CHAPTER-IV

CONTRACTUAL EXCUSE THEORIES

vis a vis

PERFORMANCE OF CONTRACT

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1. INTRODUCTION

The main object of the study is to know the concept of altered condition or changed circumstances and its application in the commercial trade (with respect to International Pacts between the Nations). To do this, it is required here, to examine it with respect to the similar other contractual excuse concepts, as laid down in the legal systems of various countries. They are also known as contractual excuses theories. These contractual excuses clauses includes all concepts, according to which, the transacting parties shall be legally excused from the effects of its failure (with respect to performance of obligation in the contract). Since long, their shadow can be well felt in the international practice of commercial trade.

In American Law it is the ‘Theory of Impossibility and Impracticability’ and in English Law it is the Frustration of Contract and Frustration of Purpose under the ‘Doctrine of Frustration’ and under Indian Legal System it is covered under section 56 of the Indian Contract Act 1872.

It is important to mention here, that the ‘Force Majeure’ theory and the ‘Theory of Improvisation’ in French law and the ‘Theory of Hardship’ in the countries that have Common Law systems are more or less similar. Though these contractual excuses clauses have the common basis, that is, legal excuse from the failure to perform the contractual obligation of the contract BUT, from the point of view of the difference in concepts and the manner in which they are interpreted in various legal systems, their applying, many a times causes mistake or misunderstandings in the International contracts.

The study or knowledge of differences between them becomes extremely important in drafting the choice of law clauses in the International Contracts. It must be kept in mind that, though the above mentioned terms are
in a sense differ from each other but they all lay down unexpected or unforeseen or fortuitous or supervening events, which happened after the formation of the contract and without the default of either party, and beyond the control of the parties to the contract and they effect the contract by some or the other way.

Effort has been made here to carry out a brief survey and the analysis of these contractual excuses concepts and to clarify their distinction from the doctrine of changed circumstances.

2. ANALYSIS OF THE THEORIES PREVALENT UNDER DIFFERENT COUNTRIES

All the legal systems of the world envisages mode of discharge of the contract. They legally excuse the liability of performance and so they can also be termed as Contractual Excuse Clauses. Although, they share a common basis but yet they are known by different names and many a times International Contracts suffer serious setbacks because of their interpretation being done differently by different nations. Therefore to achieve a common platform of their (contractual excuse clauses) interpretation the harmonization in the trade laws is required and for this their analysis is the first step towards it. The contractual excuse clauses prevalent under major legal systems of the world are:

I. Theory of FORCE MAJEURE
II. Theory of IMPREVISION
III. Theory of HARDSHIP
IV. Theory of COMMERCIAL IMPRACTICABILITY
V. DOCTRINE OF FRUSTRATION
I. THEORY OF FORCE MAJEURE

(i) General

'Force Majeure' is a legal term that has been derived from the code of Napoleon. It is a legal term in French law, that was applied for the first time in civil code of France and later on the same term or its equivalent was used in the other countries as well. In International law the same term is used and we can see it being used in English law and other law texts as well. It is one of the subject that has come into consideration in International Contracts. In most of International Contract a clause regarding is it is always noticed.

In developing nations, the trade agreements or economic development agreements may be contemplated in many forms and that also includes a variety of arrangements, such as joint ventures, concessions, other arrangements between the parities such as private investors, public domestic agencies, sovereign states and International organizations with world wide or regional responsibilities. Depending upon the nature of these circumstances, the agreements are governed by Municipal law, International law, General Principles of Law.

Thus there is a justified reason to assume that the diversified character of these agreements will have a direct impact upon the formulation and implementation of force majeure and similar other excuse clauses.

We can safely derive the opinion that both in scope and precision, 'Force Majeure' clause (which is also known as a contractual excess clause), in economic development agreements vary significantly. Certain
clauses fall short of the expectations where as others may just happen to
defy imagination by the luxury of their detail and length. Nevertheless, it
would be wrong to infer, from this kind a persuasive language of some of
these clauses, that their basic function as a legal device is different from
that of more soberly drafted provisions. Like all other contractual
stipulations, Force Majeure clauses cannot be read in isolation. They must
be construed in the light of the whole agreement in which they are
contained. It means that the whole agreement should be construed while
deciding rather than just the force Majeure clause.

(ii) Definition

‘Force Majeure’ is a legal term in French law and was derived
from the code of Napoleon and applied for the first time in Civil Code of
France. It is also been used in similar manner in English law and other
legal texts.

In French law the term force majeure has two meanings – General
sense and strict sense. In general sense (Lato sensus) Force Majeure in
French law means- Irresistible and unforeseeable event which makes the
performance of a contract impossible.

In strict sense (Stricto sense) it means an event without name
(anonymous) to which is unforeseeable and irresistible.¹

In the General sense it covers the act of third party and the act of
the promise. The act discussed here being irresistible and unforeseeable
event that makes the performance of the contract impossible.

Force Majeure occurs when the law recognizes that without
default of either party, a contractual obligation has become incapable of
being performed because the circumstances in which the performance is
called for, has rendered the performance impossible.
Force Majeure under French law is an irresistible and unforeseeable event, which makes the performance of a contract impossible. Under French law the line is drawn between on one hand the impossibility of the performance that is, Force Majeure and, on other hand, the circumstances which destabilizes the contract where economic conditions are such that fundamental and far-reaching changes occur, which is called the Doctrine of Imprevison.

At present in French law usually there is no distinction between Force Majeure and Cas Fortuit (fortuitous events) and both are used as synonyms in the jurisprudence.\textsuperscript{2} Though some of French and non-French lawyers do not believe in any distinction between them. In the International Law, the term Force Majeure is usually used in common concept, so it covers Force Majeure in strict sense and also fortuitous events.\textsuperscript{3} Though in the Common Law, the term Force Majeure is not commonly used, and cases are dealt under “Frustration” or “Impossibility”. These legal concepts are theoretically different from the Force Majeure particularly because they have wider range than Force Majeure. But in spite of all that, in the countries which come under Common Law, by using these doctrines they derived the same conclusion which are more or less similar to the result of Force Majeure.\textsuperscript{4} Besides that, the Force Majeure is used in the International Economic Contracts, which are concluded by those countries. And even this term has been defined in the Legal Lexicography written in English. In the Black’s Law Dictionary it has been written as:

“Force majeure in the law of insurance, superior or irresistible force such clause is common in construction contracts to protect the parties in the event that a part of the contract can
The Doctrine of Force Majeure is not only used in the internal law of France and all the countries which have statutory law but also in Common Law (under other concepts). It has also been introduced as a Common General Principles of Law in the civilized countries\(^6\), and also in the Public International Law. Some of the learned men of international law are not satisfied regarding its legal authenticity. But the prevailing view is that this concept has also been accepted in the Public International Law.

The Vienna Convention on the law of Treaties (1969)\(^7\). Though the term *Force Majeure* has not been used, but the concept of it has been found. The article 61 of the above convention under “Supervening Impossibility of Performance” provides as follows:

a. A party may invoke the impossibility of performing a treaty as a ground for terminating or withdrawing from it if the impossibility results from the permanent disappearance or destruction of an object indispensable for the execution of the treaty. If the impossibility is temporary, it may be invoked only as a ground for suspending the operation of the treaty.

b. Impossibility of performance may not be invoked by a party as a ground for terminating, withdrawing from or suspending the operation of a treaty if the impossibility is the result of a breach by that party either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.\(^8\)
As it has been observed, the concept of Force Majeure makes lot of sense in the article, but it seems that this article has mentioned only one aspect of it, which is based on the lack of subject of the contract, while the Force Majeure has a wider applicability. This is on account of that the said article has been criticized by some of the learned men of the international law.

(iii) Essential Elements

The French law does not easily accept Force Majeure. The general rule is *pacta sunt servanda*, as incorporated in Article 1134 of the French Civil Code. In principle, the judge cannot modify an agreement or order its non-execution unless the legislator allows him to do so. A judge is not supposed to appraise the economic situation of the parties or to rule in equity against the wordings of a contract.

Furthermore, Article 1142 stipulates that any obligation to do or not to do is dissolved by damages whenever the debtor does not execute the obligation. However, Article 1148 specifies that damages (in case of Force Majeure) not dues.

Although the courts have applied those Articles in a strict way, some change and more flexibility is noticed in recent, trends of case law. The application of Article 1148 requires simultaneously the fulfillment of the following conditions: It means that Article 1148 is applicable when following four conditions are fulfilled. They are:

(a) **The event must be irresistible.** This clearly distinguishes the Force Majeure from Imprevention. If the event simply makes the performance of the contract more difficult or more expensive, then the obligation shall nevertheless remain due.
The event must be unforeseeable.

The event is to be an outside one i.e. external.

The event should be unavoidable and absolutely beyond the control of the debtor.

As per the discussion, it can be said that Article 1148, in recognizing that a contract can be discharged due to Force Majeure, is not a mandatory law. Parties are free to give their definition to Force Majeure events and the judge has to respect such a definition.

As regards Force Majeure, it is often believed that this term is solely of a contractual nature, so that parties to a contract are free to stipulate that a certain event shall be regarded as Force Majeure, irrespective of the conditions which have to be met under the applicable law.

This view is for instance reflected in contract stipulations, in which it can often be found, that a determined event will be recognized as Force Majeure only when a Chamber of Commerce or a similar organization issues a “Force Majeure Certificate”. In the interpretation of the parties, the presentation of such a certificate will release them from their contractual obligations. They are often subsequently surprised and disappointed to learn, that though a decision of Arbitration Court, or that a Chamber of Commerce or other body can only certify, that a specific event has taken place but that the arbitrators are bound to the qualifications of the applicable law.

One of the reasons for this confusion may be that the standard contract, which are largely based on common law conceptions, are used...
by parties coming from different legal systems. Such is the case, for instance, of the Conditions of Contract (International) for Works of Civil Engineering Construction of FIDIC\(^9\) which introduce expressions like “expected risks”, “special risks”, “frustration”, which have not always a strict equivalent in continental legal terminology.

The legal elements for the qualification of an event as Force Majeure (vis a vis major, act of God, etc.) are essentially the same in most legislation, and court decisions show a universal trend to a comparable restrictive interpretation. These elements are:
(a) That, the event is of an external nature,
(b) That, it could not be foreseen or prevented and
(c) That it renders performance of a contractual obligation impossible at all or for a certain time.

(iv) Legal Effects

There are two major Effects-
(a) Termination of Obligations
(b) Dissolution of Contract.

Discussion

(a) Termination of Obligation

If the permanent impossibility of performance is the result of Force Majeure then in this case, it causes the termination of obligation and dissolution of contract. In this case, Force Majeure leads exemption of the promisor and the promisee can demand for loss incurred on the ground of non fulfillment of the contract. (Article 1148 of the French Civil Code).
(b) Dissolution of Contract

If the occurrence of event is such which has caused the impossibility of performance of the obligation, temporary, the theory of Force Majeure renders the suspension of the contract. After the removal of the obstacle, the contract comes into effect if the performance of it has preserved itself profit and coincides with the will of the parties. It means that whether after the expiry of the time of suspension, the contract has preserved itself profit and its performance coincides with the will of parties or not. If the court assesses that the nature of contract has fundamentally changed and its performance is contrary to common will of the parties at the time of formation of the contract, the court would usually issue an order of termination of contract. This problem usually happens in contracts where the war conditions have suspended the performance of them and the court would then also examine whether the contract has preserved itself profit or not\(^{10}\).

In case of suspension of the contract on account of Force Majeure, the promisor will not be responsible for the damages from non-performance or delay of the performance during the period of suspension. It sums up that whenever, the contract has not been carried out due to Force Majeure or there occurs any delay in its performance the promise can not demand the damage for this reason.

(v) Judicial Interpretations

Economic and political developments in recent years have brought rapid changes in the economic environment. One would therefore expect many noteworthy ICC arbitration cases dealing with Force Majeure and hardship issues. Surprisingly, this is not the case. As Professor Strohbach

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indicates, there have been only a few cases before Arbitration Court in CMEA countries. Let us examine them.

In case no. 2546, an Austrian buyer of raw material requested compensation from an Israeli seller for non-delivery of a part of the contracted quantity after the outbreak of the Yom Kippur War in October 1973. The defendant had evoked Majeure Force on the grounds that the plant had been closed until March 1974, and the transportation facilities, both within and from Israel have been in complete disarray. Alternatively, he alleged that further supply of raw material was to be excused in accordance with the general Doctrine of Frustration: to supply the client with the additional quantity at old prices in view of the fact that market prices had dramatically gone up, would have meant: "... his selling he product at on third of its production cost ...".

It was established that the defendant had invoked the contractual Force Majeure clause after the outbreak of war on October 8, 1973 but, the shipments has continued after that date also. In January 1974, the defendant declared the outstanding balance of deliveries as cancelled in view of the Force Majeure situation and at the same time offered new deliveries at considerably higher prices. The sole arbitrator, sitting in England under English law rejected both defences for the following reasons: He stated that:

"It was proved to my satisfaction that Force Majeure, in the shape of war, prevented fulfillment of the balance of the contract in the period from 8th October to 31st December 1973. The contract was thereupon extended, in the event, for two months. I did not find it proved that Force Majeure prevented fulfillment during January and February 1974. The evidence of that effect submitted on behalf of the Respondents did not, o my mind, give any satisfactory explanation of the
offers to ship made early in January 1974 at a higher price. I concluded that the Respondents could and would have shipped the balance in January and February 1974, if the higher price had been agreed. Or at any rate the contrary was not proved.

If I had not reached that conclusion on the facts, I would have rejected the Claimants' submission that the Force Majeure clause has no application to difficulties in production and applied only to difficulties in putting goods on board ship. I also rejected in the respondents submission that the contract was frustrated because the cost to them of performing it had considerable increased. No doubt it is possible that a contract may be frustrated through becoming more costly to perform: But it can not be said in my opinion that, as a matter of law, an increase in cost of 300 percent for example would frustrate a contract but one of 200 percent would not. My reasons for rejecting this submission were first, that there is little room for the Doctrine of Frustration to operate when a contract already has an elaborate Force Majeure clause: and secondly, that the Respondents, evidence in this area was not lacking in detail and that I was quite unable to conclude that any fundamental hypothesis of the contract was no longer fulfilled".

This award clearly shows some trends which can also be found in other decisions rendered by the International Arbitrator, namely that war will only be accepted as a Force Majeure clause if the hostilities have had a direct impact on the performance of the contract and that, in addition, performance
has to be continued if it is possible, after a reasonable time. The argument that there is no room for the Doctrine of Frustration in cases where there is an elaborate Force Majeure clause confirms the reasoning of International Arbitrators found in other ICC awards that, businessmen are considered to be well aware of the risks which they take within the framework of their business. Consequently, they are held fully responsible for the adverse results if they have failed to protect themselves in the contract.

There are other cases as well (2142\textsuperscript{13}, 2139 and 2138\textsuperscript{14}) that deal essentially with the same matter. After the expropriation of sources of raw materials in a developing country, the former owners threatened with attachment, all products which would be sold by the state enterprise entrusted with the commercialization of the product after the expropriation. In the mean time, this enterprise had concluded a series of FOB contracts with different buyers. Some of them, after being informed of the threat, refused to take the delivery under their contract on the grounds of Force Majeure. In the proceedings however, it could be proved that the other buyers had regularly taken the delivery of the product in question and that no intervention by the former owners had evidently been made.

In all these cases the arbitrators rejected the existence of Force Majeure because the nationalization had already taken place before the new buyers had signed their contracts with the new distribution enterprises. The element of enforceability was therefore lacking. In addition, no proof could be established in any case that buyer were prevented from taking delivery of the product in question, as the claimant could demonstrate that such deliveries had actually been carried out without problems for other buyers.

One argument, which often turns up in arbitration disputes by parties desirous of terminating a contract is that performance has become impossible due to exchange control or customs regulations. These questions are dealt
under two heads i.e.– Exchange Cases, case no 2216\textsuperscript{15} and case no 3093/3100\textsuperscript{16} concerns with the exchange controls and Case no. 3740 of 1918\textsuperscript{17} concerns with the export controls.

*Exchange control and Export control.*

❖ Exchange control:

In Case 2 no. 2216 and 3092/3100, buyers of crude oil refused to perform their contracts, arguing that they did not get the necessary authorizations to obtain foreign exchange. In addition, in Case no 2216, the facts were that the prices for crude oil had actually gone down and the performance of the contract would have meant a substantial loss for the buyer.

In both cases, it had been established during the proceedings that the pertinent Exchange Control Legislation had been in force before the contracts had been concluded. Therefore the buyers were fully aware of the fact that authorizations might not have been given for a specific transaction. In case no 2216, it could also be demonstrated that the buyer had probably even failed to undertake necessary steps to obtain the required authorizations.

The arbitrators decided that the element of enforceability was lacking. The pertinent Exchange Control Legislation was already in force before the contracts has been concluded, and hence it was regarded as the duty of the buyers to undertake the necessary steps to get the foreign exchange transfer permissions. As such, since it had not been the case, they were held responsible for breach of contracts.
Export control case:

In Case no. 3740\(^1\)\(^8\), an Indian defendant refused to deliver a certain quantity of a commodity on the grounds that the government of India had requested him to meet domestic requirements in priority to export commitments. He informed the claimant thereof and asked to be relieved of his contractual obligation by virtue of the Force Majeure clause, which they had stipulated.

The sole arbitrator concluded that the defendant had relied only on a confidential person-to-person letter signed by an Under Secretary of a Ministry, and that the decision to ban the export of the goods was not the subject of any export (control) amendment order published in the Official Gazette nor did it purport to have been made by the designated Minister of the Central Government. The arbitrator concluded.

"In the premises such decision did not have the force of law, or consequentially, the effect of constituting force majeure within the meaning of clause .... Of the letter dated".

This decision also shows a very strict standard: The arbitrator took a formal standpoint and did not take into consideration the administrative pressure which was probably exercised on the Indian party.

The same attitude can be found in Case no. 1703\(^1\)\(^9\). In this case, it had been established that the party which had to set up a plant on a turn-key basis had to stop the work due to outbreak of hostilities. After the end of hostilities, this party refused to continue and finish the work on the grounds that its government has withdrawn the necessary export financing facilities, that it was not possible to obtain the necessary visas for its personnel and that its security could not be maintained.
In this case Force Majeure was applied for the duration of hostility but the arbitrators, (after having Force Majeure for the duration of the hostilities) after twenty days, came to the conclusion that for the following period one basic element for the qualification of a Force Majeure situation, namely 'irresistibility', was missing: The visas could have been obtained if the defendant has made the necessary efforts (because the consulate of the country of the defendant has never been closed) and it would also have been possible to find alternative financial resources. The defendant had, in the view of the arbitrators, failed to declare his willingness to continue his work and to make the necessary efforts.

The same attitude is reflected in the Case no. 1782, a party which had to deliver trucks to country and was required to maintain them. After delivery, it refused maintenance on the ground of Force Majeure because its employees did not obtain the necessary visas. The arbitrators ruled that even if this allegation was correct, it did not make performance impossible. The defendant could have made other arrangements in order to guarantee the servicing of the trucks.

The above-mentioned ICC cases clearly demonstrate the tendency for international arbitrators to interpret Force Majeure in a very restrictive way. The same observation is true for Hardship.

ICC arbitrators have only exceptionally admitted the application of the principle of Rebus Sic Stantibus.

This restrictive approach is not only visible where French law is applicable, a law which is always quoted as an example of strict interpretation of the principle of Pacta Sunt Servanda, but also, where other laws are applied.
Hence we can conclude here that, ICC arbitrators apply at least the same restrictive criteria for admission of Force Majeure or Hardship, as do courts in the country whose law they apply.

