CHAPTER-III

RULE OF CHANGE

IN

CIRCUMSTANCES:

A DIFFERENT

DIMENSION IN THE

PERFORMANCE OF

CONTRACT
1. INTRODUCTION

To understand the concept of validity of contract under change of circumstances we need to know the legal nature and basics of the rule of altered or changed conditions or circumstances it is of course natural that the argument in favour of explanation of the concept and definition is prior to any discussion. Therefore, here we would discuss the comprehensive definition of the formative elements of the doctrine, its legal nature, scope and the concept of the rule of altered conditions or the changed circumstances, as apprehended under the various legal systems of the world. The views and opinions of the famous legal scholars’ and the legal experts regarding the concept of altered circumstances would also be witnessed here.

Firstly, the explanation of the concept of change in circumstances is discussed. According to the Black’s Law Dictionary, the expression ‘Change’ refers to the ‘substitution of one thing for another’ and as per the Oxford Dictionary it may be referred to as, ‘making or becoming different’. Therefore a change means alteration of thing to another thing or from one condition to the other. As per the legal analysis, the change is explained as an alteration in the circumstances and conditions (at the time of formation of contract) which takes place after the conclusion of it,( in the state of circumstances) at the time of the conclusion of the contract.

‘Circumstances’ here refers to the condition which is concerned to an individual or to a particular event that affects them in performance of the obligation.. (Webster’s Dictionary). More fine definition is given under legal glossary i.e. ‘Circumstances are particulars which accompany an act’. They are the surroundings of the act. In other words, they are the state of affairs surrounding and affecting an agent. It is discussed with respect to subjective
and objective condition of the contract which is the main constituent element of the contract.

'Effect' - as a term refers to the consequences of the act and is categorized in three major categories i.e. Material, Economic and Physical for the discussion.

'Validity' is discussed with respect to the effect of change or alteration of the circumstances on contract. Black's Law dictionary has defined it as a legal sufficiency. It also means to confirm or affirm. In other words, it is a 'sanction' having legal strength or may be termed as an 'adequate' in law. Validity is broadly sensed as 'force executed with proper formalities'.

'Contract' in French law is an agreement between the parties and in English law it can be nearly said to be a promise in return for a good consideration. According to American Restatement of Contracts a contract is a promise or set of promises, for breach of which the law given a remedy or the performance of which the law recognizes as a duty.

English Judges and academicians state from time to time that English law of contract is about enforceable agreements. According to G.H. Trietel a contract is an agreement giving rise to obligations which are enforced or recognized by law. Whereas, the Contract law in India is greatly inspired by English Law. As per Indian contract Act, 1872, a contract is an agreement enforceable by law. The merging of English contract law in Indian legal system has also been traced in this discussion.

2. DEFINITIONS

Basics elements of the doctrine which needs to be defined are –

I. Change
II. Circumstances
III. Effect
IV. Validity
V. Contract

Discussion

I. Change

The movable things as well as the immovable things change in life and this rule of alteration is visible in every aspect of life.

"If we presume that the earth is not moving and everything is stationary in it and no movement is taking place, then we could say that the legal relations remain without change."1

Whereas, this is not the case because life continues and the earth moves and the events and accidents happen; with the result that the effects of the mentioned change is effective in everything which exists on this earth and the legal relations are also included in it. It should be said that fundamentally, this world is movable.

"In fact the change is a rule of nature and also in every physical and unnatural system."2

O, in other famous words:

"Change is a rule of life."3

The result is that the principle of life is continuation and the principle of continuation is life and movement. However the non-existence, which has no movement or continuation, consequently has no change. The conclusion derived with the said introduction and theoretic argument is that, the fundamental continuation, movement and changes are necessary conditions of life and this change mostly appears in social life and in the inter relations between humans. But here we will discuss the trading relations which are governed by contract laws. Therefore contractual relationship is among the
relations of human beings who come into being by the intention of the parties and is enforced by the law.  

Taking into consideration that the contractual relation is a social fact with a legal effect, that happens in life. Consequently, similar to life itself, the social life is also influenced by a change. Sometimes, that change is not effected upon contractual relation and sometimes it is fundamental and in addition to the various effects, also has legal effects. Then it becomes necessary that the term of change which has been mentioned in the heading of this chapter be described briefly form the point of view of the word and the legal basis in this section.

The term of change, has various literary meanings some of them are:-

❖ "An alteration
❖ A modification or addition
❖ Substitution of one thing for another”
❖ “Making or becoming different
❖ Alterations”
❖ “To alter or make different”
❖ “The words change means to make or become different.”

Therefore here, a change means alteration of a thing to another thing or from one condition to the other condition. But this is in general that is this definition includes every change and alterations of conditions whether it may be general or special, or fundamental or non-fundamental and it also includes every modification and additions.

However, as per legal angle involved here, the term “change” has a particular meaning i.e. “Change means an alteration in the circumstance and conditions, (at the time of the formation of contract) which takes place after
the conclusion of it is the state of the circumstances at the time of the conclusion of the contract (which does not remain in its premature form.)”

In other words, Circumstances at the time of the conclusion of the contract, like every other phenomenon, is included in “change” as a result of external causes in the state of the circumstances and the conditions at the time when the contract is made (i.e. the previous state) and a fundamental difference is found with the circumstances at the time of conclusion of contract or at the time of application of the said contract (i.e. the new state).

Sometimes the change takes place in the internal elements of the contract which arise at the time of the formation of the contract or cause the formation of it, such as:-

➢ Change in the personal conditions of the parties or their financial condition or
➢ Change in the condition of the contract or
➢ The subject of obligation changes or
➢ Change in the cause of obligation or
➢ Change in the contractual balance (the first condition) and sometimes change in the external conditions or in the conditions which exist at the time of the formation of the contract like: The exceptional conditions can be whether physical or unnatural. (the second condition)

In the first condition the change does not bring up because these elements are related to the text of the contract and they are united with the contract. In the second condition the change is enforceable because, it has arisen from the external condition which are not united with the contract. These conditions are worth a discussion here:
In the first condition the legislations in the different legal systems have provided clear provisions like – the change of the obligations does not cancel the contract and it remains in force as usual with the result that the contractual obligation of the party who cancels the contract remain as the same unless in case the personality of the obligation is taken into consideration or in case of the relation of obligations which arise by the parties to contract and it evident from the nature of the contract and sometimes the change of the obligator does not make any effect in the performance of the contract, as in the contracts which have financial aspects and the obligator has no effect in the performance of the contract. And the same order is applied when some change occurs in the personal or financial condition of the parties. The change in the condition of formation and the validity of the contract like the change in the capacity of the parties, subject of the contract, cause of the contract or contractual balance, which appears after the formation of the contract, does not effect in the primary formation and the performance of the contract unless with the aspect of argument of “force majeure” which causes the cancellation of the contract. Therefore out of “force majeure” the internal changes legally are not the cause for the adjustment or cancellation of the contract.

The second condition (i.e. the change in the condition of contract or the condition which exist at the time of formation of the contract.) There are some cases in which the legislations has laid down the solution of the problem like-

“Force Majeure”, which the subject of contract is cancelled at the time of performance of the contract and the cancellation of the contract, is laid down. Also in this case, there are cases where there is need to find out the solution because it has not been pointed out as the legal article by the
legislator in the district framework such as: - Unforeseeable events which causes disturbance of the contractual balance at the later stage after the formation of the contract and exactly at the time of performance of the contract. The change in view comes in the same category as the change due to economic crisis or recession of our age.

This crisis is sometimes as now is due to invalidity of money or limitless high price of the goods or the services which are the subject of the obligation. The unforeseeable event which do not make the performance of obligations impossible (force majeure) but, makes it extremely difficult and disturbs the desired balance between the two considerations. No doubt, in the long term contracts, the changes takes place in the value of obligation of the parties i.e.: goods and services of the subject of agreement becomes costly and scarce and the value of the money decreases as it happened when the recession hit the Indian industry in the recent past, the value of Indian Rupee also decreased. Such changes can be predicted in all sort of transactions and one of the incentive for contracts is that the person acquires a guarantee for the forfuitous events and sometimes can profit also by the change. But sometimes a considerable change takes place in the circumstances at the time of formation of contract in such a manner that the obligations later on become intolerable for one of the two parties. Here this question arises that whether their

- Mutual consent covers such a situation or not?
- Whether the parties have made conditional implicitly in the transaction for the existence of the circumstances at the time of formation of the contract and its usual change, or they have designed their agreement in a manner where it would be enforceable in all conditions and the economic condition of transaction is guaranteed for all the events.?
The answer to these questions is given by the concept of change of Circumstances which is the subject matter of study of this research work and would be discussed in detail in coming chapters.

II. Circumstances

The circumstances are applied to the conditions which are concerned to an individual or to a particular event that effects them or “Particulars which accompany an act; the surroundings of an act; the state of affairs surroundings and affecting an agent.”

‘The condition or fact connected with an event or action’ and, ‘Attendant or accompanying fact’ events and conditions subordinate or accessory facts.”

The mentioned terms have been used in various branches of the human sciences among which are Sociology, Psychology and Law particularly Criminal law as well as Criminology, as has been mentioned in some legal texts. But the circumstances, in view of legal or in legal terms which is our object, are “aggregate of objective conditions which had existed at the time of the conclusion of the contract and taking into consideration such conditions the contract had been concluded.”

Though the time of the change of circumstances, which can effect the validity of the contract, has not been mentioned in the paper but it can be inferred from the general concept that the circumstances at the time of the conclusion of contract have been taken into consideration i.e. whenever the mentioned circumstances have changed, they effect the validity of the contract. Here it is, necessary to point out, what is meant by circumstances at the formation of the contract? As the whole conditions which are taken into the consideration at the time of formation of the contract are divided into two groups:
The subjective condition or circumstances of the contract are those conditions which are so much related with the nature of the contract that lack of them at the time of formation of contract prevents the validity of mutual consent.\textsuperscript{15}

Also the change or frustration of the conditions at the time of performance of contract causes the dissolution of mutual consent\textsuperscript{16} (i.e. the termination or annulment.) In this regard the law of various countries has laid down the conditions for the formation of contract.\textsuperscript{17}

Therefore the Basic Elements of a Contract are:

1. Agreement between the parties.\textsuperscript{18}
2. Actual or presumed intention to create a legal obligation.
3. Due observance of prescribed forms or modes of agreement, if any.
4. Legality and possibility of the object of the agreement.
5. Capacity of the parties to contract.
6. Consideration, if any.

No doubt, the absence of the above mentioned conditions, which explain the validity of the contract from the internal aspect, at the time of formation of the contract, prevents the validity of mutual consent and as a result prevents the formation of contract. Also the change or frustration of conditions at the time of performance of the contract cause the cancellation of mutual consent and results in the termination of the contract. In this regard the legislator in various legal systems has laid down the clear provisions.

Therefore basically, such conditions will not be discussed in this research and consequently the changes occurred in subjective conditions
which in fact are the result of the nature of contract or agreement should be excluded from the scope of this research.

But the **objective conditions** are not connected with the nature of the contract or the part of the main clause of mutual consent. They are only the common necessities belonging to the contract. Among the objective conditions of contract are the necessity of the proportional balance of consideration and the object of the contract to be in good condition etc.

Though the objective conditions generally forms the basis of mutual consent and are the part of the purport of contract or come under the category of the secondary conditions but, on the contrary the subjective conditions are not considered by the parties in particular contract and also they are not included in the scope of their common will. It is evident that in this case the nullification or change of the above mentioned condition does not affect the validity of this contract. Therefore the change of circumstances means the change of conditions which have been considered by the parties at the time of formation of the contract or their mutual consent is based upon their continuation. In spite of this, with regard to classification related to the conditions which have laid down the change of such conditions (i.e. conditions which have been considered by the contracting parties.) after the formation of contract and at the time of performance of the obligations, contrary to the subjective conditions, does not do any damage to the essential elements of the contract and also does not cause the annulment of it. It may cause the adjustment or termination of the contract. As a whole the external conditions of the contract can be laid down and the contract can be formed under those conditions and circumstances such as -- economic, political, legal, technical or technological conditions. In this research change of circumstances where the change is due to economic reason shall be
discussed. This economic reason may be due to the change of political setup or legal change or due to judicial circumstances.  

"Therefore, the circumstances at this time of formation of contract mean the economic circumstances which have been considered by the contracting parties at the time of the formation of contract and their mutual consent is based up their (circumstances) continuation."

No doubt the change of these circumstances disturbs the contractual equilibrium and the financial balance of the obligation of the parties and causes extra ordinary difficulty is the performance of contract by one party.

In long term contracts this alteration in the conditions or the change in the circumstances occur basically due to the change in economic conditions at the time of formation of contract. The change in economic conditions may be a result of inflation or economic cases as in recession faced by India and other countries now-a-days.

In this way, the aim of the circumstances firstly, are the objective conditions at the time of formation of the contract (not the basic conditions which are formative in the contract). Secondly, the objective conditions which are considered by the parties and in fact makes the fundamental bases of the mutual agreement (e.g. the economic conditions.)

Undoubtedly, the change of these conditions affects the binding force of the contract. In this research work, the effect of this change would be discussed in the coming chapter.

III. Effect

It is a known fact that every phenomenon after coming into existence has effects and consequences. These effects are broadly categorized in:

- Material effects
- Economic effects
Physical effects

Sometimes some events in addition to the national impression have Judicial Effects and consequences, because the events which take place in society have legal effects. Which have been divided into two groups

- Legal acts
- Legal events

Therefore, the Judicial Effects can be categorized as: Legal acts

Legal events

Legal Acts

They are voluntary performances in order to create a particular legal effect and also law creating a desirable effect on it. In other words, a legal or a judicial act is a voluntary act where its legal effect confirms with what the performer intends to contract and unilateral legal acts are its exclusive example.

