OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION OF CONTRACT; RECENT DEVELOPMENTS

Supervised By

ATAULLAH KHAN MAHMOOD

Submitted By

HAFIZ MUHAMMAD USMAN NAWAZ

(LL.M Corporate Law)

(*Faculty of Shariah & Law*)
INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD.

LLM

341.69

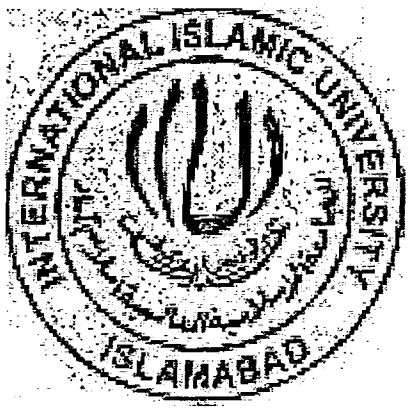
NAO

1 - War Crime trials

2. Crime against humanity

OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION OF CONTRACT; RECENT DEVELOPMENTS

(A dissertation submitted in partial fulfillment of the requirements for the degree of Master of Laws (Corporate Law))



Supervised By

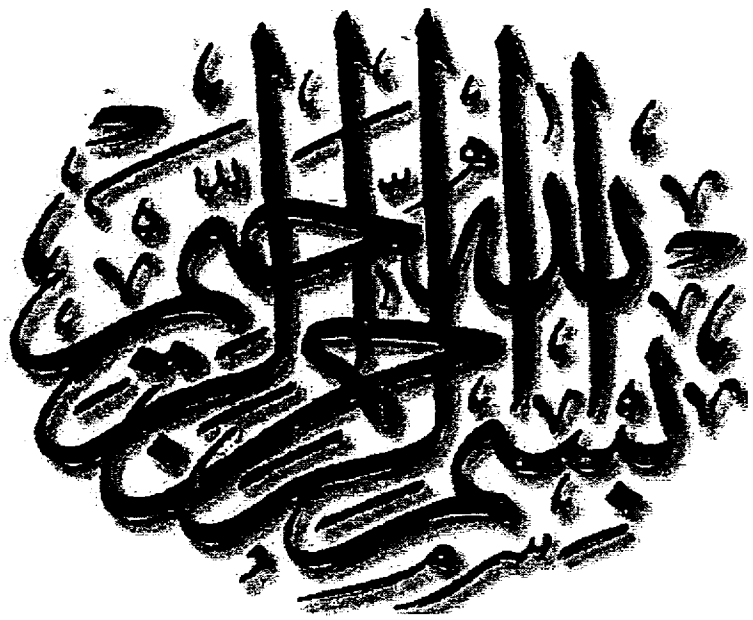
ATAULLAH KHAN MAHMOOD
Assistant Professor of Law,
International Islamic University, Islamabad.

Submitted By

HAFIZ MUHAMMAD USMAN NAWAZ
Registration No. 242-FSL/LLMCL/F09
LL.M Corporate Law

(Faculty of Shariah & Law)
INTERNATIONAL ISLAMIC UNIVERSITY, ISLAMABAD.

(June 2012 A.D/Rajab 1433 A.H.)



FINAL APPROVAL

It is certified that we have read the dissertation submitted by Hafiz Muhammad Usman Nawaz, Registration No. 242-FSL/LLMCL/F09 on the topic "**Outbreak of War as a Cause of Frustration of Contract; Recent Developments**" in Faculty of Shariah & Law. We have evaluated the dissertation and found it up to the requirements in its scope and quality by the International Islamic University, Islamabad for award of LL.M Corporate Law Degree.

VIVA-VOCE EXAMINATION COMMITTEE

1. **SUPERVISOR:**
   Mr. Ataullah Khan Mahmood
   Assistant Professor of Law,
   International Islamic University, Islamabad.

2. **INTERNAL EXAMINER:**
   Mr. Fakhar Mahmood Makhdoom
   Assistant Professor of Law,
   International Islamic University, Islamabad.

3. **EXTERNAL EXAMINER:**
   Mr. Shafqat Mahmood Khan
   Advocate High Court.

TABLE OF CONTENTS

CHAPTER NO. 1

INTRODUCTION OF FRUSTRATION OF CONTRACT

CHAPTER NO 2

DEVELOPMENT OF DOCTRINE OF FRUSTRATION

CHAPTER NO 3

OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION

Chapter No 4

COMPARATIVE ANALYSIS & CONCLUSION

DECLARATION

I hereby declare that this dissertation is original and has never been presented in any other university or institute of learning. I also declare that this dissertation has never been copied and any secondary information used has been duly acknowledged in this dissertation.

HAFIZ MUHAMMAD USMAN NAWAZ

(June 2012 A.D/ Rajab 1433 A.H.)

DEDICATION

This dissertation is dedicated to my beloved parents for their unconditional love, moral and financial support and also for their care and prayers. May Allah always shower His blessings upon them. Ameen.

ACKNOWLEDGMENT

In the name of Allah, the most beneficent, the most merciful. Salaat (Durood) and Salaam (Salutation) is upon our beloved Prophet Muhammad (ﷺ). I would like to acknowledge my parents who have supported me throughout my career with their prayers. Their support and care helped me to focus on my study. I would like to acknowledge the greatness of my supervisor Ataullah Khan Mahmood, Assistant Professor of Law for his special attention, support, advice and guidance. This work may not have been possible without his assistance. Its my pleasure to say thanks to him for his assistance and guidance. I would like to acknowledge the assistance and motivation provided by Dr. Muhammad Munir, Chairman Department of Law, IIUI. I would like to acknowledge the sincerity and support of all my colleagues especially Hafiz Muhammad Siddique, Hafiz Usman Rafiq, Ziaur Rehman, Ikram Ullah, Akbar Khan and Zaheer Abbas. I am especially thankful to my friends Muhammad Umer Mahboob, Tahir Ahmad and Tamoor Mughal for creating friendly environment at Flat. I warmly say thanks to them for providing me environment of fun and joy at our Flat. I warmly say thanks to my class fellow who is like my younger sister, Ms. Sania Ehsan for her support and sincerity. I am also thankful to my colleague Ms. Saira Bashir Dar for editing this thesis. At the end, again I say special thanks to Allah Almighty for His countless blessings upon me.

HAFIZ MUHAMMAD USMAN NAWAZ

(June 2012 A.D/ Rajab 1433 A.H)

TABLE OF CASES

ABSTRACT

OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION OF CONTRACT; RECENT DEVELOPMENTS

BY

HAFIZ MUHAMMAD USMAN NAWAZ

This dissertation describes the concept of frustration of contract with special focus on intervention of war as a cause of frustration of contract and its effects on the performance of contracts. There are different factors which affect the performance of contract and become a cause of frustration of contract. Historically, there was no concept of frustration of contract after the formation of valid contract. The doctrine of absolute liability or absolutism was prevalent among the contracting parties. Parties had to perform the contract whatever the circumstances may be. Due to this, parties had to face many problems in performance of the contract. With the passage of time this doctrine had been changed by the introduction of the doctrine of frustration of contract. Some principles and rules have been prescribed by judges to apply the doctrine of frustration. These principles and rules had played a role to create easement for contracting parties in case of emergence of fundamental changed circumstances. Similarly war is a cause of frustration of contract because it brings a fundamental change in circumstances after the conclusion of a valid contract. In this dissertation, two aspects of war have been described with their effects on performance of contract. The logical conclusion of this dissertation is that Outbreak of war is a cause of

frustration of contract only where it occurs after the parties have entered into the contract and the performance of the contract is rendered illegal or impossible by that event. But the legality of performance is not affected by the war and the contract does not automatically become frustrated by that event if the outbreak of war affects the contract indirectly only and does not change the circumstances fundamentally.

OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION OF CONTRACT; RECENT DEVELOPMENTS

INTRODUCTION:

The purpose of this dissertation is to introduce the concepts relating to performance of contracts and their exceptional circumstances under which a party to the contract may be excused from specific performance of the contractual liabilities. Actually the main focus is on the concept of frustration of contract as an exception to the general principles of contract. Application of the doctrine of frustration of contract has been elaborated with its limitations. In this dissertation, different factors have been discussed as a cause of frustration of contract with special focus on intervention or outbreak of war as a cause of frustration of contract.

The dissertation has been divided into four chapters. In first chapter, general introduction of frustration of contract has been given. It is also explained what was the remedial structure of common law. The relevance of doctrine of frustration with the law relating to breach and with the development of concept of contract has been explained to know the actual position of the doctrine. At the end, the points of similarity and points of difference between frustration and force majeure have been discussed to show a clear picture of the doctrine.

The second chapter deals with the development of the doctrine of frustration. In past, an old common law doctrine of absolutism was prevalent to determine the rights and duties of contractual parties. Parties had to perform the contract irrespective of the impossibility of performance. Paradine v Jane was an historical case which established the doctrine of

absolute liability of contracts. Due to creation of this doctrine, it became impossible for contractual parties to claim excuse from the performance of the contract. This case was decided in 1647. Doctrine of substantial performance and doctrine of prevention of performance were recognized after this and strengthened the doctrine of absolute liability. But with the passage of time, the doctrine of absolutism had been affected and subsequently changed with the introduction of doctrine of frustration. Taylor v Caldwell was the first case which had worked as revolutionary factor to change the doctrine of absolute liability into doctrine of frustration. After this many judicial decisions and legislative works had played their important role to determine the application and limitation of the doctrine of frustration of contract.

The third chapter is the key chapter of dissertation which gives a clear picture about the effects of war on performance of contracts. The effect of outbreak of war has been discussed in two phases. First phase describes the effect of war on performance of contracts when it affects the contracts directly. In this phase, discussion of alien enemy is very significant. This phase also deals with prohibition of trade with enemies especially in the state of war. While the second phase deals with effects of war on the performance of contracts when it affects the contracts indirectly. Now in this situation, war does not automatically frustrate the contracts until and unless fundamental change in circumstances has been occurred. Both the phases have been discussed with the help of decided cases especially series of cases known as the Suez Canal cases and the Shatt-al-Arab cases. In the end, recent developments has been discussed and mentioned.

At the end, the fourth chapter deals with comparative analysis of both aspects of war with each other. An effort has also been made to elaborate the doctrine of frustration in the light of Islamic law.

.....

CHAPTER NO. 1

INTRODUCTION OF FRUSTRATION OF CONTRACT

1.1. INTRODUCTION

"The remedial structure of personal actions in the early common law (i.e. the system which developed in the late twelfth and early thirteenth centuries) was polarized around two notions. On the one hand were claims to entitlements, typified by the writs of debt and detinue (as yet essentially indistinguishable), in which the plaintiff claimed property or money which was due to him, and where, if the claim was successful, he would be awarded the sum due or the precise monetary equivalent of the property claimed. On the other hand were actions based on wrongs, trespasses, in which the plaintiff claimed damages as compensation for an injury which had been done in the past."[1] These two notions are considered as the Common Law Foundations.

"Liability in the action of debt was strict, in the straightforward sense in which it has been defined: once the plaintiff had adequately proved his entitlement, it was for the defendant to produce reasons why effect should not be given to it. There was no room here for any direct consideration of fault. Liability in trespass, too, has been described as strict, though in a very difficult sense."[2] This was the situation of faults with respect to covenants. There were many complex issues in the nature of covenants with respect to faults. Especially if the covenant was breached by any party not by his own act but by another's fault, now the

[1] F.D. Rose, *Consensus Ad Idem* (London: Sweet & Maxwell, 1996), p.3.
[2] Ibid, p.4

issue of liability was addressed in another way. In this regard it was said that 'a lessee of land should not normally be liable if the land deteriorated during the currency of the term as a result of lightning or other act of God.'[3] This concept was recognized after the thirteenth century[4] that liability depends upon the fault of the party. No man is liable for any incident or breach of covenant if he has not contributed to it by his own fault.

Law of frustration is tied up with the law relating to breach. The question of frustration comes up only in the event of non-performance of the contract. Non performance would amount to breach if there is no lawful justifiable excuse for such non-performance.[5]'If a contract is made, and for whatever reason it later becomes impossible for one party to perform their obligations, then we need to think about frustration. Be careful to note that frustration is about subsequent impossibility; if a contract was impossible to perform right from the outset, then the issue is one of mistake and not frustration!'[6]

The concept of frustration of contract is also relevant with the development of concept of contract especially to the doctrine of absolute liability under contract. 'The concept of frustration of contract is inextricably tied up with the development of concept of contract through the ages with particular reference to the doctrine of absolute liability under

---

[3] Ibid, p.5

[4] Actions based on the defendant's misperformance it would have been hard to avoid consideration of fault; in the last decade of the thirteenth century FLETA tells us that a shepherd employed to look after sheep would be liable if the sheep were killed as a result of his bad custody, but not if they died of some accidental cause. Supra note 3

[5] M.A. Sujan, *Law Relating to Frustration of Contract* (Bombay: N.M. Tripathi Private Limited, 1989), p.1

[6] Deborah Smithies, August 2007
http://tutor2u.net/law/notes/contract-frustration.html (accessed July 5, 2011)

the contract. The development of law of contract runs parallel to the development of political thought and economic advancement.'[7]

1.2. DEVELOPMENT OF CONCEPT OF CONTRACT

The development of concept of contract has different stages for better understanding. We may divide it into following stages.

1.2.1. From Status To Contract

The movement from status to contract is considered as the first stage towards the development of concept of contract. This dictum presented by Sir Henry Maine in 1861 in his book "Ancient Law". He said that 'the movement of the progressive societies had been a movement from status to contract. This movement can be said to be illustrated by the institution of serfdom in England and slavery in U.S.A. Both these institutions entailed immobility. Consequent on the advent of Industrial Revolution, which led to mobility of labour, status yielded place to contract.'[8]

1.2.2. Freedom Of Contract

The next stage of the development of concept of contract is the freedom of contract. Nobody was bound to enter into a contract if he did not wish to do so. 'The idea of Freedom of contract embraced two closely connected, but nonetheless distinct concept. In the first place, it indicated that contracts were based on mutual agreements, while in the second place

[7] M.A. Sujan, *Law Relating to Frustration of Contract* (Bombay: N.M. Tripathi Private Limited, 1989), p.2
[8] Ibid, p.3

it emphasized that creation of a contract was the result of free choice unhampered by external control, such as government or legislative interference.'[9]

'Freedom of contract presaged (i) Freedom of choice in the sense that nobody was bound to enter into any contract if he did not choose to do so; (ii) Freedom of choice in the sense that everyone had a choice of persons with whom he can contract; and (iii) Freedom of choice in the sense that people could make virtually any kind of contract on any terms they chose.'[10] So we can say that freedom of contract proved a basic stage or change in the development of concept of contract because it gave a lot of rights and choices to the parties with respect to terms of contracts, persons with whom contract may be made and so on.