(vi) Review

After discussion of Force Majeure let us summarize its main points here as conclusion and distinction between the Doctrines of Force Majeure and the rule of Changed Circumstances which are as follows:

❖ Force Majeure (superior force) is an irresistible event and according to some of the legal systems and international commercial contracts is an unforeseeable event, which prevents the performance of the contract. The Force Majeure clause as an excuse in non-performance of the contract causes exemption of the promisor from the responsibility of fulfilling the contract. It has been admitted by all systems of internal law as well as in international law. Though, there are differences about its details of conditions and cases, but there is no difference of opinion regarding its basis.

❖ The change in circumstances as well as Force Majeure can take place due to any unexpected, irresistible and unforeseeable event, but Force Majeure does not prevents the performance of contract, that is, it may not cause impossibility of performance of the contract; It however creates merely a hardship for performance of contract, In other words, it causes to destabilize the contractual trade balance.

❖ Force Majeure in cause of occurrence mainly effects the contracts, for example, it causes cancellation or at last suspension of the contract. If the impossibility of performance of contract is
permanent, the contract will be cancelled and the obligation of contract would become void. But if the impossibility of performance of contract is temporary, the performance of contract will be suspended until the removal of situation that caused Force Majeure. If the performance of contract after the expiry of the specific time is not benefited or it is contrary to the common will of the parties, then in such a case, the contract is also cancelled, while under the doctrine of altered conditions or changed circumstances the change causes the modification of contract or they lead to the right of cancellation for promisor.

The Force Majeure clause that is attributable is found in most of the international commercial contracts. It can be applied by both the contracting parties. Therefore, in case of its application circumstances of the case should be carefully examined and the Force Majeure clause must be included in the contract. Whenever Force Majeure clause does not exist in contract, which is the root cause of claim, in spite of that, it may invoke the doctrine, but in this case, the rules of Force Majeure in the governing law over contract as well as international law must be considered and the attention must be paid to the particulars of the case and all the aspects of the problem should be invoked at the appropriate time. Though, there may not be any clause in the contract, but in spite of that, by virtue of the basis of the doctrine of altered conditions or change in circumstances some may invoke upon it.

It should be kept in mind that, the party who invokes the Force Majeure clause must prove the situation of it. In other words, the proof lies upon the promisor who wants exemption from the responsibility relying upon Force Majeure. However, if the
promisee claims that appearance of Force Majeure situation has arisen by the fault of the promisor consequently, the responsibility of promisor there remains that the burden of proof rests with promise.

In case of the change in circumstances, the concerned party who invokes it must prove this situation and its effects including the hardship and also the high cost of performance of the contract. The difference between two concepts is that, the factors, which cause Force Majeure situation, are as follows: revolution, chaotic conditions, strike and legal prohibition which causes ultimately the impossibility of performance of the contract. While, the economic changes are the main factors for hardship and being high costs of performance of the contract though, are rooted to the economic, political and social circumstances.

II. THEORY OF IMPREVISION

(i) General

The Doctrine of Imprevision in French law is a counterpart of Doctrine of Hardship in English law. The critical circumstances, that occurred during the First World War in Europe particularly in France (with the result that the concession institutes like electricity, water supply and telephone services became bankrupted) resulted in the change in judicial thoughts. Consequently, the Rule of Unforeseen Events was invented. This rule in French law was pronounced for the first time on 24 March, 1916 by the State Council (Conseil d' Etat) in the well renowned award of Gas de Bordeaux. Later the administrative courts admitted it
and also used it as a determining principle in the contract concluded by public services BUT not by the government in private agreements.

This rule of “Unforeseen Events” means lack of foresight in French law and is only accepted under exceptional circumstances. If the circumstances which the parties agree to recognize as unforeseeable events are not expressly and clearly stipulated in the given contract, the judges will not agree to adjust the terms of the contract. This is not the case however, in contracts where administrative law would apply.

If, for example, the motorway building company cannot obtain the expected compensation for its investment because of the lack of toll paying traffic after the construction, then the Conseil d' Etat can provide for remedy of this situation by inviting the parties to renegotiate the contractual terms in the interest of the public service.

The interest of public service is probably not the sole ground for these decisions since the administrative courts grant an indemnity for “lack of foresight” even after the building contractor had executed the work. The question here arises is that -Can one reasonably sustain that, the Courts want to prevent the spreading of fear among building contractors for public utility contracts? Or is it, the case of simple equity?

Though, this rule for the first time was laid down in French law and from there it penetrated gradually in the legal system of other countries as well. Later on the Supreme Court of France (Cour de' Cassation) explicitly rejected it on the ground of conflict of this doctrine with the doctrine of Pacta sunt servanda (agreements are to be kept). In spite of that, the state council of France with the purpose of avoiding the suspension in public services has officially accepted the doctrine of
“unforeseen events” in the territory of the public law and administrative contracts.

In French law the rule of unforeseen events has been recognized by different means and the lawyers, to analyse the legal basis of this doctrine, have invoked the doctrines of “Implied Condition”, “Interpretation of Contracts”, “Cause”, “Good Faith”, “Prohibition of Abuse of Rights”, “Unjust Enrichments” and “Created Fraud”. To support the doctrine of unforeseen event some French writers have strengthened it on the basis of more forceful law and have given accord to the adjustment of contract to civil law on the ground of the unforeseen event. They say that, the above mentioned doctrine is according to the article 1134 of the Civil Code which stipulates that the contracts should be performed with good faith and in the light of this interpretation of the article it can be accepted that, the said doctrine has a definite legal principle.

It should be kept in mind that, in French Law this concept has been accepted on the ground of Observation of Equity, Prevention of loss or Prohibition of Abuse of Rights and Unjust Enrichment. The unforeseen event here is that (any) event, which has not been foreseen by the parties at the time the contract was made, and they had not presumed any possibility of its occurrence. Possibility may be of any sort of economic events or natural calamities and also the exercise of public sovereignty.

(ii) Definition

The French professor “Laubadere” defines the Doctrine of Imprevention as follows:

“Whenever the unforeseen and beyond the will of promisor, events destabilizes the financial balance of the
contracts in such a manner that the performance of contract confronts with the hardship and also imposes any expenditure on promisor, while he is bound the execution of obligation also deserves the compensation by promisee and undertakes a part of reached cost and damage.\textsuperscript{25}

It should also be mentioned that the said lawyer has considered the doctrine in relation to the administrative law. By keeping in mind the brief history of the above doctrine, this doctrine is derived from the theories of the public law. In this doctrine, the continuation of contractual relationship is the rule. Consequently, the promisor is bound to the continuation of execution of the obligation and can not cancel the given contract. Hence, here the distinction of this doctrine and the doctrine of Force Majeure comes into light. The effect of Force Majeure is the cancellation of contract, while the effect of Doctrine of Imprevention is the continuation of contractual relationship and compensation. What is considerable in this doctrine is that, the created unnatural and exceptional situation that caused the change in the contractual balance, should be removed and it provides the conditions of continuation of the performance of contract. This task may take place by payment of indemnity and compensation. Otherwise, the given contract will be automatically cancelled and would ultimately result in the imposition of loss without compensation on the adverse party (i.e. the affected party) which would be illogical\textsuperscript{26}. 
(iii) **Essential Elements**

In the light of the above given definition of the doctrine of Imprevision, the conditions when this doctrine can be invoked are discussed henceforth:

(a) **The event must be unexpected.**

The unexpected event is to be beyond the will of the promisor.

It means that the promisor or the concerned organization should not create any unforeseen event. For example, the arising of extra costs by falling the inefficiency of the work on the ground of applying the new technology by the competitors then, here it would be considered as the incapability of the promisor, because he could not match with the competitors and in away the person was responsible for this inefficiency. On the other hand, the adverse party too should not create such a situation.

(b) **The event must be unforeseeable.**

The event talked about here is that single event that has not been forecasted, because every condition and situation which in any way changes the circumstances of contract has already happened earlier directly or indirectly and this can not be said that it was absolutely unforeseeable. On account of this, it is sufficient that the event may happen that disturbs all the calculations that were in view at the time of formation of the contract. As it happened in case *Gas de Bordeaux.*

(c) **The unexpected event destabilizes the financial balance of contract**

The *Force Majeure* in French law is applied at the time when the occurrence of an event makes the performance of contract impossible, but
for applying the *Doctrine of Imprerision*, it is sufficient that the contractual balance of the contract is disturbed.

If we presume that in any contract the parties give some consideration against whatever the gain is and, on this presumption agree to enter into a contract but, with the occurrence of the event, the balance of the contract gets disturbed THEN in such a case, the affected party would suffer a considerable loss. The *Doctrine of Imprerision* brings the lost balance to the primitive condition i.e. the balance between the two given considerations.\(^{27}\) In other words The Doctrine of Imprerision tries to maintain or bring back the lost equilibrium.

(d) **The event does not cancel the obligation**.

Contrary to Force Majeure, is the doctrine of Imprerision under which, the continuation of contract and execution of the obligation is considered important than the cancellation or termination. In the *Doctrine of Imprerision*, the principle followed is the continuation of the contract. The continuation of the performance must be made and should not be suspended for any excuse. If one does not do so and hence destabilizes the contractual balance, THEN he can not claim for the compensation.

Taking in view the application of the doctrine of Imprerision in the contracts of public law and providing public interest on continuation of the contract the given object is to maintain the continuation of the contract. The best way for keeping the public interest is that the contract should remain in force as usual and the compensation of the injured should be sought rather than its termination. The *Doctrine of Imprerision* gives the assurance to the contracting party that, the result of the change of financial balance of the contract would be guaranteed by the governmental...
organization. The judgment for compensation is not considered for revision and renegotiations of the contract. Though, the judge invites the parties for the revision of the contract, but governmental organization, requests for the facilities of public service so that it may enjoy the performance of contract and hence the judge is not bound to accept the revision. But, if the said organization does not itself accept the modification and revision of the contract, the judge would consider the compensation. If the said damage is not compensated, the contract will be automatically cancelled. In the above mentioned judgment, the judge would consider the situation of parties and calculate all aspects of promisor's profit and loss during the performance of contract. As has already been mentioned, the promisor suffers a part of damage. In any case, the missing contractual balance is compensated by some means and the benefits of parties are considered.

(e) The doctrine of unforeseen event solves the problem

To invoke this rule, it is important that the promisor should suffer a damage, because it has not been foreseen by the person or in commercial usage. This problem may arise as a result from economic conditions, natural causes or decisions taken by the government by any measure and by the decision of the exercising authority. The depreciation and appreciation in values or wages, shortage of products and the effect of law on the supply and demand, devaluation, competition of companies, taking advantage of advanced technology and increasing the efficiency and capability of the product are considered effective economic factors though. These factors themselves may arise from the natural calamities also. On this basis, happening of a natural disaster, wars, economic boycott of the goods, ratification of laws or other administrative decisions of government
would cause problem in the contractual relationship. In any case, the doctrine of unforeseen event (*Imprevision*) solves the above mentioned problems according to a certain formula evolved by the cooperation by the parties. The organization that requests the public services facilities must suffer the major part of the damage. It should be kept in mind that the government and public organization usually play main role in creating the economic crisis or controlling the effective circumstances, which destabilized the contractual balance. This is not in this sense, that only the government and public organizations create the problems or control all the events but, taking in view of the principle of maintaining the public services demand on the one hand, and the necessity of compensation on the other hand, the above mentioned formula would be the best solution. Although, the concept of maintaining the public services in the doctrine of *Imprevision* is a dominating concept, but it is not a monopolistic rule. The compensation can be given in other considerations also, which are equity, and the expenditure,\(^28\) or the compensation that is imposed to the promisor in the governmental contracts.

(iv) Legal Effects

It is worthy of note that, the legal effects of the Doctrine of *Imprevision* in the private law and the administrative law of France are different to each other.

In the *private law*, the sanction of the doctrine is modification and completion of conditions of the contract\(^29\), though the lawyers have accepted the cancellation of contract in the exceptional circumstances and in cases where there is no practical or legal possibility of modification of the contract.
In the administrative law, though some of the writers believe in modification in case of the unexpected events, but the general principle in the administrative contracts is that whenever, as a result of unforeseeable events, the execution of the obligation becomes excessively difficult or burdensome and so much expensive for the contractor, the contract is not invalid even if it is not revised in its condition. The government in such circumstances is bound to help the contractor by removing the existing difficulties and hindrances and providing necessary facilities in order to continue the performance of the contractual obligation of the contract. Hence, the government for the protection of its rights also should pay a part of the damages in a reasonable quantity to maintain the equilibrium. Despite that, the contractor has no right to violate the performance of contract on the plea of economic factor BUT in any case he is bound to continue the execution of the obligation. The Doctrine of Imprevison has, thus, been innovated for providing the principle of stability of the public affairs and in maintaining the public service so that the economic crisis may not interrupt the regular public services. In case of serious economic crisis, the parties should enter into the negotiations and compromises to avoid the damage.

In case of disagreement between the parties, the court can decide to estimate the damage keeping in mind the circumstances and the rational interpretation of the terms of the contract. The government is also bound to assist the contractor by subsidizing to check the interruption of the public services. The estimate of subsidy by the government depends upon the decision of the court. In this way, in the public law and with regard to the administrative agreements the state council does not give permission to the courts for renegotiations of contract and invites the parties for mutual consent, but consider by paying unforeseen damage as sanction of the refusal by administrative authority.
At the end, it is necessary to point out that the situation arisen by unforeseen events should be momentary. Therefore, after the setting down of the economic crisis and restorations of the contractual equilibrium between the right and obligations, the parties come back to their normal situation and the government would not pay any role in the Contract. But, if this adverse situation continues and there is no hope of the normality of situations or in case where it is established that the continuation of the performance of contract would not lead to any good result, the case would not be taken as an ‘Unforeseen Event’, but it would come under the category of ‘Force Majeure’. If it so happens the parties are allowed to go to the court to cancel the contract. It is evident that, in such situations the cause of cancellation would be Force Majeure.

(v) Judicial Interpretations

In the French legal system the doctrine usually observed is the Doctrine of Force Majeure i.e. exercise of public sovereignty and unforeseen event with various fields and its usage have different effects on the contract. In spite of the case similar to the ground of the doctrine of Imprevisión and destabilizing of the economic balance, until 1916 there was not any possibility for modification of the contract by the judge. The doctrine of Force Majeure had no role to solve the problem of the destabilization of contractual equilibrium. After the outbreak of the First World War there were rapid effects in the contracts by the rise in the prices of many goods. The new circumstances were not too far and the Conseil d'État (the state council of France) could not avoid the task of making this decision. The reason that was leading to the acceptance of the Doctrine of Imprevisión was the case Gas de Bordeaux; In this case the mayor of Bordeaux (in France) handed over the concession of production and distribution of the gas to a company. The rate
of supplying the gas was fixed by mayoralty. At the outbreak of the First World War the price of coal, the prime material to produce the gas, became high and the company faced the unforeseen event and so suffered the loss. The said company requested mayoralty to rise the price of the gas, so that it may compensate its loss. But, the petition was rejected by the mayor and was refused to pay the deficiency. The State Council of France according to the award of 13 March 1916 held paying compensation to the concern company by the mayoralty.\textsuperscript{30}

The approval of the \textit{Doctrine of Unforeseen Event} began in the administrative agreements after the implication of the above mentioned award and is still in force in the legal system of that country and consequently has been applied at several occasion. This change is the result of the new situations that has arisen in that country as well as in the other parts of the world. The real image of the doctrine appeared in the above mentioned award and later has been invoked in the many significant decisions and generalized upon, in other administrative contracts. It is evident that, the Doctrine of Imprevision in French law began since the case Bordeaux Gas and later extended to the public law, but here it does not mean that it can not be applied in the private law. The Cour d' Appeal (court of appeals) of Paris delivered an interesting opinion on the matter in \textit{E.D. F. v Shell Francaise.}\textsuperscript{31} Before putting forward the said case, again this should be pointed out that, in French law the doctrine of Imprevision is only accepted under exceptional circumstances and judge will not agree to adjust the terms of the contracts.

Article 1134 of the French Civil Code indeed binds the parties of a contract not just to what they commit themselves to, but also to, what custom stipulates and to what equity prescribes.
In 1978, the Cour d’Appel of Paris delivered an interesting opinion on the matter in *E.D.F. v. Shell Francaise*. Several oil companies signed a long-term contract with E.D.F. for the supply of fuel oil for thermal power stations. A price revision clause was inserted to the effect of linking the price to a rather complicated index system. However, the price of crude oil jumped so high after the Kippur war that the index formula left E.D.F. with a substantial loss, in the case of having to perform the contract.

The index formula was insufficient because it contained a maximum and minimum variation. The contract also contained a hardship clause stipulating that, the parties would meet “to study possible modifications to be made in the contract in case the fuel price increased by more than six francs per ton”. The court naturally noted the absence of a suitable revision formula although the parties declared their intention to “meet in order to study possible modifications”. In fact, the parties continued the performance of the contract leaving the fixation of the price open to a later decision which indicated that they basically considered the contract as valid. The court finally fixed a rule of reason in accordance with basic intentions of the parties which said:

“It therefore is zip to the parties to calculate the price and variations of it, to replace a no longer evident or applicable reference by a formula which would ensure for E.D.F., for each category of fuel, a reduced purchase price in relation to deliveries of an exceptional amount both the quantity and duration and to the public service task of this body, whilst leaving the refiner with a sufficient profit margin.”
It is interesting to note that the allusion was made to "the public service task of E. D. F."

E. D. F. is certainly a public undertaking, but with an industrial and commercial character its contracts with the companies are undoubtedly private contracts.

The inclination of the judicial precedent of France for making of award in such cases indicates that the unjustification of imposing illegal loss on one side would be a noteworthy point. In any case, the unreasonable damage should be removed and to impose it on one party of contract there is no reason (on the pretext) of non-interference of the judge in the will of parties and contract. The doctrine of Imprevision is explicitly applicable on all the government contracts, which include the person, or any institution as promisor to the government that renders its service through any commercial or industrial activity. These activities may be:

- Supply the general requirements (award 8 February 1918 R.D.P.)
- The Public Services Particularly transportation (award 3 August 1917) in Case of sea carriage
- The trade in general works in the form of contractual assignment and given in trust (award 20 November 1914 related to compensate the damage to the public services in charges and the unforeseen growth of economic expenses).

Besides the above mentioned case, there are other fields which are to be served according to the Doctrine of Imprevision. Some of the lawyers believe that the said doctrine has been approved only by the state council of France and has not been recognized by the Supreme Court. Therefore, it is applied in the government contracts only.
As has already been referred the Doctrine of Imprevision in French law in respect of nature itself (but not in the scope) is a counterpart of the Doctrine of Hardship in English law. By comparing the Doctrine of Imprevision with Hardship clauses, the latter can be considered as an agreed adjustment of Imprevision. It covers the circumstances, which are not, or have not been foreseen and provides for the ensuing consequences particularly concerning re-adaptation of the contract. If the governing law does not accept Imprevision the Hardship clauses assume their widest scope.

On the contrary, Imprevision is a recognized concept by the legal system of France (the law of the contract), and the scope of the clause is to merely adjust by agreement an already existing legal concept in the contract. Therefore, if the hardship clause is included in any contract, there is no need to invoke the Doctrine of Imprevision, but if the clause has not been mentioned, then the unreasonable damage can be checked by applying the Doctrine of Imprevision.

This doctrine, though, for the first time was laid down in French law and from there it penetrated gradually in the legal system of other countries (like Egypt and some of the Arab countries), but later on the France Supreme Court (cour de Cassation) explicitly rejected it on the ground that it contradicts with the general principle of commercial law i.e. Pacta sunt servanda.