Legal Events

Legal or judicial events are a group of events in which their legal effects are not resulted from the intention of persons but are created by the order of the law even though the creation of events might be voluntary: e.g. deliberate destruction of the property of other person, or it may be involuntary as in case of birth, death and such circumstances which are outside one's control. Therefore, change of circumstances governing the conclusion of a contract is among the legal events that is in addition to other effects have legal effects which are not resulted from the intention of a person and it might be created by the order of Law. In other words, every social phenomenon that has legal effects is included in the expressions 'judicial events'. The legal effects and the consequences of change of circumstances, such as suspension, adjustment
and dissolution of contract will be argued in this research, though undoubtedly the said change has also other effects and consequences like social effects, economic effects, physical effects etc.

IV. Validity

"Validity" of contract here means the effect of change of circumstances on the contract. Hence, here the term validity will be discussed briefly. The term validity is synonymous with the 'in force' and correctness and is defined as follows:-

"Legal sufficiency, in contradistinction to mere regularity"\(^\text{24}\)

"It also means valid, confirm, affirm, sanction, having legal strength good or adequate in law, legally binding or efficacious,\(^\text{25}\) force executed with proper formalities."

About "validity", according to legal condition is the contract or legal act\(^\text{26}\). It may be said that a valid contract is –

"A contract in which all the elements of a contract are present and therefore enforceable at law by the parties." or "A properly constituted contract having legal force."\(^\text{27}\)

In fact, if a person willingly makes obligations in any case, the obligations are presumed to have validity and must be protected by law whether the origin of obligation is a contract or a unilateral contract or any other willful act e.g. confession and judgment of a court\(^\text{28}\).

Consequently, the validity of contracts means a force of legal obligation of the contract, which compels the parties to their performance, whether the origin of the force of legal obligation is the contract of law or some other social obligation.\(^\text{29}\) Therefore, the reason that the performance of obligations is the result and validity, the different legal systems have made
provisions for the validity of contracts and incorporated them in the laws of the respective nations.

Provision of "validity" under AMERICAN Legal System

The American law (American Restatement Contracts, 1932) makes provision for the validity of contract eg.

- Competent parties,
- Subject matter
- Mutuality of agreements
- Legal consideration
- Mutuality of obligation

Provision of "validity" under ENGLISH Legal System

In English law also, there is a provision for the validity of contract eg.

- Offers and acceptance
- Intention to create legal relations
- Capacity of the parties
- Consent
- Consideration
- Legality of object and possibility of performance.

The common law has traditionally required for essential elements i.e. agreements and consideration and of course a third element intention to create a legal relation.

Provision of "validity" under INDIAN Legal System

The Indian Law also has laid down various elements which make a contract valid they are-
Proposal and acceptance of proposal (It must be there to constitute a valid contract) such an agreement then has legal binding and results in a valid contract.33

There must be free consent34

The parties must be competent to contract35

The consideration must be lawful36

The object must be lawful and

The agreement must not be expressly declared to be void37

A contract under the Indian law must follow the above mentioned mechanical process, without which, the contract is not complete and there is no meeting of minds.38

Here the main emphasis will be in regard to the legal effect of change of circumstances upon the validity of a contract i.e. the validity which as a result takes place according to the legal conditions of the contract so that the law confirms to it and it results in the force of obligation which compels the parties to perform those obligations.

V. Contract

Even though the concept of contract is evident and does not need definition but the tendencies of social scientists and the adherents of individual liberty is such that it has caused the difference of opinion regarding this concept to some extent.

Eg. At many times the lawyer confronts various difficult questions which we should deliberate upon and find proper answers of. It gives rise to many other questions regarding this discussion eg.

Does the contract includes only the definite patterns which the laws have foreseen or the freedom of will does not recognize the extent
and in fact, the contract has the legal force until it disturbs the public order or anything else?

In addition to this, the extensive scope of the contract and the role of the ruling of will over it and also the change in the concept of contract in the current law have made so many various contractual samples that to understand the concept of contract in the defined scope, it becomes necessary to know first the different kinds of it. It is for this reason that sometimes the writers of legal books allocate a particular chapter of definition of contract. Therefore it is necessary here to examine in brief the concept of contract. To highlight and understand this concept in a better way we would examine the concept of the contract in the legal system of United States of America, United Kingdom and India in this research work.

“Contract” in AMERICAN LAW

The difficulty of definition arises from the diversity of the expressions and from the various perspectives from which their formation and consequences is viewed. Therefore no entirely satisfactory definition of the term contract has been devised. Every contract involves at least, one promise which has legal consequences. The usual but not the inevitable, legal consequence is that the performance of the promise may be enforced in court by a decrees for specific performance or a money judgment. The promissory element present in every contract is stressed in a widely quoted definition:

“... A contract is a promise or set of promises, for breach of which the law gives a remedy, or the performance of which, the law recognizes as a duty...”

This like other definitions is also misleading while it is true that a promise is a necessary element is almost every contract, frequently the promise is coupled with other elements such as physical acts, recitals of fact
and the immediate transfer of property interests. In ordinary usage the contract is not a promise alone, but the entire complex structure of these elements. The criticism of definition comes when it facts to point out that a contract usually requires assent of more than one person.

An additional criticism is that there are 'voidable' and 'unforeseeable' contracts containing promises which at times may be dishonored with impunity. While promises contained in such contracts may have legal consequences, and to say that the law recognizes as duties, is sketching the concept of duty beyond its usual limitations.

Another common definition of a contract is that it is legally enforceable agreement while this definition has the advantage of emphasizing that an agreement is at the core of the law of contracts. The problematic fact is that there are certain kinds of contracts that may be formed without an agreement. Like other definitions of the term "contract", it is unenlightening and of little help in determining whether a given complex of words and acts are legally enforceable or not? Therefore to sum up, knowledge of law of contracts is a pre-requisite to an understanding of what contract actually is?

Even when there is a little or no substantive disagreement of defining a legal term so as to achieve a universal acceptance, it should be stressed that the technical terms share an affliction in common with non technical language words, carefully defined in one context, have the frequently disagreeable habit of appearing in different contexts with widely divergent meanings. Let us illustrate these with examples.

Illustrations:

- Article 1, section 10, of united states constitution provides that “No state shall pass any ...... Law impairing the obligation of contracts.”

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The United States Supreme Court has held that this clause prohibits the legislature of New Hampshire from modifying a charter granted by King George III to Dartmouth College.\textsuperscript{43}

A study of the treaties on the law of contracts would indicate clearly that this charter is not a contract, as the term is used in the law of contracts. Nonetheless, by considering the purpose of the constitutional clause and the presumed intention of the framers of the Constitution, the Court held that the charter was a contract within the meaning of the Constitution. The re-defining of a term based on the purpose for which the term was used in its particular context is one of the subtle techniques of the legal art.

- The Uniform Commercial Code (UCC) in essence defines a contract as the total legal obligation created by a bargain.\textsuperscript{44} Thus by act of the legislature, the term "contract" for purposes of Uniform Commercial Code (UCC), has a somewhat different meaning than it has in transactions not governed by the code, since the term "bargain" as used in legal practice includes transactions where no promise is made such as rule of property without warranty in exchange for cash.\textsuperscript{45}

- The term "contract" is also used by lawyers to refer to a document in which the terms of contract are written. Use of the word in this sense is by no means improper so long as it is clearly understood usually the reference is to the agreement & the writing is merely a memorial of that agreement. The law gives effect to such agreements other than contracts e.g. in case of, sale of goods, gifts, conveyances of interest in real property etc.\textsuperscript{46}

The distinction is that a contract is executory in nature. It contains a promise or set of promises that ought to be performed e.g. agreement to sell land is a contract but sale of land is not a contract.
This distinction, like many other distinctions, is helpful for the purpose of analysis and is not rigid but yes it is artificial. Looking at it from transactional perspective sales, conveyances etc are mixed transactions involving both an executed transfer of property interests or possession and promises such as warranties or promises to surrender the possession. From the analytic point of view, the distinction between the executed agreements and contracts is not far e.g. we just now discussed an illustration of Uniform Commercial Code (UCC) which includes sale of goods within its definition of contract. This was not an arbitrary legislative decision.

One of the basic purpose of Article 2 of the code is to bring the rules governing sale of goods, closer to is the rules governing contract to sell goods under the Uniform Sales Act which the code has replaced in most jurisdictions.

“Contract” in ENGLISH LAW

Under English law a contract is an agreement giving rise to obligations which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties. This proposition generally holds true, that in spite of the fact that it is subject to a number of important qualifications.

First Qualification

First qualification is that the law is often concerned with the objective appearance, rather than with the actual fact of the agreement.

“Whatever a man’s real intention may be, if he so conducts himself, that a reasonable man would believe that he was assenting to the terms proposed by the other party, and the other party upon that belief enters into a
contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to other party's terms. This objective principle is based on the needs of commercial convenience. Uncertainty would result if A after inducing B reasonably to believe that A has agreed to certain terms could then escape the liability merely by showing that he has no 'real intentions' to enter into that agreement. This principle is an important one but it would be wrong to say that the law of contract has no concern at all with the actual agreement. This would put too much emphasis on the exceptional situation for, in most cases, the appearance corresponds with the fact of the agreement.

And the principle is not purely objective. A is not bound merely because "a reasonable man would believe that he was assenting to the terms proposed by the other party." In particular there would be no contract if B actually knows that A has no intention to contract with him or to contract on alleged term. Thus a subjective element qualifies the objective principle and this follows from the purpose of that principle, which is to protect B from the prejudice which he might suffer as a result of relying on a false appearance of the agreement. In this way, there is no need to protect a party who knows that the objective appearance does not correspond with reality. It also follows from the purpose of the objective principle that it will not apply where A's apparent assent is based on a mistake induced by B's negligence.

Basically it says that the objective principle applies only where serious inconvenience is caused allowing a party to rely on his real intention. In the interest of convenience, the law may sometimes hold that there is a contract although there was not even the objective appearance of the agreement. It doesn't mean that the law is not concerned with any sort of agreement at all. So to allege this is not correct.
Second Qualification

The idea that contractual obligations are based on agreements must secondly be qualified because contracting parties are normally expected to observe certain standard of behaviour. These are the result of terms & conditions implied by law eg. A person who sells goods or enters into a contract of employment is bound by many such implied terms. The parties may be able to vary or exclude some such terms by contrary agreement, but unless they do so, they are bound by many duties to which they have not expressly agreed to and of which they may have never thought of also. So the agreement is clearly not the sole factor which determines the legal effects of a contract once it is shown to exist but however it definitely remains an important factor. For example the intention of the parties determine whether a statement made at the time of forming the contract has contractual force or not, or is a merely a representation and it also determines whether a term which is not expressly stated in the contract should be implied in fact or not i.e. because the parties must have intended to incorporate it. It has been suggested that in such cases the courts only say that the intention of the parties is a determining factor but when it comes to application, they apply rules based on various considerations of policy unconnected with that intention. But simply an assertion should not be accepted unless it is supported by an argument. And the argument can be based on the “Doctrine of Frustration” under which the contracting parties may be discharged.

The doctrine was at one time justified by saying that the parties has impliedly agreed to be discharged in such circumstances, but many lawyers now prefer to say that the parties are discharged by operation of law, whether they would have agreed to discharge or not. It can be true but the intention of the parties can not be ignored or disregarded. Before holding that the parties are discharged, it is the duty of courts to find out what they contracted about.
The courts must decide whether the parties contracted about a certainty or about a possibility and it can be done by ascertaining their intentions about the matter.

**Third Qualification**

The idea that the contractual obligations are based on agreement must also be qualified in relation to the scope of the principle of freedom of contract. Judges in 19th century took the view that persons of full capacity should in general be allowed to make what contracts they liked, the law only interfered on fairly specific grounds such as — misrepresentation, illegality or undue influence. It did not interfere merely on the ground that one party was economically more powerful than the other and so able to drive hard a bargain.

The attitude became important when the courts recognized the validity of standard form of contracts by which one party excluded or limited his common law liabilities. In the present century, this practice of contracting on standard terms has become very common. This argument holds strong where supplier has a monopoly or where all supplies in a particular field use the same standard terms. In such cases, the customer has no other option but to either accept those terms or do away without the goods or services in question.

On the other hand, exact quality of bargaining power is probably rare and there can be a dispute regarding the precise degree of pressure which makes the difference between consent reluctantly given and a state of mind which can not properly be described as consent at all.

The amount of pressure which can be put on the customer does not depend only on the respective wealth and power of the customer but also depends upon the current market conditions.
Illustration:

**Buyer’s Market**

In a buyer’s market, as private customer may be able to induce a normally powerful supplier to modify his standard terms rather than lose the sale and,

**Seller’s Market**

In sellers market, a customer may be ready to agree to any terms which the seller put forward or be willing to take his chance is person may also agree to contract on a set of terms although he does not know in detail what they provide. This is often the position where two people contract on terms settled by a trade association or where a person takes an employment on terms negotiated between his employers and the trade union.\(^{61}\) In such cases, the parties would not deny that they had agreed to the terms whatever they might be.

But there are other cases also where the law played big and the agreement and small that it becomes doubtful whether the relation ship can still be called contract or not.

