SELINUS UNIVERSITY
OF SCIENCES AND LITERATURE

A Critical Evaluation of a Force Majeure Clause in English Contract Law

By

Jaggadishen CHELUMBRUN

A DISSERTATION

Presented to the Department of Law
program at Selinus University

Faculty of Art and Humanities
in fulfilment of the requirements
for the degree of

Doctor of Philosophy

2019

Selinus University

Jaggadishen Chelumbrun

Doctor of Philosophy
in
Law

Date: 30 October 2019

"*I do hereby attest that I am the sole author of this Dissertation and that its contents are only the result of the readings and research I have done*".

Signature:

Abstract

The *Force Majeure* is a doctrine which is deeply anchored in fairness as it acts as a defense for a party to be excused from performing an obligation in a contract if an unforeseen and uncontrollable event impedes the performance. However, there are much confusions and problems when it comes to the interpretation of the clauses. Those interpretations have created some uncertainties and confusions in the case law. This dissertation attempts to critically and comparatively analyses and evaluates the doctrine of *Force Majeure* and its application under the English Law, French Law, Canadian Law, the United Nations Convention on the Contract for International Sale of Goods (CISG), the UNIDROIT Principles of International Commercial Contracts (UNIDROIT), the Principles of European Contract Law (PECL) and the FIDIC. None of these jurisdictions, statutes or conventions have provided a clear and concise interpretation of the doctrine. This research has critically examined and explored the doctrines of *force majeure* as it is applied under all those jurisdictions and conventions mentioned above. The research covered a comprehensive exploration of the various differences and similarities in the interpretations and applications of the doctrines of *force majeure*, frustrations and impossibility. It has been observed that the doctrines of *force majeure*, frustration and impossibility are not exactly the same although they all have the same objective, that is to excuse an innocent party from performance. It was also found that there are significant differences in the applications and the meaning of the phrase force majeure as contemplated by the various jurisdictions and conventions. A new phrase has been introduced and coined as “Act of Fiend”. It assists in the new approach to the interpretation of a *force majeure* clause in a contract. The new term is used to demarcate the Acts of

God and the Acts of men. Both groups collectively cover all the force majeure events. The new approach and tests allow a better and more precise interpretation of the clause of force majeure. It avoids the interchanging of the terms of force majeure and Act of God which usually creates confusion. So, there is a better classification of the unforeseen events and those that can be foreseen, such as act of men. This distinction facilitates the drafting of the clause and application of the Ejusdum generis rule of interpretation.

TABLE OF CONTENT

Acknowledgements

I would like to spend a moment reflecting on my completing this dissertation. Throughout the writing of this dissertation I have received a great deal of support and assistance and feel that my work will be incomplete if I do not panegyrize all those who in one way or another had rendered my accomplishment fruitful.

First of all, my gratitude and recognition go to my supervisor, Prof. Salvatore Fava from Selinus University who supported my research proposal and provided all support for the conduct of my research. I would also like to thank Dr. David Allen Larson, professor of Law from Hamline University Minnesota and the Eminent Professor of Law, Dr Charles Fried from Harvard University School of Law, for their encouragement and support.

I am outstandingly grateful to Professor Ian Ayres, from the Yale Law School, University of Yale for his unfathomable guidance and ideas in addressing the dissertation questions in the areas of Impossibility and Impracticability.

Last but not the least, I would wish to convey my warmest and heartiest appreciations to my wife Anjeela, my daughter Dr Fiona and my son Warren who are all, as at to date, unaware of my endeavours in conducting this doctoral research in Law. Although they are aware of my interest in academic research and have always been supporting me in all my academic activities, they did not have any clue on the objective of this research.

So, I wholeheartedly dedicate the accomplishment of this work to my family.

List of Abbreviations

ABQB	Alberta Court of Queen's Bench.
ACJ	Accident Claims Journal.
AJCL	American Journal of Comparative Law.
AJIL	American Journal of International Law.
ALJ	Administrative Law Judge.
Am. J. Int. Law	American Journal of International Law.
BGH	*Bundesgerichtshof* **(**The Federal Court of Justice**-** Germany)
CISG	Contracts for the International Sale of Goods.
CJCE	*Cour de Justice des Communautés Européennes* (European Court of Justice).
CLOUT	Case Law On UNICITRAL Text
CLR	Commonwealth Law Reports.
CTD	*Contrat Territorial de Développement* (Territorial Development Contract).
EPC	Engineering, Procurement and Construction (FIDIC contract)
EPCM	Engineering, Procurement, Construction and Management
EWHC	England and Wales high Court
EWCA	England and Wales Court of Appeal
FIDIC	*Fédération Internationale Des Ingénieurs-Conseils* (International Federation of Engineering Consultant)
Harv. L. Rev	Harvard Law Review
ICE	Institute of civil Engineer
ICLR	International Community Law Review
ILM	International Legal Materials
IPR	Intellectual property Report
JCP G	*Jurisclasseur périodique (Semaine juridique)*
JDI	Journal De Droit International

J L & Com	Journal of Law and Commerce
JORF	*Journal Officiel de la République Française*
La. Civ. Code Ann.	Civil Code of Louisiana
LGDJ	*Librairie Générale de Droit et de Jurisprudence* (General Library for Case law)
Ll L Rep.	Lloyd Law Report
MLR	Modern Law Review
N S W	New south wales
OJ	Online Journal
OLG	Oberlandesgerict (German/Austrian Regional Court of Appeals)
OUP	Oxford University Press
PECL	Principles of European Contract law
QCC	Quebec Civil Code
Q B	Law Reports of Queens Bench Division (Great Britain)
RCDIP	Revue Critique de Droit International Privé. (Critical Review of Private International Law)
RDC	Revue de droit canonique (Canon Law Review)
RFP	Request for proposal
RTD	*Revue Trimestrielle de Droit Civil* (Civil Law quarterly review)
RTDE	Revue Trimestrielle de Droit Européen
SCC	Supreme court of Canada
SCL	Supreme court of Lousiana
S.D. Ala.	Southern District Alabama
SOGA	Sale of Goods Act 1979
SSRN	Social Science Research Network

UCC	The Uniform Commercial Code (UCC or the Code) 2007 Edition
ULR	Uniform Law Review
U.N. Doc.A/CONF	United Nations conferences Documents
UNICITRAL	United Nations Commission on International Trade Law
UNIDROIT	The International Institute for the Unification of Private Law
UNILEX	International Case Law, UNIDROIT
UPICC	UNIDROIT Principle of International Commercial Contract
USCA	United States Court of Appeal
WLR	weekly law report

Lists of Journals

American Journal of Comparative Law

American Journal of International Law

American Journal of Public Health

Australian Law Journal (ALJ)

Cambridge Law Journal

Canadian Journal of Law and Jurisprudence

Electronic Journal of Comparative Law

Indiana Journal of Global Legal Studies

Journal du Droit international

Journal of Comparative Legislation and International Law

Journal of Contract law

Journal Officiel de la République Française (JORF)

Journal of International Arbitration

Journal of International Law

Journal of Law and Commerce

Journal of Law, Policy and Globalization

Journal of Law & Society

Maastricht Journal of European and Comparative Law

Mc Gill Law Journal

Nordic Journal of Commercial Law

Official Journal of the European Communities

Oxford Journal of Legal Studies

Pennsylvania Journal of International Economic Law

Russian Law Journal volume

South African Law Journal

South Western Law Journal

University of New Brunswick Law Journal

Yale Law Journal

Table of Cases Page No.

United Kingdom Cases

Canadian Cases

Australian cases

US Cases

French Cases

Other Jurisdictions

Table of Codes, Conventions, Treaty and Statutes

Institut International pour l'unification du droit privé 1993 (Unification of Private Law) -- UNIDROIT Principles (2004)

Principles of European Contract Law, PECL

UPICC

Fédération Internationale Des Ingénieurs-Conseils 1913 FIDIC Silver Book

UNITRAL convention

Chapter 1

1.1 Introduction

Sometimes during the 14th century, the British was using the terms: event, occurrence or an event happened by chance; an event that happens without any foresight or expectation to explain an accident. This meaning is associated with the French word “accident”, which they may have been confused with the Latin verb “accidere” meaning to fall down. However, legal scholars have avoided using these words for more than two centuries.

As mercantilism were growing it became more difficult to manage obligations generated under a contract between the parties. So, in cases where parties failed to perform their obligations judges were considering “vis maior” as an excuse for non-performance. The Roman concept of vis maior is quite similar to the French force majeure and the Scottish damnum fatale. These concepts were not limited to natural disasters. They also include Acts of war and crimes by pirates and robbers. A violent storm or a pirates’ attack on a ship would exempt a captain from the responsibility for his cargo.[1] In the late 16th and 17th centuries the English jurists found that it would be better for them to use English rather than Latin. Furthermore, as Christianity became stronger in England, the phrase *vis maior* became "Act of God." In fact, legally it originated from the Roman law which had had a heavy influenced on the development of civil law in England.[2] In 1609, a British court held that a fire caused by lightning was an

[1]Hall CG *An unsearchable providence*: the January 1996, Vol 86, No 1 lawyer's concept of act of God Oxford J Leg Stud 1993, 13:227-248.

[2]Thomas JAC *Textbook of Roman Law*. Amsterdam, Netherlands, North-Holland, 1976.

act of God while in 1785, a court held that a fire not caused by lightning was not an act of God. [3] Those results are unclear and create uncertainty and confusions in the interpretation of the law. In 1886, Lord Esher ruled, that the phrase “Act of God” means an act of god in the mercantile sense.[4]

The courts have been regularly rejected claims on the basis that God cannot be held responsible for human negligence.[5] If the courts have been rejecting claims in those circumstances where there have been human connection then it would be crucial to distinguish unforeseen events resulted by human involvement and those where humans are not involved at all. However, even in the absence of human connection the courts have been reluctant to excuse parties to liabilities under the *force majeure* clause. In *Pioneer v Diamond* an oil rig and a barge became loose from their moorings during Hurricane Ivan. The defendant raised the defense of Act of God and was successful because other rigs also became loose.[6] In contrast with a similar case, in *Re. Atlantic Marine* during hurricane Katrina, an oil rig and a barge became loose from their moorings causing damages. The defendant raised the Act of God as his defense and was unsuccessful because other rigs which were closer to the storm did not

[3]Ginnow AW, Nikolic M Corpus Juris Secundum, Vol 1A St Paul, Minn, West Publishing Co, 1985:757 (Ginnow).

[4]Halsbury's *Laws of England* 4th ed Vol 9 London, England: Butterworths; 1974:323- 324.

[5]Ginnow supra n 3

[6]*Pioneer Natural Resources USA Inc v Diamond Offshore Co* 638 F Supp 665 (E D La 2009).

become loose. This showed that the situation was not out of control of the defendant.[7]

In a more recent case the court has rejected the defence of *force majeure* because the defendant should have foreseen the effect of the cyclone. In *General Construction v Chue Wing* during cyclone Hollanda which stroke Mauritius a crane belonging to the appellant fell on a multi-story building in Port Louis, Mauritius and caused damages. The defendant sought to avoid liability for the damages caused by relying on a *force majeure* Clause. The court rejected the argument and held that cyclones are not uncommon in the Indian Ocean and the owner-operator should have foreseen the occurrence of Cyclone Hollanda and taken steps to ensure that the crane could be operated safely.[8] The decisions of the courts have created a lot of confusion and uncertainty when it comes to the interpretation of the clause of *force majeure*. In some cases, they use the element of human interference which cause the damage or non-performance and in others the foreseeability of the intervening events. Moreover, while the *force majeure* provision is available in the French law the English law does not have this type of provision in their law of contract. Very often there is confusion between the French *force majeure* principle and the English doctrine of frustration. Although the international conventions and the Canadian law have tried to standardize a concept in order to relieve an innocent party from liability for non-performance in case it is not at fault, the law is still unclear when it comes to its application.

[7]*Re Atlantic Marine* 570 F Supp 2d 1369 (S D Ala 2008).

[8]*General Construction Co Ltd v Chue Wing & Co Ltd* (Judicial Committee of the Privy Council, 2013).

Chapter 2

2.1 Research Problem Questions

The law of contract is unclear and confusing when it comes to relieving a party to a contract from its obligation and liability. Especially when the contract becomes impossible to perform and that the party is not at fault. Whenever there is a non-liability clause in a contract there is always a problem when it comes to its interpretation. It is perhaps unfortunate and frustrating for those parties facing litigation over the precise meaning of a *force majeure* clause and that there is no general doctrine of *force majeure* under English law, unlike the position in French law from which the doctrine is derived. This often yields to uncertainty and ambiguity in contract interpretation. One leading commentator stated that "one cannot be sure what meaning a court will give to a *force Majeure* Clause. There have been several attempts to standardize a single principle to cover such situation. Even several international conversions have not been able to reach a clear solution to address this issue.

The research aims to address the issues arising from the following problem questions.

The Act of God has been used to interprete the *force majeure* even in cases where there has been human intervention. This creates a confusion as any reasonable person would think that in an act of God there will be no human interference.

How can an Act of God be distinguished from other interfering events?

Does the *force Majeure* event have to be unforeseeable?

Of What to foresee, the event or the consequence?

Under which conditions should a force Majeure clause relieve a party from liability?

The main thrust of the research is to come up with a simple doctrine to relieve a party from liability when the contract has become impossible to perform due to an external event beyond the control of the parties and without their fault.

Chapter 3

3.1 Research Methodology

For this dissertation research I have used the most traditional approach, that is the black letter methodology. I have collected information mainly from primary sources; namely case law from different jurisdictions, statutes, Civil codes, International Conventions and academic journals. The information collected were collated and critically analysed. Various doctrines on the interpretation of the non-liability clause were studied and critically analysed. The relevant legal rules were evaluated and commented on the emergence and significance of the authorities where those rules are explained particularly case law. This has been done in order to identify any underlying system that may appear logical. Case law from various jurisdiction has been analysed, the ratios decidendi compared in order to identify any inter-related rule that might exist. Whenever a rule has been identified, it has been further examined to see whether it can be internationalised. The majority of my research has been undertaken on-line using a legal database and from good quality law libraries. The data bases such as American Law Institute Library, Central Transnational Database, Juta Law Online, Westlaw, Lexis Nexis Academic, Hein Online and Justis were used. I have also used the Legal history research methodology in order to get a proper insight on the evolution and how the law in the area of *force majeure* has developed overtime. I have also adopted a comparative approach and investigated the historical context that has given rise to the legal rules in different systems namely, the English, French, Canadian, Australian and Roman. The main weakness with the black letter approach is that it focusses on primary sources, namely case law, statute and comments from

academic journal. In this way, it focuses on the law in books rather than the law ‘in action’. As such it overlooks the sociological and political implications.

3.2 Structure of the Research

This research is based on a critical analysis approach of three different laws which are linked to one another in a certain way, the table of contents illustrates the ideas that are brought forward to enlighten the relevance of the title of this dissertation.

Abstract

This chapter gives a general overview of the expectations and outcome of this dissertation and lays the foundation for discussions on the different issues that define the aims and objectives of this dissertation. It also provokes discussions on the two important phrases of *pacta sunt servanda* and *force majeure* and how they lay the foundation for the doctrine of strict liability of contractual obligation and that of exemption due to non-performance.

Chapter 1

This chapter provides the introduction to the relationship, between the doctrine of Act of God/*force majeure*/frustration and other legal concepts like termination, risk and legal remedies. The aim of this brief introduction is to prepare for more discerning discussions that feature these legal concepts in the subsequent chapters of this dissertation. It also lays down the foundation of the research, it introduces the main concepts of the law of contracts and the various doctrines which are the focus of this research.

Chapter 2

This chapter addresses the aims and objectives of the research and identified the questions to be investigated and answered.

Chapter 3

This chapter explains the methodology to be used in the research. It indicates the primary and secondary sources of materials to be used for the research and also elaborates on the advantages and weaknesses of the methods used.

Chapter 4

This chapter covers the English law doctrines on the termination of a contract in cases of hardships / impossibility. It covers the English doctrine of frustration at the common law as well as the statutory provisions covering the remedies available following the frustration of a contract. Statutory laws of UK and Australia are covered under this chapter. It discusses the various elements and expressions that constitute frustration.

Chapter 5

Here the chapter covers the French law of contract and the termination of contract following non-performance resulting from an external event. It further goes on to analyse the scope of the applications and interpretations of various doctrines concerning the avoidance of liability for non-performance and compare them with the force majeure concept under the French Civil code.

Chapter 6

This chapter covers the international law governing the contracts. It considers the various international statutes, treaties and conventions. The exemption, *force majeure* under the CISG, UNIDROIT Principles and the Canadian principles and Quebec laws are also addressed.

Chapter 7

It covers a detailed analysis of the doctrine of fundamental breach. The doctrine is examined under the common law and statutory laws and conventions. It also examines how the doctrine has evolved over time and the development of case law on this area.

Chapter 8

This chapter covers the important doctrine of foreseeability and its interpretation and application by the courts. The evolution of the concept in relation to the *force majeure* doctrine. The analysis of the terminologies is very important in order to clarify the uncertainty in the use of the doctrines of frustration / exemption / imprévision / *force majeure* as the main focus in this research. All these doctrines have the common elements of unforeseeability which is an important factor in the determining the doctrines. These issues are addressed in this chapter

Chapter 9

This chapter covers a critical and comparative appraisal of the relationship between the different doctrines. It evaluates and identifies the similarities and differences between the doctrines in order to finally establish a

common relationship. It also covers a comparative analysis of the relationship between exemption, *force majeure* and frustration under the laws discussed in the chapters above. It analyses the applicability of various contractual remedies to the doctrines of exemption, *force majeure* and frustration under the CISG, UNIDROIT Principles, PECL and the Canadian law.

Chapter 10

This chapter concludes this research by elaborating on the results of the critical and comparative analyses of the various laws and statutes conducted under this research and a recommendation is made on a proposed method that can be used in the application of the doctrine of *force majeure*. Further it also provides some guidelines on the interpretation of the terms *force majeure* and Act of God and a proposed model that courts can be used in their application of the law in this area. The model is also being proposed with an intention to make contributions to knowledge and literature in this area.

Chapter 4

English contract law

4.1 Introduction

Everybody enters into agreements regularly as a daily routine. However, entering into a legally binding agreement is something different. In the English legal system a contract is defined as an agreement which is made by two or more parties with intention that it shall be binding upon acceptance. In the English contract law, there are three basic elements that are essentials to the creation of a contract: (i) agreement; (ii) consideration; and (iii) contractual intention. The agreement is a common feature in all contract law jurisdictions. However, consideration is an element which is specific to common law. In common law, a promise is not generally binding as a contract unless it is supported by consideration. In *Currie v Misa* the court held that consideration must "consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other".[9]

The intention of the parties entering a contractual agreement is extremely important for its validity. An agreement, even where it is supported by consideration, shall not be binding as a contract if there was no intention that it shall be legally binding upon acceptance. That is, the parties must have the intention for their agreement to be legally binding. In *Balfour v Balfour*, a

[9] *Currie v Misa* (1874) LR 10 Ex 153 (p 162).

husband who worked abroad promised to pay an allowance of £30 per month to his wife, who was in England. The wife attempted to enforce this promise but failed because the parties did not intend the arrangement to be legally binding.[10]

Normally, social arrangements do not amount to contracts because they are not intended to be legally binding. Equally, many domestic arrangements, such as agreements between husband and wife, or between parent and child, will not be enforceable as a contract because the parties would not have intended them to be legally binding.

4.1.1 The Content of Contract

The terms in a contractual agreement are incorporated through promises made by parties, often with reference to other terms or through a course of dealing between two parties. English Contract Law allows complete freedom for people to agree to the terms and content of a deal. In this way common law contracts are well done when the agreements are formed and each party knows his rights and duties well so that there is no need to resort to courts. However, this is not always the case, especially when an unforeseen circumstance arises. In those cases, the courts might contemplate that the parties would have wanted them to be released from their obligations. When the obligations are expressly stated in the contract the court must interpret them to give effect to the intention of the parties. Once the express terms have been identified, there is the issue of interpretation. The expressed terms are interpreted objectively: it is not a

[10] *Balfour v Balfour* [1919] 2 KB 571.

question of what one party actually intended but of what a reasonable person in the position of the parties would have understood by the words in the documents.[11]

4.1.2 Implied Terms

Business contracts are often very complex. A contract drafter will usually attempt to cover all of the agreed terms and provisions of the agreement when drafting a contract. Implied terms are words or provisions that a court assumes were intended to be included in a contract but had not been included for various reasons. This means that the terms are not expressly stated in the contract. Generally, a drafter of a contract would wish to avoid the use of implied terms because parties to a contract would not want to rely on a court's interpretation of the contract terms. However, sometimes it becomes inevitable. In these cases, the court will assume that some terms are implied. This allows the court to maintain and enforce the contract by looking at what the parties intended to do when entering into the contract. But in case there is no indication of their intention then the court would adopt the implied terms principle. An implied term is considered to justify the intention of the parties to a contract in which there is no expressed term clarifying an issue. The term is implied to show that the parties intended this to be so by the custom, usage or by the operation of law. Terms implied in fact are those which are not expressly laid down in the contract, but which the parties have intended to include. In *ICS v West Bromwich* the court adopted two tests for addressing the application of the implied terms.[12]

[11]see *ICS Ltd v West Bromwich* [1998] 1 WLR 896.

[12] Ibid.

That is the officious bystander test and the business efficacy test. The "officious bystander" test, stipulates that where a term is so obvious that it should have been included in the contract and that had an officious bystander asked the parties whether the term ought to be included at the time of contracting, the parties would have replied positively, then the court should make as if that term was in the contract. In other words, if it can be established that both parties regarded the term as obvious and had it been put to them at the time of contracting would have accepted it, that should be sufficient to support the implication of the term in question. The "business efficacy" test is applied where the contract would be impossible to interpret without the term. For example, in *The Moorcock* case the court held that an implied term existed in the agreement that the defendants would 'take reasonable care to ascertain that the bottom of the river at the jetty was in such a condition as not to endanger the vessel'.[13]

Bowen LJ outlined what the 'presumed intention' of the parties were in these circumstances and said that the defendants would only do business at the wharf, if the river bed was in a suitable condition for the activity to take place. It would be implied, in their agreement, that they had taken reasonable steps to ensure that the plaintiff would reasonably expect this suitable condition for their activity as they do not have experience of the wharf condition. Thus, when making the contract, the implication of terms formed part of what the plaintiff would reasonably have expected.

---

[13] 'The Moorcock (1889)' (Lawteacher.net, March 2019) <https://www.lawteacher.net/cases/the-moorcock.php?vref=1> accessed 9 March 2019.

In a contract, terms may also be implied by custom, the courts and by statute. The terms implied by custom or by trade usage define the terms as being customary in that it is a common practice within the trade in context. For example, when hiring an electrician to conduct some repairs it is implied that the electrician will bring his own tools. On the other hand the terms implied by law is derived from the relationship between the parties' legal obligations within the contract. In *Liverpool City Council v Irwin*, The Court held that the tenancy agreement was held to be incomplete because it only contained unilateral obligations of the tenants. Where a contract is silent as to the maintenance of the common parts, there is an implied term that the landload should take reasonable steps to keep the common parts in a state of repair.[14]

Parties to a contract of sales can rely on The Sales of Goods Act 1979. The formation of the contract is defined by section 2 as a contract of sale and regulates the terms of that sale in relation to the statute. It refers to the sale of goods as "a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price". The contract of sale has been entered into and therefore the terms of the SOGA 1979 must apply.[15] The strict contractual obligations arising that needs to be addressed relate to the quality of goods in sales as laid down in Section 14 which infers that: "where the seller sells goods in the course of a business there

[14] *Liverpool City Council v Irwin* [1977] AC 239 https://www.lawteacher.net/cases/Liverpool-cc-v-irwin.php?vref=1Accessed 9 March 2019.

[15] The Sales of Goods Act 1979.

is an implied term that the goods supplied under the contract are of satisfactory quality".[16]

The use of implied terms in contract law interpretation is quite common, and there are several different ways the courts can use them. However, each of the uses is based on the public policy criterium. For example, a court can imply a term if it decides that it is necessary to do so to enforce the intentions of the contracting parties. Furthermore, some terms can be implied by law when there is a statute that addresses the issue, such as state laws that cover commercial transactions. Generally, a contract will require the contractual parties to perform their respective obligations which they have mutually undertaken. A party who fails to perform his obligation risks some sort of penalties. Usually, when a party fails to perform its obligations, the court will award damages in favour of the injured party or it may also compel the defaulting party to perform its obligation. So, a party to a contract is liable in damages to the other party for failure to perform contractual obligations even though the promisor may have done everything possible within its personal power to fulfill its contractual obligations. Sometimes it becomes impossible either economically, physically or legally for one or more of the parties to perform or fulfill its obligation. However, most of the times the impossibility arises outside the control of the parties by some external events. These events may also operate to make performance more expensive to perform. At common law, the principle that is being adopted is that a promissor has, in the absence of any other expressed condition, undertaken to perform in all events and to bear the full financial risks for its (the promisor's)

[16] Ibid at s14.

failure to perform. Hence, the parties are bound by the conditions in the contract notwithstanding any change in the circumstances.[17] However, this situation very often creates lots of unfairness to the non-performing party.

4.2 The Common Law doctrine of Frustration.

4.2.1 Introduction.

Frustration is a doctrine of the English contract law that acts as a device to terminate contracts where an unforeseen event occurs and it either renders contractual obligations impossible, or it drastically changes the party's main purpose of entering into the contract. The Canon law principle of *pacta sunt servanda* establishes that 'the terms of contracts must be adhered to' and this principle is found in all jurisdiction.[18] However, this principle is not always absolute. It may be countermanded by the principle of *clausula rebus sic stantibus* which operates to nullify the former. The latter principle considers that 'a contract is binding only if the terms of the contract remain the same as they were at the time of conclusion of the contract'.[19]

Whenever a supervening change occurs and influences a contract, the court is puzzled with the dilemma of choosing which of the two principles to adopt. This dilemma is more obvious in cases of hardships especially when the event

---

[17] Chitty on Contracts, *General Principles* (25th ed., 1982), para. 1521. A similar rule was applied even by courts of equity: *Leeds v. Cheetham* (1827) 1 Sim. 146 at 150; 57 E.R.

[18] H. Wehberg, '*Pacta Sunt Servanda'* 1959AJIL (American Journal of International Law), p 775 at 786.

[19] R. Zimmermann, *The Law of Obligations Roman Foundations of the Civilian Tradition (Cape Town*: Juta 1990), p 579.
See also R. Köbler, *Die clausula rebus sic stantibus' als allgemeiner Rechtsgrundsatz* (Tübingen: Mohr 1991); M. Rummel, *Die clausula rebus sic stantibus* (Baden-Baden: Nomos 1991).

creates a situation where the contract becomes more difficult or more onerous to perform. Moreover, different countries have imposed their own level of restriction on the application of the pacta sunt servanda principle. In January 2002, Germany introduced a modern version of the German law of obligation which has prompted all jurisdictions to re-examine their current approach to changes in circumstances that influence the terms of a contract and confer a wider discretion on the judges to review and readapt the contractual terms to the unexpected circumstances.[20] In the case where the contract contains an expressed term that regulates the parties' rights then the doctrine of frustration shall not be applicable. However, in the case where the expressed terms are contrary to public policy, parties cannot rely on them to exclude the operation of the doctrine of frustration.[21] A 'Discharge' of a contract is the term used to bring a contractual relation to an end. A contract can usually be discharged in one of four ways. These are: by performance, by agreement, by breach and by frustration. For the present research only the discharge by frustration will be considered.

[20]The 2002 reform has attracted a great deal of academic attention outside Germany, see, e.g. L. Nottage, 'Changing Contract Lenses Unexpected Supervening Events in English, New Zealand, U S, Japanese, and International Sales Law and Practice' 2007 Indiana Journal of Global Legal Studies 2007, p 385 at 414; I. Kokorin, *Force Majeure* and Unforeseen Change of Circumstances. The Case of Embargoes and Currency Fluctuations (Russian, German and French Approaches)', 3. 2015 Russian Law Journal, p 46.

[21]See *Select Commodities Ltd v Valdo SA*, The Florida [2006] EWHC 1137 (Comm) at [8], [2007] 1 Lloyd's Rep 1 at 5, [2006] 2 All ER (Comm) 493.

4.2.2 Discharge by frustration

Under English law, Frustration is a doctrine which acts as a device to discharge contracts where an unexpected event has occurred rendering the contractual obligations impossible. The contract can also be frustrated if the event greatly modifies the initial purpose for which the parties had entered into a contract.

A contract will automatically come to an end when it is discharged by frustration. There are four conditions to be satisfied for frustration to discharge a contract.

Firstly, the event must be an unforeseeable one. That is something that the parties did not expect to happen and didn't make any provision for in the contract.

Secondly, there must be no fault on the part of either party to the contract. The event must not be a self-induced impossibility as in Maritime National Fish v Ocean Trawlers where the court held that there was no frustration of the charter party as the absence of a licence was due to the fact that, it was the appellants' choice of vessels which were to be granted licences. Therefore, the appellants remained liable for the hire of the vessel.[22]

Thirdly, the occurring event must be one that makes performance impossible. In a case where personal performance is necessary and one of the parties dies or an event causing the destruction of the subject matter of the contract. In Tailor v Caldwell the claimant hired a music hall in Surrey for the holding of four grand concerts and spent a lot of money and effort in organising the concerts.

[22] *Maritime National Fish Ltd v Ocean Trawlers Ltd* (Lawteacher.net, March 2019) <https://www.lawteacher.net/cases/maritime-national-fish-v-ocean-trawlers.php?vref=1> accessed 12 March 2019 (Maritime).

However, a week before the first concert was due to take place the music hall was destroyed by an accidental fire. The claimant sought to bring an action for breach of contract for failing to provide the hall and claiming damages for the expenses incurred. The court held that the contract had been frustrated as the fire meant the contract was impossible to perform. The court concluded on the fact that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently, the rule must be absolute to enter the verdict for the defendants.[23]

Fourthly, whenever there is a change in the law, making a previously legal contract illegal, the contract shall be frustrated. The simple fact that the contract becomes more difficult or more expensive to perform is not sufficient. In Cornish v Kanematsu there was no frustration where there was no steamer sailing from Japan to Sydney anywhere near the agreed contract time.[24]

In Krell v Henry the plaintiff and Defendant entered into a contract for the Defendant to rent a flat to the plaintiff to watch the coronation of the King. The defendant was induced to contract by an announcement in the window of plaintiff's flat renting windows to view the coronation procession of the king. However, the coronation could not take place as planned because the King was ill. As a result the defendant refused payment and Plaintiff sued for the

[23]All Answers ltd, *Taylor V Caldwell* (1863) 3 B&S 826;122 E R 309 (Taylor) Case Summary' (Lawteacher.net, March 2019) <https://www.lawteacher.net/cases/taylor-v caldwell.php?vref=1> accessed 12 March 2019.

[24]*Cornish & co v Kanematsu* (1913) 13 sr (NSW) 83.

remaining money due under the contract. On appeal the court reaffirmed the decision of the lower court and held that defendant is excused from performance because his purpose for entering into the contract was frustrated. Defendant's purpose of entering into the contract was to view the coronation of the King. This purpose was understood by both of the parties and regarded as the foundation of the contract. Further, the rooms were taken by their reason to suitability for viewing the coronation processions and thus the purpose of the contract. Although the performance of the contract was not rendered impossible, because in any event the defendant could have stayed in the flat even though the coronation procession did not take place. However, the defendant would not have received any benefit from staying in the flat as the purpose was not to stay but to watch the procession, therefore he must be excused from performing.[25]

At common law, the general principle is where there has been frustration of a contract the loss lies where it falls. That is only the obligations incurred prior to the frustrating event can be enforced. For example, where there is an existing liability to pay for some goods whether or not it had been delivered. Otherwise all the future obligations are unenforceable. 'Frustration' occurs due to an event that is outside the parties' control, and that event prevents the contract from being carried out by the contracting parties. The common law doctrine of Frustration discharges the contractual obligations of parties to a contract when no party is at fault. What happens is that an unexpected event occurs and

[25]*Krell v Henry* [1903] 2 KB 740 CA (Krell).

prevents the performance of a contract. This event renders the performance legally, physically or commercially impossible or if the event transforms the obligations of the contract manifestly different from those, which were agreed at the formation of the contract. At first sight, the doctrine of frustration looks quite straight forward. That is, it will only take place in rare occasions falling under the specific categories mentioned above. Howbeit, there is no clear-cut list of events that could lead to the existence of frustration. The doctrine has been developed on a case-by-case basis. Therefore, there is no constant, precise and accurate system to identify frustration of a contract. The main issue remains with the courts who will decide whether an external event had sufficiently distorted the performance in order to cause frustration of the contract and then proceed in the discharge of the contract. It creates so much uncertainty and confusion that the courts nowadays show reluctance in declaring contracts as frustrated.[26]

The decision of *Krell v. Henry* [27], the famous coronation case, is regarded as a major step in the development of the English law on frustration. It has evolved and surpass the civil law notion of impossibility.[28] The doctrine of frustration was enlarged to include the supervening impossibility as well as the new Frustration Of Purpose (FOP). The latter refers to the situation where the main purpose of the contract has fallen away and therefore its performance has

[26]The theory of frustration in English law (Lawteacher.net, March 2019) <https://www.lawteacher.net/free-law-essays/contract-law/the-theory-of-frustration-in-english-law-contract-law-essay.php?vref=1> accessed 12 March 2019.

[27]*Krell*, supra n. 25.

[28]A. Hutchison, 'The Doctrine of Frustration: A Solution to the Problem of Changed Circumstances in South African Contract Law' 2010 South African Law Journal, p 84 at 87, 88.

become useless although it is legally or physically possible for the parties to fulfil their obligation.[29]

The Krell case has introduced a new branch of the frustration rule which is used with higher flexibility but its practical effect remains quite doubtful. The first critic on the decision concerns its imprecise reasoning. Vaughtan Williams LJ distinguished the Krell case with the hypothetical example of a contract for the hire of a cab to go to Epsom on Derby Day at GBP 10 ('an enhanced rate').[30] When the race at Epsom was later cancelled, the Court of Appeal (CA) held that there was no frustration as the contract would simply be viewed as one where the passenger was being transported to Epsom and that his real motivation of the trip, that is, seeing the Derby was irrelevant to the cabman.[31] This cab example, suggests that the unanticipated occurrence of a situation which renders the contract valueless despite being known by the other party, is insufficient to frustrate a contract whose performance is still possible.[32]

Comparing the two cases, in the *Krell*, there was a 'joint assumption' shared by both parties that the coronation process would be held. The higher price charged for renting of the room on that particular occasion indicates that the parties entered into the contract with a specific and common purpose in

[29]A. Burrows, *Principles of the English Law of Obligations* (Oxford: Oxford University Press 2015), p 125.
See also N.R. Weiskopf, Frustration of Contractual Purpose – Doctrine or Myth?. St.John's L Rev (St. John's Law Review) 1996, p 239 at 239, 240.

[30]*Krell*, supra n. 25, pp 750–751.

[31]ibid.

[32]J O'Sullivan & J. Hilliard, *The Law of Contract* (Oxford: Oxford University Press, 7th ed 2016), p 341.

mind.[33] However, in the cab example the cabman also asked for an enhanced rate for his service. This is an important point to be considered in the analysis because any reasonable and objective person would definitely conclude that what has motivated the cab man to charged a higher fare is the Derby event.[34] This shows that the happening of the Derby was equally important to both parties.[35] Based on the foregoing observation it seems as if there is a flaw in the interpretation that calls into question the precise application of FOP.

In *Maritime National Fish Limited v. Ocean Trawlers Limited* Lord Wright stated that, 'The authority [*Krell v. Henry*] is certainly not one to be extended: it is particularly difficult to apply'.[36]

4.3 Theories of Frustration

The common law seems to have adopted the doctrine of frustration in the second half of the 19th century.[37] The doctrine automatically causes a contract to be discharged prospectively as it operates according to changes in circumstances occurring after the formation of the contract. It is not to be compared to initial impossibility, which may render a contract void from the outset.[38] After the contract has been discharged, both parties are relieved from

[33]ibid at p 342.

[34]P.S. Davies, JC Smith's, *The Law of Contract* (Oxford: Oxford University Press 2016), p 351.

[35]The intention of the parties should be judged by an objective test, see P S Davies, JC Smith's, p 351.

[36]*Maritime* supra n.22.

[37]Chitty, op. cit., paras 1522-1523; D. W. Greig and L. R. Davis, *The Law of Contract*, pp. 1297-1299. (Chitty, op. cit.)

[38]See, Sale of Goods Act (S.A.), s. 7.

their obligations to perform any outstanding promises. However, here the discharge does not operate retrospectively so as to excuse a party from liability under previous breaches or so as to affect obligations which have already become due for performance.[39]

In the absence of any severance clause the effect of operation of the doctrine of frustration is to discharge the entire contract once and for all, with the qualification that some provisions are clearly intended to survive termination (such as, arbitration clauses) will not be discharged.[40] Over the time the courts have proposed different theories to justify the termination of a contract on the ground of frustration.

4.3.1 The Implied Theory

The implied theory is the oldest theory on the application of doctrine of frustration. However, it has been discredited in more recent years. It suggests that a contract is discharged because, by implication, the parties have agreed that it will no longer be binding if the frustration event occurs. This approach was adopted by Blackburn J in Taylor v Caldwell.[41]

4.3.2 Imposed Term Theory

The Imposed Term Theory approach was adopted in Gamerco SA v ICM. In that case Gamerco sought to recover the payments under s1(2) Law Reform

[39] Greig and Davis, op. cit., pp. 1331-1332.

[40] Chitty, op. cit., supra n. 37 paras 1570-1573.

[41] *Taylor* supra n. 23.

(Frustrated Contracts) Act 1943 on the basis that the contract had become incapable of performance, through no fault from either party to the contract. They contended that the contract was frustrated due to the authority's revocation of the permit, and that they were not in breach of contract. The court held that the contract was frustrated because it had become incapable of performance due to the authority cancelling the permit. A term was implied into the contract that *Gamerco* would take all reasonable steps to obtain the permit, but they were not required to ensure it remained in force.[42]

4.3.3 Failure of the Consideration Theory

In *Johnson v Doggen* the court held that "There is a difference between lack of consideration and failure of consideration. A lack of consideration means no contract is ever formed. In contrast, a failure of consideration means the contract is valid when formed but becomes unenforceable because the performance bargained for has not been rendered."[43] The Failure of consideration covers every case where an obligation is not performed. This is so even when the breaching party is not at fault. Thus, a failure of consideration may be described as a non-performance which does not constitute a breach. A failure to perform an obligation may not be a breach of contract because that performance has become impossible without fault. However, it is a failure of consideration which discharge the other party from his duty to perform under the contract and giving the injured party the right to get back the payments already made or other benefits conferred.[44]

---

[42] *Gamerco SA v ICM/Fair Warning (Agency) Ltd* [1995] 1 WLR 1226.

[43] *Johnson v Dodgen*, 451 N W 2d 168, 172 (Iowa 1990).

[44] *First Nat'l Bank of Belfield v Burich*, 367 N W 2d 148, 153 (N D 1985).

4.3.4 The Fashionable Theory (Radical Change in Obligation Theory)

The fashionable theory is the "construction theory" which emerged during the second world war. This theory is also known as the "radical change in obligation theory".[45] The courts have rejected an approach calculated simply to provide a "just and reasonable result".[46] In the Panalpina case, Lord Wilberforce said that it was not necessary to select between the theories because "they shade into one another" and the choice depends on "what is most appropriate to the particular contract under consideration".[47] The "change in obligation theory" was entrenched in Australia by Stephen J. in his decision in *Brisbane City v Group Projects*.[48] His reasonings were subsequently endorsed by the High Court in *Codelja Construction Pty Ltd v. State Rail Authority* (N.S. W.).[49] During the course of his judgment in *Codelja*, Mason J. (as he then was) suggested that the test to be applied was to ask whether the situation which has resulted from the frustrating event was fundamentally different from the situation contemplated by parties at the conclusion of the contract.[50] In the *Brisbane C* case, Stephen J. had accepted the statements of principle set by the House of Lords in *Davis Contractors* and described it as "the leading modern authority".[51] It is worth drawing a comparison to the speech of Lord Reid in that case between

---

[45]The various theories are reviewed in Greig and Davis, op. cit., pp. 1299-1304.

[46]Chitty, op cit. supra n. 37 para. 1531.

[47]*National Carriers Ltd v. Panalpina (Northern) Ltd* [1981] 2 W L R 45 at 57 [Panalpina]
But compare the analysis in Greig and Davis, op. cit., pp. 1301-1302.

[48]*Brisbane City Council v Group Projects Pty Ltd*12 12 (1979) 145 C L R 143.

[49]*Construction Pty Ltd v. State Rail Authority* (N.S. W.) (1982) 149 C L R 337 at 336-337, 378.

[50]ibid. at 357.