1.2.3. Consensus Ad Idem

Freedom of contract led us towards *consensus ad idem*. *Consensus ad idem* is the basic rule of contract. Without this, contract cannot be completed or enforced. But the concept of frustration of contract has changed this concept about consensus ad idem.

> "Contract freely entered into envisaged *consensus ad idem*. While it is true that the basic rules of the law of contract are founded on the proposition that there must be consensus ad idem ascertained from the intention of the parties, yet the subsequent development of the law of contract during the later half of the nineteenth century demonstrated that this was merely a fiction. This was illustrated by the doctrine of frustration induced by the courts irrespective of the intention of the parties."[11]

---

[9] Chitty on Contract, 24thEdn, quoting Hasbury's Law of England (London: Sweet & Maxwell, 1977), Para 1
[10] M.A. Sujan, *Law Relating to Frustration of Contract* (Bombay: N.M.Tripathi Private Limited, 1989), p.5
[11] Ibid, p. 7

From the above discussion about the development of concept of contract it is revealed that the freedom of contract in terms of different choices is the key element towards the development of this concept.

1.3. GENESIS OF THE DOCTRINE OF FRUSTRATION

Historically every contract was an adventure. The times were so uncertain that a business transaction had to face either the perils of the sea or the hazards of the road journey. It was a common occurrence that caravans carrying merchandise were robbed by bandits or ships carrying stores were raided by pirates and buccaneers. It was, therefore, that the journey was started by invocation to God on an auspicious day and thanksgiving ceremony performed on safe arrival. Hence the nomenclature of adventure. Every contract, therefore, had an inherent element of risk and the concept of contract up to today embodies the allocation of risk between the parties, only the nature of risk has been changed---from transit risk to market fluctuations, governmental controls, international events relating to war and peace etc. having their impact on commerce and industry—and performance of executory contracts.'[12]

At one time the doctrine of absolute liability of the contract held complete sway and if the contract did not contain any clause providing for a contingency as absolving a party from performance, which was due to circumstances beyond control, the party was held liable absolutely to perform the contract.'[13]This was known as the doctrine of absolute liability.

[12] Ibid, p.16
[13] Ibid, p.17

Under the doctrine of absolute liability, obligations created by contract were binding in every case. Change of circumstances did not affect the contract. To make easy this concept, the doctrine of frustration of contract was developed in those cases where the contract could not be properly performed due to no fault of either party but due to happening of unforeseen events.

The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract renders it physically or commercially impossible to fulfill the contract. The doctrine is not concerned with initial impossibility which may render a contract *void ab initio* as where a party to a contract undertakes to perform an act which, at the time the contract is made, is physically impossible according to existing scientific knowledge and achievement.'[14]There are some differences between the doctrine of frustration and the doctrine of common mistake. "They both involve 'impossibility': common mistake concerning 'initial impossibility' (impossibility that arises prior to the formation of the contract) and frustration concerning 'subsequent impossibility' (impossibility that arises after formation of the contract). A significant difference between the two doctrines is that while common mistake renders the contract void *ab initio* (from the beginning), frustration merely discharges the parties from their future obligations."[15]

[14] Chitty on Contract, 24thEdn, quoting Hasbury's Law of England (London: Sweet & Maxwell, 1977), Para 1401.

[15] Ewan McKendrick, *Contract Law: Text, Cases And Materials, 2nd Edn.*(New York: Oxford University Press,2005), *905.*
http://www.routledgelaw.com/textbooks/9781859419137/sample/Chapter%2015.pdf (accessed 07-07-2011)

1.4. LITERAL MEANING OF FRUSTRATION

Literally frustration means the act of frustrating or the state of being frustrated. The meaning of frustration may be illustrated by different dictionaries and encyclopedias.

According to *West's Encyclopedia of American Law*, frustration may be defined as:

> "In the law of contracts, the destruction of the value of the performance that has been bargained for by the promisor as a result of a supervening event. Frustration of purpose has the effect of discharging the promisor from his or her obligation to perform, in spite of the fact that performance by the promisee is possible, since the purpose for which the contract was entered into has been destroyed."[16]

According to *Black's Law Dictionary*, frustration has been defined as:

> "The doctrine that if a party's principal purpose is substantially frustrated by unanticipated changed circumstances, that party's duties are discharged and the contract is considered terminated."[17]

1.5. LEGAL MEANING OF FRUSTRATION

After a discussion on the literal and dictionary meanings of frustration, we look towards its legal meaning. Legally frustration of contract has some essential elements which must be satisfied for frustration of contract. Legal meaning of frustration has been described in this way;

---

[16] *West's Encyclopedia of American Law*, http://www.answers.com/topic/frustration (accessed 08-07-2011), *Gale Encyclopedia of American Law*, 3rd Edition, Vol. 5

[17] Bryan A. Garner, *Black's Law Dictionary*, 8thEdn.(West: A Thomson Business, 2004), 694.

"Frustration occurs only where, subsequent to the conclusion of the contract, a fundamentally different situation has unexpectedly emerged. Not every turn of events satisfies the test imposed by the doctrine. The emergence of some new set of circumstances might make the performance of the contract more difficult, onerous or costly than was envisaged by the parties when entering the contract. Examples of such circumstances may include a sudden, even abnormal, rise or fall in prices or the failure of a particular source of supply requiring the seller to obtain supplies from another more expensive source. These events will not normally operate to frustrate a contract. They will do so only when they create such a fundamental change in circumstances that the parties cannot perform the contract they have made."[18]

Judges have explained the concept of frustration in different cases in different ways. The words of Lord Diplock about frustration are following:

"...[Frustration is] never a pure question of fact but does in the ultimate analysis involve a conclusion of law as to whether the frustrating event or series of events has made the performance of the contract a thing radically different from that which was undertaken by the contract."[19]

Lord Radcliffe has explained the doctrine of frustration as:

"...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 ... It was not this that I promised to do..."[20]

Lord Reid has described his view about frustration of contract in this way:

"... there is no need to consider what the parties thought or how they or reasonable men in their shoes would have dealt with the new situation if they had foreseen it. The

[18] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn. (London: Sweet & Maxwell, 2007), 117.
[19] In *Pioneer Shipping Ltd v BTP Tioxide Ltd; The Nema* (1982) A.C. 724
[20] *Davis Contractors Ltd V Fareham Urban District Council* [1956] AC 696, at p.729 www.a-level-law.com

question is whether the contract which they did make is, on its true construction, wide enough to apply to the new situation: if it is not, then it is at an end."[21]

Harman L.J. narrated the general attitude of the English courts about the frustration of contracts in this way:

"Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or unprofitable, but it is very rarely relied upon with success."[22]

Lord Denning has explained the doctrine of frustration of contract in these words:

"...the sellers ... were not relieved of their obligation to obtain the license by a rise in prices by 20 to 30 per cent in excess of the prices agreed upon with their buyers ... if it was ... 100 times as much as the contract price that would be a "fundamentally different situation" which had unexpectedly emerged, and they would not be bound to pay it."[23]

1.6. DOCTRINE OF FRUSTRATION IN ENGLISH LAW

The doctrine of frustration of contract is a famous doctrine of English Law. It works as to set aside contractual obligations. It is an exception of the doctrine of absolute contracts. In English Law,

"Frustration is an English contract law doctrine, which acts as a device to set aside contracts where an unforeseen event either renders contractual obligations impossible, or radically changes the party's principal purpose for entering into the contract. Historically, there had been no way of setting aside an impossible contract after formation; it was not until

[21] Ibid, at p.721
[22] *Tsakiroglou& Co Ltd v NobleeThorl GmbH* [1960] 2 Q.B. 318 at 370.
[23] *Brauer& Co (Great Britain) Ltd v James Clark (Brush Materials) Ltd [1952] 2 All E.R. 497 at 501.*

1863, and the case of *Taylor v Caldwell* that the beginnings of the doctrine of frustration were established."[24]

Contractual obligations come to an end when the doctrine of frustration operates. *Taylor v Caldwell*[25] was the first case law where the doctrine of frustration was formally recognized relieving the hardships of the contractual performance under the doctrine of absolute liability of contract which was established in *Paradine v Jane.*[26]

An overview of the doctrine in English Law may be summarized as,

> "A contract may be discharged on the ground of frustration when something occurs after the formation of the contract which renders it physically or commercially impossible to fulfill. The contractor transforms the obligation to perform into a radically different obligation from the undertaken at the moment of the entry into the contract."[27]

1.7. LEGAL TEST OF FRUSTRATION

There are many basis of the doctrine of frustration which has been evolved with the passage of time. The theories of "just solution",[28] "foundation of the contract", "failure of consideration" and "implied term"[29] have been over time rejected by the English courts. The

---

[24] *Frustration In English Law ,http://en.wikipedia.org/wiki/Frustration_in_English_law* (accessed 11-08-2011)
[25] *Taylor v Caldwell (1863) 3 B & S 826; 122 ER 309; [1863] EWHC QB J1* http://www.lawnix.com/cases/taylor-caldwell.html (accessed 11-08-2011)
[26] *Paradine v Jane [1647] EWHC KB J5* http://www.lawnix.com/cases/paradine-jane.html (accessed 11-08-2011)
[27] Chitty on Contract, 24th Edition (London: Sweet & Maxwell, 1977), Para 23-001.
[28] The contract is discharged by operation of law; otherwise the parties would have to perform a contract radically different from that originally undertaken. This view is expressly supported by (amongst others) Lord Radcliffe in Davis Contractors Ltd v Fareham UDC [1956] AC 696 http://www.insitelawmagazine.com/ch14discharge.htm (accessed 11-08-2011)
[29] The contract will be discharged only where the court can imply a term into the contract that the contract shall come to an end upon the occurrence of the events in question. This view is expressly supported by Lord

English courts have adopted the doctrine of radical change in the obligation which is regarded as the current legal and preferred approach by leading legal commentators. The legal test of frustration was set out by Lord Radcliffe in Davis v Fareham.[30] He stated that,

> "..Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because circumstances in which performance is called for would render the 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."[31]

Lord Radcliffe has formulated the theory/ test of radical change in the obligation by abolishing the theories of "implied term" and of "just solution". He further states his view about the theory/ test of "radical change in the obligation" in this way,

> "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."[32]

From the view of Lord Radcliffe it is obvious that the best test of frustration is "radical change in the obligation" and not the theories of "implied term" and "just solution". It is also important to note that 'it is not simply a question whether there has been a radical change in the circumstances, but whether there has been a radical change in the obligation or the actual

---

Loreburn in Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd [1916] 2 AC 397 http://www.insitelawmagazine.com/ch14discharge.htm (accessed 11-08-2011)

[30] http://www.lawteacher.net/contract-law/cases/discharge-cases.php last accessed 17-10-2011.

[31] Frustration - problem-based question, http://www.lawstudentforum.co.uk/threads/frustration-problem-based-question.377/ (accessed 11-08-2011)

[32] Ibid

effect of the promises of the parties in the light of new circumstances, viz. the court will have to establish that the performance was fundamentally different in a commercial sense.'[33]

1.8. FORCE MAJEURE CLAUSES

"Force majeure" is a term of civil law and is sometimes referred to in its Latin form as "*vis major*". In the *Civil Code of Quebec*[34] the English equivalent "superior force" is used although that term does not appear to be common in the English speaking world. Force majeure is defined as an event that is unforeseeable and irresistible and that renders the fulfillment of the obligation absolutely impossible.[35]

The first thing is to determine the definition of force majeure clause in the contract. We may define it as,

> "...a clause in agreements defining in advance mutual rights and duties if certain events beyond control occur, whether or not such events result, in the eyes of law, in the frustration of the contract...known as force majeure clauses..."[36]

Force Majeure may also be defined in this way.

> "Force Majeure events are events which are beyond the control of the parties and the expression has been judicially defined to cover 'all circumstances beyond the will of the

---

[33] *Davis Contractors Ltd v Fareham Urban District Council* [1956] A.C. 696, at 728 (per Lord Radcliffe)

[34] The Civil Code of Québec is a general law that contains all of the basic provisions that govern life in society, namely the relationships among citizens and the relationships between people and property. It governs all civil rights, such as leasing items or property, sales contracts, etc. It also deals with family law, as in the case of matrimonial regimes. Available at http://www.justice.gouv.qc.ca/english/sujets/glossaire/code-civil-a.htm (last accessed on April 29, 2012). It is in force in the province of Quebec, Canada.

[35] John O'Connor, *Force Majeure, Frustration And Exceptions Clauses*, <http://www.amac.ca/8-J_OConnor.pdf>, August 16, 2011.

[36] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edition (London: Sweet & Maxwell, 2007), 134.

man, and which it is not in his power to control and such force majeure is sufficient to justify the non execution of a contract."[37]

'Force Majeure, derived from the French term literally meaning "superior force"[38], is a clause inserted into a contract which frees the parties from their obligations when a circumstance beyond their control occurs; such as an act of God.[39] This clause is predominantly inserted when the contract is a long-term contract. Outlined in the clause are the events in which the parties deem to disable them of completing their obligations, such as fire, flood, war, and the consequences of the event occurring. If one of the events occurs, the *Force majeure* may enable the parties to terminate, suspend, re-negotiate or comply with any other express term in the contract.'[40]

'Force Majeure clauses vary in ambit and effect. That an event falls within the ambit of a force majeure clause must be proved by the party pleading it—a difficult burden as such clauses are very narrowly construed. The effect of any such provision will depend in each case on its proper construction.'[41]

'In *The Eugenia* (1964), Lord Denning said: 'To see if the doctrine [of frustration] applies, you have first to construe the contract and see whether the parties have themselves provided for the situation that has arisen. If they have provided for it, the contract must govern. There is no frustration.'[42]

---

[37] Tillotson, John, *Contract Law In Perspective, 2nd Edn., London: Butterworths, 1985.P.207.*
[38] Thomson Reuters Business, *Law Dictionary*, 2009, FindLaw, <http://dictionary.lp.findlaw.com>, AUGUST 16, 2011.
[39] Willmot, Christensen, Butler and Dixon. 2009. Contract Law, 3rd Edition, Oxford University Press, pp. 323.
[40] Ibid, p. 734.
[41] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade,* 11th Edn. (London: Sweet & Maxwell, 2007), 134.
[42] Tillotson, John, *Contract Law In Perspective, 2nd Edn., London: Butterworths, 1985. P.207.*

The application of doctrine of frustration of contract is in the hands of courts which is very difficult. There are many factors which must be considered for the application of frustration. Therefore a prudent and wise business man may always introduce a clause in his contracts explaining in advance the rights and duties of parties if certain events occur. But the condition for these events is that these events must occur beyond the control of the parties. The nomenclature for these clauses is force majeure.