Illustration:

The agreement of the parties may create a status such as marriage whose main legal incidents are fixed by law and can not be varied or changed by the parties. Also, sometimes the terms on which a person is employed (in public services generally) are governed partly by legislation eg in *Barber v Manchester Regional Hospital Board.*\(^{62}\)

In this case it was said that a claim under the statutory scheme of employment\(^ {63} \) could not be dealt with as though it were an ordinary master and servant claim in which the rights of the parties were regulated solely by contract.\(^ {64} \)
In another case Grant v S. of S. for India it was held that a member of armed forces is not in any contractual relationship with the crown, even if he enlists voluntarily. But there are cases which are borderline also, in which a mere fact that many of the terms of a relationship are settled by law and it is not prevented from being contractual is nature eg. Barber's case in which it is said that a consultant appointed to a post at a hospital under the National Health Service, works under an ordinary contract between master and servant although it is one with a strong statutory favour as it is governed by regulations made under statutory powers and having the force of law.

So far, we have discussed only those cases in which the parties are free to decide whether to enter into a relationship or not (though the law may fix some or all of its incidents) but there are other cases also in which the law to an extent restricts this freedom. E.g. at common law a common innkeeper may be liable criminally or in tort for refusing to accommodate a guest without the sufficient excuse as in Imperial Hotels Ltd.

"Statute injunctions may be granted and damages awarded against persons who with hold supplies from the retailers on the ground of price cutting and also against certain persons who refused to pay the amount on unlawful grounds i.e. discrimination on ground of race or sex and it has also been held that it is unlawful to refuse an employment to a person on the ground that he is not the member of trade union." Even in common law, withholding of supplies may be restrained by injunction in exceptional circumstances.

In all these cases a relationship which results from some degree of legal compulsion is nevertheless regarded as contractual because the parties still have the considerable freedom to regulate its incidents. But there are cases in which a relationship created by legal compulsion is clearly not contractual eg. cases where a persons property is compulsorily acquired
against his will. In such a case a person whose property is acquired compulsorily and against his will does not make a contract with the acquiring authority even though he receives compensation. Another example is the case of a patient to whom medicines are supplied under the National Health Service. He is not considered to make a contract to buy them, even if he pays a prescription charge. Similarly in another case, where a person who posts a letter or a parcel does not make a contract with the post office.

The border between the two classes of cases is by no means clearly defined because it is doubtful whether a person is actually making a contract or not? For example in case of consumer of gas, electricity or water, it is doubtful whether the consumer is actually making a contract with the statutory authority or the statutory bodies concerned are obliged to supply these things.

Similarly, it is difficult to judge whether there is a contract between a client and bus lawyer under the Legal Aid Scheme or not? or whether there is a contract between a patient and his doctor under the National Health Service or not?

In spite of the above qualification, the fact that emerges out undoubtedly is, that the "law of contract is concerned with the circumstances in which agreements are legally binding". Therefore it deals majority with two aspects – agreements and legal effects and second is its enforceability. However, the rules relating to offer and acceptance, deals with the process of reaching an agreement. The points relating to consideration and contractual intentions concerns the requirements which must normally be satisfied before an agreement is legally enforced. The rules relating to misrepresentation and illegality deals with the effect of special circumstances on account of which the law may refuse to enforce the agreements which would otherwise be binding.
The rules relating to capacity are based partly or view that certain classes of persons can not form the requisite contractual intention and partly on the view that it is undesirable to enforce agreements with such class of persons.82 The rules relating to mistake are based partly on the view that there is no agreement when the parties are at cross-point on fundamental points only83 and partly on the view that the agreement has no legal effect if both the parties were under a fundamental mistake as to the subject matter.84

The rules relating to the content of a contract, performance, breach and frustration again are partly based on the agreement between the parties and partly on rules of law which determine the precise legal effect of the agreement.85

"Contract" under INDIAN LAW

Contract law in India is greatly inspired by English Law. It becomes necessary here as to when and how the English law was introduced is the Indian legal system.

By the charter of 1661 and 1726 the English law has a deep impact on Indian legal system. The English law was applied wherever the Indian law was deficient. In 1774 the Mayor's Court at Calcutta was replaced by the Supreme Court. The regulating Act of 1773 and the charter of 1774 were silent as to the law which the Supreme Court was to apply to Indians. Consequently, s.17 of the Act of settlement, 1781 directed that questions regarding inheritance and succession and all matters of contract and dealings between the parties should be determined, -

❖ In case of Hindus and Muslims by their respective laws and
❖ Where, only one party is Hindu or Muslim then by the laws and usages of the defendant.
Similar provisions were introduced in course of time in Madras and Bombay when these towns came to have first the Recorder’s courts and then the Supreme Court. This system continued up to the enactment of the Indian Contract Act, 1872.

Therefore as per Indian contract Act, 1872, the definition of contract is as follows:

"An agreement enforceable by law is a contract." 

Thus for the formation of a contract, there must be an agreement and the agreement should be enforceable by law. Therefore an agreement is a promise or set of reciprocal promises. A promise is formed by the acceptance of a proposal. And for a proposal there must be a promisor who makes the proposal and a promisee who accepts it. In case of reciprocal promises each party is a promisor with respect to the promise he makes and a promisee with respect to that which he receives. He is both proposer and acceptor that is, promising to become liable and accepting other’s liability as well. The mutual proposals of the two parties becomes promises by mutual consent or acceptance. It must be noted here that whatever may have happened before the promises are exchanged is merely preliminary negotiations and does not enter into the legal analysis of the transaction.

For a contract, there must be an offer or a proposal which the person accepting has had an opportunity of considering and which he knows that when he accepts will form a binding contract. In other words, the proposer and the acceptor must agree upon the same thing and in the same sense.

In *Tinn v Hoffman and Company*, on 28th November, 1871, the defendants wrote to the plaintiff offering to sell certain quantity of iron at certain price. The same day the plaintiff wrote to the defendants offering to buy the same quantity of iron at the same price. The letters crossed in the
The plaintiff argued that the contract was concluded. But the court held that the defendants were not liable by such simultaneous offers because each was made in ignorance of the other.90

The necessity of the communication of the offer or proposal and its consequent acceptance seems to be the reason why identical cross offers do not make a contract. Similarly if the promise or offer made on either side is ignorant of the promise or offer made on the other side, neither can be construed as an acceptance of the other and hence does not lead to the formation of any kind of contract.

Therefore to sum up, every agreement is the result of a proposal from one side and its acceptance by the other side.91 An agreement is regarded as a contract when it is enforceable by law.92 Alternatively, an agreement that the law enforces is a contract. In Indian law, therefore, every contract is an agreement but every agreement is not a contract. Thus Indian Contract Act makes a clear cut difference between an agreement and a contract.

The question that arise – Is it an enforceable agreement? Or a concluded and a binding contract. It must be understood that there is no binding contract, if the parties have to meet each time and decide upon some essential terms which are not yet agreed and neither there is a provision (express or implied) of its solution in the contract e.g. where an agreement left the terms of price, date and quantity of delivery of goods to be agreed in future, there is no binding contract. In such cases there is a distinction between an agreement or a contract. Here the contract is an agreement that is wholly executory on both sides and agreement is one which has been executed on one side or the other. By sub-section (e) an agreement is either a promise or a group of promises.93

The distinction between an “agreement” and “contract” made by sub section (h) is however apparently original. The conditions required for an
agreement being enforceable by law are contained in chapter II of the Act, sub section 10, and the absence of any such condition would render an agreement void and certain defects would make a contract voidable. The duties of parties to a contract are explained in chapter IV of the Act. Distinction between an agreement and a contract is highlighted in *Govind Laxman v Harichand.*

In it A agreed to sell his land to B on a Bargain paper being made through a vakil two days after the date of the agreement and on execution of the bargain paper further steps were to be taken, But no bargain paper was executed. The court in this case held that there was no enforceable contract. This case emphasizes the distinction between an agreement and a contract And the test highlighted is of 'enforceability'. The Indian contract Act lays down the various elements to make a valid contract. Without these elements, the contract is not complete and there is no meeting of minds. Thus there is a strong relation and necessity between the two concepts.

In **American law**, some of the withers law negated the necessity between the two concepts – agreement and contract. Corbin defines the term contract as: “Contract is a promise enforceable at law directly or indirectly.”

He believes that the word promise is better than an agreement in defining the contract and Article 1 of the American Law Institute contract Restatement the definition of the contract has not mentioned the agreement as the source of obligation. It is stated as follow-

"A contract is a promise or a set of promises" and

"The result and arm of the agreement is creation of the legal effect – Obligations."
In English law the necessity between two concepts — agreement and the contract under English law is pointed out i.e. Agreement which is enforceable by law is the essential element of the contract.

In Indian Law Indian law has also recognized the necessity in two concepts — 'agreement' and the 'contract' is recognized. Under Indian Contract Act 1872, contract is defined as — An agreement enforceable by law is a contract. In Indian law, an agreement is also a source of obligation (like in American law) but only when it is enforceable by law.

The conclusion is that “A contract in a legal act - formation and creation of which requires agreement of two wills or minds.”

In other words contract is an agreement of two wills or minds & more than that which is made for the creation of legal effects because the agreement of mutual consent covers the contract. In fact, contract in exact concept is a particular kind of agreement which gives rise to obligations.

3. LEGAL NATURE OF THE RULE

As already mentioned the change of circumstances means the change of objective conditions of the contract which existed at the time of conclusion of the contract and the parties had formed the contract by taking in view these (objective) conditions only. In other words, the observed change of circumstances is merely the change which occurs in the objective and independent conditions of the nature of contract.

Therefore, the changes that have occurred in the fundamental or subjective conditions of the contract and which in fact are the result of the nature of contract or agreement, should be excluded from the scope of the concept under consideration because the subjective conditions or
circumstances of the contract are called the conditions which are so much related with the nature of the contract that the lack of them at the time of formation of contract prevents validity of mutual consent, for example, the intention and consent of both parties and the competence of them. Also the change or frustration of conditions for instance, the frustration of the legal cause of the transaction and the necessity of continuance of the object of the contract at the time of performance of contract causes the dissolution of the mutual consent (i.e. termination or annulment).

It is evident that, if the, continuance of these conditions does not form the principal clause of mutual consent or is not in the scope of common intention of the parties, the conclusion of the contract and undertaking of the performance of obligation will be a futile thing. For example, the clause including the obligation of the seller to delivery of goods and his ability for fulfillment of this obligation, the necessity of continuance of the goods and the promisor himself in the contract, which rely upon himself, and also the continuance of legal competence of obligator all the above mentioned clauses return to the essential clause of performance ability of contract, and are among the subjective conditions of the contract.

It should be added that the final aim in all the commercial transactions is the performance of obligation and not the creation of the obligation, and, the collective will of the parties connects the bilateral obligation so that the termination of one of them cancels the other's obligation.

If after the conclusion of contract of delivery of goods the goods get destroyed due to an inevitable accident, or, the possibility of the performance of contract is terminated on account of the death or disease or lack of competence of obligator, by the reason of termination of one of the main elements of contract, the other element also is terminated automatically. Consequently, the contract and obligation arising from it, is cancelled.
But the conditions out of the nature of contract or the objective conditions do not have these particulars because they are not connected with the nature of the contract or the part of the main clause of mutual consent. They are only the common necessities belonging to the contract. For this reason, the lack of these conditions at the time of formation of the contract, as well as after it, does not do any damage to the essential elements of the contract and also, does not cause the annulment of the contract. May be, this status only causes the adjustment or termination of the contract. Among the objective conditions of contract are the necessity of the proportional balance of considerations and the object of contract to be in good condition.

It is important to mention here that, though the objective conditions generally form the basis of mutual consent and are a part of the purport of contract or come under the category of the secondary conditions. There may, on the contrary be the subjective conditions which are not considered by the parties in the particular contract. And also they are not included in the scope of their common will or in the usage of contract that is not based on the above mentioned conditions. It is evident that in this case the nullification or change of the above mentioned conditions does not effects the validity of this contract.

Therefore, the change of circumstances means the change of conditions which have been considered by the parties at the time of conclusion of the contract and their mutual consent is based upon maintaining them and their continuation. From an economic point of view, the change of these conditions disturbs seriously the contractual equilibrium and the financial balance of the obligations of the parties and causes extraordinary difficulty in the performance of the contract for a party. But the disturbance of the contractual equilibrium is not such that causes the impossibility of performance of the contract. In other words, the change of circumstances
makes difficulty in the performance of the obligations but, does not make it impossible.  

The concept or we can say that the rule of altered conditions or the changed in circumstances in the scope of private law, applies only to the change of economic conditions which govern at the time of the conclusions of contract. In this doctrine, we will not discuss the other conditions, though there is a possibility of the change of economic circumstances taking place due to the change of political, legal and judicial conditions and even the technical conditions of the contract.

The alteration in the conditions of the contract or the change in circumstances of the contract, is basically the result or occurrence of the fortuitous events. For example, war, the serious economic crisis, the change or amendment of statute for the export and import of goods that effect to some extent the contract and create difficulty in the performance of the obligations. In fact, the essential cause of the alteration in conditions or the change in the circumstances of the contract and the so arisen difficulty in the fulfillment of the contractual obligations, is the occurrence of fortuitous events. For this reason, in the French law and the other countries which have the similar legal system, this rule comes under the title:

In French law it is “The Theory Imprevison” or “Theorie de L’Imprevison”,
In American Law “Theory of Impossibility or Impracticality”
In English and,
In Indian Law “Doctrine of Frustration”.

Now the question is that, which elements cause the fundamental change in the circumstances or which element materially causes the
alteration, and the difficulty of performance of the obligations in a contract and the which elements do not effects the performance of the contract? The elements which do not effects the performance of the contract will not be discussed in detail in this research paper because, the right place for this problem is in the frame work of economics. In other words, the occurrence of the fortuitous events, including the war, the inflation, the decrease of money value and other similar things, change the circumstances of the time of mutual consent or do not? This does not come under the scope of discussion because, these events certainly make the change, though, they may be very insignificant, in the circumstances of the time of conclusion of the contract.

