CHAPTER-I

INTRODUCTION
I. GENERAL

In a society where the exchange of goods and services is so central to its economic order as in a developing capitalist society based on free enterprise, a means of supporting the process of exchange, was needed. In this context the foundation of modern contract law were established. Its existence, is qualified significantly by the pre-commercial societies. Also the increased wealth and commerce of the country made a more convenient and highly developed system of contract law. But there was a time when contract was considered as a piece of private legislation so sacred and sacrosanct, that man was required to do obeisance from afar and not go near the sanctum sanctorum. It was considered to be a holy scripture and parties were not allowed to interfere with. Even the judges pleaded helplessness in the matter. Therefore primarily in premature times, the rule followed of Absolute Contract which admits no exception favour of the promisor who was liable for breach, notwithstanding the subsequent occurrence of any incident or any other contingency which prevented him from performing his contractual obligation undertaken in the contract. Thus for many years man was held to be strictly bound by his contract and was held liable to bear the consequences for his inability to fulfill the contractual obligation. It is worth mentioning here that the general rule that is recognized in the law of 'obligations' is the 'Doctrine of stability of contract' and the lawyers and judges have always respected it and taken into consideration. The general rule followed in commercial trade since times immemorial was 'Pacta Sunt Servanda' meaning – Agreements are to be respected. The philosophy behind the rule is that the party to an agreement is responsible for its non-execution even if the
cause of failure or non performance of the contractual obligation, occurred because of the unforeseen circumstances or some supervening event beyond the control of the parties. This philosophy is still in the heart of modern trade culture.

Also, there is no doubt that the theory of freedom of will and the rule of contract follows common intention of the contracting parties which requires mutual consent and this is also a constant binding force as a private law of parties. Inspite of this, it must not be assumed that the tenor of contract in any conditions would remain fix. Like in all human institutions, nothing is static so the change in commercial law is also inevitable.

Various compulsory and voluntary factors cause changes in the performance of the contract. Generally, in long term contracts, the duration of contract or the duration of performance is usually long and in such cases various factors cause changes in the performance of the contract in such a manner that the performance of the contractual obligations is rendered impossible. The term ‘impossible’ here refers to difficulty in performance or when the performance becomes more onerous or burdensome though not impossible in true sense. The question then arises is that what should be done in such cases? Because the general rule followed in commercial law is based on the maxim — ‘Pacta Sunt Sevanda’ which means that— Agreements are to be respected. The underlying principle of this rule is that the party to an agreement is responsible for its non-execution even if the cause of failure or non-performance of the contractual obligation and finally the breach of contract occurred because of some unexpected, unforeseen or supervening event.
The discussion leads to the questions that:

- In long term contracts if the circumstances at the time of conclusion of contract changes fundamentally in a manner that the performance of the contract becomes extremely difficult or more burdensome or more onerous then what should be done?

- Would it be correct to terminate the contract on the ground of subsequent impossibility in the performance of the contract or not?

According to the rules of frustration, the legal effect arising in such cases is only termination or cancellation of the contract. In such cases the doctrine of altered circumstance comes to rescue by keeping the contract alive by doing adjustment in the terms of the contract. This rule of altered or changed circumstances is giving a new dimension to the trade laws because on one hand it keeps the contract alive (even after frustration occurred) by making adjustment in the contract and on the other hand it also respects the general rule of trade laws ie ‘Pacta Sunt Servanda’ (Agreements are to be kept). It adheres to the principle of ‘Compensation of Unwanted Loss’ and is also in cohesion with the theory of Equity and Justice and the theory of Stability of Contract. Therefore we can say that it is truly an emerging dimension in the trade laws and is justified to be recognized independently.

In law, a party to the contract, undertaking the performance, also undertakes the risk that the performance of this undertaking may become more onerous than assumed or as a result of supervening events become impossible of performance, if the supervening change can be considered to be normal or near normal in the course of things BUT not, if there is a radical
change in the situation due to some unforeseen or unexpected events beyond the control of the parties. Here, what can be categorized as Normal, Near Normal or Abnormal is a million dollar question to be decided by taking an overall view of the circumstances of the contract. The rules of law relating to frustration can be said to be a mixture of legal principles and judicial discretions. However, judicial discretion does not permit the judges to do what they think just but they can exercise their discretion in deciding borderline cases. The vastness of rules relating to hardship or frustration at times creates difficulty in deciding cases because the legal effect results in only termination or cancellation. Therefore the rule of altered circumstances is a concept that would help to fill in the obvious gap and cure the incompleteness of the rules relating to frustration in trade laws.

With the time, the international economic and political relations between the countries have undergone a tremendous change. Also, with the increase in number of independent countries and global awakening the bilateral ties in the commercial relations between the countries have increased remarkably. Seeing such tremendous growth in the trade activities in the present scenario, a strong need is felt for the harmonization of trade laws. Because although, the mode of discharge of contract or, the contractual excuse clause do exist in different legal systems under different umbrellas and, it shares a common base still the international contracts suffers serious setback because there is a difference in their interpretations by different nations. Therefore harmonization of trade laws is required.