In spite of that, the state council of France, with the purpose of avoiding suspension in the public services has officially accepted the Doctrine of Unforeseen Events (the Doctrine of Imprevision) in the scope of the public law and administrative contracts.

Therefore, we can see that in French law, the concept of “Changed Circumstance” has been accepted by the way of the Doctrine of Imprevision.
This doctrine is exercising the well known principle of International Law known as *Rebus sic statibus* which according to some has penetrated from international law and the internal law and has applied it in many cases. But, the Doctrine of Imprevison though looks apparently similar to the Doctrine of Changed Circumstances in its concept and nature (this can be taken as one theory), but it differs in its scope because the Doctrine of Imprevison in French law has been approved for the purpose of public law and in case of administrative contracts (by the state council of France). This is based on the public interest and performing public services without break. Therefore, all the persons and organizations which have undertaken to do the public services and with the result of an unexpected events encountered enormous loss can invoke the said doctrine (e.g. the case *Gas de Bordeaux* and *E.D.F. v Shell Francaise*) while, the scope of the rule of Changed Circumstances extended to the public law (in case of administrative contract) and international law (like international trade agreements) and is also is applied in private law in cases of commercial contracts among parties. Consequently, it is not based on providing the public interest and checking the performances of public services.

Under French law a thin line is drawn between, on the one hand the impossibility of the performance ie ‘Force Majeure’ and on the other hand, circumstances which destabilizes the economic balance of contract i.e the ‘Changed Circumstances’.

*Force majeure* under French law is an irresistible and unforeseeable event which makes the performance of a contract impossible, but the *Doctrine of Imprevison* occurs when the performance of contract as a result of unforeseen event and the destabilization contractual equilibrium can become ruinous for one of them. Consequently, the promisor would then suffer an enormous expense. The *Doctrine of Imprevison* considers the
continuation of contractual relationship and also compensation related to it, based on the mutual cooperation between parties while, in the force majeure case the contract would be cancelled.

Under the Egyptian law, the *Doctrine of Unforeseen* event with the minor difference is just the same as *Doctrine of Imprevention* in the French administrative law. The Egyptian Civil Code (approved 1949) in one of the article i.e. article 147 has approved the doctrine itself and some of its effects so that, the Egyptian Courts awarded according to it. Contrary to the judicial precedent in the France (which has admitted the Doctrine of Imprevention only in the public law) in the Egyptian judicial precedent the doctrine has been applied in the public law in case of administrative contracts as well as in the private law (in case of civil cases) and taking in view of the text of the Article 147 of the Egyptian Civil Code is in force in all cases. The above mentioned rule also penetrated into the other Egyptian provisions like lease, loan, agency, contract work and right of easement.

### III. THEORY OF HARDSHIP

(i) General

With the expansion of trade facilities and activities, there has been a steep rise in the commercial activities between the nations. The International Contracts are mostly the long term contracts and in such contracts the performance of the contractual obligation undertaken, takes place for long durations, and the contracts mostly comes across various changes which affects or questions the validity of the contract and destabilizes its contractual equilibrium.
The hardship situations mostly happen on the International grounds, where the parties of the contract belongs to different nationalities or on one side of the agreement is the government of one nation and on other side (other party of the contract), is a foreign nation. The hardship clause was previously under the other concepts in the legal system of various countries and was one of the cause of effecting the validity of the contract. But during the last decade this term has been applied as *Hardship*.

During the 70th decade, the world faced great changes in circumstances with respect to the oil and its price. The first change came after the outbreak of Kippur war in 1973, when the price of crude oil fluctuated beyond expectations and the clause of hardship came into consideration. The above mentioned change and other such changes which takes place due to the outbreak of wars, revolutions, strikes, disintegration of powers, decision of the universal society or regional decisions of some of the united countries effects the international economy and the trade inevitably. It results in the disturbance of the *contractual equilibrium* of the contract and sometimes results in the great loss on one of the parties to the contract. Such changes have given much recognition to the *Hardship* clause. Consequently it has majorly effected the formation of the long term contracts (in the field of oil, petroleum and natural gas) in such a way that the duration of the long term contract is reduced to 10 years or less.

(ii) **Definition**

According to Black’s Law Dictionary hardship means:

"*Privation, suffering and adversity.*"
According to Oxford Dictionary, hardship as a term may be referred to as "Circumstances that causes severe suffering or discomfort."

According to UNCITRAL, the term hardship means:

"A change in economic, financial, legal or technological factors that causes serious adverse economic consequences is a contracting party, thereby rendering the performance of the contractual obligation more burdensome or difficult."

According to some legal experts like H. Strobbach the term hardship refers to a situation where, the alteration of factors is the result of political, economic, financial or technological change and results in an unfortunate consequence for one of the parties.

The **Hardship** clause therefore has two main aspects. **Firstly** it defines the hardship and **secondly**, it provides for the renegotiations to make the contract adapt to new situation created by the hardship. Therefore it can be said that hardship is a situation or an event that changes or we can say that, which disturbs the rights and obligations of the parties in such a way that the performance of the obligation becomes more burdensome or difficult for one of the party to the contract. Hence we can say that, it results in the serious and adverse economic consequences which make the performance unprofitable or more expensive and more burdensome.

(iii) **Essential Elements**

**Hardship** clause can be invoked when the unexpected events or the unexpected change in circumstances happens which in turn destabilizes the contractual equilibrium of the contract.
These conditions can be summarized as follows:

(a) **Unexpected and Unforeseen Event**
There must be an occurrence of unexpected and unforeseen event, to invoke the clause of Hardship.

(b) **Pendency of the contract**
Change or the alteration in the contract or the unforeseen event must have occurred after the formation of the contract and before the conclusion of the contract i.e. the unforeseen event must have happened during the pendency of the contract. If the unforeseen and unexpected event happens before the valid formation of contract, it carries no value and if it happens after the conclusion of the contract then it is not valid. Therefore the unforeseen and unexpected event must happen during the pendency of the contractual obligation undertaken, in the contract.

(c) **The event must be beyond the control of the parties**
The event which causes hardship must not have arisen or occurred by the act of either party to the contract or the third party. It means that the event which causes hardship must be beyond the control of the parties.

(d) **Destabilization of the contractual balance**
When an unexpected event occurs it radically destabilizes the contractual equilibrium of the contract. However, it must be noted here that the “Hardship” clause would not apply in cases where the damage is slight. But if the benefits decline to the extent that it destabilizes the contractual equilibrium then the hardship clause can be invoked. The hardship clause can only be invoked in cases where the contractual equilibrium of the contract is disturbed or destabilized. However, it is necessary to
point out here that it can not be invoked or applied in cases where the performance of the contractual obligation becomes impossible.

(e) The party which relies upon the occurrence of the hardship event, must continue the performance of the contract.

(iv) Legal Effects

Hardship refers to an event that changes (disturbs or destabilizes) the contractual equilibrium between the rights and obligations of the parties in such a way that the performance of its contractual obligation becomes more burdensome for one of them.

The legal effect of hardship clause may vary under different legal systems. Some legal systems have recognized it, while some are still unknown to this and in yet some other legal systems its validity has not been tested in the legal proceedings. Although most legislations have rules to cope up with the events which cause hardship but the solutions accepted by the respective national laws as well as the decisions of the courts have shown a remarkable degree of variation. It should be pointed out here that these events which cause hardship are nothing else but the situation or conditions or circumstances which roughly fall under the scope of the doctrine or the rule of changed circumstances. For Example:

1. Professor Strohbach, in a parallel study on the same subject mentions, para.295 of the Gesetz Uber Internationale Wirtschaftsvertrag (“GIW”) 1976 of the German Democratic Republic said that this is a modern law, which takes into consideration the necessity to provide for adaptation to the changing conditions during the performance of long-term contracts. Its provisions primarily aim at an adaptation of the contract to the new situations and in continuation of the contractual relationship. Such a solution can not be found in other older laws. In the “model situation”, there is not a long-term
contractual relationship requiring a continuous cooperation between the parties and even the renegotiation of contractual provisions over a longer period of time, but a single transaction to be performed in the future, the execution of which becomes too onerous for one party due to changed circumstances. The logical and legal solution to such a situation is to relieve the party of its obligations without having to bear the consequences of the breach of the contract. Although it is true that, court decisions and legal doctrine in most countries have bridged the gap between unsatisfactory provisions of the law and the needs of modern contract practice, but still the results nevertheless differ largely from one nation to the other.

The including of hardship clause helps the parties to acquire an agreement regarding to renegotiations of the contract with the new conditions and to compensate the missing balance of the equilibrium as a result of unexpected events. If the parties or one of them does not accept the conditions of the new prices after renegotiations, the contract is cancelled inevitably. But referring the task to the arbitration for assignment of the new conditions and prices helps remarkably to continue the contractual relationship and checks the cancellation of the contract. Therefore, the first effect of including the arbitration in the contract leads to the possibility of negotiations between the contracting parties. If such negotiations come to some conclusion then the role of this clause also comes to an end. In case of Arbitration the Fixation of the new prices is determined by the election of the third, independent party, or referring the task to Rules of the International Chamber of Commerce (ICC). The result of this process must show that by renegotiations of the terms of the contract and adapting the new agreements, it checks the imposition of gross damage on any one of the contracting parties.
Therefore, the legal consequences resulting from the application of each type of clause as conceived in the Guide would also differ. A *Hardship* clause would provide that, if the hardship occurs, the contract is to be renegotiated. However an *Exemption* clause would provide that, if the failure to perform an obligation occurs as a result of exempting impediments then certain remedies, in particular the recovery of damages, are not available to the aggrieved party against the party who failed to perform.

In a Hardship clause, it is important to stipulate, when and how the parties will re-arrange the contractual terms in a case, when the contract loses its economic balance due to certain supervening or unexpected or unforeseen events which may or may not be specified.

(v) **Hardship Differentiated with ‘Exemption’**

Hardship clause must be differentiated from the exemption clause. A *Hardship Clause* as conserved would apply when a change of circumstances makes the performance of a party’s obligations more onerous, but does not prevent that performance.

An *Exemption Clause* as conceived here would apply only, when a change of circumstances prevents the performance of the obligation. Thus, a hardship clause may apply where, after the contract is entered into, administrative regulations relating to environmental protection change so as to introduce more stringent requirements which greatly increase the cost of construction. An exemption clause may apply where, the regulations change so as to prevent further construction.
(vi) Hardship Differentiated with the 'Value Maintenance Clause'

Hardship clause differs from the 'Value Maintenance Clause' in a way that the Hardship clause provides for the renegotiations of the contractual terms whereas, the Value Maintenance Clause adjusts the price automatically in accordance with some prefixed monetary or economic standards. Hardship clause bears a connection with Imprevisión with respect to the scope of the clause i.e. The scope of the clause can not be fully appreciated without referring to the treatment of Imprevisión by the law governing the contract. If the governing law does not accept Imprevisión, the Hardship clause assumes its widest scope. On the contrary, when the Imprevisión is recognized by the legal system (of the law governing the contract), the scope of the clause merely gets confined to adjust the contract by making an agreement in accordance with the already existing legal concept.

In the latter situation however, hardship clauses can be used by the parties, if they consider the existing provisions too restrictive or indeed too flexible or wish to substitute an individual procedure for re-adaptation other than that provided for by the law or more in particular to avoid the jurisdiction of the courts. In French law, the courts have expressed some reservations on the vague price fixing clauses.

The French Cour de Cassation rejected their application on the basis of Articles 1591, 1592 as well as on Article 1129 of the French Civil Code. The first two articles provide that the price of a sale must be fixed by consent of the contracting parties, if not by a third person, but never unilaterally by one of the parties. Only Article 1129 is more general, stipulating that any obligation must have as its object or a thing specified or at least as to its kind. The Cour de Cassation seems to maintain that prices which are not clearly
and objectively fixed makes a sales contract void. The wide scope of Article 1129 seems to indicate that hardship clauses are void in French contracts where the price fixing is essential and where the fixing refers to custom or equity.

Therefore, it is appropriate to provide either for a clear cut calculation method (but this is a maintenance clause not a hardship clause) or for the appointment of a third independent party who in infect agreed representative of the parties with the specific mandate of adjusting the price in case of contractual hardship condition. Under such circumstances, the defendant can only avoid the rebalancing of the price in sustaining that the contractual hardship conditions do not prevail.41

The hardship clause was previously under the concepts in the legal system of various other countries and is regarded as one of the cause that effects the validity of the contract but during the last decades, the term has been applied as "Hardship". The term hardship refers to a change in the economic, financial, legal or technological factors that causes serious and address economic consequence to the contracting parties, thereby rendering the performance of the contractual obligation more burdensome or difficult for one of the parties to the contract.

The different legal systems encounter with the hardship situation in the contract law in various different ways. We shall now discuss the hardship clause with respect to American Legal System, English Legal System and Indian Law.

Position under American Legal System

In American Law the clause of hardship appears under the Doctrine of Commercial Impracticability. Before the inclusion of the above mentioned doctrine in the Uniform Commercial Code42 (UCC) the term...
referred for this was "Impossibility". Hence Impossibility and Impracticability are interchangeable expressions.

In American law, the "Hardship" of the execution of the obligations causes the situation of "Commercial Impracticability" and its legal effect is exemption of the promisor from the subsequent performance of the contract. According to scientific and practical basis, though the official comment of the section 2-615 of the U.C.C. declares that if the performance of contracts becomes difficult or more onerous or more burdensome then, it is a reason enough for the exemption of the promisor, unless it has arisen from the unforeseen and unexpected event which changes the fundamental nature of the obligation. For this reason, the American Courts are not inclined towards the acceptance of this as an excuse lesser than the impossibility for the exemption of the performance of the contractual obligation. Therefore, they do not consider the unforeseen hardship and the increase of cost of the performance as a justified excuse.

Position under English Legal System

In English law the clause of Hardship or the event which makes the performance of the contractual obligation more onerous or burdensome or difficult is not sufficient for the cancellation or the modification of the contractual terms, unless the prime obligation undertaken changes fundamentally i.e. in cases where the result of the obligation undertaken would be fundamentally different from that performed. This has been clearly mentioned in the case of Davis Contractor.

Position under Indian Legal System

The position of the hardship clause in Indian Law is same as that taken under English Legal system. Under Indian Legal system, the clause of
**Hardship** or the event which makes the performance of the contractual obligation difficult or more onerous or more burdensome, is not sufficient for the cancellation or the modification of the contractual terms, unless the prime obligation undertaken changes fundamentally. In other words, clause of hardship which makes the performance of the contract more onerous is not sufficient for the cancellation or the modification of the contract, unless the obligation undertaken is fundamentally different from that performed as described in the case of Alopi Prashad.

(vii) **Judicial Interpretations**

Economic and political developments in recent years have brought about rapid changes in the economic environment as did armed conflicts and other political disturbances. One would therefore expect many noteworthy ICC arbitration cases dealing with *Force Majeure* and *Hardship* issues. Surprisingly, this is not the case. As Prof. Strobach indicates, there have also been only a few cases before Arbitration Courts in CMEA countries. The Secretariat of the ICC Court of Arbitration has been so kind so as to investigate for the purpose of this study and provide for the relevant awards, which have been approved in the 1980-1982 period. While there was no suitable case in 1980, one case has been reported in 1981 and two cases in 1982. This is a very small percentage of the total awards, which have been approved in these years (71 in 1980, 64 in 1981 and 74 in 1982). But the previous years also show a seemingly similar picture. There are no statistics available. The only source are extracts of awards which have been published by the former Secretaries General of the court of the ICC Court of Arbitration, Messrs. Thompson and Derains, in the *Journal du droit international* (1974-1980), where altogether less than 10 cases falling in our category have been reported. It can be assumed that the actual number of
cases where force majeure or hardship has been alleged by a party is probably higher but that the authors have picked out those cases which are of some legal interest and which can be regarded precedent setters.\textsuperscript{43}

In the same line is the decision in Case no.3952, given in 1982 concerning a contract of delivery of crude oil. One party claimed Force Majeure, due to the fact that his own supplier had not delivered the necessary quantity of oil. The arbitrators, after having declared that delivery of such a fumigable product as crude oil was never impossible and decided that if the non-performance of a delivery obligation by a third supplier was to be qualified as a Force Majeure, it must be expressly stipulated in the contract. It had been negligence on the part of the defendant not to assure other supplies. Moreover, a secondary motion that, the shifting from one supplier to another would have caused high costs was not accepted as an excuse. The actual price difference of over one third of the market price was not enough to be recognized as hardship and relieve the seller from delivery.\textsuperscript{44}

In the \textit{Ekofisk} case\textsuperscript{45} there is an interesting example of a typical clause of hardship which was inserted in a long-term contract for the supply of natural gas expressly stipulating that when entering into this agreement the parties would contemplate that the effects or consequences of this agreement will not result in economic conditions which in fact would cause substantial hardship to any of them, provided that they will act in accordance with sound marketing and efficient operating practices. They therefore agreed on the following:

Substantial hardship shall mean that, if at any time or from time to time during the term of this Agreement without default of the party concerned there is an occurrence of an intervening event or the change of circumstances, beyond the said party's control, while acting as a reasonable
and prudent operator in such a way that the consequences and effects of which are fundamentally different from what was contemplated by the parties at the time of entering into this Agreement (such as without limitation the economic consequences and effects of a novel economically available source of energy), which consequently effected the said party in the situation then (and for the foreseeable future, all annual cost including, without limitation, depreciation and interest associated with or related to the processed gas which is the subject of this Agreement exceed the annual proceeds derived from the sale of said gas), Notwithstanding the effect of other relieving or adjusting provisions of this Agreement the party claiming that is placed in such position as afore-said may be issued a notice or request, for a meeting to determine if said occurrence has happened and if so to agree upon what (if any), adjustment in the price (then in force) under this agreement should be made. Agreement and/or other terms and conditions hereof is justified in the circumstances in fairness to the parties to alleviate the said consequences and effects of said occurrence. Price control by the Government of the state of the relevant Buyer(s) affecting the price of natural gas in the market shall not be considered to constitute substantial hardship.

In June 1970 a contract was concluded between Nabalco Company and one of the branches of company of the British petroleum of Australian in order to provide oil necessities. With the result of the decisions of the Organization of Petroleum Exporting Countries (OPEC) in July 1974 the price of petroleum had risen from 14 dollars to 40 dollars on every barrel in March of the same year. Consequently, the price of petroleum had increased by 300%. If the above mentioned company would have not raised the price of petroleum then for this reason the oil company could have suffered a great loss. Taking in view, the section 7 of the contract, between the above mentioned and British petroleum of Australian which had been concluded
under free F.O.B. on board, the seller had the right to balance the prices. If there would have not been any agreement between the parties the buyer could cancel the contract by sending a note to the contracting party.

**View under Indian law**

The alteration of circumstances must be "such as to upset altogether the purpose of the contract. Some delay or some change is very common in all human affairs and it cannot be supposed that any bargain has been made on the tacit condition that such a thing will not happen in any degree. This makes the court rather cautious in discharging parties from their contract. An illustration in line is the decision of the Calcutta High Court in *Sachindra Nath v Gopal Chander*.

The plaintiff let certain premises to the defendant for a restaurant at somewhat higher rent. The defendant agreed to pay high rent because the British troops were stationed in the town and a clause in the agreement especially provided that 'this agreement will remain in force so long as British troops will remain in this town. After some months, the locality was declared out of bounds to the British troops. The question was whether this frustrated the contract or not?

Henderson J relied upon the above cited passage of Lord Loreburn and held that though it was possible that the defendant would not have paid such a high rent apart from the expectation of deriving high profits from the British troops, that was not sufficient to make out a case of frustration.