Here we would confine ourselves only to the study that which elements would invoke the rule of change of circumstances and what effects the change of circumstances would cause on the validity of the contract?

As regarding the question why these changes occurred and what caused the changes to occur, this is something which is outside the scope of discussion done here.

Therefore, the question which is important and the subject of discussion here, is the distinction of fundamental character of the change circumstances, So as to examine the limitation and the quality of the effect of elements which change the economic conditions or which cause imbalance in the economic equilibrium of the contract.

To determine the above mentioned character it should be considered whether the change of the economic conditions of the contract that is required to be maintained has been the fundamental base of mutual consent or not and has it caused the disturbance of economic balance of the contract and the unusual difficulty of the performance of it or not? Whether the change of these conditions decrease the power of legal obligation and cause the adjustment or dissolution of the contract or fundamentally, does not have any
effect at all on the validity of the contract? It is evident from the above given fact that, if the answer of these questions is positive then it can be said that, the circumstances of the conclusion of the contract have fundamentally changed.

Therefore, the change of circumstances means only change of the objective/fundamental conditions. Undoubtedly, the change of the above mentioned conditions will only effect upon the contractual obligations with the intention and consent of the parties or specific basis of the contract which is formed on the basis by maintaining it. Then if the mutual intention is not based upon the maintaining and continuation of these conditions or the contract is not formed on the basis of these conditions, the change of the above mentioned conditions does not cause any damage to the obligatory power of the contract. In view of the fact that, the change of circumstances is the only cause that causes the uncommon difficulty in the performance of the contract. The impossibility of performance of the contract should be kept separate from the above mentioned difficulty, because the impossibility of performance is the results of the change of the subjective conditions, whereas the difficulty in performance, is the result of the change of the objective conditions. Consequently, in case of the change of circumstances the contractual relationship remains existent according to the doctrine of "Pacta Sunt Servanda."

The doctrine of the change of circumstances in the private law involves economic aspect, because in this doctrine the change of the economic conditions at the time of the formation of the contract is only involved by the lawyers and the change of political, judicial and social circumstances will not be discussed here. Basically, the result of the change of these conditions is that it disturbs the economic balance of contract and causes difficulty for the party to continue the performance of contract. In the
international law, on the contrary, the change of political, legal and judicial circumstances is considered and the states in numerous with the intention to withdraw the performance of the treaty, argue the last mentioned change of circumstance. The economic circumstances of the contract changes, with the result of external causes that might be involving the political and judicial aspects. For example, the occurrence of war, the strike of the worker by the change of judicial system, the increase in value of raw material and the rise in ways of labourer and etc. are among the factors which change the economic conditions that apply upon the contract.

Furthermore, in the work by contract agreement the change of technical conditions of the contract may also cause the change of the circumstances, for example, in the work by contract agreements, which may cover digging and oil production, the contractor may come across the unexpected condition during the performance of obligation in which the continuation of the project may not be possible due to the lack of the means or he may require latest advanced technology for further performance of the obligation. In such case the contractor can rely upon this pretext.

The question, as to whether this rule can be invoked or not would depend upon examining the so called change in circumstances i.e. whether there is a change in objective conditions of the contract or the subjective ones? And only then there it can be concluded whether the change would amount to termination or cancellation of the contract? Or would it result in the adjustment of the terms of agreement and thereby save the contract. Intention of the parties is also to be examined in it.
4. SCOPE OF CHANGED CIRCUMSTANCES AS AN EMERGING CONCEPT IN TRADE LAW

The concept or rule of changed circumstances is only applied to the contracts which carry out their subject during the specified time, that is, the contracts which are performed continually or with interval in their performance such as contract of lease in which the profits of the object of lease comes into existence gradually. Similarly, the work by contract agreements, where the promisor undertakes to deliver the subject of project in the fixed time. It should be noted here that, the element of time in such contracts has the main role. For this reason the doctrine of changed circumstances is not applied in contracts, in which the effect of it comes into existence at the moment when the parties intended and there is no interval between the formation of contract and its performance. Therefore, the scope of application of this concept is limited to the contracts which have the continuous and variant effects. Also, the contracts which are performed all at once are not included in the scope of the this study. And also, the theory in question only covers the bilateral or synallagmatic contracts, namely the contracts in which the (economic balance) between two considerations is the main subject of the intention of the parties at the time of mutual consent. These contracts are concluded based on comparative equilibrium between the two considerations and nonexistence of lesion. In this case the concept of changed circumstances is not applied to the gratuitous agreements and the contracts which are formed by taking in the consideration by indulgence, such as contract of settlement and contracts of guarantee because, in the gratuitous agreements basically the common intention of the parties is not the exchange of considerations and contracts including unilateral obligation. In the above mentioned second category of contracts also, the parties don’t take into consideration the equilibrium of the value of subject-matter of contract.
In such contracts presumption of existence of the contractual equilibrium basically is negative. Consequently, the concept of changed circumstances can not be applied upon them. Moreover the contracts for consideration or chance contracts (contracts aleatoires), which coincidences and the chance is effective in the fixation of the two considerations and the contract is formed on the probable loss and damage. Such contracts also should not be included in the scope of theory. (For example, in the insurance contract there is not any possibility of the fixation of the considerations at the time of contract and the determination of the exact profit and loss of the parties depends upon the incidence and chance, therefore the doctrine of changed circumstances can not be invoked here. It should also be pointed out, that the same view is applicable to the transaction of the stocks and shares exchange in course.

In the same manner, the concept is only applicable on those contracts in which difficulty of the execution of obligation is continued up to the conclusion of the period of the contract. Therefore, whenever there is any event which leads to the difficulty but it is momentary and causes loss to the contract for a short while, it is not proper to give right to the debtor for the adjustment or cancellation of the contract. In such cases the contract should not be considered as the cause of loss, because the fluctuating loss and profit during the execution of the contract is a usual effect in the long term contract and the loss to the promisor in the specific period is considered something customary.

Finally, the concept or the rule of changed circumstances should not be considered executable in case of granted loan contract. Generally in the monetary obligations arising from the long-term contracts the object is to pay the same amount even though value of the money might have changed due to the economic conditions. Therefore, the debtor can be discharged only after
paying the amount of the nominal value (par value) though the value of it might have fluctuated.

We can conclude that the rule of changed circumstances is a rule or doctrine according to which if the economic balance of contract, which the parties have anticipated at the time of formation of contract, as a result of the occurrence of the unforeseeable, inevitable and irresistible events upsets the contractual equilibrium intensely, consequently if the performance of contractual obligations become extremely difficult or more expensive then the contract would modify. Therefore, the change of circumstances means the change of the objective conditions of the contract. Undoubtedly, the change of the above mentioned conditions is only the effect upon the contractual obligations with the intention and consent of the parties or specific basis of the contract which is formed on the basis by maintaining it, then if the mutual intention is not based upon the maintaining and continuation of these conditions or the contract is not formed on the basis of these conditions, the change of the above mentioned conditions does not cause any damage to the obligatory power of the contract. The change of circumstance is basically the result of occurrence of fortuitous events. For example, war, the serious economic crisis, the change or amendment of the statute for the export and import of goods that effect to some extent the performance of the obligations of the contract. In fact, the essential cause of the change of the circumstances and difficulty of the fulfillment of obligations is the occurrence of fortuitous events. For this reason, in the French law and the other countries which have the similar legal system, this theory comes under the title: "The theory Imprevision" or "Theorie de L'Imprevision". The concept of the change of circumstances in the private law involves economic aspect, because in this rule the change of the economic conditions at the time of the formation of the contract is only involved by the lawyers and the change of political, judicial
and social circumstances will not be discussed here. Basically, as a result of the change of these conditions that disturbs the economic balance of contract and causes difficulty for the party to continue the performance of contract. In the international law, on the contrary, the change of political, legal and judicial circumstances are also considered and the states in numerous with the intention to withdraw the performance of the treaty argue the last mentioned change of circumstances.

5. BASIC ELEMENTS CAUSING “CHANGE” IN CIRCUMSTANCES

The term changed circumstances has various literary meanings. According to Black’s Law Dictionary it means:

“A name given to a tacit condition, said to attach all treaties, that they shall cease to be obligatory as soon as the state of fact and condition upon which they were founded has substantially changed.”101

This concept traces its origin from the legal rule of – “Convention Omnis Intelligitur Rebus Sic Stantibus”. It means that the contract is based on the circumstances which exist at the time of the conclusion of the contract. Today, it has found its base in the theory of Rebus Sic Stantibus. It carries same expression in various legal systems.

Legally talking the above referred concept indicates that - Every contract contains a tacit condition and based on that the contract in valid till the time circumstances do not change.

However in International law it means the change in fundamental circumstances and these circumstances are those on which the treaty or
contract that has been concluded and considered depends. Thus any change in
them may result in the invalidation of a treaty. In other words, the legal
binding force of the contract would be invalidated.

The rule of changed circumstances has been formed by two very basic
elements which in fact construct the base and the nature of the concept. These
basic elements are:-

I. The legal element
II. The Economic element

The frustration of the legal element destroys the foundation of the
contract and the frustration of the economic element destabilizes the
economic equilibrium of the contract and hence causes difficulty in the
performance of the contract.

To understand the rule of changed circumstances, when it can be invoked
and what would be its legal effects on the validity of the contract, it becomes
necessary here to understand the legal and economic elements of the rule.
The legal elements of the rule can be discussed with reference to:

i. Foundation of the contract
ii. Contractual equilibrium

I. The Legal Element

The frustration of the legal element frustrates the very foundations of
the contract. The term foundation of the contract or the teams alike have been
seen here and there in the legal texts and legal writers sometimes have
mentioned it in their writing related to the law of contract but has not been
exhaustively defined so far and only some of its instances have been
described. Attempt has been made here to define the term in its general sense.
(i) Foundation of the Contract

The foundation of contract is any matter that is considered as subject of the real intention of the parties. It can be said has any matter where the contract has been concluded with the presumption of its existence or for the sake of its fulfillment whether the matter is considered as a principle clause of mutual consent or its secondary important clause and also whether this in an expressed or implied purport of the words of the contract. Therefore in the legal transactions for consideration the cases such as continuation of existence of the object of transactions, the legal possibility of performance of the contract, continuation of capacity of the promisor in contracts depending upon certain person (personal contract) stability of the financial balance of the considerations, fulfillment of main object of the agreement (i.e. availability the considerations or acquiring the object and the specific motive of the contract) should be considered as the purports of mutual consent and foundation of the contract.

As per the discussion, the general meaning of the term “Foundation of the contract” covers some of the concepts like “cause of contract”, “the customary and legal necessities”, “the secondary important clauses of the mutual consent” and “foundation of the contracting parties”. However, here, the particular meaning of foundation of contract is taken into consideration and i.e. “Foundation of contract is any matter without expressed or implied intention in the contract and the specific base of the mutual consent is based upon it or it is the customary necessity of the contract”. That is we can say that the foundation of contract is the continuation of circumstances at the time of agreement as well as the contractual equilibrium. In other words, the customary and specific base of agreement indicates towards the stability of the particular circumstances, which have been existent at the time of the formation of the contract and also stability of the equilibrium between the
two considerations. This specific base, though, has not been mentioned expressly or impliedly in the contract, but it has been considered as the common intention by the parties to the contract and the contract was found upon it or the agreement customarily indicates that it would be included in the contractual conditions, and the parties are expected to observe it. In support of this analysis, it can be said that, today, in the long-term contracts the clause of necessity of stability of the contractual equilibrium until the end of the performance of contract or the clause of necessity of the modification of the contract, in case of destabilization, has been accepted as a common binding rule. This should be counted as "the common essential of the contract" or "common essential of one of the contractual conditions", which is considered important in the contract according to commercial usage and practice. The significance of this rule is best explained by the cases where the parties to the contract are silent. Then in such cases the silence should be presumed as if the parties are satisfied but this rule would be in force only as long as the parties have not agreed contrary to that.

(ii). Contractual Equilibrium

The disturbance of the foundation of the contract means the change in circumstances which have been considered as an object of real and implied intention of the parties at the time when the contract was made. This change, which takes place after the conclusion of the contract and during the execution of the obligation, upsets the basic nature of mutual consent and checks the acquisitions of perfect agreement of both the parties to the contract. It is evident here that both the contracting parties concluded the contract and contemplated the conditions at the time of the formation of contract. The parties undertook the execution of obligation only in case of continuation of the conditions and from their (parties to the contract) point
of view, the mutual consent was based on no change in circumstances which were prevalent at the time of formation of the contract and no change in stabilization of the contractual equilibrium.

However, where the performance of contract, in order to provide with the goods, is delayed unusually for a long time as a result of the event beyond the control of the parties in a manner so that the costs for manpower and raw materials, which had been contemplated at the time of the formation, has fundamentally changed and the performance of the contract according to the previous conditions becomes extraordinary onerous then in such a case, it can be said that the foundation of the contract has been disturbed due to the fundamental change in circumstances.\textsuperscript{102} Also, the doctrine of frustration is concerned with such changes in circumstances which destroys the basis of contract as a whole or makes the contract, in case of performance, different with that which was in consideration by the parties at the time of the formation of the contract so that the obligation is frustrated. It is interesting to note that, in the doctrine of commercial impracticability\textsuperscript{103}, the basic assumption of contract (Foundation of contract) is non-occurrence of any contingency otherwise non-performance of the obligation is not considered as a breach of contract.

