1, Chapter 2.

course, harsh position for B. By way of contrast, B, under the U.S. Uniform Commercial Code, would be excused if he showed that he acted reasonably in allocating the partial goods. This is because of the notion of 'reasonableness' and 'fairness' that is recognised by the UCC. In English law, such a notion is not considered in situations of this type. The notion of 'reasonableness', however, is only recognised in the context of contractual provisions. In Islamic jurisprudence, although such a problematic issue has not been discussed it might tentatively be suggested that the underlying principles of justice that inform the application of all Islamic law would render B would not liable.

A further important point concerning the application of the English doctrine of frustration pertains to legal consequence. Supposing that the English doctrine of frustration were applied to the *ALOCA* case the contract would have been brought to an end automatically irrespective of the wishes of the parties. In English law, the principle of modification adapting the contract to meet the new circumstances, such as the U.S. court did in the *ALCOA* case, is not recognised. It follows that the claimant (Essex) would probably have been expected to bear the resulting extra cost of production. A further issue concerning the legal consequences of frustration is the losses resulting from the discharge (that not resulted in a benefit for the other party). The legal position is ambiguous. It is not clear whether a single purpose can be identified as underlying *all* the provisions of the Law Reform (Frustrated Contracts) Act 1943. However, as noted above it has been suggested that the purpose could be prevention of unjust enrichment.[11] It is also unclear whether the remedial provisions of Saudi law in this area based upon any single guiding principle as no such specific principle has been identified in Islamic jurisprudence. However, if the losses resulting from an excused contract are not, under Saudi law, apportioned between the parties this would perhaps be inconsistent with the general principles of equity and justice which underlie all Islamic law and which appear to justify a more generous to relief in cases of commercial hardship.

It was shown above in the analysed cases that the Saudi law of impossibility exhibits greater flexibility than that the English doctrine of frustration. This is attributed significantly to the philosophies of 'justice and fairness', which work to activate the

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11 See section 5.2.2.2.2 and 5.2.2.3, Chapter 5.

concept of impossibility. It gives the court a breadth of power to excuse a contract when it sees the justice requires that it do so. Such a broad power is not admitted in English law. Indeed, commentators and judges have struggled to identify a single justifying principle to explain the proper extent and operation of the common law doctrine of frustration. The theory of 'superior risk bearer' is indeterminate. It is enough to say that the answer to the question of which party in better position to insure is likely to be unpredictable. This uncertainty leaves open the possibility that each party will rely on the other party to face the risk (or worse, that each party rakes out insurance for the same risk). This failure may be the reason why many different tests for frustration have been proposed over the years. Thus, tests such as the 'implied term', 'just and reasonable solution', 'foundation of the contract', and 'total failure of consideration' have failed. It is to some extent the test of 'radical different' in the contract is the one most satisfactory and seen as an appropriate justification for the doctrine. In contrast, it is the adoption of the broad basis for the concept of impossibility in Saudi law results a more receptive and flexibility judicial approach. Thus, the Saudi courts have a much greater opportunity to address the claims of excuse than the English courts are ever likely to encounter especially as the Saudi courts seem generally to adopt more interventionist roles than English courts. Nevertheless, in spite of the seemingly attractiveness of this notion 'justice', it is a dangerous one. Giving the court wide discretion to do what is just might lead to undermine the sanctity of contracts, especially in commercial contracts. There is clear a potential for inconsistency here; what is considered just to one judge might not be to other. In Saudi Arabia, where there is no codified law nor binding judicial cases to follow as guidelines the danger of quasi-discretionary decisions degree is higher. Thus, although the English doctrine of frustration is a narrow one its scope and limitations are significantly clearer than the rule of impossibility in Saudi law.

The final point in the analysis is that the best way to address the possibility of supervening events, and to avoid the narrow application of the English doctrine of frustration, is by providing for it in the contract. In the above cases, the defendants would have been able to protect themselves by inclusion of force majeure clauses, (assuming they are enforceable clauses) which might have indicated the intention to deal with the supervening circumstance in a particular way. In the circumstances that arose in the Suez Canal or *ALCOA* cases the original contract might have provided an adequate exculpation clauses that facilitated a contractual modification. However, and

as it was shown in the thesis, merely inserting force majeure clauses does not mean the parties are safe and their rights are protected. To the extent that this is true it undermines the argument that if the parties want to avoid the rigidity of the application of the doctrine of frustration they should incorporate contractual provisions to overcome this in their contracts. Undoubtedly, one can observe that the use of force majeure clauses in Saudi law is not as common as it is in English law. This is true, mainly because of the relatively flexibility afforded by the application of the rule of impossibility. Despite this fact, the legal opinion on recognising force majeure clauses is not clear in the Saudi courts. A significant finding of this thesis is that the Saudi court offers no clear principles with regard to the legal view of force majeure clauses.