"Change is a rule of life". Change in commercial law is also inevitable because the motivating cause of this change is the ever changing structures or needs of commercial markets and business practices. The change in commercial law is continuous because it is driven by powerful
economic forces visible throughout the world. Hence, commercial law is required to adapt itself to deal with the rapidity of changes in the trade laws both at domestic and international level to maintain the stability in the contracts. To maintain this economic equilibrium of the contract the need is felt to pursue research on this new dimension of the trade laws ie “Rule of altered circumstances”. Therefore, the underlying principle of this rule is that if due to some unexpected, unforeseen, supervening or fortuitous event the economic equilibrium of the contract gets destabilized in such a way that the performance of the contractual obligation undertaken becomes more difficult, more onerous or burdensome though not impossible THEN the terms of the contract shall be modified to keep the contract alive. This philosophy realizes its roots in the theory of Equity and Justice and also upholds the very essence of contract ie ‘Performance’. It is a powerful concept as it respects the general rule of ‘Pacta Sunt Servanda’ as well as principle of ‘Compensation of Unwanted Loss’.

2. OBJECT AND SCOPE

The development of contract law into its modern conception is fundamentally based on the Latin principle of ‘Pacta Sunt Servanda’ (all pacts must be kept) dating back to when trade first began in earnest. Therefore, with this in mind, as law developed, interactions between the nations at commercial level also increased. This increase in trade activities has witnessed an uncertainty in International Contracts. Because generally, International Contracts are long term contracts in which the performance depends on various factors. In long term contracts sometimes, circumstances witness a change at the time of conclusion of the contractual obligation. This
change many a times destabilizes the economic equilibrium of the contract. Then the question arises is what should be done?

According to the rule of ‘Pacta Sunt Servanda’ - Agreements must be respected. Therefore, according to this rule, the performance should take place but if performance takes place, it imposes hardship on the party fulfilling the obligations. In such a case, what should be done? Because continuation of the performance, in such a case is, against the principle of Equity and Justice. To counter this contradiction and, to establish the contractual and economic equilibrium, the need is felt to discuss this concept and recognize it; because it aims at avoiding cancellation or termination of the contracts by making a provision of renegotiation in the terms of the contract, thereby making the performance effective. Hence, it upholds the general principle of contract that is ‘Performance’ and also respects the rule of ‘Pacta Sunt Servanda’ as well as principle of ‘Equity and Justice’. It also adheres to the concept of ‘Compensation of Unwanted Loss’. It is a powerful concept because it aims to provide the much needed stability in International Contracts by, maintaining the contractual as well as economic equilibrium of the contract.

3. METHODOLOGY

The growth of transnational commerce, has led to an increasing pressure for the transnational harmonization of trade laws. Development in contract law is the foundation of commerce in most developed nations. The boost in bilateral ties has led to an increase in commercial trading between the nations and the glimpses of the doctrine of altered conditions or the change in circumstances can be seen widely in long term contracts, also
because of the open welcome given by the countries in developing International trade. But its history can be traced back since ancient times where, we can catch its shadows from the legal concepts prevalent in Greece and Ancient Rome. The difficulty in practicality of the performance of the contractual obligation was felt in those times too, but the scope was very limited because International Trade was not so developed as it can be seen now-a-days. Since then, with the growing of trade activities, this rule has also undergone a tremendous evolution. The opinions of the legal scholars and interpretations of the eminent jurists carried so much weight along with them that, its application can be witnessed in legal systems of various countries. Therefore, the methodology followed for the research is, by analyzing the contractual excuse clause prevalent under different legal systems. It is an established fact that, the contractual excuse clause do exist in legal systems of the world under different names but, they share a common base. The research work aims to clarify the point that though they have a common basis yet International Contracts suffers a serious setback because the viewpoint taken to interpret them by different nations is different. Thus, drawing of a comparison between them, becomes extremely important for emphasizing the harmonization of trade laws.

Hence, the study has been divided into seven chapters.

4. SCHEME OF THE STUDY

The following scheme of chapterisation has been followed in this research work:

Chapter One, as a customary rule is of Introduction. It gives a brief insight of the research work. It explains the concept by giving its underlying principle and also lays out the methodology followed and it defines the scope of the work.
Chapter Two, is devoted to the Historical Development of the different dimension of performance of contract ie. Performance under changed circumstances. It traces its evolution and its development from the Ancient times through the medieval times and to the Modern era. It would explain its historical journey backed by, the opinions of legal experts as well.

Chapter Three, explains the performance of the contract vis a vis altered conditions or the changed circumstances. It defines the formative elements of the doctrine. It also discusses and lays out the legal nature and scope of the concept backed with the views of legal scholars.

Chapter Four analyses the contractual excuse theories prevalent under different legal systems. The stress would be laid on discussing fine points of law with respect to American, English and Indian legal system. Glimpses of French Legal System are also mentioned wherever the need has been felt since it is presumed to be a strong legal system with strict interpretation of the statutes.

Chapter Five of the thesis establishes the rule of altered conditions or the change in circumstances by explaining its essential elements or the basic requirement. It discusses the situations under which the rule can be invoked or applied justifiably wrt to the performance of contract.

Chapter Six discusses the legal implications or the legal effects arising out of the rule of altered conditions or the change in circumstances of the contract after its formation and before its conclusion. It lays the principle governing it and, discusses that firstly the mode of Adjustment should be made and only if the adjustment in terms is not possible only then, the termination of the contract should be done.
Chapter Seven is exclusively devoted to conclude the whole work by summing up in brief the discussion of above chapters and laying out the suggestions. In end the Bibliography is given.