It should be kept in mind that, to find out the common intention of both the parties, in regard of necessity of continuation of the conditions at the time of the contract till its complete performance, is not easily possible. To differentiate that whether non-change of circumstances is a part of the potential tenor of mutual consent or its secondary clause, the nature of the contract and its included terms and conditions in it, circumstantial evidence and the other circumstances, which governed the mutual consent, should be critically examined. If such intentions are found in the light of the tenor of the contract, then the fundamental change in circumstances would be
considered as one of the constructive elements of the theory. If by taking into consideration the conditions of the contract, it becomes clear that both the parties have not basically considered the economic conditions and circumstances and did not agree on the continuation then the changed circumstances cannot be considered as a basis of the mutual consent. And also if it is clear that the above mentioned circumstances at the time of the contract had been considered, but at the time of the execution of the obligation, the parties had expressly or impliedly relinquished the necessity of continuation of the condition or the two parties had dealt contrary to it, then in this case, the disturbance or change of the circumstances would not upset the foundation of the contract, because, in the first case the continuation of circumstances is not common intention of both the parties and does not form the base of mutual consent and the presumption regarding the disturbance of the foundation of contract is negative (negative proposition because of its subject being non-existent).

In the second case, the relinquishment of the necessity of continuation by the parties or appearing adverse in its behavior is considered as an agreement to the performance of contract in the new circumstances and this if checked upsets the foundation of the contract. Furthermore, in cases where the parties had apparently agreed to the conditions of the price of goods or service and also had expressly or impliedly given acceptance to the conditions and after conclusion of the contract comes to know that the agreement and acceptance of the conditions has arisen from a mistake in imagination which was formed in the mind of one party and the other party and in fact, had abused the inexperience of the another person, so that, the promisor has contracted on the ground of ignorance of actual value and high cost of offered price. In other words, what had been contemplated did not indicate real intent and perfect consent of the transacting parties then in this
II. The Economic Element

One of the legal principles that has emerged and that has been admitted as a general rule in the long-term contracts and has always been considered by both the parties, is the doctrine of continuation of the economic equilibrium of contract till the perfect execution of the obligation: The doctrine, according to which the contemplated equilibrium between two considerations should be continued till the end of the termination of the performance of the contract. In the light of the above mentioned doctrine if it is based on common intention of both parties and its validity comes from the theory of freedom of the will, because in all contracts for consideration, the specific intention and will of the parties or the basis of mutual consent is based on the continuation of the economic equilibrium between the two considerations. However, it means that the economic equilibrium of the contract is the same customary equilibrium between the two considerations or financial proportion between the bilateral obligations, which are contemplated by the two contracting parties at the time of formation of the contract (that had been entered into) as well as the end of the performance of contract (i.e. the conclusion of the contract). The doctrine of mutuality of obligations demands that the equilibrium between-profit and loss
coming out of the contract should remain stable to the extent that has been reasonably contemplated by the transacting parties at the time of the conclusion of the contract.

Whenever, the parties conclude a contract, each party enters into a contract with the calculable or calculated probable profit and loss. Both the contracting parties, all the time, contemplate that the reasonable equilibrium should remain stable between the acquisition of profit and bearing of loss resulting from contract and it should also continue till the expiry of the time of the performance of contract. Therefore, the economic equilibrium of contract is the same relationship which takes place between the whole rights and powers of each other of the contracting parties on one hand, and, on the other hand their duties and obligations, and it is not changeable according to the rule of pacta Sunt Servanda (agreement and stipulation of the parties to a contract must be observed). In spite of that it should be kept in mind that, both parties in the long-term contracts are not interested in the destruction of contractual economic equilibrium, because their main object in such transactions is to obtain maximum profit and reduce loss to the minimum.

As already discussed, that is, in the long term contracts (generally), the economic condition and circumstances which existed at the time of formation of contract never remain fixed and sometimes they change completely as a result of unforeseeable events and beyond the control of parties to the contract and during the performance of the contract. On this basis, if the economic equilibrium of the contract is seriously destabilized as a consequence of the above mentioned changes and, as a result the scope of contractual obligation increases fundamentally; thereby making the performance of the contract excessively difficult for one of the party THEN in such a case, by virtue of the rule of changed circumstances, the other party (at loss ) deserves to be compensated with respect to the loss so suffered The
economic element of the rule comes into play when the occurrence of unexpected events taken place. War, strike, inflation, etc are the events that destabilizes seriously the economic balance of the considerations or the contractual equilibrium between the rights and obligations of the contraction parties during the performance of the contract so much so that it makes the execution of the obligation difficult or more onerous for the promisor in such a way that the execution becomes impossible unless by suffering an enormous and unordinary loss.

It can be concluded here that, if the economic equilibrium of the contract is destabilized because of the occurrence of some unexpected events and change in circumstances such a way that the performance of the contractual obligation becomes excessively or extraordinary difficult then in such a case the route of exemption of the affected party from the performance of the contractual obligation has been accepted by various legal systems.104

The clause of “disturbance of the contractual equilibrium” is only applied to the case, where there is a contemplated equilibrium at the time of formation of the contract, but it gets obstructed after the conclusion of the contract and during its performance. Then, whenever in a contract, since the time of formation the contemplated balance did not exist, the clause of disturbance of the contractual equilibrium is out of question, and this case on the ground of lack of the economic element cannot invoke the rule of changed circumstances.

However the conclusion driven form this is that the doctrine of altered conditions or the doctrine of change in the circumstances of the contract would be only invocable when the performance of contract in the new circumstances becomes more onerous. Therefore, if the performance of contract become virtually impossible or even extremely difficult as a result of the unforeseen events then in this case, it can only invoke force majeure by

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reason of impossibility of the performance of the contract and would result in termination of the obligation.

It is interesting to note that, the concept of difficulty or impossibility of performance of contract is divided into categories: “material impossibility” and “legal impossibility”. *Material Impossibility* of performance of the contract means that the execution of the obligations in the new conditions would be contrary to the ordinary way and would become, physically impossible. The causes, which render the performance of the contract physically impossible are destruction of subject-matter, death, illness, incapacity of the promisor in the contracts where the personality of promisor is important for performance (personal contracts), method of performance impossibility, unavailability, for example, in the charter the ship gets detained, seizes or becomes out of order so that it could not do shipping of goods in the port of delivery at the stipulated time.

The concept of “Legal Impossibility” of performance of the contract is that the performance becomes impossible under the provisions of the law or result of express executive orders issued under powers of emergency legislation, even though the physical possibility of performance is still existing. In such cases the contract becomes unlawful in the light of its nature or situation of the contracting parties eg. prevention of export and import by law and breaking of commercial relations with contracting country in war times etc are considered as causes of legal impossibility of performance of the contract.

However, the hardship of performance of the contract on the ground of change in circumstances must be distinguished with material impossibility as well as legal impossibility. The hardship of fulfillment of an obligation is not sufficient to invoke the rule of *force majeure* or termination of the contract or exemption of the promisor. It is also impossible to invoke *force*
**Majeure** in cases where the execution of the obligation on account of change in the economic situations becomes excessively expensive.\textsuperscript{105} But, may legal writers considers that the difficulty of the execution of the obligation is same as the concept of the impracticability (practical impossibility). In other words, they include the difficulty of the execution of the obligation in the impossibility of the performance and considers it just the same. For the logical explanation of this, the impossibility of the performance has been divided into two categories: "Absolute Impossibility" and "Practical Impossibility". The concept of "Absolute Impossibility" is that the performance of the contract with a physical or legal view becomes impossible for the promisor, so that in any case the promisor is not able to execute the obligation. The concept of the "Practical Impossibility" means that the performance of the contract is not absolutely impossible, but it only becomes more difficult as well as expensive. With reference to this, the exemption of the promisor is not only out of absolute impossibility, but also out of the practical impossibility i.e. the practical impossibility too it is considered as one of the causes of this exemption.\textsuperscript{106} It is however to be noted that the above mentioned analysis has not been accepted for the following there reasons:

1) The difficulty of the performance of contract result from the change in non-inherent conditions of the contract or destruction of its secondary clause (i.e., the necessity of continuation of the contractual equilibrium), while the impossibility is on the ground of the change in inherent condition and in its substantial nature.

2) The instability of the validity of the contract which takes place on account of the change in circumstances and difficulty of the execution of the obligation, may be out of
contract, that is, it is not concerned to the real intention of the both the contracting parties. But, the instability, which occurs as a result of this impossibility so that it causes the termination of the contract, and is undoubtedly is based on the theory of freedom of the will and it comes out by the intention of the parties.

3) The effect of difficulty of the performance of contract is the adjustment of the contract and in case of impossibility of the modification it results in cancellation. In this case, the right to cancellation or adjustment is given only to the person who sustained a loss due to the new (changed) circumstances. While the effect of impossibility of the performance of contract would give the right to cancellation to each contracting party, that is in this situation the contract would be cancelled and, its obligations would become void; and both parties are exempted from further execution of the obligations. The reason of this distinction is that the material or legal possibility of the performance is not negated in case of difficulty of the performance of contract. For this reason, the legal system of most of the countries has not admitted at all the dissolution or annulment of the contract on the ground of change in circumstances. But they have only contemplated renegotiations of the contract. If they admit dissolution or annulment it will apply only in rare and in exceptional cases.
Now the question which arises is here to the same as may be faced by many judges during the course of proceedings i.e. How would one find the destabilization of the equilibrium of the contract and difficulty in performance of contractual obligation? Or How would one know that the contractual equilibrium of the contract in destabilized and whether there is a difficulty in performance of contractual obligation or not? It is evident that to answer this question justifiably, there should be presented a specific standard to distinguish destabilization of the economic balance of the contract and also the difficulty in execution of the contract, law and custom. Therefore this test of distinction of the economic element is divided this three categories:
   a. Contractual Test
   b. Legal Test
   c. Customary Test

Discussion
   a. Contractual Test
   
   The Contractual test firstly must be found or tested or located in the tenor of mutual consent or in the means that both the contracting parties have chosen for explanation of their intention.

   In some of the contract the parties might have stipulated the specific provisions of the adjustment of the contract and proportion it with the new situations. Today, these provisions are included in the international contracts in the form of the typical and standard clause. They mostly appear under the title like “hardship clauses”, “renegotiations or revision clauses”, “adjustment clauses”. In these clauses, though any standard has not been specifically mentioned for finding unequilibrium of considerations and hardship (difficulty of the execution of the obligation), but it may establish the above mentioned test by the method which has been contemplated for the
adjustment or renegotiations in the contract. In important contracts, for example, the parties contemplate the supervening events and probable changes. They stipulate the specific formulas for the purpose of renegotiations of the contract. Among them are: the contracting parties in some of the long-term contracts draw up the contract price according to one of the changeable criterion of price such as the criterion of cost of living, criterion of agriculture product, criterion of consumer or industrial goods or wage of labour etc. In this case, the contract price would be adjustable i.e. increase or decreased as per the above mentioned criterion.

Therefore, we find that the standard of materialization of the economic element of the rule is by the adjustment clause of the contract. Therefore it is evident that this test would be a contractual test.

b. Legal Test

The contractual test, at times, is not sufficient for finding the destabilization of the contractual equilibrium and it is difficult in the contracts which are concluded earlier or as per the observance of the provisions of the law that contemplate the special clauses for adjustment of the contract. But for finding the conformity, the hardship clauses with the above mentioned provision should find the legal test because probably the contractual excuse clause does not confirm completely with what was contemplated in the text of the contract. When the clauses of a contract are silent with respect to changed circumstances and difficulty of execution of the contractual obligation, THEN in such a case, the test which is applied for the fulfillment of economic element of the rule would be a legal test. The adjustment of contract in changed circumstances in such cases per the legal test would be according to the legal provision of the contract.
c. Customary Test

If the tests to distinguish the un-equilibrium of contract and difficulty of its execution is not achieved by the expressed or implied intention and also has not been contemplated by any rule in the statutes, THEN in such a case, the customary (objective) test to distinguish destabilization or unequilibrium of two considerations should be used and the difficulty of fulfillment of obligation should also be examined objectively, that is without observation of personal situation of the promisor. It is on account of that, in case of difficulty of performance of contract, the customary test is applied, but not personal (subjective) test. In better words, the scope of un-bearing of loss comes out of change in circumstances and would be distinguished according to contractual usage and practice. It is evident that, the judge does not consider personal motive of the two parties and the difficulties and personal inability is not basically effective in the judge’s observation.

However, in the survey of difficulty of fulfillment, the conduct of the reasonable person would be a standard, that is, “it should be seen whether the reasonable person can endure, without adjustment of contract, the difference between the contractual obligation in former and present cases or not”? Whenever the performance of contract threatens the loss to the promisor, which is several times more than normal loss, then such a loss is considered enormous and excessive, though it is not important to the whole assets of the promisor. But, what is important is the execution of the obligation to such an extent as to make it extremely difficult and more expensive. Therefore, the normal loss in the transaction is not sufficient to distinguish the enormous unequilibrium of the two considerations. Because, the profit and loss go together in the traders transaction. In spite of this, it should be kept in mind that the degree of difficulty of performance of the contract depends on the promisor’s situation and ability and also circumstances of the contract. It
means that fulfillment of obligation may become difficult for promisor in the specific conditions and favorable for other promisor in the same conditions. It may also be possible that the execution of obligation becomes excessively difficult for promisor in the specific conditions, while it becomes normal for the same promisor in some other conditions. Therefore, to distinguish the unequilibrium between two considerations, in addition to objective conditions, the personal elements and the situation of the promisor and the special conditions of the contract, should also be considered.

Now, we reach to this conclusion that, the standard of destabilization of the contractual equilibrium and difficulty of execution of the obligation has two aspects, objective and subjective. It is objective, because the reasonable person and his endurance is considered and it is subjective because the situation of the reasonable person in the specific conditions of the contract should also be taken into consideration. Therefore, this can be said that, the standard to distinguish excessiveness of the obligation is considered as a changeable and flexible standard.