A situation like this has been described as one of *Commercial Hardship*, which may make the performance unprofitable or more expensive or difficult, but it is not sufficient to excuse the performance, for it does not bring about the fundamentally different situation such as to frustrate the
venture. The Doctrine of Frustration or Impossibility does not apply to a situation so as to excuse the performance where performance is not practically cut off, but only rendered more difficult or costly. Such cases may not fall within the purview of Section 56 and this is amply shown by the decision of Privy Council in *Harnandrai Fulchand v Pragdas.*

Law is required to adapt itself to economic changes. Marginal price rise may be ignored. But when prices escalate out of all proportion than could have been reasonably expected by the parties and makes the performance so crushing to the contractor as to border virtually on impossibility, the law would then is required to offer the relief to the contractor in terms of price revision. The Supreme Court has recognized this in *Tarapore & Co. v Cochin Shipyard Ltd.*

In this case there is no room for doubt. In this case, the parties agreed that the investment of the contractor (for crores of equipment and know-how, in foreign exchange) would be two crores and the tendered rates were predicated upon and co-related to this understanding. When an agreement is predicated upon and agreed in situation, and if that situation ceases to exist, the agreement, to that extent, becomes irrelevant. The rates payable to the contractor were related to the investment of Rupees two crores by the contractor. Once the rates became irrelevant on account of circumstances beyond the control of the contractor, it was open to him to make a claim for compensation.

Another case of commercial hardship of this kind was before the House of Lords in *Davis Contractors Ltd. v Fareham Urban District Council.* In it there was a contract to build certain houses for a council for a fixed price and it was to be completed within eight months. Bad weather and labour strikes intervened and it took twenty-two months to complete and at a
cost much more than the contract price. The contractor claimed that the contract was discharged on account of inordinate delay and, therefore, he should be paid on quantum merit basis, that is, his actual costs should be paid. But the House of Lords did not agree with him.

So, perhaps, it would be simpler to say at the outset that *Frustration* occurs whenever the law recognises that, without default of either party, a contractual obligation has become impossible of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. "The data for decision are, on the one hand, the terms and conditions of the contract, read in the light of the surrounding circumstances, and, on the other hand, the events which have occurred". It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for. If this is the law, the appellants' case seems to be along way from a case of frustration.

(viii) Model Clause proposed by ICC

As ICC works in the field of legal standardization it has always been influenced by the necessities of international trade reflected in the practice of its Court of Arbitration, its Commission on International Commercial Practice has set up a "*Force majeure and Hardship Clause*" working partly with the mandate to draft the model clauses which can be recommended to the business world to be incorporated in international contracts either as such or with amendments. Its work is now about to be concluded According to the last draft the two model clauses are foreseen:
1) **Force Majeure Clause**

It lays down the conditions for release from liability when performance of a contractual obligation has become impossible; and

2) **Hardship Clause**

It is intended to cover the cases where unforeseen events so fundamentally alter the equilibrium of a contract that an excessive burden is placed on one of the parties.

It is similar (but not identical) to the provisions of para. 295(1) GIW mentioned above and the parties to the contract are required to attempt to negotiate an adaptation of the contract. At the stage, they may agree to use the 1978 ICC Rules for Adaptation of Contracts, which provide the reference to a third person, operating under such Regulations.

If no agreement can be reached, either party shall be free to initiate legal proceedings. This is a different solution to that foreseen in para. 295(2) GIW, which provides that if no agreement can be reached the aggrieved party may terminate the agreement.

It is to be hoped that the new set of ICC Rules, when it is finalised and recommended for use, will have a beneficial and unifying effect in the field of **Force Majeure and Hardship Clauses**, thus contributing to increasing the foreseeability for the parties of the consequences they have to face when either Force Majeure or Hardship is claimed by one party.
A hardship clause as conceived in UNICTRAL GUIDE 1998\textsuperscript{52} would apply when a change of circumstance makes the performance of the obligation (of one of the parties to the contract), more onerous, but does not prevent that performance. The exemption clause as conceived here would apply only when the change of circumstances prevents the performance of the contractual obligation. It is to be noted here that an article under the title of “Hardship Clause” has usually been included in the long term contracts because the International Chamber of Commerce (I.C.C.) recommends internationally contracting parties for inclusion of it. In a hardship clause it is important to stipulate when and how the parties will rearrange the contractual terms in case the contract loses its economic balance due to certain supervening, unexpected and unforeseen events which may or may not be specified.

Therefore, it can be said that the doctrine of the hardship is applied, based on the contractual clause and contrary to the rule of changed circumstances. In other words, the aspect of the change in circumstances, which causes the economic hardship for the performance of the contract (under consideration) with hardship clause would not be different. The hardship clause is only a kind of unforeseen event, which has been already agreed to by the parties, i.e. it is based on the contractual clause, contrary to the doctrine of changed circumstances. Therefore, as compared to the doctrine of changed circumstances the hardship clause has a great resemblance between them. However, while examining some of the cases of the rule of changed circumstances, in general meanings, it is obvious that in this rule ‘the economic hardship does not always come into the consideration (contrary to the hardship clause), but the change may be to the extent that the object of the contract which has been foreseen by the parties, might have
completely failed. The frustration of the adventure which is included in the rule of changed circumstances, in general meaning, is an interesting instance, for such a case (not in specific meanings that is, when the execution of the obligation will encounter excessive difficulties that has been contemplated in this rule).

As we see, that the rule of altered conditions or changed circumstances is more or less the hardship situation only. In other words, the hardship situation is one of the results of the changed circumstances. It should be kept in mind that, concerning the occurrence and quality of the event that brings in the alteration of condition or change in circumstances and conditions at the time of conclusion of the contract, there is no difference between the two doctrines, but may be in some of the cases the difference may arise regarding the effect that falls upon the validity of the contract.

IV THEORY OF COMMERCIAL IMPRACTICABILITY

(i) General

The general rule is that when a contractual promise is made, the promisor must perform or pay damages for his failure to perform no matter how burdensome or how much difficult, the performance has become, as a result of unforeseen or unexpected or fortuitous or supervening conditions. The fundamental notion is that ‘A promise must be kept unless there is a justified reason of excuse’.

(ii) Evolution

“Suppose that the parties have agreed to, on what performance each is to make but some events makes this performance impossible or more
difficult", THEN in such a case what should be done? Such kinds of problems have been handled by two different doctrines drawn from two different sources. They are:

**Source 1**- Roman Law developed a doctrine of Impossibility to deal with impossible performances. A famous Roman text contains the maxim "There is no obligation to do the impossible."

**Source 2**- Cannon Law developed the doctrine of altered conditions or Changed Circumstances, to deal with unexpected or unforeseen events that made a performance of greater or lesser value to each party.

In the Medieval and Early Modern period, jurists developed a philosophical and moral explanation of both these doctrines. With the passage of time these explanations were simplified. Nevertheless, if we look into the historical background of these doctrines we find that, there is much to be learned both negatively and positively.

Negatively, we see that the jurists were never able to develop a good explanation of the Roman texts governing impossibility. Their explanation that, no one could be bound to do impossible did not square with the texts. Positively, we see that they did develop a good explanation of the effect of unexpected circumstances.

In 19th century the defence of Impossibility was flatly rejected by the United States Judiciary. Courts noted that, if the parties to the contract had desired to take into account any events that may develop after they reached at the stage of conclusion of the contract, then they should have accounted for such contingencies, in the contract itself.

The Law of Contract developed over 20th century as a response to the ever increasing commercial activities. The courts however began to recognize Impossibility as a valid defence to an action for non fulfillment of the
contractual obligation undertaken in a contract thereby ultimately resulting in the breach of contract. This defense did not normally apply, if one party found it unexpectedly difficult or expensive to perform according to the terms of the contract, rather it applied only when the basis or subject matter of the contract was destroyed or no longer existed.

In addition the defence of Impossibility became available only if objective impossibility existed and objective impossibility occurred when the contractual obligation could not actually be performed. The impossibility can be further categorized under two heads. They are: Subjective Impossibility and Objective Impossibility.

(iii) Types of Impossibility

Impossibility can be further categorized in two groups

(a) Objective Impossibility

It is often referred to as – ‘The thing that cannot be done., e.g. If a musician promised to play a concert at the specific hall but the concert hall subsequently burnt down, and hence it would be impossible to perform according to the contractual agreement and the musician would be excused from performing at that particular venue.

(b) Subjective Impossibility

It exists when only one party subjectively believes that the performance can not be completed. e.g. If a musician believes that he had not practiced sufficiently to perform, then this belief would not excuse the musician from performing.

Therefore we can say that, in an unforeseen or unexpected event, which makes the performance of a contractual duty impossible and the state of impossibility arises subsequent to the formation of the contract, it is often
held that, the promisor is excused from the performance of such a duty of the contract. Such holdings are exceptions from the general rule of performance of obligation of the contract i.e. Pacta sunt servanda. Hence, this rule of Supervening Impossibility is a late development in the law of contract and therefore we can see that its contours are less developed than the other doctrines in Commercial Law.

Until 1863, it was generally assumed that the impossibility of performance was no defence for the non-performance of a promise as was held in case of Taylor v Caldwell. Since then there has been a steady growth of exceptions to this assumption. These assumptions generally have been articulated in terms of implied or constructive elements. In determining whether these assumptions are imposed or implied the following questions need to be answered:

- Which party assumed the risk of unforeseen or unexpected conditions or circumstances?
- If no clear assumption is shown, then to which party the risk must be allocated?
- To what extent the rules, regarding Impossibility, should be extended to situations’ in which performance of the obligation though possible would be held Impracticable?

In the recent times the globalization touched its peak and with the ever increasing business relations between the nations, the development of Contractual Law also recorded an enormous growth. Hence, the scope of Doctrine of Impossibility also increased and a modern statement of this doctrine appears in Translantic Financing Corporation v United States. In this case it was held that

“A contractual obligations is impracticable when it can only be done at an excessive and unreasonable cost.”
It is now recognized that

*A thing is impossible in legal contemplation when it is not practicable and a thing is impracticable when it can only be done at an excessive and unreasonable cost.*

This doctrine ultimately represents the ever shifting line drawn by courts between the community’s’ interest in enforcing contracts in commercial practices and commercial senselessness of requiring the performance.

When such issues are raised in courts, typically the United States Courts are required to construct a condition of performance based on the altered conditions or we can say that based on the change in circumstances. This process involves at least three reasonably definable steps:-

**Step 1.** A contingency must have occurred. “Contingency” is something unexpected and unforeseen turn of events.

**Step 2.** The risk of this unexpected or unforeseen occurrence must not have been allocated either by agreement or by custom.

**Step 3.** The occurrence of the contingency must have rendered the performance of the obligation of the contract ‘Impracticable.’

The questions which need answers here are:-

- Was there an Unexpected or Unforeseen Event?
- Did that event render the performance of the obligation of the contract ‘Impossible’ or ‘Impracticable’?
- Upon whom should the risk of the unexpected or unforeseen contingency be allocated?
The order in which these questions may be asked may vary from case to case but in litigated cases, it is advisable to proceed by ascertaining if there is an 'Impossibility' or 'Impracticability' and if there is nothing of this sort then the promisor is bound by his promise unless a contrary intent is implied. If there is 'Impossibility' or 'Impracticability' then the question remains as- Upon whom the risk of unexpected contingency be allocated?

This can be answered by taking into the account all the surrounding conditions and circumstances and equities of the case. The decision is undoubtedly, based upon what appears to be justified under the given situation or conditions or circumstances and merits of the case and it also varies from case to case because conditions of different cases are also different.

(iv) Impossibility: equated with Impracticability

The Doctrine of Impossibility is triggered by the occurrence of a condition, the non-occurrence of which was the basic assumption of the contract. This doctrine in the Common Law of Contracts excuses performance of a duty, where that duty has become unfeasibly difficult or expensive or more burdensome or more onerous for the party who was required to perform it.

Restatement of Contract

The First Restatement of contracts equated the expression ‘Impracticability’ with ‘Impossibility’ and the Second Restatement follows the lead. Sec- 261 of the Restatement (Second) of contract does not explicitly define the scope of what is considered impracticable as it is a fairly subjective and in fact intensive test for the courts. Generally, the trend observed is that the American Courts typically do not consider events as increase in prices or
costs beyond a normal range to allow for discharge of duties or obligations of the contract, on grounds of impracticability, as such events are normally foreseeable risks of fixed price contracts.

**Uniform Commercial Code (UCC)**

The uniform Commercial Code (UCC) utilizes the term Impracticable to encompass Impossible.\(^{56}\) Section 2-615 of the Uniform Commercial Code deals with Impracticability in the context of sales of goods and introduces some additional constraint on the parties. According to Uniform Commercial Code (UCC) increased cost alone does not excuse the performance of the obligation undertaken in the contract unless, the rise in cost is due to some unforeseen contingency which alters the very nature of the performance.\(^{57}\)

The comment indicates that contingencies such as war, embargo, crop failure or a failure of a major supply source, that causes a market change or prevents seller from obtaining the supplies necessary for his performance would justify a claim of Impracticability.

Therefore it can be concluded that when the promisor is faced with unforeseen difficulties and increased cost of performance, many jurisdictions have willingly enforced an agreement made without consideration for increased compensation. In the absence of an agreement, however, the promisor has generally been held to have assumed the risk of unforeseen difficulties and increased costs.

The Californian Courts, however, has led the way towards relaxation of this rigorous rule. A noteworthy case where *Impracticability is equated with Impossibility* is in *Mineral Park Land Co. v Howard*.\(^{58}\)

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 gravel below water level on
the grounds that the cost of removal would be ten to twelve times the usual
cost of removing gravel. The court held that the defendant was excused from
performing it. It reasoned that although it was not impossible to remove the
additional gravel, for practical purposes, no additional gravel was available
and, therefore, the performance of the obligation undertaken was excused
because of the non-existence (for practical purposes) of the subject matter of
the contract.

(v) Impossibility: differentiated with Impracticability

The major difference between 'Impossibility' and 'Impracticability' however, is that while in Doctrine of Impossibility excuses the performance
of the obligation where the contractual performance cannot physically be
performed;

Whereas the Doctrine of Impracticability comes into play, where the
performance is still physically possible but would be very burdensome for the
party whose performance is due. Thus, Impossibility is an objective condition
whereas Impracticability is a subjective condition.

(vi) Test to decipher Impracticability: The United States Courts use the
following test to decipher Impracticability form Impossibility (with few
variations between jurisdictions).

❖ There must be an occurrence of conditions, the non-
ocurrence of which was a basic assumption of the
contract.
❖ The occurrence must make the performance of the
contractual obligation extremely difficult or more
burdensome or more onerous or expensive beyond the limits.

- The difficulty was not anticipated by the parties to the contract.

A classic example in which **Impossibility is differentiated from Impracticability** is the well known case of *Taylor v Caldwell.*

It was not a case of literal Impossibility since, 'by the expenditure of huge sums of money the music hall could probably have been rebuilt in the time scheduled for the concert, but no reasonable person would incur such expenditure. So for this reason the trend established in the United States of America is to abandon the words “Impossible” and “Impracticable” and use the expression of “Commercial Impracticability.” This change intended to widen the scope of the doctrine of discharge by unexpected, unforeseen or supervening events. “Impracticability” as the term referred here includes extreme and unreasonable difficulty, expense, injury or loss to one of the parties. For example- A severe shortage of raw materials or of supplies due to war, embargo, local crop failure, unforeseen shutdown of major sources of supply or the hike which causes a marked increase in the cost.

(vii) **“Impracticability”: Not a General Excuse**

*Impossibility or Impracticability* as an expression must not be taken as a general excuse in Law of Contract. A number of cases illustrate a view that Impracticability is not generally a sufficient cause to discharge the contract.

*Lord Radcliffe* has rightly pointed out-

“It is not hardship or inconvenience or material loss itself which calls the principle of frustration into play.
There must be as well as such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for."

The same viewpoint can be seen in the Suez case⁶³ where the court rejected the argument that, the greater expense caused to the party, prejudiced by the closure of the canal, was a ground of frustration. 

Lord Simon has also said-

"An increase of expense is not a ground of frustration"⁶⁴

Therefore it can be concluded that where the performance of the contractual obligation would, in view of altered or changed conditions or circumstances causes not only an extra expense but also an acute personal hardship to one party, the equitable relief may be refused, because of unforeseen circumstances not amounting to legal frustration of the contract.⁶⁵ In such cases the contract is not discharged. The defendant remains liable for damages even though the specific performance is refused on the ground of severe hardship.

(vii) Essential Elements

Doctrine of Impracticability has been invoked on many grounds in different ways. Invoking of this doctrine depends upon case and the circumstances involved in a contract. Hence it is different case to case. We will discuss here some specific grounds of Impracticability. They are:-

(a) Destruction, Deterioration or Unavailability of the subject matter.
(b) Prohibition or Supervening Prevention by Law
(c) Failure of the Means of Performance.
(d) Failure of the Contemplated Mode of Delivery
(e) Death or illness.

Discussion

(a) Destruction, Deterioration or unavailability of the Subject Matter.

The classic example of this condition is the famous case *Taylor v Caldwell*. In this case the defendant promised, for a consideration, to permit the plaintiff to use his music hall. The court held that the defendant was excused from performance and that is, his failure to perform did not constitute a breach of contract. The plaintiff in such a situation is also excused from performance under the doctrine of prospective or present inability to perform.

This case has set up the precedent that Impossibility is an excuse for non-performance where there has been a fortuitous destruction, deterioration or unavailability of the subject matter or tangible means of performance of the contract.

(b) Prohibition or Supervening prevention by Law

When the parties enter into a lawful agreement they usually assume that the law will continue to permit the performance of the contractual obligation. According to Restatement of Contract, it is a well settled rule that the Supervening Prevention or Prohibition by Law or administration regulation of the United States, the State or the Municipality provides an excuse for the non performance of such a contractual obligation, provided that all other requirements of the doctrine are met with. In such cases, it is held that only lawful performance is impossible.
There has been some dispute concerning whether prevention by court or administrative order, such as an injunction, excuses the performance of the contractual obligation of the contract or not? Obviously it is not argued, that the promisor can perform by violating the order. Rather, the arguments are that the impossibility is personal to the promisor and the 'Impossibility' is subjective rather than objective, and also that the court issued the administrative order because of some fault of the promisor.

In cases however, where the order is not issued because of the promisor's fault, there is no reason why it should not provide as an excuse for the performance of the contractual obligation, as any other kind of legal prohibition. Indeed, a non-judicial action by a governmental agency which affects a particular party rather than the public generally has been held to excuse the performance requisition of a factory for war productions.

Illustration:

The requisition of a factory for war production has been held to excuse the performance of civilian contracts for production at the factory. There is no reason why, judicial action affecting a party to the contract, without fault on his part, should not equally be an excuse. The Uniform Commercial Code (UCC) speaks in terms of:

"any applicable governmental regulation or order."

This expression is broad enough to encompass an administrative or judicial order in an individual case as well as regulations and orders of a general nature.

The early cases generally took the position that prevention or prohibition by foreign law was not an excuse for non-performance of the contractual obligation. Although this rule has been discarded in most modern cases but some courts have continued arbitrarily to distinguish between Domestic and Foreign law. The Uniform Commercial Code (UCC) explicitly
equates the Foreign Law with the Domestic Law as an excuse for non-performance of the contractual obligation or the duty.69

(c) Failure of the Means of Performance

Failure of the Means of Performance has also been held to be a ground to invoke the doctrine of Impracticability for discharge of the contract. However, decisions concerning the failure of intangible means of performance have not been uniform. Logically speaking, there should not be any difference between the failure of tangible means and intangible means of performance. The same view is taken by the Restatement of the Contract.70 However; the failure of intangible means of performance is usually more seen than the failure of tangible means of performance because it is the kind of risk which the business community normally considers to have assumed.