[51]*Davis Contractors Ltd v. Farebam* U D C [1956] A C 696. [Davis Contractors]

the situation as contemplated by the parties and the situation which resulted from the frustrating event. If the promisor's obligation has become fundamentally different from what was originally contemplated by the parties, the contract is said to be frustrated provided the frustrating event has not been caused by the fault of the promisor himself. Here, It is not the change in circumstances which frustrates the contract but the change in obligation which has been created by the changed circumstances.

By contrast, Lord Radcliffe's approach in *Davis Contractors* was to suggest that frustration occurs: "whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contractor. *Non haec in foedera veni* (It was not this that I promised to do)."[52]. Here, the emphasis is on the difference between the obligation as originally undertaken and the obligation that was now being required to be performed following the changed circumstances.[53]

In *Davis Contractors* both Lords Reid and Radcliffe stated that when interpreting a contract, the first step is to construe the terms of the contract in light of the nature of the contract and its relevant surrounding circumstances at the time of formation of the contract. This construction gives the court an indication on the scope of the parties' obligations under the contract. This apprehension will depend on what the court has assessed in terms of the performance that the parties would have required in time, labour, money and materials at the time of

[52]ibid. at 729.

[53]Chitty, Op cit., supra n. 37 para. 1525.

the contract formation and if there had been no change in the circumstances at the time of the claim. Thereafter, the court must examine the situation as it has become after the occurrence of the alleged event that has frustrated the contract. In doing so, the court would ascertain on what would be the obligation of the parties when the terms of the contract were to be enforced in the new circumstances. At this stage there are the original obligation and the new obligation arising after the event. Lastly it is for the court to compare the two sets of obligations in order to decide whether the new obligation is 'radically' or 'fundamentally' different from the original obligations. The question is not whether there has been a radical change in the circumstances, but whether there has been a radical change in the 'obligation'.[54]

In the *Panalpina* case, the House of Lords stated that "Frustration of a contract takes place when a supervening event (without default of either party and for which the contract makes no sufficient provision) significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and/or obligations from what the parties could reasonably have contemplated at the time of its execution and that it would be unjust to hold them in the new arising circumstances; in such a case the law declares both parties to be discharged from further performance'.[55] It has also been stated that the doctrine of frustration should be flexible and capable of being adapted to new circumstances which arise.[56] The determination of an occurrence as a frustration event is a subjective judgment although the courts have always

[54]ibid, para. 1526.

[55] *Panalpina*, supra n 47

[56]ibid.

adopted an objective test for its determine.[57] On the operational side the doctrine is very unpredictable. In deciding whether a contract has been frustrated or not the court has to assess the facts and circumstances of the particular case resulting from the frustrating event and then assess the intention of the parties as expressed in their contracts. As seen above it is obvious that a contract has to be drawn in such a way as to make it impossible for the contract to be frustrated. In order to achieve this end, specific clauses such as impossibility, *force majeure* and delay are included in the contracts. Generally, those clauses are essential in long-term contracts.[58] The difficulties in conceptualizing the doctrine of frustration and the reluctance of the courts to apply the doctrine arise from the need to maintain certainty and public interest and at the same time ensuring that the law is fair to the parties.[59]

4.4 Frustration Rule

In earlier cases such as *Taylor* and *Krell*, the operation of the doctrine of frustration was based on an implied term approach. The main reasoning rests on the assumption that there is an implied term between the contracting parties that a particular event would continue to exist.[60] This approach seems to be fictitious in application since there would hardly be a common intention of the

[57]See *Pioneer Shipping Ltd v. B T P Tioxide Ltd* [1982] 2 AC 724 at 752-754; *Davis Contractors* at 728; *Reid House Pty Ltd v Beneke* (1986) 5 A C L C 451; *Almond v Camrol Pty Ltd* (1984) 3 B P R 9461.

[58]Yates, op. cit. at 187.

[59]C J R McKillop, *Commentary on Effect of Changed Circumstances* [1984] AMPLA Yearbook 361 at 365-371.

[60]See *Tamplin Steamship Co Ltd v Anglo Mexican Petroleum Products Co Ltd* [1916] 2 AC 397, 403–404. [Tamplin Steamship]

parties to terminate a contract on the occurrence of a particular event.[61] Furthermore, the power of the courts to add implied terms to any contract conceals the principle of freedom of contract.[62] By doing so it allows the courts to deface the contractual relationship between parties to a contract by disregarding the commercial practices of the parties and the common 'usages of similar commercial transactions'.[63]

Most of the contracts that have been held to have been frustrated are those where illegality had cropped up, for example, where there has been a change in the law.[64] Or where the performance by the contract, is required in a certain manner and that it has become impossible to perform in the contracted manner.[65] However, it is not in all cases of impossibility of performance that the contract will be frustrated.[66]

In Metropolitan Water it was held that a strike will not be regarded as an event frustrating a contract.[67] The decision to determine whether a contract is frustrated depends on the nature of the contract, the relationship between the parties, the general circumstances of the case and the alleged impossibility. At common law, the courts do not have power to change or modify the obligations of the parties following a frustrating event. There are no remedies that have

[61]A.G. Guest, *Chitty on Contracts* (London: Sweet & Maxwell, 27th edn 1994), para. 23-007.

[62]L.E. Trakman, 'Frustrated Contracts and Legal Fictions' 1983 Modern Law Review, p 39.

[63]ibid.

[64]Chitty, op. cit. supra n.37, paras. 1540, 1543-1545; Greig and Davis, op. cit., pp. 1305-1307.

[65]Greig and Davis, op. cit., pp. 1307-1309.

[66]Chitty, op. cit. supra n.37, para. 1561.

[67]*Metropolitan Water Board v. Dick Kerr & Co. Ltd* [1917] 2 K.B. 1 at 35.

been developed in law in regard to a frustrated contract. At law, the "loss lies where it falls".[68] When a contract is frustrated the rights and obligations of the parties in terms of moneys paid and property transferred remained the same as they were on the date frustration.[69] However, where a party was able to show that, in the circumstances of a frustrating event, a substantial amount of the obligation had already been perform pursuant to and conformably with the contract, the party which had performed might be able to recover some money based on unjust enrichment.[70] If some substantial benefit had been received by the performing party, that party could not recover on the basis of unjust enrichment.

4.4.1 Statutory laws on frustration

The Parliaments of England and Australia have enacted legislation on the issue of frustration. In Australia the states of Victoria, New South Wales and South Australia have each enacted frustrated contract legislation in order to improve the law in this area. The English Law Reform (Frustrated Contracts) Act 1943 is quite similar to Victorian Frustrated Contracts Act 1959. The New South Wales and South Australian Acts are very different from the English and Victorian Acts. However, they all have a common purpose, that is, to assist the court in deciding on the financial position between parties to a partly performed but frustrated contract.

---

[68]Chitty, op. cit. supra n.37, para. 1570; Greig and Davis, op. cit., pp. 1332-1336.

[69]*Chandler v. Webster* [1904] 1 K.B. 493. (Chandler).

[70]Chitty, op. cit. supra n.37, paras. 1572-1573; Yates, op. cit. at 187.

4.4.1.1 United Kingdom Law Reform (Frustrated Contracts) Act 1943

The Law Reform (Frustrated Contracts) Act 1943, is an Act of Parliament in the United Kingdom that addresses the issues of liabilities and rights of the parties who are involved in a frustrated contract. The Act covers a different principle to that of the common law which did not permit a party in a frustrated contract to recover the money that had been paid prior to the frustration of the contract. Prior to the introduction of the Act the court in *Chandler v Webster* refused to allow the claimant the right to receive payment in the circumstances of a frustrated contract.[71]

Although it stood for a long time before the Law Revision Committee suggested changes to the rule by way of the Law Revision Committee's Seventh Interim Report, this rule was considered to be harsh and unjust. There was a feeling that a more appropriate rule should be imposed in order to allow the claimant to claim for the money paid prior to the frustration of the contract. In response to the recommendation, the Law Reform (Frustrated Contracts) Act 1943, was passed and came into effect in August 1943. The main aim of this act was to bring better protection to the parties who had paid money for a certain performances under a contract and the contract has become frustrated.

In *Chandler v Webster* the rule was that the claimant under the contract could not recover the money he had paid prior to the frustration of the contract. The main change that the Law Reform (Frustrated Contracts) Act 1943 made was to ensure that the sums paid would become recoverable in the event the contract became impossible to perform. It provides an opportunity for a party to

[71] *Chandler* supra n.69.

recover the benefit which had unjustly enriched by the other party. The Act applies to any contract under the English law and those that has become impossible of performance.[72] While the act allows money paid before frustration to be recovered by the claimant, and if the party to whom the sums were so paid has incurred expenses before the time of frustration, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or recover the whole or any part of the sums so paid.[73] Another very important provision of this act is that where any contract contains any clause which, upon the true construction of the contract, is intended to have effect in the event of circumstances arising which operate to frustrate the contract, the court shall give effect to the said clause. When interpreting the clause the court shall only give it effect to such extent, so as to make it consistent with the said provision.[74] The court will give effect to the intention of the parties to deal with a frustrating event. However, in BP Exploration v Hunt, Lord Goff said that the court would have to be careful in situation where it has to draw this inference as the clause in the contract might have been intended to be applicable only in "radically changed circumstances".[75]

[72]Section 1 (1) Law Reform (Frustrated Contracts) Act 1943.

[73]ibid at Section 1 (2)

[74]ibid at s2(3)

[75]*BP Exploration Co (Libya) Ltd v Hunt* [1979]

4.4.1.2 The Victorian Act Frustrated Contract Act

The Victorian Act concerns the consequences of frustration and not the circumstances in which a contract has been frustrated. Unlike the other States, in Australia the Victorian Act operates on the impossibility to perform, that is whether or not the contract is frustrated in the true sense.[76]

The purposes of the Act are to ensure that money paid before frustration of the contract is recoverable and that money which is outstanding can no longer be claimed by the promisee. This principle allows the party who has incurred some expenditures prior to the frustration of the contract to recover a fair amount of that expenditure.[77] It also requires the party who has received a substantial benefit from the contract to pay the other party for that benefit acquired.[78] The Act operates contrary to the common law principle which states that where the "entire" contract is frustrated, nothing is recoverable. The Act provides rooms for judicial discretion.[79]

4.4.1.3 New South Wales Frustrated Contract Act

The Frustrated Contracts Act 1978 is quite different as compared to the Victorian Act. Firstly, any loss arising by reason of the frustration of the contract

[76]s3(1) of the Victorian Frustration Contracts Act 1959 provides: Where a contract becomes impossible of performance or is otherwise frustrated or a contract is avoided by the operation of s.12 of the Goods Act 1958 . . . the following provisions of this section shall . . . have effect in relation thereto.

[77]s3(2) of the Victorian Frustration Contracts Act 1959

[78]ibid at s3(3).

[79]See the cases cited in Greig and Davis, op. cit., pp. 1336-1343.

is to be shared equally between the parties. Secondly, the Act expressly provides for some adjustment of the parties' rights upon frustration, rather than leaving such adjustment to be at discretion of the court.[80] The New South Wales Act provides that money that has been paid prior to frustration shall be returned.[81] It also states that any promises due but not performed before the frustration of the contract including promises to pay money are discharged. The only exception is when it is necessary to support an action in damages if there had been a breach prior to the frustrating event.[82] The key section of the act provides that where the whole performance has been fulfilled by one party prior to the frustration of the contract the other party must pay the performing party an amount which is equal to the agreed return for the performance.[83]

There has not been any reported judicial commentary of the New South Wales Act. It seems to be well accepted.

4.4.1.4 South Australia Frustrated Contract Act

The South Australian Frustrated Contracts Act 1988 came into effect on 1 April 1988. The Act, however, does not substantively deal at all with the concept of frustration. It is mainly concerned with the consequences of frustration. Therefore, in order to decide as to whether there has been a frustration of a

[80] The Act is analysed in A Johns, An Unduly Complex Act, A Consideration of the Frustrated Contracts Act 1978 (N S W) Article No. 17, Australian Current Law 36075 (October 1988) and in Greig and Davis, op. cit., pp. 1344-1347.

[81] s.12 of the Frustration Act 1978.

[82] s6.

[83] s10.

contract a party must turn to the common law. Section 3 of the Act defines Frustration and includes the avoidance of a contract under s.7 of the Sales of Goods Act 1895 which applies where the subject matter of a contract for sale has perished before the formation of the contract. The key provision of the Act is s.7 which provides for an adjustment between the parties in a frustrated contract so as the parties are not unfairly treated.[84] In order to ensure fairness the value of the benefits received is assessed as at the date of frustration of the contract.[85] However, where the court finds that there is a better method of computing for the adjustment it will use its discretion so as to ensure a more equitable outcome.[86]

Cases of Hardships

Events such as a breakdown of the economic systems or political tensions, wartimes or exceptional weather conditions can considerably alter the settings under which the parties to a contract had calculated their risks, costs and benefits under their contract. These sorts of unforeseen supervening circumstances can very often distort the balance of performance under a contract. Moreover, their respective values can also be affected which leads to

[84]s7(1) 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.

[85](2) Subject to this section, for the purpose of the adjustment referred to in subs. (1)-(a) The value of contractual benefits received up to the date of frustration by each party to the contract will be assessed as at the date of frustration and those values aggregated.

[86](4) Where, in the opinion of a court, there is, in the circumstances of a particular case, a more equitable basis for making the adjustment referred in subs. (1) than the one set out in subs. (2), the court may make an adjustment on that basis rather than on the basis of subs. (2).

a fundamental dis-equilibrium of the contract. In cases of economic hardships the courts have always been reluctant to apply the doctrine of frustration.[87]

The main issue arising is which of the parties shall bear the risk of such a change in circumstances and to what extent the one party shall be liable. Generally, the question is determined by applying the principle of *pacta sunt servanda* (Sanctity of contract) against the principle of good faith.

On one hand, the principle of *pacta sunt servanda* of contracts suggests that the parties must remain bound to the terms of their agreement where the performance of their respective obligations is still possible. On the other hand, the performance of their obligations is subject to the principle of good faith.[88] So, the principle of good faith might be transgressed when the performance of the contract under its original terms is required even though the performances have become excessively disproportionate and burdensome for one party.[89]

Before applying the two principles, it is important to understand the difference between them and apply them in different cases.

There are three different ways to balance the above two principles in order to be able to allocate the risk to the parties in a contract. These are:

(1) The courts may hold the obligor to its obligations under the contract even though there has been a subsequent change in the circumstances. The courts will adopt this solution if the performance of the contract has not

[87]R. Backhaus, *The Limits of the Duty to Perform in the Principles of European Contract Law*, 8.1 EJCL (Electronic Journal of Comparative Law) 2004, p 14, www.ejcl.org/81/abs81-2.html.

[88]Gareth H. Jones, Peter Schlechtriem, 1999 - *Breach of contract* - para. 216 (p. 135) J C B Mohr (Paul Siebeck)

[89] ibid

become extremely onerous or where the law adheres to the principle of *pacta sunt servanda*, such as the French civil law.

(2) The law may provide an exemption to the obligor in case there is a change in circumstances and allow the parties to terminate the contract. This approach may be seen to be inequitable inasmuch as it transfers the aggrievement to the other party.

(3) The other way to balance the two principles is to apportion the economic risks of the change in circumstances between the parties. This can be done by adapting the contract to the new situation in order to restore the equilibrium. The courts must be empowered to do so. This principle has a less drastic legal consequence that the termination of the contract.

The UNIDROIT Principles of International Commercial Contracts / Principles of European Contract Law (UPICC/PECL) generally follow the third approach. If ever there is hardship which comes in existence, the aggrieved party is entitled to request a renegotiation of the terms of the contract. If the parties fail to reach an amicable agreement, the contract is then adapted in a broad sense. Such an 'adaptation' may involve a reformation of the contract, with the aim to restoring its equilibrium (e.g., an amendment of some other contractual clauses). The adaptation will not necessarily cover the full loss sustained by the aggrieved party due to the change in circumstances because regard must be had on the extent of the relevant risk that the party must bear.[90]

[90] *Force majeure and Hardship under General contract principles* pp 479ff Kluwer Law International Netherland 2009, by Christoph Brunner.

In a hardship case the court would not adapt the terms of a contract to a changed in circumstances. The advantage here is that it enables the relationship between the parties to continue on different terms.[91] The hardship exemption has been considered as a group of cases under the *force majeure* excuse. Those are cases where the impediment to performance has resulted from a change of circumstances which has ultimately lead to a hardship.

The basic requirements for the two exemptions to take effect are the same.[92] The risk allocation to the parties are considered in the light of the parties' intention, whether expressly or impliedly. This is done on the basis of the contract interpretation. The main issue to be identified is whether the equilibrium of the contract has been drastically altered.

Therefore, the hardship exemption is based not only on the issue of whether the disadvantaged party has assumed the risk but also of how much risk the disadvantaged party has assumed.[93] In such situations, the main issue is the degree of change in the performance as to whether the performance of the contract has become excessively onerous, and as to whether it is still reasonable to compel the obligor to fulfil its obligation. So, in the hardship cases the issue of risk allocation requires a value judgment to a larger extent. That is why the risk of the aggrievement should not be allocated to the non-performance party (exception to the principle that the loss lies where it falls). However, the

[91]McKendrick, E.: *Contract Law, Text, Cases and Materials*. Oxford University Press, Oxford, 2012. p. 402.

[92]ibid pp. 397.

[93]Judge Henry Friendly in *United States v. Wegematic Corporation*, 360 F.2d 674, 676 (2d Cir. 1966).

legal basis for an exemption under the concept of hardship is widely considered to fall under the principle of good faith.[94] Usually a hardship clause in a contract would define the scope of hardship and would lay down the procedures that are to be adopted by the parties in the event that such hardship occurs. So, the clause in fact imposes an obligation on the parties to act in good faith and review the terms of the contract so as to alleviate the hardship that has arisen.[95] So, If a change of circumstances has resulted in an extensive disproportion between performance and counter-performance, and the aggrieved party insist on the performance in accordance with the terms of the contract by the obligator, it may be seen as contrary to the principle of good faith. This would amount to an abuse of right provided the aggrieved party has not assumed the risk of the change in circumstances.[96] Conceptually, the issue of change of circumstances may be considered as a problem of (constructive) contract interpretation.[97] The interpretation or gap filling process are being conducted in light of the principle of good faith and all relevant circumstances of the case. The question of whether the aggrieved party shall bear the risk of the changed circumstances

[94]Under German law, Zimmermann, in Saggi, Conferenze e seminari 48 (2002), 13 ('The rules on change of circumstances have, under the old law, been worked out and generally recognized under the auspices of the general good faith rule of § 242 BGB and they have thus constituted one of the most famous examples of a judge-made legal doctrine; they are now found in statute in § 313 BGB').

[95]McKendrick 2011, p 257, Beale, H G, Bishop, W D, Furmston, M P, Contract, Cases and Materials. Oxford University Press, Oxford, 2008. p. 493.; Superior Overseas Development Corporation v British Gas Corporation [1982] 1 Lloyd's Rep 262, 264-65, CA In: Burrows A, *A Casebook on Contrac*t. Hart Publishing, Oxford and Portland, Oregon, 2013 p 707.

[96]Under the English frustration of contract doctrine, the prevailing test is - at least in abstract terms - stated as follows: 'If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken?' (McKendrick, in *Chitty on Contracts*, para. 24-012).

[97]See Restatement (2d) of Contracts, Introductory Note to Ch. 11 (Impracticability of Performance and Frustration of Purpose): 'The rationale behind the doctrines of impracticability and frustration is sometimes said to be that there is an "implied term" of the contract that such extraordinary circumstances will not occur.

by its own or not is to be assessed by way of contract interpretation. Some studies of the English contract law have revealed some significant gaps between law and the business expectations in various types of local transactions.[98] Roy Goode, a law scholar, observed that business expectations were not being met in many areas of English contract law, especially where there is a limited scope to relief due to impracticability under the frustration doctrine.[99] Goode believed that it would be unfair for one party to a contract to withhold the other party to the terms of the original bargain where there has been major changes in the circumstances. He felt that it would be better for the court to offer the party seeking relief the choice of accepting the modification or having the contract terminated by the court.[100]

The main aim is to find out what the trading community would regard as the appropriate allocation of risks in contracts similar to the one in question. The provision on release from liability in Art. 79 CISG lies on this principle.

The contract is the legally binding instrument retained by the parties, so the judge must take it as the starting point for his deliberations. If the judge finds that there is a gap, he shall fill it in accordance with the standard adopted by trading practice for contracts of that particular type.

Generally, all contracts would have a sort of balanced between the risks taken and benefit acquired by the parties. These are usually *ex ante pareto* superior

[98]R. Lewis, *Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry*, 9 J L Soc'y (Journal of Law & Society) 1982, p 153.

[99]L Nottage, Indiana Journal Global Legal Studies 2007, at 414.

[100]R. Goode, *Commercial Law in the Next Millennium* (London: Sweet & Maxwell 1998), p 37.

for every party.[101] (The allocations that are said to be Pareto superior increase at least one person's utility without adversely affecting the utility of the other; they produce winners but no losers). So, when there is judicial intervention it destroys the benefit which the contract is intended to confer on the parties because the court will decide not the parties to the contract.[102]

While the legal basis on the doctrine of hardship can be seen in the principle of good faith and the power of the courts to fill gaps in the contract by inserting some term, it should also be noted that hardship is a legal doctrine of its own and with its own requirements. It is not equivalent to the general concept of implied terms.[103] Another similar clause to the hardship clause is the intervener clause which gives an arbitrator the authority to resolve a dispute which has arisen between parties to a contract as a result of a hardship event.[104]

The concept of Impossibility v Frustration.

Under the common law, Frustration provides a party with an excuse for the non-performance of a contractual obligation because that party's ability to perform has been compromised by a supervening event. Frustration resembles the civil law doctrine of force majeure in many respects but there are also some important differences. The civil law has never accepted that a party could contract to do something impossible. Whereas with the development of the doctrine of frustration, the common law has accepted that an impossibility was

[101]See M D A Freeman, *Lloyd's Introduction to Jurisprudence*, London: Sweet & Maxwell, 7th edn 2001, p 558.

[102]T. Roberts, *Commercial impossibility and Frustration of Purpose*, *A Critical Analysis*, 16. CJLJ (Canadian Journal of Law and Jurisprudence) 2003, p 129 at 132.

[103]See Art. 4.8 UPICC, Art 6:102 PECL

[104]McKendrick 2011 p 257.

not an excuse for failure to perform the obligation under a contract.[105] As Treitel put it, there was no theory of impossibility in most of the common law jurisdictions.[106] So, initially the common law adopted the doctrine of "absolute" contractual obligations. From this principle whenever an impossibility to perform arises there was no legal excuse for non-performance. The common law was more reluctant than the civil law to accept the termination of contractual obligation when an unanticipated event occurred. However, there were some exceptions to the general rule of absolute contracts such as the enactment of subsequent legislation that would make the performance illegal.[107]

Apart from a few exceptions, the common law principle of *pacta sunt servanda* was to prevail over a contractual impossibility. In 1920, Lord Buckmaster of the Privy Council stated that:

> "no phrase [is] more frequently misused than the statement that impossibility of performance excuses a breach of a contract. Without further qualification such a statement is not accurate; and indeed, if it were necessary to express the law in a sentence, it would be more exact to say that precisely the opposite was the real rule".[108]

The statement of Lord Buckmaster confirmed the stand of the Common law as it then was. So, where a party has made an unqualified contractual promise at common law it shall have a prima facie duty to perform even though if the circumstances has dramatically changed after the contract formation and has rendered the performance impossible. The parties shall still be bound by their

---

[105]*Paradine v Jane* [1647] EWHC KB J5 [Paradine]

[106]Guenter Treitel, *Frustration and Force Majeure*, 2d ed London Sweet & Maxwell, 2004 at 1-4 under the sub-heading No Theory of Impossibility.

[107]John D McCamus, *The Law of Contracts,* Toronto: Irwin Law, 2005 at 568.

[108]*Grant, Smith & Co v Seattle Const. & Dry Dock Co*, [1920] A C 162 at 169 (U.K.).

obligations unless there is an implied term indicating that the contract is discharged.

Martin C.J. of Saskatchewan stated that,

"[w]here a person by his own agreement creates a duty or charge upon himself, he is bound to carry it out notwithstanding that he is prevented from so doing by some accident or contingency which he ought to have provided against in his agreement".[109]

This statement is in line with the judgment in Paradine which held that contractual performance is absolute and impossibility is not an excuse for not performing unless a provision is provided in the contract.

So, it is clear that the only possible protection at common law would be to include a clause in the contract in order to cater for the impossibility of performance. Over the years, the common law became more flexible in the application of the doctrine of absolute contractual obligations. The change started with Blackburn J's decision in *Taylor v Cadwell*.[110] In that case Taylor and Caldwell entered into a contract, in which, Caldwell agreed to let Taylor use The Surrey Gardens and Music Hall on four certain days. After the signing of the contract, but before the first contract, the concert hall was destroyed by fire. The destruction was without fault of either party and was so extensive that the concerts could not be given. Taylor sued Caldwell for breach of contract to rent out his facility for four concert dates. It was held that the contract here is subject to an implied condition that the parties shall be excused if performance becomes impossible from the perishing of the thing without fault of the contractor. The contract contained an implied condition that both parties would be excused if

[109] *McCuaig v Kilbach* [1954] 3 D L R 117 at 119 (Sask C A).

[110] *Taylor*, supra n.23.

the hall did not exist. Blackburn J did not directly assert the opposite of the precedent in *Paradine* in that impossibility could not be applied to cases involving land, as the land could not be destroyed. However, the accidental destruction of a building by fire on property that was to be leased could discharge a contract as this was an essential element of the contract. Blackburn J gave a similar ruling in *Appleby v Myers*.[111]

That case concerned a contract for the manufacture and installation of machinery for a factory, and thereafter the maintenance of the machinery for two years. It was held that the contract was discharged when the factory was destroyed by fire prior to the installation of the machinery. Blackburn J also acknowledged the principle that both parties were to be excused from their performance but the plaintiffs could not recover any expenses for any work that had already been completed. The common law approach to frustration and discharge was that all losses should be limited to where they fall at the time of frustration.

The Supreme Court of Canada had applied the decisions in *Taylor v. Cadwell* and *Appleby v. Myers* in two early cases[112]. According to G.H.L. Fridman, the development of the doctrine of frustration started with the decisions in the cases of *Taylor v. Cadwell* and *Appleby v. Myers*. He stated that, "[t]he courts were attempting to extricate themselves from the straight jacket of the absolute theory of contracts".[113] Treitel acknowledged the judgment of Blackburn J in *Taylor v.*

[111]*Appleby v Myers* [1867] L R 2 C P 651.

[112]The cases were *Kerrigan v Harrison* (1921), 62 S C R 374 and *Canadian Government Merchant Marine Ltd v Canadian Trading Co* (1922), 64 S C R 106.

[113] G H L Fridman, *The Law of Contract in Canada*, 5th ed. Toronto, Thomson/Carswell, 2006 at 633.

Cadwell and stated that " formulating the doctrine of discharge in a way which facilitated its development and expansion".[114] However, Treitel discussed the development of frustration within the context of cases beginning with the case of *Paradine* that has remained historical.[115] In fact, the common law, has never abandoned the *pacta sunt servanda* principle in developing the modern doctrine of frustration. Lord Shaw stated that,

"frustration can only be pleaded when the events and facts on which it is founded have destroyed the subject-matter of the contract, or have, by an interruption of performance thereunder so critical or protracted as to bring to an end in a full and fair sense the contract as a whole".[116]

It seems that Lord Shaw was alluding to the implied-term theory which had a big impact on the development of the doctrine of frustration in the common law. However, in the English jurisprudence it was Blackburn J in his ruling in *Taylor*, who articulated a concept that had evolved into the "implied condition" to a contract. Although there is no expressed provision in a contract for discharge in the event of the destruction of the building by fire, according to Blackburn J, "a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance […] [T]hat excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the particular person or chattel".[117] This was in line with the decision in *Paradine* which acknowledged the defense of an implied promise or a "legal incident", for example, "if a house be destroyed by a

[114] Treitel, supra n 106 at 55.

[115] ibid at 50

[116] *Lord Strathcona Steamship Co. v. Dominion Coal Co* [1926] A C 108 at 114 U K.

[117] *Taylor,* supra n 23 at 839.

tempest".[118] Comparing with an express provision in the contract to repair the same house would make a tenant liable for repair even though it be burnt by lightning.

Similarly, Blackburn J viewed the contract in *Taylor* as one which contained an implied condition that the owner would be excused in the event that the subject matter of the contract was destroyed. As he rightly put it, "looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall […] that being essential to their performance".[119] It seems reasonable and fair to excuse the parties to a contract performance if the subject matter of the contract is destroyed. According to Blackburn J this must have been the presumed intent of the parties at the formation of the contract. Following this reasoning it looks like performance under a contract shall be dependent on some promises made by the parties and the same promises shall be dependent upon the performance of some other conditions.[120] Even in the absence of an expressed provision that the promise be depended on the occurrence of certain event, it should be implied into a contract that this was intended based on an objective test.

Therefore, contracts could be said to be subject to either a condition precedent or a condition subsequent. Suppose, the implied term was a condition precedent, it would be based on the law on dependency of performance, that is performance will depend on satisfying the condition precedent. Alternatively, if the implied terms were a condition subsequent then it would be a case of

[118] *Paradine* , supra n 105.

[119] *Taylor*, supra n 23 at 839

[120] *Fridman*, supra n 113 at 633-634.

impossibility or frustration. It is now recognised that an implied contractual term on performance could be dependent upon a condition subsequent, that is, a supervening event. Therefore, it can be said that a contract could be deemed frustrated and excused on the basis of impossibility to perform an obligation under the contract. The concept of implied conditions had been the basis for the English doctrine of frustration for a long time until the House of Lords rejected *National Carriers v Panalpina*.[121] The law reform act 1943 covers most of the legal consequences of frustration, but its main aim was to prevent unjust enrichment.[122] Otherwise it did very little in regard to bringing changes to the common law. It did not cover the issue of implied intent in the contract interpretation.[123] Therefore, many types of contracts fell outside the scope the act.[124] The main problem with the implied theory was the interpretation of the term intent. It did not mean to be the actual intent of the parties but the presumed intent of the parties acting as reasonable persons. In an event where the contract was destroyed no one would be able to ascertain whether the parties would not have wanted to continue with the contract. It is difficult to believe and accept that someone has impliedly provided for something that he did not even, at the first place, expect or foresee.[125] In earlier jurisprudence there has been very limited cases which had dealt with implying contractual terms. In *Tamplin*

[121]Brunner, supra n 90 at 89.
See also Panalpina, supra n 47.

[122]The Law Reform (Frustrated Contracts Act)1943.
See also Brunner, supra n 90 at 90-91.

[123]ibid.

[124]ibid

[125] *Davis Contractors* supra n. 51

v Anglo a party requisitioned a ship for a charter party to carry troops during the first world war.[126] In the *Tamplin Steamship Co* case a steamship was chartered for a period of five years, from 1912 to 1917. However, in 1915 the government requisitioned the ship to carry troops during the war. The government was paying a large amount of money in term of compensation for the ship. While the charterers were agreed to continue on paying their agreed freight the owners of the ship claimed that the charter party has been frustrated by the requisition of the government as they wanted to obtain the large compensation from the crown. The House of Lord held that there was no frustration as the interruption was of insufficient duration to make it unreasonable for the parties to continue. This case can be compared to the case of *Jackson v Union Marine* where the court held that the duration of the interruption was sufficient for the contract to be frustrated.[127] So, in *Tamplin Steamship Co* while the owners claimed that the charter party had been discharged by the requisition the charterers, who wished to continue with the contract, claimed that the government's requisition was not sufficient to frustrate the contract. The majority of the court found that there was no term in the charter party that could be implied to excuse performance. In his dissenting opinion Viscount Haldane stated that the charter party could be dissolved on the basis that,

"[a]lthough the words of the stipulation may be such that the mere letter would describe what has occurred, the occurrence, itself, may yet be of a character and extent so sweeping that the foundation of what the parties are deemed to have had in contemplation has disappeared, and the contract itself has vanished with that foundation".[128]

---

[126] *Tamplin Steamship*, supra n 60.

[127] *Jackson v Union Marine Insurance Co Ltd* [1874] LR 10 CP 125

[128] *Tamplin Steamship* supra n 60 at 406-407.

The main issue with the implied term theory was that it gave the courts the liberty to determine the true intention of the parties. The courts were forced to determine whether in the absence of fault by either party, a supervening event had fundamentally affected the contract that it would be unfair to keep the parties bounded to their original bargain. In *National Carriers*, when the House of Lords rejected the implied term theory Lord Hailsham L.C. Stated that, "[t]he weakness […] of the implied term theory is that it raises once more the spectral figure of the officious bystander intruding on the parties at the moment of agreement".[129] Lord Hailsham L.C. preferred a theory which was based on the construction of the contract. In this way it will be a theory that can recognise the real meaning of the terms of the contract as contemplated by the parties.

One of the most important element of the outcome of *Tamplin* by the House of Lords was that the case was not a case of total impossibility; but rather the "perfect case of delay".[130]

All the five judges found the principle of *Taylor v Caldwell* as the one which is most appropriate.[131] Lord Loreburn stated that the implied term test was the appropriate one even in cases like *Geipel* and *Dahl*:

"The parties must have made their bargain on the footing that a particular thing or state of things would continue to exist. And if they must have done so, then a term to that effect will be implied though it be not expressed in the contract … When the question arises in regard to commercial contracts as happened in *Dahl* … [and] *Geipel v Smith* … the principle is the same."[132]

---

[129] *Panalpina*, supra n 47 at para. 13.

[130] John Henry Schlegel *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things – The Doctrine of Impossibility of Performance* (1968-1969) 23 Rutg L R 419 at 424.

[131] Mc Elroy R G, *Impossibility of Performance*, Glanville L Thomas, Cambridge University Press 1941 at 158

[132] *Tamplin*, supra n 60, at 403-404
See also, Dahl v Nelson, Donkin & Co ([1881] 6 App. Cas. 38), and Geipel v Smith (1872) L R 7 Q B 404.

The House of Lords treated delay as merely "a specific instance of the doctrine of *Taylor v Caldwell*".[133] The courts have treated *Tamplin* as authority for such a proposition. Therefore, according to McElroy and Williams, the unification of the principles may be considered as "The Tamplin Fallacy".[134]

It is fallacious because the principles were not expressing the same idea. As Oliver Wendell Holmes pointed out, the common law does not "get a new and single principle by simply giving a single name to all the cases to be accounted for."[135] Thereafter the common law recognised "one single doctrine of frustration".[136] This concept covers "the entire doctrine of discharge by a supervening event".[137] This is also seen in the wording of the Frustrated Contracts Act 1944 which applies where a contract "has become impossible of performance".[138] This shows that impossibility could be considered a sub-set of the broader principle of frustration.

Specific Performance in general.

In a common law jurisdiction, specific performance refers to a decree made and enforced in equity.[139] At common law there is a separation between the Law and equity. The common law courts usually award damages while

[133]Schlegel, supra n 130, at 425.

[134]McElroy and Williams, supra n 131, at 158.

[135]Oliver Wendell Holmes Jnr. The Common Law, Boston, Little Brown and Co, 1881 at 204.

[136]Michele de Gregorio, *Impossible Performance or Excused Performance? Common Mistake and Frustration after Great Peace Shipping* 2005 17 KCLJ 69 at 78.

[137]James P Nehf (ed) Corbin on Contracts (Newark, LexisNexis, 2001) Vol 14, § 74.1.

[138]Frustrated Contracts Act 1944, s 3(1) (emphasis added). Compare Law Reform (Frustrated Contracts) Act 1943 (UK), s 1(1).

[139]*See* Treitel, supra n 106

equity grants specific performance. Contrary to the common law, civil law systems view specific performance as the preferred remedy for the breach of a contract.

Fundamental breach in court and arbitral practice.

The convention does not provide any definition of fundamental breach. It is appropriate to refer to case law on fundamental breach in order to get a clearer explanation.

Late performance and fundamental breach

In international sales late performance occurs frequently due to events such as the distances. It may be caused either by the seller's late delivery of the goods or by the buyer's late payment. With respect to late delivery of the goods, both the case law[140] and the legal authors hold that delay shall not amount to a fundamental breach.[141] This serves to preserve the contractual relationship between the parties. However, in case law there are several restrictions that were applied to the general rule by distinguishing between the essential and non-essential term for delivery. There is case law that upheld that the breach of

[140]See OLG München, 8 February 1995, in UNILEX, holding that since the parties had not agreed on the precise date of delivery, the seller's readiness to deliver in August and October was no breach of contract. Thus, the right to declare the contract avoided because of the non-delivery of the cars was lost by the buyer; ICC award no. 7585, 1992, in UNILEX (late payment); Arbitration Court of the Budapest Chamber of Commerce and Industry, 5 December 1995, CLOUT case no. 164, where the arbitral court held that buyer was not entitled to declare the contract avoided since term for delivery was not fixed.

[141]See Peter Schlechtriem, in Commentary on the UN Convention on the International Sale of Goods (CISG), Schlechtriem ed., Munich, 1998, p. 417, stating that "the mere failure to observe a delivery date, with delivery as such still being possible, is not generally to be regarded as a fundamental breach of contract."

an essential term would constitute a fundamental breach "if delivery within a specific time is of special interest to the buyer".[142]

In case of seasonal goods (spring collection clothes), the Court of Appeals of Milan held that the term for delivery was of essential importance because these clothes were to be worn only during that season and unlikely to be worn in a different season.[143] The cases show that the term must be determined in relation to the circumstances of each case and different factors may be relevant. Generally, it would seem that under the Convention the remedy of avoidance would be considered as the last resort (*ultima ratio*), that is it would be applied only when it is no longer possible to continue with the contractual relationship. The case law, however, seems to use a less restrictive approach.[144]

[142]See OLG Hamburg, 28 February 1997, in UNILEX

[143]See Corte di Appello di Milano, 20 March 1998, in UNILEX. In that case the buyer had ordered seasonal knitted goods and pointed to the essential importance of delivery at the fixed date, since the goods had to be sold during the Christmas sales.

[144]For a restrictive approach towards avoidance see, Bürgerliches Gesetzbuch BGH, 3 April 1996; Oberste Gerichtshof OGH, Austria, 7 September 2000, in Internationales Handelsrecht 2001, p. 42, also in UNILEX.

CHAPTER 5

French Law of Contract

5.1 Introduction

In France the codification of law has been a continuous process although it is traditionally associated with Napoléon as it was during his reign that the five great Codes were born.[145] The most important aim is not merely to regroup legal knowledge which are dispersed across case law but also to offer a complete and unified vision of contract law to the newly updated civil code. The French Civil Code is the main private law instrument in France. Some parts have been modernised to keep pace with the changes over time and lately on 1 October 2016 there has been a marked change in the law of contract.[146]

Since its introduction in 1804 the French Civil code articles on contract law had almost remained untouched. While some people consider this as stability in the application of law others find that obsolete elements must be removed. Its relevance is very important since it extends beyond the French borders. Countries like Mauritius and Seychelles still have the French civil code in their jurisdictions. Over the years, the re-interpretation of the code had become very extensive. Most of the articles had been reviewed substantially and developed

[145]In particular the Civil Code, that has been used as a model for countless countries and is sometimes referred to as the civil constitution of France.

[146]Ordonnance no 2016-131 *du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations,* 2016 JORF no 0035. The Ordonnance was translated by John Cartwright, Bénedicte Fauvarque-Cosson, and Simon Whittaker: http://www.textes.justice.gouv.fr/art_pix/THE-LAW-OF-CONTRACT-2-5-16.pdf.

into new concept. In some areas the courts had reshaped the articles in almost entirely new laws.[147]

The Civil Code as such did not give a clear picture of the French law of contract. The latter was mainly covered by case law rather than the Civil Code. This was not well appreciated in a jurisdiction with codified law in which legislation has more legitimacy than case law. The code was originally meant to set rules in a clear and consistent manner for both lawyers and non-lawyers but with the development of case laws it has become like a property for lawyers. The French Civil code governs the interpretation of contracts through articles 1156-1164. The most important one being article 1156, which provides that courts should take into account the "common intention of the parties."[148]

This article forms the basis for a broad interpretation of a hardship clause. Suppose a seller whose performance becomes onerous due to a change exchange rate and assume that the hardship clause covers only "hardship cases caused by a change in economic circumstances." The seller could then rely on article 1156 and argues that the purpose of a hardship clause is to interprete the clause flexibly thus requiring the court to consider changes in political circumstances as well as economic circumstances. This principle of

[147]One example is the extension by the courts of the principle in article 1134 of the 1804 Code that contracts should be performed in good faith to the pre-contractual negotiation, formation and termination stages. Another is the primacy given by the courts to specific performance and their restrictive interpretation of article 1142 of the 1804 Code, which favours damages to the exclusion of other remedies. The courts were also particularly creative in using 'la cause' to interprete the terms of contracts and promote what they perceived to be fair.