1.8.1. Specifications *of Force Majeure* Clause

There are some specifications for insertion of *Force Majeure Clause* in the contract. Some important specifications are:

(I) When incorporating a *force majeure* clause, both parties must be particularly specific about the circumstances which the clause will apply using specific examples and explicit terms and language to ensure there is no ambiguity about what the clause is defining. An example of this would be 'party A is not liable for any failure to perform her contractual duties in the event of earthquake, fire, etc', is typical of the specific language used in this type of clause.[43]

(II) When contracting parties are negotiating a *force majeure* clause, they must be specific and analyze the risk of certain events to ensure a fair clause that is not

---

[43] *Yale University,* Force Majeure, *2000, Licensing Digital Information,* <http://www.library.yale.edu>, August 16, 2011.

one-sided.[44]Most *force majeure* clauses apply equally to both sides, excusing either party from its contractual obligations in the event of a *force majeure* event.[45]

1.8.2. Force Majeure& Frustration Clauses

The interesting thing is that the terms *Force Majeure and* Frustration are not same and not interchangeable. They have different legal concepts. However there are many things which are common. The points of similarity between these two terms are following:

(I) The terms *Force Majeure and* Frustration are both relevant to the effect of supervening events on existing contracts.

(II) "Both the civil law and the common law have rules concerning the effect of antecedent events on the formation of contracts. Such events, the existence of which is unknown to the parties at the time of entering into the contract, are referred to as mistakes and the resulting contract is usually said to be null *ab initio* as the conditions upon which it is based were not in fact in place at the time of entering into the contract even though the parties thought, erroneously, that they were."[46]

---

[44] Ruszat, Richard, *"Force Majeure: A method to allocate risk of nonperformance"*, 2000, Blackley and Blackley LLP, <http://www.bandblaw.com>, August 16, 2011.

[45] Licensing Digital Information, Yale University, 2000, *Force Majeure*, <http://www.library.yale.edu>, August 16, 2011.

[46] Ibid

(III) The terms *Force Majeure and* Frustration both require that the supervening event must not be caused by either party. If either party is at fault in causing the event, then the event must be a breach of contract and is actionable by the other party.

(IV) The terms *Force Majeure and* Frustration both cause the discharge of the contract. Thus both the parties are discharged from their obligations and no need to pay damages to the other.

We have seen different points of similarity between Force Majeure and Frustration. *Force majeure* clauses act in a similar way to the doctrine of frustration. This doctrine describes that after the contract is formed, if an unforeseeable event occurs which wouldn't allow the parties to meet their obligations as set out in the contract, they can be discharged.[47]

These two concepts are not same and have their identical position. Frustration is available if the performance of the obligation is possible although totally unrelated to the obligation the party had intended to undertake.[48]While a *force majeure* event must be 'circumstances beyond the control of the person concerned', which has been judicially examined as 'an occurrence which neither the person concerned, nor any person acting on their behalf to do the act, or take the step, could prevent.'[49]

---

[47] Force Majeure Clauses, <http://contractb-sp4-2009.wikispaces.com/Group+Six>, August 16, 2011.
[48] John O'Connor, *Force Majeure, Frustration And Exceptions Clauses*, <http://www.amac.ca/8-J_OConnor.pdf>, August 16, 2011.
[49] Caltex Oil v Howard Smith Industries Pty Ltd [1973] 2 NSWLR 89, 96.
<http://www.fedcourt.gov.au/how/admiralty_cases_auststates_nsw.html#1973> August 16, 2011.

1.8.3. Tests of Force Majeure

If a person [defendant] in a particular situation wants to have recourse to a force majeure clause, the event or situation must pass three important tests. These tests are following.

(I) ***The 'externality' test:*** The defendant must have nothing to do with the event's happening.[50]

(II) ***The 'unpredictability' test:*** The defendant has an obligation to be prepared for the event if it is reasonably foreseeable. Thus, the defendant will be held accountable if they are unprepared.[51]

(III) ***The 'irresistibility' test:*** Where the consequences coming from an event must be unpreventable. For example, in areas that natural disasters are common, the force majeure clause must define the size of the event that may occur.[52]

From the above mentioned three tests we may derive some main elements of force majeure clause. The *force majeure* clause must address three main elements. It must define: the events which will trigger the operation of the clause; the impact those events will have on the party who invokes the clause; and the effect invocation will have on the contractual obligations.[53]

---

[50] <http://en.wikipedia.org/wiki/Force_majeure>, August 16, 2011.
[51] Force Majeure Clauses, <http://contractb-sp4-2009.wikispaces.com/Group+Six>, August 16, 2011.
[52] Ibid
[53] Davies, Edward "Swine Flu: Contracts & Force Majeure" (2009) Practical Law Company <http://construction.practicallaw.com/blog/construction/pinsents/?p=35>, August 16, 2011.

1.9. KEY FEATURES OF THE DOCTRINE OF FRUSTRATION

There are some essentials of the doctrine of frustration. 'In *J. Lauritzen AS v Wijsmuller BV (The Super Servant Two)*, Bingham LJ set out the following five propositions which he regarded as the essence of the doctrine:[54]

1. Frustration mitigates the rigour of the common law's insistence on literal performance of absolute promises;
2. The doctrine operates to kill the contract and discharge parties from further liability under it;
3. Frustration brings a contract to an end "forthwith, without more and automatically";
4. It should not be due to the act or election of the party seeking to rely on it, so that there must be some "outside event or extraneous change in the situation";
5. A frustrating event must take place without a party's fault, *i.e.* it cannot be self-induced.

1.10. FACTORS TO BE CONSIDERED IN FRUSTRATION OF CONTRACT

There are certain factors and elements which should be considered in frustration of contract. These factors are very important to decide whether an event is frustrated or not. At the time of analyzing any factor that it is a cause of frustration of contract or not, we must consider

[54] *The doctrine of frustration in English law*, <http://www.steptoe.com/f-260.html>, accessed on Sep 07, 2011.

some important factors. Following are some important factors in the shape of questions that require special consideration:

- "Does the contract contemplate that if 'X' fails to supply the goods to the seller, the seller is obligated to procure the specific goods from any other alternative source (irrespective of the fact whether the same would be commercially viable or not). Has this intention of the parties been expressly provided for in the contract, or is it in contemplation of both parties but not expressly mentioned in the contract or is it only a one sided contemplation?"[55]
- "Is there any Government regulation that prohibits the export/ importation of goods? Is it temporary or exists upto the period of performance of contract. Does it absolutely prevent the seller or the buyer from performing the contract or make the performance of contract illegal?"[56]
- "Is the payment of unexpected /escalated higher price reasonably foreseeable by the parties at the time of entering into the contract?"[57]
- "Is this supervening unexpected event beyond the control of the parties?"[58]

These factors are basic requisites to attract the doctrine of frustration of contracts. This is the conclusion of the above discussion.

---

[55] Karnika Seth, *Frustration Of Contract & Impossibility Of Performance*, <http://www.123oye.com/job-articles/cyber-law/frustration-contract.htm> (accessed On 13-09-2011)
[56] Ibid
[57] Ibid
[58] Ibid

1.11. CONDITIONS FOR FRUSTRATION OF CONTRACT

It is not possible to describe a complete and exhaustive list of those events or conditions which may cause frustration of the contract. There are some sets of circumstances on which this doctrine comes into operation. Following are some sets of circumstances in which it is said that the contract was frustrated.

1.11.1. Destruction Of Subject-Matter

This is the simplest form of frustration of contract. If the performance of the contract is contingent on the continuous existence of a person or a thing and after the formation of the contract that thing or person has been physically destroyed, now the contract will be frustrated due to physical destruction of the subject-matter of the contract. In the cases of frustration due to destruction of the subject-matter, "a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance."[59]

The above principle was established in *Taylor v. Caldwell* where the contract was discharged due to destruction of hall. 'The continued existence of the hall was a basic assumption upon which the contract was founded. The frustrating event rendered further performance physically impossible.'[60]

---

[59] See L.E. Trakman, *Frustrated contracts and Legal Fictions*, (1983) 46 M.L.R. 39. http://www.jstor.org/stable/1095751?seq=1 (accessed 17-10-2011)

[60] http://peisker.de/ffa/Discharge.htm (accessed 17-10-2011)

However, if the performance of the contract has become impossible before the conclusion of the contract, the doctrine of frustration will not come into operation. It comes only into operation when the performance becomes impossible after the conclusion of the contract.

1.11.2. Subsequent Legal Changes

Laws are made for the welfare of the people and amendments or reforms in existing laws are necessary to meet the challenges of the modern world. Besides this, laws are also amended for the public benefit at large. These changes in the laws may affect the performance of contracts between parties. Subsequent change in the law affecting the performance of the contract is a well recognized head of frustration. The legislative authority may intervene the performance by the process of legislation. If the performance of the contract has become impossible due to subsequent legal changes, the contract will be frustrated. This principle was established in the case of *Bailey v. De Crespigny* (1869).[61] In this case, "a lessor was held not liable for an alleged breach of his covenant that neither he nor his assignee would build on a piece of land adjoining the demised premises, when a railway company, under its powers derived from a subsequent statute, compulsorily acquired the land and erected a station on it."[62]

1.11.3. Supervening Illegality

It is very important head of frustration now a days and it has gained a position of custom as it is customary to treat it as a condition of frustration. It is similar to frustration of contract due

[61] (1869) L.R. 4 Q.B. 180
[62] Chitty on Contracts, 24th Edition (London: Sweet & Maxwell, 1977), Para 1418.

to subsequent legal changes. 'Since the contract was made, a new law has made it illegal to carry it out! The best example is *Avery v Bowden* (1856), in which a ship was supposed to pick up some cargo at Odessa. With the outbreak of the Crimean War, the government made it illegal to load cargo at an enemy port, so the ship couldn't perform its contract without breaking the law. The contract was therefore frustrated.'[63]

Another important case which describes the supervening illegality is *Fibrosa case*[64] in which trade with enemy was declared illegal due to outbreak of war. Thus a situation arose where the performance of the contract was restricted as a result of supervening illegality.

1.11.4. Incapacity Or Death

Death of parties may be a cause of frustration of contract only where a person becomes unavailable for performance due to death, illness or for any other reason similar to this. But this principle operates only in the case of personal performances and not for commercial services. Illness may be a cause of frustration as it may create impossibility to perform the contract. This principle was established in the case of *Condor v The Baron Knights*[65]. In this case, "a drummer engaged to play in a pop group was contractually bound to work on seven nights a week when work was available. After an illness, Condor's doctor advised that it was only safe to employ him on four nights a week, although Condor himself was willing to work every night. It was necessary to engage another drummer who could safely work on seven nights each week. The court held that Condor's contract of employment had been frustrated

[63] http://tutor2u.net/law/notes/contract-frustration.html (accessed 17-10-2011)
[64] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* (1943) A.C. 32
[65] Condor v The Baron Knights [1966] 1 WLR 87

in a commercial sense. It was impracticable to engage a stand-in for the three nights a week when Condor could not work, since this involved double rehearsals of the group's music and comedy routines."[66]

Another important case which explains the unavailability for performance as a valid cause of frustration is *Robinson v Davison.* In this case, "a pianist booked for concert could not perform on a particular day due to illness."[67] The contract was frustrated.

1.11.5. Outbreak Of War

There are different conditions and sets of circumstances upon which the contract is frustrated. One of those conditions is the outbreak of war. It is of great importance because the outbreak of war has two aspects. First, the outbreak of war affects the contract directly as the outbreak of war is between the contracting countries. In this situation, the contract is automatically dissolved by the outbreak of war becoming an alien enemy. Second, the outbreak of war affects the contract indirectly only. Now the question arises whether the performance of the contract is rendered illegal in this case by the event or not. It is, of course, an entirely different question whether in these circumstances the contract might be frustrated for other reasons, in particular on the ground that its performance is prohibited by the government of either contracting country or that in consequence of the effect of war there has been a vital change in circumstances. There is an exhaustive list of cases affecting the performance of the contracts but we will explain those cases in detail in upcoming chapters.

---

[66] http://www.lawteacher.net/contract-law/cases/discharge-cases.php (last accessed 17-10-2011)

[67] William Wu, *The leading cases in frustration 2010,* http://www.wlwu.co.uk/?p=144 (last accessed 16-10-2011)

1.11.6. Fundamental Change In Circumstances

We have discussed different conditions under which the performance of the contract becomes impossible and the doctrine of frustration operates. The crux of the sets of circumstances stated above is that the basic and key element for the operation of the doctrine of frustration of contract is *'fundamental change in circumstances'*. Fundamental change in circumstances is a cause of frustration of contract as expressed:

> "A contract is...frustrated if, after it was made, such a radical change of circumstances has occurred that the foundation of the contract has gone and the contract, if kept alive, would amount to a new and different contract from that originally concluded by the parties."[68]

TH-10008

1.12. DOCTRINE OF FRUSTRATION IN SUB CONTINENT

We have discussed in detail the doctrine of frustration in English Law. Now we move towards the Indian and Pakistani legislation on this doctrine. As our legal system and also of Indian legal system has the influence of the British legal system, therefore this doctrine has application in our legal system. Section 56 of the *Contract Act, 1872* embodies the doctrine of frustration of contract in these words;

> **"Contract to do act afterwards becoming impossible or unlawful:** A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promissor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."[69]

---

[68] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Ed. (London: Sweet & Maxwell, 2007), 125.
[69] Section 56 of the Contract Act, 1872.