(d) Failure of the Contemplated Mode of Delivery

The Uniform Commercial Code (UCC) governs the cases which involves frustration of the contract due to the failure of the Contemplated Mode of Delivery.

According to Section 2-614 of the UCC:

1) Where without fault of either party ,the agreed berthing, loading, or unloading facilities fail or an agreed type of carrier becomes unavailable or the agreed manner of delivery otherwise becomes commercially impracticable but a commercially reasonable substitute is available, then such substitute of performance must be tendered to and accepted.
2) If the agreed means or manner of payment fails because of domestic or foreign governmental regulation, the seller may withhold or stop the delivery unless the buyer provides a means or manner of payment which is commercially a substantial equivalent. If the delivery has already been taken and the payment by the means or in the manner provided by the regulation is made, then it discharges the buyer’s obligation unless the regulation is discriminatory, oppressive or predatory.

It can be concluded that, the impossibility of performance is treated differently in this situation than in situations where the impossibility goes to the essence of the contract. Mode of delivery and the manner of payment, although important, are incidental to the principal obligations, which are, that the goods be delivered and paid for. Thus, impossibility as to these incidental matters does not excuse performance if a commercially reasonable substitute is available. If payment in accordance with the terms of the agreement becomes illegal under applicable foreign or domestic regulations, it is obvious that the payer’s duty should not be discharged, instead, payment in some other manner should be required. Similarly, if one vessel is destroyed, a substitute vessel, if available, should be used.

The principal involved is well illustrated by a number of cases involving the closing of the Suez Canal in 1956 and again in 1967, because here a substitute route around Africa was available. Hence, it was held that the closing of the canal neither excused the performance of ship charters, which contemplated the Suez route, nor were the grounds enough for the recovery of the additional compensation. It is to be noted that, the Code
provisions were applicable only by analogy as ship charters are outside the purview of the Code.

(e) **Death or Illness**

Death or Illness of the party to the contract has also been held a condition (specific) that can invoke the contractual excuse clause of Doctrine of Impossibility or Impracticability.

The death of the offer or (person who makes the offer in a contract) terminates the power of acceptance created by his offer. But the death does not necessarily terminate a contract. However, if a contract calls for personal performance by the promisor or a third person, and if the person who is to render the contractual performance dies or becomes as ill as to make the performance by him impossible or seriously injurious to his health then the promisor’s duty is excused, unless this risk was assumed by the promisor.\(^72\) However if the act to be performed is delegable (one which can be delegated), then, the death or illness of the promisor or of a third person who is expected to perform the act, does not excuse the performance of the contractual obligation undertaken in the contract.\(^73\)

**Status of an Employee:**

In case of a deceased employee, the personal representative is entitled to quasi-contractual recovery for the reasonable value of the services rendered. The contract rate is evidence of this value but is not conclusive, except that it sets the upward limit of recovery. Although, the death of the employee who is to render the personal service is not a breach, a number of jurisdictions have permitted the employer to set off his damages for non-performance of the contract against the estate’s claim for quasi-contractual recovery for part performance. Such results appear to be sound as such but
the parties' own risk allocations ought to be considered as a principal guide towards reallocations of the risks necessitated by the doctrine of impossibility of performance.

**Status of an Employer:**

The same principles should govern the death or serious illness of an employer. If the employee was to work under the personal direction and supervision of the employer, the employer's incapacity makes supervision in accordance with the contract impossible. The employer is discharged because of impossibility and the employee because of employer's prospective inability to perform. Thus, the question is, whether the employer's duty and right of supervision is delegable and assignable or not? Although perhaps most of the cases are reconcilable with this test, the view taken is that the courts have indulged in sweeping generalizations and have indicated that a rule of mutuality is applied to the effect that, in cases where the employee's duties are personal, the death of the employer discharges both the contracting parties.

**(viii) Impossibility or Impracticability: Indian View**

Impossibility in Indian Law comes under the scope of Section-56 of the Contract Act of India (1872) in which it has been held that - "*An agreement to do an impossible act is void.*" Also, if a contract to do an act which after the formation of the contract, becomes impossible by the reason of some event beyond the control of the promisor, then such a contract becomes void, when the said act becomes impossible or unlawful.

In other words, when one person has promised to do something which he knows or, which he with a reasonable diligence might have known and which the promisee did not know to be impossible or unlawful THEN, in such a case the promisor must make the compensation to such a promisee for
any loss which the promisor sustains because of the non-performance of the promise.

The Act lays down a positive rule of law on the question, which the English and American courts have lately tended to regard as a matter of construction depending upon the true intention of the contracting parties. As it is not permissible to import the principles of English law in the statutory provisions therefore it should be noted that, English cases carry only a persuasive value with them and are only helpful in showing how the English courts have interpreted and pronounced, under the similar circumstances or conditions or similar situation.

Impossibility or Impracticability in India can be seen in case of Satyabrata Ghose v Mugneeram Bangur. In this, Justice Mukherjee enunciated the doctrine as contained in section -56 of the Indian Contract Act, (1872)

"The first paragraph of the section lays down the law in the same way as in England. It speaks of something, which is impossible inherently or by its very nature, and no one can obviously be directed to perform such an act. The second paragraph enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done."

The words used in this paragraph are quite simple and subtle. It is clear now, that the word "Impossible" has not been used here in the sense of physical or literal Impossibility. In the light of the above discussion it can be said, that the doctrine under the study can be attracted, if the performance of the act though may not be literally impossible but may be impracticable. Unless from the point of view of the object and the purpose which the parties
had in view, if an untoward event or change in circumstances totally upsets the very foundation upon which the parties rested their bargain, THEN it can be very well said that, the promisor found it impossible to do the act which he (earlier) promised to do.

The expression "Impossibility" is same as "Frustration." In fact, they are inter-changeable expressions. In the Indian Legal system, under the scope of Section -56 of the Indian Contract Act, 1872 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 intrusion or occurrence or happening of untoward, unexpected or unforeseen event or change in circumstances or there is material alteration in the conditions, which was not contemplated by the parties at the time of formation of the contract.

Section 56 of the Contract Act of India(1872), lays down a positive rule of law relating to Frustration and does not leave the matter of Frustration to be determined by the court and according to the intention of the parties. And the Courts cannot travel outside the terms of that section. When an event occurs, which causes change in the conditions or circumstances, and which is so fundamental as to be regarded by the law as striking at the root of the contract, then in such a case, the court has the power to pronounce the contract to be frustrated, in the end.

In such cases the court is required to examine the contract on the basis of the following two aspects:-

1) Conditions or Circumstances under which the contract was formed.

2) The belief, knowledge and Intention of the parties being the evidence of whether the changed
In English law, such a rule is known as the Rule of Construction whereas in India it is the Rule of Positive Law, and it comes under the scope of Section- 56 of the Contract Act of India.

The Supreme Court of India has dealt with the doctrine of Impossibility or Impracticability under section- 56 of the Contract Act of India, 1872 and has applied in yet another case of Ganga Saran v Ram Chander Gopal.

In it the parties entered into 5 contracts by 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 goods were to be supplied out of the goods which will be “prepared by the mills”.

The defence of frustration by the circumstances beyond the control of the sellers was held unsustainable in a suit for damages, for failure to supply the goods. The contract, it was held, 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 section 56. Hence, the doctrine was unavailable “when the non-performance was attributable to one’s own fault.
In yet another landmark case The Supreme Court of India once again examined the nature and extent of the doctrine of Impossibility Or Impracticability and defined its scope in

*Satyabrata Ghose v Mugneeram Bangur & Co.*

In it, the defendant was required to develop a considerable area or land under a developmental scheme. A contract of sale of a 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 the development began, a considerable portion of the land was requisitioned and the entry of the owner on the land during the period of requisition was made illegal. The defendant company offered to return the earnest money with cancellation of the contract or completion of the conveyance of the land in the condition it was, and if neither of the alternatives was acceptable then the agreement would be considered cancelled and the earnest money confiscated. In a suit by the plaintiff for the enforcement of the contract, the defendant pleaded discharge by frustration.

But the Supreme Court held that the doctrine was inapplicable, having regard to the nature and terms of the contract. It was held that, the actual existence of the 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 its nature, a temporary character, which did not affect the fundamental basis of the contract nor did the performance of the contract become impossible, within the meaning of section 56 of the Contract Act and hence, it could not attract the said doctrine.

(ix) Review

As per the discussion, it can be safely concluded that in American Legal System the Doctrine of Impossibility or Impracticability has been
recognized as an independent concept whereas the concept of altered conditions or changed circumstances, though existent, is not recognized as an independent concept but is covered under the scope of the said doctrine. In other words, the concept of changed circumstances or altered conditions has not come into play in the form of an independent rule but is laid down with the Doctrine of Commercial Impracticability which has been recognized as a mode of discharge of contract in case, where the performance of the contract becomes impossible or impracticable due to some unforeseen or unexpected event beyond the control of the parties. From the legal point of view, the expression “Commercial Impracticability” exists only in the sense of difficulty of the performance of the contractual obligation of the contract which occurs unexpectedly.

The lawyers have been found to use this term or expression in cases where the performance of the contract will encounter excessive difficulty or burden due to the change in circumstances or material alteration in the conditions, even though the physical performance of the contract may still be possible.

Wherever the performance of the contract becomes absolutely impossible the expression ‘Impossibility’ is used. The expression ‘Impossible’ has often been interchanged with ‘Impracticable’. The Second Restatement of contract in American Law has instituted the expression “Impracticability”. It has been emphasized that ‘Impracticability’ results in excessive difficulties or enormous loss with respect to the performance of the contract in case of change of circumstances.

In American law, the change in the nature of the obligation is considered as the basis of the judgment. For this reason, it has been observed that American Courts have been extremely reluctant to accept anything short of Impossibility as an excuse for the performance of the contract in case of
alteration in conditions or circumstances of the contract. However, unforeseen difficulties and increased cost of performance have not been considered by many jurisdictions. The case *Columbus Railway, Power & Light Co. v City of Columbus* highlighted this view and is typical of holdings in most jurisdictions.

In cases where, the difficulty and increased cost of performance comes too close to physical impossibility, the non performance of the contractual obligation is accepted as a reasonable excuse.

For example, as discussed earlier in case of *Mineral Park Land Co. v Howard* where the Californian Court has led the way towards relaxation of this rigorous rule. For this reason, it is now recognized that-

*A thing is impossible in legal contemplation when it is not practicable and a thing is Impracticable when it can only be done at an excessive and unreasonable cost.*

In English Law, the doctrine of Impracticability (Considering the supervening costs and excusive difficulties in performance of the contract without any change in the essential nature of performance of the contract), is not considered as the acceptable cause of Frustration. The same view has been adopted by Indian Legal System under section 56 of the contract Act of India, 1872.

But if we accept that the **Doctrine of Impracticability** in American Law applies where, the presupposed conditions of the contract, (which are the basic conditions supposed at the time of the formation of the contract) changes in such a manner that it results in fundamental change in the nature of contractual obligation THEN it can be equated at par with the **Doctrine of Frustration** in English Law and Indian Law which has been
recognized, examined and accepted in the legal systems of the respective nations and the Rule of Altered Conditions or the Rule of Changed Circumstances, which is the subject matter of this research work.

It can be summed up here that "Impracticability is a result of change in non essential conditions in such a way that it does not alter the nature of the contract or intention or consent." Thus view is in coherence with the basis of the Doctrine of Commercial Impracticability. Firstly and most importantly it suits the economic aspects of the doctrine and secondly it clearly differentiates between the expression Impossibility and Impracticability.

The difference is that the "Impossibility" takes place when the performance of the contract become absolutely impossible, whereas, "Impracticability" comes into play when the performance of the contract is possible but only after suffering enormous or excessive loss and in cases where the execution of the contractual obligation becomes executions of the contractual obligation becomes excessively difficult.

The basic difference between the two concepts is based on excessive and unreasonable difficulties and enormous loss with respect to the performance of the contractual obligation. However, it is to be noted that in both cases the legal effect i.e. the exemption of the promisor from the subsequent performance remains the same.

The conclusion derived here is that Doctrine of Frustration in English Law and section 56 of the contract Act of India, 1872 in Indian Law can be equated with the Doctrine of Impossibility in American Law. Though Impossibility and Impracticability are interchangeable expressions and the legal effects of both are same i.e. termination or cancellation of the contract and the excuse of promisor from the (contractual obligation) still, there is a minor difference in them which we explained earlier.
However, the Doctrine of Impracticability can be equated at par with the Rule of Altered Conditions or Doctrine of Changed Circumstances but when it comes to legal effects there is a difference in both these doctrines. The legal effect of “Doctrine of Impracticability” is the termination or cancellation of the contractual obligation and exemption of the promisor from the performance of the obligation whereas the legal effect of the “Rule of Changed Circumstances” or the “Doctrine of Changed Circumstances” is firstly the modification of the contract and secondly in case of impossibility only it would lead to cancellation or termination of the contractual obligation.

It can be concluded from the above discussion that both the doctrines i.e. “Doctrine of Impracticability” and “Doctrine of Changed Circumstances” are substantially similar to each other except for the difference in the legal effects of both. For this reason and to remove this difference and to equate the “Doctrine of Impracticability” and the “Doctrine of Changed Circumstances”, it is suggested that the courts in case of Impracticability – instead of cancellation or termination of the contract and exemption of the promisor or the full-fledged execution of the contracts finds a path, midway to balance the issues. This midway path can be achieved by modifying the contents of the agreement i.e. by equal division of the unforeseen damages between the contracting parties and the same is the subject matter of this research work.

V. DOCTRINE OF FRUSTRATION

(i) General

The doctrine of frustration is based on the maxim “Lex non cogit ad Impossibilia”. It means that ‘Law does not compel the Impossible’. In a
contract between the two parties, there is a fundamental assumption that the performance of the contract depends upon the continued existence of a given person or a thing and, any impossibility arising later on (by the perishing of the person or the thing) shall excuse the performance of the contractual obligation. Such a condition is implied in all contracts.

'Frustration' means when the contract is rendered impossible of its performance by the external causes which are beyond the contemplation of the parties concerned. It includes both—

(1) Impossibility of the performance of the contractual obligation and
(2) Impossibility of the fulfillment of the ulterior purpose for which the contract was entered into. In other words, 'Frustration' occurs, when the performance of a contract becomes Impossible i.e. the purpose which the parties had in mind is frustrated. If the performance becomes impossible because of a supervening or unexpected and unforeseen event, then the promisor is excused from the performance.

Justice Blackburn in case of Taylor v Caldwell has said that—

"The principle seems to us to be that in contracts in which the performance depends on the continued existence of a given person or a thing, a condition is implied that the impossibility of performance arising from the perishing of the person on the thing excuse the performance."

The doctrine of frustration is relevant when it is alleged that a change of circumstances after the formation of the contract has rendered it physically or commercially impossible to fulfill the contract or, has transformed the required performance into a radically different obligation from that undertaken in the contract. The doctrine is not concerned with initial impossibility which may render a contract void ab initio, as where a party
to a contract undertakes to perform an act which, at the time when the contract is made, is physically an impossible act according to the existing scientific knowledge and achievement.

Primarily in premature times the rule laid down was of "Absolute Contracts" according to which it was held that a man was strictly bound by his contract, and that, in the absence of any express limitation of his liability, he must take the consequences of being unable to perform his obligation in changed circumstances. Therefore, it admitted no exception in favour of the promisor, who was liable for the breach of his promise, notwithstanding the subsequent occurrence of an accident or other contingency which prevented him from performing it. The classic decision on the rule as to "absolute contracts" is a case of Paradine v Jane, where a lessee who was sued for arrears of rent pleaded that he had been evicted and kept out of possession by an alien enemy; such an event was beyond his control, and had deprived him of the profits of the land from which he expected to receive the money to pay the rent. In this he was held liable on the ground that:-

"Where the law creates a duty or change and the party is disabled to perform it and hath no remedy over there, the law will excuse him .... but when the party of his own contract creates a duty or charge upon himself, he is bound to make it good, if he may not withstanding any accident by inevitable necessity, because he might have provided against it by his contract."^83

Though this rule was peculiar to English Common Law, it continued to be enforced until 1863. Even shortly before that year, courts still refused to recognise any general principle that, a party might be released from the
liability in the absence of an express condition which operates to release him in the particular event which accrued.

However, in 1863 in *Taylor v. Caldwell* Blackburn J., giving the judgment of the court of the Queen’s Bench, held that the defendant were not liable in damages, since the doctrine of the sanctity of contracts applied only to a promise which was positive and absolute, and not subject to any condition expressed or implied. The learned Judge employed the concept of an implied condition to introduce the doctrine of frustration into English law, since he said, that it might appear from the nature of the contract that the parties must have known from the beginning that the fulfillment of the contract depend on the continuing existence of a particular person or thing.

Though the **Doctrine of Frustration** was first introduced into English law to cover situations where the physical subject matter of the contract had perished, it was quickly extended to cases where, without any such physical destruction, the commercial adventure envisaged by the parties frustrated.

‘**Frustration of Common Venture**’ first appeared in 1874, in *Jakson v Union Marine Insurance Co. Ltd.* where a ship was required under a charter party to proceed from Liverpool to Newport to load a cargo for San Francisco. On the first day out from Liverpool the ship ran around, and it took six weeks to refloat her and another six months to complete repairs. The jury was asked whether the time necessary for getting the ship off and repairing her so as to be a cargo carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered up by the ship owners and the charterers. The Jury answered in the affirmative and the Court of Exchequer Chamber held that the charter party ended upon the mishap. Bronvall B. said that the jury had found that
It can be said that the commercial aims, which the parties pursued when concluding the contract, are defeated through no fault of their own but by force of supervening circumstances. The situation existing at the conclusion of the contract may subsequently have changed so completely that, the parties acting as reasonable men, had they had any inclination about what was going to happen, would not have made the contract, or would have made it differently, All legal systems take notice of this situation. They admit the excuse for non-performance in certain circumstances. But the conditions, on which this defence is admitted, vary in different legal systems.

**Contractual Excuse clause in American Legal System.**

The American Uniform Commercial Code (UCC) admits the excuse of as “Commercial Impracticability.” as discussed earlier.

**Contractual Excuse clause in English Legal system**

English law has developed the “Doctrine of ‘Frustration’” which is discussed in the present topic.

When the performance of a contract becomes impossible, the purpose which the parties had in mind is frustrated. If the performance becomes impossible because of supervening or unexpected and unforeseen events, the promisor is excused from the contractual obligation such a condition is implied in all contracts and is known as ‘Doctrine of Frustration.’

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.”

Contractual Excuse clause in the Indian Legal System

Law relating to frustration in India is dealt under section-56 of the Indian Contract Act, 1872 which says that:-

“An agreement to do an act Impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible or, by reason of some event which the promisor could not prevent, unlawful, become void when the act becomes impossible or unlawful, where one person has promise to do something which he know, or with reasonable diligence might have known, and which the promise did not know, to be impossible or unlawful, such promisor must make compensation to such promise for any loss which such a promise sustains through the non-performance of the promise.”

Section 56 of the Indian Contract Act, 1872 lays down a positive rule of law and the courts can not travel outside the term of that section. It broadly simplifies the English rule and it neither leaves the matter to be determined according to the intention of the parties nor does it leave any scope for the consideration of the different theories propounded in England.
The basis of the doctrine of frustration in India has been explained in *Satyabrata Ghose v Mugneeram Bangur* by Justice Mukherjee. It is as follows:

"The essential idea upon which the doctrine is based is that of Impossibility of Performance of the contract. In fact, impossibility and frustration are often used as interchangeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to perform an impossibility .......... The doctrine of frustration is really an aspect or pact or the law of the discharge of contract by reason of supervening impossibility or illegibility of the act agreed to be done and hence comes within the purview of section-56 of the Indian Contract Act, 1872."