Therefore, the conclusion drawn from the discussion in that, the doctrine of altered conditions or the changed circumstances has been formed by two basic elements. They constitute the base of the rule. They are legal elements and economic element. The frustration of legal element destroys the foundation of the contract. The particular meaning referred to here, of the foundation of contract is, any matter that has been accepted by the parties without expressed or implied mention in the contract and the specific base of the mutual consent is based upon it. Therefore, the meaning of the foundation of the contract is the continuation of the circumstances at the time of the agreement as well as the contractual equilibrium. In other words, the customary and specific base of the agreement indicates to the stability of the particular circumstances, which have been existent at the time of the
formation for the contract, also stability of the equilibrium between two considerations.

Therefore, the disturbance of foundation of contract means the change in circumstances, which have been considered as an object of real and implied intention of the parties at the time when the contract was made. The meaning of frustration of the economic element is to destabilize the economic balance and make the performance of contract difficult.

As we know, the economic conditions and circumstances which existed at the time of formation of contract never remain fixed and may be that they may get completely changed as a result of the unforeseeable events, which occur during the performance of the contract. On this basis, if the economic balance of contract is seriously destabilized as a consequence of the above mentioned changes and the scope of contractual obligations is fundamentally increased and consequently if the performance of contract become excessively difficult for one of the party, THEN the other party deserves to be compensated for the enormous loss suffered out of the new circumstances, by virtue of the rule of changed circumstances.

Therefore, it mean that the rule of changed circumstances can only be invoked in case where the performance of the contract in new condition i.e the changed circumstances becomes more onerous.

It becomes worthwhile here to examine this concept of changed circumstances in the legal system of United States of America, United Kingdom and India (and since we are dealing with the trade laws it is necessary to discuss it with respect to “Vienna Convention on the law of treaties” also.)
6. POSITION UNDER DIFFERENT LEGAL SYSTEMS

I. American Law

In American Law the mode of discharging a contract is laid down in the doctrine of Impracticability”. Hence the concept of changed circumstances doesn’t find its place as an independent concept but is covered under the Doctrine of Impracticability in the American Legal System.

Under the American Law. “Impracticability” as a term is used in different senses. According to Oxford Dictionary\textsuperscript{108} it means.

- *Impossible to be put into practice or something which is not practicable.*

Commercial Impracticability excuses either party from performing a contract where the following conditions exist-

- Contingency must occur
- Performances must become Impracticable
- Non occurrence of the said contingency must have been the basic assumption on which the contract was made.\footnote{109}

Legally speaking the commercial impracticability is only the difficulty of the performance of the contractual obligation, which occurs unexpectedly and unforeseen. The lawyers use the said term only in such cases when the performance of contract is extremely hard and unbearable due to the rise of new conditions, though the physical performances may still be possible. The term impossibility is used where the performance of the contract becomes absolutely Impossible.

It is to be noted here that, the Uniform Commercial Code (UCC) uses the term impracticable to encompass Impossible.\footnote{110} The Second
Restatement follows the lead of the code. However courts have been extremely reluctant to accept anything short of Impossibility as an excuse for performance. Now the question is:

- Whether American Law recognizes the concept of changed circumstances or not? or
- If at all it recognizes than whether it does it in the same sense or not?

To answer these questions we would briefly examine the doctrine of Impracticability here. It would however be examined in detail and compared with other legal excuse clauses and the concept of changed circumstances, later.

In American law it has been interpreted differently in different cases. In the leading case *Mineral Park Land Co. v Howard*, the California court has led the way towards relaxation of this rule. In this case the defendant agreed to fulfill his requirements of gravel needed on a bridge building project by removing it from plaintiff’s land and to pay for it at the rate of five cents per yard. The defendant removed all of the gravel above water level but refused to take prevail below water level on the grounds that the cost of removal would be ten to twelve times the usual cost of removing the upper gravel. The court held that the defendant was excused from performing the obligation. The court reasoned that although it was not impossible to remove the additional gravel, for practical purposes and additional gravel was available. Therefore, performance was excused because of the non-existence, for practical purposes, of the subject matter of the contract. Many cases (leases) had previously been decided on a variety of grounds, mostly as a matter of interpretation of the lease and also on grounds of mutual mistake of fact. The case however, is noteworthy as equating impracticability with impossibility. Many cases e.g. *Swiss oil Corp. v Riggsby* and others in...
accord concerning mineral leases had previously been decided on variety of grounds, mostly as a matter of interpretation of the lease.

In the Second Restatement of law, the emphasis has been laid on impracticability in case of difficulty or unreasonable loss and damage. The increase in the expenditure of the performance of contract, only could not exempt the obligator to fulfill the obligation, but exemption happens due to unforeseen events which changes the fundamental nature of the performance of the obligation e.g. the extreme shortage of raw material or the means of the performance of the job, as a result of outbreak of war or economic boycott, unproductively in the region, unexpected break in original sources, provision of the goods, etc.

In this way whatever the judge, (no.1) apprehends with regard to impracticability and (no.2) what view the judge takes regarding the unforeseen circumstances in the performance of the contract and (no.3) whether the circumstance were reasonable at the time of the contract or not or whether they changed later on, would initiate the course of decision to be taken. Therefore "Impracticability" by nature in the sense of change or in the sense presumed in the contract is the change in the nature of obligation resulting from the contract. This is exactly the same view as taken by English Law in Commercial Frustration and by Indian Law in Sec 56 of the Indian Contract Act. The same view has been recognized as the dominating view in American Jurisprudence also.

From the above discussion it can be concluded that the concept of changed circumstances in American law has been approved though not as an independent doctrine but along with the Doctrine of Commercial Impracticability because it has been observed that the Doctrine of Impracticability is applied where the objective conditions (i.e. the conditions or circumstances of the contract which exist at the time of conclusion or
formation of the contract and exist in a manner that form the base of the mutual consent on which the contract is formed), basically change or presumed to be changed due to occurrence of some uncontrollable events which may result in exceeding the contractual obligation or may make the performance extremely difficult for the obligator. The effect of the change in circumstances is the termination of obligation and exemption form performance of the contractual obligation.

Therefore in American law, the legal effect of the change of circumstances under *Doctrine of Commercial Impracticability* is reviewed in contracts best in case of Impossibility and it causes termination of the contract.

II. **English Law**

In English law also, the concept of changed circumstances has not got any independent expression but is covered under *Doctrine of Frustration*. In common law, however, it has been recognized as one of the causes of termination of obligation.

Some of the English writers who have brought this concept directly under the Doctrine of Frustration are David walker\(^{118}\) and H. Beal\(^{119}\) Scholar's like G.H. Treitel,\(^{120}\) have also recognized it under the title "Method of performance Impossible and Unavailability. Other scholar's have exceeded this limit and have opined that the change of circumstances is the prime element of frustration. In other words, the frustration occurs when the change occurs in fundamental circumstances of the contract in such a manner that the initial circumstances have a basic difference with the newly evolved circumstances. As a result of this change (in fundamental circumstances), the change occurs in the performance of the contract in manner that performance either becomes impossible or illegal from the business point of view.
According to Chitty-

"Frustration is so much concerned with the change in circumstances that it cancels the base of the contract as a whole or in case of performance makes it different with that which was in consideration by the parties in the beginning and is concluded by the legal order."

In case of Davis Contractors v Fareham U.D.C.\textsuperscript{122} Lord Radiciff said:-

"Frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which its performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do .... There must be such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.\textsuperscript{123}

The above statement was explicitly approved by House of Lords in Case of National Carriers Ltd. v Panalpina (Northern) Ltd.\textsuperscript{124}

Since 1956 (taking into view the practice followed) the House of Lords has particularized the standard of distinction between Frustration and Changed Circumstances. In common sense, it is cover in the sense of primary element of physical impossibility or commercial impossibility which causes frustration.\textsuperscript{125} But from legal point of view this sense is applied only in cases where the possibility of performance of contract exists in such a manner that performance becomes difficult beyond the limits and also it becomes a futile matter from the commercial point of view

Now the question is:
Whether the English Law has, officially recognized the concept of changed circumstances in the same sense as mentioned, or not?

Again we would follow the same method i.e. to briefly examine first the Doctrine of Frustration and then compare it with the rule laid in Doctrine of Changed Circumstances.

"Frustration' as per the English law is, unforeseen and unexpected dissolution of the contract due to the occurrence of some unforeseen, unthinkable or unimaginable incidents, which makes its performance impossible or illegal. In other words, frustration is that where impossibility of performance happens due to some unforeseen events and the contract gets dissolved unexpectedly. Hence for this reason the English Lawyers discuss the Doctrine of Frustration under the heads such as – "Impossibility or Supervening Impossibility or Discharge by Operation of Law or discharge by Subsequent Impossibility". All these terms in explanation denotes subsequent change in circumstances which render the contract invalid or results in the termination of the contract.

The very first time when this concept of Changed Circumstances and Frustration of purpose was approved in the Judicial System of England was, in the year 1874 and the evolutionary or historical or the landmark case was Union Marine Insurance Co. Ltd. v Jackson. After this case the claim of Frustration of contract arising from the reason of changed circumstances was accepted by other courts as well for example in Anglo American Petroleum Co. Ltd. and in Dick, Kerr Co. Ltd.
In this way in England the Law of Frustration of contract was evolved and finally held its place in the said “Doctrine of Frustration.” By tracing the evolution of frustration in English law, we can easily conclude the evolution of the concept of changed circumstances side by side of the frustration even if not as an independent rule. This is why in this research it has been emphasized that if this concept was recognized since times immemorial then finally now the need has come to formally and officially recognize it in the various legal systems as a Rule or Doctrine of Changed Circumstances. And it cannot run side by side because the legal effects of both are different.

The legal effect of *Doctrine of Frustration* is cancellation of the contract from the beginning whereas the legal effect of the concept of changed circumstances is *firstly* – the modification of the terms of the contract and *secondly* in case of Impossibility is the cancellation of the contract. This Rule of Changed Circumstances has respected the Rule of “*Pacta Sunt Servanda*” (i.e. agreements are to be kept.) Therefore, it is concluded here that the concept of changed circumstances has not been officially recognized in the current sense.

III. Indian Law

In Indian Legal System, the concept of changed circumstances has not been given an independent status but it has been recognized under sections 32 and 56 of the Indian Contract Act (1872). The rule in sec 56 of the Indian Contract Act, 1872 exhaustively deals with the doctrine of frustration of contracts. Although, Indian legal System has not defined the doctrine of frustration but the Indian Judiciary has frequently used this term as in case of *Raja Dhruv Dev Chand v Raja Harmohinder Singh*\(^{129}\). In fact, Impossibility and Frustration are often used as interchangeable expressions by the Indian Judiciary as in case of *Satyabrata Ghose v Mugneeram Bangur & Co.*\(^{130}\).
Some of the Indian writers have also used them in a similar manner (interchangeable) while other have explained the concept of changed circumstances under specific grounds of frustration. But the question is:

- But how these expressions are interchangeable?

As regards this question, the courts are unable to clarify the point. The Supreme Court of India says that "Frustration" as an expression is applicable to executory contracts but in executed contracts, frustration will not apply. It merely creates hardship and Supreme Court of India in two similar case Sushila Devi v Hari Singh and Raja Dhruv Dev Chand v Raja Maimohinder Singh have held that the

"Doctrine of Frustration as applicable, in cases where something is not humanly possible".

But Professor, I.C. Saxena in his article "Frustration in Frustration" has criticized these decisions and suggested that Supreme Court may review its decisions. Regarding the acknowledgement of the concept of changed circumstances is Indian legal System again we would require the answer to the question-

- "Whether the concept or the rule of altered conditions or the of Change in Circumstances has been officially recognized in the same sense in India legal system or not?"

To answer this question, we would briefly examine the legal sense of Impossibility or Frustration in India Legal System. It has been held than in Indian Legal System the expression "Impossibility" and "Frustration" are inter-changeable. Therefore the doctrine of Frustration comes into play when a contract becomes impossible of its performance, after it is made, on account of circumstances beyond the control of the parties to the contract as held in Satyabrata Ghose. Here the changed circumstances made the
performance of the contract impossible. The court can give relief on the ground of subsequent impossibility when it finds that the whole purpose or the basis of the contract has been frustrated by the occurrence of an unexpected event or change of circumstances which were not contemplated by the parties at the time of the formation of the contract.

The rule laid down under Section -56 of the Indian Contract Act, 1872 is a positive rule relating to Frustration and it does not leave the matter of frustration to be determined by the courts according to the intention of the parties and the courts are not expected is go beyond the scope of the terms of that section. The conclusion is that the court is required to examine the contract as well as the circumstances under which it was made and the belief, knowledge and intention of the parties would relate to the evidence whether the changed circumstances destroyed altogether the basic nature and object of the contract or not. In English law it is known as Rule of Construction and in India it is known as Rule of Positive law and comes under the scope of section- 56 of the Indian Contract Act (1872).

According to section 9 of the Indian Contract Act (1872), the terms of a contract may be expressed or implied. Therefore, where as a matter of construction the contract itself contains impliedly or expressly a term according to which it would stand discharged on the happening of a certain event, then in such a case the dissolution of the contract would take place under the terms of the contract itself and hence it would be outside the scope of section -56 of the Indian contract Act. In English Law they are treated as cases of Frustration only, but in Indian Law, they would fall under section - 32 of the Contract Act which deals with contingent contracts or similar other provisions contained in the Act. Let us illustrate it with some of the leading cases.
The Supreme Court of India has dealt the Doctrine of Impossibility under the scope of section -56 of the Indian contract Act, 1872 in following landmark case:

*Satyabrata Ghose v Mugneeram Bangru & Co* 138.