The same wording has been written in section 56 of the Indian Contract Act. There are many case laws which explain the doctrine of frustration of contract in India and in Pakistan. We will discuss those developments in the form of case laws in second chapter.

1.13. CONCLUDING REMARKS

The doctrine of frustration of contract is an important doctrine of the law of contract. Before the emergence of this doctrine, the doctrine of absolute liability was in vogue, under which the performance of the contract is obligatory in every case. The performance of the contract would not be excused on the basis of impossibility of performance. However the doctrine of absolute liability was changed with the emergence of the doctrine of frustration in contract law. In this way the concept of relaxation in the performance of the contract, due to valid reasons explained above, was introduced. In modern legal systems, this doctrine has gained an important place especially in international business/commercial contracts. In Pakistan, this doctrine has also been recognized in our legislation as well as in judicial decisions, which will be discussed in detail in second chapter.

CHAPTER NO. 2

DEVELOPMENT OF DOCTRINE OF FRUSTRATION

This chapter deals with the development of the doctrine of frustration of contract. What are events which led towards the evolution of this doctrine will be focused. Especially case laws will be discussed which had changed the doctrine of absolute liability in the performance of contracts and this new doctrine has been emerged.

2.1. DOCTRINE OF ABSOLUTE LIABILITY OF THE CONTRACT

This is an old common law doctrine which makes the performance of the contract mandatory in *stricto senso* whatever the circumstances may be. The famous case of *Paradine v. Jane* (1647)[70] created the doctrine of absolute liability of contracts where it was held that 'When a party creates a duty or charge upon himself, he is bound to make it good.'[71]Until the nineteenth century, the common law had adopted the rule of absolutism in performance of contractual obligations.

2.1.1. Paradine v. Jane

In this case, 'the Court of King's Bench is said to have laid down the basic rule of absolute liability in contract, according to which a party contracting to bring about some result will be

[70] 82 Eng. Rep. 897 (1647)
[71] http://4lawnotes.com/showthread.php/618-Paradine-v.-Jane (last accessed 29-11-2011)

liable if the result is not achieved, irrespective of any fault on his part.'[72]The facts of this classical case are as under:

> "Paradine (Plaintiff) sued Jane (Defendant) under a lease for three years for unpaid rent. Defendant pleaded that as a result of the invasion of an enemy of the King Defendant was forced out of possession of the property and was unable to take the profits. Defendant refused to pay Plaintiff rent for the time he was forced out of possession by the army. Plaintiff demurred and the plea was held to be insufficient."[73]

From the facts it is clear that the defendant could not make payment of rent due to invasion of enemy forces. Now the question arises whether the defendant was excused from performance of the contract on the basis of frustration of purpose or due to fundamental change in circumstances. If the performance of the contract was excused then what are those grounds on the basis of which it was happened. And if it was not so then what are the reasons behind this. This was addressed in the decision of the case as under:

> "Defendant must pay the required rent to the Plaintiff. The law creates a duty, however, the law will excuse him of performance if the party was disabled to perform without any default in him and he has no other available remedy. When a party by his own contract creates a duty upon himself, he is bound to make it good notwithstanding accident because he could have provided against it in the contract. Here, the rent is a duty created by the parties, and the Defendant must make it good, notwithstanding interruption by enemies, for the law would not protect him beyond his agreement. The Defendant lessee must run the burden of casual losses and cannot place the burden on the Plaintiff lessor. Therefore, the Defendant here remains liable for the unpaid rent."[74]

---

[72] Ibbetson, David, *Absolute Liability In Contract: The Antecedents Of Paradine v. Jayne* (London: Sweet & Maxwell, 1996), p.2

[73] http://www.casebriefs.com/blog/law/commercial-law/commercial-law-keyed-to-lopucki/performance/paradine-v-jane/ (last accessed 28-11-2011)

[74] Ibid

This was the decision of the classical case establishing the doctrine of absolute liability in contracts. Here it was said that 'the law could not reform the risk distribution as it lay upon contract formation. The contract did not provide for any reallocation of the loss due to foreign invasion, so the loss remained where it fell.'[75] Once the risk has been allocated by the terms of the contract, now the impossibility of the contract will not void the contract and reallocation and redistribution of risk will not be possible. The argument which had been taken by the Council for the defendant is that 'There should be no liability to pay rent if the lessee had not received the benefit of land.'[76] But this argument was failed because in contract law it is an established rule that the obligations might be mutually independent.

It is also an established rule that contracts must be performed strict senso according to the intentions of the parties. In other words, parties may become discharged or released by performance. In this regard 'an historical approach is useful. The original rule at Common Law was always that performance must be precise and exact. In other words, the obligation under the contract was entire and only an entire performance would entitle a party to payment under the contract.'[77]

There are some case laws which explain this historical approach in a very good way. In *Cutter v Powell*,[78] damages have been paid due to non performance of the contractual obligations irrespective of the change of circumstances. Another case law which represents

---

[75] http://4lawnotes.com/showthread.php/618-Paradine-v.-Jane (last accessed 29-11-2011)
[76] Ibbetson, David, *Absolute Liability In Contract: The Antecedents Of Paradine v. Jayne* (London: Sweet & Maxwell, 1996), 32.
[77] http://www.insitelawmagazine.com/ch14discharge.htm last accessed on 20-12-2011
[78] *Cutter v Powell* [1795] EWHC KB J13 available at www.e-lawresources.co.uk/Cutter-v-Powell.php *(last accessed 20-12-2011)*

the same principle of discharge by performance is *Bolton v Mahadeva*[79], the plaintiff was refused to pay by the Court of Appeal due to poor performance and hence the plaintiff could recover nothing. These two decisions are representing the harsh rule which may be known as absolute liability rule, according to which contracts must be performed irrespective of the circumstances.

2.1.2. Doctrine of Substantial Performance

For the sake of justice between the contracting parties, the judges have recognized some doctrines. The famous doctrine of substantial performance is one of them. Under this doctrine, 'If the contract has been substantially performed, though not necessarily literally or exactly, the injured party cannot treat himself as discharged from his obligation to pay, though he will have a counterclaim or a right of set-off for any loss sustained by reason of the incomplete performance.'[80]A promisor who has rendered a "substantial performance" (albeit incomplete) can get judgment for the contract price, with a deduction for minor defects and nonperformance. i.e., the party who has substantially performed is limited to the contract price less the cost of completing the contract or correcting defects. "Substantial performance" is defined as whether the performance meets the essential purpose of the contract.'[81]

---

[79] *Bolton v Mahadeva* [1972] 1 WLR 1009 available at www.e-lawresources.co.uk/Bolton-v-Mahadeva.php *(last accessed 20-12-2011)*

[80] http://www.insitelawmagazine.com/ch14discharge.htm last accessed on 20-12-2011

[81] http://www.west.net/~smith/perform-content.htm (last accessed 20-12-2011). This is also explained in *Jacob & Youngs v. Kent* 230 N.Y. 239, 129 N.E. 889 (1921) available at www.invispress.com/law/contracts/jacob.html *(last accessed 20-12-2011)*

In other words, the injured party has no right to repudiate for breach of condition but does have a right to compensation for breach of warranty.'[82]

2.1.3. Prevention of performance

If one party is prevented from completing his contractual obligations by the default of the other party, the injured party can either recover damages for breach of contract or alternatively reasonable remuneration on a *quantum meruit* basis for work already done.[83]This doctrine is also well explained in California Civil Code 2005 in this way.

> "1511. The want of performance of an obligation, or of an offer of performance, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate:
>
> 1. When such performance or offer is prevented or delayed by the act of the creditor, or by the operation of law, even though there may have been a stipulation that this shall not be an excuse; however, the parties may expressly require in a contract that the party relying on the provisions of this paragraph give written notice to the other party or parties, within a reasonable time after the occurrence of the event excusing performance, of an intention to claim an extension of time or of an intention to bring suit or of any other similar or related intent, provided the requirement of such notice is reasonable and just;
>
> 2. When it is prevented or delayed by an irresistible, superhuman cause, or by the act of public enemies of this state or of the United States, unless the parties have expressly agreed to the contrary; or,
>
> 3. When the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time.

[82] http://www.insitelawmagazine.com/ch14discharge.htm last accessed on 20-12-2011
[83] http://www.insitelawmagazine.com/ch14discharge.htm last accessed on 20-12-2011

1512. If the performance of an obligation be prevented by the creditor, the debtor is entitled to all the benefits which he would have obtained if it had been performed by both parties.

1514. If performance of an obligation is prevented by any cause excusing performance, other than the act of the creditor, the debtor is entitled to a ratable proportion of the consideration to which he would have been entitled upon full performance, according to the benefit which the creditor receives from the actual performance.

1515. A refusal by a creditor to accept performance, made before an offer thereof, is equivalent to an offer and refusal, unless, before performance is actually due, he gives notice to the debtor of his willingness to accept it."[84]

2.2. CHANGES IN THE DOCTRINE OF ABSOLUTE LIABILITY OF THE CONTRACT IN ENGLISH LAW

We have seen that the doctrine of absolute liability of contracts was in vogue and redistribution of risk was not permitted after the conclusion of the contract. Under this doctrine, 'if the contract did not contain any clause providing for a contingency as absolving a party from performance, which was due to circumstances beyond control, the party was held liable absolutely to perform the contract.'[85] Slowly and steadily this doctrine has been affected and subsequently changed with the introduction of doctrine of frustration. Judicial decisions and legislation have played an important role to introduce this new doctrine which has abolished the classical doctrine of absolute liability. What are significant developments which led towards the doctrine of frustration? These developments in the form of judicial decisions and legislation are following:

[84] http://law.justia.com/codes/california/2005/civ/1511-1515.html (last accessed 20-12-2011)

[85] Sujan, M.A., *Law Relating to Frustration of Contract(Bombay: N.M. Tripathi Private Limited, 1989)*, p.17

2.2.1. Taylor v. Caldwell (1863)

'In historical terms, the doctrine of frustration is a relative newcomer to the battery of rules which regulate the contracting process, being traceable to a mid 19th century case which sought to justify the excuse for non performance of existing contractual obligations on the ground that there was an implied condition that if a particular thing was expected by the parties to exist and that thing was destroyed without fault on either side, neither party should be expected to perform that which had become impossible.'[86]

This was a case of great importance with regard to the doctrine of absolute liability. In this case the doctrine of frustration was evolved. It is the point of evolution of this doctrine. The principle which was settled down by this case law is that 'where the entire performance of a contract becomes substantially impossible without any fault on either side, the contract is prima facie dissolved by the doctrine of frustration.'[87] The facts of *Taylor v. Caldwell*[88] *are as following:*

> "Caldwell (D) contracted to permit Taylor (P) the use of the Musical Hall at Newington. Caldwell was to retain possession of the hall and Taylor merely had the use of it for four days to present four concerts in exchange for 100 pounds per day. The contract stated that the Hall must be fit for a concert but there was no express stipulation regarding disasters. The Hall was destroyed by fire before the first concert was to be held and neither party was at fault.

[86] Oughton, David and Martin Davist, Sourcebook on Contract Law (Great Britain: Cavendish Publishing Limited, 1996), p. 258.
[87] Atiyah, P.S., *An Introduction To The Law Of Contract*, Third Edition (Oxford: Clarendon press,1981), P.200
[88] *Taylor v. Caldwell*, King's Bench, 3 B. & S. 826, 122 Eng. Rep. 309 (1863).

The concerts could not be performed at any other location and Taylor sued for breach and sought reimbursement for costs in preparing for the concerts."[89]

The close analysis of the facts of the case law shows that the performance of the contractual obligations became impossible due to no fault of either party. But the person aggrieved by this non performance went to the court for damages because specific performance could not be possible. Now the question arises that if we apply the doctrine of absolute liability or absolutism then the decision will go against that person who could not perform his contractual obligations whatever the circumstances may be. But this is not just and equitable. If any impossibility is happened due to no fault of any party then how they can be made liable. Now we see what is the decision of the court in this regard. The court had given decision against the plaintiff rejecting the doctrine of absolutism and creating an exception to that rule. It was said that the contract between the parties was dissolved due to impossibility of performance of the contract and no party will be liable for damages or for specific performance. In this way the court had introduced a new doctrine which is known as doctrine of frustration. This doctrine has minimized the difficulties about the issues of non performance of contractual obligations. So we can say that this is the first case of frustration which had changed the dimensions of the law of contract.

[89] http://www.lawnix.com/cases/taylor-caldwell.html (last accessed on 12-01-2012)

Analysis of Taylor v Caldwell given by Lord Wright[90] is as:

> "The doctrine of frustration is intended to achieve a just and reasonable result. Blackburn J. in Taylor v Caldwell starts his judgment by referring to what he regards as the general rule of English law that a party who positively contracts to do a thing must perform it or pay damages even though, by unforeseen accidents, performance has become impossible. And a dictum unnecessary to the decision of the Court of King's Bench in *Paradine v Jane* (1647) Aleyn, 26 is often quoted: "When the party, by his own conduct, 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." I am not clear what "if he may" means. It may mean "legally may," but the reference to inevitable accident seems inconsistent with reading "if he may" as reserving impossibility. But the results of holding a man to the absolute terms of a contract would often be so unjust that, from early times, as Blackburn J.'s examples in *Taylor v Caldwell* show, the courts set themselves to avoid these results wherever justice seemed to require it."[91]

2.2.2. Krell v Henry (1903)

This is the second most important case on the development of doctrine of frustration of contract. This case is helpful to know the theory of implied conditions in this doctrine. The facts of Krell v Henry[92] are as:

> "Krell offered to rent out his rooms in London overlooking a street where processions to the royal coronation were going to take place. Henry offered to pay £75 to rent the rooms in order to watch the processions (a lot of money in 1903). Henry put down £25. Nowhere in their written correspondence did either of them explicitly mention the coronation ceremony.