Therefore it can be said that the provisions contained in section 56 of the Indian Contract Act, 1872 lays down a positive rule of law and English authorities therefore, cannot be of direct assistance, though it cannot be denied that they definitely have a persuasive value in showing how English Courts have dealt with cases under similar circumstances or under similar conditions.

**Status of Contractual Excuse clause in French Legal System**

French law admits it in case of 'Force Majeure' as has been discussed previously.
Contractual Excuse clause in German Law

German Law uses the notion of Wegfall der Geschäftsgrundlage (collapse of the basis of transaction), and the CMEA General Conditions of Delivery relieve a party from liability in case of "circumstances of insuperable force", which are defined as events of an extraordinary character that were unforeseeable and unavoidable.91

(ii) Evolution

For many years it was held that a man was strictly bound by his contract and that in the absence of an expressed limitation of his liability, he must bear the consequence of being unable to perform his contractual obligation, in changed circumstance. So the rule laid down was that of an "Absolute performance of the contract". It admitted no exception in favour of the promisor, who was liable for the breach of his promise notwithstanding the subsequent occurrence of any contingency which prevented the performance of the contractual obligation undertaken.

Therefore, before 1863, a man was absolutely bound to perform any contractual obligation undertaken by him under the rule of the law of contract and he could not claim to be excused by the mere fact that the performance had become impossible, subsequently. It can be further strengthened by citing here Paradine v. Jane92 which is a good example of this principle. In this case the court held:

"When the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, not with & tending any accident by inevitable necessity, because he might have provided against it by his contract"93
The principle of “Absolute Contracts” worked well enough where, it was usual to make provisions for the supervening events or where the party relying on it could have been reasonably expected to make such provisions but, in other cases, this doctrine was regarded as an unsatisfactory way of allocating the loss occasioned by the supervening or unexpected events. It was found to be not applicable in the contracts which called for a personal performance by the party who died or was permanently incapacitated. The other exception was however recognized in the cases of supervening illegality.

J. Blackburn in *Taylor v Caldwell*\(^94\) relied on the exceptions given above and formulated a general rule of discharge of contracts. It came to be known as “Doctrine of Frustration”. Justice Blackburn in this historic and landmark case *Taylor v Caldwell* stated that:-

*Where from the nature of contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless....... Some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done, there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without the fault of the contractor.*\(^95\)

After being established in Taylor v. Caldwell the doctrine of frustration started its development. Its scope was also extended to cases in
which the performance became impossible otherwise than through the perishing of a specific thing, and also to the cases where the performance did not become impossible at all but the commercial object, or purpose, of the contract was frustrated. In _Krell v. Henry_\(^9\), it was held that:

"Frustration was not restricted to physical impossibility; it also applied to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of thing, going to the root of the contract and essential to its performance".\(^9\)

In words of Lord Simon as held in _British Movietone News Ltd v London and District Cinemas_\(^9\)

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to the execution or the like. Yet this does not in itself affect the bargain which they have made".\(^9\)

Since this case, there has been some restriction in the scope of the Doctrine of Frustration. There are many factors responsible for narrowing this scope. Some of them are:

- The reluctance of the courts to allow a party to rely on the doctrine as an excuse for escaping the bad bargain or
- The difficulty in drawing the line between the cases of frustration and the cases where the liability for breach of contract is very strict etc.
However, looking at it from the practical point of view, the doctrine of Frustration invites two related difficulties:

Firstly, that it may scarcely be more satisfactory to hold that the contract is totally discharged, than to hold that it remain in full force. Often some compromise may be a more reasonable solution and Secondly, that the allocation of risks produced at common law by the doctrine of frustration is not always satisfactory. This difficulty however is covered by the doctrine of altered conditions or the change in circumstances.

Therefore, the trend observed is that the doctrine will not be applied where the performance is actually prevented, (as it was seen in a number of charter party cases in which the ships were trapped in the port for a long time after the outbreak of hostilities between the Iran and Iraq in 1980), But there is a marked reluctance to hold the contracts frustrated where the performance has merely become more difficult or less advantageous for the party seeking to apply or invoke the Doctrine of Frustration.

In English law, the principles on which the Doctrine of Frustration is founded, are well settled. But whether in a particular case the conditions or the circumstances qualify as a frustrating event or not, is often difficult to decide. The question of frustration in the words of Lord Diplock in Nema is:

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

But if the arbitration is arranged, the courts will normally leave it to the arbitrator to decide, on the facts found by him, whether the contract is frustrated or not and the court will intervene only if he has failed to apply the
correct legal test or has reached a conclusion which no reasonable person, on the facts found, could have reached.

By virtue of this doctrine the parties are free from liability for acts of performance not yet due when their contract is regarded by the law as frustrated. The doctrine is exceptional because “in the ordinary way, it does not matter whether the failure to fulfill a contract by the seller is different because he is indifferent or willfully negligent or just unfortunate.” It does not matter what the reason is BUT what matters is the fact of performance that he has performed or not?

Therefore it can be concluded here that the doctrine of “Commercial Frustration” is of great importance in international trade transactions because they imply a greater element of uncertainty than home transactions in consequence of the fact that they are subject to political and economic influences in foreign countries. It is no accident that the doctrine of frustration in its present form has also emerged from litigation, which was primarily concerned with transactions of international trade.

(iii) The Law Reforms (Frustrated Contract) Act, 1943

When the contract is discharged on account of frustration, the adjustment of the contractual rights of the parties has to be carried out (mostly) in compliance with the provisions of the Law Reforms (Frustrated Contracts) Act, 1943. This act was passed after the litigation of the leading case of Fibrosa. In this case there was a contract for the sale of the machinery to be shipped to Gdynia. It was frustrated when that part was occupied by the enemy during the Second World War. Although it might have been physically possible to get the goods to the destination, the contract was discharged because of the strong public interest in ensuring that no aid should be given to the enemy economy at the time of war. In the litigation of
the famous *Fibrosa* case it was held, that the Polish-buyers could recover the deposit of $1000 on the ground that there was a total failure of consideration.

After the *Fibrosa* case this Law Reforms (Frustrated Contracts) Act was passed in 1943. It abrogated the rigid rule laid down in this case.

The said English Law Reforms Act, 1943 was passed with the aim of enabling the courts to adjust these differences on the basis or *Equity and Justice*. It aimed at the prevention of *Unjust Enrichment* of either party at the expense of other. The provisions of the Act, relating to this are as follows:

**Section 1 (2)** All advances paid before the time of discharge can be recovered by the party that paid them. But, the recipient of the money is entitled to retain such expenses incurred before that time or for the purpose of the performance of the contract and as the court may consider just.

**Section 1 (3)** Where no advance was paid and consequently expenses cannot be retained, the court may allow a claim for payment of just expenses against the party who, at the time of the discharge of the contract, had obtained a valuable benefit at the cost of the claimant.

**Section 1 (4)** The Act provides expressly that overhead expenses and personal labour may be included in the claim for retention or recovery of expenses.

**Section 1 (5)** When the adjustment is made, the court shall not take into account the fact that a party may have insured voluntarily against the frustrating event and obtained the insurance...
money, but, if the insurance was effected in consequence of an express term of the frustrated contract (or under an enactment), e.g. if it was a c.i.f. contract, the insurance money has to be taken into account when the adjustment is made.

However this Act does not apply to the following exceptional cases:-

**Exception No. 1** Where the contract is not governed by English law (s.1(l)). This provision lacks precision because it does not state what is to happen when different aspects of the contract are governed by different laws. Where, e.g., a contract is concluded in England but is to be performed in Brazil, the essential validity of the contract is likely to be governed by English law, but the incidents of performance by the law of Brazil. it is believed that such a contract, if frustrated, cannot be adjusted under the provisions of the Act, but that those provisions apply only where English law governs the performance of the contract.

**Exception No. 2** The Law Reforms Act is not applicable to certain contracts of insurance; certain charter parties and other contracts of carriage by sea (s.2(5)). The contracts dealing with these topics normally contain special provisions for the adjustment of the rights of the parties when frustration occurs.

**Exception No. 3** The Law Reforms (Frustrated Contracts) Act, 1943 is not be applicable where section-7 of the Sale of Goods
Act (1979) of England applies. Section 7 of the Sale of Goods Act (1979), of England provides for the avoidance of a contract for the sale of specific goods, which have perished before the risk passed on to the buyer. In such a case, the buyer can recover the advances paid on the purchase price, but the seller is not entitled to retain or recover the just expenses.

**Exception No. 4**

When the contract contains provisions which are intended to have effect in the event of commercial frustration; in this case the court has to give effect to the contractual provisions and to apply the provisions of the Act only to such extent as appears to be consistent with the contractual provisions (s.2(3)).

The Act provides especially (s. 3(2)) that it shall likewise apply when the dispute is to be determined by an arbitrator. An arbitration clause is normally not invalidated when a party maintains that the contract is frustrated, and the arbitrator has to decide a dispute between the parties on the question whether the contract has been frustrated or not.

**(iv) English Law on Frustration**

In English law the principles on which the Doctrine of Frustration is founded are well settled. “Frustration” occurs only where a fundamentally different situation unexpectedly occurs, subsequent to the conclusion of the contract. To pass this test of ‘unforceability’ and ‘unexpectedness’ is the main factor which determines whether the event has fundamentally changed the circumstances or not. Not every turn of event satisfies this test. Such uncontemplated development might make the performance of the contract
more difficult or more onerous or more costly than it was envisaged by the parties, during the formation of the contract. It can be due to sudden and even abnormal, rise or fall in prices or to the necessity of obtaining supplies from other, and dearer sources of supply than those anticipated. These events, as such, do not operate as frustrating a contract of export sale; only where they are of such magnitude as to create a fundamentally different situation, they result in the frustration of the contract. This is clearly stated by Lord Radcliffe and Lord Simon.

**Lord Radcliffe** said in a passage which has become the classic statement of the *Doctrine of Frustration*

In words of Lord Radcliffe:\footnote{102}

"... frustration occurs whenever the law recognizes that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. *Non haec in focdera veni. It was not this that I promised to do* ".

In the words of **Lord Simon**:\footnote{103}

"The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate -- a wholly abnormal rise or fall in prices, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract, in
the light of the circumstances, existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because on its true construction it does not apply in that situation".

(v) Indian Law on Frustration

The basis of the frustration in Indian legal system can be traced in the words of: Viscount Simon L. C’s Opinion:\textsuperscript{104}

\textquote{Frustration is the occurrence of an intervening event or change of circumstances so fundamental as to be regarded by the law both as striking at the root of the agreement and as entirely beyond what contemplated by the parties when they entered into the agreement.}

The legal basis of the doctrine of frustration in India was further strengthened be in \textit{Satyabrata Ghose v Mugneuam Bangur}\textsuperscript{105} in which Justice Mukherjee of the Supreme Court of India stated:

\textquote{The essential idea upon which the doctrine is based is that of impossibility of performance of the contract, in fact Impossibility and Frustration often used as inter-changeable expressions. The changed circumstances make the performance of the contract impossible and the parties are absolved from the further performance of it as they did not promise to
perform an impossibility ............ the doctrine of frustration is really an aspect or part of the law of the discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section 56 of Indian Contract Act, 1872".106

In another case of Ganga Saran v. Ram Charan107 Justice Fazal Ali of Supreme Court of India expressed his views about the legality of frustration in India. The Supreme Court observed:

"We hold therefore that the doctrine of frustration is really an aspect or part of law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of section-56 of the Indian Contract Act".

Therefore, it is observed that since times the doctrine of frustration occupies an ambient position in various legal systems. In English Law, it is covered under the expression Frustration and in Indian Legal System, it comes under the scope of section 56 of the Indian Contract Act, 1872.

It is evident from these observations that the modern international merchant is expected to have a considerable degree of foresight. He should therefore guard himself against an unexpected or a supervening event.

(vi) Essential Elements

Frustration refers to when the contract is rendered impossible of its performance by external causes beyond the contemplation of the parties. It includes both -
• Impossibility of the performance of the contract and
• Impossibility of the fulfillment of the ulterior purpose for which the contract was entered into.

The doctrine of frustration is relevant, when it is alleged that a change of circumstance or the alteration of the conditions, after the formation of the contract but before the conclusion of the contract, has rendered the fulfillment of the contract impossible, physically as well as commercially. The doctrine is not concerned with the initial impossibility which may render the contract void ab initio.

The principle of frustration of contract is applicable to a great variety of contracts. It is therefore, not possible to lay down an exhaustive list of situations in which the doctrine of frustration is going to be applied so as to excuse the performance of the contractual obligation undertaken. The law upon this matter is undoubtedly under the process of evolution still. Yet, there are some grounds which have become established as to when the Doctrine of Frustration can be invoked. They are:-

(a) Destruction of the subject Matter
(b) Destruction of a thing (other than the subject matter) But essential for the performance of the contract:
(c) Unavailability of the subject matter or the thing essential for the performance of the contract
(d) When the method of performance becomes Impossible
(e) Death of the party
(f) War
(g) Strike
(h) Export/Import Prohibitions
(i) Change of Circumstances
Discussion:

(a) Destruction of the subject Matter.

The most obvious application of the doctrine of frustration starts from the case like *Taylor v. Caldwell*.\(^{108}\) in which the subject matter of the contract was destroyed. In this case the defendants had agreed to permit the plaintiffs to use a music-hall for concerts on four specified nights. After the contract was made, but before the first night arrived, the hall was destroyed by fire. Blackburn J., giving the judgment of the Court of Queen's Bench, held that the defendants were not liable in damages, since the doctrine of the sanctity of contracts applied only to a promise which was positive and absolute, and not subject to any condition express or implied. The learned judge employed the concept of an implied condition to introduce the doctrine of frustration into English law, since he said that it might appear from the nature of the contract that the parties must have known from the beginning that the fulfillment of the contract depended on the continued existence of a particular person or thing. He held that the particular contract in question was to be construed as:

"subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing, without default of the contract.\(^{109}\)"

*Taylor v. Caldwell* also points out that a contract may be frustrated by, destruction of only a part of the subject matter also. The contract related to the Surrey Gardens and Music Hall was discharged though, only the hall was destroyed, while the gardens still remained in use, as a place of entertainment. It is enough if the main purpose of the contract is defeated.
Therefore the principle evolved here is that, in cases where the performance depends upon the continued existence of a given person or a thing then a condition is implied that the impossibility of performance arising from perishing of that very person or thing shall excuse the performance of the contractual obligation. In words of J. Blackburn:110

"a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance".

However, it is to be noted that, the partial destruction of the subject matter, which does not have this drastic effect will not frustrate the whole contract though, it may provide for one party with an excuse for performing in full or give the other party the option to rescind.

The principle evolved in case of Taylor v. Caldwell was soon applied in other cases and was also accepted by the legislature in relation to agreements for the sale of goods.111

(b) Destruction of a Thing (other than the subject matter) BUT essential for the performance of the contract:

A contract may be frustrated in cases where, what is destroyed is not the subject matter of the contract but something which is essential for the performance of the contractual obligation. In case of Appleby v Myers112 it was held that a contract to install machinery in a particular factory can be frustrated by the destruction of the factory, even though the subject matter of the contract here is the machinery. Now, as for answering to the question, that—

• What is essential for the performance of the contractual obligation of the contract?
It can be said that, the terms of the contract decides what is essential for the performance of the contractual obligation in the contract.

The destruction of the subject matter of the contract does not necessarily frustrate it, for it may be governed by the rules which determine when, the risk of loss passes from one party to the other under certain types of contracts. The relationship between these rules and the doctrine of frustration can be summed up by saying that, where the destruction leads to the frustration it discharges all the contractual obligations of both parties while, where it is governed by the rules with respect to the risk, it discharges only some of the obligations of one party. The distinction may be cleared by reference to the contracts for the sale of goods and to building contracts.

In case, where the subject matter of the contract is the sale of specific goods, e.g. In the case of sale of the second hand machinery or the antiques etc, it is expressly provided in section 7 of the Sale of Goods Act 1979 (England) which says that:

"Where there is an agreement to sale the specific goods and subsequently the goods, without any fault on the part of the seller or buyer, perish before the risk passes to the buyer, the agreement is avoided."\(^{113}\)

In the other words, under a contract for the sale of goods, the general rule is that, the risk passes with the property and, property may pass before the delivery, so that, it is possible for the risk in goods to have passed to the buyer while they are still in the hands of the seller or of a carrier. If the goods are destroyed after the risk has passed, the contract is not frustrated. On the contrary, the statement that the risk has passed means that the buyer is bound to pay the price, while the seller is discharged from his duty to deliver the goods. But the seller is not fully discharged from all his obligations. If goods
are destroyed before the risk has passed, the contract is frustrated if, the goods are **specific** or, if they are to be taken from a particular source and all the goods from that source are destroyed. If on the other hand, the goods are **generic**, the contract is not frustrated merely because the particular goods which the seller intended to supply under the contract were destroyed, before the risk had passed. On the contrary, to say that the risk has not passed on this situation means that the seller is bound to deliver other goods of description under the contract.

But frustration cannot be pleaded if the event which made the performance of the contractual obligation impossible, existed already before the conclusion of the contract and, could have been covered by adding some appropriate clause to the contract.

(c) **Unavailability of the subject matter or the thing essential for the performance of the contract**

A contract may also be frustrated if the thing or the person essential for its performance, though not ceasing to exist or suffering with a permanent incapacity becomes unavailable for that purpose. In other words, in a case where, a person or a thing essential for the performance of the contract becomes unavailable at the time fixed for the performance, as a result of some supervening event BUT becomes available later on then in such cases, this kind of temporary unavailability will most obviously frustrate the contract, if it is clear from the nature of the contract that, it was to be performed only at that particular time or within that specified time and, if the unavailability factor extended over the whole of that time.

It can be very well explained by the famous case *Robinson v Davidson*. In this case the contract to play in a concert on a particular day was held to be frustrated by the illness of the performer on that very day.
In *Howell v Coupland*¹¹⁵ the defendant contracted to sell a specified quantity of potatoes to be grown on his farm, but failed to supply them as the crop was destroyed by a disease. Delivering the judgment of the Court of Appeal, Mellish LJ said:

"Suppose the potatoes had been fully grown at the time of the contract, and afterwards the disease had come and destroyed them; according to the authorities it is clear that the performance would have been excused; and I cannot think it makes any difference that the potatoes were not then in existence; here there was an agreement to sell and buy two hundred tons out of a crop to be grown on a specific land, that it is an agreement to sell what may be called specific things, therefore neither party is liable if the performance becomes impossible".

A parallel decision under section 56 of the Indian Contract Act (1872) is that of the Madras High Court in *V.L. Narasu v P.S. V. Iyer*¹¹⁶, where a contract to exhibit a film in a cinema hall was held to have become impossible of the performance when on account of heavy rains the rear wall of the hall collapsed, killing three persons and its license was cancelled, until the building was reconstructed to the satisfaction of the chief engineer. It was held that: the owner was under no liability to reconstruct the hall and, even if he did reconstruct it took him some time and, by that time the film would have lost its appeal¹¹⁷.

A contract may even be discharged in cases where the subject matter - to be obtained from a particular source becomes unavailable without the fault of the either party. To understand this, it can be categorized into following three groups:-
I. Cases where the contract expressly provides for the source.