[148]Code Civil [C civ] art 1156 (Dalloz ed 1982). Article 1156 states that *on doit dans les conventions rechercher quelle a étè la commune intention des parties contractantes, plutôt que de s'arrêter au sens litteral des termes.* (In contracts, one must seek to determine the common intention of the contracting parties, rather than limiting the interpretation to the literal meaning of the terms).

interpretation under article 1156 is commonly known as the doctrine of clause *claire et precise* (Clear and precise).[149] This doctrine states that a clear and precise clause is interpreted by its plain meaning. If a Clause is *Claire et precise* the buyer may use it to obtain a narrow interpretation of a hardship clause. Suppose the seller's costs is increased by five percent beyond the costs laid down in the clause, and the hardship clause covers only of a hardship beyond a six percent rise in costs. The buyer would argue that the hardship clause is a clause *claire et precise*, which takes effect only by a six percent increase in cost. However, the French law has adopted some sort of flexibility in interpreting contracts. The most significant canon is found in article 1602 which states that ambiguous phrases will be construed against the seller."[150]

On the other hand, this creates some difficulties for the seller as most of the time it is the seller who claims hardship. Although the hardship clauses are often referred to as "sellers' clauses it is not always the case. For example, In the event of a sharp decline in demand for the buyer's finished product, the buyer will find a hardship clause a valuable tool for a renegotiation. The principle that a contract has the force of law on those who make them and may only be revoked by mutual consent of those who formed the contract was written in the

[149]Alex Weill describes the doctrine as: *Lorsqu'une clause à étè valablement acceptée par les deux parties et qu'elle est claire et precise, elle doit être appliqué telle quelle, à moins qu'elle ne soit illicite. En principe il n'y a pas de place pour l'interprétation d'un contrat révélant par sa lettre et son esprit la commune intention des contractants*. (Once a clause has been accepted by both parties and it is clear and precise, it must be enforced as it is, unless it is an unlawful clause. In principle there is no need to give an special meaning to a clause of a contract which reveals the clear common intention of the contracting parties).

[150]C civ art 1602 (Dalloz ed 1982) Article 1602 states: *Le vendeur est tenu d'expliquer clairement ce à quoi il s'oblige. Tout pacte obscur ou ambigu s'interprete contre le vendeur*. (The seller must clearly explain his obligations. All obscure and ambiguous agreements are to be interpreted against the seller).

Civil Code.[151] This was further qualified by the provision that they, might also be revoked for reasons authorized by law.[152] This means that if a certain thing or event which constituted the subject matter of a contract was lost, or was destroyed, the obligation would be nullified.[153] Article 1148 of the French Civil Code explained the way the law qualifies a contract.[154] The Civil code goes further to expand the scope of non-performance in article 1148 which provides that no damages could be recovered when the non-performance was the result of a *force majeure*.[155]

However, there is no definition of the term *force majeur* that has been given anywhere in the code. It is so broad with no limit as to its applicability. So far, the French courts have followed the Anglo-American courts and have worked out on the scope of the applicability of the law covering the discharge of obligations on the ground of impossibility. Jean Carbonnier laid down the classical requirements for a force majeure and said: "An event only constitutes a *force majeure* if it presents the threefold quality of being

1) insurmountable,

2) unforeseeable (which is expressed more specifically by a fortuitous

[151]French Civil. Code, art. 1134, lines 1 and 2.

[152]ibid.

[153]Civil Code, art. 1302, line 1 See also art. 1722.

[154]Code civ art 1148 (Dalloz ed 1982) Article 1148 states: *Il n'y à lieu aucune dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le debiteur a étè empéché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit*. (There will be no award of damages, if as a result of a force majeure or a fortuitous circumstance the obligor was prevented from fulfilling his obligations or has done that which he was forbidden to do).

[155] *Force majeure* may be translated as 'superior force'. The Code also makes use of the term "cas fortuit," (fortuitous event) and while there is some dispute concerning the utility of drawing a distinction between the two, the expression "force majeure" has, in contractual matters, virtually supplanted the former in the jurisprudence and in legal writings.

circumstance), and

3) beyond the parties' control (this is that the *force majeure* is an external cause)."[156]

So, hardship clauses would include the requirement of imprevisibility (unforeseeability). The rationale behind this is that if an occurrence is foreseeable, then the party should take all reasonable precautions to avoid it.[157] This standard for imprevisibility was strictly applied by the *Cour de cassation*.[158] In *Societe Air Nautique v ISSTA*[159] an Israeli student organization contracted for flights to Israel with an air charter company in February 1965. At the same time, the French Transport Ministry stopped flights to Israel, and the Israeli student group sued the charter company for breach of contract. The French *Cour de cassation* upheld the claim, stating that it was foreseeable that flights would be suspended, and that the charter company had to bear the risk of damages.[160] Another important requirement in French law is exteriority (beyond a party's control). The reason for this requirement is because the *force majeure* will not

[156]J. Carbonnier, Les obligations 290 (1985). *Un événement ne constitue une force majeure que s'il présente le triple caractère d'irrésistibilité (A quoi fait plus proprement allusion l'expression force majeure, vis major), d'imprévisibilité (ce qu'exprime plus spécialment le cas fortuit), d'extériorité (c'est en quoi la force majeure est une cause étrangère).*

[157]Jean Carbonnier observes: *Il n'y a de force majeure qu'autant que l'obstacle échappait, lors de la conclusion du contrat, A des prévisions humaines. Car, s'il était prévisible, le débiteur avait le devoir de prendre le surcroît de précautions qui auraient pu l'éviter; A la limite, il devait s'abstenir de contracter plutôt que de braver le risque.*

[158]The Cour de cassation is the highest court in France. Generally, the Cour de cassation does not decide a case on its merits, but reviews the judgment rendered by the lower court, to ensure it is in accord with the law. 0 Kahn-Freund, C Uvy & B Rudden, A Source Book on French law 275-76 (1979).

[159]*Judgment of Dec 1, 1970, Cass, 1970 Bulletin des arrêts de la Cour de cassation, première section civile* [Bull. Civ. 1.) no. 320.

[160] ibid.

be applicable if the parties are at fault. Therefore, the unforeseen event must be beyond the control of the parties for the defense of *force majeure* to be allowed."[161] Where a strike within a company is related to a national labor unrest, the French courts have held that the event was beyond the employer's control and may be grounds for *force majeure*.[162]

This could have been foreseen at the time of concluding the contract. On 11th of February 2016 the French government had launched a comprehensive reform and modified the contract law in the French Civil Code that has been left unchanged since its adoption in 1804. This modification has several different aims and motives.[163] It seeks to reconcile the current French Contract law with the Civil Code in order to enhance the competitiveness of the French economy by simplifying the law and improving the predictability. It also seeks to render French contract law more attractive to the international businesses as the English common law.[164]The reforms can be seen as having mainly codified the principles previously developed in the French case law over time. The idea was

---

[161]Jean Carbonnier observes: *L'événement empêchant l'exécution n'est liberatoire qu'à la condition de se produire en dehors de la sphère dont le débiteur doit répondre. Ainsi, la défaillance du matériel où du personnel qu'un contractant emploie à l'exécution du contrat peut bien être irrésistible et imprévisible pour lui; mais comme elle est survenue à l'intérieur de son entreprise, il ne peut s'en prévaloir comme d'une force majeure*. (The event preventing performance does not release the parties except under the condition that it occurs outside the sphere to which the obligor must respond. Thus, a defect of the material or failure personnel that a party to the contract employs for the performance of the contract may well be insurmountable and unforeseeable; but as it happens within the confines of his business, he cannot invoke it as a force majeure).

[162]ibid. at 460.

[163]See Smits M. Jan and Caroline Calomme, The Reform of the French Law of Obligations: *Les Jeux Sont Faits*, 2016 Maastricht Journal of European and Comparative Law 6 pp. 1040-1050.

[164]See *Loi 2015-177 du 16 fevrier 2015 relative a la modernisation et a la simplification du droit et des procedures dans les domaines de la justice et des affaires interieurs* (1), 2015 J O feb. 17, p. 2961 art. 8.
See also Van Loock Sander, The reform of the French law of obligation: how long will the Belgians remain Napoleon's most loyal subjects, in Stijns S., and S. Jansen (eds.), The French contract law reform: a source of inspiration, Intersentia, 2016, at pp. 17.

to make the contract law more up to date, more precise and accessible.[165] The reforms have introduced several new articles in the code but for the sake of this present research only the relevant articles shall be discussed. The most important article in the present case is article 1134 (1) which states that legally formed agreement has the force of law between the contracted parties. This means that the contract must be adhered to fully (*pacta sunt servanda*), one must perform that which one has promised to do. This principle encourages certainty and in case of a breach it justifies specific performance as a remedy.[166] In the case of Article 1104 the reforms have codified case law that had extended the principle of good faith to the pre-contractual negotiations and formation stages of the contract. [167] It provides that contracts must be 'negotiated, formed and performed in good faith'; whereas in the 1804 Code it simply stated that the contract should be performed in good faith. Those update clarifies some areas of the law of contract. However, when it comes to the application of *force majeure* there is no indication or application of the concept of good faith. The draftsmen could also have extended the principle of good faith and codified the principle that the termination of a contract must be in good faith. It is obvious that a court would refuse to order termination where the remedy is sought in bad faith.[168] Another interesting innovation of the reforms concerns the termination

[165]*Rapport au Président de la République relatif à l'Ordonnance no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no 0035 of 11 February 2016.

[166]S Rowan, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (OUP, Oxford 2012), 49-50.

[167]Art 1104 of the Civil Code states that Contracts must be negotiated, trained and executed in good faith. This provision is of public order.

[168]Court of Appeal of Poitiers, 1st Civ Chamber, 4 July 2006, Juris-data no 2006-313835.

for breach of contract. Now the Code provides a very comprehensive section consisting of seven articles on termination. In the 1804 Code, there was only one article which dealt with the remedy. The most relevant change is the formal recognition of self termination. Prior to the reforms, termination was a matter for the court to decide. The old rule, article 1184 of the 1804 Code was that, subject to certain exceptions, the injured party of a breach who wished to terminate the contract had to apply to the court for an order discharging the contract.[169] Only the court could decide whether to terminate a contract for breach. The injured party could not decide on his own. This supervisory power of the court over termination for a breach of contract is regarded as a protection for the contractual parties and especially the interests of the defaulting party.[170]

This empowers the court to ensure that there is no illegitimate attempt to oust a promissor from a contract for a breach. It means that the court should ensure that any attempt to oust a promissor from the contract would be legitimate.[171]

Besides judicial termination, article 1224, also provides for termination pursuant to a right of an injured party in the contract and a self-help termination to an injured party to a contract. As regard to a self-help termination, the injured party

[169]One exception was where the contract included a termination clause. Another exception was where the breach was so serious that continuation of the contract was extremely difficult or impossible: Civ (1) 13 Oct 1998, Bull civ I no 300, D 1999.198; see Rowan supra n. 166 at 80-94.

[170]J Rochfeld, *Résolution et exception d'inexécution* in P Rémy-Corlay and D Fenouillet (eds), *Les concepts contractuels français à l'heure des Principes du droit européen des contrats* (Dalloz Paris 2003) 216.

[171]Introductory comments of Rochfeld in *Avant-Projet de Réforme du Droit des Obligations* (Art 1101 à 1386 du Code civil) *et du Droit de la Prescription* (Art 2234 à 2281 du Code Civil) under the direction of P Catala, 22 Sept 2005 (Paris, *Documentation française*, 2006).

can now terminate the contract where the breach is 'sufficiently serious' by giving a notice to the defaulting party. However, there are some safeguards that have been introduced in new article 1226. First, following a breach, the injured party must put the promisor on notice that performance must be effected within a reasonable period of time, failing which termination will follow.[172] With this requirement the promisor gets another chance to perform his obligation. Furthermore, in case the promisor still fails to perform his obligation the promisee must give the promisor another notice of termination stating the grounds of termination. Although the French contract law has changed by the reforms it still remains highly interventionist and the courts have to interfere considerably. Where the reforms had sought to limit the intervention of the court, its powers are still significant. This can be seen in the context of self-help termination. When the defaulting party challenges the injured party's termination of the contract, the court can intervene to assess whether it is fair to maintain the contract. The court may also give the defaulting party a grace period before performance. As such this is creating difficulties and uncertainties when there is non-performance of a contract. Moreover, there is no definition of good faith and ‘unforeseen circumstances’ in the new code. It becomes more difficult to apply when there are circumstances which are beyond the control of the parties. The meaning of reasonably foreseeable is still to be decided by the court. So, in case of *force majeure* the new code does not bring much in terms of interpretation. When it comes to a breach that is sufficiently serious which can follow by a unilateral termination of the contract, it would be more practical and

[172]Except where there is urgency: article 1226 of the Civil Code.

relevant to have a good definition of the term “sufficiently serious”. There is no doubt that the new Code has made the French contract law more accessible and predictable. The articles are more coherent and accurate statement of the law. There is less need to search into case law that had developed over two centuries to interpret the Civil Code. One of the main reasons for the reforms was to render French law more attractive to foreign legislators and commercial parties to contract. Some jurisdictions like Seychelles and Mauritius have to review their Civil codes to adapt to the modern changes. Both have the French Civil code as the source of their civil law. When reviewing the code, the French wanted to re-establish confidence in the French civil code and encourage contracting parties to select French law to govern international contracts.[173]

It seems that the extensive codification of the case law has rendered French law more attractive to foreign parties. They can readily understand the law with more clarity and certainty. Some of the changes introduced by the reforms are commercially sensible. For instance, the new provisions on remedies for breach. It is less rigid, more flexible and maintain a fair balance between the competing interests of the contracting parties. In order to meet those objectives the French legislator had introduced Article 1195 that introduces the theory of “*imprevision*” (unforeseeable) into French contract law. This new provision enables judges to adjust or to discharge the agreement that became due to unforeseen and excessively onerous situations. This means that under the new French provision a judge has a power to adjust or terminate a contract.

[173]*Rapport au Président de la République relatif à l'Ordonnance no 2016–131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, 2016 JORF no 0035. See the article by J Cartwright *'Un regard anglais sur les forces et faiblesses du droit français des contrats'* RDC 2015.691.

Moreover, it can also be argued that the modern theory of *imprevision* have internalized the idea of "favor contractus", that is the need to maintain the contract. The Reform sets out a specific definition of *force majeure* and describes its consequences. It states that where a party is prevented from performing its obligations, performance is suspended, unless the delay is so important that it warrants the termination of the contract. If performance is prevented definitively, the contract will be automatically terminated, as of right. However, it will be for the parties to decide on what extent they intend this legal regime to apply to their contract. For example, the events the parties want to automatically qualify as *force majeure* or those events that would be excluded from this principle. They may also consider the specific contractual arrangements relating to the consequences of *force majeure* including the automatic termination of the contract. The most innovative part of the reform is the section of remedies. In the 1804 code remedies were dispersed and appeared under different articles. Now all remedies are grouped under one section of the Code. The New article 1217 provides for remedies to the injured party where there has been a breach. It allows the injured party to refuse to perform or suspend performance of his obligations. He may also claim to enforce performance or a reduction in price or even to terminate the contract or a combination of those remedies that are not incompatible. So, the reform affirms specific performance as a remedy for breach of contract. Under the 1804 code, article 1142 provided for damages as a remedy to the injured party.[174] However, articles 1217 and 1221 state that, upon breach, the injured party can seek specific performance of the contract. It is also important to note the

[174]Art 1142 of 1804 Code.

limitation under article 1221 which states that the remedy should not be ordered where there is 'a manifest disproportion between its cost to the promisor and the benefit to the promisee'. This is a major difference from the previous law. Before the reforms, the remedy was available as of right and the defaulting party could not resist it on grounds of reasonableness or proportionality.[175] In one of the famous decisions of the *Cour de Cassation*, a building company built a house 13 inches beneath the height required in the contractual specification. The Aix-en-Provence Court of Appeal found that the breach did not relate to an essential term of the contract, and that the house was fit for purpose.[176]
It therefore declined the invitation to order that the house be demolished and rebuilt. This decision was quashed: the injured promisee was entitled to compel the defaulting promisor to perform its obligations to the letter.[177] There was another similar decision in another case.[178] The reforms now, seems to bring a certain balance in the law. The rationale in limiting specific performance is that where a party seeks specific performance when there is a manifest disproportion between its cost and the benefit to the promisee it would amount to an abuse of right (*abus de droit*) and the court would reject the demand.[179]

The new exception to specific performance will enable the court to give more sensible ruling and would avoid punishing the default party. On the other hand,

---

[175]S Rowan, supra n 166

[176]Civ (3) 11 May 2005, RDC 2005.323 note D Mazeaud.

[177]ibid.

[178]Civ (3) 17 Jan 1984, RTD civ 1984.711.

[179]*Rapport au Président de la République relatif à l'Ordonnance* no 2016-131 *du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations*, 2016 JORF no 0035.

the injured party shall have the option to terminate the contract unilaterally and thus reducing the intervention of the court. However, the scope of the exception is unclear. There is no clear guidance as to the meaning of 'manifest disproportion'. The general observation shows that it will be interpreted narrowly by French courts, which have always been willing to order specific performance.[180] It seems that only in extreme cases will the court refuse the remedy of specific performance. So, it is very unlikely to consider compensatory damages to be sufficient and adequate to fulfil the expectations of the injured party. Specific performance is therefore likely to remain available for the promisee to chose over damages. From the above analysis it is doubtful as to whether the new Code will assist in deciding on situation of *force majeure*. The general interpretation of specific performance does not assist in *force majeure* context. In *Ruxley* v Forsyth[181] the appellant agreed to build a swimming pool at Forsyth's home. The contract specified the depth of the pool to be seven feet and six inches. *Ruxley* completed the pool to a depth of six feet and nine inches. Forsyth brought an action for breach of contract, claiming the cost of rebuilding the pool as specified in the contract. The court held that Forsyth could not recover the cost of re-building because this would be totally out of proportion to the loss he had suffered. He could only recover £2,500 for loss of amenity. It was also held that the law must cater for cases where full performance of the promise would vastly exceed the loss which had truly been suffered. The pool in this case was, in fact, worth no less because of the breach. The court further

[180]G Chantepie and M Latina, *La réforme du droit des obligations, Commentaire théorique et pratique dans l'ordre du Code civil (*Dalloz, Paris 2016) 139. 546-54; Deshayes, Genicon and Laithier (n 121) 485-88.

[181]*Ruxley Electronics and Construction Ltd v Forsyth* [1995] UKHL 8

observed that, to award nothing would render the contractual promise illusory, and so a nominal award was appropriate.[182]

Article 1195 of the Civil Code deals with the problem of excuse for non-performance of contracts caused by unforeseen occurrences, which is regarded as one of the most controversial doctrinal concept in law. The question is whether the recent introduction of *imprévision* provision in Article 1195 has really increased fairness and contractual certainty. It is argued that the reform of the French law is a correct step towards regulating the "unforeseen contingencies" phenomena, but it is also accepted that further improvement of the current Article 1195 is be needed.[183]

5.2 The Concept of *Imprévision*

Historically, French private law has been reluctant to recognize the effect of unexpected circumstances on the binding force of contracts. That is a party cannot claim relief from an obligation whose performance has become excessively burdensome due to an unforeseen change of circumstances. This area has been addressed under the *théorie de l'imprévision* (The theory of unforeseeability). In accordance to the French doctrine the performance of a contract shall be still possible even after the occurrence of an unforeseen event though it would have become more onerous or ruinous for one of the parties.[184]

---

[182]ibid – Case Brief (Lawteacher.net, March 2019) <https://www.lawteacher.net/cases/ruxley-v-forsyth.php?vref=1> accessed 5 March 2019.

[183]Smits and Calomme in their work on the reform of the French law of obligations emphasize similar sceptical insights; Smits M. Jan and Caroline Calomme, The Reform of the French Law of Obligations: *Les Jeux Sont Faits,* Maastricht Journal of European and Comparative Law 6, 2016, pp. 1040-1050.

[184] De Lamberterie, I. D. (1989), p. 228, *The Effect of Changes in Circumstances on Long-Term Contracts*: French Report. In Harris, D; Tallon, D; Contract Law Today: Anglo-French Comparisons. Oxford: Clarendon Press, 1989, p. 228–229.

It is important to distinguish this problem from *force majeure* doctrine, where the performance of an obligation under a contract has become absolutely impossible because of an impediment event. Provided the non-performing party is not at fault it will be excused from its obligations.[185] Moreover, in the case of *force majeure* the non-performer is released from his obligation without further liability. But, in the case of *imprévision* the parties have the duty to renegotiate the contract or the court may readapt the contract.[186] The modern French legal doctrine, and the reformed Civil Code support the express admission of imprévision to some extent. Moreover, recent case law has shown the reluctance of the court to recognise the theory and have imposed a duty on the parties to renegotiate the contract. However, in practice the revision of contracts by the courts in such situations where a change of circumstances has occurred is still not a remedy for the injured party. So, it seems that the traditional approach has not been completely discarded. The traditional French contract law doctrine has recognised the full application of principles of contracts based on article 1134 of the Code Civil: *'La règle pacta sunt servanda reste (…) un rempart inviolable* (…)'.[187] Hence, in the French legal tradition the contract is

[185]Articles 1147 and 1148 Code Civil provide: [1147] A debtor shall be ordered to pay damages, if any, for the non-performance of the obligation, or for any delay in performing, in case it cannot prove that the impediment was due to an external cause and that it had acted in good faith (Le débiteur est condamné, s'il y a lieu, au paiement de dommages et intérêts soit à raison de l'inexécution de l'obligation, soit à raison du retard dans l'exécution, toutes les fois qu'il ne justifie pas que l'inexécution provient d'une cause étrangère qui ne peut lui être imputée, encore qu'il n'y ait aucune mauvaise foi de sa part). [1148] There shall be no damage to a debtor when he was prevented from giving or from doing that to which he was bound, or did what was forbidden to him, by reason of force majeure or of a fortuitous event (Il n'y a lieu à aucuns dommages et intérêts lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit).

[186]Translation available at www.legifrance.gouv.fr. Fauvarque-Cosson (2004).

[187]J.P. Niboyet, *La Révisión des Contrats par le Juge, Rapport Général, in Rapports Préparatoires à la Semaine Internationale de Droit, Societé de Législation Comparée*, Sirey, 1938, at 1 et ss; cited by Mazeaud (2008), pp. 554-555.

not readapted and there is no intervention of the court, notwithstanding any circumstances which threaten its existence.[188] In cases where there has been an *imprévision* the *Cour de Cassation* (French Supreme court) has systematically rejected the revision of contracts. The landmark case in this area is *l'arrêt Canal de Craponne*[189] in which the Court laid down the basis on which the court should reject the remedy of judicial intervention or adjustment of contracts:

> ….*dans aucun cas, il n'appartient aux tribunaux, quelque équitable que puisse apparaître leur décision, de prendre en considération le temps et les circonstances pour modifier les conventions des parties et substituer des clauses nouvelles à celles qui ont été librement acceptées par les contractants*.[190]

In that sixteenth century case Mr De Craponne had contracted to construct a canal for a certain sum of money. As the water in this canal could also be used for irrigating the orchards of the community of Pélissane, it has been agreed that the inhabitants of Pélissane had to pay a small sum of money for the maintenance of the canal. After three hundred years, the case came before the courts as the agreed sum had become insignificant and totally insufficient to maintain the canal. The court at first instance and the Court of Appeal at Aix En Province increased the sum to what they thought were a reasonable amount. Their based their decisions on the grounds of equity and with the aim to restoring the economic balance between the counter-obligations. However,

[188]Mazeaud (2007), p. 770.

[189]Cass. civ., 6 March 1876, DP 1876, 1, 195, note Giboulot.

[190] '…in any case, it is not for the courts, however fair their decision may seem to be, to take the time and circumstances into account to modify the contracts entered into by the parties and to introduce new terms to replace those that have been freely agreed upon by the parties at the formation of the contract.

while doing so the Court gave prevalence to the *pacta sunt servanda* principle as laid down in article 1134 of the Code.[191]

It seems as if the binding force of a contract is being given priority over the unforeseen impediment event. So, combining the *pacta sunt servanda* principle with article 1134 and the decision of the court would yield to the conclusion that only the parties by their mutual agreement may adjust or modify the contract, because they are the only ones who are qualified to determine the terms of the contract which protect their mutual interest.[192] Subsequent courts decisions have confirmed this conclusion and have rejected the judicial revision of contracts.[193]

The Courts have also refused to revise agreements on the ground of *imprévision*. Because the suspension, adaptation or termination of the contract was refused in further cases the political unrest of 1968 was not considered as a case of *force majeure* and therefore an employer of a theatre was not allowed to annul payments to its workers.[194] It is argued that the courts' refusal to readapt or terminate contracts in cases of *imprévision* is based on a reasonable choice. On the judicial front, the rejection aims to avoiding bad faith by the

[191]See Capitant et al., (2000) pp.123-126; Zweigert, Kötz (1998), p. 526; De Lamberterie (1989), p. 228.

[192]The Canal de Craponne decision was preceded by a series of cases in the first half of the nineteenth century. In those cases, the Court had quashed certain decisions of lower courts which had granted the termination of insurance contracts which had become excessively onerous because of the Crimean War, on the grounds that they were not cases of force majeure leading to an absolute impossibility to perform (Civ. 9 Jan. 1856, DP 1856. 1. 33; 11 Mar. 1856, DP 1856. 1. 100). See Capitant et al., (2000) p. 127.

[193]Civ. 6 June 1921, D. 1921.1.73, rapp. A Colin; 30 May 1922, D. 1922.69; cited in Capitant et al, (2000) p. 127.

[194]Cass. Soc. 08 Mar. 1972, D.S. 1972. J. 340 cited in Gordley von Mehren (2006).

contracting parties who seek to escape from detrimental dealings thus preventing the danger of contractual instability and to maintain the principle of the security of transactions. On the other hand, there is an economic reason which is based on the eventual risk of the series of unmanageable claims that can arise from parties following the effects of an *imprévision* event.

In France, the consistent reluctance of the civil courts to readapt or terminate contracts in cases of *imprévision* has led to several intervention by the legislator through the enactment of laws. It is clear that there is a real lack of statutory provision on *imprévision* in the French Private Law but the legislative is also trying to favour an increase in the intervention of the courts to permit the adaptation of contracts in specific cases.[195] It seems that the legislature wants to protect the individual interests and correct the injustice, thereby balancing the reciprocal obligations of the parties to a contract after a change in the circumstances has impeded the performance of the contract.

In 1984, parliament passed on law that allows the judge to revise the terms and burdens imposed in some will or gift. Article 900-2 Civil Code provides that: 'A beneficiary may apply for judicial revision of the conditions and charges encumbering the gifts or legacies which he has received, where, in consequence of a change of circumstances, performance of them has become for him extremely difficult, or seriously detrimental'.[196] Here, the legislators have given a broad power to the judge to modify a donation or a will.[197] Finally, in

[195]Ghestin (1990), p. 301.

[196]Translation from http://www.legifrance.gouv.fr/.

[197]Fauvarque-Cosson (2004); Ghestin (1990), p. 123.

1991, article 1244 Code Civil was modified and a new article 1244-1 had been inserted which states that:

'taking into account the debtor's position and in consideration of the creditor's needs, a judge may, within a two-year limit, defer or spread out the payment of sums due. By a special judgment, setting out the grounds on which it is based, the judge may order that the sums corresponding to the deferred due dates carry interest at a reduced rate which may not be lower than the statutory rate or that the payments be appropriated first to the capital'.[198]

Following the case of *Gaz de Bourdeaux*,[199] The French administrative law had elaborated an autonomous doctrine of *imprévision* (unforeseen) which is different from the private law approach.

The fact of the case concerned a contract which was concluded in 1904 by a gas company to supply gas and electricity to the city of Bordeaux at fixed rates for a period of thirty years. After the upsurge of the first world war, the price of coal rose significantly. So, the company sought to increase the rates due to the change in circumstances. The company's application was rejected by the *Conseil de Préfecture* of the Department of Gironde at first instance. However, on appeal to the Conseil d'Etat (the French superior administrative court) the decision was quashed. The Conseil d'Etat stated that the fact that the coal-producing areas of central Europe were in enemy's hands, and the ocean transport had become extremely onerous as a consequence of the war, the whole economic basis of the contract had ben subverted. Therefore, the increased cost 'certainly exceeds the outer limits of the increases that could have been contemplated by the parties when the concessionary contract was

[198]Translated in http://www.legifrance.gouv.fr/.

[199]CE 30 March 1916, D. 1916.3.25, S. 1916.3.17.

concluded'.[200] The court considered the 'general interest which requires the continuation of company services.' After this decision, there had been many cases which were ruled along the same lines by the administrative courts.[201] Therefore, the administrative courts did not re-adapt the contract to the new circumstances, but somehow the parties are invited to reach a settlement. So, it looks as if there are no differences between the two decisions as both had not provided a remedy to the injured party.[202] The important point to note about the doctrine is the duty to protect the public interest by maintaining the contract. However, if there is a failure to renegotiate then the court will grant a compensation (*indemnité d'imprévision*) to the contractor to cover at least part of the additional burden.[203]

The grant of compensation could be seen as a temporary measure because in case the supervening event becomes permanent, it would be considered as a *force majeure* and the contract would be terminated.[204] So far, the *imprévision* doctrine has been applicable only in administrative law where there is a public service and the public interest principle had been the thrust of the decisions.[205] So, private contracts, where the parties are privates, are excluded from the *imprévision* doctrine. Furthermore, for the doctrine to be applicable the impediment must have been caused by an unforeseen event, which was

[200]Translation by Aubrey (1963), p. 1175.

[201]For instance, CE 9 Dec. 1932, S. 1933-3-39; CE 15 July 1949, S. 1950-3-61; See Fauvarque-Cosson (2004) and Ghestin et al., (2001) for further references.

[202]Flour et al., (2002), p. 407.

[203]Fauvarque-Cosson (2004); Ghestin (1990), p. 133.

[204]Compagnie des tramways de Cherbourg CE 9 Dec. 1932, D. 1933.3.17. See Fauvarque-Cosson (2004).

[205]Philippe (1986), pp. 79-80.

external to the parties and had resulted to a fundamental change in the balance of the obligations of the parties to the contract. That is a change that has exceeded the reasonable expectations that the parties had at the time of contract formation.[206]

Although the doctrine of *imprévision* has not been applied in private law, the Conseil d'État has stated that the re-adaptation of administrative contracts in cases of *imprévision* is not exclusively based on the importance of public interest but also on the right of the private party in order to maintain a certain degree of economic equilibrium.[207] Notwithstanding what has been stated above, it is also seen that in cases of *imprévision* the modern French legal doctrine supports the re-adaptation of contracts. Adopting the same view, Ghestin and other French scholars have stated that it would be necessary for the French law to formulate some exceptions to the absolute *pacta sunt servanda* principle. They found that in order to maintain the social efficiency of contracts there should be exception for the revision or termination of the agreement in cases where injustices would result from an excessive imbalance in the parties original obligations.[208] So, in cases of unforeseen change in circumstances there is an important part of the modern doctrine which favours the possibility of a judicial adaptation. Here there has also been argument that the judge is not only acting as interpreting the clauses of the contract but also acting as a party to the contract.[209] Therefore, it can be said that where there

[206]Fauvarque-Cosson (2004).

[207]Mazeaud (2008) p. 583; and Fauvarque-Cosson (2004).

[208]Ghestin (1990), p. 173, Terré et al., (2002), p. 434.

[209]Demogue (1923), pp. 525-544.

is a serious change in circumstances resulting to a substantial change in the obligations of the parties creating a serious imbalance or impediment to performance the only alternative remedy available to termination is a revision of the contract. The revision would then be seen as a means to preserving the contract rather than an uncertainty in the operation of a contractual agreement.[210]

The French Civil code has always supported the principle of revision of contracts. This can be seen in article 1134 which states that contracts must be performed in good faith. So, where a change in circumstances severely affects a party's performance in a contract the courts may revise the contract provided the other party is still capable of continuing performance on its part. The court will not allow any unjust enrichment from a contract due to changes in the circumstances. According to Ripert, the founding of the revision of contract is based on the abusive exercise of their rights by the creditor. So, the elements of unforeseeability of the new circumstances and the onerousness of the performance for the injured party are not enough to give rise to a revision of contract. It should also be associated to an unjust profit for the creditor if the contract is maintained in its original form.[211]

[210]Mazeaud, supra n 207, pp. 583-584.

[211]Ripert (1925). Ripert places its ideas with regard to the revision of contracts in a broader theory of the abuse of right. In the case of unexpected circumstances, the foundation of the revision is the abusive exercise of their rights by the creditor, which has as consequences its unjust enrichment and the ruination of the debtor.

For, Denis Mazeaud the institution of the revision of contract 'has a bright future' because, although the legislator has given the courts power to revise contractual terms, they have always exercise their power diligently with moderation.[212] Furthermore, the traditional view of contracts based on the ideas of the free will of the parties, has been replaced by a concept which views contracts as instruments to promote justice and equity. A general duty of good faith is imposed on the parties in order to maintain a moral rectitude to contractual relationships.[213] However, despite the general acceptance of the doctrine, the approach of the *Cour de Cassation* is still highly confined. Recently, the Court stated that even when article 1134 of the civil code allows the judge to take action against a party acting in bad faith, the court is not allowed to modify the substance of the terms agreed by the parties and that goes to the root of the contract.[214]

The decision clearly shows the priority given to the importance of contracts as per paragraph 1 of article 1134 over the requirement of good faith in the performance of contract by virtue in paragraph 3 of the same provision. There are also critics that the application of the provision has been inconsistent, in the light of the decisions of the Court which has sanctioned bad faith of the party who refused to revise the terms of the contract when a change of circumstances

[212]This was the case in the loi du 9 julliet 1975, which gave the courts the power to reduce excessive clauses pénales (liquidated damages clauses). See Mazeaud (2008), p. 559, concluding that *l'existence d'un pouvoir de revision judiciaire ne rime pas fatalement avec l'instabilité contractuelle et n'emporte pas nécessairement la chute des colonnes du temple contractuel.* (The existence of the power of the court to revise a contractual term is not fatal to the root of the contract)

[213]Terré et al., (2002), pp. 434-440.

[214]Cass. com., 10.07.2007, pourvoi n.06-14768, note D. Mazeaud, RDC 2007-4-005.

has created an imbalance in the obligations of the parties.[215] The decision of the *Cour de cassation* on 18 March of 2009 has confirmed the supremacy of the *pacta sunt servanda* principle as laid down in article 1134 of the Code. At first instance the court accepted to revise the contract. However, on appeal the *cour de cassation* quashed the decision and refused to include a term that was not present in the contract because any revision of the contractual terms would imply a violation of paragraph 1 of article 1134.[216] The modern case law demonstrates a limited recognition of the doctrine of *imprévision* through the duty to renegotiate.

Recently, the *Cour de cassasion* has consistently held that there is a duty to renegotiate a contract where the performance by one party has become excessively onerous and has fundamentally disturbed the contractual equilibrium.[217] By virtue of article 1134 which establishes the duty to perform contracts in good faith, the *Cour de Cassation*, stated that if an unforeseen event results in a severe imbalance in contractual equilibrium, the principle of good faith between the parties gives rise to a duty for the non-injured party to renegotiate the terms of the contract at the request of the injured party. In the case of *Huard*,[218] the Court stated that a company was liable to pay damages because it had not executed it's obligation in good faith. Six years later, in the

[215]ibid.

[216]Cass. civ., 3e, 18 mars 2009, n. 07-21.260, *D.* 2009. AJ 950, obs. Y. Rouquet

[217]Cass. com., 3 November 1992, « arrêt Huard », D. 1995, Somm. p. 85, note D. Ferrier; Cass. com. 24 November 1998, « arrêt Chevassus-Marge », D. 1999, IR p. 9; Cass. civ. 16 March 2004, D. 2004 Somm. p. 1754, note Denis Mazeaud; CA Nancy 2nd Ch. Com. 26 September 2007, La Semaine Juridique No 20, 14 May 2008, p. 29.

[218]Cass. com, 3 November 1992, D. 1995, Somm. p. 85, note D. Ferrier.

case of *Chevassus-Marge*,[219] the Court applied the same reasoning in deciding whether the party had acted in good faith. In both cases, the duty to act in good faith was invoked in order to impose liability on the party which had refused to renegotiate the agreement when the performance of the contract had become fundamentally different from the original agreement.

Despite the evolution of the law in the area of contract revision by the court, the approach of the *Cour de cassation* towards the judicial revision is still negative. Therefore, it can be inferred that the court would consider the duty to renegotiate the terms of a contract, following a drastic change in circumstances, as a last and only resort and that no right shall be granted to the court to have the contract terminated or adjusted.

In a case from the *cour de cassation* on 3 October of 2006,[220] the parties had agreed on two clauses regarding the revision of the contract where the parties were obliged to review the terms of their contract if there is any unforeseen event occurring which alters the balance of their obligations significantly and to explore the methods for reviewing the contract in order to preserve their mutual interests. In its decision the court stated that renegotiation clauses do not impose a duty to accept the proposed modification but only a duty to renegotiate under the principles of good faith and fair dealing. In other decisions from the French courts of appeal it would seem that where negotiations between the parties have failed the judge shall have the possibility to revise the contract. In the case of *Electricité de France c Shell Française* the court of appeal of Paris

[219]Cass. com. 24 November 1998, D. 1999, IR p. 9.

[220]Cass. com, 3 October 2006, D. 2007 n°11, Somm., 767, note D. Mazeaud.

held that considering the common intention of the parties to safeguard the contract and to adapt it to certain change in circumstances and at the same time observing the public interest principle in their performance, the parties must renegotiate in the presence of a third party appointed by the court so as to settle their differences.[221] In the event where there is no settlement between the parties then the court reserves its right to revise the contract.

In the case of *Nancy* the court of appeal set an interesting precedent.[222] In that case, in 1999 the Socoma company entered into a contract to supply and electricity steam to the Novacarb company for its processing. In 2005, the government passed a legislation establishing an exchanged system whereby Socoma obtained a profit of about 3 millions euros solely from the transfer of the surplus quota. Navacarb claimed that Socoma has benefitted of an unjust enrichment as the parties never contemplated for that new legislation when concluding their contract. Moreover, it claimed that Socoma's additional profit was directly linked to the execution of their contract. So, Novacarb wanted to revise the terms of the contract with Socoma in order to re-establish the contractual equilibrium and to include in the contract, a clause on the distribution of profits derived from the transfer of the surplus quota. However, the negotiation failed and Novacarb sought to have a judicial revision of their contract. The court at first instance refused to revise the contract. On appeal, the court reversed the decision of the lower court and ordered the negotiation

[221]CA Paris, 1st Ch. A. 28 September 1976, *La Semaine Juridique* 1978, p. 18810, n. Jean Robert.

[222]CA Nancy 2nd Ch. Com. 26 September 2007, SAS Novacarb c/ SNC Socoma, *La Semaine Juridique* No. 20, 14 May 2008, p. 10091, n. Marie Lamoureux; RDC, 2008/3, p. 739-743 and 759-762, note D. Mazeaud and S. Carval.

on the basis of good faith supported by article 1134 and further held that the additional profit derived from the contractual performance must be shared as both parties have contributed to the result. The court also stated that the new legislation was an unforeseeable event at the time of contract formation and this had led to a change in circumstances.

This is an interesting decision as the court has ordered the parties to resume negotiations and has also given them guidance on the sharing of the profit. At the same time the court has reserved its right to take a decision in case that the parties could not come to a final agreement. However, in some cases the French courts have revised contracts on grounds similar to unexpected circumstances.[223]

Thus, according to the French law, in a case of a *force majeure* the debtor is excused from its obligation and the other party cannot claim any compensation for the non-performance of obligation. However, it should be noted that in cases of partial non-performance due to *force majeure* the courts have revised the terms of the contract to allow its performance for the part that is still possible.[224] The decision taken by the courts can be seen as an implied admission of the *théorie de l'imprévision* as a ground for the termination of the contract.[225]

As seen above, it can be said that the legal foundation for the decision was based on the concept of cause. That is, whenever there is an unforeseen

[223]The powers of the courts to revise or determine the contract price, as extended by the decisions of the *Assemblée pléniere* of the Cour de Cassation (decisions of 1 December, 1995, Bull. Civ. 1995 A.P. No 7, p. 13 ss), have also been interpreted to support the intervention of the judge in cases of imprévision. See Capitant et al., (2000), p. 131.

[224]Legrand Jr (1987), p. 1040.

[225]The *théorie de l'imprévision* is not precisely mentioned in the judgment of the Court but the change in circumstance of the case and the supervening imbalance arising in the general economy of the contract can be clearly seen in those applications.

supervening event that causes a fundamental change in the obligation of the parties, the resulted imbalance in the obligations may entail the termination of the contract because of the disappearance of the original cause of the contractual obligation. So, the disappearance of the original cause of the contract will render the contract void.[226]

According to Picod, the evolution of the French Contract law has taken place outside the scope of the Civil Code, through case law and legislative instruments such as the *Code de commerce* or the *Code de la consummation*. This has made the law in this area more complex and created more legal uncertainty.[227]

Regarding the effects of *imprévision*, it clearly shows that the judge shall not be entitled to revise the contractual terms of a contract unless the parties agree. So, the actual role of the court will be very limited when it comes to amending the terms of a contract as the parties would not seem to agree to the courts' action especially after a failure in their renegotiation. This renders the application of this provision as imaginary.[228]

It seems that the *Cour de cassation* does not have the intention to change its interpretation of article 1134 where there is no express recognition of the doctrine of *imprévision*. It still prefers to stick to the traditional prevalence of the contract law over any disruption to the contractual relationship between the parties following an unforeseen circumstance. The recognition of the duty to

[226]See Mazeaud (2010), p. 2484.