---

[90] See *Joseph Constantine Steamship Line, Limited v Imperial Smelting Corporation, Limited* [1942] A.C. 154 at p. 184

[91] http://www.lawandsea.net/List_of_Cases/T/Taylor_v_Caldwell_1863_3BS826.html (last accessed 13-01-2012)

[92] Tillotson, John, "*Contract Law in Perspective*" (London: Butterworths, 1985), p.201

> The king got sick and the processions didn't happen. Henry refused to pay. Krell sued for the remaining £50 and Henry countersued for the £25 deposit."[93]

This was the situation of this case. The analysis of the facts of the case tells us different points.

I. There was no express condition in the contract about the procession of coronation ceremony.

II. No condition was present regarding non happening of the procession for which purpose the room was taken on rent.

III. Quantum of damages had not been mentioned or agreed between the parties in case of non performance of the contract.

Keeping in view the above points, we can say that the contract between the parties was without express conditions of damages. Now the question arises, what will be the solution of this dispute? Does the doctrine of absolute liability or doctrine of sanctity of contract be applicable in this situation? If we apply these doctrines, then Henry has to pay the remaining amount whatever the circumstances may be. But here the court had applied the doctrine of frustration of contract on the basis of implied condition. Therefore Darling J. the judge of 'the English Trial Court dismissed the Krell's complaint and found for Henry on his counterclaim. The Trial Court found that there was an *implicit condition* in the contract. Namely that there would be a coronation.'[94]

[93] http://www.invispress.com/law/contracts/krell.html (last accessed 13-01-2012)
[94] Ibid

The plaintiff appealed. In the Court of Appeal, panel consisted of Vaughan Williams LJ, Romer LJ, and Stirling, LJ. The judgment of Vaughan Williams LJ is as:

> "The subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed."[95]

The judgment of Romer LJ is as:

> "I concur in the conclusions arrived at by Vaughan Williams L.J. in his judgment, and I do not desire to add anything to what he has said so fully and completely."[96]

Stirling, LJ said:

> "He had had an opportunity of reading the judgment delivered by Vaughan Williams L.J., with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of Taylor v. Caldwell."[97]

In this way the Appeal was dismissed and the doctrine of frustration of contract was respected in this case. But this case has got great attention of Judges in order to conclude the case. And this fact was accepted by the panel also.

2.2.3. Walton Harvey Ltd v Walker & Homfrays Ltd [1931]

The performance of the contract must be implemented in stricto senso. It means that preference should be given to the rule of performance not to the frustration. This is the

[95] http://www3.uninsubria.it/uninsubria/allegati/pagine/1438/priv_comp2.pdf (last accessed on 13-01-2012)
[96] Ibid
[97] Ibid

doctrine of sanctity of contract. 'Sanctity of Contract is a general idea that once parties duly enter into a contract, they must honor their obligations under that contract.'[98] Therefore according to this doctrine, parties should respect their obligations. There is another point of importance in this regard that if any impossibility to the performance of contract has been occurred due to default of either party. Now the doctrine of frustration will not apply and in this regard the aggrieved party can claim damages for non performance of contractual obligations.

Walton Harvey Ltd v Walker & Homfrays Ltd[99] is a case which describes limitations of the doctrine of frustration of contract. If a party is aware of future circumstances and in spite of this fact, the party enters into a contract whose performance might be impossible. Now the second party will claim damages for non performance of the contract by the first party who has knowledge of the facts. This case law also tells the same situation. Now we see the facts of case precisely to know the actual position of the parties in the case. The facts of the case are as:

> "A hotel owner entered a contract with an advertising agency enabling them to put illuminated adverts on the roof of their hotel. The hotel was then compulsorily purchased by the Local Authority and demolished. The advertising agency sued for breach of contract and the owner of hotel argued the contract had become frustrated."[100]

---

[98] http://definitions.uslegal.com/s/sanctity-of-contract/ (last accessed on 19-01-2012)
[99] *Walton Harvey Ltd v Walker & Homfrays Ltd* [*1931*] 1 Ch 274
[100] http://www.e-lawresources.co.uk/Walton-Harvey-Ltd-v-Walker--and--Homfrays.php (last accessed 19-01-2012)

The close analysis of the facts of the case tells us different points. But the most important point is that the owner of hotel was aware of the fact that his hotel will be compulsorily purchased by the concerned authority. Now if we see the doctrine of frustration of contract generally, then here the owner of the hotel is right on the point that the contract has been frustrated. And if we apply the rule of absolutism, then the owner of the hotel is liable for breach of contract and he has to pay damages. Let see what the decision of the court in this case law. It was held:

> "The contract was not frustrated as the hotel owners were aware that the Local Authority was looking to purchase the hotel at the time they entered the contract. They should have foreseen the fact that this could happen in the life time of the contract and made provision in the contract for such an eventuality. They were therefore liable to pay damages for breach of contract."[101]

Now the situation is clear that if ant party is aware of the future circumstances, then the contract will not frustrate and the doctrine of absolutism will be applied in that case.

2.2.4. Maritime National Fish Ltd. V. Ocean Trawlers Ltd. (1935)

As we have discussed that the principle of frustration assumes that there is no fault of either party in causation of frustrating event. This is an essence of the doctrine of frustration. It means that self induced frustration cannot become an excuse for von performance of the contract. Therefore judges have used this doctrine very carefully and put many limitations on this doctrine. Some experts also say that 'frustration is a doctrine only too often invoked by a

[101] Ibid

party to a contract who finds performance difficult or unprofitable, but it is very rarely relied on with success. It is, in fact a kind of last ditch, and ... is a conclusion which should be reached rarely and with reluctance.'[102]

Maritime National Fish Ltd. V. Ocean Trawlers Ltd[103] is another case which represents limitations on this doctrine. The principle discussed in this case was that "If either party contributes to the occurrence of the event, they cannot claim that it amounts to a frustrating event. If there is a requirement that vessels with trawls be licensed, then if you have 5 vessels and only 3 licenses, then you cannot claim that your inability to use all the vessels, amounts to a frustrating event such as to excuse you from payment of the hire fee for the vessel."[104]

To look critically and analytically we move towards the facts of the case. The facts of the case are as:

> "Maritime National rented a fishing trawler from Ocean Trawlers bringing their fleet to five vessels. The rented boat could only operate with a trawl. Then, the federal minister of fisheries allocated only three trawling licenses to Maritime. Maritime elected to use their licenses for the other boats in their fleet and then claimed their contract with Ocean was frustrated by the lack of an operating license."[105]

Here the respondents had the opportunity to elect the vessels for use and he could perform the contract. But he did not do so. 'The Privy Council held that they could rely on

---

[102] Tillotson, John, Contract Law In Perspective, Second Edition (London: Butterworths, 1985), p.200.
[103] Maritime National Fish Ltd. V. Ocean Trawlers Ltd. [1935] A.C. 524 (P.C.)
[104] http://netk.net.au/Contract/Maritime.asp (last accessed 19-01-2012)
[105] http://www.duhaime.org/LegalResources/Contracts/LawArticle-91/Part-6-Restraint-of-Trade-Assignment-Novation-Frustration.aspx (last accessed 19-01-2012)

frustration, since they had by their own voluntary election prevented by the *St. Cuthbert* from being used as an otter trawler.'[106] Lord Wright said in his judgment:

> "It was the act and election of (Maritime National) which prevented the (rented boat) from being licensed for fishing with an otter trawl.... The essence of frustration is that it should not be due to the act or election of the other party (or) without any default of either party."[107]

This decision shows that the doctrine of frustration has become clear in its application after such legal decisions. 'The judges have therefore kept the doctrine within strict limits since it was first introduced over a hundred years ago, just as they similarly curtailed the doctrine of mistake in so far as it relates to a pre-existing impossibility of performing a contract.'[108]

Till now, we can conclude that the doctrine of absolutism has faced a lot of changes in the shape of emergence of frustration. But besides this, the courts also recognized the old concept of performance of contract. The development of the doctrine of frustration does not mean that the doctrine of performance of contract or absolutism has been abolished. Due to these reasons we say in the light of judicial decisions that there should be proper legislation on this point so that difficulties may become minimized and disputes between contracting parties might be solved in a proper way.

2.2.5. Fibrosa Spolka v Fairbairn [1943]

This was an important case due to which a piece of legislation had been introduced. First of all we look towards the facts of the case which are as:

---

[106] Chitty on Contracts, 24th Edition, p.685.
[107] http://www.e-lawresources.co.uk/Frustrated-contracts.php (last accessed 19-01-2012)
[108] Tillotson, John, Contract Law In Perspective, Second Edition (London: Butterworths, 1985), p.200.

> "A Polish company had ordered certain flax-hackling machines from manufacturers in Leeds shortly before the outbreak of the Second World War. The machines had to be delivered c.i.f. Gdynia within a certain time and the contract provided that in case of war or other events beyond the control of the parties, a reasonable extension of time of delivery should be granted. After the outbreak of war, Gdynia was occupied by the Germans."[109]

From the facts we may consider following points to determine the implementation of the doctrine of frustration.

I. The contract provided a provision about reasonable extension of time for performance.

II. Result of the outbreak of ear was that the Germans occupied Gdynia, a place for execution of performance.

III. The contract did not provide any provision regarding adjustment of rights in case of non performance.

IV. Poland was declared an enemy territory by the Council and it was ordered that any type of trade with Poland is not allowed for British Companies.

By considering above points in this case, it may be said that there was a complete change of circumstances or a fundamental change in circumstances. Now under these circumstances, which doctrine will be applicable? It was decided by the House of Lords in this way.

> "The contract was frustrated owing to war and the British manufacturers were discharged from delivering the machines. The clause allowing for extension of the time of delivery did

[109] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 122.

not save the contract because it was intended to cover merely minor delay as distinguished from a prolonged and indefinite interruption of contractual performance."[110]

The crux of this case may be summarized in this way that when the contract becomes impossible to perform due to supervening illegality, then contracts will frustrate.

However court has said that 'advance payment could be recovered if there is a total failure of consideration. Advance payment will not be able to be recovered if the other party had received some benefits ('All-or-Nothing Approach').[111]

2.2.6. Law Reform (Frustrated Contracts) Act 1943

Frustration does not mean that contractual rights come to an end. Adjustment of rights of contractual parties is necessary on the eve of frustration. This is a general rule. In England the first legislation was made for the purpose of adjustment of rights of the parties. Actually this Act was passed after the *Fibrosa* litigation. The aim of this Act was to enable the Courts to adjust the rights of the parties. The basis for this adjustment of rights will be equity and justice.

This was the first piece of legislation on the topic of frustration. 'The Act aims at the prevention of unjust enrichment of either party at the expense of the other.'[112]

According to Goff J.

---

[110] Ibid

[111] http://mavrkylawcenter.blogspot.com/2005/08/contract-law-doctrine-of-frustration.html (last accessed 19-01-2012)

[112] Carole Murray, M.A. (Cantab.)and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 133.

> "... The Law Reform (Frustrated Contracts) Act 1943 is described as an Act to amend the law relating to the frustration of contracts. In fact, it is concerned not with frustration itself, but with the consequences of frustration; and it creates statutory remedies, enabling the court to award restitution in respect of benefits conferred under contracts thereafter frustrated ..."[113]

'This Act was a great achievement in the development of the doctrine of frustration and its relevant doctrines. There are two key provisions in the Act. The first, s 1(2), deals with money paid or owing under the contract prior to the frustrating event and the second, s 1(3), deals with the situation where a party has obtained a non-money benefit before the time of discharge. The leading case on the operation of these provisions is *BP Exploration Co (Libya) Ltd v Hunt (No 2).*'[114]

2.2.7. Davis Contractors v Fareham Urban DC [1956]

When impossibility or impracticability of contract has been caused due to neither fault of any party, the doctrine of frustration operates here. Davis Contractors case[115] is an important development in the application of the doctrine of frustration. The facts of the case are as:

> "...the parties were the Appellants Davis Contractors Limited, a firm of building contractors, and the Respondents the Fareham Urban District Council. On the 9th July, 1946, the parties had entered into a building contract whereby the Appellants agreed to build for the Respondents 78 houses at Gudgheath Lane, Fareham, in the county of Southampton within a period of eight months for a sum of £85,836.

---

[113] BP EXPLORATION CO (LIBYA) LTD V HUNT (NO. 2) [1982] 1 ALL ER 925

[114] http://www.routledgelaw.com/textbooks/9781859419137/sample/Chapter%2015.pdf (last accessed 20-01-2012)

[115] Davis Contractors v Fareham Urban DC [1956] A.C. 696.

> For various reasons, the chief of them the lack of skilled labor, the work took not eight but twenty-two months. The Appellants were in due course paid the contract price which, together with stipulated increases and adjustments, amounted to £94,424. They contended, however, that owing to the long delay the contract price had ceased to be applicable and that they were entitled to a payment on a *quantum meruit* basis."[116]

The analytical study of the facts of the case shows different dimensions. For example, the nature of reasons for non compliance of the terms of the contract should be considered. Another point should be considered that the appellants were paid according to the prescribed increases. Can these reasons be a cause of frustration of the contract? This is the real question. The Appellants presented their arguments in this way. They said that 'the contract had been entered into on the footing that adequate supplies of labor and material would be available to complete the work within eight months, but, contrary to the expectation of both parties, there was not sufficient skilled labor and the work took twenty-two months, and that this delay amounted to frustration of the contract.'[117]

This is the key case law to understand the concept of frustration in contracts. In this case law, it was settled that emergence of new circumstances can make the performance of the contract impossible or more difficult. To clear this concept, Lord Radcliffe has stated his opinion in his case law in this way.

> "... Frustration occurs only whenever the law recognizes that without fault of either party a contractual obligation has become incapable of being performed because the circumstances

[116] http://www.nadr.co.uk/articles/published/ConstructionAdjudicationLawReports/Davis%20Contractors%20v%20Farham%20DC%201956.pdf (last accessed 20-01-2012)
[117] Ibid

in which performance is called for would render it a thing radically different from that which was undertaken by the contract."[118]

In the light of this case law, it may be concluded that this doctrine has been developed to achieve just, reasonable and equitable results so that rights of neither party would be violated or infringed. Therefore it can be said that both the doctrines i.e. doctrine of frustration and the doctrine of absolutism should be read and used side by side so that the law can be implemented in its true spirit.