In this case the supreme court of India has examined the nature and the extent of the Doctrine of Impossibility or Frustration and defined its scope.

Facts of the case were, that here the defendants were required to develop a considerable area of land under a land development scheme. A contract of sale of plot out of that land was entered into with the plaintiff after the war broke out. The sale deed was to be executed within one month after the scheme was completed. But before development began, a considerable portion of the land was requisitioned and the entry of the owner on that land during the period of requisition was made illegal. The defendant company offered to return the earnest money with conciliation of the contract or completion of the conveyance of the land on the condition that if neither of the alternatives was acceptable, the agreement would be considered cancelled and the earnest money would be confiscated. In a suit by the plaintiff for the enforcement of the contract, the defendant pleaded discharge by frustration.

The Supreme Court of India held that the doctrine was inapplicable. Having regard to the nature and terms of the contract, the actual existence of conditions at the time when it was entered into, there being no time-limit in the agreement for completion of the scheme, and the fact that the order of requisitioning was by nature a temporary character which neither affected the fundamental basis of the contract nor it affected the performance of the contract. Hence here the performance of the contract did not become impossible within the meaning of section -56 of the Indian Contract Act.

*In Ganga Saran v Ram Charan Gopal.* 139
Facts of the case were that in it the parties entered into five contracts under which the defendant undertook to supply 184 bales of cloth manufactured by Victoria Cotton Mills. The contract provided that the sellers would continue sending the goods to the buyers as soon “as they are prepared” by the mills and they would go on supplying to the buyers “as soon as the goods are supplied to the sellers” by the mills. Further in it, goods were to be supplied out of the goods which will be “prepared by the mills.”

In it the defense took the plea of Frustration by circumstances & asked for damages beyond the control of the sellers was held unsustainable in a suit for damages for failure to supply the goods. It was held that the said contract was not contingent upon the happening of an uncertain future event; i.e. the goods being supplied by the mills. The words “prepared by the mills” were only descriptive of the goods to be supplied and the words “as soon as they are prepared” and “as soon as they are supplied to us” by the said mills indicated the process of delivery. The contract did not fall within the second paragraph of the section-56 of the Indian Contract Act. Hence the doctrine was unavailable “where the non-performance was attributable to one’s own fault.

Now broadly it can be said that, “Frustration” in essence, is an unforeseen and unexpected dissolution of the contract due to the occurrence of some events which makes its performance impossible or it can be said that some events act as an obstacle to reach the main object of the contract. In other words, the meaning of Frustration is that the contract gets dissolved due to unexpected events which make its performance impossible. On the same ground in all the contracts, in Indian courts, this implied condition presumes that the subsequent impossibility of performance of the contract causes its dissolution and as a principle it is for this reason that in the legal texts of India the writers have discussed the doctrine of Frustration under the
Impossibility. It seems that in the Indian Law, the Change of Circumstances although in common concept is considered as a primary element of the Frustration and Impossibility. But as it has been mentioned from the legal point of view, the term of change of circumstances is applied only in cases were the possibility of the performance of contract exists in such a manner, that in spite of the performance, (due to commercial hardship which makes the contract unprofitable or more expensive) becomes futile. Therefore, the change of circumstances in the particular concept does not cover the Frustration and Impossibility. For this reason, according to this doctrine, the contract is not terminated only due to the reason that it became more onerous, but contrary to the concept of changed circumstances in the particular sense.

The Indian Judiciary has always held the view that the courts have no power to absolve a contract on the ground that the performance becomes more onerous. It has been perfectly explained in *Alopi Prashad v Union of India*.

Facts of the case were- “A. P. and Co. had been appointed under an agreement in writing by the Governor General as buying agents for the purchase and supply of Ghee for the Army personnel with effect from October 1, 1937 and were to be paid a buying commission and certain other charges. After the outbreak of the World War II, there was an enormous increase in the demand by the government and the agreement was revised by mutual consent in 1942 and the original rates were scaled down. In 1943, the appellants made a representation to the government for enhancing rates. The court held that-

“*A contract is not frustrated merely because the circumstances in which it was made are altered. The courts have no general power to absolve a party from the performance of his part of the contract merely because its
performance has become more onerous on account of an unforeseen turn of events."

The matter was referred for Arbitration and the appellants argued that the agreement of 1942 was not binding upon them and claimed payment on basis of initial terms made in the contract in 1937. In this case the court found that – the agents were fully aware of the altered circumstances and held that the mere fact that the circumstances in which the contract was made were altered the contract was not frustrated. The Supreme Court held that if a consideration of the terms of the contract in the light of circumstances, when it was made, shows that the parties never agreed to be bound in a fundamentally different situation which unexpectedly emerges; the contract ceases to bind at that point, not because the court in its discretion considers it just and reasonable to qualify the terms of the contract but because on its true construction it does not apply in that situation.

Therefore in Indian Law, the Change of Circumstances that results in Frustration or Impossibility is also called the cause of futility of contract and it guarantees the dissolution of contract and exemption of the obligation of performance in the contract. The difference in expression i.e. Futility of Contract because of Changed Circumstances or Frustration or Commercial Frustration is only the nature of change of the obligation. It should be noted here that these specification do not exist in the concept of Changed Circumstance because in this concept, we consider only the change of objective conditions or other baseless conditions which does not change the nature of obligation and does not alter the contractual relationship with new events.

Furthermore, the legal effect of Frustration from the beginning is cancellation of the contract but the legal effect of the concept or Rule of Changed Circumstances is firstly – modification of the purport of contract
and secondly only in case of impossibility of modification, it is cancellation or termination of the contract.

Hence, by studying the above explanation, it can be said that the Indian Legal System has not officially recognized the concept or Rule of Changed Circumstances but a strong need is felt in this developing times to smoothen the bilateral agreements between different countries to incorporate it as an Independent Rule in the Legal System of India.

7. VIENNA CONVENTION ON THE LAW OF TREATIES w.r.t. CHANGED CIRCUMSTANCES

Under Article -62 “A fundamental change of circumstance which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless :

1) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty and

2) The effect of the change is radically to transform the extent of the obligation still to be performed under the treaty”

Thus, after examining it carefully it may be said that with regard to the clause of “Rebus Sic Stantibus”, this Vienna Convention has deviated from its direct and expressed sense which is the continuity of the circumstances at the time of the conclusion of the contract, and it has relied on its indirect meaning. It is for this reason that the legal concept of the above mentioned doctrine has become remote to some extent from its literal
meaning but it becomes necessary here to explain that the doctrine of Rebus Sic Stantibus does not completely state the concept of the Rule of Changed Circumstances because this doctrine expresses only the subjective aspect of the theory, that is, it is presumed that there is implied condition in the contract and it does not take into consideration the objective aspect of the rule which expresses the connection of the rule with the objective principles of law, including the Rule of Equity. As a result, the compilers of the Vienna convention on the Law of Treaties did not apply the above mentioned rule in regard to the Article -62 of this act.142

8. OPINIONS OF THE LEGAL SCHOLARS’

One of the main cause of cancellation or destruction of international treaties is the cause of ‘Rebus Sic Stantibus’. Advocators of international law also do not negative this clause. Some Advocators have taken a broad view while some have taken a strict view and still others have rejected it.

For example. Professor G. Scelle143 accepts it fully and considers it practicable and in international Law, diplomatic views treaties, whereas Professor Triepel144 declared that the above mentioned clause is fully deprived of any legal worth value. Since there is so much vastness and variety in the views of legal advocators or legal scholars, therefore, their opinions, regarding the clause of “Rebus” or ‘rule of changed circumstances’ have been categorized in to the following three groups:-

I. Legal scholars who strongly oppose the clause of Rebus Sic Stantibus.

II. Legal Scholars who though oppose the clause of Rebus but Sic Stantibus not the strongly or extremely.

III. Legal Scholars who support the clause of Rebus Sic Stantibus.
Discussion

I. Legal Scholars who oppose the Doctrine

In the earlier chapter we traced the origin and journey of the principle of *Rebus Sic Stantibus*. After examining the journey of the historical development of the rule of changed circumstance, it is noticed that this rule has not been applied earlier in the public justice and law and obviously has not penetrated in the international law as well because the real source of international law is public justice only. If the scholar’s or advocators of law did not approve this doctrine in the middle ages, it would neither have found a place in the private law nor in the international law.

After being introduced to the public law, the legal scholar’s or advocator’s got a chance to frame opinions regarding it. Here the views of scholars who strongly oppose this rule are discussed. In this group, the views of those scholars would be discussed who not only negated the legal existence of this rule but also did not believe in accounting for it.

First to be mentioned is *Henry Trieple* who negated its existence at the end of 19th century. After him the place is taken by *Bruno Schmidt* who in the year 1907 had advocated that this rule had no legal value or worth and believed that this is only the advice which is a result of experience and it stands between the policy and law which is in the state of formation and would be created as a result of influence of the social and international elements and powers which are beyond and above the legal concepts.

Another famous legal scholar *Hans Kelson* has also negated the clause ‘Rebus’ absolutely. He relied on his belief and held a great respect for the doctrine of *Pacta Sunt Servanda* and hence advocated that the clause of “Rebus” or the “Rule of Changed Circumstance” is harmful for the ultimate goal of international law (which is the continuation of the judicial stability or equilibrium of the laws). At this point it is worth mentioning that *Kelson* did
not pay heed to the point that the judicial stability of the international law is practicable only when a process is evolved by removing of the defects and causes of non consistency of the legal order.

If the agreements and treaties do not coordinate with the new circumstances, (which is necessary feature) the judicial international security will face danger because in every legal order, the co-ordination with the new circumstances is a necessary feature.

It has been seen that the opponents of the clause “Rebus” or opponents to the “Rule of Changed Circumstances”, in fact, wanted to expose certain irregularities of the international legal order and other technical problems of the international legal order. It should be noted here that, in fact, those who negated absolutely or rejected it completely and wanted to remove it from the circle of international judicial and legal relations have not presented or advocated their views with any kind of specifics legal proofs or accountable legal propositions.¹⁴⁶

II. Legal Scholar’s who though oppose the rule but not so strongly or absolutely.

We have discussed above the views of those scholar’s who negated it absolutely .yet there is a group of scholar’s who have opposed the rule but not so strongly or absolutely .Probably they have not taken the subject so strictly as taken by the above group.

In this group comes Rods Loub who writes that this rule is contrary to the nature of every contract and this can neither be recognized in private law or in international law. In most cases it is inclined indirectly towards the destruction of the bias of right of people and it makes the law of nation a puppet in a manner that whenever it is of no use it be thrown Nevertheless, he has shown his inclination towards the acceptance of this rule as well.

¹⁴⁶
According to him this doctrine should be accepted but not as a legal rule but with a view as a means of encouragement of the concerned parties for the correct interpretation of the treaties and agreements. Therefore it can be said that the scholar has finally shown his inclination towards the acceptance of this rule.

Professor H. Lauterpacht has also rejected the doctrine of rebus but still in one of his lecturer at the International Academy of Law, has changed his views and has shown inclination in its acceptance. Professor. A Cavaglieri has also mildly changed his negative view and has considered this doctrine practicable with respect to several conditions. A famous legal scholar Grotius also recognized the clause where the parties have included the changed of circumstance in the text of the contract.

Baron de Taube also agrees with this belief. Contrary to that, a considerable number of legal experts, without rejecting the doctrine, has shown fear about the fact that the execution of the rule may cause extremity and would bring chaos in the international society. Regarding this De Caviedes has said that those who view it like this, they are people of sound views because they want to pay attention to the dangers of its execution in chaotic conditions. Hence they want to limit its execution to the regular defined legal limits.

Contrary to it, if they want to negate the execution of this rule and want to rely on the dangers, they will certainly be making a big mistake because in any case the extremity or abuse of right or abuse of any principle of the judicial principles, should not be considered as one of the causes of negation of that right or judicial principle. In case of extremity an effort should be made to reform the wrong execution of the principle and right because there in a strong possibility that every right or principle or rule may be abused which can lead to the extremity or chaotic conditions. Therefore if
any rule of law is used as a pretext for creating chaotic political situations, then certainly one cannot deny the legal and judicial nature of the rule and negate its existence.147

III. Legal Scholars' who support the rule

After discussing the opinions of the legal scholars who more or less rejects the principle of *Rebus sic stantibus* (change of circumstance), now the views of advocators who support the above mentioned clause would be discussed. It is to be noted here that the number of scholars who support the views is supposedly much more than the number of advocators who oppose it:-

The supporters of this rule can be broadly categorized in three groups namely:

i) Supporters who accepts on legal basis.

ii) Supporters who accepts without legal basis.

iii) Supporters who accepts and consider it as one of the objective principles of international law.

Diagrammatic representation:

Supporters of the rule

<table>
<thead>
<tr>
<th>Who accepts on legal basis</th>
<th>Who accepts without legal basis</th>
<th>Who considers it as an objective base</th>
</tr>
</thead>
</table>
Discussion

i) Supporters who accepts on legal basis (Will of the parties)

The followers of this view have tried that they should find the legal base in the will of the parties and makes this legal base as one of the general principles of international law. The group of legal experts who have considered that the will of the parties is the legal base of the clause Rebus (change in circumstance) have described their views in different styles.

A famous legal expert Oppenheim and classical scholars like Fauchille and Bonfils believe that every international accord like every internal contract includes an implied condition and according to which, it is permanently presumed that in an international agreement as long as everything is in its normal state, the agreement is valid and enforceable. In other words, the clause Rebus is understood in every international contract or accord (whether it is permanent or without any specific period) without it being mentioned clearly. But it must be pointed out that there is not even a single evidence which could indicate that such a clause might have been added in international agreement by the express will of the parties to the contract. In fact, it can be said that there does not exist such a hypothesis except in fiction.