[227]Picod (2009), p. 3; Vogenauer (2009), p. 6.

[228]Ghestin (2009).

renegotiate is the only exception to the traditional approach. So, the French courts would insist on determining cases of *imprévision* through the renegotiation of the terms of the agreement by the contracting parties and not through any intervention of the court. The court wants to maintain the original cause of the contract as contemplated by the parties at the time of its conclusion.

5.2.1 The Admission of *L'Imprévision*

L'imprévision is seen as all unforeseen intervening events which has made a party's contractual obligations harder and more onerous to perform after the contract has been concluded although it might still be possible to perform. So, an *imprévision* is only *unforeseeable event*; it is not *irresistible* or *exterior* to the party, as opposed to the doctrine of *force majeure* events.

The theory of *imprévision* has been admitted in some areas of the law such as French administrative contract law but it has always been refused as grounds for the termination of contractual obligations by French civil law. This can be seen in the famous case of *Canal de Craponne*.[229]

Prior to the reform, the French civil contract law had consistently refused to admit the theory of *l'imprévision.* Article 1195 of the *ordonnance* shows the three conditions to be satisfied in order to invoke *l'imprévision*:

(1) There must have been an *unforeseen change of circumstances*;

[229]Cass. Civ., 6 mars 1876, *De Galifet c/ Cne de Pelissanne*. En ce sens, v. Cass. Civ., 30 mai 1922, *D.* 1922. 1. 69, S. 1922. 1. 289, note Hugueney; Cass. Com., 18 déc. 1979, *Bull. civ.* IV, n° 339, *RTD civ.* 1980, p. 180, obs. G.

(2) This change must render a parties' obligations excessively more onerous to perform;

(3) The party seeking reliance on the concept must not have accepted the risks of such a change of circumstances when concluding the contract.

In the presence of these conditions the injured party can ask to renegotiate the terms of the contract, which is not really a change with the actual French case law.[230] The parties can also ask the judge to re-adapt the contract to these new and unforeseen circumstances. However, if both of these measures fail, one of the parties can ask the judge to terminate the contract. This is a drastic alternative that may incite the parties to renegotiate and re-adapt their contract on their own accord because otherwise they may be forced to reconsider the contract at the current prevailing market condition. This would result to hardships on the parties.

Article 1195 of the French Civil code states that:

> If a change of circumstances that was unforeseeable at the time of the conclusion of the contract renders performance excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. The first party must continue to perform his obligations during renegotiation.

This article appears to be ambiguous with regards to the unforeseeability of the change of circumstances. The unforeseeability requirement makes sense only if the change in circumstances is foreseeable. This would create a presumption

[230]Cass. Com., 3 nov. 1992: *Bull. civ.* 1992, IV, no 338 ; *RTD civ.* 1993, p. 124, obs. J. Mestre; *Defrénois* 1993, art. 35663, n° 131, obs. J.-L. Aubert ; Cass. Com., 24 nov. 1998, n° 96-18.357 : *Bull. civ.* 1998, IV, n° 277 ; *JCP G* 1999, I, 143, n° 5, obs. C. Jamin, et II, 10210, note Y. Picod ; *Defrénois* 1999, art. 36953, n° 16, obs. D. Mazeaud; *RTD civ.* 1999, p. 98, obs. J. Mestre and B. Fages.

of the acceptance of the associated risk by the parties. The main problems arising here is what would constitute a change in circumstances. Furthermore, performance must have become excessively onerous following the change in circumstances but what would constitute excessively onerous. While the admission of the doctrine of *l'imprévision* seems to promote fairness and justice in the law of contract the rule displayed an increase in legal uncertainty as the criteria for its implementation are vague and have not been precisely defined by case law. So, contracting parties would not be able to confidently predict when the doctrine of *l'imprévision* will be applicable to their contract and when it will fail. Unless they can do so, it is unlikely that they will choose to submit their contract to such a legal system that appears to be so uncertain on the termination of their contractual obligations.

5.3 The reformed French Civil Code

Traditionally in French law the effect of unforeseen circumstances upon existing contractual relations has been handled through the doctrine of *force majeure.*[231]

French civil law did not discharge a contract which has become excessively onerous.[232] The contract has to be performed however onerous its performance has become. This rigid approach was followed until 2016. The new Code caters

[231]See David, René, 'Frustration of Contract in French Law,' 28 J. Comp. Leg. Pts. III - IV, 11, 3rd ser., 1946. The theory of force majeure was construed by French courts around two short Articles of the Civil Code*;* Article 1147 C.civ. and Article 1148 C.civ.

[232]See De Lamberterie, Isabelle, '*The Effect of Changes in Circumstances* – French Report,' in Harris and Tallon, D., (eds.), Contract Law Today, Anglo-French Comparisons, Oxford, 1989. See also Beale, Hugh, Hartkamp, Arthur, Kötz Hein and Tallon Denis, '*Contract Law: Cases, Materials and text*,' Hart Publishing, 2002, p. 629.

for unforeseen contingencies and this can be found in Article 1195 of the new Code Civil. This article gives the court broad powers to adjust the contract when unforeseen circumstances have made the obligations more onerous. The article 1195 departs from the previous French approach and reverses the famous *Canal De Craponne* decision and states:

1. If an unforeseen event that was unforeseeable at the time of the conclusion of the contract renders performance of the obligation under a contract excessively onerous for a party who had not accepted the risk of such a change, that party may ask the other contracting party to renegotiate the contract. However, the first party must continue to perform his obligations during renegotiation.

2. In the case of refusal of renegotiations, the parties may agree to terminate the contract on the conditions which they determine, or by a common agreement request the court to readapt it. In the absence of an agreement within a reasonable time, the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.[233]

The change is fundamental in the sense that as per the previous principle the judge does not interfere in the contract. However, as of 1 October 2016 a judge is able to interfere in the contract which has been concluded after this date. In

[233] New Code Civil, Article 1195, Chapter IV, The Effects of Contracts, Section 1, The Effects of Contracts between the Parties, Sub-section 1.

fact, as of 1 October 2016, a contract might be reviewed or terminated due to an unforeseen event that had made it more onerous for one party to meet its obligations.[234]

The new Article 1195 clarifies that parties are free to dissolve their contract in the event that their renegotiation is unsuccessful and also allows each party to seek a judicial adaptation of the contract.[235] The new provision further gives the court full discretion to decide on whether to adapt or to discharge a contract.[236] Now, the French law requires the parties to renegotiate their failure rather than triggering the application of adaptation/discharge remedy.[237] However, there are still several shortcomings of the new Article 1195. The main shortcoming would most probably be that the central criterions is tautological. Friedman stated that when a theory is viewed as a language there is no such substantive content and it may be regarded as a set of tautologies. He further stated that these tautologies have an important place in economics as a specialized language for organizing empirical material.[238] The other shortcoming is that there is no definition of "unforeseeable circumstances" and the current definition depends on what the law will decide and define for the parties to follow. Usually parties will expect that the law to be applied fairly, and so expect a clear and well define

[234]Article 1195 (2)

[235]Lutzi Tobias, Introducing Imprevision into French Contract Law – A Paradigm Shift in Comparative perspective, in Stijns S. and S. Jansen (eds.),The French Contract Law Reform: a Source of Inspiration, Intersentia, 2016, at pp. 111.

[236]Article 1195 (2) provides that the court may, on the request of a party, revise the contract or put an end to it, from a date and subject to such conditions as it shall determine.

[237]Lutzi Tobias, supra n. 235 p112

[238]Friedman also stresses that an economic theory must be more than s structure of tautologies if it is able to predict and not merely describe the consequences of action; if it is to be something different from disguised mathematics; Friedman Milton, Essays in Positive Economics: The Methodology of Positive Economics, University of Chicago Press, 1966, pp. 3-43.

meaning of “unforeseeable circumstances”. The other point is that the article does not explain whether the event must be outside the control of the parties. The exogeneity of the impeding event should, besides the unforeseeability, be considered as a necessary condition of any provision on the change of circumstances. This is more important if the contingency arose from one party’s fault and was as a result not an exogenous factor. Therefore, the defaulting party cannot seek excuse of such a basis. In addition, French provision fails to provide a requirement that an adaptation or discharge of a contract would not be possible if the risk in question was assigned expressly by the parties’ agreement or by the rules of law. In terms of the contract being “excessively onerous” there is no indication as to when the performance would be considered to be excessively onerous. A clear definition of these terms such as one where the increase in costs exceeds the price of the contract. However, if the costs of performance become infinite due to the unforeseen impediments then the impossibily of performance doctrine of *force majeure* shall be applicable. In order to satisfy the *force majeure* threshold, costs of performance must become infinite. Another important drawback of the new French provision in relation to the English law is the absence of any clear demarcation between the re-adaptation and discharge. The employment of these two principles is left to the court’s discretion. Where the adaptation would be considered as first remedy and the discharge as a secondary option then it could be criticized as a source of creation of uncertainties and inefficiencies. When considering the adjustment as a remedy it should be applied restrictively. That is, where an unforeseen event has raised both the costs of performance and the value of performance significantly and that the new increased value of performance has exceeded the

increased costs of performance. This implies that if after the unforeseeable event has occurred and the performance under the contract is still possible the contract should be enforced. Therefore, the adjustment should only be granted when one of the parties has made substantial investments or in case where the promisor has already performed his obligation. In all other instances the discharge of contract would be considered as the appropriate remedy. So, a clear and precise description of Article 1195 as regard to the discharge of a contract as first remedy and the renegotiation as an exceptional secondary option is warranted here. The requirement in Article 1195 that requires a party that has born substantive losses to ask the other contracting party to renegotiate the contract and even to continue to perform his obligations although such performance has now become excessively onerous, may destroy the contractual balance. This could create a superior bargaining power for one party and affect the negotiation position of the other weaker party. The party that has less to lose which is the non-performing party in cases of unforeseen contingencies, is in the strongest bargaining position (ceteris paribus) and can extract unjustified gains from the weaker party.

Article 1195 (2) provides that in "the case of refusal or the failure of renegotiations, the parties may agree to terminate the agreement". According to this provision it may argue that this possibility represents a solution in case the parties could not come to an agreement as the promisor could simply refuse to renegotiate and seek the termination of the contract. So, such a termination would provide a solution only in cases of mutual termination of a contract.[239] In

[239]a termination requires a consent of a non-performing party which again creates a superior bargaining position for this non-performing party which can then create a hold-up problem.

fact, this reasoning brings the argument back to art 1134 which stipulates that a contract can only be terminated when both parties are agreeable. So, the renegotiation requirement in Article 1195 might open the doors to hold up problems, might deter cooperation and diminish certainty in the application of the article. From the above analysis it would seem more appropriate to adopt a discharge of a contract without the duty to renegotiate. After the initial contract is discharged the parties may freely renegotiate, enter into another contract in the light of new circumstances. So, it can safely be submitted that the art 1195 has not met its objective to making the French code more attractive and easier in application.

5.3.1 The Disappearance of the Cause

The “cause” as a condition for the validity of a contract in the French contract law has been abolished by the 2016 reform of the French Civil code. It attempted to explain why a party contracted and it was also an essential element for the validity of contracts.

The cause was distinguished in two ways:

(1) Subjectively as being the reasons or motives that have influenced a party to enter into the contract;

(2) Objectively as the legal reason for accepting the contractual obligations.

There are two different control mechanisms that arose from those two views:

(1) The existence of a cause was determined objectively depending on the type of contract[240]

(2) The legality (cause licit) was determined subjectively based on the real motivations of the parties.

Traditionally the requirement of cause as a condition of a contract has always been criticised in its definition and applications. Since the 2016 law reform in France the requirement of cause has been abolished. Indeed article 1128 of the *ordonnance* states that the validity of a contract lies on three conditions; the consent of the parties, the capacity of the parties to conclude the contract and the contract have a lawful and certain content. So, it looks as if the requirement of cause has been replaced by the contractual content. In fact, two requirements have been replaced by one. The cause and object requirements have been replaced by contractual content. Additionally, article 1162 states that the contract shall not depart from the public interest principle by its content or aim. This means that aim and content are two different elements to be considered. Moreover, in order to remain within the public interest concept, the aim of the contract must be legal. So, it indicates that although the cause has been abolished as a condition for the validity of a contract its functions seems to be still present.[241]

[240]For example: Cass. 1re Civ., 25 May 1988, *Bull. civ.* I, n° 149 declaring that the cause of an obligation in a synallagmatic contract resides in the other party's obligation. This principle suffers from an exception; when the *concrete motifs* of a party have entered the contractual sphere (*champs contractuel*) then they may be used to determine the existence of the cause, see Cass. Com., 6 Dec. 1988, *Bull. civ.* IV, n° 334.

[241] Essentially the lawfulness of contracts, of the parties' expectations and controlling contract terms, cf. <http://goo.gl/2ilRGP>.

The question that arises now is why should the concept of cause be abandoned and its functions retained? It is questionable whether this action would increase certainty in the application of the law.

CHAPTER 6

Law Governing International Contracts

6.1 The UNIDROIT Principle

The Institute for the Unification of Private Law is an international governmental organization which has its head office in Rome. The main tasks are to research on the needs and methods for harmonizing, updating and coordinating private law, particularly commercial law between States so as to formulate a uniform law for all the states. UNIDROIT has 63 members States from the five continents. They represent a variety of different legal, economic and political systems with different cultural backgrounds. After several years of intensive research, in 1994, the International Institute for the Unification of Private Law (UNIDROIT) brought up the UNIDROIT principles of international commercial contracts. There had been lots of efforts made towards the international unification of law. This have resulted in some binding instruments, such as supranational legislation or international conventions. The UNIDROIT Principles mostly reflect the concepts that are found in many, if not all, legal systems. Since the UNIDROIT Principles are intended to provide a system of rules that are especially tailored to meet the needs of international commercial transactions, they are also considered to be the best solutions to be adopted. The main objective of the UNIDROIT Principles is to create a set of rules to be used in all the States irrespective of their legal systems or the economic and political conditions of the countries in which they are to be applied. The UNIDROIT Principles do not use terminologies that are specific to any particular

legal system. Moreover, when interpreting a provision of the principles, the comments are made without referring to any particular national law. This enhances the international character of the UNIDROIT Principles. The only exception is when a rule has been literally taken from the United Nation Convention on Contracts for the International Sales of Goods (CISG) reference is made to its source. Concerning the substantive part, the UNIDROIT Principles regularly take into account the changes in the environment such as technological changes, economic development and political policies regarding cross-border practices. The general idea is to ensure fairness in an international contract by expressly laying down the duties of the parties while acting in good faith and maintain fair dealings using the standard of a reasonable person. However, the UNIDROIT Principles are not a binding instrument and that their acceptance will depend on whether that particular state is a member of UNIDROIT. Even though the Principles are made for international commercial contracts, nothing prevents private persons from agreeing to apply the Principles to a domestic contract. The doctrine of freedom of contract has always been accepted universally by the Law, which allows the parties to a contract to provide for the terms and conditions that they wish to be governed by in their contractual relationship.[242] The parties may also agree that their contract be governed by the UNIDROIT principle.[243] The binding character of a

[242]Article 1.1 - Freedom of contract --The parties are free to enter into a contract and to determine its content.

[243]Parties wishing to provide that their agreement be governed by the Principles might use the following words to add any desired exceptions or modifications: “This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles ...].” In addition, parties wishing to provide for the application of the law of a particular jurisdiction might use the following words: “This contract shall be governed by the UNIDROIT Principles (2004) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X].

contractual agreement assumes that an agreement has been concluded by the parties and that the agreement reached shall not be affected by any ground of invalidity. Article 1.3 lays down the principle of *pacta sunt servanda.* The only exception to depart from this principle is when both parties agree to do so.[244] As the UNIDROIT Principles is a non-legislative instrument, and so are the individual contracts concluded in accordance with the Principles, they cannot be expected to prevail over mandatory rules of domestic law of the state, that are applicable in accordance with the relevant rules of private international law.[245]

6.1.1 Good Faith and fair dealing

Parties to a contract must act in accordance with good faith and fair dealing in their trade. This standard applies to the negotiation, formation, performance and interpretation of international contracts. Article 1.7 of the UNIDROIT principles makes references to "good faith and fair dealing in international trade".[246] It is important to note that whenever the provisions of the Principles are referred to, only good faith and fair dealing should always be understood as a reference to good faith and fair dealing in the international trade as specified in this Article. The reference to "good faith and fair dealing in international trade" also makes it clear that in the Principles the two concepts are not to be applied according to the standards usually adopted within the various national legal

[244]Article 1.3 - Binding character of contract -- A contract validly entered into is binding upon the parties. It can only be modified or terminated in accordance with its terms or by agreement or as otherwise provided in these Principles.

[245]Article 1.4 - Mandatory rules --Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law.

[246]Article 1.7 -- Good faith and fair dealing (1) Each party must act in accordance with good faith and fair dealing in international trade. (2) The parties may not exclude or limit this duty.

systems. The domestic standards may be taken into account only if they are accepted among the other legal systems. The Convention also considers the civil law concept of *culpa in contrahendo*.[247] So, the parties to a contract must always act in good faith in the course of their negotiations. This concept is part of the civil law, yet the American courts with their common law concept frequently replicate results similar to those available under the civil law through the use of concepts such as fraudulent non-disclosure and promissory estoppel. Moreover, there are four articles (Articles 2.1.19 – 2.1.22) that deal with the special situation where one or both parties use standard terms in concluding a contract. Standard terms are those contract provisions which are prepared in advance for general or repeated use by one party. They are usually used without negotiation with the other party (paragraph (2)). What is decisive is not what they really want but the fact that they are drafted in advance for general and repeated use. They are used in a given case by one of the parties without negotiation with the other party. The other party must accept the general terms as a whole, while the other terms of the particular contract may be the subject of negotiation between the parties.[248] It has been the rule in some civil law

[247]The classic English language article on the subject is Friedrich Kessler & Edith Fine, Culpa in Contrahendo, Bargaining in Good Faith, and Freedom of Contract: A Comparative Study, 77 Harv. L. Rev. 401 (1964). The concept has been invoked in American scholarly writing with some frequency.

[248]Article 2.1.19 --Contracting under standard terms
(1) Where one party or both parties use standard terms in concluding a contract, the general rules on formation apply, subject to Articles 2.1.20 - 2.1.22.
(2) Standard terms are provisions which are prepared in advance for general and repeated use by one party and which are actually used without negotiation with the other party.
Article 2.1.20-- Surprising terms
(1) No term contained in standard terms which is of such a character
that the other party could not reasonably have expected it, is effective
unless it has been expressly accepted by that party.
(2) In determining whether a term is of such a character regard is
to be had to its content, language and presentation.
Article 2.1.21 (Conflict between standard terms and non-standard terms)

systems and in some common law cases that if an agreement is impossible to perform at the outset, and that the fact is unknown to both parties, then the agreement is void.[249] This situation arises where the goods have either perished or had never existed.[250]The common law cases usually find that one party or the other has impliedly warranted the existence of the goods that is impossible to deliver or that there has been negligence by the promisor.[251] This rule together with other obsolete rules are discarded on the fact that one cannot contract to sell that which one does not own.[252] In paragraph (1) of Article 3.1.3 states in general terms that the mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract. It assumes that performance would be possible at a later stage.[253]

This rule may also cause difficulties as in a case where it had made stock-selling impossible.[254] A contract is still valid even if the assets to which it relates have

---

In case of conflict between a standard term and a term which is not a standard term the latter prevails.
Article 2.1.22 --Battle of forms- Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

[249]It is enshrined in Restatement (Second) of Contracts § 266 (1979).

[250]See Jan Z. Krasnowiecki, Sale of Non-Existent Goods: A Problem in the Theory of Contracts, 34 Notre Dame Law. 358, 358 (1959);

[251]See *McRae v. Commonwealth Disposals Comm'n*, 84 C L R 377, 386 (Austl. 1951) (sale of nonexistent ship).

[252]UNIDROIT convention art. 3.1.3.

[253]ibid-- Initial impossibility
(1) The mere fact that at the time of the conclusion of the contract the performance of the obligation assumed was impossible does not affect the validity of the contract.

[254]See John Randolph Dos Passos, A Treatise on the Law of Stock-Brokers and Stock-Exchanges 393-406 (1882).

already perished at the time of contracting. This is because the initial impossibility of performance is equated with impossibility occurring after the conclusion of the contract. The rights and duties of the parties arising from one party's inability to perform are then determined according to the rules on non-performance. This rule pays attention to the fact that the party already knew of the impossibility of performance at the time of contracting. The rule is laid down in paragraph (2) of the article 3.3.[255] Article 3.1.3 also removes possible doubts as to the validity of contracts when goods are to be delivered in the future.

6.1.2 Excessive advantage

Article 3.2.7 of the principle allows a party to a contract to avoid the performance of his obligations in cases where there is gross disparity between the obligations of the parties, where one party has acquired unjustifiably excessive advantage. However, the excessive advantage must have existed at the time of the conclusion of the contract. The "excessive" advantage denotes a great disparity in the value and the price of the subject matter which upsets the equilibrium of performance. However, this does not suffice to allow the avoidance of the contract under this Article. In these circumstances it requires that the disequilibrium be so great as to shock the conscience of a reasonable person.[256]

[255]Article 3.1.3-- The mere fact that at the time of the conclusion of the contract a party was not entitled to dispose of the assets to which the contract relates does not affect the validity of the contract.

[256]Article 3.2.7 -- Gross disparity

According to Art. 3.2.7 a party may avoid the contract or an individual term of it if, at the time of the conclusion of the contract, the contract or term unjustifiably gave the other party an excessive advantage.

However, regard is to be had to:

(a) the fact that the other party has taken unfair advantage of the first party's dependence, economic distress or urgent needs, or ignorance, or lack of bargaining skill, and

(b) the nature and purpose of the contract.

As regards to the Common intention of the parties paragraph (1) of Article 4.1 lays down the principle that in determining the meaning of the terms of a contract, the common intention of the parties must first be taken into account.[257] Therefore, there is a possibility that when a contract term is given a meaning, it differs from the literal sense of the language and also from the meaning which a reasonable person would have attached to it. However, this is possible only if the different understandings were common to both parties when concluding the contract. If the common intention of the parties cannot be determined, the principles move to the reasonableness approach.[258]

In the event that the common intention of the parties cannot be established, paragraph (2) provides that the contract shall be interpreted in accordance with the meaning which reasonable persons would have given. That

[257]Article 4.1(1) A contract shall be interpreted according to the common intention of the parties.

[258]Article 4.1(2) If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstances.

is the standard objective test as applied by the court. It is to be noted that both the “subjective” test laid down in paragraph (1) and the “reasonableness” test in paragraph (2) may not always be appropriate in the context of standard terms. Notwithstanding, what the actual understanding of the parties to the contract or reasonable persons of the same kind as the parties, might have had the standard terms should be interpreted in accordance with the reasonable expectations of their average users.

6.1.3 Express and Implied obligations

Article 5.1.1 reinforces the widely accepted principle that the obligations of the parties to a contract are not necessarily limited to that which has been expressly laid down in the contract. Other obligations may be impliedly stated therein.[259] There are close links that exist between this Article and some of the other provisions of the Principles. Thus Article 5.1.1 is a direct upshot of the rule where a party to a contract must act in good faith. (Article 1.7).

6.1.4 Performance under UNIDROIT

Whenever there is need to determine when a contractual obligation is to be performed, Article 6.1.1 distinguishes three situations. The first situation is where the contract states the precise time for performance or makes it determinable. The second situation is where the contract does not specify a precise time but a specific period of time for performance to be carried out. In the latter case, any time during that chosen period chosen by the performing

[259]Article 5.1.1--Express and implied obligations--The contractual obligations of the parties may be express or implied.

party will be acceptable. Finally, in all other cases, the performance is due within a reasonable time.[260] As to the definition of non-performance the UNIDROIT Principles, in its article 7.1.1 pays particular attention to two features. The first is that "non-performance" is defined in such a way as to include not only all forms of defective performance but also the complete failure to perform. Thus, it will be a non-performance if a builder erect a building which is partly in accordance with the contract and partly defective or to complete the building late. The second feature is that the concept of "non-performance" shall include both non-excused and excused non-performance. Non-performance may be excused by reason of the conduct of the other party to the contract.[261]

6.1.5 Hardship under UNIDROIT

Hardship is defined as a state of affairs where the occurrence of an event has fundamentally altered the equilibrium of the contract, provided that the event meets the requirements as laid down in sub-paragraphs (a) to (d).[262] The purpose of Article 6.2.1 is to clarify that, based on general binding principle of parties to a contract, performance must be fulfilled as long as it is possible

[260]Article 6.1.1-- Time of performance.--A party must perform its obligations: (a) if a time is fixed by or determinable from the contract, at that time; (b) if a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the other party is to choose a time; (c) in any other case, within a reasonable time after the conclusion of the contract.

[261]Article 7.1.1--Non-performance defined-- Non-performance is failure by a party to perform any of its obligations under the contract, including defective performance or late performance.

[262]Article 6.2.2-- Definition of hardship-- There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party; and (d) the risk of the events was not assumed by the disadvantaged party

and regardless of the difficulty it may impose on the performing party. Even if a party incurs heavy losses instead of making profits the terms of the contract must be maintained.[263] Since the general principle is that a change in circumstances does not affect the obligation to perform (see Article 6.2.1 above), therefore a party may not claim hardship unless there has been a fundamental change in the equilibrium of the contract. To determine whether the change has been fundamental all the circumstances affecting the performances are taken into account. Moreover, according to sub-paragraph (a) of Article 6.2.2, the events causing hardship must take place or become known to the disadvantaged party after the conclusion of the contract. If that party had known about the intervening events when concluding the contract, it would have been able to take them into account at that time of the formation of the contract. In such a case that party would not be able to raise the issue of hardship.[264]

6.2 United Nations Conventions on Contracts for International Sales of Goods (CISG)

6.2.1 Introduction to CISG

The United Nations Convention on Contracts for the International Sale of Goods (also known as the Convention or CISG) provides a uniform text of law

[263]Article 6.2.1--Contract to be observed--Where the performance of a contract becomes more onerous for one of the parties, that party is nevertheless bound to perform its obligations subject to the following provisions on hardship.

[264]Article 6.2.2--Definition of hardship--There is hardship where the occurrence of events fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished, and (a) the events occur or become known to the disadvantaged party after the conclusion of the contract; (b) the events could not reasonably have been taken into account by the disadvantaged party at the time of the conclusion of the contract; (c) the events are beyond the control of the disadvantaged party and (d) the risk of the events was not assumed by the disadvantaged party.

for international sales of goods. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL) and was adopted by eleven states at conference of the United Nations Convention on Contracts for the International Sale of Goods on 11 April 1980. As at February 2019 the number of member states has risen to ninety. This main aim of the Convention is for the unification of the law governing the international sale of goods, so as to facilitate it's application and interpretation in a consistent manner within all legal systems. The basic principle of freedom of contract in the international sale of goods is recognized by all jurisdictions. It permits the parties to exclude the application of any part of this Convention or derogate from or to vary the effect of any of its provisions. The exclusion of the Convention however, would often result from the choice of the law of a non-contracting State by the parties. The parties may also choose the domestic law of a contracting State to be the applicable law to the contract. Great care has been taken in the drafting of the provisions in order to make it clear and easy to understand and apply. Nevertheless, there are disputes arising as to the meaning and explanation of the terms therein. In these situations all the courts and tribunals shall observe its international character and promote a uniformity by observing the principle of good faith in international trade.

6.2.2 Buyer's Remedies (Article 46)

Article 46 gives the buyer the rights to require performance. Under Article 46 (1) a buyer may require performance by the seller of his obligations provided the buyer has not resorted to a remedy which is inconsistent with this requirement. Moreover, under Article 46(2) if the goods do not conform with the

contract, the buyer may require delivery of substitute goods if the lack of conformity constitutes a fundamental breach of contract. Following Article 46(3) If the goods do not conform with the contract, the buyer may also require the seller to remedy the lack of conformity by repair, unless this is unreasonable having regard to all the surrounding circumstances. This section requires the seller to deliver conforming goods or perform other obligations. The three sections together can be considered as the buyer's right to specific performance.[265] Under Article 46(1) the buyer has a general right to ask the seller for performance of any due obligation in kind except in other cases covered by Arts. 46(2) and (3). However, if obligation in kind is not possible then the buyer loses his right to require performance from the seller.[266] In any case, if performance in kind is impossible, such as when the unique product has been sold and afterwards it gets destroyed, then the buyer's right to require performance is extinguished. CISG Art. 46 covers different levels of breach, fundamental and non-fundamental. Based on the level of breach, it gives the buyer a right to require performance.[267]

Paragraphs 2 and 3 deal with the replacement and repair of non-conforming goods and introduce some restrictions for these specific remedies, whereas paragraph 1 applies to all other cases.[268] Both Arts. 46(2) and 46(3) are meant

[265]*See* John O. Honnold, Uniform Law for International Sales under the 1980 United Nations Convention 362 (2d ed. 1991) (Honnold).

[266]ibid p364

[267]Article 7(1) states that in the interpretation of this Convention, regard is to be had . . . to the need to promote uniformity in its application and the observance of good faith in international trade.
See also. CISG United Nations Conference on Contracts for the International Sale of Goods, 11 Apr. 1980, S. Treaty Doc. No. 98-9 (1983), I L M. 668 (1980) (CISG).

[268]Honnold, supra n 265 p 365

to be applied in cases of non-conformity. Whenever there is non-conformity, the other element to be considered is the level of non-conformity whether it is fundamental or not fundamental. This division is used to further distinguish the two specific provisions of Arts. 46(2) and 46(3) from each other. So, whenever there is a breach that occurs it is important to evaluate the consequences and determine if the breach is fundamental. If the breach is fundamental the buyer shall have a right to avoid the contract[269] or he may ask for the delivery of substitute goods.[270]In case the breach is not fundamental, the buyer will still have a right to require a repair.[271] The important point that arises here is that the buyer is not allowed to claim substitution of the goods. In the event of non-conformity of goods, the seller may opt to deliver substitute goods if he feels that this is easier for him provided that the substitute is not unreasonable for the buyer.[272]. Moreover, even in a case where there is a fundamental breach, the buyer who is entitled to claim substitute goods may instead require a repair. It is a discretion on the part of the buyer. Art. 46(2) and (3) show that the remedies provided therein are separate remedies, they are not to be regarded as alternatives, both of them can be resorted to in the same case. So, a buyer can request both substitute goods and the repair of goods at the same depending on the circumstances. As it is accepted that the buyer has a right to require the seller to perform his obligation under the contract, it is submitted that the provisions of the Convention that give the buyer a right to require the seller to

[269]CISG Art. 49/64.

[270]CISG Art. 46(2).

[271]CISG Art. 46(3).

[272]Honnold, supra n 265 p364-365

correct his non-conforming obligation by delivery of substitute goods are consistent with the general legal principles and the authorities allowing the buyer to receive specific performance.[273] Both Art. 46(2) and Art. 46(3) of the CISG aim to follow the *pacta sunt servanda* principle. On the one hand, when there is fundamental non-conformity the buyer is given the opportunity, under Art. 46(2), to count on the seller's undertaking and require him to re-deliver substitute goods and as such fulfilling his obligation as agreed between the parties when concluding the contract. On the other hand, where the breach is not fundamental the right of the buyer is to require the seller to repair non-conformities, according to Art. 46(3), and delivers goods reinforces the CISG's basic principle to respect the contract made between the parties. Consequently, the *pacta sunt servanda* principle and the belief that the most sensible remedy for the buyer for a breach is to require the seller to perform his obligation as originally agreed upon between the parties, is reinforced.[274]

6.2.3 Seller's Remedy (Article 62)

Article 62 is quite similar to article 46 in the sense that here it gives the seller a right to compel performance as oppose to the buyers' right under article 46. Moreover, this principle in article 46 is being reinforced by the concept of *pacta sunt servanda*. Similar to Article 46, the seller may lose the right to require performance if he chooses an alternative remedy such as avoidance under Article 64. The main difficulty that arises with article 62 is when a seller

[273]See G.H. Treitel, Remedies for the Breach of Contract 46 (1988).

[274]ibid.

tries to force a buyer to perform an obligation that he does not want. For example, when the seller forces a buyer to accept goods that he does not want. Article 62 is not clear on as to whether the buyer is forced to pay for the price of goods if he has not received the goods or has not taken the goods. The application principle of the CISG to the seller's right to specific performance is that if the buyer has not received the goods and does not want to receive them, the recovering of the full price by the seller is as if the buyer is being forced to accept the transaction.[275]

6.2.4 The right to avoid the contract under CISG (Article 49)

Article 49(1)(a) CISG provides that avoidance of the contract is possible, and only possible, where the failure by the seller to perform any of his obligations under the contract results into a fundamental breach of contract. Moreover, according to Article 25 CISG, a breach is considered fundamental when it causes a detriment to the buyer which substantially deprive him of what he expected under the contract, provided the seller had not reasonably foreseen such a result. The Fundamental breach is a milestone concept of CISG, since it is the necessary precondition for avoiding the contract under articles 49(1)(a) and 64(1)(a)). The Fundamental breach also entitles the buyer to claim delivery of substitute goods (art. 46(2).

However, under article 74 a mere non-fundamental breach will entitle the aggrieved party to claim damages and the aggrieved party can also claim a price reduction under art. 50. Whenever a fundamental breach is committed by

[275] Honnold, supra n 265 (1987), p. 357

the seller, a buyer can avoid the contract as stated in article 49(1). The effect is that it relieves both parties from their contractual obligation.[276] While it gives the buyer the right to get back the money paid under the contract it also requires the buyer to return any goods that has already been delivered to him by the seller.[277] So, if the buyer wants to exercise his right to avoid he must ensure that the good are kept in good condition. In the event that the buyer cannot return the goods in the condition in which he received it he might lose his right to avoid the contract.[278] There is also a requirement that the buyer must send a notice of avoidance to the seller within a reasonable time after he had had knowledge of the breach.[279] The seller also has a right to avoid performance of his obligation under the contract where the buyer has committed a fundamental breach or has not provided consideration to a *Nachfrist* notice.[280] The seller is excused of his responsibility to perform under the contract.

---

[276]U.N. Conference on Contracts for the International Sale of Goods, Final Act (April 10, 1980), U.N. Doc. A/CONF.97/18, *reprinted in* S. Treaty Doc. No. 98-9, 98th Cong., 1st Sess. *and* 19 Int'l Legal Mat. 668 (1980) [hereinafter cited as "Sales Convention"]. Art 81(1)

[277]ibid. art. 81(2). In addition, an avoiding buyer can claim interest from the date of payment. *Id*. art. 84(1).
See also art 84(2).

[278]The buyer retains the right to avoid if (1) its inability to restore the goods substantially in their original condition is not due to its own act or omission, (2) the goods changed condition as a result of the inspection provided for in Article 38, or (3) the buyer has sold, consumed or transformed the goods in the normal course before discovering their nonconformity. ibid. art. 82.

[279]ibid art 49(2)(b)(i) Subsections (ii) and (iii) of Article 49(2)(b) adjust the time within which buyer must avoid if the buyer has given a Nachfrist ultimatum under Article 47 or if the seller has exercised its right under Article 48(2) to demand the buyer declare whether it will accept performance.

[280]A *Nachfrist* notice is the German concept similar to the French procedure of *mise en demeure*, whereby in the case of Non-performance by the seller, the buyer sends a *Nachfrist* notice fixing of an additional period of time of reasonable length for performance by the seller of his obligations.

6.3 The Principles of European Contract Law (PECL)

6.3.1 Introduction

In the early seventies, the Lando-Commission initiated a project with the aim to achieving a Community-wide uniform legal system for contract law. The Lando-Commission started with the presumption that the mere unification of international private law rules will not be enough to meet the needs of the common European market. The Lando-Commission proposes a uniform system for the contractual relationships of parties doing business within the Community. It provides a set of rules which is separate from national legal systems and thus facilitating cross-border trading within the European Community. The various European legal systems differ as to whether a liability for precontractual negotiations should exist or not. Generally, the civil law countries recognise such a liability although under different conditions and with different remedies available in each individual country. The English law does not accept a general principle to negotiating in good faith although sometimes they do accept precontractual liability as an implied contract or negligence.[281] The unification of rules on 'choice of law', such as the EC Convention on the Law applicable to Contractual Obligations,[282] may have its merits but fails when it comes to market integration. With the assumption of the existence of different legal systems, the idea of unifying international private law would not satisfy the

[281]See for details Reinhard Zimmermann & Simon Whittaker (eds), *Good Faith in European Contract Law*, Cambridge 2000.

[282]1980 Rome Convention of the Law Applicable to Contractual Obligations, 1998 OJ C 27/98, (consolidated version).

needs of the common market.[283] In the process of the European integration, the law has been one of the main instruments for integration. The structure of the European national legal systems has substantially been influenced by the Community regulations, in as much as the basic orientation of both the legal systems as well as the individual legal fields have been affected. Since the building of a single European entity has been guided by principles of building a single market, a new economic framework has been created. These European economic activities and social regulation have lead to a (national) development of the private law too. In this context, for example the European Directive on Unfair Terms in Consumer Contracts made an impact on the national private law.[284] This clearly shows that, it is no longer the legislation of the Member States which determines the operation of the private national law but European regulations. These create difficulties to assimilate the resulting changes into the existing national legal systems. Moreover, as the European community is growing it creates more confusion to the supranational rules which are deeply affecting the structures of the individual legal systems. The Lando-Commission had aimed to reach a compromise between the need for a common legal framework of contract law and the blended character of European legislative activities. The PECL has been created to provide a solid legal framework for the common European principles and to consolidate the community law regulating various types of contracts.[285] After several years the commission has finally

[283] That is why some authors speak of second best solution if they talk about the unification of rules on choice of law; cf, for instance, H. Heiss, *'Europäisches Vertragsrecht*: in statu nascendi, (1995) *Zeitschrift für Rechtsvergleichung* (ZfRVgl).

[284]Council Directive 93/13/EEC of 5.4.1993, OJ 1993 L 95/23 of 21.4.1993.

[285]See http://www.ufsia.ac.be/~estorme.PECL.html and [http://ra.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html].

elaborated on a common European principles of contract law known as The Principles of European Contract Law (PECL).[286] The PECL have four different objectives.[287]

The first objective of the PECL is to offer the parties to a contract the possibility to have their contract governed by a set of impartial principles.[288] This encourages the parties to expressly adopt the PECL when concluding a contract. They can do so by stating that 'This contract is subject to the Principles of European Contract Law'. However, the national mandatory law still remains in force (that would be applicable to the contract of parties from different jurisdictions according to the rules of private international law).[289] But the question that arises here is whether the parties can also choose the PECL as their applicable law instead of choosing for a national legal system?

In the case of a contract between contracting parties of different European states, the EC Convention on the Law Applicable to Contractual Obligations 1980 shall be applicable.[290] Article 3 of the Convention states that only a national legal system can be chosen as applicable law. This indicates as if it is not possible to choose the PECL in the national legal system. Some authors have however criticised this stand.[291] It is obvious that the parties to a contract

---

[286]The first results were published in book form in 1995: cf, O. Lando & H. Beale (eds), The Principles of European Contract Law, Part I. Performance, *Non-performance and Remedies*, *Nijhoff, Dortrecht* 1995. For a preview of the second and enlarged part, see [http://ra.irv.uit.no/trade_law/doc/EU.Contract.Principles.1997.preview.html].

[287]Parts I and II, xxiii and art. 1:101 PECL; cf. Part III, xv ff.

[288]This is also the view held by the drafters. See Parts I and II, xxiv and Part III, xvi.

[289]Parts I and II, xxii.

[290]Rome, 19 June 1980, OJ 266/1. See the Green Paper on the Conversion of the Rome Convention of 1980 into a Community instrument and its modernization, COM (2002) 654 (01).

[291]Cf. Art. 1:101, PECL and in particular K. Boele-Woelki, Principles in IPR, Lelystad 1995, also in ULR 1996, 652. Against this possibility: Cathérine Kessedjian, Une exercise de rénovation des

will prefer a choice of law for a national legal system for certainty in its applicability. But when there is uncertainty in this respect, parties will prefer to choose the PECL. Generally, when it comes to a choice of law it seems that the legal certainty is found to be much more important than the ability to choose a law of better quality than national legal systems. As the principles in the PECL are rather vague and open-ended it is uncertain how a court will handle the various principles. At the moment there is a shortage of case law on this matter. All shows that, as long as there will be such uncertainty on the application of PECL by a court the parties to a contract will not choose them as their applicable law. This is because these principles are not enhancing the legal certainty in their contractual relationship.[292]So, the extent to which the contracting parties will expressly adopt the PECL is still not clear. While it is certainly a better option for the contracting parties, it also depends on the national conflicting law whether it is possible to choose PECL. In order to understand the role of the PECL in establishing a common process in contract law, it is important to understand whether such principles can be considered as similar to principles in a national legal system. Some of the provisions of PECL are supposed to restate the common requirements of contract law in Europe. Art. 2:201 (1) on what is an offer clearly illustrates what presumably most European legal systems have in common. Other articles such as art. 6:111 on *imprévision*

sources du droit des contrats du commerce international: les Principes proposés par l'Unidroit, RCDIP 84 (1995), 641.