2.2.8. Frustrated Contracts Act 1988

In South Australia, an effort has been made in the shape of a piece of legislation to cover the area of frustrated contracts. This Act has clearly said that on the eve of frustration, parties are discharged from their further obligations with respect to that contract. This Act also deals with the situations known as partly frustration. Section 5 of the *Frustrated Contracts Act 1988* describes this rule in this way.

> "A contract is not wholly frustrated by the frustration of a particular part of the contract if that part is severable from the remainder of the contract."[119]

As we say that the object of the doctrine of frustration is to achieve just, reasonable and equitable results. This Act also describes a phenomenon for the adjustment of losses between the parties so that no party can take unfair advantage of frustration of contract. The language of the Act is as:

---

[118] Carole Murray, M.A. (Cantab.)and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 117.
[119] See section 5 of *Frustrated Contracts Act 1988.*

"Where a contract is frustrated, there will be an adjustment between the parties so that no party is unfairly advantaged or disadvantaged in consequence of the frustration."[120]

2.3. DOCTRINE OF FRUSTRATION IN PAKISTAN

The development of the doctrine of frustration has also its effects on the laws of Sub-Continent. As we know that in Pakistan and India, law regulating the contracts is Contract Act, 1872. We have to know that whether the laws of sub-continent have developed or remained silent on this issue. Section 56 of the Contract Act, 1872 contains the doctrine of frustration. Act describes this doctrine in this way.

"A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."[121]

Pakistani courts has defined and elaborated this doctrine in detail. A lot of judicial decisions are found on this issue. The Supreme Court of Pakistan has given its judgment on the issue whether doctrine of frustration is an exception of the rule of absolutism or not. It is said by the Court that' doctrine of frustration is not really an exception to the rule that a man must pay damages if he breaks the contract for there can be no default in doing that which the law prohibits.'[122]It is also stated that 'doctrine of frustration applies only to executory contracts and not to the transactions completed.'[123]

---

[120] See section 7 (1) of *Frustrated Contracts Act 1988.*
[121] See section 56 of the Contract Act, 1872.
[122] PLD 1980 SC 122
[123] PLD 1970 SC 185 Abdul Muttalib v Razia Begum

About the effects of the frustration, the rule has been prescribed by the Supreme Court. It is observed that, 'when there is frustration the dissolution of the contract occurs automatically. It does not depend upon the choice or election of either party.'[124]

Indian Courts have also discussed this doctrine in detail and accepted this doctrine in the regime of contract law. Indian Supreme Court had explained the term impossible in 1954 with reference to doctrine of frustration.[125]With the passage of time this doctrine has been developed in India in the shape of judicial decisions. There is a need of legislation on this issue to cover its core areas so that disputes between parties regarding frustration may be resolved according to the provisions of that legislation.

2.4. CONCLUDING REMARKS

To conclude this chapter, I can say that the doctrine of frustration has been developed gradually. Judicial decisions had some pieces of legislation on this have played their role in its development. Doctrine of absolutism is also important for our system. There is need of parallel use of these two doctrines to achieve just, reasonable and equitable results so that parties to the contract will no victimized by this doctrine. Another important issue which has been discussed in this chapter is that if any party is not ready to perform his part of contract which can be performed, he cannot plead for frustration.'[126]In the end, I would like to say that there is need to legislate on this issue to avoid future ambiguities and to preserve the sanctity of contract.

---

[124] PLD 1980 SC 122.
[125] See Satyabrata Ghose v. Mugneeram Bengur and Co. and another, AIR 1954 SC 44.
[126] AIR 1921 Cal. 305.

CHAPTER NO. 3

OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION

This chapter deals with different conditions upon which the contract is frustrated with special emphasis on outbreak of war as a cause of frustration of contract. 'When, after the parties have entered into the contract, war breaks out, the question arises whether the performance of the contract is rendered illegal by that event or is only indirectly affected by the outbreak of war.'[127] There are different conditions and sets of circumstances upon which the contract is frustrated. One of those conditions is the outbreak of war. It is of great importance because the outbreak of war has two aspects. First, the outbreak of war affects the contract directly as the outbreak of war is between the contracting countries. In this situation, the contract is automatically dissolved by the outbreak of war becoming an alien enemy. Second, the outbreak of war affects the contract indirectly only. Now the question arises whether the performance of the contract is rendered illegal in this case by the event or not. 'It is, of course, an entirely different question whether in these circumstances the contract might be frustrated for other reasons, in particular on the ground that its performance is prohibited by the government of either contracting country or that in consequence of the effect of war there has been a vital change in circumstances.'[128] There are modern developments in the form of judicial decisions which support my point of view that the legality of performance is not affected by the war and the contract does not automatically become frustrated by the event if

---

[127] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn. (London: Sweet & Maxwell, 2007), 121.
[128] Ibid

the outbreak of war affects the contract indirectly only and does not change the circumstances fundamentally.

3.1. DEFINITION OF WAR

The effect of outbreak of war after the conclusion of contract will be discussed in two phases. The first phase will point out the legal aspects of war when it affects directly. The second phase will analyze its effects when it affects indirectly only. First of all, the term of war is defined here to know its actual meaning.

The term war is used in many senses in our society. In ordinary conversation this term is used frequently as a flexible expression which may be allotted to an allusion to any serious strife, struggle or campaign like war of nerves, class wars etc.'[129] This is general use of the word war in poetic sense especially. But this term has different meanings in legal sense. Its legal or technical meaning may be narrated as following.

According to Gale Encyclopedia of American Law,

> "Open and declared conflict between the armed forces of two or more states or nations."[130]

According to Black's Law Dictionary,

> "Hostile conflict by means of armed forces, carried on between nations, states, or rulers, or sometimes between parties within the same nation or state."[131]

---

[129] See Dinstein, Yoram, *War, Aggression and Self-Defence*, Third Edition (Cambridge: Cambridge University Press, 2001), 3.
[130] Gale Encyclopedia of American Law,3rd Edition, Vol. 10
[131] Garner, Bryan A., *Black's Law Dictionary*, Eighth Edition (USA: Thomson west, 2004), 1614.

'War in its most generally understood sense was a contest between two or more States primarily through armed forces, the ultimate purpose of each contestant or each contestant group being to vanquish the other or others and impose its own conditions of peace. This is similar to the conception of the greatest theorist of the nature of war, Kari Von Clausewitz (1780-1831), for whom war was a struggle on an extensive scale designed by one party to compel its opponent to fulfill its will.'[132]

L. Oppenheim has given the definition of war in this way.

> "War is a contention between two or more States through their armed forces, for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases."[133]

'Oppenheim has discussed four major points in his definition of war. Firstly, contention between at least two States; secondly, the use of armed forces; thirdly, purpose must be of overpowering the enemy; and fourthly, imposing such conditions of peace as the victor pleases.'[134]

Hall has defined the term war which was judicially approved in *Driefontein Consolidated Gold Mines v. Janson*:

> "When differences between States reach a point at which both parties resort to force, or one of them does acts of violence, which the other chooses to look upon as a breach of the peace, the relation of war is setup, in which the combatants may use regulated violence against each

[132] Starke, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 458.
[133] L. Oppenheim, *International Law*, Vol. II (H. Lauterpacht ed., 7th Edition, 1952), 202.
[134] See Dinstein, Yoram, "*War, Aggression and Self-Defence*", Third Edition (Cambridge: Cambridge University Press, 2001), 5.

other, until one of the two has been brought to accept such terms as his enemy is willing to grant."[135]

War may be defined in this way:

> "War is a phenomenon of organized violent conflict typified by extreme aggression, societal disruption, and adaptation, and high mortality. There is some debate about other characteristics, but in general there is agreement that war involves at least two organized groups, is a premeditated activity at least on the part of one side, and at least one of the groups uses violence against the other. In other words violence, destruction is the result of every war fought."[136]

From the above definitions we may conclude that war is a contention between two or more States with the purpose to overpowering the enemy and to impose victor's conditions of peace. War may be a civil war, imperfect war, perfect war, and imperfect war.'[137]

3.2. OUTBREAK OF WAR AS A CAUSE OF FRUSTRATION OF CONTRACT

It is not possible to describe a complete and exhaustive list of those events or conditions which may cause frustration of the contract. There are some sets of circumstances on which this doctrine comes into operation. That list of circumstances has been prescribed in chapter one. One of them is intervention of war. War is an important factor to determine the nature of the performance of the contract. As we have explained that intervention of war has two

---

[135] Starke, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 458.
[136] Jadoon, Babar Khan, "Social and Environmental Impacts of Conflicts in Swat Region" (MS Thesis, International Islamic University, Islamabad, 2012), 1.
[137] For details see Garner, Bryan A., *Black's Law Dictionary*, Eighth Edition (USA: Thomson west, 2004), 1614.

aspects. Sometimes it affects directly and sometimes it affects indirectly. What are the consequences of these two situations? This is the real task of our research here.

3.3. ENEMY CHARACTER IN WAR

'An alien enemy is an individual who, due to permanent or temporary allegiance to a hostile power, is regarded as an enemy in wartime.'[138] 'The outbreak of war, as such, has far reaching effects on the relations between the opponent belligerent States. As the outset, it is necessary to know what persons or things are to be deemed of enemy character, as usually municipal legislation will prohibit, trading and intercourse with the enemy, and to provide for the seizure of enemy property.'[139]

First of all, the issue of 'enemy character in war' needs to be settled before further discussion on this topic. 'As to individuals, State practice varies on the test of enemy character. British and American Courts favor residence or domicile as against the Continental rule which generally determines enemy character according to nationality. But as a result of exceptions grafted on these two tests Anglo-American practice, has tended to become assimilated to the Continental practice.'[140] Which test would be preferred and used in modern world? The answer is given by William Herbert Page in this way:

> "Whether a natural person is to be regarded as an alien enemy or not, within the meanings of the rule which forbid trading with the enemy, is to be determined by his personal domicile or his business domicile, rather than by his nationality. If the person who has assumed a domicile in the country of the enemy, is in fact a native subject of such country, and if he has

[138] http://legal-dictionary.thefreedictionary.com/Alien+Enemy (last accessed on March 25, 2012)
[139] Starke, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 470.
[140] Ibid, at 471.

assumed a domicile in the country of his nationality in anticipation of the outbreak of war, he is still to be treated as an alien enemy."[141]

Nationality or domicile of parties as test is being used and analyzed in the modern world in famous case laws. The leading case of Porter v. Freudenberg[142] affirms the test of residence in enemy territory as determining enemy status in this way:

> "This law was founded in earlier days upon the conception that all subjects owing allegiance to the crown were at war with the subjects of the state at war with the crown, and later it was grounded upon public policy, which forbids the doing of acts that will be or may be to the advantage of the enemy state by increasing its capacity for prolonging hostilities in adding to the credit, money or goods, or other resources available to individuals in the enemy state."[143]

'The same result is ordinarily reached in prize cases and the property of persons whose business domicile is in the enemy country, is regarded as subject to capture as enemy property, even if the individuals are neutrals.'[144]

Another famous case which has given a very stringent principle to know the enemy character of individuals in war. The first issue has resolved in this way that test of domicile instead of test of nationality will be used to know the enemy character of individuals in war. The second issue relating to this topic is known as '*Daimler Principle*' which is very stringent principle regarding enemy character of individuals in war. 'In the case of *Daimler Co Ltd v*

---

[141] Page, William Herbert, "*The Law Of Contracts*", Vol. 5 (The W. H. Anderson Company, 1919), Sec. 2732. available at http://chestofbooks.com/business/law/Law-Of-Contracts-4-5/Sec-2732-Nationality-Or-Domicile-Of-Parties-As-Test.html (last accessed on March 25, 2012)

[142] [1915] 1 KB 857

[143] See Porter v. Freudenberg [1915] 1 KB 857, available at http://chestofbooks.com/business/law/Law-Of-Contracts-4-5/Sec-2732-Nationality-Or-Domicile-Of-Parties-As-Test.html (last accessed on March 25, 2012)

[144] See The Friendschaft, 17 U. S. (4 Wheat.) 105, 4 L. ed. 525; The Nayade. 4 C Rob. 251; The Vigilantia. 1 C. Bob. 1 (15). Available at http://chestofbooks.com/business/law/Law-Of-Contracts-4-5/Sec-2732-Nationality-Or-Domicile-Of-Parties-As-Test.html (last accessed on March 25, 2012).

Continental Tyre and Rubber Co (Great Britain) Ltd[145], the House of Lords adopted the test of enemy associations of enemy control for corporations carrying on business in an enemy country but not incorporated there, or corporations neither carrying on business nor incorporated there but incorporated in Great Britain itself or a neutral country.'[146] The House of Lords had given ruling in this case regarding the enemy character in this way,

> "... the enemy character may be assumed by such a corporation if 'its agents or the persons in *de facto* control of its affairs' are resident in an enemy country, or, wherever resident, are adhering to the enemy or taking instructions from or acting under the control of enemies."[147]

'As regards ships, prima facie, the enemy character of a ship is determined by its flag.'[148]'As to goods generally, if the owners are of enemy character, the goods will be treated as enemy property. This broad principle was reflected in the various wartimes Acts of countries of the British Commonwealth, prohibiting trade with the enemy and providing for the custody of enemy property.'[149]

3.4. PROHIBITION OF TRADE AND CONTRACTS IN WAR

As we have discussed earlier in this chapter that war may be a cause of frustration of contracts. Here we face two situations. Firstly, effect of war on existing contracts and secondly, effect of war on conclusion of new contracts. The solution of these situations is present in different case laws which is also expressed by Chitty in this way,

---

[145] [1916] 2 AC 307.
[146] Starke, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 472.
[147] Ibid
[148] Ibid
[149] Ibid

> "The outbreak of war renders illegal all intercourse between British subjects (or other persons owing temporarily allegiance to the Crown) and alien enemies. Consequently, any contract which involves such intercourse is automatically dissolved by the outbreak of war, or by the party thereto becoming an alien enemy, even though it contains a clause suspending its operation during the continuance of a state of war, for this would be void as against public policy."[150]

Further explanation of this point has been given which is also very stringent application of the rule of frustration and to establish the status of alien enemy in this way.