On the other hand advocates of legal studies like Lord Mc Nair, Anzlotti and Burkardt share a different opinion. According to them they consider the doctrine of Rebus sic stantibus as the problems related to the interpretation of will of the parties to the contract. According to Anzlotti an agreement is the product of exercising rights and performing obligations according to the wills of the parties to the contract.

In the other words, it is the opinion of the parties according to their will, that they have undertaken and fixed the limits which they wanted. In
case where at the time of the formation of a contract, they had considered a
distinct legal circumstance as its base, it is natural that by changing of that
circumstance one come to this conclusion that the parties are not bound in the
condition of the will which they had considered (at the time of the formation
of the contract) and also the contract which was related to the existence of
that circumstance, is not valid any more. This is on account of that and
according to the opinion of the above mentioned scholars of law, that the rule
*Rebus* is the only interpretation of the will of parties. If they are determined
on this will that the specific circumstance forms the base of the validity of
international agreement, it is certain that the clause of the validity in its first
stage is a contract itself and at the secondary stage is the provision which the
parties have considered in the contract, whether expressly or impliedly. But if
the rule of *Rebus* is in fact the expressed or implied condition, that is, which
explains the will of the parties, of course then in this situation it should be
executed and this is an undisputed and a clear fact as it supports the doctrine
of legal intention. But, here starts another problem, it is possible that if from
any side this clause was not included in the contract whether expressly or
impliedly and on the other side it is also possible that the above mentioned
clause (may be according to the will of the parties) be included in the
agreement on this reason that the new circumstance have been unforeseeable
or at least the parties could not foresee those circumstances. In this case, then
how this problem can be solved in accordance with the rule of *Rebus sic
stantibus*?

One can not deny that the parties have the right to mention expressly
or impliedly the rule of *Rebus* in the Treaty as the international diplomacy
has practised in the same manner whether in Washington treaty of shipping
(1922) or accord of shipping between England and Germany (1935). But this
conduct does not lead to any solution for the real problem of the doctrine of
Rebus. The real problem of this doctrine is that what measure can be taken whenever in a contract such a clause has not been included for the reason that the change of circumstances at the time of formation of the contract could not be foreseen or the rule of Rebus did not exist. In cases where the circumstances have changed later than they originally were, at the time of the formation of the contract and there is no such clause of Rebus included in the contract THEN, in such a case from this point of view, the will of the parties is also not evident and execution of the contract should be carried out seriously. In spite of that, in such cases the contract is held valid and from this point of view it is accepted that even in case of complete change of circumstances of the contract, an objective principle definitely existed which argued the cancellation of the treaty.148

ii) Supporters who support without legal basis

Under this group come those legal scholars who adopted the rule of Rebus sic stantabus (change of circumstance) easily and without any limitation. It can be traced from the known words of Bismarch that:-

“All the contracts made with the big and powerful countries loses its obligatory unlimited force”.

This should be noted that such situation indicates clearly that the doctrine of Rebus has been accepted without any limit and for this reason it loses completely its legal base and with the result it is not considered as one of the general principles of law. Because according to the ideology which considers boundless value regarding right of domination of the countries naturally it can not be based on the legal, international and contractual aspects of Rebus. When the contractual rules, which obligate the government and country, are in contract with the vital interests and the full right which it bears as the high political society and puts them in danger than naturally the
government and the country can not fulfill such obligations and they are held to be not binding. If the obligation that has been accepted causes danger on the high political interest and the main aims, which are guarded by the government and country, then the official declaration of the unilateral cancellation of such an obligation is considered reasonable. These said obligations are automatically considered invalid without any obligatory force by the government which declared the unilateral cancellation.¹⁴⁹

iii) Supporters who consider Rebus as one of the objective principles of international law

The scholars who do not consider the creation of the mind and will of the human being, are naturally pro the objective principle of law and from this point of view they include the clause *Rebus* as one of the objective principles of International Law. As a result they do not take into consideration the will of the contracting parties, whether the parties have mentioned it expressly or impliedly. Among the scholars who are the exponents of this opinion, the name of *Erich Kaufman* should be specifically mentioned because his writings are the subject of different interpretations. Firstly, he considers international society as the specific and particular society and secondly he considers the International Law as the law of co-ordination (*un droit de co-ordination*) which is arranged for the particular purpose and according to logical planning. While the internal law is contrary to the law which is organized under the public power and with this regard it declares, the main object and inherent evidence of agreement and to be appropriate also legal interests and the equilibrium between the obligations, as the base of the clause *Rebus*. He believes in complete co-ordination between the clause *Rebus* and the principle of justice and equity, with the result the doctrine of bona fide (good faith)from one side and the perfect
defence of the right on the other hand has been put in force. But it should be pointed out that while Kaufman, who considers that the base of doctrine of Rebus is the right of existence of the country and government and believes that it is not morally possible for the government that to execute the formed agreement that is against their right of existence, also makes a mistake. In this regard, the mistake is that, the right of existence of the country and government that it explains only is a necessity in the case, but not the clause of Rebus because, the characteristic of the above mentioned clause is that, in cases where the vital interest or the existence of country are not in danger it is possible to be laid down and put in force. Again, the criterion of the life of government is not a stable criterion\textsuperscript{150} because when we approve the life and existence of government on the base of doctrine of Rebus, it should be proved objectively that the states have inherent rights which have compulsory recognition in the international law. But as it is not so and according to the belief of most of the scholars the meaning of the inherent rights of state is that' the individual right of a human being should be transferred to the state. But such an idea is not recognized in the international law because, state can not be counted as a human being and the rights which are enjoyed by the human being can not be transferred to the state. Besides Kaufman, the large numbers of scholars of law are also against the subjective will in the international law. They consider the base of principle of \textit{Rebus sic stantibus} as the objective base and believe that the legal base of \textit{Rebus} should be on the objective principle and not the subjective principle.
An agreement will be enforced when the following essential elements exist:

1. Offer and Acceptance. There must be an offer by one party and an acceptance of it by the other.
2. Intention to create legal relations.
3. Capacity of the parties. Each party must have the legal capacity to make the contract.
4. Consent must be genuine. The consent must not be obtained by fraud, or duress, for example.
5. Consideration must be present (except in contract under seal, i.e. by deed).
6. Legality of object of the contract must not be one of which the law disapproves.
   All the above elements must be present. If one or more is absent the contract will be void, voidable, or unenforceable.
AMERICAN LAW (American Restatement section-19)-
1. A promisor and a promise each of whom has legal capacity to act as such in the proposed contract.
2. A manifestation of assent by the parties who form the contract to the terms thereof, and by every promisor to the consideration for his promise, except as otherwise stated _ss.85-94:
3. A sufficient consideration except as otherwise stated _ss.85-94 and 535:
4. The transaction, though satisfying the foregoing requirements, must be one.
That is not void by any statute or by special rules of common law.

INDIAN LAW- In Indian Law, an agreement only becomes a contract on fulfillment of following condition -
1. Free consent of the contracting parties (Sections 13 to 22);
2. Competency to contract (section 11);
3. For a lawful consideration (section 23);
4. Not declared void (sections 20, 26-30 and 56);
5. In writing if so required by law [e.g. Art. 299(1) of Constitution of India; sec. 17 of The Indian Registration Act; Municipal Acts, Companies Act].
18 Circumstances such as fraud, undue influence duress, misrepresentation etc must also be examined.
19 Law Review Bureau for International Services vol I.
20 Demogue obligations vol I
21 Demogue obligation vol I
22 General principles of contract
23 General Principles of Contract.
25 S 30 T.P. Act
26 Sec 28 Court fee Act of India.
28 Obligations of Law vol I
29 Highlights the importance of knowledge, of an action to contract.
34 Sections 13 to 32 of the Indian Contract Act.
A duty is a legal relation that exists whenever certain action or forbearance is expected of an individual and the default of it will lead to some act in predetermined manner injurious to the defaulting individual. Soc A carbon 182. while the aggrieved party to an voidable or unenforceable contract sometimes has a remedy against the defaulting promises where there is no remedy for non performance, it seem inappropriate to speak of a duty of performance.

Restatement contracts 2nd ad. – An agreement is a manifestation of mutual arrant on the part of two or more persons.

Sec ch 5 intra

Trustees of Dartmouth College Vs wood ward 17 Us (4 wheat) 5184 L Ed. 629 (1819)

Sec C1-201(11) read with 1-20(3)

Reporters note – Restatement Contracts 2nd ed.

See 1 Corbin 4 – A bailment is not necessarily formed by an agreement. Eg A finder of personal property is a baiter.


Contract Uniform Sales Act.

Smith v Hughes (1871) LR 6Q.B.597, 607.


Eg. Post pp.8-9, 272.

See post p. 9

Post pp. 273, 286


Post p. 41

The Hannah Blumenthal [1983] a AC 854, 916-917

Post p. 316

Post p. 185

Introduction to the Law of Contract.

Rise and Fall of freedom of contract.

Chap. 4, 10, 11 post

Chap. 7 post.

Post p. 194
Barber v Manchester Regional Hospital Board [1958] 1 WLR 181, 196.

Barber v Manchester Regional Hospital Board [1958] 1 WLR 181, 196.

Barber's case, for the effect of this distinction on remedies see post pp 910-911.

Grant v S. of S, for India (1877) 2 CPD 445. Mitchell v R (1890) [1896] 1 Q. B. 121n.


R v Ivens (1835) 7c & p. 213.

Constantine v Imperial Hotels Ltd (1944) KB 693.

Resale Prices Act 1976 ss. 12, 25.


Sex Determination Act 1975 ss. 65 66 & 71

Race Relations Act 1976 pts II & III ss. 56, 57

Counts and legal services Act 1990, s. 64.

Employment Act 1990 S1(1) (a) of ibid S-2 (1) (a) under s.30 and sched. 1 para 5 the remedy in last resort is by way of compensation.

Acrow (Automations) Ltd. v Rex chain but inc [1971] 1 WLR 1676.

Sovorts Investment ltd. v S of S for the Environment [1971] QB 411, 443. If price is agreed after notice to treat there is said to be a statutory contract.

Sovorts Investment ltd. v S of S for the Environment [1971] QB 411, 443. If price is agreed after notice to treat there is said to be a statutory contract.


Gas Act 1986 s 10 (1)

Electricity Act 1989 ss 16, 22

Water Act 1989 ss 45, 46. (where it is clear whether the agreement in the latter case has contractual force)

Legal Aid Act 1988 s 9(7), 24 and sched 3 pt 1 para 2(1); s 16(10) refers to a contract between the Regally assisted person and the Board. Courts and legal services Act 1990 s. 61.

Post chap 2

Post chap 3, 4

Post chap 9, 11 also 10 & 12

Post chap 13

Post chap 8, s2

Post chap 8, s1
Outlines of Indian Legal History 4th ed. Pp 361-362 by M. P. Jain, Prof.
Sec 2(b) of the Indian Contract Act, 1872
(1873) 29 L. T. 271
Ibid p 279.
Abaji Sitaram v Trimbak Municipality (1903) 28 Bom 66, at p. 72
Goving laxman v Harichand 25 Bom L R 531 (PC)
Art. 1 of American Law Institute Contract Restatement.
Under Article 7 of the sale of Goods Act of England (1979), C. 54: “where there is an agreement to sell specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the agreement is avoided.”
Article 7 of the sale of Goods Act of England (1977, C. 54)
Black’s Law Dictionary, 6th ed. ,P 126
F. Momeni, op. cit., P 275
Vienna convention of the law of treaties, 1969
Oxford Advanced Learner's Dictionary, Second Impression, 1992
Uniform Commercial Code 2-615
Uniform Commercial Code 2-615
Second Restatement chap-II Impracticability of Performance and Frustration of Purpose)
172 cal. 289, 156 P458 (1916)
Swiss oil Corp. v Riggsby, 252 ky. 374,67 S.W 2nd
Brick Co. v Pond, 38 Ohio St 65 (1882)
Restatement of Law, Contracts 21, comment(d) (American Law Institute)

UCC 1978 (Uniform Commercial Code) 9th ed, P 172

American Jurisprudence vol 12 PP. 938 + 957


Chitty, Contracts, 23rd ed vol I

[1956] A.C. 696, 729

ibid


The same view is taken by Chitty. Contract vol I

Union Marine Insurance Co. Ltd. v Jackson (1874) L. R. 10 C.P. 125.

Anglo American Petroleum Considerations. Ltd v. Tamplin S S

Considerations. Ltd (1916)

Dick, Kerr Considerations. Ltd v. Metropolitan Water Board (1918)

Raja Dhruv Dev Chand v Raja Harmohinder Singh (1968) A.S.C 1024


Avtar Singh, Law of Contract 6th ed PP 298-300. Pollok and Mulla,

Indian Contract and Specific Relief Acts Vol I, 11th ed, P 601

Sushila Devi v Hari Singh (1971) A.S.C. 1756

Raja Dhruv Dev Chand v Raja Harmohinder Singh (1968) A.S.C 1024

Prof. I. C. Saxena, Annual Survey of Indian vol. XVIII 1982, the Indian

Law Institute, New Delhi 1982 p. 57.

Satyabrata Ghose v Mugneeram Bangur & Co. (1954) S.C.R 310, 318

ibid

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Ganga Saran v Ram Charan Gopal (1952) S.C.R 36

Alopi Prasad v union of India (1960) S.C.R 793


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Hans Triepel, Volkerrecht and Landesrecht, p.89, No.2.

B. Schmidt, Clausula Rebus Sic Stantibus. p. 225.

(uber die volkerrecht)


Ibid., p.153.
148 Ibid., p.159.