[292] On the experiences with the (as to contents and purpose) similar Unidroit Principles of International Commercial Contracts, see M.J. Bonell, *The Unidroit Principles in Practice*: The Experience of the First Two Years, ULR 1997, 34.

provides a ‘progressive’ development from that common core including the Civil code.[293]

Art. 2:301 PECL states that:

‘(1) A party is free to negotiate and is not liable for failure to reach an agreement.

(2) However, a party which has negotiated or broken off negotiation contrary to good faith and fair dealing is liable for the losses caused to the other party.

(3) It is contrary to good faith and fair dealing, in particular, for a party to enter into or continue negotiations with no real intention of reaching an agreement with the other party’.

It seems that this provision covers the European common core. The civil law and the common law position have been rightly stated in section (1). However, section (2) is like a sort of trade-off between the two legal systems. On the one hand, the article satisfies the civil law rule that conduct contrary to good faith may lead to liability, even *before* the contract formation. On the other hand, English law is also being supported in the sense that if good faith and fair dealing do not require the English contracting parties to negotiate in a certain way liability will not arise under this provision.[294] However, this is not a comprehensive appreciation of the provisions of the PECL.

6.3.2 Aim of PECL

The goal of this principle is mostly to design new rules that do not exist in any European legal system and is an ideal European law. When looking for an ideal

[293]Cf. Parts I and II, xxiv.

[294]Reinhard Zimmermann supra n 281

law the variations in the national law have to be left out. This can be seen in their introduction to Part III of the PECL which says that 'every effort has been made to draft short and general rules' and they resisted the temptation 'to seek to cover every particular eventuality, which would have led to excessive detail and specificity'.[295] This can also be confirmed by the Unidroit Principles of International and Commercial Contracts where the drafters stated that 'the objective of the Unidroit Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied'.[296]In this respect to its function there is an essential difference between the principles as they function in national law and European principles like the PECL. This is because the national principles are completely embedded in the national legal culture and are in fact law; they can be enforced in concrete cases because there is a national morality ('shared understanding') which tells the courts how to apply the principles. This is different with respect to the European principles.

6.3.3 Remedies for non-performance of obligation

Under the PECL, its chapter 8 provides remedies for Non-performance of obligations arising from contracts.[297] So, the remedies available for non-

[295]Part III, xvii.

[296]UNIDROIT Principles, viii.

[297]Art. 8:101 states that:
(1) Whenever a party does not perform an obligation under the contract and the non-performance is not excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9.

performance is dependent upon whether the non-performance is not excused or is excused due to an impediment under Art. 8:108 or results from the action of the other party. A non-performance which is not excused may give the injured party the right to claim performance or the recovery of money due under Art. 9:101 or specific performance under Art. 9:102 and to claim damages and interests under Arts. 9:501 through 9:510, or to withhold its own performance under Art. 9:201, or to terminate the contract under Arts. 9:301 through Art. 9:309 and to reduce its own performance under Art. 9:401. Therefore, the foregoing shows that in case a party fails to fulfil a duty to receive or accept performance the other party may also make use of the remedies mentioned. A non-performance which is excused due to an impediment does not give the injured party the right to claim specific performance or to claim damages.[298]. However, the aggrieved party may avail other remedies as set out in Chapter 9 of PECL.

Since a non-performance caused by a party's act or omission has an effect on the remedies available to the other party it would be contrary to good faith and fairness for the creditor to have a remedy when it is responsible for the non-performance. The termination of a contract is always considered as a drastic remedy. So, as far as possible the parties must be encouraged to maintain it in force. Consequently, the contract termination is not available as a remedy for just any breach of contract. It usually requires a fundamental non-performance as a precondition. So, a "non-fundamental" breach must be distinguished from

(2) Where a party's non-performance is excused under Article 8:108, the aggrieved party may resort to any of the remedies set out in Chapter 9 except claiming performance and damages.
(3) A party may not resort to any of the remedies set out in Chapter 9 to the extent that its own act caused the other party's non-performance.

[298]Article 8:108

a "fundamental" breach in order to decide on the termination of a contract on the basis of breach. It is important to specify the different remedies which are available to the injured party. For instance, under the *CISG* the injured party can, not only claim damages, price reduction or the repair of non-conforming goods in case of a "fundamental" breach, but may also declare the contract terminated.

Under the PECL, non-performance is considered as a fundamental breach of a contract when it substantially deprives the aggrieved party of the benefit of its bargain in such a way that the aggrieved party loses its interest in performing the contract. However, where the non-performing party did not foresee and could not reasonably have foreseen the consequences of its non-performance then it would not be considered as a fundamental breach.

6.4 The FIDIC Standards

6.4.1 Introduction

The French name Fédération Internationale Des Ingénieurs-Conseils (also known as FIDIC, acronym stands for the French version of the Federation's name) is a body founded in 1915 by three European states namely Belgium, France and Switzerland. Their main purpose was to create a standard contract that may be used in the construction and installation projects everywhere because they believe that every construction project around the world would have the same principles as foundation. Those standard agreements take into account the interests of both parties involved.

In 1999, FIDIC has issued a series of standard for the construction and installation agreements that may be used in relation to the specificities of the

project. The three most well-known standard agreement are known as “red” FIDIC, “yellow” FIDIC and “green” FIDIC. The colour simply relates to the cover of the document under which such agreements have been published. “Red” FIDIC has been drafted in 1956 is used for construction works in which the design is made by the employer. This balances the risks undertaken by the parties, and the payment for the works is made based on a monthly basis based on the amount of works completed. “Yellow” FIDIC lays the conditions of Contract for Plant and Design-Build for Electrical and Mechanical Plant and for Building and Engineering Works. The designed is made by the Contractor. This type of agreement is used in construction works in which the design is ensured by the contractor. These payments are made in a lump sum based upon the certification by the engineer. “Green” FIDIC is generally used for low value projects or one developed over a short period of time, regardless of whether the design is made by the contractor or by the employer. The payments are made on a monthly basis and there is no engineer supervising the works.

6.4.2 FIDIC Silver Book

In the recent years the FIDIC has developed the Silver Book which has become the *de facto* starting position for Engineering, Procurement and Construction (EPC) contracts. Indeed, the Silver Book’s full title is ‘Conditions of Contract for EPC Turnkey Projects’. Thus, it uses the terms EPC and turnkey inter-changeably, but they mean the same thing. The Silver Book represents a fixed price lump sum arrangement and turnkey where the contractor assumes most of the construction risks. It is internationally recognised by a majority of contracting community. The contractor assumes most of the risks on key areas

such as design, price and certain unforeseen risks. This is different from the Red and Yellow Books where the Employer assumes most of these key risks. The silver book is in line with the purpose and scope for which the contract is being used. The difference in the risk allocation between the different FIDIC contracts can be seen in the market by the price difference. So, it can be seen that a contractor bidding under a Red Book risk profile is likely to offer a lower price than for a Silver Book risk profile because of the higher risk for the contractor under the Silver book. In project financing there is an increased preference for the Silver Book allocation because of the need to ensure the certainty of the price and the completion date. This is also because the project Special Purpose Vehicle (SPV) generally does not have the capacity to absorb the cost increases beyond the levels covered by its committed financial resources. FIDIC has also drafted other standard contracts which are based on the specificities of the projects such as those projects that are financed by banks or “turnkey” projects.

6.4.3 Turnkey contracting

The turnkey approach operates when the contractor took the project, engineers, procures and construct the required works. When the works is completed and ready for operations the contractor hands over the keys to the owner so that he may operate the facility. In the Turnkey principle the contractor provides whatever is necessary for a particular project. Turnkey contracting is also known as Lump Sum Turnkey or ‘LSTK’, emphasising on the responsibilities allocated to the contractor to deliver the project on time and to a required performance level, in return for payment of a fixed price. Usually a lump

sum turnkey price will include a contingency allowance to protect the contractor against the risk of the works costing more or taking longer to deliver. The owners are expected to pay a premium for a turnkey contract.[299] An EPC contractor is responsible for the engineering design of the works, its procurement and the subsequent construction.[300] A particular feature of the turnkey approach to contracting is the requirement for the contractor to prove the reliability and performance of the plant and equipment. So, when drafting the turnkey contracts some importance is given to the testing, commissioning and handover of the works and as to how these are to be undertaken. The performance of the asset is also important in those turnkey projects funded through project financing. As security for financing the projects lenders will generally ensure that upon completion the facility will be operational and generate revenue, whether power, chemicals, processed metals or road toll revenue. This is an important element which is reflected in the General Conditions of the FIDIC Silver Book: the 'Time for Completion' of the works includes not only the completion of the works so that the owner can take them over, but also 'passing of the Tests on Completion'.[301] It is important to note that under the turnkey arrangement the extent to which risk is allocated to the contractor depends on a range of other factors too. This includes the availability and strengths of the guarantees provided by the promoters of the project. In cases where the promoters will not provide any guarantee or will provide only a limited guarantee to the lenders

[299]However, it is increasingly common for turnkey contracting to be based on, or involve, an initial cost reimbursable or target cost element.

[300]The acronym EPCM is also encountered frequently on international projects, but this is very different from EPC. EPCM is a services-only contract, under which the contractor performs engineering, procurement and construction management services.

[301] Clause 8.2 of the FIDIC Silver Book.

then there will be a need to allocate complete risk to the turnkey contractor. The turnkey contract is the means by which risk is judiciously allocated. In some other cases projects usually require a range of skills and products which are not always readily available from a single turnkey contractor. For example, large petrochemical projects may have a series of turnkey contracts for various skills and expertise or technologies. These may be represented by different process units turnkey contract. Each process unit will be engineered, procured and constructed by a different turnkey contractor, although they will work alongside each other within the same site locations.[302] The main risk in any construction project is completion risk that is the works may not be completed within the agreed time or agreed price. In a turnkey agreement it is always the contractor who has responsibility for the control monitoring of all the elements of completion risk. This approach allocates only limited responsibility to the owner. Where there are more than one turnkey contractor in a project there can be difficulty in providing the owner with a single-point guarantee or responsibility wrap under one contract from one particular EPC contractor. This can be seen particularly in the multi-sectorial projects (e.g Petrochemical sector), where there are several process units which involve the use of different technologies licensed by third parties. If the third party company which owns the technology licence is not the same company that undertakes the works there will be difficulty in obtaining a single-point responsibility wrap under one contract from

[302] For the US$5bn SABIC petrochemical project in Saudi Arabia, turnkey contracts were entered into for various plants forming the project, including Technip for the olefins plant; Toyo for the glycol ethylene plant; Aker Kvaerner and Sinopec for the polyethylene and polypropylene plants; and Foster Wheeler who are undertaking the project management plus utilities and offsites.

one EPC contractor.[303]Due to a high demand in the construction industry and demand in raw materials the market pressure is growing. These are having a huge impact the turnkey contracting market. Contractors are not so keen to take risk amongst other contractors. It is no more an acceptable procurement strategy to transfer all completion and other risks to the turnkey contractor. Currently there are different deals that are being engineered. The most popular one is where the contractors are engaged on a two-stage principle. The first stage is a reimbursable Front End Engineering Design (FEED) contract. At this stage the contractor makes the design, gets the quotations and confirms the supply. After the contractor has ensured the certainty as to the scope of the design, cost and date of completion the contract is converted into a turnkey arrangement.[304] Such arrangements is usually engineered through a single contract, which contains a mechanism to convert the contract from a reimbursable to a turnkey contract. Generally, FIDIC discourages any amendments to its forms. However, the market practice has been to amend these documents in order to cater for issues which often arise in practice while taking into account the particular features of each project. Whenever there is an unforeseen situation that has arisen the FIDIC approach has to be adjusted to give effect to the standard forms.[305] While doing so for a standard form of an engineering contract a test of foreseeability is adopted. Thus, clause 12 of the

[303]The turnkey contractor will likely seek to carve out from its liability problems arising due to technology performance, or to cap its liability by reference to the recourse available from the technology provider.

[304]For a more in-depth look at such procurement strategies, see Nick Henchie and Phil Loots, Worlds Apart: EPC and EPCM contracts: Risk Issues and Allocation, ICLR July 2007.

[305]See Julian Bailey, 'What Lies beneath: Site Conditions and Contract Risk' (SCL paper 13 7, May 2007).

ICE (Institution of Civil Engineers) Conditions provides: 'If during the carrying out of the Works the Contractor encounters physical conditions (other than weather conditions or conditions due to weather changes) or artificial obstructions resulting in conditions or obstructions that could not, in his opinion, have reasonably been foreseen by an experienced contract, the Contractor shall as early as practicable give written notice thereof to the Employer's Representative".[306] Originally the FIDIC forms were based on the ICE Conditions of Contract.[307]

6..5 Performance under the Canadian common law

6.5.1 Canadian Common Law

The Canadian contract law is governed by the civil code in Quebec and the common law in the other parts of the country. There is a distinct notion of *force majeure* in the civil law, including in the Civil Code of Québec.[308] While the French Civil Code refers to "*force majeure*", the English text refers to "superior force."[309] Usually when the civil code makes a reference to *force majeure* it in fact is referring to the common law doctrine of frustration. It is not an expressed provision of a contract.[310] This yields to two implications in the

[306]Institution of Civil Engineers, ICE Conditions of Contract 7th ed (ICE7), Design and Construct version, London, ICE/Thomas Telford (2001).

[307]Indeed, further editions of the FIDIC forms have followed later editions of the ICE forms and vice versa. As Edward Corbett, FIDIC 4th: A Practical Legal Guide, London, Sweet & Maxwell (1991).

[308]SQ 1991, c 64 [Civil Code].

[309]ibid, s 1470.

[310]Equivalent in the sense that both being "default" positions dealing with supervening events. The two doctrines are not the same.

Canadian law. The first implication is when reviewing the case law that refers to *force majeure* it is important to differentiate between a *force majeure* clause and the interpretation of the civil law doctrine. It is also very important to consider the possibility that when a party to a contract comes from Quebec or any other civil law jurisdiction he may have had the civil law notion of *force majeure* in mind when concluding the contract. In the American law the doctrine of discharge of obligation under a contract is somewhat different from that of UK's law. It give more opportunities for relief in cases of impracticability as opposed to impossibility.[311] When considering an international commercial contract, especially one which is not governed by national law of the state where the contract is formed, it is important to pay attention to the difference between the applicable law and their Canadian counterpart. Even if a clause may have the same name it will not be identical under the Canadian law.

Non-Liability Clause – *Force Majeure*

The doctrine of frustration in common law is not always clear and very often unpredictable. This has created rooms for the development of *force majeure* clauses to counter the limitation of the frustration doctrine. Moreover, when drafting a contract parties have the opportunity to include a list of supervening events that they would wish to include in the *force majeure* clause to protect them in case any of these events would warrant a change in any of the parties' obligations. They may also include events that would not be normally qualified as a frustrating event under common law. The parties may further

[311]See *Roy v Stephen Pontiac-Cadillac*, Inc, 543 A (2d) 775 (Conn 1988).

agree on the effect that these events will have on each party's obligation. Under the law of frustration, the parties have limited relief to full discharge of their respective obligations. Parties are free to draft the *force majeure* clause to include the events, and consequences for those events as they see fit. In *Atcor*, the Alberta Court of Appeal stated that a *force majeure* clause should address three questions: (1) how broad should be the definition of triggering events; (2) what impact must those events have on the party who invokes the clause; and (3) what effect should invocation have on the contractual obligation.[312] The test in that case was whether the event created a real and substantial problem that made performance unfeasible. To overcome the effect of the event, *Atcor* was obliged to mitigate by acquiring replacement gas if to do so was reasonable.

6.5.2 Quebec Civil Code

In the Quebec Civil Code the right to specific performance appears in Article 1601 which states that: "A creditor may, if permissible, demand that the debtor be forced to fulfil its specific performance obligation."[313] Otherwise very little is said elsewhere in the Civil Code which deals with specific performance. Article 1602 only provides an alternative mode of performance for the creditor in case the debtor fails to perform his obligation. In *Varnet v Varnet* the Court of Appeals held that plaintiff was entitled to specific performance of a licensing and distribution contract, whereby the plaintiff was granted the rights to market

[312]*Atcor Ltd v Continental Energy Marketing Ltd* (1996), 178 AR 372 at para 12 (CA)

[313]Quebec Civil Code, Art. 1601. All references to the Quebec Civil Code are from Henri Kélada, Code Civil du Québec (texte annoté) (1993 Carswell Pub) (hereinafter Q C C).

the defendant's software.[314] Under the Quebec's civil law the general rule is the specific performance of the contract. However where there is ambiguity in the terms the courts will not apply the general rule. In *Nault v Canadian Consumer* the Supreme Court of Canada pointed that cases where the goods that are being sold have not been specified in the contract are not to be admitted for specific performance.[315] In that case the contract was for the sale of knives but there were no mention of what kind of knives that were to be sold. The decisions of the recent cases under the Louisiana and Quebec codes show that the courts have given great importance to the specific performance provisions. The cases only deny specific performance where the common law jurisdictions would have done so.

[314]*Varnet Software Corp. v. Varnet U.K. Ltd*., 59 Canadian Patent Reporter 3d 29 (Court of Appeal 1994).

[315]*Nault v. Canadian Consumer Co. CTD* [1981] I.S.C.R. 553, 557-58.

Chapter 7

Doctrine of Fundamental Breach

7.1 Introduction

During the 1950's and early 1960's a body of law known as the "doctrine of fundamental breach" was developed in England ". This doctrine held that where one party to a contract has committed a "fundamental breach" of the contract then that party could not rely on an exclusion clause present therein to avoid liability for the breach. The doctrine of fundamental breach was used to determine whether a party can rely on an exclusion of liability clause in a contract. Generally, where an exclusion of liability clause allowed a party to fundamentally breach a contract, the court would strike down the clause under the doctrine of fundamental breach to make it ineffective. In the UK, there are some cases that have supported the doctrine and its evolution. One of the most important case which highlights the doctrine is *Karsales v Willis*.[316]

In that case Lord Denning maintained the law on exemption clauses. The law in that area has evolved especially where there are printed exemption clauses which are often passed unread. Now, it is settled that exemption clauses only avail the party when he is carrying out his obligations in its essential respects and not when he is guilty of a breach which goes to the root of the contract. Although the doctrine was very popular in England, in 1967 the House of Lord in *Suisse Atlantique v NV*

[316]*Karsales (Harrow) Ltd. v Wallis*, [1956] 2 All ER 866 (CA) (Karsales).

Rotherdamsche questioned its principle.[317] The House of Lords rejected the approach adopted in Karsales and held that the proper approach to determine the applicability of an exemption clause was to look at the construction of the agreement.

In Suisse Atlantique v. N.V.Rotterdamsche the House of Lords considered and rejected the existence of the doctrine of fundamental breach.[318] The court later held that the question whether and to what extent a party may rely on an exclusion clause was to be resolved by construction of the contract.[319] In Harbutt's v. Wayne Tank the English Court of Appeal revived the doctrine of fundamental breach although with some modifications.[320] The Harbutt's doctrine stated that if following the consequence of a fundamental breach of a contract the innocent party elects to terminate the contract or if such an election, due to the nature and extent of the breach, renders it otiose then the guilty party would not be allow to rely on that exclusion clause. The election of the injured party to terminate the contract was an essential element of the new doctrine. In the event that the innocent party affirmed the contract then any exclusion clause therein would be subject to construction. In coming to this decision the Court of Appeal purported to rely on the Suisse Atlantique Case.

However, in Suisse Atlantique Lords Reid and Upjohn had created some confusion with their judgment. The judgment appears to contain a mixture of both

---

[317]*Suisse Atlantique Societe d'Armement Maritime S.A. v N.V. Rotterdamsche Kolen Centrale*, [1967] 1 AC 361.

[318]ibid

[319]B. Coote, 'The Rise and Fall of Fundamental Breach' 1967 40 A L J 336; C. D. Drake, 'Fundamentalism in Contract' 1967 30 M L R 531.

[320]*Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd*. [I970] 1 Q.B. 447.

the doctrine of fundamental breach and the doctrine of repudiatory breach. They maintained that if a fundamental breach is established, the next question is what effect that has on the applicability of the other terms of the contract. Wherever, the innocent party has opted to consider the breach as a repudiation, that is to bring the contract to an end and sue for damages there is no problem. However, here the whole contract has ceased to exist and this include the exclusion clause, so, that clause cannot then be used to exclude an action for loss which the innocent party will be suffered after the contract has ceased to exist. For example, loss of the profit which the injured party would have accrued if the contract had run its full term.

In 1977, the enactment of the *Unfair Contracts Terms Act* 1977 (UK) puts an end to the doctrine of fundamental breach as applied to the consumer contracts. In situations where the legislation would not apply, the courts further reduced the application of the doctrine as set out in the case of in *Photo Production v Securicor*.[321]

Securicor Transport Ltd, a company providing security services entered into a contract with Photo Production Ltd to provide a patrol service for Photo Production's factory. The contract contained two exclusion clauses. One clause stated that: Under no circumstances shall the company (Securicor) be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer. In the Photo Production the court determined that the construction approach was the one which is most appropriate to apply. The approach was explained by Lord Diplock:

[321]*Photo Production Ltd. v Securicor Transport Ltd*, [1980] A C 827 (HL) (Photo).

Since the obligations implied by law in a commercial contract are those which, by judicial consensus over the years or by Parliament in passing a statute, have been regarded as obligations which a reasonable businessman would realise that he was accepting when he entered into a contract of a particular kind, the court's view of the reasonableness of any departure from the implied obligations which would be involved in construing the express words of an exclusion clause in one sense that they are capable of bearing rather another, is a relevant consideration in deciding what meaning the words were intended by the parties at conclusion of contract.[322]

7.2 Fundamental Breach

McKendrick defines a fundamental breach of contract as one which either breaches a fundamental term of the contract or involves a deliberate refusal to perform obligations under a contract, or has especially serious consequences for the other party.[323]

For many years it was unclear as to which approach is to be taken where one party to a contract wanted to rely on an exclusion clause to avoid liability for a fundamental breach of contract. However, in the case of Photo Production v Securicor Transport, the House of Lords held that it was possible to apply an exclusion clause where there had been a fundamental breach, of the contract but this would depend on the construction of the contract.[324] McKendrick suggested

[322]ibid at 850-1.

[323]McKendrick *Force Majeure and Frustration of Contract*, 2nd ed. 2013, p. 193 (McKendrick).

[324]*Photo*, supra n. 321.

that the more serious the breach is, the less likely it should be for the courts to interpret the exclusion clause as applying to the breach.[325] Fundamental breach is the corner stone concept of the United Nations Convention on Contracts for the International Sale of Goods (CISG), as it is a precondition for avoiding the contract under articles 49(1)(a) and 64(1)(a). The drafters of the CISG had the intention to make a distinction between fundamental breach and non-fundamental breach. A fundamental breach entitles the injured party to decide on whether to avoid the contract or not. So, whenever there is a breach it has to be evaluated to see whether it is a fundamental one or not.

Unfortunately, art. 25 CISG does not give any definition of fundamental breach; it simply states that;

> "a breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result".

This provision does not give a clear definition of fundamental breach. Such broadness can be attributed to the differences that exist in the definitions of fundamental breach in the various legal systems. This did not facilitate the work of the drafters. There is no example of fundamental breach in the Convention, it simply provides general interpretive guidelines. Great efforts have been made to achieve a uniform interpretation of the CISG and various solutions have been proposed. Yet, still there is no concensus.

The art. 25 of CISG is very complex. The first part qualifies fundamental breach as the detriment caused by one party to the other party, which substantially deprives him of what he is entitled to expect under the contract. The second part of art. 25

[325]See McKendrick, supra n. 323.

is conditional. It allows the party in breach to prevent avoidance of the contract provided that he proves that he did not foresee and any reasonable person of the same kind and in the same circumstances would not have foreseen such a result. So, the important elements are “substantial detriment” and “foreseeability”. This description becomes more complex when it comes to distinguishing between “Substantial” and “Fundamental”. Another consideration in the determination of fundamental breach is the party’s inability to perform at all. Non-performance is considered a fundamental breach where performance is objectively impossible, namely where the object of the transaction is unique and has been destroyed.[326] For example, if a party contracts to sell his house and it has been burnt down by a fire caused by lightning, performance is objectively impossible since no one could deliver the house.

In Canada too this doctrine has been unclear and inconsistent. The application of the doctrine of fundamental breach has been different between courts. A number of courts followed the decision in *Suisse Atlantique* which was decided in the UK and applied its reasoning. In the B.G linton case the supreme court of Canada applied this reasoning.[327] The doctrine of fundamental breach was a powerful tool, as it enabled courts to strike down exclusion clauses where it appeared unfair to a party in a contract. In 1989, the doctrine of fundamental breach was again raised in the supreme court in the case of *Hunter Engineering v Syncrude*.[328]

[326] Peter Schlechtriem, Art. 25, in Kommentar Zum Einheitlichen Un-Kaufrecht, Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004 at 310-311(Schlechtriem).

[327] *B.G. Linton Construction Ltd. v C N R Co* [1975] 2 SCR 678 (Linton).

[328] *Hunter Engineering Co. Inc. v Syncrude Canada Ltd* [1989] 1 SCR 426

This was an opportunity for the court to reaffirm its position on this doctrine as pointed out in B.G. Linton. However, the court in Hunter failed to reach a majority decision and instead rendered two decisions. Wilson J. did not dispense with the doctrine of fundamental breach and maintained that the doctrine still has its place in situations where it would be unfair to apply the exclusion clause when there is a breach. On the other hand, Dickson C.J.C. maintained that the doctrine of fundamental breach should be "laid to rest" and replaced with the doctrine of unconscionability.[329]

The two judgments have been applied differently and inconsistently. This situation has continued until the supreme court of Canada released its decision. The doctrine of fundamental breach has been struck down by the Supreme Court of Canada in *Tercon v British Columbia*.[330] In Tercon v British Columbia the Supreme Court of Canada agreed on the appropriate framework of analysis and that the doctrine of fundamental breach should be laid down to rest.[331] In that case the province of British Columbia sought to design and construct a highway. The province issued a request for proposals with respect to the highway's construction. Under the terms of the RFP, only the six proponents who had responded to the province's earlier 'request for expression of interest' would be eligible to submit a proposal. The RFP also contained an exclusion of liability clause which prevented the proponents from lodging claims for compensation "of any kind whatsoever" as a result of participating in the RFP. The effect of this clause is to prevent the

[329]ibid at 462

[330]See *Tercon Contractors Ltd. V British Columbia* (Transportation and Highways), 2010 SCC 4 [2010] 1 SCR 69 (Tercon).

[331]ibid

proponents from suing the province for damages in the event that it breaches the terms of the RFP. The province selected a proponent called Brentwood. The latter has violated the terms of the RFP and had formed a joint venture with another company, which is an unqualified bidder, in order to strengthen its proposal. When *Tercon* learned about that it brought an action in damages against British Columbia for having breached the terms of the RFP.[332] The main issues in that case were: Did the province breach the tendering contract by accepting a bid from an ineligible bidder? If so, does the exclusion clause contained in the RFP bar Tercon from making a claim for damages against the province for having breached the terms of the tendering contract? The court allowed the appeal in favour of Tercon. The court held that the exclusion clause contained within the RFP cannot bar Tercon from bringing an action in damages against the province for breach of the terms of contract of tender.[333]

The court held that when assessing the enforceability of exclusion clauses, a three-part test must be applied:

1. As a matter of interpretation, does the clause apply to the circumstances established? That is, did the conduct of the alleged 'contract breaker' fall within the terms of the exclusion clause at issue?

2. Was it unconscionable at the time the contract was made? Unconscionability may arise from situations of unequal bargaining power between the parties.

3. Should the court refuse enforcement based on public policy (the onus of proof lying with the party seeking to avoid enforcement)? The public policy must be shown to outweigh the "very strong public interest in the enforcement of contracts."

[332] ibid

[333] ibid

Cromwell J. found that the exclusion clause did not cover the Province's breach. He based this finding on the interpretation of the word "participating" found in the exclusion clause and held that the language of the clause was ambiguous. The court applied the *contra proferentem* rule so as to resolve the ambiguity in favour of Tercon (the clause does not apply to bar Tercon's damages claim). The court also found that the province's breach was fundamental and that it was unfair to enforce the exclusion clause.

The doctrine of fundamental breach has caused a lot of confusion because of its relationship to the doctrine of repudiatory breach. Although the two doctrines are entirely different they are sometimes merged and the terms used interchangeably. In fact the two doctrines are different. When one type of breach has been found it gives a completely different outcome than when the other type is found. Problems arise when the two doctrines are combined resulting in no clear differences between the two. This creates great confusion in the terminology.

In *Barlot v Alberta* Mr. Luhur's company owned a parcel of land in Edmonton. The parcel was subject to a re-zoning application, which required the owner and the City of Edmonton to negotiate a By-Law in order to regulate its development.[334] Ultimately the By-Law was passed by the City of Edmonton and a multi-disciplinary team was hired for the project. Some issues arose between the multi-disciplinary team and Mr Barlot's architectural office. Moreover, Mr. Luhur believed that Mr. Barlot had failed to address some questions that had dire financial consequences on the project. On October 16, 2005, Mr. Luhur terminated the contract with Mr. Barlot's architectural company on ground of a fundamental breach of contract. This case involved several actions including the fundamental breach of the contract. In

[334] *John Barlot Architect Ltd. V 413481 Alberta Ltd*., 2013 ABQB 388

his ruling, Macleod J. defines fundamental breach as “a breach [that] deprives the innocent party of the substantial benefit of the contract, or goes to the root of the contract” (para. 36). Therefore, if a breach is so “fundamental” that it deprives the innocent party of the benefit of the contract, then the injured party shall be entitled to cease performing and sue for damages. In the legal terms and supported by case law it looks like Macleod J. is actually referring to the doctrine of “repudiatory breach”; the “doctrine of fundamental breach” is completely different and is used in different circumstances. On top of the confusion in the decision of the present case, Macleod J. relied on some cases that illustrated the doctrine of fundamental breach but yet used the definition of repudiatory breach. A breach of contract is not considered fundamental when the defaulting party had not foreseen the detrimental consequences and when a reasonable person, of the same kind and in the same circumstances, could not have foreseen these consequences.[335] This is an objective evaluation that is required by Article 8(2). However, the CISG does not specify which moment in time would be relevant for the determination of foreseeability. In most cases determination is made at the time of concluding the contract. Even though the fundamental breach has been evaluated on a case-by-case basis, it is possible to establish different sets of situations which are more easily defined for such an evaluation.[336] For example, in the case of non-performance, the injured party is deprived of what it could have expected under

[335]Wilhelm-Albrecht Achilles, Kommentar Zum Un-Kaufrechts Übereinkommen (CISG) (2000) at 69-70.
See also Achilles W A, Spring 2006, Journal of Law and Commerce

[336]Leonardo Graffi, Divergences in the Interpretation of the CISG: The Concept of Fundamental Breach, in the 1980 Uniform Sales Law. old issues revisited in the light of recent experiences at 305 ff (Franco Ferrari ed., 2003). (Leonardo)

the contract. A definite non-performance must, therefore be considered as a fundamental breach of the contract as under Article 25.[337]

7.3 Fundamental Breach of Contract Under CISG

Article 25 of the CISG defines the fundamental breach in light with an international character and avoids any recourse to any domestic concept.[338] According to Article 25, a breach of contract is considered to be fundamental when it deprives the other party substantially of what it is entitled to receive under the contract, provided that the party in breach of the contract did not foresee such a result. Moreover, the party in breach must also demonstrate that any reasonable person of the same kind and in the same circumstances would not have foreseen such a result. The definition of fundamental breach is very broad.[339] The most essential condition of the concept of "fundamental breach" under the CISG is that the breach must come from an obligation under the contract or the practice as established between the parties, or the usages referred to in Article 9 of the CISG.[340] In case there is no such breach Article 25 is not applicable.[341]
Therefore, there shall be no fundamental breach where a party behaves incompatibly with his obligations and that party is entitled to abstain from his

[337]See Achilles, supra n. 335, at 66

[338]*See* Michael R. Will, *Art. 25*, in the 1980 Vienna sales convention. commentary on the international sales law 205, 209 (Massimo C. Bianca & Michael J. Bonell eds., 1987); Martin Karollus, Art. 25, in *kommentar zum un-kaufrecht. übereinkommen der vereinten nationen über verträge über den internationalen warenkauf* (CISG) 260 (Heinrich Honsell ed., 1997)

[339]See Leonardo, supra n 336 at 311.

[340]Andrew Babiak, Defining Fundamental Breach under the United Nations Convention on Contracts for the International Sale of Goods, 6 Temple Int'l & Comp. L.J. 113, 127, 133 (1992).

[341]Karollus Martin, *UN-Kaufrecht* 38 (1991) p 259.

obligations.[342] For example in a case where a party fails to collaborate with the other party thus making it impossible for the latter to perform his obligations. It is to be noted that the CISG does not distinguish between the breach of a principal and an anciliary obligation. So, a simple breach of an anciliary obligation can result to a fundamental breach as long as the parties have subjected themselves to the rules of the CISG.[343] The Fundamental breach also requires that the injured party suffer a substantial detriment that deprives that party of what it would have expected under the contract. However, the term "detriment," has not been defined in the convention. So, it must be construed extensively.[344] A breach of contract is fundamental when the detriment suffered by the injured party is such that it is "substantially depriving the injured party of what it would be entitled to expect under the contract." The wording of Article 25 clearly shows that the fundamental character of the breach is to be assessed by the judge.[345] It does not depend on the extent of the detriment but rather on the impairment of the contractual expectations of the injured party. The impairment must be so serious that it discourages the injured party from performing its obligation. The injured party would no longer be expected to be satisfied with remedies such as damages or repair. According to the CISG principle the avoidance of a contract in case of a fundamental breach should constitute an *ultima ratio* remedy. The seriousness of the impairment must be decided on a case to case basis.[346]

---

[342]See Achilles, Supra n 335, at 64.

[343]See Schlechtriem, Supra n 326, at Art. 25 p 310-311.

[344]See Karollus,Supra n 341, at 262-63.

[345] For this statement in case law, see, e.g., Bundesgerichtshof, Germany, 3 Apr. 1996, *available at* <http://cisgw3.law.pace.edu/cases/960403g1.html> accessed 5 May 2019

[346] See Bundesgericht, Switzerland, 28 Oct. 1998, *available at* <http://www.cisgonline.ch/cisg/urteile/413.htm> accessed 5 May 2019.

7.4 Repudiatory Breach

There are two types of provisions in contracts: conditions and warranties. Conditions are important provisions and any breach of a which will deprive the innocent party of substantial benefit of the contract. So, the injured party is entitled to stop performing and sue for damages. Whereas warranties are less important contractual provisions. Whenever there is a breach of a warranty the innocent party is not entitled to stop performing; it must continue performing. However, the injured party may sue the defaulting party for damages. In order to determine whether a term is a condition or a warranty it is important to look at the contract and try to determine what the parties intended at the time of entering into the contract. If the parties had stated that one term is a condition, then a breach of it would end up the contract regardless of how insignificant the effect of the breach would be. This created a problem when demarking the condition and warranty. It was too rigid and usually lead to absurd consequences. The classification of condition and warranty was later expanded in *Hong Kong Fir v Kawasaki* where the court held that another classification should be developed.[347] In that case the court did not change the categories of condition and warranty but it expanded the timing at which the terms should be categorised. It stated that for some terms the classification of whether they are conditions or warranties must be considered at the time of the breach. Diplock L.J. developed the category of “innominate” or “intermediate” terms. When introducing the new term he noted that many contractual undertakings cannot be categorised as conditions or warranties. From these undertakings all that can be

[347] *Hong Kong Fir Shipping Co. Ltd. V Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 (CA).

predicted is that some breaches will, and some will not give rise to a situation which would deprive the injured party of substantially the whole benefit that it was intended for him to obtain from the contract. The legal consequences of the breach depend on the nature of the event which does not automatically follow a prior classification of the undertaking as a condition or warranty. The breach of a term that is considered as a "condition" or a term that is classified as an innominate term and deprives the party substantially of the benefit of the contract, is a repudiatory breach.

7.5 Fundamental Breach versus Repudiatory Breach

These two concepts have often been seen to be interchangeable because of their similarity in language. However, it is important to keep them apart because in the event of a breach of a term of a contract the question of whether an exclusion clause can be relied upon is quite different as compared to whether a breach of a contract is so significant in order to entitle the injured party to stop performing. There are several cases that have fused the two concepts. This fusion has created lots of confusion. In *Photo Production* Lord Diplock merged the two concepts in his analysis of primary and secondary obligations under the agreement. Moreover, in *Hunter Engineering*, Wilson J. relied on that part of Lord Diplock's judgment and said that "A fundamental breach occurs where the event resulting from the failure by one party to perform the primary obligation has the effect of depriving the other party of substantially the whole benefit which the parties intended him to obtain from the contract".[348]

[348]See *Photo* Supra n 321

In *Hunter Engineering*, Wilson J. further referred to the doctrine of fundamental breach as it applied to exclusion clauses, but he used the definition of repudiatory breach. In this current case, Macleod J. referred to the doctrine of repudiatory breach but relied on a case on the doctrine of fundamental breach which was related to the exclusion clauses and used the definition of repudiatory breach. In doing so it did not make Macleod J.'s analysis incorrect. The judgment was about whether the breach at issue was repudiatory or not and there were indeed several references that correctly state the definition of repudiatory breach. This case does not concern an exclusion of liability clause. The issue lies in the use of the term "fundamental breach", the doctrine that applied only to exclusion clauses.[349]

The significance of the distinction between a fundamental breach and the concept of repudiatory breach is enormous. The breach must be fundamental enough to deprive the innocent party of the benefit of the contract and to entitle it to stop his performance. But it is not accurate to refer to it as "fundamental breach" where the court uses the doctrine to determine the enforceability of exclusion clauses. In order to enhance clarity in this area it is important to keep those two concepts separate.

According to the doctrine of fundamental breach whenever there is a breach of the condition the contract ends and the wrongdoer cannot rely on an exclusion clause as the contract has ceased to exist. This reasoning is fallacious because the parties' primary obligations arising from the contract have come to an end but the contract is still relevant in assessing the damages owed to the innocent party. At common law there is an implication that when a contract ends due to a fundamental

[349]See *Hunter Engineering Co Inc v Syncrude Canada Ltd*, [1989] 1 SCR 426

breach of a condition, an anticipatory secondary obligation arise. An exclusion clause may have been intended to modify the implied obligations of the defaulting party and hence must be referred to when determining the obligations in relation to the intention of the parties. In the Photo Production case Lord Wilberforce commented on the damages clause in the contract and said that if there were a claim for damages under the contract so what reason can there be to discard what the contract says about damages, whether the contract liquidates them, or limits them or excludes them.[350]

This fallacy has arisen from the imprecise use of the terminology. In the case of a fundamental breach the innocent party can elect to put an end to the primary obligations of both parties. This is often referred to as “termination”, “rescission” or “discharge” of the contract. The contract is said to “have ceased to exist”. These expressions have created lots of confusion in the interpretation of a contract.

In *Heyman v. Darwins Ltd*, Lord Porter, pointed out that it is incorrect to say that a contract is rescinded when the injured party accepts the renunciation of the contract.[351] He further stated that a more accurate description could be that the injured part is absolved from all future performance of his obligations under the contract. In such a case the injured party may accept rescission as a breach of a condition that goes to the root of the contract and is discharged from further performance of his obligation under the contract. At the same time he may also bring an action for damages as the contract itself is not rescinded.

[350]See Photo Supra n. 321at 290.

[351]*Heyman v Darwins Ltd* 1942 AC 356 42.

7.6 The English Law concept in Light of the Photo Production Case

It is apparent, after reviewing the Suisse Atlantique Case and the Photo Production Case that the House of Lords wishes to maintain that the contract is a matter of a true construction of the contract. The other members of the House of Lords express agreement with this conclusion and also stated that the doctrine of fundamental breach is inconsistent with such an approach and must be rejected. Here it is submitted that Lord Diplock's analysis gives effect to the House of Lords' clear intention to adopt an approach based on the true construction of the contract.