To conclude finally, several points are worthy of additional attention. Firstly, both English and Saudi law align in not operating the law of frustration or impossibility discharge if the alleged event was foreseen or foreseeable at the time the contract was concluded. This is based on the supposition that the parties foresaw the risk, and therefore assumed its allocation. However, this is an inadequate view. It was shown in this study that in a case where parties are silent with regard to a foreseen risk, the allocation of that risk is not conclusively proven. For instance, the parties might simply left the risk unallocated in the hope that it would never occur, or they feared that negotiating over the allocation of risk might be injurious to the relationship, and that, as a result, the bargain might fall through. Instead, it was argued that, as a first step, the court must comprehensively investigate the circumstances leading up to and surrounding the parties' agreements in order to ascertain the allocation of risk. For instance, the court might attain considerable assistance from the parties' manner of dealing, including pre-contractual statements and behaviours. As a second step, after the court investigated and concluded that the risk was unallocated, the contract may be held to be frustrated. Such an approach would be more transparent and most importantly respect the parties' initial contractual arrangement.

In English law, it is suggested that there is no reason for not operating the doctrine of frustrating to situations of commercial hardship. This can be supported by observing that the limited doctrine of frustration which English law now recognised was itself a response to the injustice inherent in rule of absolute liability. Once this is recognised, then equally why not to see the same notion of justice in situations where contracting

parties' obligations have become financially very burdensome without fault from either side? There is a certainly some lack of consistency in situations where the doctrine of frustration has been applied and where it has not in situations of commercial hardship. The most satisfactory basis for the doctrine, 'radical different' in performance, conceptually and theoretically is capable of embracing the circumstances of commercial hardship. An extreme change in contractual equilibrium conceptually can be described as a radical change in performance. Indeed, a mere loss should not be seen as sufficient grounds for frustration; the English court was correct in rejecting the alleged frustration in the case of *Davis Contractors*. The argument put forward that parties are free to incorporate a clause in their contract in order to avoid the rigidity of the doctrine of frustration, and therefore protect themselves from a supervening event of commercial hardship, is perhaps not always adequate response to cases of severe hardship. In this regard, applying the doctrine of frustration to cases of commercial hardship, assuming it was recognised, should not be confined only to a specific type of contracts, particularly long-term and relational contracts. This is because the notion of both long-term and relational contracts is unclear and elusive. The ambiguity and difficulty lies in identifying what constitutes long-term or relational contracts. It is true that in long-term contracts there is a difficulty for parties to allocate the risks of future events at the time of the contract and therefore, the possibility of it being interrupted by the risks is high. Likewise, relational contract bears valuable norms such as trust and cooperation between the parties. Nevertheless, there is no valid reason to see why the promisor in long-term contracts might be excused and not in discrete or short-term ones. So, as the changed circumstances might take place during long-term and relational contracts, this is so for short-term contracts.

Therefore, as observed above, commercial hardship can be better served by the modification of a contract than by the only and severe relief under the doctrine; automatically discharge the contract irrespective of the wishes of the parties. It might be true that the parties would never agree to an automatic discharge of the contract, had they previously considered the potential interruptive events. Rather, each party would have sought reservations or qualifications of some form. Therefore, a court imposed modification is consonant with 'gap-filling' in contracts philosophy, and furnishes a flexible process for dispute resolution. England has not experienced events of such a magnitude as those suffered, for instance, by Germany, subsequent to the

two World Wars, which drastically affected the equilibrium of commercial contracts necessitating the reconsideration of the law.

Despite the fact that the concept of impossibility in Saudi law is a flexible one, it is somewhat challenging to delineate its exact scope and impact. A number of important points remain unclear, and some have not been discussed at all in the relevant literature, resulting in calls the need for further development; such as, ascertaining the circumstances in which courts will impose a solution, how the remedy of modification of the contract will be applied, the extent to which increased cost in performance is sufficient to invoke the concept of impossibility, or the legal status of the force majeure clause. Much of the jurisprudence was written hundreds of years ago, when the typical transaction was relatively simple and compared to the diverse scenarios that take place now. Statements in Islamic literature not only address limited contractual stereotypes but they are also sometimes expressed in general statements without qualifications. Further, opinions such as that, a lessor is entitled to be discharged from his contract upon deciding to sell his house, and a lessee has also the same entitlement upon the desire to travel or to leave the area to change jobs, must not, as with many other scenarios—be adopted without qualification because such prescriptions show insufficient respect for the fundamental principle of the sanctity of contracts. In the modern world, both transactions and interruptive events take multiple forms, and there is a prevalent use of force majeure clauses, all of which necessitate further developments of the Saudi law. In addition, the heavy reliance upon Islamic jurisprudence, without recourse to a codified law or precedent cases to follow, requires justification and is perhaps in need of reconsideration.

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