II. Cases where the contract contains no reference regarding the source but only one party contemplates its use.

III. Cases where the contract makes no express provisions regarding the sources but both parties contemplate its use.

Category I

The first category of cases consists of those cases in which the contract expressly provides that the goods are to be taken from the specific source. In such cases, the contract is frustrated if that source falls. Thus, in *Howell v Coupland*\(^{18}\) a farmer sold 200 tones of potatoes to be grown on land specified in the contract. That crop largely failed and it was held that the contract was frustrated, so the farmer was not held liable in damages for non delivery. For this purpose, it is assumed that the contract specifies an exclusive source of supply.

Category II

The second category of cases consists of those cases in which the contract contains no reference to the source and only one of the parties intends to use that source. In such cases, failure of the source does not lead to frustration. In *Blackburn Bobbin Co. Ltd. v T.W. Allen Ltd.*\(^{19}\), a contract for sale of Finland Birch Timber was not frustrated merely, because the seller expected to get the supplies from Finland and ultimately he could not do so because, of the severing of trade routes after the outbreak of war in 1914, for all the buyers knew delivery might have been made from the stocks in England.
Category III

The third group consists of cases in which the contract makes no express reference to the source but both the parties contemplate that it will be used. One possibility in cases of this kind is, for the court to construe that the contract is containing an implied reference to the source. For this purpose, it is not enough to show that the parties contemplating the source, must have intended that the source should be used. There is a little English authority on the question whether the failure of a source which was merely contemplated by both parties will frustrate a contract or not. For example in a case of Lipton Ltd. V. Ford[20] the point that: such failure would frustrate the contract or not was conceded.

Therefore, it can be concluded that there is no clear cut English decision on the effect of the failure of a mutually contemplated source of supply. Where the source was contemplated by one party only, the courts sometimes emphasized this fact in rejecting the plea of frustration. This may give some support to the view that, the plea would succeed where the source was contemplated by both the parties. On the other hand, in some such cases the commercial background may be that, it would be usual for the seller to protect himself against the contingency, e.g., by prohibition of export clause. Where this is the position, it is likely that failure of even a mutually contemplated source would frustrate the contract.

(d) When the method of performance becomes Impossible

A contract may be held to be frustrated if the method of performing the contractual obligation becomes impossible. However, it is to be noted here that, 'Where a contract provides for an attractive methods of performance, it is not frustrated if one or more of them become impossible, so long as, at least one method remains possible'. For example, if the
contract is to deliver at X or Y, delivery must be made at X if delivery at Y becomes impossible. Similarly if the contract is to ship from X or Y shipment must be made from X is shipment from Y becomes impossible as held in the Furness Bridge case\textsuperscript{121}.

(e) Death of the party

Certain 'personal' contracts, such as contracts of employment apprenticeship or agency etc, are discharged by the death of either party. Even a commercial contract may involve reliance by one party on the personal skill of the other, in which case, the death of that party can discharge the contract. The same rules apply, where a party is permanently incapacitated from performing such a contract. In \textit{Jackson v Union Marine Insurance Co. Ltd.}\textsuperscript{122} the Court held the contract to write a book is frustrated by the supervening insanity of the author.

(f) War

After the parties have entered into the contract and the war breaks out then -

- What is the effect on the performance of the contract?
- Whether the contract itself would be regarded illegal by the unexpected event (war) or it is only indirectly affected?

Regarding answer to these questions, it would be advisable to examine the following cases and discussion.

Interventions of war or, war like conditions in the performance of the contract have often created difficulties. The Second World War gave rise to a few reported cases and the Suez crises of 1956 produced only two reported cases in which frustration was successfully pleaded but they were also late and were overruled by \textit{Tsakioroglou & Co. Ltd. v. Noble Thovl G. mb. H.}\textsuperscript{123}
In this case the following statement of facts was given by Lord Reid:

"The appellants agreed to sell to the respondents three hundred tons of Sudan groundnuts c.i.f. Hamburg. The usual and normal route at the date of the contract was via Suez Canal. Shipment was to be in November/December, 1956, but, on November 2, 1956, the Canal was closed to traffic and it was not reopened until the following April. It is stated that the appellants could have transported the goods via the Cape of Good Hope. The appellants refused to ship goods via the Cape. The question now is whether by reason of the closing of the Suez route, the contract had been ended by frustration."

The appellant's argument was that it was an implied term of the contract that shipment should be via Suez. But it was held that such a term could not be implied. The customary or usual route via the Suez Canal being closed, the appellants were bound [by the Sale of Goods Act, 1893, Section 32(2)] to ship the groundnuts by a reasonable and practical route and, though the appellants might be put to greater expense by shipping the groundnuts via the Cape of Good Hope, that did not render the contract fundamentally or radically different, therefore, there was not any frustration of the contracts in the sense perceived.

However, if there are more than one ways of performing a contract and the war cuts off only one of them, the party is still bound to perform by the other way, however inconvenient or expensive it may be. This appears from the decision of the Privy Council in Twentsche Overseas Trading Co. Ltd. v. Uganda Sugar Factory Ltd.124
There was contract for supplying “Krupps” steel rails. The rest of the facts appear from the following words of Lord Wright:

“The appellant claimed that the rails specified under the contract were to be rails manufactured by a German firm and by that firm only. On this they based their claim to be excused from their failure to deliver the goods because to do so would have involved dealing with alien enemies due to the outbreak of World War II and hence the performance of the contract became impossible and illegal”.

Their Lordships held that, it was not open to the supplier to invoke the Doctrine of Frustration and there was nothing in the contract, which called for the rails to be obtained from Germany only. The reference to “Krupps” did not indicate a source of supply, but merely indicated a specification of the rails. There were many other sources of supply also, and the contract left the supplier with a free hand in the matter.

Indian Interpretation

In Gambhirmar v. Indian Bank Ltd\textsuperscript{125}, it was held that, if the intervention of a war is due to the delay caused by the negligence of a party the principle of frustration cannot be relied upon.

In yet another Lalit Mohan Ghose\textsuperscript{126} the Patna High Court held that, the further performance of a contract of life insurance had become impossible because the insurer was a German company and on the outbreak of war its business was closed by the Government of India and the disposal of pending policies was handed over to a firm of chartered accountants. The assured was accordingly allowed to recover the money paid by him under the policy. In
another Calcutta case, a contract of carriage by river was intercepted by the enemy seizing the boat along with cargo, during the hostilities between India and Pakistan. The court allowed the carrier the plea of impossibility.

Therefore the trend observed is that the doctrine of frustration will not be applied where performance is actually prevented, as it was seen in number of charter party cases in which ships were trapped for a long time after the outbreak of hostilities in 1980. But there is a marked reluctance, to hold the contracts frustrated where the performance has become merely more difficult or less advantageous for one party. The Suez Canal cases also rejected the argument that the greater expense caused to the party prejudiced by the closure of the canal was a ground of frustration. In words of Lord Simon:

"an increase of expense is not a ground frustration".

(g) Strike

In French law it is said that "a strike is not, in jurisprudential principle, a case of frustration" and the same view is accepted in India as well.

A promisor may not be absolved of his duty to carry out his promise (of performance) merely because there is a strike by the workmen employed in the performance of the contract. According to Williston.

"Whether a strike will result in impossibility of performance or not would depend upon various other factors of the contract".

If the strike renders the performance impossible in any circumstances, the doctrine of frustration can be invoked for excusing the contractual obligation.
(h) Export and Import Prohibitions

Apart from the case of war, a contract may be frustrated because subsequent to its conclusion, if the government has prohibited its performance, e.g. by placing an embargo on the exportation or importation of the goods sold.

However, great care should be applied in applying frustration in such cases because not every governmental prohibition has the effect of rendering the contract illegal. Sometimes the effect is merely to suspend and postpone the performance of the contract. It is always necessary to relate the prohibition to the terms of the contract, especially those governing the time of performance. The prohibition operates as a frustrating event only if, it is final and extends to the whole time, still available for the performance of the contract. It these conditions are not satisfied, a party would be well advised to wait until the time of performance has expired, before treating the contract as frustrated because, the prohibition may be removed in time to allow the performance. If the government prohibition extends beyond the stipulated time for performance, it is normally safe to assume, that the contract is frustrated because, there is an implied condition in every contract that its performance shall be legal at the date when the contract is to be performed.

The rule, that a subsequent government prohibition operates as a frustrating event only if it oversees the whole of the contract period, applies likewise, if the prohibition does not come into operation at once and, exporters are allowed a time of grace during which they may perform existing contracts. In RO SST Smyth & Co. Ltd., the contract provided for the shipment of horse beans from a Sicilian port c.i.f. Glasgow during October and November 1951. By an Italian regulation dated October 20, 1951, the exportation was prohibited as and from November 1, 1951, except
under special license. The sellers failed to ship, and the buyers claimed the damage. It was held by Justice Devlin that they were entitled to succeed.

The prohibition did not operate as a frustrating event; it merely reduced the time of shipment from two months to one month and, after the issue of the Italian regulation the sellers had still 10 day’s grace within which they could have effected the shipment. If the prohibition of export had been instantaneous, it would have operated as a frustrating event, and the same would have been the case, if the sellers could have proved that they had no shipping facilities during the remaining 10 days.

Further, sometimes the government prohibition may allow exporters to perform at least some of the contracts into which they have entered into. It may thus leave the “loopholes”. It may, e.g. allow the exporters who have goods already on lighters or have begun to load them on the vessels, to fulfill their contracts. In these cases, an exporter who wishes to plead the frustration has the heavy burden of proving that, he could not avail himself of one of these “loopholes”.

(i) Change of Circumstances

Frustration of the contract also occurs, if there is a material alteration in the conditions of the contract or if there is a fundamental change in circumstance (after the formation of contract but before the conclusion) and the change is so fundamental that, if the contract still remains (i.e. if the performance continues) then, it would result in a new and altogether different contract which is entirely different from that, as originally concluded by the parties. To hold the parties to such a contract would mean substitution of a different contract than what was originally agreed to or contemplated for.
It is however, easy to ascertain whether the contract is frustrated or not but it is difficult to ascertain the cases, where the performance is possible and where the fundamentally different situation has arisen unexpectedly.

The English courts have shown that the courts consider the principle of *Sanctity of Contracts* as infinitely of higher importance than the requirements of commercial convenience. Also, that they are not inclined to accept a contract as frustrated where the contract is capable of its performance. The contract is declared frustrated only when the change in circumstance or change of the conditions is so fundamental so as to render the performance impossible or, if possible than the performance would result in something different from that contemplated for. For example, in a contract for supply of goods, if the performance is delayed inordinately for reasons beyond the control of the parties and consequently the prices which were fixed in relation to the then existing conditions of labour and costs of raw material are entirely outdated, it may well be argued that the spine (foundation) of the contract has gone. In this category falls cases, in which the contract is aimed at the execution of a particular object and which has been defeated by the occurrence of the supervening events. Normally an event, which was within the contemplation of the parties when they entered into the contract, does not operate as a frustrating event, even though they did not expect or consider it probable that it would happen; but in exceptional cases the doctrine has been applied where the parties were aware of the possibility that, the frustrating event might occur but still omitted to provide for that eventuality.

In *Metropolitan Water Board v Dick Kerr and Co.* it was held that, the contract was frustrated since it was likely that there would be total change in conditions by the time, the restriction might be lifted.
However, at times it is difficult to contend successfully that the alteration in the condition or the change in the circumstance would be so fundamental that it would result in frustration of the contract. For example in popular known cases of *Suez Canal*.130

In this case, the Suez Canal was closed November 2, 1956, as a result of Military operations between Egypt and Israel. The exporters in East Africa had sold certain goods for shipment in specified European destinations. The contract was made before the date of closure of the Suez Canal but it had to be performed after that date i.e. when the Suez Canal closed. Now, when the date of the performance of contract came, the canal was closed, hence, the shipment was not possible. However, it was possible to ship the goods (via Cape of Good Hope) to their destination. This route was no doubt longer and caused considerable additional expenditure. It became clear from it that the additional expense was of such a magnitude that the contract would not have gained. Hence the contract was frustrated on this ground. The question that arose here was:

❖ Whether the necessity to ship via the alternate route (i.e. via Cape of Good Hope) constituted a radical difference in the character of the seller's obligation or not?

To this, the House of Lords answered in negative. The court held that the sellers were under a duty to send the goods by a reasonable and practicable route when the usual route via the Suez Canal was not available. In the present case, the alternate route was available i.e. via Cape of Good Hope.

In the Court of Appeal Harman L.J. stated that the general attitude of the English courts to the issues of frustration is given in the following expression:

"Frustration is a doctrine only too often invoked by a party to a contract who finds performance difficult or
unprofitable, but it is very rarely relied upon with success. It is, in fact, a kind of last ditch, and, as Lord Radcliffe says in his speech in the most recent case, it is a conclusion which should be reached rarely and with reluctance.” 131

In view of the decision of the House of Lords in Davis Contractors Ltd. v. Fareham U.D.C. 132 and later cases the proper test for frustration may be formulated as follows. The question that needs to be answered to determine frustration is “If the literal words of the contractual promise were to be enforced in the changed circumstances, would performance involve a fundamental or radical change from the obligation originally undertaken?” In this case Lord Radcliffe 133 said:

“...frustration occurs whenever the law recognises that without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the 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”.

This statement was explicitly approved by the House of Lords in National Carriers Ltd. v Panalpina (Northan Ltd.)134 In this case Lord Simon restated as follows.
“Frustration of a contract takes place when there occurs a supervening event (without default of either party and for which the contract makes no sufficient provision) which significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights or obligations from what the parties could reasonably have contemplated at the time of execution of the contract and that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances. In such case, the law declares both the parties to be discharged from further performance”. Hence it was held that the doctrine should be flexible and capable of new applications the new circumstances arise.

A contract would frustrate where the circumstances arise which makes the performance of the contractual obligation impossible, in the manner and at the time contemplated. This principle was explained in P.D. Mehra & Sons v. Ram Chand Om Parkash. In this case A contracted to supply to B. certain classes and quantities of American piece goods. The contract was c.i.f. Krachi. The goods arrived there after some delay. B refused to accept on the ground that both the qualities and quantities offered for delivery were not according to the particular contract. A called upon B to, refer the dispute to the nominated arbitrator who was residing at Karachi. Then came the partition, which made it impossible for non-Muslims to go to Karachi. The court held that the contract was not frustrated. The court further said:-

“If it was necessary for the parties to go to Karachi and to take witnesses there, the performance of the arbitration
agreement would have been rendered impossible. But as going to Karachi was not necessary the change of circumstances did not have a material effect on the contract”.

In this case Justice Kapur of Punjab High Court has said:-

“It is clear that if there is entirely unanticipated change of circumstances the question will have to be considered whether this change of circumstances has affected the performance of the contract to such an extent as to make it virtually impossible or even extremely difficult or hazardous. If that be the case, the change of circumstances not having been brought about by the fault of either party, the courts will not enforce the contract”.

Hence, the principle established is that a normal alteration in the condition or the normal change in circumstance, such as price rise, does not frustrate the contract. The conclusion derived is that the courts do not have the general liberty to absolve a party from the liability to perform his part of the contract merely on account of some unexpected events or uncontemplated turn of events (where the performance becomes more onerous or more burdensome). In such a kind of case, in the general course of carrying out the contract, the parties (to an executory contract) are often faced with a turn of events which they did not anticipate at all or did not contemplate at all like – abnormal rise or fall in price, a sudden depreciation of the currency, an unexpected obstacle to the execution of the contract or alike. Yet, it does not affect the bargain made between the parties. This principle was also established by the Supreme Court in case of Alopi Prashad.
(vii) Frustration of Venture

English Law was first to introduce the doctrine of frustration in the landmark case of *Taylor v. Caldwell.* It was later applied to the cases where, the commercial venture envisaged by the parties was frustrated without the destruction of the subject matter of the contract. It first appeared in 1874, in case of *Jackson v. Union Marine Insurance Co. Ltd.* In this case a ship was required to proceed from Liverpool to Newport to load a cargo for San Francisco. On the first day, out from Liverpool the ship ran aground, and it took six weeks to refloat her, and another six months to complete repairs. The jury was asked whether the time necessary for getting the ship off and repairing her so as to be a cargo-carrying ship was so long as to put an end in a commercial sense to the commercial speculation entered upon by the ship owner and the charterers. The jury answered in the affirmative, and the Court of Exchequer Chamber held that the charter party ended upon the mishap. Bramwell B. said that the jury had found that "a voyage undertaken, after the ship was sufficiently repaired would have been a different voyage... different as a different adventure..."

It must be noted here that the principle of frustration is not only confined to physical impossibilities. It also extends to cases where the performance of the contract becomes physically possible, and the object that the parties had in mind failed to materialise. The well-known coronation cases *Krell v. Henry* is the one that illustrates this:

In it the defendant agreed to hire from the plaintiff a flat for June 26 and 27, on which days it had been announced that the coronation procession would pass along that place. A part of the rent was paid in advance. But the procession having been cancelled owing to the King's illness, the defendant refused to pay the balance. It was held that, the real object of the contract, as
recognised by both the contracting parties, was to have a view of the coronation procession. The foundation of the contract here was- taking place of the procession and, the object of the contract was frustrated by not happening of the coronation. Hence, the plaintiff was not entitled to recover the balance of the rent.

Thus the Doctrine of Frustration comes into play in two types of conditions:-

1) Where the performance is physically cut off.
2) Where the object has failed to materialize.

(viii) Provision in Indian Legal System

The Supreme Court of India has held that section 56 of the Indian Contract Act, 1872 (which covers frustration) is to be applicable to both kinds of frustration i.e. –

(i) Section 56 is applicable to cases where the frustration occurs because the performance is physically cut off.
(ii) Section 56 is applicable to cases where the frustration is a result of the object has failed to materialize.

In Satyabrata Ghose v. Mugneeram Bangur42 Justice Mukherjee of Supreme Court of India observed that:-

"This much is clear that the word “impossible” has not been used here in the sense of physical or literal impossibility. The performance of an act may not be literally impossible but it may be impracticable and useless from the point of view of the object and purpose which the parties had in view; and if an untoward event or change of circumstances totally upsets the very foundation
upon which the parties rested their bargain, it can very well be said that the promisor finds it impossible to do the act which he promised to do”.

It can concluded here that the concept of “Frustration of venture” was first introduced in English Law to cover situations where the physical subject matter of the contract was destroyed or had perished as in Taylor v. Caldwell143 but, it was quickly extended to cases where, without any such physical destruction, the commercial venture envisaged by the parties was frustrated.

It should be kept in mind that English writers in their compilations have discussed the above mentioned doctrine under other titles like: “Frustration of Purpose or Object”, “Frustration of Venture or Adventure”, “Frustration of Business Venture” and “Frustration of Commercial or Practical Purpose of the Contract” but all of them contain the common purport.

(ix) Codification in Indian Law.

When the performance of a contract becomes impossible, the very purpose which the parties had in mind gets frustrated. If the performance of the contractual obligation becomes impossible on account of a supervening event, the promisor is excused from the performance of the contract. This is known as the Doctrine of Frustration under the common law and is covered under Section-56 of the Indian Contract Act, 1872. This doctrine is based on the maxim ‘Lex non cogit ad impossibilea’ i.e is - the law does not compel to do something which is impossible.

In words of Justice Krishna Iyyer quoting Anson in Union of Indian v Domoni and Co.144 held:
"Most legal system makes provision for the discharge of contract where subsequent its formation, a change of circumstances renders the contract legally or physically impossible of performance. And indeed it is a part of statutory law of India."^{145}

In Indian Legal System there is a codification regarding the law in all its facts under sections 32 to 36, section 56 and 65 in Indian Contract Act 1872. Section 32 to section 36 deals with contingent contracts.