Chapter 8

Foreseeability Concept

8.1 Introduction

The term foreseeability is used in everyday language to describe the actual and subjective awareness of possible future happenings. It is a sort of prevision and implies the ability of the parties to plan for those future possibilities. In the law of contract, whenever there is a breach of a party's contractual obligations, the plaintiff may only recover damages as the promisor could have reasonably been foreseen at the time of contracting,.[352] However, in some cases the courts have imposed liability in cases where damages could not have been foreseen by the defendant. A well known example is the case of *Vosburg v Putney*.[353]

In that case an 11-year-old school boy kicked one of his classmates on the shin. The kick caused serious injury due to a pre-existing medical condition. Even though the injury was unforeseeable the court held that the defendant was responsible in full, since "the wrongdoer is liable for all injuries resulting directly from the wrongful act, whether they could or could not have been foreseen by him."[354]

In contract, foreseeability limits the scope of damages that a breaching party is liable for its breach.[355] Foreseeability is seen to function similarly in contract and

[352]This principle was first established in Hadley v. Baxendale, 156 Eng. Rep. 145 (1854).

[353]*Vosburg v Putney*, 80 Wis. 523, 50 N.W. 403 (1891).

[354]ibid.

[355]See E. A. Farnsworth Contracts § 12.14 (1982) (Farmsworth).

tort. The main difference lies between obligations which are based on the strict liability principle and those arising under the fault-based contract and tort theories. In both, contract and in tort, the courts must have regard to the element of remoteness. They must identify which of the consequences of the breach of duty that are too remote to be associated to the actor's responsibility. This enables the court to determine where liability lies.[356] The foreseeability element is a sort of defence provided by the convention for the party in breach to escape from contract avoidance.[357] The foreseeability factor is also a substantial ground for an excuse to prevent the aggrieved party from declaring the contract void. It needs to be proven by the party relying on this clause. The breaching party may invoke unforeseeability in different circumstances but whenever there is an expressed provision in the contract which states that performance of an obligation is of essence then it would be difficult to prove an unforeseeable detriment. So, foreseeability is just a condition that must be proven to prevent the contract from being avoided. The burden of proving unforeseeability rests on the breaching party.[358] Further, the test must be conducted on objective grounds.[359] So, it will be more preferable not only to evaluate whether a reasonable person of the same kind could have foreseen the event, but to look if people from the same trade sector

[356]See Prosser and Keeton on Torts, § 43 West Group 5th Edition (1984) (Prosser)
See also E.A. Farnsworth, supra n.355 1§ 12.14.

[357]See The 1980 Vienna Sales Convention, Bianca, Bonell eds., Milan, 1987, p. 215, stating that: the unforeseeability test in the final conditional clause of the article constitutes a further innovation of the Convention.

[358]See Will, sub. Art. 25, in Commentary on the International Sales Law. The 1980 Vienna Sales Convention, Bianca, Bonell eds., Milan, 1987, p216.

[359]See also, Enderlein, Maskow, International Sales Law. United Nations Convention on Contracts for the International Sale of Goods-Convention on the Limitation Period in the International Sale of Goods. Commentary, New York/ London/Rome, 1992, p116.

would have foreseen the event.[360]It seems that time is the most controversial issue of the foreseeability test.[361]There are different views as to the moment when the party in breach must have foreseen the aggrieved party's interest in receiving the performance. That is, whether the circumstances arising after the conclusion of the contract are relevant for determining fundamental breach. Some authors argue that the importance of an obligation must be determined only in light of the circumstances known at the conclusion of the contract.[362]

There are other authors who feel that any subsequent information is also important as they may indicate the parties' interest in receiving performance.[363] The latter reasoning is in line with the general principle of good faith which according to case law underlies the principle of convention to the extent that the party who is in breach was in fact aware of the subsequent information.[364] The evaluation of foreseeability in contract has raised several questions namely;

1. The first question is whether foreseeability works the same in both contract and tort.

[360]See, Schlechtriem, in Commentary on the UN Convention on the International Sale of Goods (CISG), Schlechtriem ed., Munich, 1998, p. 179.

[361]See Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Deventer-Boston, 1989, p. 205.

[362]Heuzé, La vente internationale des merchandises. Droit uniforme, Paris, 1992, p. 295.

[363]see Honnold, Uniform Law for International Sales, 3d. ed., The Hague, 1999, p. 116; The 1980 Vienna Sales Convention, Bianca, Bonell eds., Milan, 1987, p. 221; United Nations Convention on Contracts for the International Sale of Goods-Convention on the Limitation Period in the International Sale of Goods, Commentary, New York/ London/Rome, 1992, p. 113; Flechtner, Remedies Under the New International Sales Convention: The Perspective from Article 2 of the U C C in J L & Com., 1988, p. 53.

[364]See BGH, 31 October 2001, in Internationales Handelsrecht, 2002, p. 14; OLG Karlsruhe, 25 June 1997, in UNILEX; OLG Köln, 21 May 1996, in UNILEX; LG Saarbrücken, 26 March 1996, in UNILEX; Court of Appeal, New South Wales, Australia, 12 March 1992, in UNILEX.

2. In case it operates differently are there some clear criteria to classify them?

3. In the area where there is no-fault liability, can foreseeability control the scope and remoteness questions?

4. As foreseeability is important in the fault theory and irrelevant in strict liability, is it the fact that because the fault theories require the foreseeability element that it is selected instead of the no-fault theories?

5. Should the foreseeability element be retained in the analysis of liability for breach?

In order to answer those questions, there should be a clear definition of the meaning of foreseeability. Although foreseeability has been used in case law, statutes and academic researches, its meaning and scope is still unclear and confusing. In Hadley v Baxendale the court elaborated on the lack of clarity of the term foreseeability.[365]

There has been lots of discussions and arguments on this issue yet there is no clear solution that has been proposed. Foreseeability has an apologetic as well as a pragmatical role. In its apologetic role it validates the action of the defendant as one who has failed in his obligation. On the pragmatical front it provides a principle that limits the liability of the default party. In cases of fault-based liability, foreseeability has performed both roles. However, when it comes to strict liability it cannot perform either role. So, in the strict liability system there is a remoteness issue that has to be taken into account. Foreseeability is considered to be part of

[365]*Hadley v. Baxendale*, [1854] EWHC J70 (1854) 9 Ex Ch 341; 156 ER 14 (Hadley).
See also *Victoria Laundries (Windsor) Ltd. v. Newman Indus., Ltd* [1949] 2 K B 528; *C Czarnikov, Ltd. v. Koufos (Heron II)*, [1969] 1 A C 350; and *J Parsons (Livestock) Ltd. v. Uttley Ingham & Co* [1978] 1 All E R 525.

a prudent rational human beings. There is some degree of foreseeability associated to these rational persons.

When analyzing the actions of a person the concept of foreseeability is derived from its relationship to the issues of choice and fault. If a performer foresees that his action will end up in a possible harmful result affecting other people and disregard this foresight and acts in a way that allows the harm to occur, then he should be blamed for his action. He would be considered to be at fault. While he might be blamed for his failure to take the appropriate measures to prevent harm, his wrongful act would not have been taken into account.[366] When considering the harm causes to others it may also be said that the performer failed to see the harmful consequence of his act or that he foresaw the harm but made a bad choice of action. The foreseeability concept has been legally constructed on the basis of the moral analysis and has thus depersonalized it. With the addition of the "reasonable" person, to the related concepts of foreseeability, choice, and fault, foreseeability has become an objective standard. The arguments for objective standards have well been established in the legal systems.[367] The change from a subjective to an objective standard as a basis for imputing liability is problematic. In either case, a person shall be liable when, although subjectively aware of a danger and capable of preventing injury to another has failed to do so. However, only under a legal analysis that a subjectively unaware person shall be treated as if he had had knowledge of a danger similar to what a reasonable person with normal faculties would have been aware of it. In this way, by applying foreseeability

[366]See L Fuller, The Morality of Law 9-32 (1964) (distinguishing between the morality of duty and the morality of aspiration).

[367]Holmes, The Theory of Legal Interpretation, 12 1899 Harv. L. Rev. 417.

to an unaware defendant, the legal analysis extends and justifies liability beyond personal wrongdoing. Generally, foreseeability is related to the concept of fault. The tort theory has long been based on the concept of fault.[368]

In the nineteenth century the contract theory was also based on fault. Under the principle of freedom of contract, it was assumed that the obligor had voluntarily accepted the obligation.[369] Upon the conclusion of a contract, the obligor was obliged to perform his obligations fully and completely. There were very limited excuses for non-performance that were accepted by the courts.[370] In case there is a failure to perform the voluntary assumed duty by the breaching party, the failure was considered as wrongful and the breaching party was at fault. Prior to the widespread use of insurance, losses were borne by the person on whom the event had caused them to fall, unless the sufferer could persuade the court to pass on the liability to someone else.[371] The most appropriate approach was to prove that the losses were the result of the wrongful act of the defendant; that is, the defendant was at fault..[372] It is only when the obligor has a choice that fault can occur. If he has only one course of action and is compelled to act in a particular way there shall be no wrongful act.[373] There should be no responsibility for an action for which no alternative course of action is available and which is less

---

[368]ibid, at 63-129.
See also Keeton, *Conditional Fault in the Law of Torts*, 72 1959 Harv L Rev 401, 401-05.

[369] The voluntary assumption of an obligation remains a central concept in contract. Nineteenth century law, however, failed to balance voluntariness with notions of fairness.
See Levin & McDowell, The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations, 29 Mc GILL L. 24 (1983).

[370]See E.A. Farmsworth, supra n 355 § 17, at 21.

[371]See 0. W. Holmes, Supra n 367 at 42, 76-77.

[372]ibid

[373]See Prosser supra n. 356, § 24.

dangerous than the one pursued. The concept of foreseeability has been used to evaluate the scope of an actor's fault. In this case the opportunity to have a choice is considered as a necessity before imputing fault on an actor, the choices must only be related to the consequences contemplated by the actor before he committed himself.[374]

Several questions arise here. These are:

What must be foreseen?

Is it the action that would be considered as wrongful by the legal system?

Is it the injury caused by the act?

In Parson v Uttley the court held that the breaching party must have foreseen that his act would be harmful but not that he would have foreseen that particular harm.[375] In contract liability for damages depends on whether at the time of contracting, the parties to the contract have contemplated the particular losses.[376] In fact, the purpose of the foreseeability concept is to locate a point on a continuum between responsibility and remoteness beyond which the defendant shall have no liability. This is a point where the defendant will not assume any liability because at this point he would not have foreseen that anyone would have treated his actions as one which would create an obligation. If that point is located at the beginning of the continuum, then the actor would not be liable for his act. If the point is placed at the opposite end of the continuum, the actor will be responsible for all damages caused by his act. The difficulty lies in finding a reasonable and just middle point. Having seen the problems arising with the application of the foreseeability concept

[374]Holmes, Supra n 367 at 76-77.

[375]See *H Parsons (Livestock) Ltd v Uttley Ingham & Co* [1978] 1 All E R 525, 540 (Scarman L J).

[376]See, Hadley, Supra n 365.

the pertinent thought cropping up is why not simply abandon the foreseeability concept. The main argument for maintaining the concept is that it forces the court to consider whether an actor would have had knowledge of the probable risks that could be avoided. This evaluation requires a thorough assessment of how rational, careful and prudent the defendant was in his action. Contract litigation focuses on the legal duty and the damage caused to the complaining party. Where the foreseeability element is connected to damages it will allow more room to deal with the remoteness issue. As such some injuries or losses shall not be recoverable if they are not foreseeable. On the one hand, if foreseeability is connected to the cause of the losses or injury it will be more difficult to separate what is recoverable and not recoverable in the event that the wrongful act has caused all the losses. On the other hand, If foreseeability is attached to the legal duty, it will determine whether the plaintiff was within the scope of harm and not whether all the damages suffered by the plaintiff are recoverable.

8.2 Foreseeability under the *Force Majeure* concept

Force majeure is a French term which when translated literally means ”Major force”. Its legal principle is derived from Article 1148 of the French Civil Code.[377] However, the term *force majeure* is undefined wherever it appears in the French Civil Code. The Code does not define, and indeed French statutes generally lack the definition section. In French legal system the meaning of a term is usually left to be determined by doctrine and the courts. There are numerous

[377]Article 1148. *Il n’y a lieu à aucun dommages et intérêts lorsque, par suite d’une force majeure ou d’un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit.* (There shall be no liability on an obligor for non-performance of his obligation when a Force majeure has prevented performance).

definition and explanation which are available online. However, all of them mention extraneous, extraordinary and catastrophic events outside the control of the parties, similar to an "Act of God" such as floods, earthquakes or war. *Force Majeure* is related to the concept of an Act of God, that is an event for which no party can be held accountable, such as a cyclone, earth-quake, hurricane or a tornado. It also encompasses human actions, such as armed conflict, war or terrorism. Generally speaking, for events to constitute force majeure, they must be unforeseeable, external to the parties of the contract, and unavoidable. The problem here is that these concepts are defined and applied differently by different jurisdictions.

In Parabhai v Grid the court describes *force majeure* as an "Act of God".[378]

It went on to say that the Act of God is an act of nature which so extraordinary that it could not be foreseen, or if foreseen could not be guarded against, for example, sunami, flood or cyclone. According to this meaning, there should not be any human involvement but in Lebeaupin v Crispin the court took into account other uncontrollable events such as terrorism and war when considering the Act of God. The court described a *force majeure*, as involving both acts of nature (eg., floods and hurricanes) and acts of people (eg., riots, strikes, and wars).[379] Here it would seem that the *force majeure* will not only concern acts of nature but also the act of man. The court adopted this view because a *force majeure* clause in a contract is always negotiable by the contracting parties. So, they can define the clause within

[378]In Saraswati Parabhai and Another v Grid Corporation of Orissa and Others, 2001 ACJ 1874, AIR 2000 Ori 13, the court defined an Act of God as "the operation of natural force free from human intervention.

[379]In *Lebeaupin v Crispin* (1920) 2 KB 714 it was held that wars, floods, epidemics and strikes all may be included in Force Majeure. (Lebeaupin)

the contract during its formation.[380]This approach broadens the scope of interpretation which makes it difficult to ascertain a *force majeure* clause. A narrower interpretation can be seen in the case of *Atlantic Paper v St Anne* where Dickson J stated that "An act of God or *force majeure* clause generally operates to discharge a contracting party when a supervening, sometimes supernatural, event, beyond the control of either party, makes performance impossible. The common thread is that of the unexpected, something beyond reasonable human foresight.[381] So, by virtue of those definitions the event must be something that is not foreseeable, an event that the parties have not contemplated to be intervening with their performance. *Force majeure* clauses are meant to excuse a party provided the failure to perform could not be avoided by the exercise of due diligence and care. Any party to a contract who seeks to have protection through a *force majeure* clause must prove that he could not have foreseen the event even with all due diligence and that despite all care and caution he could not have controlled it. In reality there are many situations where a party may not extend protection of a *force majeure* clause. The main reason is the different interpretation of the *force majeure* clause in different jurisdictions. Moreover, a law based on case-law developments is unpredictable and a source of legal uncertainty. Parties to a contract usually have difficulty to understand the clause.

In *Pioneer v Diamond* an oil rig and a barge became loose from their moorings during Hurricane Ivan. The defendant raised the defense of Act of God and was

[380] Ibid

[381]Justice Dickson of the Supreme Court of Canada in *Atlantic Paper Stock Ltd v St Anne-Nackawic Pulp and Paper Co*, [1976] 1 SCR 580.

successful because other rigs also became loose.[382] However, in Re. Atlantic Marine during hurricane Katrina, an oil rig and a barge became loose from their moorings causing damages. The defendant raised the Act of God as his defense and was unsuccessful because other rigs which were closer to the storm did not become loose. This showed that the situation was not out of control of the defendant.[383] So, in fact it is not because of the *force majeure* that the parties have won and lost their cases but on whether the defendants had control over the event. In a more recent case, the court has rejected the defense of *force majeure* because the defendant should have foreseen the effect of the cyclone. In General Construction v Chue Wing during cyclone Hollanda, a crane belonging to the appellant fell on a multi-story building and caused damages. The defendant sought to avoid liability for the damages caused by relying on a *force majeure* Clause. The court rejected the argument and held that cyclones are common in the Indian Ocean and the defendant should have foreseen the occurrence of Cyclone Hollanda and taken appropriate steps to ensure a safe operation.[384]

So, it seems that the courts have been using the principle of foreseeability when interpreting the *force majeure* clause. The above three cases illustrate this approach. The question that arises now is whether a human can foresee an Act of God. No reasonable person would be tempted to say that he can foresee an Act of God. In the event that an Act of God can be foreseen, as in the case of *General Construction v Chue Wing*, where in the Indian Ocean there is an annual cyclonic

[382] *Pioneer Natural Resources USA Inc. v. Diamond Offshore Co*. 638 F. Supp. 665 (E.D. La. 2009).

[383] *Re Atlantic Marine* 570 F. Supp. 2d 1369 (S.D. Ala. 2008).

[384] *General Construction Co Ltd v Chue Wing & Co Ltd* (Judicial Committee of the Privy Council, 2013) (Chue Wing).

period then other questions will arise. What should the parties foresee? Is it the event? Or is it the consequences of the event?

In *Lebeaupin v Crispin* Mc Cardie J attempted to establish the type of event which would amount to a *force majeure* event in English law, although there was no general doctrine. He stated that the term *force majeure* went beyond 'vis major' or Act of God and that it could apply to other events such as an embargo or an accidental breakdown of machinery. However, he further noted that such a clause would have to be construed with a '*close attention to the words which precede or follow it, with due regard to the nature and general terms of the contract*'.[385] It is very common to see a *force majeure* clause in various types of contract. They can be very detailed, where the drafters have come up with every possible catastrophe that they would imagine would befall the parties. It is also unfortunate for aggrieved parties who face litigation over the right and precise meaning of *force majeure* as there is no such doctrine as *force majeure* in English law. This is contrary to the French Law from where the term originated. In order to determine whether the clause applies to a particular case depends entirely on the clear and proper definition of the term *force majeure* otherwise it would create frustration to the parties. One commentator stated that: 'one cannot be sure what meaning a court will give to a *force majeure* clause. At best a significant amount of time is likely to be wasted in arguing about the proper construction of the clause.[386] The definition of *force majeure* varies from project to project and in relation to the country in which the project is located. But the definition of *force majeure* would generally include "the risks that are beyond the reasonable control of a party and that the risks would

[385] See *Lebeaupin* supra n 379.

[386] Mckendrick, Force Majeure and Frustration of Contract, 2nd ed. At p.59

not be a product or result of the negligence of the afflicted party. Furthermore, the risks must have an adverse effect on the ability of such party to perform its obligations". Usually, *force majeure* is pleaded when there is a breach of a contract. It is very common that parties to a contract do not give due attention to this clause when negotiating the contract. They would rather be satisfied by inserting a 'boilerplate' *force majeure* clause into their contracts that are not tailored to reflect the particular agreement. So, this usually leads to problems when a *force majeure* event later materialises. It is also important to include a proper *force majeure* clause as the international arbitral tribunals are as a rule reluctant to interfere with a proper specific contractual clause.

8.3 Foreseeability under the French legal system

Different legal systems have developed different theories in response to this need, including the doctrines of impossibility and frustration in England and the United States and *force majeure* in France. Under French law, *force majeure* is an event that is unforeseeable, unavoidable and external that makes execution impossible.[387] In order to avoid the uncertainties and delays involved in relying on the applicable law, parties to contracts often prefer to provide for a specific regime for *force majeure*, along with a definition of which events shall qualify for special treatment. The term *force majeure* used in drafting project documents comes originally from the *Code Napoléon* of France, but should not be confused with the French doctrine. Generally, *force majeure* means what the contract says it means.

[387] *Impossibilité absolute de remplir ses obligations due à un événement imprévisible, irrésistible et extérieur* French Civil Code, arts 1147 and 1148 (30 August 1816, reprinted 1991).

The 2016 French Civil Code law reform introduces a new concept of *force majeure* but it has not been well established by French courts. It creates new Article 1220, which is in reality a defence for a party to a contract when his partner has failed to fulfil his obligation.[388] Therefore, a party to a contract who has a certain obligation can refrain from fulfilling his own obligation as a preventive measure even before he can establish that the other contractual partner is in default. This article of the French Civil code looks as if it is pressurising one contractual party to perform his duty. But the term "sufficiently serious" breach shows that it goes beyond a mere defence article. Furthermore, the party relying on this article shall have to notify the other party in an expressed manner of his intention not to perform his obligation.

In the recent case, Classic Maritime v Limbungun, Teare J stated that in order to be excused by a *force majeure* clause the party must show that in case the *force majeure* event had not happened it would have performed its obligation by the usual means.[389]

An example of a *force majeure* clause could be:

'*where a party is affected by a force majeure, that party shall not be liable for any non- performance of its obligations under this contract if such failure to perform is caused by that force majeure event and without the fault of the parties".*

In case law there are many specific clauses which often list a series of events as 'examples' of *force majeure* events. A typical list would be events such as 'floods,

[388]Art 1220: A party may suspend the performance of his obligation as soon as it becomes evident that his contracting partner will not perform his obligation when it becomes due and that the consequences of this non-performance are sufficiently serious for him. Notice of this suspension must be given as quickly as possible.

[389]*Classic Maritime Inc v Limbungan Makmur SDN BHD & Lion Diversified Holdings BHD* [2018] EWHC 2389 (Comm).

fire, Hurricane, earthquakes, riot, war, invasion, terrorist act, strike, Act of God' and then follows by a general wording at the end of the clause. The general wording could be, "or any other causes beyond the control of the parties.

This type of drafting raises several issues that could give rise to litigations. These could be:

What counts as a '*force majeure*' event?

What would be considered as 'other cause beyond the parties' control'?

Whether the event or the damage that must be 'beyond the reasonable control' of the parties;

Does the event have to prevent performance? Or only make it more onerous or difficult?

Does the *force majeure* event have to be unforeseeable?

It would seem that by trying to answer those questions one could formulate a general approach of what a court could regard as a *force majeure* event. However, this could yield to a false concept as a clause need to be construed while taking into account other words used in the clause itself and the general construction of the contract. This cannot be done on the basis of the current law.

In fact, the courts have adopted a more structured approach when there are a number of events in the *force majeure* provision which are then followed by the general words '*or any other causes beyond our control*' or similar. It would be expected that the preceding list of events guide the interpretation of the latter general words. However, this is not that clear as it seems to be. Initially, the courts were quite reluctant to apply the *ejusdem generis* rule when interpreting the clauses in a contract. In *Chandris v Isbrandtsen-Moller* Devlin J stated that *'the ejusdem generis rule means that there is implied into the language which the*

parties have used, words of restriction which are not there. It cannot be right to approach a document with the presumption that there should be such an implication.'[390]

Moreover, Staughton J cited this statement in relation to a *force majeure* clause in *Navrom v Callitsis* Ship management.[391] In other cases the courts have held that meaning can also be drawn from the events mentioned before the general words.[392] There are also cases which suggest that meaning can be drawn from the events specified before such general words. Both of those approaches seem to be consistent with the general principles of contract interpretation. In *Tandrin Aviation v Aero Toy Store* the court had to decide whether a *force majeure* clause would be applicable in the downfall in the world's financial market. Mr Justice Hamblen stated that even though there was no requirement to interpret the phrase '*any other cause beyond the Seller's reasonable control*' *ejusdem generis* with the examples set out in the clause (in that case act of God, war, fires and the like) '*it is telling that there is nothing in any of those specific examples…which is even remotely connected with economic downturn, market circumstances or the financing of the deal*'.[393]

It seems that the process of interpretation would be to consider the terms before the general words and determine their effects on the clause as a whole without taking into account the rule of *ejusdem generis*. In this principle of application all the terms and circumstances of the case are being taken into account. This

---

[390]*Chandris v Isbrandtsen-Moller Co Inc* (1949) 83 Ll L Rep 385 at p.392

[391]*Navrom v Callitsis Ship Management SA* [1987] 2 Lloyd's Rep 276

[392]*Sonat Offshore SA v Amerada Hess Development and Texaco (Britain)* [1988] 1 Lloyd's Rep 145.

[393]*Tandrin Aviation Holdings Limited v Aero Toy Store LLC* [2010] EWHC 40 (Comm).

principle might be seen as yielding a fairer result to the contractual parties. So, force majeure clauses must be construed in according to their accurate wording and the general principle of contract interpretation. However, where there is no such wording, it creates difficulties and uncertainty. So far there is no authority which requires the interpretation of a *force majeure* clause to be narrowly interpreted against the party seeking to invoke the defense. But, there must be a requirement for clear and precise wording to be used. In contract, the plaintiff may only recover damages that the promisor had reasonably foreseen, at the time of formation of the contract, that could result from a breach of his contractual obligation.[394] In Hadley v Baxendale two parties entered into a contract and one of them breached the contract. The aggrieved party was entitled to damages. The court held that the quantum of damages must be fairly and reasonably be considered in relation to the natural course of things happening or such as the parties may have had reasonably contemplated at the time of formation of the contract that could have been a probable result of the breach.[395]

While foreseeability is the focal point of the fault theory it is irrelevant in the strict liability case. Should the foreseeability element be retained in the analysis of liability or should a different approach be adopted to the problem of compensation recovery?

Over the time the Mauritian and French case-law have identified and adopted three constituent elements of an event of *force majeure*. For an event to be considered

[394]*Hadley* supra n 365.

[395]ibid

as a *force majeure* it must be (i) *extérieur or étranger à la chose*, (ii) *imprévisible* and (iii) *irrésistible*.[396]

There is a marked difference between the absence of *faute* and the standard of conduct referred to as a reasonable possibility. The simple fact that a defendant had not committed any fault does not prove that the defendant had taken all reasonable measures that were practically available to him. So, the concept of irresistibility that includes a standard of reasonable and practical possibility still requires a defendant to do something more than just proving that he was not at fault. In fact, he must show that once the event was foreseeable, he had done everything which was reasonably possible and practicable and not only something that had been reasonable for him to do. In the case of *General construction v Chue Wing* the *Assemblée Plénière* argued about the double need of foreseeability and irresistibility. It is important to note the nature of the cumulative character of these two elements. If it is unforeseeable and irresistible, there is no doubt, it is a *force majeure*. But there may occur an event which is foreseeable yet when it occurs, it is irresistible. In that case, it would qualify as a *force majeure*: "*Quand le danger prévisible était irresistible, il y a bien force majeure*".[397]

8.4 Foreseeability under convention

The demarcation line between the two classes of events (foreseeable and unforeseeable) can be very deceitful. For example, a work-men strike over wages that affects the promisor. Is this action one that is beyond the control of the

[396]English translation are: (i) External (ii) Unforeseeable (iii) Irresistible/ very strong

[397]*Chue Wing* supra n384.

promisor or within his control? Can't it be said that this event is foreseeable? In *Channel Island Ferries Ltd v Sea-link* the court found that a *force majeure* clause covering strikes 'beyond the control' of a party, did not cover strikes that could be settled by taking reasonable steps for example increasing wages.[398]

It is submitted that all legal strikes are foreseeable and that its consequences are more easily foreseen than a cyclone as seen in *General Construction v Chue Wing.* The requirement of foreseeability has caused lots of confusions when it comes for interpretation. In the *Channel Island Ferries Ltd v Sea-link* case it seems that the court was assessing the effect of the strike and not whether the strike was beyond the control of the parties. In the case of *General Construction v Chue Wing* the court held that the owner should have foreseen that cyclone Hollanda would strike Mauritius. The issue of what to foresee is not clear. Is it the intervening event or the consequences of the intervening event? In some cases, it is quite clear to foresee an event such as the hurricane or cyclone but the intensity and damage that it can cause cannot be foreseen. In other cases, the event itself cannot be foreseen, such as in the Coronation case, so here the question of damages does not arise. Therefore, it would be better to first evaluate whether the event can be foreseen and if the answer is yes, then move further to see whether the damage can be foreseen and mitigated.

The foreseeability doctrine was developed in English and American judicial practice. It is important because there are differences between rule found in English common law and the foreseeability doctrine in the Vienna Convention. The

[398] *Channel Island Ferries Ltd v Sealink UK Ltd* [1988] 1 Lloyd's Rep 323

foreseeability doctrine was quite easily adopted as part of the Vienna Convention because it is already known in several legal systems.[399]

Article 79 of the Vienna Sales Convention requires a higher standard of reasoning before any relief is granted for any liability. The introduction of the foreseeability doctrine into the rules of the Convention has made the system of relief more stringent. Whenever the liability for compensation is not based on the party's fault then the whole risk for damages which result from the breach of the contract shall rest on the party in breach, only to the extent that was foreseeable at the time of the contract formation.[400]

There is a connection between the concepts of liability based on non-negligence and liability limited to foreseeable damages. These are the main thrust on the liability system of the convention. Generally common law tends not to subject to compensation, damages that could not be forecasted with good probability at the time of contracting.[401]

According to the Vienna Convention it is sufficient reason if the breaching party could calculate the damage as the "possible consequence" of his breach. It is not a pre-requisite requirement to calculate the "possible" nature of the resulting damage. It seems that the foreseeability doctrine of the Vienna Convention is to be applied in cases of negligence and even in cases of intentional breach of contract. In this way the Vienna Convention deliberately departs from Article 1150 of the Code civil which excludes the use of the foreseeability doctrine where there

[399]Hellner: The Limits of Contractual Damages… op. cit. 47.

[400]Similar observation by Rabel: *Das Recht des Warenkaufs*. op. cit. 495.

[401]The *Hadley* supra n 365 states this point explicitly: "contemplation of both parties": (1854) 9 Exch 341, 354.

is an intentional breach of contract. The UNIDROIT Principles determines the liability for damages of a breaching party independently of his fault and excuses him from liability only on the basis of an impediment beyond his control such as a *force majeure*.[402] "Article 7.4.4 of UNIDROIT states: "*The non-performing party is liable only for harm which it foresaw or could reasonably have foreseen at the time of the conclusion of contract as being likely to result from its non-performance*". The meaning of this UNIDROIT rule seems to coincide with Article 74 of the Vienna convention as it only slightly differs in its wordings. The difference lies between the phrases "could reasonably have foreseen" and "ought to have foreseen". It also differs with the expressions "as being likely to result from" instead of "as a possible consequence".

In comparing the UNIDROIT Principles with Article 74 of the Vienna Convention the former seems to contemplate the foreseeability of damage as a precondition of liability of the party in breach and not the causes of the breach. (Articles 7.4.2 and 7.4.3), therefore the burden of its proof rests with the injured party. Article 49(1)(a) of the CISG provides that the avoidance of a contract is possible, "if the failure by the seller to perform any of his obligations under the contract results into a fundamental breach of contract." Moreover, according to Article 25 CISG, a breach is considered fundamental "if it causes such a detriment to the buyer which deprives him substantially of what he expected to receive under the contract, provided the seller had not reasonably foreseen such a result.[403] This means that

[402]Article 7.17., Force Majeure: Non-performance by a party is excused if that party proves that the non-performance was due to on impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences.

[403]Michael R. Will, *Art. 25*, in the 1980 Vienna sales convention. commentary on the international sales law 205, 209 (Massimo C. Bianca & Michael J. Bonell eds., 1987); Martin Karollus, Art. 25, in *kommentar zum un-kaufrecht. übereinkommen der vereinten nationen über verträge über den internationalen warenkauf* (CISG) 260 (Heinrich Honsell ed., 1997)

according to Article 25, the breach of a contract is said to be fundamental only when it deprives the aggrieved party substantially of what it is entitled to receive and that the party at fault has not foreseen the detrimental consequences following the breach. The defaulting party is compared to what, a reasonable person, of the same kind and in the same circumstances would have foreseen. In other word the courts will apply an objective test to determine the foreseeability element.[404]

8.5 Doctrine of Good Faith and Fairness

The doctrine of Good faith originates from the law of equity. In the Court of Chancery, Lord Mansfield, in his decision in *Carter v Bohemn*, introduced the concept of good faith. In his words Lord Mansfield stated that "Good faith forbids either party by concealing what he privately knows, to draw the other into a bargain, from his ignorance of that fact and his believing the contrary".[405] In the words of Sealey & Hooley, "the concept seems impossible to define with any degree of precision". This is evidenced in section 61(3) of the Sales of Goods Act (SGA) which defines good faith as "honestly, whether it is done negligently or not".[406]

Common law countries are rather reluctant to use the concept of good faith as it's application is not quite clear. However, the legislation of these countries reveals some use of good faith arising out of the European influence. It is the subjective good faith that is found in various pieces of legislation from common law countries.

---

[404]Achilles W A, 25 Spring 2006 Journal of Law and Commerce at 69-70

[405]*Carter v Boehm* (1766) 3 Burr 1905.

[406]Commercial Law: Text, Cases, and Materials Paperback – 11 Sep 2008, by LS Sealy (Author), RJA Hooley (Author).

This is illustrated by art 23 of the Sales of Goods act which makes use of good faith in its subjective sense.[407] Historically the courts have been reluctant to imply a general duty of good faith because in doing so would likely undermine the contractual certainty. Instead, the English courts have developed a piecemeal solution to address the issue of unfairness.[408]

There is no proper and acceptable definition of the concept under English law. In his judgement in *Interfoto Picture v Stiletto*, Bingham LJ stated "In many civil law systems and perhaps in most legal systems outside the common law world, the law of obligation recognises and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not simply mean that they should not deceive each other, it is a principle which any legal system must recognise; its effect is most aptly conveyed by such metaphorical colloquialisms as 'playing fair', 'coming clean' or 'putting one's card face upward on the table'. It is in essence a principle of fair and open dealing…".[409] In fact, English law has developed piecemeal solutions in response to solve problems of unfairness…Thus equity has intervened to strike down unconscionable bargains. Whenever the parties to a contract have expressly included the good faith obligations in their contract, the courts will give effect to those express provisions which relate to the actual performance of that particular obligation. However, whether a party can successfully rely on such a provision

[407]Article 23 states that: When the seller of goods has a voidable title to them, but his title has not been avoided at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

[408]*Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433.

[409] ibid.

will depend on the specific wording of the clause in question. The court will apply the usual principles of contractual interpretation.[410] Where there is an express clause containing an obligation of good faith, parties seeking to rely on the clause have often tried to argue that the obligation is a general one that applies to other provisions of the contract. However, the courts have consistently followed a narrow interpretation of the express obligations of good faith, and where the duty relates to a specific provision, they have been reluctant to extend its application to the other sections.

The Court of Appeal has overturned the *MSC* decision at first instance, reverting to the traditional position that English contract law does not recognise a general duty of good faith.[411] So, where a party argues that an implied term which is based on the concept of good faith applies, the term would still need to meet the strict implications tests.[412] Whilst the English courts have been reluctant to recognise the duty of good faith in contract law many jurisdictions have expressly included in their civil code references to the doctrine of good faith. In those situations, an obligation to act in good faith in the performance of a contract becomes an express obligation on all the parties. The requirement of Good Faith during pre-contractual negotiations was first codified in 1942 in the Italian Civil Code.[413] The Vienna Convention on the Law of Treaties was signed on 23rd May

---

[410] *Marks and Spencer Plc v BNP Paribas Security Services Trust Company (Jersey) Limited* [2015] UKSC 72 (Marks & Spencer).

[411] See *MSC Mediterranean Shipping Company SA v Cottonex Anstalt* [2015] EWHC 283 (Comm).

[412] See *Marks & Spencer* supra n. 410.

[413]Article 1337 : *Le parti, nello svolgimento delle trattative e nella formazione del contratto, devono comportarsi secondo buona fede* (1366,1375, 2208). It appears to be generally admitted that this necessity of good faith during the precontractual period implies « duties of information, clarity and secrecy […].

1969. Article 26 of the treaty provides that: "*Every treaty in force is binding upon the parties to it and must be performed by them in good faith*". This is further clarified by article 31 which states that: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the Treaty in their context and in light of its object and purpose*". The Vienna Convention of 11th April 1980 on international sale of goods clarifies this situation. Article 7(1) states that when interpreting the Convention, particular attention must be paid to the "observance of good faith in international trade". Good faith is thus considered as an important tool for the interpretation of the whole Convention. There must be full compliance with good faith in all international trade"[414] This provision has created some sort of flexibility in the conventional rules.[415]One important characteristic of good faith is the uncertainty that is associated with the doctrine. There is no clear legal definition or terminology defining good faith which yields to some inconsistency.[416]

Irrespective of the definition given to the term good faith it is clear that when applied to specific cases, the meaning will be adapted to fit a particular legal dispute. The great flexibility in its application has raised criticisms that undermines the legal predictability and security of the good faith concept. Even though the concept of good faith was meant to promote a certain idea of contractual justice, there have been many different proposals put forward in order to define the notion of good faith. So far, good faith appears as a moral connotation used to regulate the

[414] V Heuze, *La vente internationale de marchandises*, LGDJ 2000, n°91.

[415]ibid.

[416]G. Wicker *Force obligatoire et contenu du contrat' in Les concepts contractuels français à l'heure des principes du droit européen des contrats*, dir. P. Remy-Corlay, D. Fenouillet, Dalloz, 2003, p. 151 et spec. no 2 p. 154.

business life. Where the freedom of the contracting parties is essential for the business, the freedom of one must coexist with the freedom of others. Therefore, good faith presents itself as one of the regulating principles which ensures this coexistence. Whilst the Vienna Convention does not expressly establish "good faith" as a basic principle of contract law, both the Principles of European Contract Law (PECL) and the UNIDROIT principles have done so. Article 1.201 imposes a duty of good faith on the parties to a contract.[417] As it is widely defined it establishes a truly general obligation. It could therefore, be considered that good faith is required both during the implementation of the contract and at the stage of its formation.[418] In the same way, article 5 of the UNCITRAL Convention of 1995 states that the principle of good faith must be observed when applying the convention.[419] A similar expression appears in the UNIDROIT Conventions of 28th May 1988.[420] Even if article 1.6 of the UNIDROIT Principles does not expressly set out good faith as a principle of interpretation, it impliedly refers to it in the second paragraph as: "*issues within the scope of these principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles*". As can be seen in the explanatory note for the article, in order to successfully apply the UNIDROIT principles, one should, on one hand, resort to analogy, and on the other, take into account some fundamental concepts set out

[417]Article 1.201 of the PECL sets out a duty to act in good faith: "Each party must act in accordance with good faith and fair dealing. The parties may not exclude or limit this duty".

[418]J. Mestre, Article 1 :201 – *Bonne foi, in Regards croisés sur les principes du droit européen du contrat et sur le droit français*, C. Prieto (directed by), PUAM 2003, p. 116.

[419]Art 5: in the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in the international practice of independent guarantees and stand-by letters of credit.

[420]Articles 4 and 6 concerning international factoring and international financial leasing respectively.

by the Principles amongst which there is good faith, as stated by the note on article 1.7. Therefore, in the UNIDROIT Principles the term “good faith” is used “to define a concept in reference to which a contract must be interpreted”. In the case where there is a litigation on the term of a contract article 4.8 allows for an implied term to be included in the interpretation bearing in mind the intention of the parties, the purpose of the contract and whether the parties have acted reasonable and in good faith.[421]

Amongst all the international sources of law applicable to a contract, the notion of “good faith” appears mainly in the United Nation Convention on Contracts for the International Sale of Goods (CISG), 11 April 1980. The expression is very frequently used in the convention. There is an implied obligation of good faith in the CISG. However, the Convention does not impose a duty of good faith in the implementation of a contract. And whilst article 7(1) states that good faith should prevail in the interpretation of the Convention but it does not impose an actual duty of good faith upon the parties. This article seems to be like a compromise between those from the civil law countries, who were favourable to the establishment of a duty of good faith, and those of the common law countries who strongly opposed to this solution.[422] This result has caused the convention to be interpreted in various ways. Some believe that because it does not expressly impose a duty of

[421]Article 4.8 of the UNIDROIT states that where the parties to a contract have not agreed with respect to a term which is important for a determination of their rights and duties, a term which is appropriate in the circumstances shall be supplied, and paragraph 2 of the same article adds: in determining what is an appropriate term, regard shall be had, among other factors to (a) the intention of the parties; (b) the nature and purpose of the contract; (c) good faith and fair dealing; (d) reasonableness.

[422]See *Conférence des Nations-Unies sur les contrats de vente internationale de marchandises*, Vienne, 10 March – 11 April 1980, *Documents officiels des Nations Unies*, p. 79 and p. 272 ; see also G. Eorsi, Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods, Am J Int Law, 1979, vol. 27, p. 311, esp. p. 313.

good faith upon the parties, it means that such a duty does not exist. However, others think that a general principle of good faith can be implied from the principles. A number of provisions in the convention contain an implied duty of good faith, so a better view of looking at it would be to consider this duty of good faith as a fundamental principle on which the convention is based. The interesting point here is that without any express provision in the convention the principle of good faith has found its way through a number of articles of the convention.

Article 29(2) provides for an implied condition of good faith based on the conduct of the parties.[423] According to article 77 the parties have an obligation to mitigate any loss arising from a breach of a contract in order to demonstrate that they have acted in good faith.[424] This is an important provision because a party to a contract may not simply rely on the mistake of the other party to avoid performance. In order to rely on the provision of Article 80, it is important for the party to show that it has fulfilled the obligation as set up by article 77.[425]

As far as PECL is concerned, they expressly refer to good faith as a guide to the interpretation of the whole *corpus*, as stated in article 1:106.[426] The expression is

[423]Article 29(2) states: A contract in writing which contains a provision requiring any modification or termination by agreement to be in writing may not be otherwise modified or terminated by agreement. However, a party may be precluded by his conduct from asserting such a provision to the extent that the other party has relied on that conduct.