> "Any contract which, though not actually made with a party who becomes an alien enemy, necessarily involves intercourse with or advantage to the enemy, is within the rule."[151]

'Trading and intercourse between the subjects of belligerent States ceases on the outbreak of war and usually special legislation is introduced to cover the matter.'[152] Those contracts which were concluded before the outbreak of war, they are of special importance here. Because 'accrued rights under such a contract (e.g. for a liquidated sum of money already due) are not destroyed, though the right of suing in respect of such rights may be suspended for the duration of the war or so long as the claimant remains as alien enemy.'[153] We have certain examples in the form of case laws from which we can conclude the true nature of war as a cause of frustration of contract.

---

[150] A.G. Guest, Editor, *Chitty on Contract*, 24thEdn, quoting Hasbury's Law of England (London: Sweet & Maxwell, 1979), Para 1425.
[151] Ibid
[152] Starke, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 474.
[153] A.G. Guest, Editor, *Chitty on Contract*, 24thEdn, quoting Hasbury's Law of England (London: Sweet & Maxwell, 1979), Para 1425.

In Hugh Stevenson and Sons Ltd v AG fur Cartonnagen Industries,[154] *it was* held that 'where a partnership agreement is dissolved by one partner becoming an alien enemy , the enemy partner is nevertheless entitled to a share in the profits made thereafter by the English partner with the aid of the enemy partner's share of the capital.'[155]

In *Bevan* v. *Bevan*,[156] it was observed that 'executory contracts, whose continuance in force is not against public policy, are not abrogated by one party becoming an alien enemy; for instance, a separation agreement by which a husband agrees to pay regular maintenance to his wife remains in force when she becomes an alien enemy, though during the war payments should be made to the Custodian of Enemy Property.'[157]

Before moving to discuss the effects of war on the performance of the contracts when it affects directly, one more issue is of great importance in this scenario. What will be the effect of war on enemy property? Whether every kind of property will be confiscated? In this regard, the practice is that 'a belligerent State may confiscate movable property belonging to the enemy State' while for the enemy private property, the general practice now of belligerent States is to sequestrate such property in the territory (i.e. seize it temporarily)

---

[154] *Hugh* Stevenson and Sons Ltd v AG fur Cartonnagen Industries, [1918] A.C. 239.
[155] A.G. Guest, Editor, *Chitty on Contract*, 24thEdn, quoting Hasbury's Law of England (London: Sweet & Maxwell, 1979), Para 1425.
[156] Bevan v. Bevan [1955] 2 Q.B. 227.
[157] A.G. Guest, Editor, *Chitty on Contract*, 24thEdn, quoting Hasbury's Law of England (London: Sweet & Maxwell, 1979), Para 1425.

rather than to confiscate it, leaving its subsequent disposal to be dealt with by the peace treaties.'[158]

3.5. WAR AFFECTING DIRECTLY THE PERFORMANCE OF CONTRACT

Now we discuss the effects of war on the performance of the contracts when it affects directly. Following are the examples in the form of judicial decisions which explain the effects of war on contracts.

In *Fibrosa case*,[159] 'a Polish company had ordered certain flax-hackling machines from manufacturers in Leeds shortly before the outbreak of the Second World War. The machines had to be delivered c.i.f Gdynia within a certain time and the contract provided that in case of war or other events beyond the control of the parties, a reasonable extension of the time of delivery should be granted. After the outbreak of war, Gdynia was occupied by the Germans.'[160] 'It was held by the House of Lords that the contract was frustrated owing to war and the British manufacturers were discharged from delivering the machines. The clause allowing for extension of the time of delivery did not save the contract because it was intended to cover merely minor delay as distinguished from a prolonged and indefinite

---

[158] See for details Starke, J.G., *Introduction to International Law*, Tenth Edition (London: Butterworths, 1989), 474.

[159] *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*, [1943] A.C. 32

[160] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 122.

interruption of contractual performance.'[161] This is an example of the contract which was frustrated due to direct effect of war on contract.

3.5.1. Suez Canal Cases

Suez Canal cases are of great importance to know the nature of the doctrine of frustration of contract. The facts behind the Suez Canal cases are also of great significance. "On July 26, 1956, President Nasser of Egypt announced the nationalization of the Suez Canal, then owned by the French-managed Suez Canal Company. The Canal had been one of the most important commercial passages for shipments from the Middle East to Europe. From October 28, 1956, heavy fighting between Egyptian and Israeli forces took place in the Sinai Peninsula. Great Britain and France bombed by air various targets in Egypt just after the ultimatum was delivered on October 30, 1956. A general cease-fire took effect on November 7, 1956; by that time, the Canal was blocked by over forty sunken ships, and it was likely that the Canal would be closed for a period of time."[162] 'In fact, the Canal was closed for some five months until April 1957, when it was reopened through the aid of the United Nations.'[163]

Outbreak of war operates as a cause of frustration of contracts because it creates a situation which is totally different from the previous situation which was at the time of contract. This is the main cause of frustration. Element of frustration may be traced

---

[161] Ibid

[162] Société Franco Tunisienne d'Armement v. Sidermar S.P.A., [1961] 2 Q.B. 278, 286 (1960). See for details Lee, Wanki, "*Exemptions of Contract Liability under the 1980 United Nations Convention*", 8 Dickinson Journal of International Law (Spring 1990) 375-394

[163] http://www.cisg.law.pace.edu/cisg/biblio/lee.html (last accessed on 16-04-2012)

successfully by tracing so-called Suez Canal cases which were the result of military operations between Egypt and Israel. The brief overview of these cases is as:

> "In these cases exporters in East Africa had sold certain goods for shipment c.i.f. specified European destinations; the contracts were made before the date of the closure of the Canal but had to be performed after that date. On the date of performance the Canal was no longer open for shipment but it was still possible to ship the goods to their destination via the Cape of Good Hope. That route was very much longer than the voyage via the Canal and caused considerable additional expense."[164]

These are the facts of those cases of Suez Canal. From the analysis of the facts, it is clear that after the formation of contract between parties, the situation had been changed totally due to which such circumstances has been emerged that one party may be in loss if he performs the contract according to the terms and conditions. But 'it was clear that the additional expense was not of such magnitude as to support the view that the contracts were frustrated on that account.'[165] Another question was very difficult to answer in this situation 'whether the necessity to ship by the alternative route the Cape constituted a radical difference in the character of the seller's obligation.'[166] Apparently it seems that the decision would be in favor of those who want to continue the performance of the contracts because there was no fundamental change of circumstances in these cases as Lord Denning said in one case[167] about fundamental different situation in this way,

---

[164] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 126.

[165] Ibid

[166] Ibid

[167] Brauer & Co. (Great Britian) Ltd v James Clarke (Brush Materials) Ltd [1952] 2 All E.R. 497 at 501.

> "If it was ... 100 times as much as the contract price, that would be a "fundamental different situation" which had unexpectedly emerged, and they would not be bound to pay it."[168]

Another argument of this point of view is that an alternative route was available to the sellers to perform the contract according to the terms and conditions of the contracts. The House of Lords held in these cases differently from the judgment of Lord Denning and considered minor additional expenses as a cause of frustration which were not 100 times or even 50 times of the contract price. The House of Lords held:

> "The sellers were under a duty when the usual route -via the Canal- was no longer available to send the goods by a reasonable and practical route..."[169]

It means the House of Lords had treated the doctrine of frustration as a general rule in case of difficulty by ignoring the previous decisions of Courts of Law. In 1956 the House of Lords had given these decisions and settled this rule but afterwards many decisions came which were against this rule and elaborated that it is very difficult to rely upon frustration for excuse of non performance of contracts after their formation. Lord Radcliffe and Harman L.J. were of the point of view that this doctrine of frustration should be carefully used in determining the rights of parties to the contract. And they said that 'it is a conclusion which should be reached rarely and with reluctance.'[170] There are seven cases after the first closure of the Suez Canal in 1956 and two cases after the second closure in 1967.[171]

---

[168] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade,* 11th Edn.(London: Sweet & Maxwell, 2007), 119.

[169] Ibid, at p. 126.

[170] See *Schmitthoff's Export Trade: The Law and Practice of International Trade,* 11th Edn., p. 127.

[171] *See* Carapanayoti & Co. v. E.T. Green Ltd., [19591 I Q.B. 131 (1958); Tsakiroglou & Co. v. Noblee Throl G.m.b.H., [1962] A.C. 93 (H.L. 1961); Albert D. Gaon & Co. v. Société Interprofessionalle des Oleagineux Fluides Alimentaries, [1960] 2 Q.B. 348 (C.A.); Glidden Co. v. Hellenic Lines, Ltd., 275 F.2d 253 (2d Cir.

The closure of Suez Canal in 1956 had created a difficult situation especially for the United Kingdom in the shape of financial crisis and sought help from IMF. As mentioned in IMF working paper,

> "Egypt's nationalization of the Suez Canal in 1956 and the failed attempt by France, Israel, and Britain to retake it by force constituted a serious political crisis with significant economic consequences. For the United Kingdom, it engendered a financial crisis as well. That all four of the combatants sought and obtained financial assistance from the IMF was highly unusual for the time and had a profound effect on the development of the Fund."[172]

The Suez Canal cases are the examples of effects of war on the performance of contracts when it affects contracts directly, and changes the circumstances fundamentally but it depends upon the facts of each case.

3.6. WAR AFFECTING INDIRECTLY THE PERFORMANCE OF CONTRACT

As we have stated earlier in this chapter that there are two situation relating to intervention of war with regard to frustration of contract. First situation has been discussed in the light of Suez Canal cases and a famous case of a Polish company namely *Fibrosa case*. Second situation is related to intervention of war between two foreign countries and not between the countries of contracting parties. Whether this intervention of war be a cause of frustration of

---

1960); Société Franco Tunnisienne d'Armement v. Sidermar S.P.A., [1961] 2 Q.B. 278 (1960); Ocean Tramp Tankers Corporation v. V/O Sovfracht. [1963] 2 Lloyd's List L.R. 155, aff'd, [1964] 2 Q.B. 226 (C.A. 1963); Transatlantic Financing Corporation v. United States, 363 F.2d 312 (D.C. Cir. 1966); Palmco Shipping, Inc. v. Continental Ore Corp. [1970] 2 Lloyd's List L.R. 21 (1969); American Trading Production Corp. v. Shell International Marine Ltd., 453 F.2d 939 (2d Cir. 1972).

[172] IMF Working Paper, "*Northwest of Suez: The 1956 Crisis and the IMF*", Prepared by James M. Boughton, December 2000 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880301 (last accessed on April 28, 2012)

contract between the parties only due to outbreak of war between two foreign countries which is affecting the performance of the contract indirectly only. This issue may be resolved with the help of critical analysis of *ratio decidendi* of cases relating to frustration of contract. Because ratio decidendi works as *illah* or underlying cause of decisions. And it is also a well known analysis of the decisions of cases relating to frustration that all the factors responsible for frustration of contract create a situation different from the previous situation under which contract was formed. So it may be said that outbreak of war between two foreign countries (not of countries of contracting parties) will not be operative to frustrate the contracts if there is no fundamental change in circumstances. Secondly, it has also been considered that in these cases war does not normally work as frustrating event but the effect of war may be a cause of frustration of contract.

3.6.1. Shatt-Al-Arab Cases

Outbreak of war when affects the contracts indirectly, then we look forward to Shatt-al-Arab cases for their effects on contracts. Before going to the details of Shatt-al-Arab cases, first of all we know about Shatt-al-Arab. According to *Encyclopedia Britannica Online*,

> "Shatt-Al-Arab, (Arabic: "Stream of the Arabs") Persian Arvand Rūd, river in southeastern Iraq, formed by the confluence of the Tigris and Euphrates rivers at the town of Al-Qurnah. It flows southeastward for 120 miles (193 km) and passes the Iraqi port of Basra and the Iranian port of Abadan before emptying into the Persian Gulf. For about the last half of its course the river forms the border between Iraq and Iran; it receives a tributary, the Kārūn River, from the eastern (Iranian) side. Its width increases from about 120 feet (37 m) at Basra to 0.5 mile (0.8 km) at its mouth. Along the settled banks there are date-palm groves, which are naturally irrigated by tidal action. The Kārūn empties large quantities of silt into the

> Shatt-Al-Arab, necessitating continuous dredging to keep the channel navigable for shallow-draft oceangoing vessels. The present river pattern probably is relatively recent, but its mode of formation is uncertain. The Tigris and Euphrates possibly once flowed to the Persian Gulf by a more westerly channel, while the Shatt-Al-Arab's present lower course may have been part of the Kārūn. In the 1980s the Shatt-Al-Arab was the scene of prolonged and intense fighting between Iraq and Iran; the former had invaded the latter in 1980 after asserting Iraqi sovereignty over both banks of the river."[173]

A line of cases namely the Shatt-al-Arab cases, have different conclusions regarding frustration of contracts due to outbreak of war. In these cases the principle laid down by Courts was that the frustration is a difficult conclusion which should be reached carefully and reluctantly. And it should not be taken lightly because it determines the rights and duties of parties to the contract. The facts of these cases are very common and may be described in this way,

> "When war broke out between Iran and Iraq in September 1980, a large number of vessels were trapped in the Shatt-al-Arab, a waterway separating the two hostile countries. Legal disputes concerning some of these vessels arose, mainly on the issue when the charter-parties relating to these vessels were frustrated."[174]

The principle established in the Shatt-al-Arab cases may be traced in the Chrysalis[175] in these words,

> "Outbreak of war between two foreign countries does not normally act as a frustrating event, but that the effect of such war may lead to frustration."[176]

---

[173] *Encyclopedia Britannica Online*, s. v. "Shatt Al-'Arab", accessed April 29, 2012, http://www.britannica.com/EBchecked/topic/31417/Shatt-Al-Arab.

[174] Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 127.

[175] Finelvet AG -v- Vinava Shipping Co Ltd ("The Chrysalis") [1983] 1 WLR 1469; [1983] 1 Lloyds Rep 503

[176] See for details Carole Murray, M.A. (Cantab.) and others, *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edn.(London: Sweet & Maxwell, 2007), 127.