Discussion:

**Section 32** In section 32 it is postulated that if the contingent event becomes impossible, the contract is void.

**Section 33** Section 33 of the contract Act of India speaks of enforcement of contingent contracts i.e. contingent on event not happening.

**Section 34** Section 34 of the Indian Contract Act refers to cases where event on which a contract is contingent is deemed impossible, if it is the future conduct of a living person.

**Section 35** Section 35 of the Indian Contract Act, 1872, deals with contracts becoming void which are contingent on happening of a specified event with in a fixed time. It also adverts as to when the contracts may be enforced which are contingent on specified events not happening within the fixed time.

**Section 36** Section 36 of the contract Act of India (1872) postulates that in a contingent contract to do anything or not to do anything, if an impossible or unexpected event or if a supervening event happens, are void, irrespective of the fact whether the
impossibility of the event is known to the parties to the contract or not, at the time of formation of the contract.

Section 56  Section 56 of the Indian Contract Act (1872) Says that:

"An agreement to do an act impossible in itself is void. A Contract to do act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful where one person has promised to do something which he knew, or with reasonable diligence might have known, add which the promisor did not know, to be impossible or unlawful, such promisor must make compensation to such promisor for any loss which such promise sustain through the nonperformance of the promise."

Para wise Explanation

Para First (Sec.56)

The very First Para relating to section 56 of the Indian Contract Act, 1872, postulates that an agreement to do an impossible is void in itself. The expression ‘impossible’ here refers to a pre-existing impossibility i.e. that the impossibility existed at the time of formation of contract also and the parties were blind towards it.

Illustration

The illustration to section 56 of the Indian Contract Act (1872) reads as follows:

❖ “A agrees with B to discover treasury by magic. The agreement is void.”
When 'A' agrees with 'B' to discover treasure by magic, it is absurd to suggest that 'B' can sue 'A' for specific performance to find out the treasure for this, the mode being by magic.

In yet another one if 'A' promisor that he will raise a mango tree in one hour in 'B's Garden by involving some mantras, such an agreement is also void. For it is against nature that a mango tree fully grown up should sprout out in one hour.

Therefore, the promise shown or undertaken in the above illustrations are not binding in nature because they are manifestly impossible. It means that, an Impossible Promise is no consideration for a contract and therefore such a kind of promise fails in its very foundation and, is hence unenforceable.

To attract the provisions of first paragraph (of section 56 of Indian Contract Act) the impossibility talked about should be preexisting in fact or in law.

In Karl Ettlinger v Changamdas the court must be assured of the fact that the act is an act of 'Physical Impossibility'.

In another case of Uganda Sugar Factory the privy council held that:
It means that a contract has ceased to bind the parties because the common basis on which by mutual understanding it was based has failed. It would be more accurate to say not that the contract has been frustrated but that there has been a failure of what in contemplation of parties would be an essential condition or purpose of the performance.

In India in *Gauri Shankar v H. P. Maitra*[^148] the Calcutta High Court observed that according to the doctrine a subsequent event or contingency beyond the control of the parties at the time of transaction, for the occurrence of which they have not provided may, sometimes operate to undermine and avoid the contract between them.

In yet another case *Surpat Singh v Sheo Pd.*[^149] Patna High Court observed that:

> That doctrine, as I understand, is that when the performance or further performance of a contract has been rendered impossible or has been indefinitely postponed in consequence of the happening of an event which was not and could not have been contemplated by the parties to the contract, when they made it, a court will consider what as fair and reasonable man the parties could have agree upon if they had in fact foreseen and provided for the particular event, and if in its opinion they would have decided that the contract should be regarded as at an end, will discharge the party who would otherwise be liable to pay damages for non-performance of the contract ............... Again before the doctrine of

[^148]: Calcutta High Court
[^149]: Patna High Court
frustration can be invoked, it must be shown that the event which has produced frustration was an event which the parties to the contract did not foresee and could not, with reasonable diligence have foreseen.\textsuperscript{150}

Therefore it can be said that the occurrence the frustrating event was of a kind not contemplated by the parties to the agreement during the formation of the contract. Had it been foreseen by the parties to the contract, they would have undoubtedly, included some appropriate provision to overcome the difficulty of the impossibility of performance of the contractual obligation. It is noteworthy to point out here that, section 56 of the Indian Contract Act (1872) embodies a positive rule of law relating to the application of Doctrine of Frustration in India. In words of Justice Hegde Smt. Sushila Devi v. Hari Singh\textsuperscript{151} the Supreme Court observed that:

"Section 56 of the Indian Contract Act Lays down a rule of positive law and does not leave the matter to be determined accordingly to the intention of the parties"\textsuperscript{152}

Para Second (Section 56)

In the Second Para. of Section 56 the words used are- when the act become 'impossible or unlawful'. So it must be physical or legal impossibility, and not a mere impossibility pleaded with reference to want of ability and circumstances of the promisor. The Supreme Court of India in Satyabrata Ghose v. Mangneeram Bagar and Co.\textsuperscript{153} has observed:

"In deciding cases in India, the only doctrine that we have to go by is that of the supervening impossibility or illegality as laid down in S.56 taking the word 'impossible' in its practical and in literal not sense."\textsuperscript{154}
The Supreme Court further observed:

In cases, where the court gathers as a matter of construction that the contract itself contained impliedly or expressly a term according to which it would stand discharged on the happening of certain circumstances, the dissolution of contract would take place under the terms of the contract itself and such cases would be outside the purview of Section 56 altogether. ......... They would be dealt with under S. 32 which deals with contingent contracts as similar other provisions contained in the Act. In the large majority of cases however, the doctrine of frustration applied not on the ground that the parties themselves agreed to an implied term which operated to release those from the performance of the contract. The relief is given by the court on the ground of subsequent impossibility when it finds that the whole purpose or basis of a contract was frustrated by the intrusion or occurrence of an unexpected event or change of circumstances which was beyond what was contemplated by the parties at the time when they entered into the agreement. .............. when such an event or change of circumstances occurs which is so fundamental as to be regarded by law as striking at the root of the contract as a whole, it is the court which can pronounce the contract to be frustrated and at an end. Court has undoubtedly to examine the contract and the circumstances under which it was made. The belief, knowledge and intention of the parties are evidence, but evidence only on which the court has to form its own
conclusion whether the changed circumstances destroyed altogether the basis of the adventure and its underlying object..... This is really a rule of positive law and as such comes within the purview of Section 56 of the contract Act.155

In the same case, Justice B. K. Mukerjee of the Supreme Court of India further opined that.

The first Para of the section lays down the law in the same way as in England. It speaks of something which is impossible inherently or by its vary nature and no one can obviously be directed to perform such an act. The second Para enunciates the law relating to discharge of contract by reason of supervening impossibility or illegality of the act agrees to be done. The wording of this Para is quite general and though the illustration attached to it are, not at all happy, they can not derogate from the general words used in the enactment."

Therefore it can be stated that, the expression 'Impossible' here has not been used in the sense of physical or literal impossibility. The conclusion derived is that the performance of an act may not be literally impossible but it may be impracticable. If an untoward or unexpected event or change of circumstances totally upsets the very foundation on which the parties to the contract rested their bargain then it can be referred to as the frustration of the contract i.e. in such a case it can be said that the promisor finds it impossible to do the act which promised to do.

In another case Smt. Sushila Devi v, Hari Sing.156 Justice Hegde of Supreme Court of India observed:
"Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined accordingly to the intention of the parties. The impossibility contemplated by section 56 of the Contract Act is not confined to something which is not humanly possible. If the performance of a contract becomes impracticable or useless having regard to the object and purpose the parties had in view then it must be held that the performance of the contract has become impossible. But the supervening events should take away the basis of the contract and it should be such a character that it strikes at the root of the contract."

Therefore, it can be summed up here that the Second Para of Section 56 of the Indian Contract Act 1872 enunciates the law relating to the discharge of contract by reason of Supervening Impossibility or Illegality of the act agreed to be done.

Para Third (Section 56)

The Third Para of Section 56 of the Contract Act of India (1872) is a sort of exception to the Doctrine of Frustration where instead of declaring the contract as discharged the promisor is rested with the liability to pay the compensation to the promise for the non performance of the promise.

The essential thing for the application of the Third Para of Section 56 is that-

- Whether the promisor is required to pay the compensation for the non-performance of the contractual obligation or not?
Therefore it can be said that the Third Para of Contract Act of India (1872) deals with the compensation in case of frustration. Hence it can be referred to as a sort of exception to the doctrine of frustration where the promisor is under the liability to compensate the promisor for the non-performance of the contractual obligation.

(x) Operation under Indian Legal System

In Indian legal system, Doctrine of Frustration [under provisions of section 56 of the contract Act of India (1872)] operates in two ways:-

1. When the performance of the contract becomes impossible.
2. When the performance of the contract becomes unlawful.

Indian courts do not openly justify frustration on any other basis except as given in Para Second of the section 56 of the Indian Contract Act, 1872. Section 56 therefore requires that, to have the effect of frustration, the impossibility or unlawfulness must be of such a nature that it destroys the very foundation of the fundamental basis of the contract in question.

Section-65 Section 65 of the Indian Contract Act, 1872 says that, when an agreement in discovered to be void or when the contract becomes void, any person who has received any advantage under such an agreement or contract, is bound to restore it or, in other words the person who received the advantage must make a compensation for it (the advantage received) to the person for whom he received it.

It can be concluded here that the Doctrine of Frustration is exhaustively codified in Indian legal system.
Self Induced Frustration

A party cannot rely on self induced frustration, that is, frustration due to one's own conduct or due to the conduct of those for whom one stands responsible. The principle of frustration is that should not be self induced as explained in Maritime National Fish Ltd. v Ocean Trawlers Ltd.\(^{158}\) In this, it was explained that

"The essence of frustration is that it should not be due to the act or election of the party."

The facts of the case were:

The appellants hired the respondents' trawler, called the "St. Cuthbert" to be employed in fishing industry only. Both parties knew that the trawler could be used for that purpose only under a license from the Canadian government. The appellants were fishing five trawlers and, therefore applied for five licenses. Only three were granted and, the Government asked the appellants to name three trawlers and they named the trawlers. They, then repudiated the charter and pleaded frustration in response to the respondents' action for the hire.

The judicial Committee of the Privy Council held that the frustration in this case was the result of the appellant's own choice of excluding the respondent's ship from the license and, therefore, they were not discharged from the contract.

In yet another case Bank line v Arthur Capel & Co.\(^{159}\) Lord Summer had observed that:

"I think it is now well-settled that the principle of frustration of an adventure assumed that the frustration arises without blame or fault on either side. Reliance cannot be placed on a self-induced frustration".

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View taken by Indian Legal System

The Indian courts have taken the view that if the event which made the performance of the contract impossible, happened because of the fault of the promisor, then it is undoubtedly a case of self Induced frustration and the promisor will be liable in such a case.

The Supreme Court in Boothalingam Agencies v V.T.C. Periasamy held:

“In other words, the doctrine of frustration of contract can not apply where the event which is alleged to have frustrated the contract arises from the act or election of the party—We hold that this principle can not be applied to the present case for there was no choice or election left to the appellant to supply chicory other than under the terms of the contract. On the other hand, there was a positive prohibition imposed by the license upon the appellant not to sell imported chicory to any other party but he was permitted to utilize it only for consumption as raw material in his own factory.”

The essence of self-induced frustration is, that the act or omission which results in frustration, must be some thing deliberate and intentional. Frustration is not ‘self-induced’, if what is shown is merely passive negligence. It should be of such a character, that it might be fairly inferred there from, that the promisor has no intention of performing the contract and has in effect repudiated it.

The principle of frustration of a contract assumes that, the frustration arises without blame, as fault on either side. Reliance cannot be placed on
self-induced frustration. But it may give the other party to the contract the option to treat the contract as repudiated. Where, antecedent to frustration, the promisor is not only diligent in obtaining the permit, but even withdraw his application for permit the prior conduct on his part would enable the other party to repudiate the contract (under s. 39.) This constitutes a case of self induced frustration.

Therefore the conclusion drawn is that, a party cannot rely on the Self Induced Frustration, that is, a frustration due to one’s own conduct or due to the conduct of those for whom one is responsible. The doctrine therefore, does not protect a party whose own breach of contract actually results in frustrating event nor does it protect him if the breach is only one of the factors, leading to the frustration. The onus of proving that the frustration is self induced is not the party who alleges it in the case.

(xii) Legal Effects

The most obvious legal effect of the doctrine of frustration is the discharge of the contractual liability of the contract. The legal effect of the frustration does not depend on the intention or opinion or, even the knowledge of the parties to the contract regarding the event. The belief, knowledge and intention of the parties, however, are evidences on which court is required to from its conclusion that whether the changed circumstances altogether destroyed the very basis of the contract or not. Therefore it can be said that, frustration operates automatically to discharge the contract irrespective of the intention or interest of the parties concerned and also irrespective of the circumstances.

However in H. R. & S Sainsbury Ltd. V. Street it has been observed that, in certain circumstances frustration may be waived by one party and then the other would be bound by the contract. In this case there
was a sale of 275 tans (57 more or less) of feed barley to be grown on the seller's land and whereas the crop amounted to 140 tons only. The seller resold it to another and, contended that he had the right to do so because the contract had ended by frustration. In this case, he was held liable for breach of contract. The court observed that in this case there was frustration only to the extent of failure of crops. The buyer could waive it and could have claimed delivery of whatever little crop the seller's land had produced.

(xiii) Judicial Interpretations (Indian Legal System)

The Indian Law under Section 56 of the Indian Contract Act, 1872 lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties.

It has been exhaustively explained by the Supreme Court in *Satyabrata Ghosh v Mugneeram & Co.* Justice B. K. Mukherjee in his case observed that:

*The doctrine of frustration is really an aspect or part of law of discharge of contract by reason of supervening impossibility or illegality of the act agreed to be done and hence comes within the purview of Section 56 of the Indian Contract Act.*

In yet another case *Dhruv Dev v Harmohinder Singh* the Supreme Court of India observed that:

"it lays down a rule of positive law and the courts can not travel outside the terms of the section".

The Supreme Court again clarified the concept of Doctrine of Frustration in *Sushila Devi v Hari Singh.* In this case Justice Hedge observed:
"Section 56 of the Indian Contract Act lays down a rule of positive law and does not leave the matter to be determined according to the intention of the parties. ... the supervening event should take away the basis of the contract and it should be of such a charter that it strike at the root of the contract."

Therefore the Supreme Court has laid down that, the expression 'Frustration' puts an end to the liability to perform the contract and whether the doctrine of frustration would apply or not has to be decided within the framework of the contract and, if the contract contains an 'Arbitration Clause', the Arbitrator could decide the matter of Frustration.

The other legal effect which emerges out is the "Adjustment of the rights of the parties and the rights of the parties are adjusted under section 65 of the Indian Contract Act (1872).

The effect of the principle laid down in the section is that when the parties have entered into an apparently valid contract and some benefits have been passed under it, and subsequently the contract is either discovered to be void or becomes void, the party who has received the benefits must restore them to the other. Thus, the section does not apply to the contract where the parties at the time of formation of the contract knew to be void as held in Nihati Jute Mills v Khayaliram.168

The section also does not apply to a case where the benefits are being passed at a time when the contract though unknown to the parties, has already ceased to be enforceable. This was the position in Jagadosj Prasad Pannalal v Produce Exchange Corporation Ltd.169 There was a contract for the sale of one wagon of maize starch at the rate of Rs.77 per cwt., the control price being Rs.78. The goods were delivered on January 3 and paid for. A
few days earlier, viz, on December 16, a new order was passed by the Government making Rs.48 as the price and this was to apply to all contracts in which delivery was to be given on or after January 1. The buyer brought an action to recover the difference between the revised control price and the price he paid. The court agreed with him to this extent that, the contract had become void by the change in the control price and, therefore, neither party was compellable to perform, but that the buyer, having paid up, was not entitled to any refund under Section 65 of the Indian Contract (1872). For this section to apply the advantage must have been received under "contract", whereas, in the present case, the excess price was paid after the contract had already become void and ceased to be enforceable.\textsuperscript{70}

(xiv) Review

Therefore, it can be summed up by saying that 'Frustration' occurs when the law recognizes that without the fault of either party, a contractual obligation has become incapable of being performed because the circumstances, in which the performance is called for, would render it a thing radically different from that which was undertaken by the contract.

The concept of frustration is different in different legal systems. The lawyers however have felt that, this concept of frustration is broader than the French concept of 'Force Majeure' or 'Imprevision' or the German concept of "Wegfall der Geschäftsgrundlage"

The term Force Majeure is not usually used in common law but, its problems and cases are considered under doctrine of "Frustration" or "Impossibility". The last mentioned legal doctrines differed theoretically from Force Majeure and "changed circumstances" in the specific meaning and particularly their scope is more extensive than force majeure. Nevertheless, in common law countries with the help of doctrine of
"Frustration" and 'Impossibility", the results which are derived are more or less similar to the results which are outcome of force majeure.

In the Black's law dictionary\textsuperscript{171} the \textit{Doctrine of Frustration} is divided to two types: "Frustration of Contract" and "Frustration of Purpose" or "Frustration of Adventure". According to \textit{Frustration of Contract}, where existence of a specific thing is, either by terms of contract or in contemplation of parties necessary for the performance of a promise in the contract, the duty to perform the promise is discharged if, the thing is no longer in existence at time for performance. And the \textit{Frustration of Purpose} excuses a promisor in certain situations, when the objectives of contract have been defeated by circumstances arising after formation of agreements, and the performance is excused under this rule even though there is no impediment to the actual performance.

Therefore it can be said that Frustration is in the sense, unforeseen and unexpected dissolution of the contract due to the occurrence of some accidents which makes its performance impossible.

In other words, Frustration means, the dissolution of the contract due to impossibility of performance of the contractual obligation, which happens unexpectedly.

\textit{Frustration} therefore refers to an unexpected dissolution of the contract due to impossibility of performance of the contractual obligation of the contract. And the same view is adopted by the English Courts as well as the Indian Courts. Doctrine of Frustration has been discussed under various heads by the English as well as Indian writers such as – Impossibility, Supervening Impossibility, Discharge by Subsequent Impossibility and Discharge by operation of Law.

Therefore from the discussion of the \textit{Doctrine of Frustration} it is evident that, in English Law and in the Legal System of India, the difficulty

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in performance of contractual obligation or making it more expensive, does not naturally changes the nature of the contract and also does not make it a completely new contract. The occurrence of unexpected events like fall of value of currency, high price of raw materials, scarcity of some goods, which extraordinary increases the extend of contractual obligations and restrain the contracting parties to get the commercial profit which they had anticipated at time of the formation of contract however, is not sufficient, to excuse the performance and define frustration. Although, some of the lawyers like H. Beal\textsuperscript{172} have said that:

\begin{quote}
\textit{the doctrine of frustration has extended so much that it decreases the hardship of performance of the obligation}
\end{quote}

But in fact these events when do not change the nature of obligation do not result in the frustration, in any case. Therefore, the practical hardship of execution of the obligation is not sufficient to result in frustration. This in fact, limits the application of the Doctrine of Frustration in English and Indian Law.\textsuperscript{173}

The conclusion drawn here is that although the ‘Doctrine of Frustration’ is very near to the rule of altered conditions or the change in Circumstances but it is not exactly like it. The Doctrine of Frustration relates to the effect of the event or events which prevents the performance purpose of the contract while the rule of altered conditions or the change in Circumstances relates to or discusses the change of fundamental condition of the contract, which forms the very base of the contract.
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