[424]Article 77 states that A party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount by which the loss should have been mitigated.

[425]Article 80 of the Convention states that: a party may not rely on a failure of the other party to perform, to the extent that such failure was caused by the first party's act or omission. In this last article, the good faith of the debtor is required; indeed, the debtor cannot rely on the slightest mistake of the creditor to avoid performing his obligations under the contract.

[426]Article 1:106 - Interpretation and Supplementation (1) These Principles should be interpreted and developed in accordance with their purposes. In particular, regard should be had to the need to promote good faith and fair dealing, certainty in contractual relationships and uniformity of application

undisputable, PECL will have to be interpreted in good faith, but the Principles have in addition a political aim, that of promoting good faith among the parties to the different contracts and it is in the light of this aim, that each provision must be read. So, we have found that while some international texts aim to promote good faith in the contractual relationship, the PECL raises it to the status of a principle of interpretation of the provisions it contains. Therefore, good faith can be said to be acting as a regulating principle, not only in the reading of the texts relating to contracts but also in the interpretation of the contracts themselves. Moreover, the idea that a contract must be interpreted according to the principle of good faith applies to all the law relating to business contracts.

It has first been developed in the frame of the *lex mercatoria* [427]and has anchored deeply to such an extent that it has become one of its fundamental principles.[428] Professor Jacquet pointed out that:

"the principle of good faith, sometimes seen as a basic principle of the *lex mercatoria*, can therefore be directly applicable to international contracts. So, the principle of good faith can impose obligations of behaviour directly upon the parties in the conclusion as well as in the implementation of the contract"[429]

In fact, the requirement of good faith arose from a number of international arbitration awards which has established a “general principle whereby all agreements must be applied in good faith”[430]The interpretation of contractual

[427]*Lex Mercatoria* is a thin body of law, which consist of the rules of international conventions and uniform laws and of international custom and usages and of the common core of legal system.

[428]See B. Goldman, *La lex mercatoria dans les contrats internationaux: réalités et perspectives*, J D I, 1979, 475.

[429] Le contrat international, Dalloz 2nd ed. 1999, p. 101 and 102.

[430] Ph Fouchard, E Gaillard and B. Goldman *Traité de l’arbitrage commercial international*, Litec 1996 n°1470.

provisions in accordance to the good faith principle in international arbitration, is seen as an alternative way of favouring the interpretation according to the parties' real intention as oppose to a literal interpretation"[431] In doing so, where there is bad faith and a party to a contract claims the benefit of the law for himself his bad faith shall be invoked against him. It seems to be like a disguised way of introducing the law of equity.[432] The term is partly close to equity, and is similar to article 1135 of the French Civil Code which states that: "agreements are binding not only as to what is expressed therein, but also as to all the consequences which equity, usage or statute give to the obligation according to its nature". So, it looks as if the Principles follow the French code. They do not differentiate between the consensual and formal agreements. (The old law did not follow the principle of equity and good faith for formal agreements).[433] The projects of codifying the doctrines whether international or regional make use of the principle of good faith. As stated by Lando: "the principles of European contract law and the UNIDROIT Principles pay great importance to the principle of good faith under the influence of several laws mainly German, Dutch and American. In each of these legal instruments, good faith is promoted to the rank of general principle which covers all stages of a contract".[434] This function of good faith has changed from an interpretative role to that of the whole content of a contract. Article 5:102 of the

---

[431]ibid

[432]P. Mayer, *Le principe de bonne foi devant les arbitres du commerce international* op. cit. p 654.

[433]See quote by E. Colas *La notion d'équité dans l'interprétation des contrats* (1980-81) page 394: there is no type of contract where it is not understood that one party acts in good faith as regards the other, with all the effects required by equity, whether in the way the contract is expressed, as in the performance of what is agreed including all consequences.

[434] O Lando, *L'avant-projet de réforme du droit des obligations et les Principes du droit européen du contrat: analyse de certaines différences*, RDC, jan. 2006, p167 et s. §11.

Principles of European contract law displaces the same reasoning in the interpretation of contract where regard must be had in particular to good faith and fair dealing. Article 6:102 goes further and asserts that on top of the express terms, a contract may contain implied terms originating from the (a) the intention of the parties, the nature of the contract, the purpose of the contract, and good faith and fair hearing. Even nowadays the concept of good faith remains a relevant principle of interpretation in respect of a formal and written contract. Although the term "good faith" is not always expressly appear in a contract, that of fairness is. This is because it's implication seems to be more objective, having some moral aspect."[435] The initial text of PECL imposed on each party the duty to act in good faith while exercising their rights and performing their duties. However, the French version of PECL make a reference to a compliance with the requirement of good faith and the English version mentions "good faith and fair dealing". The term "good faith" indicates an intention to act honestly and fairly. It is seen as a subjective concept. The term "fair dealing" appears to be an objective criterion, it is the facts of having acted with fairness. The term good faith used in French law must therefore be used in a broader way, as including the objective dimension. According to Calais-Auloy the term "good faith" must be taken into account in its subjective form in addition to the objective requirement of fairness.[436]

[435]See P. Hetsch, *L'émergence des valeurs morales dans la jurisprudence de la CJCE* , RTDE, 1982, esp. p. 547.

[436]J. Calais-Auloy, *Le devoir de se comporter de bonne foi dans les contrats de consommation*, in General clauses Standards in European Contract Law Comparative Law, EC Law and Contract Law Codification, éd. S. Grundmann et D Mazeaud, Kluwer Law International, 2005, p. 192-193. See also, ECJ, C-240 à 244/98, 27 June 2000, Oceano Grupo, esp. consid. 21.

The UNIDROIT principles expressly set out the principle of “good faith” in its Article 7.1 paragraph 1.[437] The commentary makes it clear that each party must act in accordance with good faith, and that even in the absence of any particular dispositions in the Principles, the parties, must act in good faith during the entire duration of the contract, including at the negotiation phase. Moreover, article 7.1 paragraph 2, makes good faith mandatory by setting that: “The parties may not exclude or limit this duty”. However, the UNIDROIT principles, unlike PECL use the expression “good faith and fair dealing in international trade and the comments on article 7(1) adds, that even when the Principles refer to “good faith” or “good faith and fair dealing”, they would mean as to refer to the full expression of good faith and fair dealing in international trade. This indicates that the French concept of “good faith” should be understood as including some special conditions as applied to international trade. Here the principles lay down the requirement so that the concept of good faith may not to be applied in accordance with the criteria adopted by different legal system. This is the basis upon which the principle of good faith used in international trade was developed. The requirement of good faith is present in many provisions of the Principles of European Contract Law.[438] The concept of good faith is presented as a principle which restricts the freedom of contract. Article 1:102 (1) states that: "Parties are free to enter into a contract and to determine its contents, subject to the requirements of good faith and fair dealing, and the mandatory rules established by these Principles." So, on top of the freedom of contract and the legal certainty the notion of good faith is also an

[437]Article 7.1 “Each party must act in accordance with good faith and fair dealing in international trade”.

[438]I. De Lamberterie, G. Rouhette et D. Tallon, *Les principes du droit européen du contrat*, Paris, *La documentation française*, 1997, p. 19.

important segment of a contract.[439] Very often the concept of good faith is also associated with reasonableness as can be seen in article 1:302.[440]

As regard to a change in the circumstances which leads to fundamental change in the obligation of the parties article 6:111 states that the court may award damages for the loss suffered by a party as a result of the other party refusing to negotiate contrary to the principle of good faith and fair dealing. It is also important to note that according to article 4:110 (1): "A party may avoid a term which has not been individually negotiated if, contrary to the requirements of good faith and fair dealing, it causes a significant imbalance in the parties' rights and obligations arising under the contract to the detriment of that party". It is well known that in countries with a civil law tradition contracts are traditionally interpreted with reference to the parties' intentions; more attention is given to the spirit of the agreement rather than the strict wording of the contract..[441] The French law appears to embrace a distinction between good faith and loyalty. Article 1134 para. 3 of the French Civil Code states that "[Agreements] must be performed in good faith". That is "The relationship between the commercial agent the and principal shall be governed by an obligation of loyalty and a reciprocal duty of information" (article L134-4 al.2 of the Commercial Code). Similarly, article L120-4 of the Employment code provides that "Contracts of employment shall be executed in good faith" whilst article L121-9 al.3 of the same code states that "the employee has a duty of loyalty towards his or her employer". Regarding the French

[439] D. Mazeaud , Le nouvel ordre contractuel, RDC, déc. 2003, p. 295, § 29.

[440]Article 1:302: "Under these Principles reasonableness is to be judged by what persons acting in good faith and in the same situation as the parties would consider to be reasonable".

[441]As is the case in Belgium law, French law, Quebec law, Italian law and in Dutch law.

international private law, the court of *cassation* in its decision in the famous Lizardi case, held that when a French person enters into a contract in France with a foreigner, "it should not be required to know the laws of the different nations and their provisions concerning minority, legal majority and the extent of contractual obligations which can be undertaken by foreigners with regards to their legal capacity; the contract will be valid as long as the French party acted without rashness, without carelessness and in good faith".[442] Therefore, it seems as if good faith is used to simplify the legal relations between the parties to a contract. In fact without such solution, a French national entering into a contract will have to enquire about the nationality of the other party and when it happens to be foreigner, the French party will have to investigate the content of the relevant national law.[443] English courts have realised the importance of the requirement of good faith, and have been willing to enforce express duties to act in good faith. In *CPC Group v Qatari Diar* the court found a duty of good faith but not a breach in a dispute concerning a joint venture.[444] The difficulty found by English courts is not the duty of good faith as such, but the way in which the duty is included in contracts. In *Yam Seng v International Trade*, Leggatt J called for the implication of a term requiring performance in good faith in all commercial contracts.[445] However, in *Ilkerler Otomotiv v Perkins*, Longmore LJ commented Legatt J's remarks in Yan Seng and stated that although Legatt's suggestion called for a coorperation in the performance of a contract it does not extend to the cooperation in relation to the

[442] Ch. Req., 16 janv. 1861, D., 1861, 1, 93, S., 1861, 1, 306, note Massé, *Grands arrêts du droit international privé, n°5.*

[443]P. Mayer et V. Heuzé, *Droit international privé*, Montchrestien, 8ème éd. 2004, n°524.

[444]*CPC Group Ltd v Qatari Diar Real Estate Investment Co* [2010] EWHC 1535 (Ch)

[445]*Yam Seng Pte Limited v International Trade Corp* [2013] EWHC 111 (QB)

termination of a contract.[446] So it is submitted that to date there is no general doctrine of good faith in English contract law and it seems very unlikely to arise by way of implication in a contract.

[446] *Ilkerler Otomotiv v Perkins Engines Co Ltd* [2017], [2017] EWCA Civ 183

Chapter 9

A Critical Analysis and application of the Force majeure clause.

9.0 Introduction

Most European countries have included the concept of *force majeure* in their legislation in order to deal with cases of unfairness. Moreover, some countries have introduced special rules to deal with hardships which had occurred by extraneous events after the formation of the contract.[447] It is important to note that the common law has never adopted a doctrine based on or to give effect to *force majeure* as such. The common law has rather developed the very disappointing doctrine of frustration. If the contracting parties wish to receive the benefit of the concept of *force majeure*, the contract must expressly provide for that benefit. The general objectives of a *force majeure* clause in a contract can be considered as:

- to exclude or diminish the possibility of the contract being discharged by frustration;
- to give relief to a defaulting party who is confronted with changed circumstances which render the performance more difficult or more onerous than the original plan.

9.1 *Force Majeure* under French Law

According to the Art 1148 of the French Civil Code the *force majeure* (Superior force) is described as: "*Il n'y a lieu à aucun dommages et intérêts*

[447]See L. W. Newman, "Problems with Long Term Contracts: A Practical Viewpoint" [1986] AMPLA Yearbook 487 at 488-490; D. Yates, "Drafting Force Majeure & Related Clauses" (1990-1991) 3 Journal of Contract Law at 186 (n. 4).

lorsque, par suite d'une force majeure ou d'un cas fortuit, le débiteur a été empêché de donner ou de faire ce à quoi il était obligé, ou a fait ce qui lui était interdit". The English translation means that following a "superior force" or extraordinary event that causes an impossibility for an obligor to fulfil his obligations under a contract then the obligor shall not be liable for any damage resulted from his non- performance. So, it is clear that in the civil code there is no definition of *force majeure* as such. *Force majeure* has no fixed and settled meaning in the French legal system or any law. It has been left for the court to decide on the interpretation when conflicts arise. The interpretation by the courts have created several concerns as to consistency, fairness and certainty. Under French law, *force majeure* is considered as an event that is unforeseeable, unavoidable and external that makes execution impossible.[448] In the French jurisprudence, several expressions have been used for the phrase such as; "*par suite de circonstance de force majeure*" which means following an "overwhelming force or an unforeseeable, insurmountable and irresistible impediment to performance", "force greater than the power of resistance of the promisor".

On 1 October 2016, the article 1218 of the French Civil Code has re-defined the *force majeure* concept. For the first time, it codified the three essential elements that comprise force majeure: (i) *l'extériorité* (externality); (ii) *l'imprévisbilité* (unforeseeability); and (iii) *l'inévitabilité* (inevitability).

In *Matsoukis v. Priestman*, Bailhache J stated that:

> "The words *force majeure* are not words which we generally find in an English contract. They are taken from the Code Napoleon ... In my construction of the words *'force majeure'* I am influenced to some extent by

[448] *Impossibilité absolute de remplir ses obligations due à un événement imprévisible, irrésistible et extérieur* French Civil Code, arts 1147 and 1148 (30 August 1816, reprinted 1991).

> the fact that they were inserted by this foreign gentleman . . . At the same time I cannot accept the argument that the words are interchangeable with 'vis major' or 'act of God'. I am not going to attempt to give any definition of the words *'force majeure'*, but I am satisfied that I ought to give them a more extensive meaning than 'act of God' or 'vis major'."[449]

In *Lebeaupin v. Crispin* the Court defined *force majeure* as:... every circumstance which is independent of the will of man, and which he cannot control, and that *force majeure* justifies the non-performance of a contract.[450] The court further added that war, inundations and epidemics are cases of *force majeure*. This definition is not clear as on one hand it stated that the force must not be an act of man and on the other hand it also included war and strike of workmen. Can a War or strike be considered as an act of God? I submit that no reasonable person would consider a War or Strike of workmen an Act of God. So, if it is not an Act of God, it should be an Act involving man action. But in *Lebeaupin v Crispin* the court stated that *force majeure* must be independent of the will of man and which he cannot control. In the case of a strike by work men, the event can be one which the promisor is not willing to occur but it can be a situation which is under his control. This definition is blurred and unclear.

Moreover, a Force majeure clause must be used cautiously in the presence of an expressed exclusion or limitation clause as both have as objective to exonerate the promisor from liability. The one clause may render the other inoperative. Generally, a *force majeure* clause is confined to external events and an exclusion or limitation clause would be confined to acts that are within the control of the promisor.

---

[449] *Matsoukis v. Priestman* [1915] 1 K.B. 681 at 685-687.

[450] *Lebeaupin v. Crispin* [1920] 2 K.B. 714 at 719.

The doctrine of *force majeure* originates from the Roman and French law.[451]
In most jurisdiction the non-performance of a contractual obligation is considered as a breach of the contract with various consequences on the contractual parties. In contract law *force majeure* is seen as an exception to the principle of p*acta sunt servanda*[452] when there is an unexpected event happening.

It provides an excuse for the non-performer from the usual consequences arising out of a breach of contract if the non-performance which has resulted in the breach of contract falls within the definition of a *force majeure* event.
The Roman law refers to the doctrine as *vis major* (superior force) and *casus fortuitus* (Fortuitous case). *The term Vis major in roman* is described as "a superior force which is beyond resistance or control"[453] It includes events such as floods, earthquakes, storms and fires. *Casus fortuitus* on the other hand describes an event resulted from the action of one or more persons, and includes theft, strikes and arson. These are actions not related to natural events. The common link with both cases is that the event or occurrence is unforeseeable and beyond the control of any of the contracting parties.
In the South African law, the *casus fortuitus* principle has been described as

> "a species of *vis major*, [which] imports something exceptional, extraordinary or unforeseen and which human foresight cannot be expected to anticipate, or, if it can be foreseen it cannot be avoided by the exercise of reasonable care or caution".[454]

---

[451]Lombardi R "*Force majeure* in European Union law" 1997 *International Trade & Business Law* 82-87

[452]*Pacta sunt servanda* refers to the sanctity of contracts. It is an accepted principle in contract law that all legal contracts which are entered into freely and fairly should be upheld and enforced. It is regarded as one of the foundational principles of the South African law of contract. Christie 12 and Hutchison *et al.* 12–13, 21.

[453]Cooper WE *The South African Law of Landlord and Tenant* (1973) 2nd edition 181

[454]Du Bois F *Wille's Principles of South African Law* (2007) 9th edition 850

Van der Merwe, Van Huyssteen, Reinecke and Lubbe[455] described these concepts as “events arising from nature or human causation, which cannot be resisted, which is beyond the control of a normal person, and which is unforeseen or unforeseeable by the relevant party.” In their examples they include death, natural disasters, sickness and disease, war, strike action or intervention by authorities.[456] Hutchison et al gave a wider definition of these concepts which includes all unavoidable acts of nature and humans.[457]In certain cases, a breach of contract will avail some remedies to the disadvantaged party. This approach follows the principle of *pacta sunt servanda* of contract law. However, a rigid enforcement of such terms in a contract may result to an unfair and detrimental outcomes, especially in cases where neither party to the contract could be held responsible for the non-performance. This is the main reason for contractual parties to include a *force majeure* clause in their contract.

The main objective of including a *force majeure* clause in a contract is to limit the scope of the strict liability imposed on a contractual party for performance of their contractual obligation after the occurrence of an unforeseen event which has created an impediment to a party’s performance.[458] Where a non-performing party to a contract proves that its inability to perform was due to an event which falls within the ambit of the *force majeure* definition, then that party shall escape liability.

---

[455]Van der Merwe S Van Huyssteen LF Reinecke MF & Lubbe GF *Kontraktereg: Algemene beginsels* (2007) 3de uitgawe 575

[456]Van der Merwe *et al*. 575

[457]Hutchison *et al*. 384

[458]Lombardi, Supra n 451, 84

The common law principle of supervening impossibility and frustration of contracts in England has created much uncertainties in contracts where there had been non-performance following an unforeseen impediment. Due to the limited nature of the principle to ensure relief and certainty in contracts, most jurisdictions have introduced a *force majeure* clause into contracts.

The definitions that follows are the related concepts dealing with non-performances as a result of an intervening impediment external to the contract of the parties:

Force majeure

> *Force majeure* is a contractual clause that regulates the liability of the parties following an unexpected event or circumstance which is beyond the control of the parties and which prevents either party or both from fulfilling their obligations under the contract.

Frustration of contract

> Frustration is the English law principle which provides for contractual relations to be discharged in cases where a supervening event changes the circumstances of performance of the contract so significantly that the parties no longer need to performance of their obligations under the contract.

Imprévision

> The doctrine of *imprévision* is raised when an unforeseen event has rendered the performance of the contract either absolutely impossible or more burdensome for the parties.

Impossibility

Impossibility of performance is a doctrine whereby one party can be released from a contract due to unforeseen circumstances that render performance under the contract impossible. This doctrine can be raised as a defense to relieve a party from liability when there is a breach of contract.

Hardship

The aim of a hardship clause in a contract is to cover cases when unforeseen events occurring fundamentally alter the equilibrium of the contract and resulting in an excessive burden being placed on one of the contractual parties.

In the modern application of contract law, where a supervening event or situation which is beyond the control of the parties to a contract occurs and causes the performance of obligation of the contractual parties impossible, then the principle of supervening impossibility is applicable.

Hutchison *et al*., stated that following the conclusion of a contract, if without the parties' fault performance becomes objectively impossible as a result of an unforeseen and uncontrollable event, the common law generally requires the parties to perform their obligation, as well as suppressing the right to performance.[459] Both parties are excused from performing, because in such situation due to the impossibility of performance and the foreseeable expectation of the parties, their intention to performing the agreement is altered and frustrated

[459]Hutchison et al. 383. This view is also supported by Van der Merwe et al. 575, Bob's Shoe Centre v Heneways Freight Services (Pty) Ltd 1995 (2) SA 421 (A) 425, 432, as well as Unibank Savings & Loans Ltd (formerly Community Bank) v Absa Bank Ltd 2000 (4) SA 191 (W) 198 B-E and Peters Flamman & Co v Kokstad Municipality 1919 AD 427 434-435.

the purpose of their agreement.[460] This is in line with the maxim *impossibilium nulla obligatio est*.[461]

In order to objectively assess whether a performance is really impossible regard must be had to the two requirements:[462]

1. Performance must really be objectively impossible and not merely more difficult or more burdensome or more onerous.[463]

2. The event causing the impossibility of performance must be one which no reasonable person would have been able to avoid.[464] Even though the event is foreseeable, if it is unavoidable then the contractual party could raise impossibility of performance.

At common law, the condition creating an impossibility to performance terminates the obligations of the parties. The debtor is excused from performing.[465] The creditor is also excused from performing his obligation. However, there are two situations where the obligation for performance will not be terminated, that is when the debtor was already in *mora* at the time performance became impossible, and

[460]The two requirements are discussed and explained by Hutchison *et al*. 383, Van der Merwe *et al.* 575 and Christie 490.

[461]This Latin maxim is accepted in our law and means that nobody has an obligation to the impossible.

[462]The common law position is discussed in Christie 491, Hutchison et al. 383–385, Van der Merwe et al. 57–577.

[463]Hutchison *et al.* 383.

[464]Ibid at 384.

[465]*Peters Flamman & Co v Kokstad Municipality* 1919 AD 427 434–435.

where the impossibility of performance was the fault of the debtor.[466] Due to the existing risks and the realities of a supervening impossibility in a contractual relationship there is a need to include specific clauses into the parties' agreement in order to ascertain their legal position when the situation arises. So, the specific clause would protect the contractual parties from liability for non-performance in instances where there is impossibility. The parties may include a *force majeure* clause that will expressly state the consequences of an unforeseen event occurring and how their liabilities will be handled following such event.

The courts are more inclined to strictly observe the sanctity of contract and enforce the clauses therein as strictly as possible. In the case of *Rumdel Cape v South African National Roads Agency* the court took only the specific clause in the contract into account and did not follow the general common law principle[467]

Therefore, it is important when drafting a *force majeure* clause to be cautious and expressly include the issues agreed by both parties. There are many cases where parties simply include a basket clause covering several issues together and whenever there is impossibility of performance there are problems arising in the interpretation of the clause. This is why the drafting of a *force majeure* clause which expressly addresses the issues agreed by the contractual parties is said to be of great importance. In such situation the need for an alternative remedy will arise in order to relieve the non-performing party from liability. If there would be no specific clause inserted into the contract (*force majeure* clause) that elaborates on the contractual consequences, there will be no remedy.

---

[466]Lubbe & Murray *Farlam & Hathaway Contract Cases, Materials & Commentary* (1988) 3rd edition 303

[467]*Rumdel Cape v South African National Roads Agency Soc Ltd, 2015 JDR 0388 (KZN) 2015 14-23.*

The events and circumstances impeding performances are generally unforeseen and can severely impact a party's ability to perform.

> "Events such as these could place parties in a materially different position than to what they were in when the contract was concluded. The degree of the impact will vary in some instances, however it could be unquestionable in at least some other cases and this could lead to the equilibrium of the contract being severely upset."[468]

According to Hutchison "the contractual equilibrium exchange is said to be upset when there has been a fundamental change in the parties' obligation."[469]

There are situations where performance may become highly disproportionate yet not impossible. So, where the economic impact is very severe it may raise the question as to whether hardship would be regarded as a *force majeure* occurrence. Therefore, in order to avoid any uncertainty, it is advisable to include a *force majeure* clause when drafting a contract.

A *force majeure* clause has a suspensive effect, resulting in the suspension of the contractual obligations for the duration of the *force majeure* event. Therefore, once the *force majeure* event has ended and performance has become possible again, the contract will resume. In fact, it provides an excuse for non-performance of contractual obligations due to the impossibility to perform.[470]

---

[468]Coetzee 6. The writer refers to the concept of the change in the contractual equilibrium due to circumstances beyond the parties' control. His argument is that once the equilibrium is disturbed, the law should provide for a remedy to restore the equilibrium, even though this falls short of rendering performance objectively impossible.

[469]Hutchison A 414

[470]Declercq PJM "Modern analysis of the legal effect of force majeure clauses in situations of commercial impracticability" 1996 Journal of Law and Commerce 214.

In some cases the suspension may be too long and the practical impossibility may continue through out the duration of the contract. So, parties would usually include a resolutive time period in the *force majeure* clause. In this way where the *force majeure* event continues beyond the agreed period, any party to the contract can decide on their right to terminate the agreement unilaterally by simply giving a notice to the other party.

The peculiarity with a *force majeure* clause is that when there is impossibility of performance, a suspensive condition is applied in order to provide time for the evaluation of the circumstances instead of giving effect to the contractual provision right away. The resolutive period ensures a finality and certainty in the management of the circumstances.

As the Frustration doctrine at common law and the *Force majeure* at Civil law are extremely limited in addressing every eventuality is problematic, it is necessary that the *force majeure* doctrine be developed and provide for wider and universal application.

9.2 Force Majeure Common law

Generally, a contract requires the parties to fulfil their obligations which they have expressly and impliedly undertaken to perform. So, if one party refrains from performing his duties he does so at its own risk.[471] In case a party fails to discharge its obligations, the court will intervene and compel it to do so by way of performance or the award of damages to the promisee. In the absence of some

[471]See *Scanlan's New Neon Ltd v Tooheys Ltd* (1943) 67 C L R 169 at 191-192.

expressed provision to relieve a contracting party from liability for non-performance, the non-performer will be liable for damages to the other party for a failure to substantially perform his obligation under the contract. This can be so even in the absence of a fault or want of care from the promisor. It is quite common to see that obligations under a contract becomes impossible, legally, physically or economically for a party to perform. More often the performance becomes impossible by a supervening event which is wholly outside the control of the parties. In general, the common law approach is that in the absence of an express provision, the promisor undertakes to perform its obligations in all events and take the full financial risks of its inability to perform. Therefore, the parties were held to the terms of their contracts notwithstanding any changes in the circumstances.

The legislation in most countries would include provisions in the contracts which deal with the concept of *force majeure*. Some other countries have rules to deal with hardship inflicted on contractual parties by the occurrence of extraneous events.[472] The common law, however, has never contemplated to embracing a doctrine based on the *force majeure* principle. The common law has developed an unsatisfactory instrument known as frustration. If the contracting parties wish to benefit from the concept of *force majeure*, they must expressly include it in the contract. So, although the common law does not have a *force majeure* doctrine on its own the parties to a contract can peruse the frustration doctrine and can also avail themselves with the *force majeure* doctrine by including a provision in their contract. As such, in case they want to exclude or diminish the possibility of the contract being discharged by frustration they can do so. Moreover, the promisor

[472]See L W Newman, Problems with Long Term Contracts: A Practical Viewpoint 487 at 488-490; D Yates, "Drafting Force Majeure & Related Clauses" (1990-1991) 3 Journal of Contract Law at 186.

can get relief from liability in case the obligation becomes impossible due to an unforeseeable and uncontrollable event. At common law the foreseeability doctrine plays a very important role. This principle was first applied in *Hadley v Baxendale* by the Court of Exchequer.[473]

Force majeure clauses usually contain a description of events that may ultimately give rise to *force majeure*. The clause would include a list of specified events, and a basket clause (catch-all clause) designed to cover events that have not specifically been set out in the list. The number of events on the list may vary from clause to clause and similarly the scope of the basket clause. Nowadays, the contracts contain clauses by way of basket clauses that require the events to be outside the control of the parties.

Some common triggering events in *force majeure* clauses would include:

- acts of God, storm, lightning, flood and earthquake.
- actions of military, war and terrorism;
- civil disturbance;
- epidemic and quarantine
- unusual delay by common carriers;

The list of specified events is tailor made in relation to the circumstances of the contract in question. At common law precedents are helpful to determine a case but when there is a *force majeure* clause in a contract it addresses the situations which are directly related to the parties, their operations and intentions. For example if one party is relying on a particular supply, the parties to the contract must take in account as to whether a failure on part of the supplier would amount

[473]*Hadley v Baxendale*, (1854) 9 Exch 341, 345 et. Seq.

to a *force majeure* and lay down the agreed provision in the contract. The Association of International Petroleum Negotiators provide a good example of the optional tailored events of *force majeure* which include the supply and purchasing chain issues. In that example the "failure of Gas Transporter to take delivery of and transport Gas, through the Transporter's pipeline system would constitute a *Force Majeure* Event as defined in this Agreement provided the Gas Transporter were a Party to this Agreement."[474] Another problem that may arise here is the exact wordings of the basket clauses. In modern contracts it will generally be referred to as any other clauses beyond the control of the contracting parties. Quite often parties seek a very broad interpretation and would add different wordings such as "without limitation" in the clause. On the other hand, the party who has a lot to lose when the other party fails to perform would wish to narrow the scope of the application of the clause. It is common practice now to put the basket clause first and then add a list of specific events.[475]Whenever there is a contract in which a party is to receive some services, the receiving party would wish it to be clear in the contract that in the case of a natural disaster it does not fall within the event of *force majeure*. So, it is extremely important to draft the *force majeure* clause carefully in order not to get anomalies in the interpretation especially when there are some boilerplate clauses in the contract. When interpreting *force majeure* clauses which would usually include interpretation of the intervening events, the courts apply the rule of contractual interpretation. Those may include the principles

[474]Association of International Petroleum Negotiators (AIPN), AIPN Model Form Gas Sales Agreement, *Force Majeure* Event (2006), art 1.1.

[475]This approach is used in most of the AIPN and Petroleum Joint Venture Association (PJVA) model forms.

of ejusdem generis and expressio unius.[476] In *Atlantic Paper v St Anne* the supreme court of Canada applied the ejusdem generis principle.[477]

The clause read: “St. Anne warrants and represents that its requirements under this contract shall be approximately 15,000 tons a year, and further warrants that in any one year its requirements for Secondary Fibre shall not be less than 10,000 tons, unless as a result of an act of God, the Queen’s or public enemies, war, the authority of the law, labour unrest or strikes, the destruction of or damage to production facilities, or the non availability of markets for pulp or corrugating medium”.[478] At one point during the contract term, St. Anne served a notice to Atlantic paper informing that it would not be receiving any further deliveries of waste paper for reason of *force majeure*. It pleaded the *force majeure* clause particularly, the “non-availability of markets for pulp.”[479] The Court applying the principle of ejusdem generis to the clause; “non-availability of markets” held that the clause was limited to an event over which St. Anne had no control, because all the preceding events in the clause were that type of event.[480] The Court further stated that St. Anne itself was responsible of its own misfortunes. Although it was true that there was a limited market, St. Anne ought to have contemplated this at the time it concluded the contract. There is nothing that has changed in the market

[476] The *ejusdem generis* rule is that, when interpreting documents containing a list of specific items followed by more general items, the general items will not be interpreted in a broad or wide sense but instead will be limited to the type or class of specific items previously listed.
The *expressio unius est exclusio alterius* is a principle in statutory construction: when one or more things of a class are expressly mentioned others of the same class are excluded.

[477] *Atlantic Paper Stock Ltd. v. St. Anne-Nackawic Pulp and Paper Company Limited*, [1976] 1 S C R 580.

[478] ibid at 581-82.

[479] ibid at 581.

[480] ibid at 583.

since the contract was signed.[481] The fact that the market was no more economic for St Anne cannot be considered as a situation that has occurred outside the control of St Anne.[482] In the case of Atlantic Paper there was no basket clause. However, in later cases where there was a *force majeure* clause and a basket clause in the contract the principle of ejusdem generis was defeated. In *Morris v Cam-Nest* the *force majeure* clause was found in two purchase and sales agreements for residential condominiums.[483] The clause contained a list of specific events such as "strikes, lock-outs, fire, lightning, tempest, riot, war and unusual delay by common carriers or unavoidable casualties" followed by a basket clause that read "or by any other cause of any kind whatsoever beyond the control of the Vendor."[484]

So, in the case the vendor was delayed in completing the condominium units by reason of a *force majeure* event, the vendor would be entitled to a reasonable extension in the completion date.[485] Here the vendor invoked the *force majeure* clause saying that the project was delayed due to an unusual cold weather followed by strikes.[486] The purchasers on the other hand argued that the cold whether was not the type of event that was contemplated by the parties to the contract when drafting the *force majeure* events. The purchasers relied on the principle laid down in *Atlantic Paper*.[487] The court held that due to the presence of

[481]ibid at 583-87.

[482]ibid at 587.

[483]*Morris v Cam-Nest Developments Ltd* (1988), 64 OR (2d) 475.

[484]ibid at 482.

[485]ibid.

[486]ibid at 478.

[487]ibid at 484-85.

the basket clause the ejustem generis rule is inapplicable. The court found that those events consisting of unusual cold weather and strikes are events that are beyond the control of the vendor.[488] The vendor was entitled to an extension to complete the condominium.

In the case of *World Land v Daon*, the Alberta court considered the application of the ejusdem generis principle to limit the scope of a basket clause based on the list of specific events.[489] However, the court held that the list of events were not all of the same group of similar events so as to the application of the principle. Some acts were of human based and some from nature, so they are not from the same genus. It is noted that while the courts are prepared to give a broad definition to a *force majeure* clause they will be quite cautious to allowing the clause to be an escape route.

In *Atcor* the court stated its concerns regarding a contract with a very broad list of events. In such case the event does not need to be an ”act of God” or a catastrophe. Only a simple miscalculation in entering the contract could yield to a *force majeure*. With a broad list of *force majeure* events in a contract there are risks that the bargain is turned around.”[490] The court further found that when the list of *force majeure* events is broad it would be important to look at the other elements of the clause, such as its impact and legal effect. Those shall have to be drafted and interpreted in such a way to put reasonable limits on the application and extent of *force majeure*. It is also to be noted that there is no rule of law which requires a narrow interpretation of a *force majeure* clause against the party relying

[488]ibid at 484.

[489]*World Land Ltd v Daon Development Corp*, (1981), 20 Alta LR (2d) 33 (QB).

[490]*Atcor Ltd v Continental Energy Marketing Ltd* (1996), 178 AR 372 at para 13-14 (CA) (Atcor).

on such clause.[491] Sometimes the courts do apply a strict construction of the clause. The rationale is because sometimes the clause is considered as an exclusion of liability clause and this requires a strict interpretation against the party relying on this clause to avoid liability.[492] Another important reason is because of the difficulty in drawing a line between Frustration and *force majeure*. This requires the impossibility of performance to be applied to a *force majeure* clause.[493]

The Canadian contract law is governed by the civil code in Quebec and the common law in the other parts of the country. There is a distinct notion of *force majeure* in the civil law, including in the Civil Code of Québec. While the French Civil Code refers to "*force majeure*", the English text refers to "superior force." Usually when the civil code makes a reference to "*force majeure*" it is in fact referring to the common law doctrine of frustration. The latter is not an expressed provision of a contract. Although the two doctrines are not the same the courts have considered them as equivalent. This approach has caused a lot of problems when parties from Quebec contract with parties from other jurisdictions in Canada. There are confusions and uncertainties in the application of the contract law in this area which need to attention.

[491]GH Treitel, Frustration and Force Majeure, at 478, 2d ed, ch 7 (London: Sweet & Maxwell, 2004).

[492]See *Fishery Products International Ltd v Midland Transport Ltd* (1992), 100 Nfld & PEIR 222 at para 1.

[493]See *Atcor*, supra n 490 at para 11.

Civil Law v Common law

Both Louisiana and Quebec have civil law jurisdiction and are surrounded by common law jurisdictions. They present a natural middle ground because they are civil law in the middle of common law. As such, they influence and are influenced by the common law jurisdictions that surround them.

In a pure civil law jurisdiction, the court would consult the code as the primary authority and apply the general principle to the case without relying on the precedent. However, in both Louisiana and Quebec the decisions are made by the use of case law and develop opinions which are very similar to those seen in common law jurisdictions. If a code is applicable to the case, the relevant provision would be construed with reference to things outside the code. In Louisiana and Quebec the courts pay more attention on their respective codes and then develop principles thereon more than they interpret.

The main difference is that under the common law method the courts deduce generally applicable principles from specific cases and facts whereas under the civil law method it starts with the general principles of the code and see whether they apply to the particular case.

Louisiana

The most general article of the Louisiana Civil code that deal with specific performance is Article 1758 which states that "an obligation may give the obligee the right to . . . enforce the performance that the obligor is bound to render. . . ."

The open phrasing of this article is similar to the specific performance provisions of CISG.

Both Articles 2485 and 2549 deal with specific performance in the sales context.[494] Article 2485 states that "when the seller fails to deliver or to make timely delivery of the thing sold, the buyer may demand specific performance of the obligation of the seller to deliver or it may seek dissolution of the sale." [495]

This article stressed on the application of specific performance by an expressed provision stating that the remedies under the article 2485 are subject to the rule of obligation including Article 1986.[496]

On the other hand Article 2549 does not mention anything about specific performance, but states that the obligations of the buyer are to pay the price and take delivery of the thing. Contrary to Article 2485 it does not make any reference to the general provisions on obligations. It seems, that the only provisions of the code that grant the seller specific performance are Articles 1758 and 1986. In *Staple Cotton v. Pickett,* the Louisiana Supreme Court affirmed the granting of specific performance for the buyer of cotton under an output contract.[497] Here the specific performance was allowed although cotton was an easily obtainable commodity and the contract contained a disputed liquidated damages clause.[498] In *Lombardo v. Deshotel* the Louisiana Supreme Court recently reaffirmed specific performance as a substantive right under Article 1986.[499]

---

[494]*See* La. Civ. Code Ann. arts. 2485, 2549 (West 1995). Both articles are grouped under Title VII, "Of Sales," in Book III.

[495]ibid

[496]Article 1986 applies to the buyer's right of specific performance in the sale of goods through Article 2485.

[497]Staple Cotton Corporate Ass'n v. Pickett, 326 So. 2d 337 (La. 1976).

[498]The court determined that the liquidated damages clause was inapplicable on its own terms.

[499]Lombardo v. Deshotel, 647 So. 2d 1086, 1090 (La. 1994).

The Lombardo case concerned the sale of real property, but the court's arguments on specific performance was confined to Article 1986 which applies to the buyer's right of specific performance in the sale of goods through Article 2485.

Force Majeure Clause versus Frustration

The *force majeure* clause has been developed partly to overcome some limitations of the frustration doctrine under the common law. It is not to be taken as to overcome the doctrine.

When evaluating the effect of a *force majeure* clause on the doctrine of frustration it becomes clear as to why parties to a contract should contemplate the inclusion of a *force majeure* clause that would not be a frustrating event. This can be seen in the case of MA Hanna Co. v Sydney Steel.[500] In that case Sydney Steel was a buyer of iron ore pellets under a long-term supply contract with Hanna (MA). Sydney Steel stated that the crash in the steel market coupled with the response of Sydney Steel to the crash was a *force majeure*. Its response was that Sydney Steel changed its steel making technology in order to reduce its demand for pellet.[501] Sydney Steel also raised the issue of frustration.

The court in this case rejected the frustration argument raised by Sydney Steel stating that while performance of the contract by Sydney Steel has become more onerous the changed in the market did not render the performance of the contract

[500]See e.g. Hanna (MA) Co v Sydney Steel Corp (1995), 136 NSR (2d) 241 at para 1 (SC) [MA Hanna] for an example of a low impact threshold: “If, by reason of any impediment of whatsoever nature, including but not by way of limitation, action of military, naval or civil authorities.”

[501]ibid at paras 26-28.

impossible. So, frustration was not available.[502] The court further held that the *force majeure* clause which was broadly and generally drafted was applicable to the changed circumstances of the steel industry.[503] In other cases, the court has rejected the *force majeure* clause and has found frustration. In British Columbia v Cressey the court allowed frustration and rejected *force majeure*.[504] In that case Cressey entered into an agreement to purchase lands from the Province of British Columbia. The objective of Cressey was to subdivide the lands and sell them by smaller plots.[505] Cressey proposed that the agreement be made subject to a condition of rezoning, but British Columbia rejected the proposal and the agreement was signed without the condition on rezoning. Cressey paid its deposit but later asked for an extension on the basis that rezoning had not yet been obtained. British Columbia refused and sued Cressey for breach of contract. During trial Cressey defended and argued both frustration and *force majeure*.[506] The Court refused to allow *force majeure*.[507] But instead found that the contract has been frustrated arguably incorrect as the seller never accepted the condition. However, in doing so the court considered purpose of the contract to be development of property for sale to the public as residential property.[508]

Although there is no rule stipulating that a force majeure clause cannot be frustrated, it seems that in some cases a force majeure clause can act to prevent

---

[502] ibid at paras 69-70.

[503] ibid at para 74.

[504] British Columbia (Minister of Crown Lands) v Cressey Development Corp (1992), 66 BCLR (2d) 146 (SC). [British Columbia]

[505] ibid at paras 2-4.