Mustill J. had described the position of doctrine of frustration in this way,

> "Except in the case of supervening illegality, arising from the fact that the contract involves a party in trading with someone who has become an alien enemy, a declaration of war does not prevent the performance of a contract; it is the acts done in furtherance of the war which may prevent performance, depending on the individual circumstances of that case."[177]

The *Evia case*[178] was of great importance among the list of the Shatt-al-Arab cases. In this case, the House of Lords observed the doctrine of frustration in this way,

> "A port was not safe unless in the relevant period the ship could reach it, use it and return from it, in the absence of abnormal occurrences."[179]

From the logical decisions of the Shatt-al-Arab cases it may be presumed that Outbreak of war is a cause of frustration of contract only where it occurs after the parties have entered into the contract and the performance of the contract is rendered illegal / impossible by that event. But the legality of performance is not affected by the war and the contract does not automatically become frustrated by that event if the outbreak of war affects the contract indirectly only and does not change the circumstances fundamentally.

3.7. RECENT DEVLOPMENTS IN LAW OF FRUSTRATION

A piece of legislation is present in Australia namely South Australia Frustrated Contracts Act 1988[180] which was passed with the aim to reform the law relating to frustrated contracts. This

---

[177] Ibid.

[178] Kordos Shipping Corporation of Monrovia v Empresa Cubana de Fletes; The Evia (No. 2) [1983] 1 A.C. 736.

[179] Sujan, M.A., *Law Relating to Frustration of Contract (Bombay: N.M. Tripathi Private Limited, 1989)*, p. 65, 66.

law explains the jurisdiction of the doctrine of frustration of contract. It also describes the effect of partial frustration of contract. And the most important feature of this is that it provides the provisions about adjustment of rights and obligations between the contracting parties.

In 1992, *the Lefthero*[181] was an important case law describing the limits of doctrine of frustration. In this case it was held that plea of frustration cannot be claimed on the basis of general exceptions of the contract. Facts should be carefully examined and the doctrine of frustration should be used in exceptional circumstances.

In 2007, Mr. Justice Gross quoting Chitty on Contracts in his recent judgment in The "Sea Angel" said that there can be no frustration if the delay in question is within the commercial risks undertaken by the parties.'[182]

And the most recent development in this regard is United Nations Convention on Contracts for the International Sale of Goods, 2010[183] which explains all the issues of frustration in detail. Article 79 of it deals with exemptions under which a party is not liable to perform the contract but subject to the conditions prescribed for this avoidance of performance.

---

[180] South Australia Frustrated Contracts Act 1988 available at http://www.legislation.sa.gov.au/LZ/C/A/FRUSTRATED%20CONTRACTS%20ACT%201988/CURRENT/1988.11.UN.PDF (last accessed on April 29, 2012)

[181] *Ellis Shipping Corporation v. Voest Alpine Intertrading (The "Lefthero")*[1992] 1 Lloyd's Rep 109.

[182] Newsletter *Sea Venture*, issue 6 available at http://www.simsl.com/Sea-Venture/SeaVenture_6_V30608.pdf (last accessed on April 29, 2012)

[183] United Nations Convention on Contracts for the International Sale of Goods, (United Nations: New York, 2010) available at http://www.uncitral.org/pdf/english/texts/sales/cisg/CISG.pdf (last accessed on April 29, 2012)

3.8. CONCLUDING REMARKS

In the light of above discussion of case laws and of pieces of legislation, it is obvious that the doctrine of frustration has its own importance and it cannot be ignored during performance of the contracts. Doctrine of frustration is operative in law of contract but decisions of judges show that it should be carefully used so that no party can get undue advantage in any contract due to wrong application of this doctrine. As regard to war as a cause of frustration, this should be kept in mind that if a war is declared between the countries of contracting parties, then contracts frustrate due to enemy character. And in second case when war is between foreign countries and not between the countries of contracting parties, the contracts do not frustrate normally due to war but due to the effects of war which have created a fundamentally changed situation.

CHAPTER NO. 4

COMPARATIVE ANALYSIS & CONCLUSION

This chapter deals with the study of doctrine of frustration in Islamic law. Moreover a comparison of effects of both aspects of war will be accompanied to draw distinction between the two. In the end, conclusions will be drawn from the whole discussion and then appropriate recommendations will be presented for the better use of this doctrine in the law of contract to determine the rights and obligations of contracting parties.

4.1. COMPARATIVE ANALYSIS OF BOTH ASPECTS OF WAR

In the third chapter we have discussed two aspects of war and their effects on the performance of contract. If we analyze these two aspects of war, we will come to know following points:

I. When war is between the countries of contracting parties, all contracts made before that event automatically frustrate under the rules of international law as trade with enemy is prohibited. While in second situation, when war is between two foreign countries and not between the countries of contracting parties, now contracts do not frustrate automatically.

II. In the first situation, the enemy character of party to the contract is responsible for frustration of contract. While in second situation, fundamental change of circumstances will be a cause of frustration.

III. In the first situation, contracts frustrate irrespective of the fact that performance has been impossible or not. Only enemy character is sufficient. While in second situation, fundamental change of circumstances is essential.

IV. In the first situation, parties may be deprived of the right of adjustment of obligations and rights but it is not so in second situation.

4.2. DOCTRINE OF FRUSTARTION IN ISLAMIC LAW

The doctrine of frustration was accepted in Islamic law as a principle and ruling was given on the basis of that principle in the very beginning of it. From the definition of Islamic law, it is obvious that the communications from Allah Almighty are sometimes expressed in declaratory form. Declarations are further sub-divided into *Azimah* and *Rukhsah* which may be termed as general rule and exceptions in western law. The purpose behind this classification is to fulfill the needs and necessities of human beings ant to minimize hardship from their lives.

These exceptions are prescribed in textual sources of Islamic law. For example, Quran says: "Almighty Allah did not impose any hardship on you in the matters of religion."[184] Another verse of Quran is: "Allah desires facility for you and desires not hardship and for this"[185] Quran says in another verse: "Allah places not burden on any soul but to the extent of his strength"[186]

[184] Al-Quran 22:78
[185] Al-Quran 2:185
[186] Al-Quran 2:286

There is a famous tradition of Holy Prophet (ﷺ): No injury is to be caused and none is to be borne.[187]

From these texts it is obvious that Islamic law gives room to human beings. The Muslim scholars discussed the frustration under the topic of excuse (uzr) which affects on the obligations imposed by contract. Due to operation of *uzr* in Islamic law, parties become able to eliminate or remove their contractual obligations or to convert into alternative way which may be less harmful than the performance of basic obligations.

In Islamic law, legal capacity and its different kinds will be helpful to know the detailed concept of frustration.

4.3. CONCLUSION

From the whole discussion of the doctrine of frustration, we can conclude following points.

a) In order to use the doctrine of frustration of contract, the first thing which should be considered is completion of contracts. When contract was made, it was possible to perform the contract. If any contract was made and at the time of conclusion of contract its performance was impossible, now this doctrine cannot be attracted in this case.

b) Frustration is operative in case of subsequent impossibility: after the formation of a valid contract. Event must be subsequent to the contract.

[187] See Sunan Ibn Majah, Tradition # 2341

c) If part of the contract becomes impossible and contract is separable, in this situation part performance will be conducted.

d) Time of performance is very important in these cases. If time is essential to the contract, then contract should be performed within time. If time has not been specified and not essential to the contract, any impossibility occurs for a limited time, after the end of impossibility, the party has to perform the contract. Here doctrine of frustration will not be attracted.

e) If the contract is absolute and covers the events of frustration, now the parties are bound by the contract.

f) Frustration works as an exception to the doctrine of absolute liability and it mitigates the harshness of common law.

g) The operation of this doctrine kills the performance of the contract and no further liability may be arose after the frustrating event.

h) Frustrating event must be without the fault of either party. It should not be self-induced. The burden of proof to establish the fact that frustration is self induced is on the plaintiff.

i) To attract frustration, the performance of contract must become absolutely impossible due to supervening event. If contract is still able to be performed inspite of supervening event, the doctrine cannot be attracted.

j) If a party is not ready to perform his part of contract which can be performed, he cannot go for frustration of contract.

k) At common law, frustration does not rescind the contract *ab initio*. It merely releases both parties from further performance.

l) Due to operation of this doctrine, contract becomes void. In void contracts, if one party has performed something, he should be paid back according to the principle of *quantum meruit.*

m) This doctrine does not come into operation if the party claiming it had the actual knowledge of impossible or unlawful act.

.....

SELECTED BIBLIOGRAPHY

Selected Books and Articles

1. Abu `Abdallah Muhammad ibn Yazid *Ibn Majah* al-Rab`i al-Qazwini. *Sunan Ibn Majah*,
2. Al-Quran
3. Atiyah, P.S. *An Introduction to the Law of Contract*. Third Edition. Oxford, 1984.
4. Baig, Luqman. *Mercantile Law*. Lahore, 2005.
5. Beale BA, H.G. and others. *Contract: Cases and Materials*. London, 1985.
6. Beatson, Jack. *Increased Expense and Frustration*. London, 1996.
7. Briks, Peter. *Failure of Consideration*. London, 1996.
8. Carole Murray, M.A. (Cantab.) and others. *Schmitthoff's Export Trade: The Law and Practice of International Trade*, 11th Edition. London, 2007.
9. Columbia Law Review Association, Inc. *Columbia Law Review*. Vol. 44, No. 5 (Sep., 1944) http://www.jstor.org/stable/1117939
10. Cretney, Stephen. *From Status to Contract*. London, 1996.
11. Davies, Edward. *Swine Flu: Contracts & Force Majeure*. Practical Law Company, 2009. http://construction.practicallaw.com/blog/construction/pinsents/?p=35
12. Dinstein, Yoram. *War, Aggression and Self-Defense*. Third Edition. Cambridge, 2001.
13. *Encyclopedia Britannica Online*, http://www.britannica.com
14. *Gale Encyclopedia of American Law*, 3rd Edition.
15. Garner, Bryan A. *Black's Law Dictionary*. Eighth Edition. USA, 2004.
16. Goldberg, Victor P. *Reading in the economics of contract law*. USA, 1989.
17. Guest, A.G. Editor. *Chitty on Contracts*, 24th Edition. London, 1979.

18. Ibbetson, David. *Absolute Liability in Contract: The Antecedents of Paradine v. Jayne*. London, 1996.

19. IMF Working Paper. *Northwest of Suez: The 1956 Crisis and the IMF.* Prepared by James M. Boughton, December 2000. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=880301

20. Jennings, Sir Robbert and Sir Arthur Watts. *Oppenheim's International Law*, 10th Edition. Vol. II. Delhi, 1996.

21. Jowell, J.L. and J.P.W.B. McAuslan. *Lord Denning: The Judge and the Law.* London, 1984.

22. Kuchhal, M.C. *Mercantile Law.* 10th Edition. Lahore.

23. Lee, Wanki. *Exemptions of Contract Liability under the 1980 United Nations Convention.* 8 Dickinson Journal of International Law. Spring 1990.

24. Lowenfeld, Andreas F. *International Private Trade*. New York, 1981.

25. Mahmood, Shaukat & Nadeem Shaukat. *The Contract Act 1872.* 8th Revised and Enlarged Edition. Lahore, 2009.

26. Mansoori, Dr. Muhammad Tahir. *Islamic Law of Contracts and Business Transactions.* 5th Edition. Islamabad, 2009.

27. McKendrick, Ewan. *Contract Law: Text, Cases and Materials,* 2nd Edition. New York, 2005.

28. Newsletter *Sea Venture*, issue 6. http://www.simsl.com/Sea-Venture/SeaVenture_6_V30608.pdf

29. Nyazee, Imran Ahsan Khan. *Islamic Law of Business Organization: Corporations.* Islamabad, 1999.

30. Nyazee, Imran Ahsan Khan. *Islamic Law of Business Organization: Partnerships.* Islamabad, 1998.

31. Nyazee, Imran Ahsan Khan. *Law of Contract.* Lahore, 2010.

32. Nyazee, Imran Ahsan Khan. *Outlines of Islamic Jurisprudence*. 5th Edition Reprint, 2012.

33. O'Connor, John. *Force Majeure, Frustration And Exceptions Clauses*. http://www.amac.ca/8-J_OConnor.pdf

34. Oughton, David and Martin Davist, *Sourcebook on Contract Law*. Great Britain, 1997.

35. Page, William Herbert. *The Law of Contracts*. Vol. 5. The W. H. Anderson Company, 1919.

36. Qureshi, Sajid A. *Business Laws*. Rawalpindi, 2001.

37. Rose, F.D. *Consensus Ad Idem*. London, 1996.

38. Ruszar, Richard, *Force Majeure: A method to allocate risk of non performance*. Blackley and Blackley LLP, 2000. www.bandblaw.com/articles/presale/presaleBB5/presaleBB5-1.pdf

39. Sachdeva & Gupta. *A Simple Study of Mercantile Law*. Delhi, 1992.

40. Seth, Karnika. *Frustration of Contract & Impossibility of Performance*. http://www.123oye.com/job-articles/cyber-law/frustration-contract.htm

41. Shukla, M.C. *Mercantile Law*. 13th Revised Edition. New Delhi, 2007.

42. Starke, J.G. *Introduction to International Law*. 10th Edition. London, 1989.

43. Sujan, M.A. *Law Relating to Frustration of Contract*. Bombay, 1989.

44. Tillotson, John. *Contract Law in Perspective*. 2nd Edition. London, 1985.

45. Trakman, Leon E. *Frustrated contracts and Legal Fictions*. *The Modern Law Review*. Vol. 46, No. 1 (Jan., 1983), pp. 39-55 http://www.jstor.org/stable/1095751?seq=1

46. Treitel, G.H. *Remedies for Breach of Contract: A comparative Account*. New York, 1991.

47. Treitel, G.H. *The Law of Contract*. 6th Edition. London, 1983.

48. Virginia Law Review. *Virginia Law Review*. Vol. 33, No. 4 (Jul., 1947) http://www.jstor.org/stable/1068825

49. *West's Encyclopedia of American Law*

50. *Willmott, Christensen, Butler & Dixon. Contract Law, 3rd Edition.* Melbourne, *2009.*

Laws, Acts & Conventions

1. Law Reform (Frustrated Contracts) Act (1943)
2. The Contract Act 1872
3. The Civil Code of Québec 1994
4. South Australia Frustrated Contracts Act 1988
5. United Nations Convention on Contracts for the International Sale of Goods, 2010
6. United Nations Convention on Contracts for the International Sale of Goods (CISG) 1980