[506] ibid at para 5.

[507] ibid at para 37.

[508] British Columbia, supra note 504 at para 48

the application of the doctrine of frustration. The Court concluded that the Supreme Court of Canada's decision in Atlantic Paper required that the *force majeure* event had to render performance "impossible".[509] However, subsequent to Atlantic Paper case law has not always required "impossibility" as a pre-requisite for a force majeure, and has determined the issue based on the language of the particular force majeure clause at issue.

In, Fishman v Wilderness a fire caused a delay in construction of a condominium unit that was the subject of a purchase and sale agreement.[510] The seller raised the issue of the *force majeure* clause, which provided for late delivery of the unit in the event of fire.[511] The buyer argued that the contract was frustrated and that the *force majeure* clause did not cover frustration.[512] The Alberta Court of Appeal rejected the argument and stated that the force majeure clause anticipated late delivery in circumstances of fire. So, the *force majeure* clause provided for delayed performance by the vendor. Therefore, as it was not impossible to perform the obligation the contract was therefore not frustrated.[513]

[509]Atlantic Paper, Supra note 477 at 583

[510]Fishman v Wilderness Ridge at Stewart Creek Inc 2010 ABCA 345, [2011] AWLD 163 at paras 1-2.

[511]ibid at para 2.

[512]ibid at para 3.

[513]ibid at para 5.

Force majeure Clauses and the CISG

The notion of force majeure under CISG

The Article 7.1.7 covers the principle adopted by the doctrines of frustration and impossibility of performance in common law systems and by doctrines such as *force majeure* in civil law systems. However, there is no similarity between any of those systems. The term *force majeure* was chosen because it is widely known in international trade practice, and this confirmed by its presence in many international contracts in the form of a *force majeure* clause.[514] *Force majeure* and hardships cases are mainly relevant to long term contracts. The same facts may be present under both cases.[515] In hardship cases the principles encourage a negotiation between the parties to end their relationship rather than dissolving it.[516] Likewise, in the case of *force majeure*, parties can anticipate situation, in light of the nature of the relationship and they would have an interest to continue rather than terminating their business relationship.

Hence, the parties would wish to provide in their contract for the continuation of the business relationship even in the case of *force majeure*. The termination will

[514]ARTICLE 7.1.7--Force majeure—(a) Non-performance by a party is excused if that party proves that the non-performance was due to an impediment beyond its control and that it could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences. (b) When the impediment is only temporary, the excuse shall have effect for such period as is reasonable having regard to the effect of the impediment on the performance of the contract. (c) The party who fails to perform must give notice to the other party of the impediment and its effect on its ability to perform. If the notice is not received by the other party within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, it is liable for damages resulting from such non-receipt. (d) Nothing in this Article prevents a party from exercising a right to terminate the contract or to withhold performance or request interest on money due.

[515]See Article 6.2.2.

[516]See Article 6.2.3.

only be considered as a last resort. In general, parties include *force majeure* clauses in their CISG contracts. This clause either supplements article 79 or "limit or supplant the article 79 default rule".[517] So, if a party's performance fails to fall within the ambit of the *force majeure* clause, it can still be excused pursuant to article 79.

The problems of specific performance arising under CISG are quite difficult to resolve. The restriction that Article 28 imposes in order to arrive at a uniform and international interpretation of CISG is rigid. Although Article 28 resulted from a compromise between the common law and civil law, it should not be allowed to disturb the uniform and international interpretation of the convention.

The Need for a Force Majeure Clause

The force majeure clauses can protect parties to a contract in many ways. For example, article 79 does not expressly state whether an impediment excuses performance if part performance is still possible. So, it is possible to include in a *force majeure* clause that a party must perform to the extent that is possible. When the parties to a contract have already clarified the issue of partial performance while concluding the contract they can later avoid costly litigation in case there is an event preventing performance. In order to overcome the issue of foreseeability of a future impediment in the performance of their duties under a contract, parties may include a *force majeure* clause in the contract. To some extent, it can be said that every impediment is foreseeable.[518] Since a *force majeure* clause in a CISG

[517]Joseph Lookofsky, Understanding the CISG in the USA: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods 77 (1995) at 84, 85 (stating that article 79 is a "gap-filling rule" and that parties can draft a "more lenient *force majeure* clause").

[518] ibid… (stating that "nearly all potential impediments to performance - even wars, fires and embargoes (let alone late trains and defective goods) - are 'foreseeable' to some degree").

contract may restrict or supplant the applicability of article 79, parties to a contract can negotiate *force majeure* excuses without regard to foreseeability.[519] So, even though when a party could not claim any excuse under article 79 because the restriction was foreseeable the party could still be excused by an event laid down in the *force majeure* clause.

Force majeure under FIDIC

The turnkey contract shows that the allocation of risk is made to the contractor. Moreover, clause 19 of the FIDIC Silver book which is a *force majeure* clause creates an opportunity for the contractor to revert that risk to the owner. Such as the time and cost impacts of an event of *force majeure* will be allocated to the owner.[520] All the FIDIC forms receive similar treatment in relation to the risk of a *force majeure* occurrence.

As opposed to the FIDIC standard most other standard forms of contract allocate the time risk of a *force majeure* event to the owner and leave the cost neutral such as in the UK's Engineering and Construction Contract (also known as the NEC).[521]

The FIDIC Silver Book gives a wide definition of *force majeure*. Under clause 19.1 *force majeure* is considered as 'an exceptional event or circumstance'. So, in order

---

[519] ibid

[520] The treatment of force majeure is slightly different under FIDIC short form and dredging contracts, in that these erroneously fail to provide that a force majeure event releases the affected party from its obligations under the contract. For further details, see the author's paper presented to the FIDIC International Users Conference (London, 11 th-12th December 2006).
A later version of this paper is available at
http://www.mayerbrown.com/london/practice/article.asp?pnid=1544&id=3288&nid=1562.

[521] Institution of Civil Engineers, Engineering and Construction Contract/The New Engineering Contract (NEC3), London, ICE/Thomas Telford (2005); obtainable via www.neccontract.com

to show that there has been a *force majeure* it suffices to demonstrate that the event is beyond the reasonable control of the party and that it could not have been reasonably avoided or provided for before entering the contract. Moreover, the event should not have occurred as a result of a fault from the other party.

9.3 Act of God

Force majeure events are popularly referred to in shorthand as "Acts of God". But the term encompasses much more than natural disasters. Act of God means an event which occurs independently of human action (*Actus dei nemini facit injuriam*) such, as storm, earthquake, and volcanic eruptions, which no human foresight would reasonably be expected to anticipate. For example, damage from a cyclone or a lightning strike would be considered an act of God. *Vis* is a Latin word meaning any kind of force or disturbance to person and *vis major* means an Act of God. Although, human can predict some act of nature such as an hurricane they cannot predict the force of nature and also they do not have the ability to guard these forces. The doctrine of Act of God states that a person shall not be held liable for damages resulting directly from that *vis major*. Act of God was first defined by Lord Westbury in *Tennet v. Earl* of Glosgow, and later it was recognised by Blackburn J. in *Rylands v. Fletcher*.[522] The Black's Law Dictionary defines an Act of God as "An act occasioned exclusively by violence of nature without the interference of any human agency". "It is a natural necessity proceeding from physical causes alone without the intervention of man. It is an accident which could not have been occasioned by human agency but proceeded from physical causes

[522] *Tennet v. Earl of Glosgow* (1864) 2 M HL 22 at 26-27, *Rylands v Fletcher* (1868) LR 3 HL 330

alone."[523] Moreover, a *vis major* is similarly defined as a superior and irresistible force. So, it can be said that it is an act which "is due solely to natural causes and without human intervention. Although there is no clear definition it can be said that it is such a direct, violent, sudden act of nature that no man could foresee and or prevent. The most important element of an "act of god" is the happening of an unforeseeable event. If harmful damages or losses were caused by a foreseeable accident that could have been prevented, the party who suffered the injury will have the right to compensation. However, when the damage is caused by an unforeseen and uncontrollable natural event the injured party will not be compensated because it could not have been prevented or avoided, even by a person exercising most due care and attention. So, it is important to distinguish cases where the damages are caused by an act of god that could be foreseen and cases where damages are caused by a force of nature which can be foreseen by man. An Act of God cannot be prevented by reasonable human foresight and care. But, other ordinary natural causes may be foreseen and avoided by human care. For example, it is normal for someone to foresee the possibility that rain water would leak through a defective roof. In such cases of foreseeable causes, failure to take the necessary precautions would constitute negligence, and the injured party would be entitled to damages. However, an Act of God, is so extraordinary that any reasonable care would not be capable of preventing the consequences. Therefore, in such cases the injured party has no right to damages. So, this distinction is important in order to classify an event as an act of God. Fire can be an act of god only when it is caused by lightning but cannot be considered act of

[523]Black law dictionary, free online 2nd edition

god if caused by other factors such as where there a short circuit in the electrical wiring.

While in *Matsoukis v Priestman*, Bailhache J said that a *force majeure* must be more extensive than an Act of God and included war and strike as *force majeure* events, in *Lebeaupin v Crispin* the courts held that war and strike too should be considered as *force majeure*. Moreover, Bailhache J said that he cannot accept that the words *force majeure* be interchangeable with 'vis major' or 'act of God'. So, there is a great contradiction between those explanations. It would be more sensible to say that an Act of God is a subset of a force majeure. That is an Act of God consists of an event that is beyond human control. Everybody knows that an Act of God exists (such as Cyclone, flood etc.) but no one exactly knows its forms, strength or when and how it will strike. In the case an Act of God event is differentiated from a *force majeure* then it warrants a clear definition in order to avoid confusion and creates more clarity and certainty in their interpretation.

9.4 Ejusdem generis rule

The term '*ejusdem generis'* means words of a similar class. The rule is that where particular words have a common characteristic, then any general words that follow should be construed as referring to that class. The *Ejusdem Generis* rule is applied to resolve the problem of giving meaning to groups of words where one of the words is unclear. This principle is limited in its application to general words following specific words from the same genus. If the specific words do not belong to a distinct genus, this rule is inapplicable. The principle of *ejusdem generis* is not universally applicable. If the legislation rules out the applicability of this rule, it has no role in the interpretation of general words. The basis of the principle of *ejusdem*

generis is that if the legislature had the intention to interpret the general words in an unrestricted sense, it would not have had included the use particular words at all. In order to apply this principle of interpretation to a force Majeure clause having a list of unforeseen events followed by general words it is extremely important to ensure that the events are from the same genus. So, a clear categorisation of the force majeure events is critical.

From the previous chapters we have seen that the force majeure clause contemplates events that beyond the control of contracting parties. Those clauses are of two types: open and close ended. Close-ended clauses are those that specify the exact events that constitute *force majeure*. As regard to the open-ended clause the parties simply give a broad description of the events or list of events constituting the *force majeure* situations and add "*any other such events that are beyond the control of parties*". The doctrine of frustration in common law has not always been clear and is very often unpredictable. The *force majeure* clause has been developed in order to counter the limitation of the frustration doctrine. The parties to a contract have the liberty to include a list of supervening events that they would wish to include in the *force majeure* clause in order to protect them in case any of these events would impede their respective performance. They are also free to include events that would not usually be qualified as a frustrating event under common law. This method of drafting the *force majeure* clause has created a lot of problem and uncertainty when interpreting the clauses. At first, the courts were very reluctant to apply the *ejusdem generis* rule to clauses of contracts. In *Chandris v Moller* Devlin J stated that "the *ejusdem generis* rule means that it is implied in the language that the parties have used words of restriction which are not there. It cannot be right to

approach a document with the presumption that there should be such an implication."[524] The *ejusdem generis* rule of application is a rule of statutory interpretation stating that where there is a general word (or words) that follow some specific words in a list, that general word (or words) must be construed as referring only to the types of things identified by the specific words. The *ejusdem generis* rule of interpretation will not be applicable to a force majeure clause containing a list of words which are not from the same type of things. That is from a different genus.[525] An example of such a clause could include events such as war, hostilities, invasion, act of foreign enemies, requisition, embargo or any other hostile group. In this case, although strike will fall under a hostile group the rule will not be applicable as all other words implies strangers to the parties but strike by the employees are people known to the parties. Defining the *force majeure* events is not sufficient and it is also important to define the desired consequences of those events.

In regard to a *force majeure* clause, Staughton J cited Devlin J's statement in *Navrom v Callitsis* Ship.[526] Therefore, it would seem that the proper interpretation of a clause would be to consider the terms or list of events laid out before the general words that have been used and determine their effect on the clause as a whole, without resorting to the specific *ejusdem generis* rule. However, when there are lists of events consisting of two or more classes of things, such as cyclone, flood, strike and acts of terrorist and any other similar events; it will be difficult if

[524]See Mr Justice Devlin in *Chandris v Isbrandtsen-Moller Co Inc* (1949) 83 Ll. L. Rep. 385 at p.392.

[525]See *Reardon Smith Line Ltd v. Ministry of Agriculture* [1961] 2 All E.R. 577 at 589; [1959] 3 All E R 434 at 454.

[526]*Navrom v Callitsis Ship. Management SA* [1987] 2 Lloyd's Rep 276.

not impossible to know which genus to follow. Therefore the force majeure clause in this case will not be applicable. So, it is extremely important to classify the *force majeure* events correctly so as the *ejusdem generis* rule can be applicable. By adopting a more general approach to contractual interpretation of the *force majeure* clause, rather than the *ejusdem generis* rule, all the terms and circumstances of the case can be taken into account. This may result in a fairer result for both parties, rather than a strict application of the principle. However, in the practical term it shall be more difficult for the parties in a contract to list all the possibilities of *force majeure* events when concluding their contract. So, it would be more appropriate to redefine the doctrine of force majeure and keep the *ejusdem generis* rule for the interpretation.

Chapter 10

Conclusion and Recommendation

10.1 Conclusion

The *force majeure* doctrine is mainly ascribed to the contract: it is up to the parties to define what it means in their contract.[527] Usually a *force majeure* clause is included in a contract to address events beyond the reasonable control of the parties, including "Acts of God" such as fire, floods, earthquakes or tsunamis. Increasingly however *force majeure* clauses have been used to include other events such as war, strike or act of terrorists. The term Act of God was first used as a legal term in the mid-19th century when discussing an act outside human control. Peter Simmonds' Dictionary of Trade Products, 1858, used the term: "*force-majeure,* a French commercial term for unavoidable accidents from superior force in the transport of goods, the Act of God, etc." Moreover, Lawyers have been consistently interchanging the terms *force majeure* with Act of God. Those inversions of the terms have created a lot of confusions and uncertainties in the interpretation of terms of contracts. So, in order to ensure clarity and certainty in the legal interpretation it is absolutely essential to clearly define which types of circumstances will be covered by the *force majeure* clause.

From the previous chapters we have seen the *force majeure* doctrine being referred to Act of God. The definition of Act of God clearly shows that it includes only act of nature and not events occurred through acts of human interactions. At

[527]See *Tandrin Aviation Holdings Ltd v Aero Toy Store Llc & Anor* [2010] EWHC 40 (Comm), at [43].

the same time a *force majeure* clause is said to include natural occurring events together with act of war, terrorism act or labour strikes. So, this is creating a lot of confusions when drafting a *force majeure* clause in a contract. This raise several issues when the courts have to interpret such clauses. Furthermore, when interpreting the *force majeure* defence clause some courts have applied the doctrine of foreseeability even in cases where there were an Act of God[528] which is supposed to be an unforeseen event. It would be more sensible to consider an Act of God as an unforeseen event. In General Construction[529]it was held that the company should have foreseen the occurrence of cyclone in Mauritius because it is an area where cyclone is common. However, nobody can accurately and with certainty predict the effect of a cyclone which is an act of God. Moreover, in some cases the courts have considered the foreseeability of the unforeseen events while in others the foreseeability of the consequences of the events.

As discussed above, the *force majeure* doctrine covers events which are inevitable and unforeseeable. Following the attack on the World Trade Centre on September 11, 2001 terrorism has become a very real threat and may unfortunately no longer be considered as an unforeseen possibility. If a threat is real, then it cannot be said to be unforeseeable. So, a terrorist act is a real threat, so it is foreseeable and cannot be considered as an Act of God. Therefore, in order to obtain a fair application of the *force majeure* clause it is extremely important to review the concept. It warrants a clear distinction between an Act of God and a *force majeure*.

[528]General *General Construction Co Ltd v Chue Wing & Co Ltd* [2013] UKPC 30.

[529]ibid

10.2 Recommendations:

I submit the following recommendations for any future application in the interpretation of a *force majeure* clause or for any further research on the topic.

- that the term Act of God no longer be considered as equivalent to the term *force majeure.*
- that the doctrine *force majeure* covers all events belonging to two distinct categories namely; the Act of God and another category of events other than Act of God.
- that the second category covers only events where there has been the involvement of men at some point. Here I would coin a new term “Act of fiend” to categorise those events falling under this class.
- Therefore a *force majeure* event would either fall within an Act of God or an Act of Fiend.
- that all naturally occurring events without human intervention at all shall be known as Act of God.

  So, where the Act of God is concerned it would only consist natural disasters like Hurricanes, Floods, Earthquakes, or Tsunami. In this way, it will be easier to apply the *ejusdem generis* rule of interpretation and more accurate results will be obtained.
- that the foreseeability factor used for the interpretation of an Act of God be done only with regards to the consequences of the events and not the event itself as it was in the case of General Construction. This is because impediment always arise from the consequences of the events.
- that all other events be covered under the heading “Act of Fiend”. This would include all events other than those naturally occurring, that is where there has been

human involvement at one point. Again, here too the ejusdem generis rule shall be applicable.

- that in the interpretation of the Act of Fiend the foreseeability factor be used with regards to the events and the consequences of the events.

10.3 Proposed TEST

In order to apply this principle to determine a *force majeure* event I submit that "A Force Majeure Event Test" be carried out.

A force Majeure event must be an event which is unforeseeable and uncontrollable by man.

The "Force Majeure Event Test" shall be a two tiers test.

The first tier is to determine in which class the intervening event falls, whether the Act of God or an Act of Fiend.

The second tier will depend on the outcome of the first's tier test.

When the first tier falls under an Act of God, then the foreseeability concept shall be applied to determine the extent of the damage caused that is, whether the unforeseen event has caused a substantial detriment to the injured party. Here, there shall be no foreseeability test on the possible occurrence of the event as an Act of God is unforeseen but the consequences can be foreseen up to a certain limit. If the detriment is fundamental and beyond human expectation, then the defence may succeed.

Where the first tier falls under an Act of Fiend, then the foreseeability concept be applied shall be in relation to both the occurrence of the event and extent of the damages; whether the damage is substantial or not. However, if at the first instance the defendant succeeds at the foreseeability test, that it could not have

foreseen the event occurring, then there would be no need to further examined the extent of damage. The defence is upheld.

However, if the defendant fails the foreseeability test and it is found that with due consideration it could have foreseen the events occurring then a further evaluation should be carried out to examine the extent of the damage. In the event the extent of the damage too was foreseeable then the defence of force majeure shall fail. The foreseeability principle be applied using the standard objective test.

The advantage of using this principle of interpretation of a *force majeure* clause is that it is simple and the outcome will be more consistent. Furthermore, the *ejusdem generis* rule can be applied easily as drafters will be having a proper guideline to categorise the group of words and the general words in the clause.

Bibliography

Achilles W A, 25 Journal of Law and Commerce Spring 2006 at 69-70.

Association of International Petroleum Negotiators (AIPN), AIPN Model Form Gas Sales Agreement, *Force Majeure* Event 2006, art 1.1.

Aubrey M, *Frustration Reconsidered-Some Comparative Aspects*, International and comparative law quarterly 12,1963,1165.

Babiak A, Defining "Fundamental Breach" under the United Nations Convention on Contracts for the International Sale of Goods, 6 Temple Int'l & Comp. L.J. 113, 127, 133 1992.

Backhaus R., *The Limits of the Duty to Perform in the Principles of European Contract Law*, 8.1 EJCL (Electronic Journal of Comparative Law) 2004, p 14, www.ejcl.org/81/abs81-2.html.

Bailey J, *What Lies beneath: Site Conditions and Contract Risk*, SCL paper 13 7, May 2007.

Beale, H G, Bishop, W D, Furmston, M P, *Contract, Cases and Materials*. Oxford University Press, Oxford, 2008. p. 493.

Beale H, Hartkamp A, Kötz H and Tallon D, *Contract Law: Cases, Materials and text*, Hart Publishing, 2002, p. 629.

BGH, 31 October 2001, in Internationales Handelsrecht, 2002, p. 14.

Black law dictionary, free online 2nd edition.

Brunner C, *Force majeure and Hardship under General contract principles* pp 479ff Kluwer Law International Netherland 2009.

Bürgerliches Gesetzbuch (BGH), Germany), 3 April 1996 in UNILEX.

Burrows A, *A Casebook on Contrac*t. Hart Publishing, Oxford and Portland, Oregon, 2013 p 707.

Burrows A, *Principles of the English Law of Obligations* Oxford: Oxford University Press 2015, p 125.

Calais-Auloy J, *Le devoir de se comporter de bonne foi dans les contrats de consummation*, in General clauses Standards in European Contract Law Comparative Law, EC Law and Contract Law Codification, éd. S. Grundmann et D Mazeaud, Kluwer Law International, 2005, p. 192-193.

Capitant H, Terré F, Lequette Y, *Les grands arrêts de la jurisprudence civile: Introduction, personnes, famille, biens, régimes matrimoniaux, successions*, Dalloz, 2000.

Cartwright J, *Un regard anglais sur les forces et faiblesses du droit français des contrats* RDC 2015, 691.

Chantepie G, Latina M, *La réforme du droit des obligations, Commentaire théorique et pratique dans l'ordre du Code civil*, Dalloz, Paris 2016 139. 546-54.

Chitty on Contracts, General Principles 25th ed 1982 para. 1521.

Chitty, op. cit., paras 1522-1523.

Chitty, Op cit., para. 1525-1526.

Chitty, op cit., para. 1531.

Chitty, op. cit., paras. 1540, 1543-1545

Chitty, op. cit., para. 1561.

Chitty, op. cit., paras 1570-1573.

Christie 12 and Hutchison *et al.* 12–13, 21.

Colas E, *La notion d"équité dans l"interprétation des contrats*, 1980-81 page 394.

Cooper WE *The South African Law of Landlord and Tenant* (1973) 2nd edition 181

Coote B, The Rise and Fall of Fundamental Breach 40 A L J 336, 1967.

Corbett E, *FIDIC 4th: A Practical Legal Guide*, London, Sweet & Maxwell 1991.

Corte di Appello di Milano, 20 March 1998, in UNILEX.

Davies P S, Smith J C, *The Law of Contract* Oxford: Oxford University Press 2016, p 351.

Davis L R and Greig D W, *The Law of Contract*, op cit pp1297-1304.

Declercq PJM *Modern analysis of the legal effect of force majeure clauses in situations of commercial impracticability* 1996 Journal of Law and Commerce 214.

De Lamberterie, I , *The Effect of Changes in Circumstances on Long-Term Contracts*: French Report 1989 p 228.

De Lamberterie I, *The Effect of Changes in Circumstances* – French Report, Harris and Tallon D, eds, Contract Law Today Anglo-French Comparisons, Oxford, 1989.

De Lamberterie I, Rouhette G, Tallon D, *Les principes du droit européen du contrat*, Paris, *La documentation française*, 1997, p. 19.

Demogue R, *Traité des obligations en general*, Librairie Arthur Rousseau: Paris1923.

Drake C D, *Fundamentalism in Contract* 30 M L R 531,1967.

Du Bois F *Wille's Principles of South African Law* (2007) 9th edition 850

E. A. Farnsworth Contracts § 12.14 1982.

Enderlein, Maskow, International Sales Law. United Nations Convention on Contracts for the International Sale of Goods-Convention on the Limitation Period in the International Sale of Goods. Commentary, New York/ London/Rome, 1992, p116.

Eorsi G, *Problems of Unifying Law on the Formation of Contracts for the International Sale of Goods*, Am. J. Int. Law, 1979, vol. 27, p. 311, esp. p. 313.

Farnsworth § 17, at 21, Contracts 874-75 1982.

Fauvarque-Cosson, *Compagnie des tramways de Cherbourg* CE 9 Dec. 1932, D. 1933.3.17, 2004.

Fauvarque-Cosson B, *Le changement de circonstances,* Revue des Contrats 1, 67 2004.

Flechtner, *Remedies Under the New International Sales Convention*: The Perspective from Article 2 of the U.C.C., in J. L. & Com., 1988, p. 53.

Flour J, Aubert J L, Savaux É, *Les obligations. Tome* 1: L'acte juridique, Dalloz: Paris 2002 Fouchard et al *Traité de l"arbitrage commercial international, Litec* 1996 n°1470.

Freeman M D A, *Lloyd's Introduction to Jurisprudence*, London: Sweet & Maxwell, 7th edn 2001, p 558.

Fridman G H L, *The Law of Contract in Canada*, 5th ed. Toronto, Thomson/Carswell, 2006 at 633.

Friedman Milton, "Essays in Positive Economics: The Methodology of Positive Economics," University of Chicago Press, 1966, pp. 3-43.

Fuller L., The Morality of Law 9-32 1964.

Gareth H J, Schlechtriem P, 1999 - *Breach of contract* - para. 216 (p. 135) J C B Mohr (Paul Siebeck)

Ghestin J, *Le prix dans les contrats de longue durée*. LGDJ: Paris 1990.

Ghestin J, Jamin C, Billiau M, *Traité de Droit Civil. Les Obligations. Les effets du contrat*. LGDJ: Paris 2001.

Ghestin J, *Observations sur le projet de réforme du droit des contrats*, Petites affiches 2009, 31, 5.

Ginnow AW, Nikolic M *Corpus Juris Secundum*, Vol 1A St Paul, Minn: West Publishing Co 1985:757.

Goldman B., *La lex mercatoria dans les contrats internationaux: réalités et perspectives*, JDI, 1979, 475.

Goode R, *Commercial Law in the Next Millennium* (London: Sweet & Maxwell 1998), p 37.

Gordley J, Von Mehren A T, *An introduction to the comparative study of private law: readings, cases, materials*, Cambridge University Press 2006.

Graffi L, *Divergences in the Interpretation of the CISG: The Concept of "Fundamental Breach," in the 1980 uniform sales law*, old issues revisited in the light of recent experiences 305, 311 Franco Ferrari ed, 2003.

Gregorio D M, *Impossible Performance or Excused Performance? Common Mistake and Frustration after Great Peace Shipping* 2005 17 KCLJ 69 at 78.

Greig and Davis, op. cit., pp. 1305-1307.

Greig and Davis, op. cit., pp. 1331-1336.

Greig and Davis, op. cit., pp. 1307-1309.

Greig and Davis, op. cit., pp. 1336-1347.

Guest A G, Chitty on Contracts London: Sweet & Maxwell, 27th edn 1994, para. 23-007.

Hall C G, *An unsearchable providence*: the January 1996, Vol. 86, No. 1 lawyer's concept of act of God. Oxford J Leg Stud. 1993; 13:227-248.

Halsbury's Laws of England 4th ed. Vol 9. London, England: Butterworths; 1974:323- 324.

Harris D, Tallon D, *Contract Law Today: Anglo-French Comparisons*. Oxford: Clarendon Press, 1989, p. 228–229.

Harris and Tallon D, *Contract Law Today, Anglo-French Comparisons* eds Oxford, 1989.

Heiss H, *'Europäisches Vertragsrecht: in statu nascendi*, 36 *Zeitschrift für Rechtsvergleichung (ZfRVgl)* 54, 1995.

Hellner: The Limits of Contractual Damages… op. cit. 47.

Henchie N, Loots Phil, *Worlds Apart: EPC and EPCM contracts: Risk Issues and Allocation*, ICLR July 2007.

Hetsch P, *L"émergence des valeurs morales dans la jurisprudence de la* CJCE, RTDE, 1982, esp. p. 547.

Heuzé, La vente internationale des merchandises. Droit uniforme, Paris, 1992, p. 295.

Holmes O W Jnr. *The Common Law*, Boston, Little Brown and Co, 1881 at 204.

Holmes O W, The Theory of Legal Interpretation, 12 Harv. L. Rev. 417 (1899).

Honnold, Uniform Law for International Sales, 3d. ed., The Hague, 1999, p. 116.

Honnold J O, *Uniform Law for International Sales under the 1980 United Nations Convention* 362 2d ed 1991.

Hutchison A, *The Doctrine of Frustration: A Solution to the Problem of Changed Circumstances in South African Contract Law*, South African Law Journal 2010, p 84 at 87,88.

Hutchison A, at 414

Hutchison et al. 383–385.

Johns A, *An Unduly Complex Act, A Consideration of the Frustrated Contracts Act* 1978 N S W Article No 17, Australian Current Law 36075 October 1988.

Karlsruhe OLG, 25 June 1997, in UNILEX;

Karollus M, *Art. 25, in kommentar zum un-kaufrecht. übereinkommen der vereinten nationen über verträge über den internationalen warenkauf* (CISG) 260 Heinrich Honsell ed, 1997.

Keeton, Conditional Fault in the Law of Torts, 72 Harv. L. Rev. 401, 401-05 (1959).

Köbler R, *Die clausula rebus sic stantibus" als allgemeiner Rechtsgrundsatz Tübingen: Mohr 1991, M. Rummel, Die "clausula rebus sic stantibus,* Baden-Baden: Nomos 1991.

Kokorin I, *Force Majeure and Unforeseen Change of Circumstances*, The Case of Embargoes and Currency Fluctuations, Russian, German and French Approaches, 3 Russian Law Journal 2015, p 46 at 59 et seq.

Köln OLG, 21 May 1996, in UNILEX.

Krasnowiecki J Z, *Sale of Non-Existent Goods: A Problem in the Theory of Contracts*, 34 Notre Dame Law. 358, 358 1959.

Kritzer, Guide to Practical Applications of the United Nations Convention on Contracts for the International Sale of Goods, Deventer-Boston, 1989, p. 205.

Institution of Civil Engineers, Engineering and Construction Contract/The New Engineering Contract (NEC3), London, ICE/Thomas Telford (2005); obtainable via www.neccontract.com

Lando O, *L"avant-projet de réforme du droit des obligations et les Principes du droit européen du contrat: analyse de certaines différences* , RDC, jan. 2006, p167 et s. §11.

Le *contrat international*, Dalloz 2nd ed. 1999, p. 101 and 102.

Legrand Jr P, Judicial Revision of Contracts in French Law: A Case-Study. Tulane Law Review 62, 963 1987.

Legrand Jr P 1987 p 1040.

Levin & McDowell, *The Balance Theory of Contracts: Seeking Justice in Voluntary Obligations*, 29 Mc GILL L J 24 (1983).

Lewis R, *Contracts between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Practices in the Building Industry*, 9 J L Soc'y (Journal of Law & Society) 1982, p 153.

Loi 2015-177 du 16 fevrier 2015 relative a la modernisation et a la simplification du droit et des procedures dans les domaines de la justice et des affaires interieurs (1), J.O., feb. 17 2015, p. 2961, art. 8.

Lombardi R "*Force majeure* in European Union law" 1997 *International Trade & Business Law* 82-87

Lookofsky J, Understanding the CISG in the USA: A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods 77 (1995) at 84, 85

Lubbe, Murray F & Hathaway *Contract Cases, Materials & Commentary* (1988) 3rd edition 303

Mayer P., *Le principe de bonne foi devant les arbitres du commerce international* op. cit. p 654.

Mazeaud D, *Le nouvel ordre contractuel*, RDC, déc. 2003, p. 295, § 29.

Mazeaud D, *Renégocier ne rime pas avec réviser*, note sous Com., 3 oct. 2006. Recueil Dalloz de doctrine de jurisprudence et de législation: hebdomadaire, 2007.765-770.

Mazeaud D, *La revision du contrat. Rapport Français*. In: *Société de Législation comparée* (Ed) *Le Contrat: Journées Brésiliennes, Société de Législation comparée:* Paris 2008.

Mazeaud, D, *L'arrêt Canal "moins*, note sous Com. 29 juin 2010, Recueil Dalloz de doctrine de jurisprudence et de legislation: hebdomadaire, 2010, 2481-2485.

McCamus J D, *The Law of Contracts,* Toronto: Irwin Law, 2005 at 568.

McElroy R G, *Impossibility of Performance*, Glanville L Thomas, Cambridge University Press 1941 at 158.

McKendrick E, *Contract Law, Text, Cases and Materials*. Oxford University Press, Oxford 2011, p 257,

McKendrick, E.*Contract Law, Text, Cases and Materials*. Oxford University Press, Oxford, 2012. p. 402.

McKendrick, in *Chitty on Contracts*, para. 24-012.

McKendrick, Force Majeure and Frustration of Contract, 2nd ed. At p.59, p.193

McKillop C J R, *Commentary on Effect of Changed Circumstances,* AMPLA Yearbook 1984, 361 at 365-371.

Mestre J, *Article 1 :201 – Bonne foi, in Regards croisés sur les principes du droit européen du contrat et sur le droit français*, C. Prieto, Puam 2003, p. 116.

Nehf J P (ed) Corbin on *Contracts,* Newark, LexisNexis, 2001 Vol 14, § 74.1.

Newman L W, *Problems with Long Term Contracts: A Practical Viewpoint* [1986] AMPLA Yearbook 487 at 488- 490.

Niboyet J P, *La Révisión des Contrats* par le Juge, Rapport Général, in *Rapports Préparatoires à la Semaine Internationale de Droit, Societé de Législation Comparée*, Sirey, 1938.

Nottage L, *Changing Contract Lenses: Unexpected Supervening Events in English, New Zealand, U.S., Japanese, and International Sales Law and Practice*, Indiana Journal of Global Legal Studies Vol. 14: Iss 2, Article 9 2007.

Nottage L, Indiana Journal Global Legal Studies 2007, at 414.

Oberste Gerichtshof (OGH), Austria, 7 September 2000, in Internationales Handelsrecht 2001, p 42 in UNILEX.

Oceano Grupo, ECJ, C-240 à 244/98, 27 June 2000, , esp. consid. 21.

OLG München, 8 February 1995, in UNILEX.

OLG Hamburg, 28 February 1997, in UNILEX

Ordonnance *no 2016-131 du 10 février 2016 portant réforme du droit des contrats, du régime général et de la preuve des obligations, JORF no 0035 of 11 Février 2016*.

O"Sullivan J & Hilliard J, *The Law of Contract Oxford*: Oxford University Press, 7th ed 2016, p 341.

Passos Dos J R, *A Treatise on the Law of Stock-Brokers and Stock-Exchanges* 393-406 1882.

Peter Schlechtriem, Art 25 in Kommentar Zum Einheitlichen Un-Kaufrecht 307, 311, Peter Schlechtriem & Ingeborg Schwenzer eds, 4th ed 2004 at 310-311.

Philippe D M, *Changement de circonstances et bouleversement de l'économie contractuelle, Bruxelles*, E. Bruylant,1986.

Picod Y, *Les projets français sur la réforme du droit des obligations*, Indret 677 2009.

Prosser and Keeton on Torts § 92, at 665 5th ed 1984.

Rapport au Président de la République relatif à l'Ordonnance no 2016–131 du 10 février 2016 *portant réforme du droit des contrats, du régime général et de la preuve des obligations*, JORF no 0035 of 11 February 2016.

Ripert G, *Le droit privé français au milieu du XXe siècle études offertes, Paris Pichon & Durand-Auzias*, 1925.

René D, *Frustration of Contract in French Law*, 28 J Comp Leg Pts III - IV, 11, 3rd ser, 1946.

Roberts T, *Commercial impossibility and Frustration of Purpose*, *A Critical Analysis*, 16. CJLJ (Canadian Journal of Law and Jurisprudence) 2003, p 129 at 132.

Rochfeld in *Avant-Projet de Réforme du Droit des Obligations et du Droit de la Prescription* under the direction of P Catala, 22 Sept 2005 Paris, Documentation française, 2006.

Rochfeld J, *Résolution et exception d'inexécution Les concepts contractuels français à l'heure des Principes du droit européen des contrats,* P Rémy-Corlay and D Fenouillet eds*,* Dalloz Paris 2003 216.

Rome Convention 1980, *The Law Applicable to Contractual Obligations*, OJ C 27/98, 34, 1998.

Rowan S, *Remedies for Breach of Contract: A Comparative Analysis of the Protection of Performance* (OUP, Oxford 2012), 37-52.

Roy Granville McElroy and Glanville L Williams Impossibility of Performance: *A Treatise on the Law of Supervening Impossibility of Performance of Contract, Failure of Consideration, and Frustration*, Cambridge, Cambridge University Press, 1941 at 63.

Saarbrücken L G, 26 March 1996, in UNILEX.

Schlechtriem P, the UN Convention on the International Sale of Goods (CISG), Schlechtriem ed., Munich, 1998, pp. 179, 417.

Schlegel J H, *Of Nuts, and Ships, and Sealing Wax, Suez, and Frustrating Things – The Doctrine of Impossibility of Performance* (1968-1969) 23 Rutg L R 419 at 425.

Sealy L S, Hooley R J A Commercial Law: Text, Cases, and Materials Paperback – 11 Sep 2008.

Smits M, Calomme J & C, *The Reform of the French Law of Obligations: Les Jeux Sont Faits*, 23 Maastricht Journal of European and Comparative Law 6, 2016, pp. 1040-1050.

Telford T, Institution of Civil Engineers, ICE Conditions of Contract 7th ed (ICE7), Design and Construct version, London, ICE/ 2001.

Terré F, Simler P, Lequette I, Droit civil, *Les obligations* Dalloz 2002 pp. 434-440.

Thomas J A C, *Textbook of Roman Law*, Amsterdam, Netherlands North-Holland 1976.

Tobias L, *Introducing Imprevision into French Contract Law, a Paradigm Shift in Comparative perspective*, Stijns S. and S. Jansen eds, The French Contract Law Reform: a Source of Inspiration, Intersentia 2016, at pp. 111.

Trakman L E, *Frustrated Contracts and Legal Fictions*, Modern Law Review 1983, p 39.

Treitel G H, *Frustration and Force Majeure*, 2d ed ch 7 London: Sweet & Maxwell, 2004 at 478

Treitel G, *Frustration and Force Majeure*, 2d ed London Sweet & Maxwell, 2004 at 1-4 under the sub-heading No Theory of Impossibility.

United Nation Conference on Contracts for the International Sale of Goods, Final Act U N Doc A/CONF 97/18, April 10,1980.

Van der Merwe S Van Huyssteen LF Reinecke MF & Lubbe GF *Kontraktereg: Algemene beginsels* (2007) 3de uitgawe 57-577

Van Loock Sander, “The reform of the French law of obligation: how long will the Belgians remain Napoleon's most loyal subjects?,” in Stijns S., and S. Jansen (eds.), “The French contract law reform: a source of inspiration?,” Intersentia, 2016, at pp. 17.

Vogenauer S, An overview In: Cartwright J, Vogenauer S, Whittaker S. Eds, Reforming the French Law of Obligations, Comparative Reflections on the *Avant-Projet De Réforme Du Droit Des Obligations Et De La Prescription,* the Avant-Projet Catala, Hart Publishing: Oxford 2009.

Wehberg H, *Pacta Sunt Servanda, American Journal of International Law* 1959 p 775 at 786.

Weiskopf N R, *Frustration of Contractual Purpose – Doctrine or Myth*, St John’s Law Review 1996, at 239, 240.

Wicker G., *Force obligatoire et contenu du contrat*, in *Les concepts contractuels français à l"heure des principes du droit européen des contrats,* dir P Remy-Corlay, D Fenouillet, Dalloz, 2003, p 151 et s, spec. no 2 p 154.

Will M R, *Art 25, in the 1980 Vienna sales convention. commentary on the international sales law* 205, 209 Massimo C. Bianca & Michael J Bonell eds, 1987.

Will MR, Art. 25, in Commentary on the International Sales Law. The 1980 Vienna Sales Convention, Bianca, Bonell eds., Milan, 1987, p. 221, p216.

Will M R, *The 1980 Vienna Sales Convention*, Bianca, Bonell eds., Milan, 1987, p. 215.

Will M R, Art. 25, in the 1980 Vienna sales convention. commentary on the international sales law 205, 209, Massimo C Bianca & Michael J Bonell eds, 1987.

Yates D, *Drafting Force Majeure & Related Clauses* 1990-1991 3 Journal of Contract Law at 186.

Yates, op. cit. at 187.

Zealand, U S, Japanese, and International Sales Law and Practice, Indiana Journal of Global Legal Studies 2007, p 385 at 414.

Zimmermann R, *The Law of Obligations Roman Foundations of the Civilian Tradition*, Cape Town: Juta 1990, p 579.

Zimmermann, *Saggi, Conferenze e seminari* 48 (2002), 13 § 242 BGB § 313 BGB.

Zimmermann R & Whittaker S eds, *Good Faith in European Contract Law*, Cambridge 2000.

Zweigert K, Kötz H, *An introduction to comparative law*, Clarendon Press Oxford: Oxford 1998.